

**NON-CODIFIED DOCUMENTS IS THE DEPARTMENT  
OF LABOR REGULATING THE PUBLIC THROUGH  
THE BACKDOOR?**

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**HEARING**

BEFORE THE

SUBCOMMITTEE ON NATIONAL ECONOMIC GROWTH,  
NATURAL RESOURCES, AND REGULATORY AFFAIRS

OF THE

COMMITTEE ON  
GOVERNMENT REFORM

HOUSE OF REPRESENTATIVES

ONE HUNDRED SIXTH CONGRESS

SECOND SESSION

FEBRUARY 15, 2000

**Serial No. 106-171**

Printed for the use of the Committee on Government Reform



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## **NON-CODIFIED DOCUMENTS IS THE DEPARTMENT OF LABOR REGULATING THE PUBLIC THROUGH THE BACKDOOR?**

**TUESDAY, FEBRUARY 15, 2000**

HOUSE OF REPRESENTATIVES,  
SUBCOMMITTEE ON NATIONAL ECONOMIC GROWTH,  
NATIONAL RESOURCES, AND REGULATORY AFFAIRS,  
COMMITTEE ON GOVERNMENT REFORM,  
*Washington, DC.*

The subcommittee met, pursuant to notice, at 1:12 p.m., in room 2154, Rayburn House Office Building, Honorable David M. McIntosh (chairman of the subcommittee) presiding.

Present: Representatives McIntosh, Barr, Terry, Walden, Ryan, Kucinich, Ford.

Staff present: Marlo Lewis, Jr., staff director; Barbara F. Kahlow, professional staff member; Heather Henderson and Bill Waller, counsels; Gabriel Neil Rubin, clerk; Elizabeth Munding, minority professional staff; Michelle Ash, minority counsel; and Ellen Rayner, minority chief clerk.

Mr. MCINTOSH. The subcommittee on National Economic Growth, Natural Resources, and Regulatory Affairs will come to order. The purpose of today's hearing is to examine the Department of Labor's use of non-regulatory guidance documents and determine whether the Department is regulating the public through the backdoor.

This hearing will allow the Department's Chief Legal Officer, and the Solicitor, to discuss the Department's use of non-regulatory guidance and inform us of its views on that and the ways in which it discloses or fails to disclose whether or not such guidance is a regulatory document.

Various laws enacted by Congress ensure legal and procedural protections for the public so that agencies may not issue documents that are binding on the public—regulations and rules—without the public's opportunity to participate in the policymaking process. These good government provisions are key to our democratic process. They protect citizens from arbitrary bureaucrats and enable citizens to effectively participate in the policy development process at the Federal level.

If agencies avoid these legal protections or issue documents that do not clearly state if they are not binding or if they are, then the public may indeed be confused or unfairly burdened, sometimes at great cost. I am well aware that the agencies claim they are just trying to be customer-friendly and to serve the regulated public when they issue advisory opinions and guidance documents. And,

I think much of what the agencies have worked on may indeed be that, where they do help the customer understand Federal rules and regulations.

But, this may in fact not be the case in many of the situations we are confronted with. However, when the legal affect of such documents becomes unclear, the regulated parties may well experience this help, if you will, as being corrosive. An offer they dare not refuse. Regrettably, the subcommittee's investigation suggests that some guidance documents are intended to bypass the rulemaking process and expand an agency's powers beyond the point where Congress said it should stop.

Such backdoor regulation is an abuse of power and a corruption of our constitutional system. For example, the Department of Labor issues a non-regulatory guidance letter which redefined a "serious health condition" under the Family and Medical Leave Act. Originally DOL's 1995 opinion letter stated that minor illnesses, such as the common cold, were not a serious health condition. I think that reflected congressional intent and everybody's understanding when that law was passed.

However, in 1996, in December, the Department of Labor retracted this previous definition and stated that the common cold, the flu, earaches, upset stomachs, et cetera, all were covered by the Family and Medical Leave Act. And, if an employee was incapacitated for more than 3 consecutive days and receives continuing treatment from a health provider, in other words you have got a severe cold, you are out with a fever and you are in bed and you go see a doctor, then the requirements of that act are triggered.

Now the consequences of this non-regulatory and costly redefinition, because there are a lot of costs associated with this, have reverberated throughout the employer world. Since 1993, Vice President Gore has led a reinventing government initiative which includes the implementation of President Clinton's Executive Order 12862, entitled, "Setting Customer Service Standards." Today's hearing will examine whether the Vice President's action and that Executive order have led the agencies to increase their use of non-regulatory guidance documents in an attempt to avoid the due process procedures mandated in the Administrative Procedure Act.

Or is there another explanation for DOL's and the Department's subdivision of OSHA in issuing 16 boxes worth of guidance documents in 1999 alone and 31 boxes of such documents during the last 4 years. I would draw everyone's attention to the boxes lined up against the wall there. Those are the OSHA guidance documents in the last 4 years. I would venture to say very few people have had a chance to read all of those and digest them. The question remains, are they attempting to regulate with those boxes or are they attempting to simply elaborate existing rules and regulations?

This hearing will question the volume used before the Congressional Review Act was enacted in 1996, and before the Vice President's action on the National Performance Review. Since enactment of that Congressional Review Act, agencies have been required to submit for congressional review each agency rule, which the Congressional Review Act broadly defines to include not only regulatory actions under the Administrative Procedure Act, but also

those containing general statements of applicability and future effect designed to implement, interpret or prescribe policy or law.

In other words, many of those guidance documents, to the extent they go beyond a written regulation, but have an effect on the regulated public, need to be submitted under the Congressional Review Act. The Office of Management and Budget has failed to issue adequate governmentwide guidance under that act. So in some ways it is not necessarily the agency's fault that it is interpreting it in various ways when OMB has failed to inform their agencies what are rules and what are regulations.

By the way, OMB does that, notwithstanding repeated urging by our subcommittee to do exactly that in April, June, August and October 1999. On October 8th, the subcommittee began an investigation of the agencies overall use of non-codified documents in large part because OMB was failing to do its job. Now the subcommittee requested the Department of Labor, the Department of Transportation and the Environmental Protection Agency, three of the agencies imposing the most regulatory burdens on the public, to complete a compendium of all their non-codified documents in a tabular format and to provide a copy of each codified document, including a highlighted and tabbed reference to the specific explanation in the document itself regarding its legal affect. The compendium required the agencies to reveal which documents had been submitted for congressional review under the Congressional Review Act, and which documents were indeed intended to be legally binding.

Both the Department of Labor and the Department of Transportation admitted that none of their listed 1,641 and 1,225 guidance documents, respectively, were legally binding, and none were submitted to Congress for review under the Congressional Review Act. Last week, 4 months after the subcommittee's request, EPA finally submitted its 2,600 documents. The review of those agency documents revealed that the vast majority, it was not clear what the intended legal effect was and that the regulated public could not understand whether they were legally binding or not, based upon reading them.

In addition, after OSHA's Assistant Secretary, Charles Jeffress, in testimony before the House Education and Workforce Committee, on January 28th, cited an even higher number of guidance documents than DOL had reported to this subcommittee, we determined that the number of OSHA documents was not the 1,600, but in fact closer to 3,375 documents.

Furthermore, only 8 percent of OSHA's 1999 documents included any explanation of legal affect, and only 5 percent put this explanation at the beginning of the document. So for the vast majority of those 3,300 documents, the public is not told, is this legally binding, is it something you have to follow as a rule or regulation, or is it, as the agency claims to us in their written explanation, not legally binding.

In contrast, the Department of Transportation did include that explanation in 40 percent of its documents. Still less than half, but much better in terms of reaching that goal of informing the public what the status of the advice they are getting is. Now DOL's back-door approach to regulation is not limited to OSHA. I cited earlier

an example from the Department of Labor's Employment Standards Administration which issued non-regulatory guidance redefining serious health condition to mean the flu and the common cold.

One witness will discuss the problem that this redefinition has created for needy people. Dixie Dugan, who is with Cardinal Management Services will explain how she has difficulty in following that ruling in providing the best possible care to her patients who suffer from handicaps and making sure that the staffing is there round the clock, as she needs, because of that redefinition under that Employment Standards Administration's letter ruling.

Now as Professor Robert Anthony, one of our witnesses today, stated in an article in 1992, even those documents that do not have legally binding effect, they have practical binding effect, whenever the agency has used them to establish criteria that affect the rights and obligations of private persons. Those will be the issues that we discuss today in our hearing.

I want to welcome today our witnesses. We are conducting the hearing in a panel where all the witnesses will be on one panel so that we can have an interchange back and forth. But let me welcome the Department of Labor Solicitor, Henry Solano. Mr. Solano, welcome. Let me also welcome former Reagan administration Assistant Secretary for Policy and current vice president for Policy and Communications and Public Affairs at the National Association of Manufacturers, Mr. Michael Baroody, welcome.

Former chairman of the Administration Conference of the United States and current George Mason professor, Robert Anthony. Welcome, Professor. I also want to welcome four citizen witnesses. Jud Motsenbocker, who is the owner of Jud Construction Co. in my hometown of Muncie, IN, welcome. Dixie Dugan, whom I mentioned earlier, who is the Human Resources Coordinator for Cardinal Services Management from New Castle, IN. And Dave Marren, vice president and division manager of the Central and Lake States Division of Bartlett Tree Expert Co., who is from Roanoke, VA.

Also welcome Adele Abrams, an attorney for Patton, Boggs, who is representing the American Society for Safety Engineers. Welcome, Ms. Abrams. Let me ask all of you now to please rise.

Well, let me actually first ask if my colleague, Mr. Kucinich, would like to make an opening statement at this time.

[The prepared statement of Hon. David M. McIntosh and the information referred to follow:]

**Chairman David M. McIntosh**  
**Opening Statement**  
**Is The Department of Labor Regulating the Public Through the Backdoor?**  
**February 15, 2000**

The purpose of today's hearing is to examine the Department of Labor's (DOL's) use of nonregulatory guidance documents and determine whether DOL is regulating the public through the backdoor. The hearing will allow the Department's chief legal officer, its Solicitor, to discuss DOL's use of nonregulatory guidance documents instead of public rulemaking and the ways in which DOL discloses or fails to disclose whether or not each such guidance document is legally binding.

Various laws enacted by Congress ensure legal protections for the public so that agencies may not issue documents that bind the public without the public's opportunity to participate in the policymaking process. These good government provisions are key to our democratic process. They protect citizens from arbitrary bureaucrats and enable citizens to effectively participate in the process. If agencies avoid these legal protections or issue documents that do not clearly state if they are binding or not, the public may be confused or unfairly burdened --sometimes at great cost.

I am well aware that agencies claim they are just trying to be "customer friendly" and serve the regulated public when they issue advisory opinions and guidance documents. This may, in fact, be true in many cases. However, when the legal effect of such documents is unclear, regulated parties may well experience this "help" as coercive -- an offer they dare not refuse. Regrettably, the Subcommittee's investigation suggests that some guidance documents are intended to bypass the rulemaking process and expand an agency's power beyond the point where Congress said it should stop. Such "backdoor" regulation is an abuse of power and a corruption of our Constitutional system.

For example, DOL issued a nonregulatory guidance opinion letter which redefined a "serious health condition" under the 1993 Family and Medical Leave Act. DOL's 1995 opinion letter said that minor illnesses, such as the common cold, were not a serious health condition. However, in December 1996, DOL retracted its previous definition and stated that the common cold, the flu, ear-aches, upset stomachs, etc., all are covered by the Act if an employee is incapacitated more than three consecutive days and receives continuing treatment from a health care provider. The consequences of this nonregulatory and costly redefinition have reverberated throughout the employer world.

Since 1993, Vice President Gore has led a "Reinventing Government" initiative, which includes the implementation of President Clinton's 1993 Executive Order 12862, entitled "Setting Customer Service Standards." Today's hearing will examine whether the Vice President's actions have led the agencies to increase their use of nonregulatory guidance documents, in an attempt to avoid the due process procedures mandated by the Administrative Procedure Act (APA). Or is there another explanation for why DOL's Occupational Safety and Health

Administration (OSHA) issued 16 boxes' worth of guidance documents in 1999 alone, and 31 boxes of such documents during the past four years? [The 31 boxes are on display in the hearing room.] The hearing will question what volume of guidance existed before the Congressional Review Act (CRA) was enacted in March 1996 and before the Vice President's National Performance Review (NPR) started in 1993.

In 1995, the Vice President proudly announced, as part of his NPR, "a reinvented approach to achieving worker health and safety in the Nation's workplaces." Another 1995 NPR document states, "When fully developed in the regulatory area, it [the reinvented approach] will allow easy access to a broad range of regulatory guidance."

Since enactment of the CRA, agencies have been required to submit for Congressional review each agency "rule," which the CRA broadly defines to include not only regulatory actions subject to statutory notice-and-comment procedures but also other agency actions that contain statements of "general ... applicability and future effect designed to implement, interpret, or prescribe law or policy." The Office of Management and Budget (OMB) has failed to issue complete government-wide CRA implementation guidance to the agencies, despite a 1999 Treasury and General Government Appropriations Act provision requiring OMB to do so by March 31, 1999. For example, OMB failed to inform the agencies that guidance documents with general applicability or future effect are "rules" under the CRA and must be submitted for Congressional review.

After repeated and unsuccessful requests that OMB provide additional CRA guidance to the agencies (in April, June, August, and October 1999), on October 8, 1999, the Subcommittee began an investigation of the agencies' use of non-codified guidance documents. The Subcommittee requested DOL, the Department of Transportation (DOT) and the Environmental Protection Agency (EPA) -- three of the agencies imposing the most regulatory requirements on the public -- to complete a compendium of all their non-codified documents in tabular format and to provide a copy of each non-codified document, including a highlighted and tabbed reference to the specific explanation in the document itself regarding its legal effect. The compendium required the agencies to reveal which documents had been submitted for Congressional review under the CRA and which documents were legally binding.

DOL and DOT asked the Subcommittee to narrow its request. In response, the Subcommittee narrowed its request to only those documents issued since March 1996 by DOL's OSHA and DOT's National Highway Traffic Safety Administration (NHTSA).

Both DOL and DOT admitted that none of their listed 1,641 and 1,225 guidance documents, respectively, was legally binding and none were submitted to Congress for review under the CRA. Last week, four months after the Subcommittee's request, EPA finally submitted its 2,653 guidance documents. Review of the agencies' documents revealed that, for the vast majority, it was not made clear to the public that the documents have no legal effect.

In addition, after OSHA Assistant Secretary Charles Jeffress, in testimony before the House Education and the Workforce Committee's Subcommittee on Oversight and Investigations on January 28, 2000, cited an even higher number of guidance documents than DOL claimed in its response to our request, we determined that the number of OSHA documents was not 1,641, as DOL had claimed, but actually 3,374. Furthermore, only 8 percent of OSHA's 1999 documents include any explanation of legal effect, and only 5 percent put this explanation at the beginning of the document. In contrast, DOT included an explanation of legal effect in about 40 percent of its guidance documents. [Refer to the Subcommittee's chart, entitled "Agency Guidance Documents," on display in the hearing room.]

On January 5, 2000, the Subcommittee wrote DOL about its November 15, 1999 work-at-home guidance letter, which was not included in the 3,374 documents, to determine if it had been submitted to Congress for review under the CRA and if it had any legal effect. Subsequently, DOL withdrew this guidance document; however, DOL's 1993, 1995, and 1997 work-at-home guidance documents have still not been withdrawn.

Another chart the Subcommittee prepared, entitled "Examples of Labor's OSHA Guidance Documents in Two Areas," shows how OSHA's mismanagement confuses the regulated public in two areas. Of its 1993, 1995, 1997, and 1999 work-at-home guidance documents, only the 1999 document was withdrawn; the 1993 and 1995 documents were not withdrawn but have an advisory on OSHA's website that they are "under review;" and the 1997 document was not withdrawn and has no such advisory. The 1998 and 1999 guidance documents for arborists were both withdrawn after threats of lawsuits were made against DOL for not following the APA's statutory procedures for new rulemaking. One was finally just removed from OSHA's website, perhaps in anticipation of today's hearing. One witness today will describe the effect of these policies on arborists.

DOL's backdoor approach to regulating is not limited to OSHA. I earlier cited an example from DOL's Employment Standards Administration (ESA), which issued nonregulatory guidance redefining a "serious health condition" under the 1993 Family and Medical Leave Act. One witness will discuss the problem this redefinition has created for needy people.

In February 1999, DOL's ESA issued a Fair Labor Standards Act nonregulatory guidance opinion letter, which applied the overtime requirements of the Act to a stock option program proposed by an employer for his employees. Since valuing stock options for employees can be quite burdensome, this guidance may discourage employers from offering them to employees covered by overtime requirements.

As Professor Robert Anthony, one of our witnesses today, stated in a 1998 article entitled "Unlegislated Compulsion: How Federal Agency Guidelines Threaten your Liberty," "Even though those documents do not have legally binding effect, they have practical binding effect whenever the agencies use them to establish criteria that affect the rights and obligations of private persons." Another 1998 article published by the Washington Legal Foundation, entitled

“‘Informal’ Actions Allow Agencies To Duck Rulemaking Requirements,” concludes by stating, “More attention should be placed on promoting the use of notice and comment rulemaking.”

I want to welcome our witnesses: DOL Solicitor Henry Solano; former Reagan Administration DOL Assistant Secretary for Policy and current Senior Vice President, Policy, Communications & Public Affairs of the National Association of Manufacturers Michael Baroody; and former Chairman, Administrative Conference of the United States and current George Mason University Foundation Professor of Law Robert Anthony. I also want to welcome four citizen witnesses: Jud Motsenbocker, Owner, Jud Construction Company, who is from Muncie, Indiana; Dixie Dugan, Human Resource Coordinator, Cardinal Service Management, Inc., who is from New Castle, Indiana; Dave Marren, Vice President and Division Manager for the Central and Lake States Division, the F.A. Bartlett Tree Expert Company, who is from Roanoke, Virginia; and Adele Abrams, an attorney with Patton Boggs, LLD, who is representing the American Society of Safety Engineers.

# AGENCY GUIDANCE DOCUMENT

<b>LABOR</b> OSHA	<b>TRANSPORTATION</b> NHTSA	<b>EPA</b>
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<b># OF GUIDANCE DOCUMENTS</b>	1,641+1,733= 3,374	1,225	2,653
<b>% SUBMITTED FOR CONGRESSIONAL REVIEW</b>	NONE	NONE	2
<b>% WITH ANY LEGAL EFFECT</b>	NONE	NONE	4
<b>% WITH ANY EXPLANATION OF LEGAL EFFECT</b>	8 <sup>1</sup>	40 <sup>2</sup>	not available
<b>% WITH ANY EXPLANATION OF LEGAL EFFECT AT THE BEGINNING OF DOCUMENT</b>	5 <sup>1</sup>	36 <sup>2</sup>	not available

<sup>1</sup>In OSHA's 1999 documents.

<sup>2</sup>Based on inspection of a sample.

## EXAMPLES OF LABOR'S OSHA GUIDANCE DOCUMENTS IN 2 AREAS

DATE & SUBJECT	STATUS	WEB STATUS
10/8/93 Work-at-Home	<b>NOT WITHDRAWN</b>	On with "under review" advisory
6/19/95 Work-at-Home	<b>NOT WITHDRAWN</b>	On with "under review" advisory
2/21/97 Work-at-Home	<b>NOT WITHDRAWN</b>	<b>ON WITHOUT ADVISORY</b>
11/15/99 Work-at-Home	1/5/00 Withdrawn	Removed
3/4/98 Tree Trimming	6/22/98 Withdrawn after threat of lawsuit	<b>STILL ON</b>
12/13/99 Arborists on Aerial Lifts	1/29/00 Withdrawn	<b>Not on after threat of lawsuit</b>

# DOT/NHTSA EXAMPLE

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# DOL/OSHA EXAMPLE

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The following questions and answers have been prepared to assist employers, employees, and compliance staff in determining what is required under the provisions of OSHA's recently revised requirements for fall protection in the construction industry.

The interpretations and compliance direction in this packet have been approved by OSHA's Office of Construction and Maritime Compliance Assistance and will be considered the official compliance interpretation for all OSHA offices.

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106TH CONGRESS  
2D SESSION

# H. R. 3521

To amend chapter 8 of title 5, United States Code, to provide for a report by the General Accounting Office to Congress on agency regulatory actions, and for other purposes.

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## IN THE HOUSE OF REPRESENTATIVES

JANUARY 24, 2000

Mr. McINTOSH introduced the following bill; which was referred to the Committee on the Judiciary, and in addition to the Committee on Government Reform, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

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## A BILL

To amend chapter 8 of title 5, United States Code, to provide for a report by the General Accounting Office to Congress on agency regulatory actions, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*  
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the "Congressional Ac-  
5 countability for Regulatory Information Act of 2000".

6 **SEC. 2. FINDINGS.**

7 Congress finds that

1 (1) many Federal regulations have improved  
2 the quality of life of the American public, however,  
3 uncontrolled increases in regulatory costs and lost  
4 opportunities for better regulation should not be  
5 continued;

6 (2) the legislative branch has a responsibility to  
7 ensure that laws passed by Congress are properly  
8 implemented by the executive branch;

9 (3) in order for the legislative branch to fulfill  
10 its responsibilities to ensure that laws passed by  
11 Congress are implemented in an efficient, effective,  
12 and fair manner, the Congress requires accurate and  
13 reliable information on which to base decisions; and

14 (4) the legal effect of many Federal agency  
15 guidance documents and other Federal agency state-  
16 ments that are not published in the Code of Federal  
17 Regulations is often not clear to the affected public.

18 **SEC. 3. REPORTS ON REGULATORY ACTIONS BY THE GEN-**  
19 **ERAL ACCOUNTING OFFICE.**

20 (a) IN GENERAL. Section 801(a)(2) of title 5,  
21 United States Code, is amended by striking subparagraph  
22 (B) and inserting the following:

23 (B)(i) After an agency publishes a regulatory action,  
24 a committee of either House of Congress with legislative  
25 or oversight jurisdiction relating to the action may request

1 the Comptroller General to review the action under clause  
2 (ii).

3       “(ii) Of requests made under clause (i), the Comp-  
4 troller General shall provide a report on each regulatory  
5 action selected under clause (iv) to the committee which  
6 requested the report (and the committee of jurisdiction in  
7 the other House of Congress)Ð

8           “(I) except as provided in subclause (II), by not  
9 later than 180 calendar days after the committee re-  
10 quest is received; or

11           “(II) in the case of a request for review of a no-  
12 tice of proposed rule making or an interim final rule  
13 making, by not later than the end of the 60-cal-  
14 endar-day period beginning on the date the com-  
15 mittee request is received, or the end of the period  
16 for submission of comment regarding the rule mak-  
17 ing, whichever is later.

18 The report shall include an independent analysis of the  
19 regulatory action by the Comptroller General using any  
20 relevant data or analyses available to or generated by the  
21 General Accounting Office.

22       “(iii) The independent analysis of the regulatory ac-  
23 tion by the Comptroller General under clause (ii) shall  
24 includeÐ

1            “(I) an analysis by the Comptroller General of  
2            the potential benefits of the regulatory action, in-  
3            cluding any beneficial effects that cannot be quan-  
4            tified in monetary terms and the identification of  
5            those likely to receive the benefits;

6            “(II) an analysis by the Comptroller General of  
7            the potential costs of the regulatory action, including  
8            any adverse effects that cannot be quantified in  
9            monetary terms and the identification of those likely  
10           to bear the costs;

11           “(III) an analysis by the Comptroller General  
12           of any alternative regulatory approaches that could  
13           achieve the same goal in a more cost-effective man-  
14           ner or that could provide greater net benefits, and,  
15           if applicable, a brief explanation of any statutory  
16           reasons why such alternatives could not be adopted;

17           “(IV) an analysis of the extent to which the  
18           regulatory action would affect State or local govern-  
19           ments; and

20           “(V) a summary of how the results of the  
21           Comptroller General's analysis differ, if at all, from  
22           the results of the analyses of the agency in promul-  
23           gating the regulatory action.

24           “(iv) In consultation with the Majority and Minority  
25           Leaders of the Senate and the Speaker and Minority

1 Leader of the House of Representatives, the Comptroller  
2 General shall develop procedures for determining the pri-  
3 ority and number of those requests for review under clause  
4 (i) that will be reported under clause (ii). The procedures  
5 shall give the highest priority to requests regarding a no-  
6 tice of proposed rule making for a major rule, and to re-  
7 quests regarding an interim final rule making for a major  
8 rule.

9       “(C) Federal agencies shall cooperate with the Comp-  
10 troller General by promptly providing the Comptroller  
11 General with such records and information as the Comp-  
12 troller General determines necessary to carry out this sec-  
13 tion.”.

14       (b) DEFINITIONS. Section 804 of title 5, United  
15 States Code, is amended

16           (1) by redesignating paragraphs (2) and (3) as  
17 paragraphs (3) and (5), respectively;

18           (2) by inserting after paragraph (1) the fol-  
19 lowing:

20           “(2) The term ‘independent analysis’ means a  
21 substantive review of the agency’s underlying assess-  
22 ments and assumptions used in developing the regu-  
23 latory action and any additional analysis the Comp-  
24 troller General determines to be necessary.”; and

1 (3) by inserting after paragraph (3) (as redesignated by paragraph (1) of this subsection) the following:

2 (4) The term 'regulatory action' means

3 (A) notice of proposed rule making;

4 (B) final rule making, including interim final rule making; or

5 (C) a rule."

6 **SEC. 4. DISCLOSURE OF NONBINDING EFFECT OF GUIDANCE DOCUMENTS.**

7 (a) IN GENERAL. Chapter 8 of title 5, United States Code, is amended by inserting after section 803 the following:

8 **“§ 803a. Notice of nonbinding effect of agency guidance**

9 **ance**

10 “The head of an agency shall include on the first page of each statement published by the agency that is not a rule a notice that the statement has no general applicability or future effect (or both), as applicable, and is not binding on the public.”

11 (b) CLERICAL AMENDMENT. The table of sections at the beginning of chapter 8 of title 5, United States Code, is amended by inserting after the item relating to section 803 the following:

12 “803a. Notice of nonbinding effect of agency guidance.”

1 **SEC. 5. AUTHORIZATION OF APPROPRIATIONS.**

2       There are authorized to be appropriated to the Gen-  
3 eral Accounting Office to carry out chapter 8 of title 5,  
4 United States Code, \$5,200,000 for each of fiscal years  
5 2000 through 2003.

6 **SEC. 6. EFFECTIVE DATE.**

7       This Act and the amendments made by this Act shall  
8 take effect 180 days after the date of enactment of this  
9 Act.

○

CONGRESSIONAL ACCOUNTABILITY  
FOR REGULATORY INFORMATION  
ACT OF 2000

HON. DAVID M. MCINTOSH

OF INDIANA

IN THE HOUSE OF REPRESENTATIVES

Thursday, January 27, 2000

Mr. MCINTOSH. Mr. Speaker, today, I rise to introduce the "Congressional Accountability for Regulatory Information Act of 2000," a bill to aid Congress in analyzing Federal regulations and to ensure the public's understanding of the legal effect of agency guidance documents. To accomplish the former, the bill requires an analytic report to Congress by the General Accounting Office (GAO) on selected important agency proposed and final rules. To accomplish the latter, the bill requires the agencies to include a notice of nonbinding effect on each agency guidance document without any general applicability or future effect.

On May 22, 1997, Representative SUE KELLY introduced H.R. 1704, the "Congressional Office of Regulatory Analysis Creation Act." On March 11, 1998, the House Government Reform Committee's Subcommittee on National Economic Growth, Natural Resources, and Regulatory Affairs, which I chair, held a hearing on this bill. Rep. KELLY testified at the hearing that the analytic function will "help Congress deal with an increasingly complex and burdensome regulatory system. It will give Congress the resources it needs to oversee the regulations that the Executive Branch issues on a regular basis and facilitate use of the Congressional Review Act." She also stated that it "would provide a second opinion" of the agency's analysis of the impact of a rule. On March 13, 1998, the House Committee on the Judiciary reported an amended version of the bill and issued a report (H. Rept. 105-441, Part I). On June 3, 1998, the House Government Reform Committee reported a further amended version of the bill and issued a report (H. Rept. 105-441, Part II). There was no further action on the bill during 1998 and 1999.

The "Congressional Accountability for Regulatory Information Act of 2000" is introduced to respond to some criticisms of the earlier bill, especially about the creation of a new Congressional agency. Instead, the "Congressional Accountability for Regulatory Information Act of 2000" places the analytical function within GAO, which, since March 1996, has been charged with certain related functions under the Congressional Review Act (CRA).

Congress has delegated to the agencies the responsibility of writing regulations. However, regulations need to be carefully analyzed before they are issued. Under the CRA, Congress has the responsibility to review regulations and ensure that they achieve their goals in the most efficient and effective way. But, Congress has been unable to fully carry out its responsibility because it has neither all of the information it needs to carefully evaluate regulations nor sufficient staff for this function. Under my bill, GAO will be tasked with reviewing agency cost-benefit analyses and alternative approaches to the agencies' chosen regulatory alternatives.

The "Congressional Accountability for Regulatory Information Act of 2000" has a companion bill on the Senate side, S. 1198, the "Congressional Accountability for Regulatory Information Act of 1999." This bill was introduced by Senators SHELBY, BOND, and LOTT on June 9, 1999 and then renamed and reported by the Senate Governmental Affairs Committee as the "Truth in Regulating Act of 1999" on December 7, 1999. The House and Senate bills are both intended to promote effective Congressional oversight of important regulatory decisions.

In addition, the House version includes a provision to ensure that public's understanding of the effect of agency guidance documents (such as guidance, guidelines, manuals, and handbooks). It requires agencies to include a notice on the first page of each agency guidance document to make clear that, if the document has no general applicability or future effect, it is not legally binding. Under the CRA, "rules" subject to Congressional review are broadly defined to include not only regulatory actions subject to statutory notice and comment but also other agency actions that contain statements of general applicability and future effect designed to implement, interpret, or prescribe law or policy. Unfortunately, the Office of Management and Budget (OMB), despite a 1995 Treasury and General Government Appropriations Act directive to do so, has still not issued adequate guidance to the agencies on the requirement to submit to Congress any noncodified guidance document with any general applicability or future effect.

As a consequence, on October 8, 1999, the Subcommittee on National Economic Growth, Natural Resources, and Regulatory Affairs began an investigation of the agencies' use of noncodified documents, including the specific explanations within each of these documents regarding their legal effect. I asked the General Counsels of the Departments of Labor (DOL) and Transportation (DOT) and the Environmental Protection Agency (EPA) to submit their noncodified documents issued since the March 1996 enactment of the CRA and to indicate which were submitted to Congress under the CRA. DOL and DOT asked that I narrow my request; as a consequence, I asked for only those documents issued by DOL's Occupational Safety and Health Administration (OSHA) and DOT's National Highway Traffic Safety Administration (NHTSA).

Both DOL and DOT admitted that none of their 1,641 and 1,225 guidance documents respectively, had any legal effect and none was submitted to Congress for review under the CRA. Now, nearly four months later, EPA has still not completely produced its guidance documents. The investigation also revealed that the absence of any legal effect was not clear to the public. In fact, only 11 percent of OSHA's guidance documents included any discussion of legal effect and only 7 percent had this discussion at the beginning of the document. On February 15, 2000, I will be holding a hearing to examine DOL's use of guidance documents as a possible backdoor approach to regulating the public.

Let me conclude by thanking Representative SUE KELLY of New York, Chairwoman of the Small Business Committee's Subcommittee on Regulatory Reform and Paperwork Reduction, for her leadership in this area in 1997 and 1998.

Mr. KUCINICH. I would and thank you very much, Mr. Chairman. Thank you for calling this hearing. And as you know, you and I may have some differences of opinion.

We both agree that the role of Congress in this democratic structure of government is essential and that as the honorable opposition here I want to indicate to you my concern that the voice of Congress always be heard and that congressional approval never be overwritten. And that is one of the reasons why I am so respectful of the Occupational Safety and Health Act, as well as any role which Congress may play in the future in creating new laws for this country.

The Occupational Safety and Health Act, also referred to as OSHA, has protected the lives of many American workers. According to the Bureau of Labor Statistics, occupational injury and illness incident rates for 100 full-time workers are at their lowest since they began reporting this information in the early 1970's, shortly after OSHA was passed. From 1973 to 1992, the rate declined by 19 percent. And the rate declined by another 21 percent between 1992 and 1998. So that law is working and it is working to help American workers.

I believe an integral part of OSHA's success is the guidance that the Department of Labor provides to the regulated public. Compliance assistance is greatly appreciated by both the employers who want to better understand the responsibilities, and the employees who are protected by these laws. Congress recognized the importance of compliance assistance when, in 1996, it passed the Small Business Regulatory Enforcement Fairness Act which requires that agencies prepare compliance assistance guides and answer questions asked by the regulated public. In response, the Department of Labor has provided over 1,500 guidance documents to the public which have also been produced to the subcommittee.

The Department has made many of these documents available on the internet. Mr. Chairman, I agree that guidance should not expand the law. And if the reader is likely to be confused about the legal affect of a document, it makes sense to try and clear up this confusion in the text of the document. In fact, many of the documents provided by the Department of Labor, I believe, clearly state that the document does not alter or determine compliance responsibilities which are provided for in the underlying statutes and regulations.

And I support the Chair's concern because congressional intent is something that we take very seriously here. However Mr. Chairman, in addressing these issues we need to make sure that we do not discourage agencies from providing quick responses to the public's questions. If the Department of Labor would be made to jump through so many hoops before providing compliance assistance, I would be concerned that the business person with a safety question may not get a response in time to protect his employees.

We also should not discourage agencies from publishing the guidance on the Web. If a question has already been asked and answered, others with similar questions should benefit from these responses. Publishing on the internet provides information to the public faster and promotes consistent enforcement of the law. I also want to make sure that we do not add to any confusion by forcing

agencies to stamp all statements with boiler-plate language which could create more confusion than it clears up.

Our guidance comes in many forms, including telephone conversations, speeches, directives to OSHA employees, letters answering specific factual questions posed by the public, and broadly applicable guidance manuals. It could be confusing if directives to OSHA employees stated that it was not legally binding. And although non-codified guidance has no legal binding effect, the Small Business Regulatory Enforcement Fairness Act specifically provides that some of this guidance may be used to determine the reasonableness of fines and penalties.

Therefore, boiler-plate language stating that a document is not legally binding, may create the misimpression that it cannot be used in court for any purpose.

Mr. Chairman, OSHA is an extremely important statute and we need to make sure that the Department is able to both enforce it and provide guidance to the public on how to comply with it. However, I look forward to hearing from the witnesses and gaining some insight as to how the guidance process might be improved. And I want to again express my appreciation to the Chair for his willingness at all times to call these Departments and agencies to an accounting. That is the purpose of this committee. Thank you.

[The prepared statement of Hon. Dennis J. Kucinich follows:]

**Statement of Mr. Kucinich  
February 15, 2000  
NEG Subcommittee Hearing on DOL Guidance**

**Mr. Chairman, the Occupational Safety and Health Act -- also referred to as OSHA -- has protected the lives of many American workers. According to the Bureau of Labor Statistics, occupational injury and illness incidence rates per one hundred full time workers are at their lowest since they began reporting this information in the early 1970s, shortly after OSHA was passed. From 1973 to 1992, the rate declined by nineteen percent. And the rate declined another twenty-one percent between 1992 and 1998.**

**I believe an integral part of OSHA's success is the guidance that the Department of Labor provides to the regulated public. Compliance assistance is greatly appreciated by both the employers who want to better understand their responsibilities and the employees who are protected by these laws. Congress recognized the importance of compliance assistance when, in 1996, it passed the Small Business Regulatory Enforcement Fairness Act which requires that agencies prepare compliance assistance guides and answer questions asked by the regulated public. In response, the Department of Labor has provided over 1500 guidance documents**

to the public which have also been produced to the subcommittee. The Department has also made many of these documents available on the Internet.

Mr. Chairman, I agree that guidance should not expand the law. And, if the reader is likely to be confused about the legal effect of a document, it makes sense to try and clear up this confusion in the text of the document. In fact, many of the documents provided by the Department of Labor clearly state that the document does not alter or determine compliance responsibilities which are provided for in the underlying statutes and regulations.

However, Mr. Chairman, in addressing these issues, we need to make sure that we do not discourage agencies from providing quick responses to the public's questions. If the Department of Labor has to jump through too many hoops before providing compliance assistance, the businessperson with a safety question may not get a response in time to protect his employees. We also should not discourage agencies from publishing the guidance on the web. If a question has already been asked and answered, others with similar questions should benefit from these responses. Publishing on the Internet provides information to the public faster and promotes consistent enforcement of the law.

I also want to make sure that we do not add to any confusion by forcing agencies to stamp all statements with boiler plate language which could create more confusion than it clears up. Guidance comes in many forms, including telephone conversations, speeches, directives to OSHA employees, letters answering specific factual questions posed by the public, and broadly applicable guidance manuals. It could be confusing if directives to OSHA employees stated that it was not legally binding. And, although noncodified guidance has no legal binding effect, the Small Business Regulatory Enforcement Fairness Act specifically provides that some of this guidance may be used to determine the reasonableness of fines and penalties. Therefore, boiler plate language clearly stating that a document is not legally binding, may create the misimpression that it cannot be used in court for any purpose.

Mr. Chairman, OSHA is an extremely important statute and we need to make sure the Department is able to both enforce it and provide guidance to the public on how to comply with it. However, I look forward to hearing from the witnesses and gaining some insight on how the guidance process might be improved.

Mr. MCINTOSH. Thank you, Mr. Kucinich. And let me say I think there is good bi-partisan working relationship on this project and I certainly agree with two of your main points. That we don't want to impede any real effort to improve safety by slowing down effective guidance to people. And that it is a good idea to put these on the internet. For example, this hearing is live on the internet today.

I am a big believer that you use that as a way of informing people about information that otherwise would be hard to obtain out of the government. So you raise some very good points and I appreciate your help with that. Let me now ask if, Mr. Terry, do you have any brief remarks you would like to do or you can put them into the record.

Mr. TERRY. I will submit it for the record.

Mr. MCINTOSH. Thank you. Mr. Ford, did you have any brief comments?

Mr. FORD. I will submit to the record as well. I am of the belief that when you invite witnesses to testify they should have an opportunity to testify. So I look forward to hearing what they have to say. And I would say that I share the beliefs of my chairman, I think, and for the holding the hearing as well as some of the admonitions of my colleague, Mr. Kucinich, has advised.

I do note that all those, I guess, are OSHA advisories over in the corner there. I hope we don't have to review all those doggone things before they get put out, as we start the hearing. So with that I yield back the time to the Chair.

[The prepared statement of Hon. Harold E. Ford, Jr., follows:]

Statement on Non-Codified  
Documents by the Dept. of Labor  
February 15, 2000  
Congressman Harold Ford, Jr.

On October 28th of last year, on National Telework Day, I sat in the Education and Workforce Committee's hearing on the status of "telework" in the United States.

We discussed the impact that new technologies were having not only on the American workplace, but also on the American family.

We discussed how new technologies enabled parents to spend more time with their children.

We heard projections that as telework increased, pollution, congestion, and sprawl would decrease.

It is rare to see such a bi-partisan consensus on a labor issue. In 1994 President Clinton issued a statement to create a more family friendly federal workforce, a workforce which now contains 60,000 employees who telecommute at least one day a month.

In an analysis of telecommuting, the General Service Administration found that telecommuting "produces a more efficient use of time" and therefore "translates into better customer service and better ability to get things done."

With all these advantages to workers, families, and communities unanimously noted I was as shocked as anyone to read of the OSHA advisement on telework.

That letter seemed to reincarnate the era of big government. Although the workplace had changed, our bureaucratic culture had not.

That is why I was heartened when the advisory was withdrawn. When the Education and Workforce Subcommittee on Oversight and Investigations held a hearing on the letter of advisement I was fully reassured.

I was reassured because I learned that the Department of Labor had no plans, and would never have plans to carry out home office inspections. In fact, the only times homes were inspected were over a decade ago- and that was because minors were making fireworks, and a woman was smelting lead in her kitchen.

I was also reassured to learn that advisement letters do not have the force of law. The offices which compose these letters do not then mandate their enforcement. They are what they are designated- advice.

Advisement letters are how we can assure that our government is responsive. They get to the root of what effective government is, customer service.

By providing prompt and courteous service, executive branch and administrative offices can curtail costs to businesses and the public.

But these agencies must also bear in mind that our goal as public servants is to help our citizens and their businesses obtain the best possible results. The two recent controversial letters; the first on home offices and the second on overtime and stock options, if followed could clearly inhibit profit and prosperity.

That is why I commend the swift action from the Labor Department to clarify and correct these letters. It is also why I commend the legislative redress to these matters that Congress is pursuing.

Thank you all for being here, I look forward to hearing your statements today.

Mr. MCINTOSH. Thank you, Mr. Ford. Mr. Ryan.

Mr. RYAN. Mr. Chairman, I too would like to submit a fuller statement for the record. But let me just, just from listening to my friend from Ohio and yourself, Mr. Chairman, I would just like to say that, as Members of Congress, it is very important that we represent our constituents as they interact with the Federal Government and the Federal Government's agencies.

And there seems to be a lot of confusion out there when they are receiving these guidance documents. So I think if we are ever going to err, we err on the side of what is legal, what is right and what is digestible for our constituents. OSHA is a very important statute. It is very important for the employers, it is very important for the employees, but it ought to be something that is extraordinarily clear to both parties involved. And that is why I think it is important to have some kind of a workable solution.

Not boiler-plate, but a workable solution which makes sure that guidance documents do contain within them what legal value they have or do not have, so that the recipients of these documents know where they stand and that they are not embroiled in some kind of confusion. So I think it is important that we put together a workable standard and I look forward to hearing the testimony from the witnesses. With that, I yield.

Mr. MCINTOSH. Thank you, thank you very much, Mr. Ryan. Mr. Walden.

Mr. WALDEN. Thank you, Mr. Chairman, I will just be brief as well. But I wanted to followup on a comment from my colleague, from I believe Tennessee, who said he hoped we didn't have to read all 17,400 pages of the OSHA documents. And the point is, and being in small business, that is what you get saddled with. And that is just one agency. And I think that is the whole issue.

And I certainly see it as licensing and the Federal Communications Commission and some of their most recent rules that are out, including mandating what I have to put on an internet site if my company has to have an internet site, and I didn't know they had jurisdiction to dictate content on internet sites, but that is a whole matter for another day. Thank you, Mr. Chairman.

Mr. MCINTOSH. That is an agency that has a lot of problems. Shall we proceed.

Mr. FORD. I will note that that is over a few years and I hope you, no small business would have to read it. But I know the purpose of this hearing is to try to figure out how we can do best by business and do best by employees around the Nation. So I appreciate it.

Mr. WALDEN. But if you look at the one I pointed to, that is just 1999, and just one agency, on the right.

Mr. FORD. I look forward to hearing from the agency why there are so many of them. I appreciate it.

Mr. MCINTOSH. Let us hear from the witnesses and we definitely have one question for you, Mr. Solano, along with others. Let me ask all of the witnesses to now please rise. It is the policy of our full committee to always swear in all of our witnesses. So please repeat after me.

[Witnesses sworn.]

Mr. MCINTOSH. Thank you. Let the record show that each of the witnesses answered in the affirmative. And what I would suggest for each of the witnesses is to provide for us a summary of your written statement. You needn't read it all into the record. We will include it there as an official part of this hearing, but touch on the highlights for us. And feel free, as we are going through it, to have a discourse back and forth. It will then, in the question and answer period, give folks a chance to respond if a subsequent witness has made a point they want to discuss further.

Because the goal here is to illuminate this issue and find out what is happening and how we can best manage this process so that it does not create new burdens, but it does effectively inform people of what the rules are. With that, Mr. Solano, please share with us a summary of your testimony.

**STATEMENTS OF HENRY SOLANO, SOLICITOR, U.S. DEPARTMENT OF LABOR; MICHAEL BAROODY, SENIOR VICE PRESIDENT, POLICY, COMMUNICATIONS & PUBLIC AFFAIRS, NATIONAL ASSOCIATION OF MANUFACTURERS; ROBERT ANTHONY, PROFESSOR OF LAW, GEORGE MASON UNIVERSITY; JUD MOTSENBOCKER, OWNER, JUD CONSTRUCTION CO.; DIXIE DUGAN, HUMAN RESOURCE COORDINATOR, CARDINAL SERVICE MANAGEMENT, INC.; DAVE MARREN, VICE PRESIDENT AND DIVISION MANAGER, THE F.A. BARTLETT TREE EXPERT CO.; AND ADELE ABRAMS, ATTORNEY, PATTON, BOGGS, LLD**

Mr. SOLANO. Chairman McIntosh, members of the subcommittee, I am pleased to appear before the subcommittee today to discuss the Department of Labor's use of non-codified documents. Non-codified documents are documents related to compliance with the laws and regulations enforced by the Department. They are not published in the Code of Federal Regulations, they do not create new law or change existing law.

Let me reemphasize that. They do not create new law or change existing law. Issuing these documents is an important part of the Department's responsibility to faithfully execute the laws that Congress has passed. The public regularly asks for guidance and the Department routinely responds to these requests. This is a long-standing and well established practice. Congress has made it clear that agencies should be providing such compliance assistance.

The end result is better public understanding of the law. That means better protection for American workers and their families. The Labor Department is responsible for a wide range of statutes. They cover everything from safety and health in the work place and the security of employee benefit plans, to minimum wage and overtime guarantees, family and medical leave and equal employment opportunity.

American employers want to comply with the laws that apply to them, but statutes and regulations can be complicated. At the same time they cannot specifically address every factual situation that may come up in the work place. Questions about application of the law are bound to come up. When they do, citizens rightfully and rightly expect agencies to give them guidance. On the whole, the practice of providing compliance assistance works well.

Some questions take longer than others to answer, and there are times when an answer needs to be clarified. But I think the Department's answers, for the most part, are helpful to the public. Certainly, that is our goal. In cases involving the application of Federal statutes and regulations, Federal courts do often give weight to the interpretations offered by the regulatory agencies.

That is if they are reasonable and depending on the nature and the circumstances of the interpretation. That principle is well established in our law. It is based on the authority that Congress has delegated to the agencies and on the expertise that the agencies have developed. But the courts have the final say, and they provide an important check on agency action. As I said, the public has a strong interest in compliance assistance information.

That is an important reason why the volume of non-codified documents issued by the Department is large. Many documents are generated in response to specific requests from the public. That holds true for the OSHA documents that you requested for this hearing, Mr. Chairman. The Labor Department is committed to helping the public comply with the law. The Department is also committed to complying with the laws that applies to its own regulatory work. Statutes like the Administrative Procedure Act and the Congressional Review Act.

My written statement discusses some of these requirements. One important function of the Solicitor's Office is to help the Department's agencies follow the law. That help includes giving day-to-day advice, as well as broader, more formal efforts. For example, the Department began taking steps to implement the Small Business Regulatory Enforcement Fairness Act, including the Congressional Review Act, shortly after the law was passed in 1996.

My office helped to provide training to more than 250 Department staff members. Later we met with agency contacts to review basic SBREFA responsibilities with the focus on the Congressional Review Act requirements. I believe that the Department is complying with the requirements of the Congressional Review Act in a responsible way, consistent with the law and with the guidance from the Office of Management and Budget.

Since the passage of the Congressional Review Act, the Department has submitted about 100 rules to the Congress. None has been rejected. I would be pleased to answer questions from the subcommittee.

[The prepared statement of Mr. Solano follows:]

STATEMENT OF HENRY L. SOLANO  
SOLICITOR OF LABOR  
U.S. DEPARTMENT OF LABOR

BEFORE THE

SUBCOMMITTEE ON NATIONAL ECONOMIC GROWTH,  
NATURAL RESOURCES, AND REGULATORY AFFAIRS  
OF THE  
COMMITTEE ON GOVERNMENT REFORM  
U.S. HOUSE OF REPRESENTATIVES

FEBRUARY 15, 2000

Chairman McIntosh and Members of the Subcommittee:

I am pleased to appear before the Subcommittee in response to your invitation to discuss the Department of Labor's use of "non-codified documents." I understand the term "non-codified documents" to mean materials, related to compliance with the laws and regulations enforced by the Department, which are issued by the Department in printed and/or electronic form, but which are not published in the Code of Federal Regulations. These types of documents do not create new law or change existing law.

Issuing such documents is an important part of the Department's responsibility to faithfully execute the laws that Congress has passed. Among other virtues, these documents help ensure that employers, employees and other members of the public understand the legal requirements that may apply to them, in their particular circumstances. Companies, labor organizations, individuals, and others regularly ask for guidance, and the Department routinely responds to these requests, as it has for decades. Congress has made it clear that agencies should

be providing such compliance assistance; that we should be striking a balance between enforcement and compliance assistance. We should be helpful to the regulated communities “up front.” For example, the Small Business Regulatory Enforcement Fairness Act (SBREFA) requires compliance assistance of this sort. The result, we hope, is a better understanding by employers and employees of the requirements of the law and ultimately better protections for American workers and their families.

Today, I would like to generally describe the Department’s use of this kind of compliance assistance material. I will also briefly describe the legal framework, including the Administrative Procedure Act and the Congressional Review Act, that applies to agency statements and how the Department seeks to comply with these laws.

As you know, Congress has given the Department of Labor a broad range of responsibilities in connection with the American workplace. The Department has among its components five major enforcement agencies with offices across the country: the Wage and Hour Division and the Office of Federal Contract Compliance Programs in the Employment Standards Administration, the Occupational Safety and Health Administration, the Mine Safety and Health Administration, and the Pension and Welfare Benefits Administration. The Department administers a broad array of statutes covering issues such as safety and health in the workplace, the security of employee benefit plans, minimum wage and overtime guarantees, family and medical leave, and equal employment opportunity—to name just a few subjects. The

great majority of American workers are protected by these laws, and the great majority of American employers are governed by them.

American employers want to comply with the laws that apply to them. They believe in treating their workers fairly. They believe in following the law. While every effort is made to ensure that laws and regulations clearly articulate the rights and responsibilities of employers and employees, the laws and regulations enforced by the Department can be complicated and do not explicitly address every factual situation that may arise in the workplace. Therefore, employers and others inevitably have questions about the application of these laws and regulations. When they do, citizens expect agencies to give them proper guidance and assistance. We believe our answers, for the most part, are very helpful to those who ask the questions. However, there are times when answers are not sufficiently clear and further clarification is needed. And there are times when an answer needs to be clarified. But on the whole, there should be no doubt that the practice of providing compliance assistance is an illustration of good government. It works well for employers, for workers, and for the general public. One type of compliance assistance is the use of non-codified documents. These documents are not legally binding.

Compliance assistance materials can take many forms such as brochures and fact-sheets. With advances in technology, such as the rise of the Internet, these materials have become more sophisticated and more easily accessible—twenty-four hours a day, seven days a week, from home or office.

The public's strong interest in compliance assistance information is an important reason why the volume of non-codified documents issued by the Department of Labor is large. Many of these documents are generated in response to specific requests from individual employers, trade associations, industry groups, and other members of the public asking how a law or regulation applies to their particular circumstances. The practice of issuing non-codified documents is longstanding and well-established. Successive Administrations have found the practice valuable in carrying out the Department's responsibilities.

In response to your request for documents in connection with this hearing, Mr. Chairman, we have provided more than 1,600 documents (totaling more than 38,000 pages), which were generated by the Occupational Safety and Health Administration between March 29, 1996, and October 8, 1999. Many of these documents represent OSHA's efforts to educate and inform workers and employers about the Occupational Safety and Health Act and related requirements. As is apparent from the quantity of these documents alone, the Department looks for every opportunity to provide compliance assistance information.

The Department is committed to helping the public comply with the law. By the same token, the Department is committed to complying with the laws that apply to its own work. Here, I mean statutes like the Administrative Procedure Act (APA) and the Congressional Review Act, which—along with the statutes that the Department administers—govern how the Department issues rules that bind the public.

Administrative law is a complicated field, and growing more complicated all the time, as new laws are passed and new judicial decisions are issued. I have not been asked to discuss all of the intricacies of administrative law, but I do want to mention certain basic principles that may be relevant today. The Administrative Procedure Act contains the definition of what a “rule” is. 5 U.S.C. 551(4). Certain rules must be published in the Federal Register. Some of these rules-- those which have “general applicability and legal effect”--ultimately are codified in the Code of Federal Regulations (the “CFR”). 44 U.S.C. 1510. Under Section 553 of the APA, legally binding rules generally are issued when a public notice and comment process is followed. Other rules--for example, “interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice”--are exempt from those requirements.

In cases involving the application of federal statutes and regulations, the federal courts often give considerable weight to the interpretations offered by regulatory agencies, provided that they are reasonable and depending upon the nature and the circumstances of the interpretation. This principle is well-established in our law. It is based on the authority that Congress has delegated to the agencies and on the expertise that the agencies have developed in the course of administering and enforcing the laws that Congress has passed. Agencies are not free to act arbitrarily, capriciously or contrary to law because the courts, as final arbiters on statutory interpretations, provide an important check on agency action.

Under the Congressional Review Act (CRA), in turn, certain rules must be submitted to Congress before they “can take effect.” 5 U.S.C. 801(a)(1)(A). The Act also provides Congress

with the opportunity to enact a joint resolution of disapproval, preventing a rule from taking effect or from continuing in effect. The CRA incorporates the APA's definition of a "rule," but also makes certain exceptions, including exceptions for "any rule of particular applicability" and "any rule of agency organization, procedure, or practice that does not substantially affect the rights or obligations of non-agency parties." 5 U.S.C. 804. The first exception covers agency opinion-letters to individuals, even though these letters may be published and relied upon by other people in similar situations. This was confirmed by statements of legislators after the enactment of the Act. The second exception means that rules of agency procedure that do not substantially affect the public need not be submitted to the Congress.

The legal requirements I have described are not always simple to apply. One important function of the Solicitor's Office at the Department of Labor is to help the Department's regulatory agencies comply with the requirements of administrative law, both long-standing requirements and new requirements. That assistance includes giving day-to-day advice to agency staff members on specific matters, as well as broader, more formal efforts.

The Department is committed to complying with the provisions of the Congressional Review Act. We began taking steps to implement the CRA's requirements shortly after the law was passed on March 29, 1996 to ensure that DOL staff understood and complied with CRA procedures. For example, on May 30--just two months after passage--senior staff from the Office of the Solicitor and from other agencies provided training on SBREFA and the CRA to more than 250 Department staff members. Further, on September 11, 1996, the Office of Small

Business Programs, with the participation of the Solicitor's Office and the Office of the Assistant Secretary for Policy (OASP), held a meeting with SBREFA agency contacts to review basic SBREFA responsibilities, with focus on the CRA requirements.

I believe that the Department is complying with the requirements of the Congressional Review Act in a responsible way, consistent with the law and with guidance from the Office of Management and Budget (OMB). Since the passage of the Congressional Review Act, the Department has submitted about 100 rules to the Congress. None has been rejected.

As I have said, the use of non-codified documents is an appropriate and effective way to achieve the goals of the laws that Congress has enacted and that the Labor Department is responsible for enforcing. Outreach and compliance assistance efforts are integral to the Department's mission. The large volume of information disseminated by the Department means that American employers, American workers, and the general public are better informed than ever about their rights and responsibilities and about the laws entrusted by the Congress to the Department of Labor for administration and enforcement.

This concludes my prepared remarks. I would be pleased to answer your questions.

Mr. MCINTOSH. Thank you, Mr. Solano, and we will indeed have some questions for you.

Let me turn now to Mr. Michael Baroody for your testimony. Please summarize your written testimony for us.

Mr. BAROODY. Thank you, Mr. Chairman and members of the subcommittee.

On behalf of the National Association of Manufacturers, our 14,000 member companies, large, mid-sized and small, and the 18 million people who make things in America, I want to thank you for this opportunity to testify before you today. To put the matter simply, your subject is important. It is important economically and commercially, socially and politically, legally and constitutionally.

Jefferson, when asked why a formal Declaration of Independence was needed, said its purpose was to put the matter before people in a language so plain and firm as to command their assent. And, when he wrote the Declaration, he wrote with what he termed a decent respect to the opinions of mankind. I am a Labor Department veteran and a proud one, having served as Assistant Secretary for Policy there for more than 4 years, including most of Ronald Reagan's second term.

I don't expect the Department, in its regulating, anymore than I expect Congress in its legislating, to always match Jefferson's language, plain, firm and compelling. That would be too much to expect. But, on behalf of manufacturers and the broader business community, I do not think it too much to expect that the appointees in charge of regulatory agencies of the Department, and governmentwide for that matter, would at least display a decent respect for the opinions of the regulated and for the public in general.

The many times in recent years when they have not, is the important subject before this committee. An attachment to my testimony includes an annotated list of examples which we will be happy to try to expand in coming weeks. Importantly, the short list we have provided makes the point that the problem of non-regulatory guidance, non-rule rules, backdoor rulemaking, as it is variously described, is not just a problem of OSHA, nor just a problem at the Department of Labor.

It is a problem widespread in the administration. One has the sense that the administration, perhaps gotten in its final year an intimation of its own mortality, is in a bit of a rush to make policy by administrative fiat where it has failed to do so by legislative means or by following the regular regulatory order. The recent "Work at Home" rules provide a well known case in point. First noticed in an interpretive letter on OSHA's Website, the letter spoke in terms of obligations on all employers.

National news accounts and the firestorm of ridicule and reaction they prompted, teased out of the Department an explanation that the letter describing obligations on all employers actually applied only to one employer; that the interpretation intended to offer clear answers to questions put to OSHA, had caused confusion instead, though it had been 2 years in the drafting; and that the letter was therefore being withdrawn.

When the letter was withdrawn, though, it seemed, at least for a while, that the interpretation stood and the confusion was only compounded. Perhaps the matter of "Work at Home" is concluded,

though one can't really be certain. And certainty about what the law means and what it requires is what this hearing is all about.

But the underlying problem exists. Let me give another example. It has been the settled practice in OSHA compliance for a long time to treat repeat violations as more serious than first-time events. Equally settled was the definitional point that such violations were those found in separate inspections at the same plant. Quietly, through a compliance directive and without notice to employers, much less notice and comment rulemaking, in 1998, OSHA redefined repeat violations to mean that a violation found in one company's plant in, say, New York, even if corrected when found in New York, was a repeat violation if previously found in another of that company's plants in, say, Idaho, even if corrected in Idaho.

The question here, as the chairman well knows, isn't which is better, the old policy or the new. Rather, since they are unarguably two different policies with very different impacts and implications, the question is how an agency of the government of the United States of America can go from one policy to the other without telling anybody or asking anybody. Without so much as a by your leave.

To repeat, when rulemakers and enforcers behave this way, how is one to know what the law means and what it requires and for that matter, how long it will continue to mean what it seems to mean today. And how long it will be until the requirements change. Mr. Chairman, the NAM applauds efforts by you and many of your colleagues to impose greater discipline, oversight and scrutiny on what may be called the Regulatory Branch.

Clarity in rulemaking, consistency in compliance enforcement and stronger analysis of both economic and scientific bases for rulemaking are all devoutly to be wished. But, as a Labor Department veteran, I offer the caution that the regulatory history of recent decades has been one of piecemeal encroachments and expansions. And there may be a limit to how much can be achieved by attempting to deregulate in the same way.

At the NAM, we have successfully sued OSHA for its lock out/tag out rules, and more recently the EPA, for its new national ambient air quality rules. In both cases, the U.S. Court of Appeals has stepped in, ruled in our favor and found the agencies overstepped the doctrine of non-delegation. In the lock out/tag out case, the court held, "that OSHA's proposed analysis would give the executive branch untrammelled power to dictate the vitality and even survival of whatever segments of American business it might choose."

For perhaps 30 years or more, until the middle of the past decade, Congress had often legislated so broadly and vaguely as to invite the agencies to make law. The brakes on this imposed by recent Congresses and proposed in this one, are welcome but they may be brakes that can at best slow, rather than bring to a full stop the problems that arise when agencies are willful, ideologies run strong and interests demand satisfaction.

What is needed by Congress, the Supreme Court or both is a reassertion of both the doctrine and the habit of non-delegation. One other general point, Mr. Chairman, if I may, the subcommittee is properly focused on agency avoidance of the scrutiny and oversight

provided for by the Administrative Procedure Act, the Congressional Review Act and similar enactments.

In fact, such avoidance through guidance and other means is always inappropriate and at least occasionally illegal. Equally troubling, though, are the occasions when an agency might technically comply with such legal requirements, but does so in a way that may be best described as pre-textual.

In other words, when compliance with what I have called the accountability statutes is a ruse. I cite in my written submission, Mr. Chairman, the Reg Flex example, we can talk about that later if you wish. The second example is far more recent and current. OSHA's ergonomics proposal, along with supporting documents, was published about 96 hours after the first session of this Congress adjourned without finalizing legislation that would have prevented it.

The rule was not actually available on OSHA's Website on its publication date. The comment period was only 70 days and that extended over a period including Thanksgiving, Christmas, New Year's, Hanukkah and Martin Luther King Day. And, during the comment period, the rule was amended to correct errors in the original version, though the errors were never specified. This is arguably the biggest rule in OSHA's history.

For new rules and changes in existing rules of far less consequence and controversy, comment periods of 90, 120 days and even more are not uncommon. This ergonomics proposal may be notice and comment rulemaking in some technical sense, Mr. Chairman, but it does not in our view display a decent respect for the opinions of the regulated. Thank you, Mr. Chairman.

[The prepared statement of Mr. Baroody follows:]



## Testimony

Of Michael Baroody

*Senior Vice President, Policy, Communications and Public Affairs*

*on behalf of the National Association of Manufacturers*

*before the Subcommittee on National Economic Growth, Natural Resources, and Regulatory Affairs, House Committee on Government Reform*

*on "Is the Department of Labor Regulating the Public Through the Backdoor?"*

**February 15, 2000**



# Manufacturing:

## The Key to Economic Growth

- The United States was rated number one in global competitiveness by the Switzerland-based Institute for Management Development by a wide margin — almost 20 percent above its closest competition, Singapore and nearly twice as high as traditional economic rivals, Germany and Japan.
- U.S. manufacturing productivity growth averaged more than 4 percent during 1996 and 1997 — roughly one-third higher than the trend since the early 1980s and nearly three times as great as the rest of the economy.
- U.S. manufacturing's direct share of the Gross Domestic Product (GDP) has remained remarkably stable at 20 percent to 23 percent since World War II. Manufacturing's share of total economic production (GDP plus intermediate activity) is nearly one-third.
- Manufacturing is responsible for two-thirds of the increase in U.S. exports, which have grown to 12.9 percent up from 11.4 percent in 1986.
- No sector of the economy, including the government, provides health care insurance coverage to a greater percentage of its employees. Average total compensation is almost 20 percent higher in manufacturing than in the rest of the economy.
- Technological advance accounts for as much as one-third of the growth in private-sector output, and as much as two-thirds of growth in productivity. The lion's share of this comes from the manufacturing sector, which accounts for more than 70 percent of the nation's total for research and development.

**TESTIMONY of**  
Michael Barody  
Senior Vice President  
Policy, Communications and Public Affairs  
National Association of Manufacturers

Before the Subcommittee on National Economic Growth,  
Natural Resources, and Regulatory Affairs  
House Committee on Government Reform

February 15, 2000

Chairman McIntosh, members of the subcommittee, on behalf of the National Association of Manufacturers, our 14,000 member companies -- large, mid-sized and small --and the 18 million people who make things in America, I want to thank you for this opportunity to testify before you today.

To put the matter simply, your subject is important. It is important economically and commercially, socially and politically, legally and constitutionally.

It was Jefferson, I believe, who when asked why a formal declaration of independence was needed, said its purpose was to put the matter before people in language so plain and firm "as to command their assent." And when he wrote the Declaration, he wrote with what he termed a "decent Respect to the Opinions of Mankind . . . ."

I am a Labor Department veteran -- and a proud one -- having served as Assistant Secretary for Policy there for more than 4 years, including most of Ronald Reagan's second term. I don't expect the Department in its regulating, any more than I expect Congress in its legislating, to always match Jefferson's language -- plain, firm and compelling. That would be too much to expect.

But on behalf of manufacturers and the broader business community, I do not think it too much to expect that the appointees in charge of regulatory agencies of the Department, and government-wide for that matter, would at least display a decent respect for the opinions of the regulated – and for the public in general.

The many times in recent years when they have not, is the important subject before this subcommittee. As an attachment to my testimony we have included an annotated list of examples. In all candor Mr. Chairman, it is far from a complete list and with the subcommittee's permission, we would be pleased to try gather additional examples to share with you in coming weeks.

Importantly, the short list we've provided makes the point that the problem of non-regulatory guidance, "non-rule rules," back-door rulemaking as it is variously described, is not just a problem at the Occupational Safety and Health Administration, nor is it just a problem at the Department of Labor. It is a problem widespread in this Administration.

One has the sense that the Administration, perhaps having gotten in its final year an intimation of its own mortality, is in a bit of a rush to make policy by administrative fiat where it has failed to do so by legislative means or by following the regular regulatory order.

The recent "Work at Home" rules provide a well-known case in point. First noticed in an interpretive letter posted on OSHA's web site, the letter spoke in terms of obligations on "all employers." National news accounts and the firestorm of ridicule and reaction they prompted teased out of the department an explanation that the letter describing obligations on all employers applied only to one employer; that the

interpretation intended to offer clear answers to questions put to OSHA had caused confusion instead (though it had been two years in the drafting); and, that the letter was therefore being withdrawn. When the letter was withdrawn, though, it seemed at least for a while that the interpretation stood – and the confusion was only compounded.

Perhaps the matter of work at home is concluded (though one can't really be certain, and certainty about what the law means and what it requires is what this hearing is all about) but the underlying problem persists.

Just as OSHA seemed with a simple letter to extend the reach of the Act to the millions of homes that double as work sites in our dynamically changing modern economy and changing contemporary workplace, so did DoL's Wage and Hour Division upset 30 years of settled collective bargaining agreement in the food industry with an opinion letter. The so-called "donning and doffing" provisions had become a staple of labor contracts in the meat industry, wherein labor and management agreed that time taken to put on protective clothing and equipment and take it off and clean utensils at the end of a shift was non-compensated time. With its opinion letter in response to a UFCW inquiry, DoL not only abrogated collectively bargained contract provisions, it contradicted its own position in two court cases it had just litigated.

To take just one more example, the settled practice in OSHA compliance has long been to treat repeat violations as more serious than first-time events. Equally settled was the definitional point that such violations were those found in separate inspections at the same plant. Quietly, through compliance directive and without notice to employers much less notice and comment rulemaking, in 1998 OSHA redefined repeat violations to mean that a violation found in one company's plant in say, New York – even if corrected when

found in New York – was a repeat violation if previously found in another of that company's plants in, say, Idaho – even if corrected in Idaho.

The question here, as the Chairman well knows, isn't which is better – the old policy or the new. Rather, since they are unarguably two different policies -- with very different impacts and implications – the question is how an agency of the government of the United States of America can go from one to the other without telling anybody or asking anybody, without so much as a “by your leave.”

To repeat, when rule makers and enforcers behave this way, how is one to know what the law means and what it requires – and for that matter, how long it will continue to mean what it seems to mean today and how long it will be until the requirements change?

Mr. Chairman, the NAM applauds efforts by you and many of your colleagues to impose greater discipline, oversight and scrutiny on what may be called the regulatory branch. Clarity in rulemaking, consistency in compliance enforcement, and stronger analysis of both economic and scientific bases for rulemaking are all devoutly to be wished.

But as a Labor Department veteran, I offer the caution that the regulatory history of recent decades has been one of piecemeal encroachments and expansions and there may be a limit to how much can be achieved by attempting to deregulate in the same way.

At the NAM, we have successfully sued OSHA for its lockout/tagout rules and more recently the EPA for its new national ambient air quality rules. In both cases, the U.S. Court of Appeals has stepped in, ruled in our favor and found the agencies

overstepped the doctrine of non-delegation. In the lockout/tagout case, the Court held that “OSHA’s proposed analysis would give the executive branch untrammelled power to dictate the vitality and even survival of whatever segments of American business it might choose.” *UAW v. OSHA*, 938 F.2d 1310, 1318 (D.C. Cir. 1991). For perhaps 30 years or more, until the middle of the past decade, Congress had often legislated so broadly and so vaguely as to invite the agencies to make law. The brakes on this imposed by recent Congresses and proposed in this one are welcome but they may be brakes that can at best slow, rather than bring to a full stop, the problems that arise when agencies are willful, ideologies run strong and interests demand satisfaction. What is needed by Congress, the Supreme Court, or both, is a reassertion of both the doctrine and the habit of non-delegation.

At least as important to solving this problem as are the accountability statutes this Congress is considering – a strengthened Congressional Review Act such as the Chairman proposes, for example – is the need for Congress to act on its more recent commitment to legislate plainly, and to “non-delegate” its own law-making authority to the agencies, thereby leaving less room for agency discretion and concomitantly less room for agency abuse of discretion.

One other general point, Mr. Chairman, if I may: This subcommittee is properly focused on agency avoidance of the scrutiny and oversight provided for by the Administrative Procedure Act, the Congressional Review Act and similar enactments. In fact such avoidance through “guidance,” through interpretive and opinion letters, through compliance documents and the like is always inappropriate and at least occasionally illegal. Equally troubling are the occasions when an agency might technically comply

with such legal requirements but does so in a way that may be best described as pretextual -- in other words, when compliance with what I have called the accountability statutes is a ruse.

Two examples: The first goes back many years to passage of the Regulatory Flexibility Act which required agencies to analyze rules to determine any disproportionate impact on small businesses. At the NAM, more than 10,000 of our total 14,000 member companies are small and mid-sized concerns and they saw passage of “Reg Flex” as the promise of a new era of reasonableness in regulation. But by the time of my arrival at the Department in 1985, agencies had learned the drill. A sort of statement of summary judgment to the effect that “nothing in this rule has been found to have a disproportionate adverse impact on small business” had become a regular feature of federal rules, a regular part of the boilerplate of federal register notices – in short, a joke. The NAM appreciates that, more recently, Reg Flex determinations have been made subject to judicial review under the Small Business Regulatory Enforcement Fairness Act and that judicial review has been used successfully. Nevertheless, litigation is a poor substitute for oversight controls within the agencies themselves.

The second example is far more recent; in fact it is current. OSHA’s ergonomics proposal along with supporting documents comprises about 1500 pages. It was “published” about 96 hours after the 1<sup>st</sup> session of this Congress adjourned without finalizing legislation this House passed which would have delayed OSHA’s action for another year, pending completion of a National Academy of Sciences study on the science of ergonomics. The rule was not actually available on OSHA’s website on its publication date, the comment period was only 70 days – and that extended over a period

that included the Thanksgiving holiday, Christmas, New Year's, Hannukah and Martin Luther King Jr. day -- and during the comment period the rule was amended to "correct" errors in the original version though the errors were never specified.

This is arguably the biggest rule in OSHA's history. For new rules and changes in existing rules of far less consequence and controversy, comment periods of 90 or 120 days, or even longer are not uncommon.

This ergonomics proposal may be notice-and-comment rulemaking in some technical sense, Mr. Chairman, but it does not, in our view, display a decent respect for the opinions of the regulated.

Why are we so concerned? There are several reasons, but I've already cited the principal one. Let me repeat the Court of Appeals' statement in the lockout/tagout case: ". . . OSHA's proposed analysis would give the executive branch untrammelled power to dictate the vitality and even survival of whatever segments of American business it might choose."

In addition, Mr. Chairman, compliance with any regulatory policy, directive, interpretation or other agency decision in whatever form is often expensive and time-consuming. People who make things in America have to divert their attention from their productivity and quality goals to dealing with bureaucracies, inspectors, complainants, lawyers and courts. Mistakes – or worse, deliberate acts that exceed an agency's authority – can cause serious disruptions in the course of business, in the lives of manufacturers and in the livelihoods of manufacturing workers and their families.

Second, we don't often know what policy has changed, and don't get advance notice to properly plan for the changes. In some cases, a company does not find out

about an agency's position until an issue is in litigation. The NAM is now in litigation over this tactic: in October, we filed a brief in the Supreme Court in which we argue that the position taken by IRS lawyers in the course of litigation should not be given deference over the contrary position of a taxpayer. If the law and regulations are not clear, a court should not blindly defer to an IRS lawyer's interpretation. It is troubling to us that agencies assume such power in the first place and that it might take a Supreme Court ruling to rein them in.

This raises our third concern – the reluctance of agency appointees to solicit and incorporate the views of manufacturers and others in the regulated community. Congress long ago established formal procedures by which agencies are expected to adopt regulations. All too often these regulations are supplemented, amended, broadened in scope or extended in reach through procedures that do not provide the prescribed level of openness or fairness. Officials at OSHA seem reluctant to use the legal process of amending regulations because it is too difficult. Unfortunately, expediency for a federal agency means hardship for the public.

What are the hardships to manufacturers? I'd like to outline a few examples from both the Department of Labor and the EPA.

Cooperative Compliance Program. In 1997, twelve thousand companies received letters from OSHA before Christmas stating that they must comply with new safety and health requirements or else face wall-to-wall inspections. The NAM sued, and the U.S. Court of Appeals for the D.C. Circuit found that OSHA exceeded its authority by trying to promulgate a standard without using the formal notice-and-comment procedures. The new requirements that OSHA proposed would have required companies to implement

comprehensive safety and health programs based on principles that OSHA had issued as “voluntary guidelines” in 1989. These “guidelines” included very prescriptive, top-to-bottom requirements that would have allowed OSHA to begin issuing citations for any workplaces that are not ergonomically perfect, an issue that is heatedly contested in scientific, legal and political forums.

Striker Replacement. In 1996, the President himself issued an Executive Order enabling Executive Branch agencies to blacklist government contractors who legally hire permanent replacements for workers on an economic strike. The order was issued without notice and comment, added new penalties on companies that want to do business with the federal government and was a top priority of the AFL-CIO at its annual meeting in 1995. Again the D.C. Circuit had to step in and toss out the order, declaring that the President and the Executive Branch agencies ordered to carry it out exceeded their authority and violated the requirements of the National Labor Relations Act.

Why must manufacturers and other employers be forced to go to court to prevent these regulatory excesses? Why are these regulatory decisions being made without the authority to do so?

Expansive assumption of authority. I know first-hand the quality of civil servants available to support policy makers there who are serious about advancing the statutory purposes of each agency in the department. The issue before this subcommittee is different: it involves efforts to further purposes that have not been clearly, unequivocally and statutorily delegated to the agency.

We usually recognize these when their justification purports to lie in the broad, general language of each authorizing statute. It is not surprising that a large segment of the public rises to object when policies are announced which decide issues that the public's duly elected representatives have long been unable to resolve among themselves.

We see that happening now with OSHA's proposed ergonomics standard. We also see it in the Department of Labor's proposal to allow unemployment insurance funds to pay the wages of people who are not unemployed, but who take time off of work under the Family and Medical Leave Act. While we are encouraged to see that the department is actually soliciting public comment on these proposals, the public comment periods are woefully short. Only through the pleading of more than a thousand companies, and our threat to go to court once again, has OSHA added a mere 30 days to the comment period on the proposed ergonomics standard. And, once again, we are being forced to consider filing a lawsuit, this time against the unemployment insurance rule when it comes out later this year.

Political influence. We believe there are far too many examples where agencies attempt to expand their authority as a result of political pressure from specific interest groups. Several of the issues on which the Department of Labor has so doggedly proceeded are top priorities of the leadership of the AFL-CIO. Their implementation is seen as important new tools in support of labor's organizing efforts. The DOL's pro-union activities are but one agency's visible manifestation of how its agenda is set. Other agencies, and the White House, are supporting the same agenda to one degree or another.

For example, the General Services Administration announced plans on July 9, 1999, to add new penalties to government contractors in addition to those they are subject

to under existing statutes relating to union relations, employment, workplace safety and health, tax, environmental, antitrust or consumer protection. These new proposed blacklisting regulations are, in intent and effect, similar to the President's 1996 Executive Order debarring companies that legally hire striker replacements, and fulfill a promise made by Vice President Gore to the AFL-CIO more than two years ago. Companies that properly defend their rights under the OSH Act, the NLRA or many other laws, are subject to the possibility that a disgruntled labor-organizing contingent, a consumer group, or some other interest group will harass them with unreasonable allegations to federal contracting authorities. In addition, another provision in the proposal would deprive companies of the ability to recover the costs associated with efforts to educate employees about the consequences of unionization without at the same time eliminating the cost rules that favor unions. As we told the GSA in November, this new policy will result in a distinct benefit to unions in violation of the government's labor neutrality policy.

While the implementation of politically motivated policies or programs without proper procedures and safeguards is never well timed, it is particularly suspect when it arises during the uncertainty of the current presidential campaign cycle. Under the circumstances, the Executive Branch should take special care to avoid the appearance of unlawfully expanding its regulatory authority at the expense of the regulated.

Attached to this testimony are some specific examples where the EPA and the Department of Labor have developed so-called "legally non-binding" policies. These policies are often justified as an exercise of prosecutorial discretion, whereby the agency announces situations in which it will not take action. In many cases, however, the agency

actually tries to expand its statutory authority into situations where it proposes to act. In each case, the anticipated impact of the policy is substantial and a large segment of manufacturers have felt compelled to step forward and respond.

Regulations as New Opportunities for Back-Door Rulemaking. While the incidents where DOL and other agencies have issued interpretations and guidance that impose unauthorized new requirements on manufacturers are abundant, we are also seeing new and innovative ways that agencies can, and do, multiply this pernicious technique. Specifically, agencies are proposing regulations and standards that may survive legal challenge, but that include gaps and ambiguities that will be “clarified” in the future through interpretations and guidance without adequate notice-and-comment protections. Just as Congress sometimes avoids controversial issues in agency authorizing legislation, leaving the agencies with more leeway to assume authority they do not have, so do those same agencies avoid controversial issues in their regulations, leaving their staff with more leeway to assume authority they do not have. By the time a manufacturer gets an answer OSHA’s proposed safety and health program rule will require companies to have workplace programs and procedures sufficient to satisfy broad, general mandates. After the rule becomes effective, OSHA will disseminate enforcement documents, interpretations and other materials that could again bring ergonomics regulation in through the back door.

Conclusion. Unfortunately, as you can see, we have learned to expect an all-too-steady stream of questionable, and sometimes outright illegal, policy-making from federal agencies. They ignore procedural due process, avoid judicial requirements, exploit the vagueness of statutes and their own regulatory language and collude with

nominal plaintiffs in the settlement of litigation, to expand their authority over the regulated community. We call upon them to exercise restraint. Regulatory agencies should act not because they have the power to act, or because they assume the power to act, but only when they have the clearly delegated authority to act according to the will of the people acting through their elected representatives.

If they fail, and regulate too much using guidance documents, the Congressional Review Act technically is available as a brake, but its use is unwieldy and subject to the same problems of consensus-building that prevent Congress from reaching agreement on issues that agencies eventually take upon themselves to resolve. We applaud this committee for bringing this issue to light, and for attempting to remind our Executive Branch enforcement agents of their obligation to undertake their responsibilities with care, with due consideration for the limits imposed by law and the Constitution, and with a decent respect for fairness in the use of their power against the people who make things in America.

Thank you. I'd be happy to answer any questions you may have.

**ATTACHMENT to Testimony of Mike Baroody  
Senior Vice President  
Policy, Communications and Public Affairs  
National Association of Manufacturers**

**EXAMPLES OF AGENCIES ATTEMPTING TO EXPAND THEIR AUTHORITY  
WITHOUT NOTICE-AND-COMMENT RULEMAKING**

**Department of Labor**

Home Work. OSHA attempted to regulate work at home through an interpretation and compliance letter placed on their web site. Despite OSHA's withdrawal of the letter and subsequent statements of contrition, we believe they still will require companies to keep records of injuries occurring at employees' homes, along with all the formalities that such recordkeeping entails. OSHA's single-mindedness on this point means that it is likely to continue to search for ways to prosecute manufacturers for ergonomic injuries in the workplace or at home, without clear scientific or legal authority to do so.

Mandated Pay in Unionized Facility. In 1997, the Wage and Hour Division reversed 30 years of settled collective-bargaining practice in the meat industry by issuing an opinion letter in response to a request from the United Food and Commercial Workers' Union (UFCW). Under the terms of their settled collective-bargaining pattern, workers were not paid for putting safety equipment on and off, or for cleaning their implements at day's end. Ultimately, of course, the union's signature appeared next to management's on the final agreement year in and year out. Yet, in response to the UFCW inquiry, DOL decided that this time should be compensated – regardless of the contract and in direct contradiction of the Department's position in two cases that it had just litigated. A few minutes per day times tens of thousands of employees is an expensive proposition, one that, had it been known in advance, would have prevented the affected companies from agreeing to wage and benefit demands in their collective bargaining negotiations. The

opinion letter arrived with its enormous economic impact like a thief in the night, without warning and without the DOL ever having consulted business.

Repeat OSHA Violations. In 1998, OSHA made a quiet change to its enforcement policy with regard to repeat violations. Up until then, to qualify for sevenfold penalties for a repeat violation, a company had to have been cited for the same violation at the same plant. Now, a multi-site employer qualifies for a repeat violation if it has a similar subsequent violation anywhere in its company. This was also done without notice to the group on which it would have the greatest impact: employers. This is a great concern to companies that reach settlements with OSHA, since those agreements might be used to multiply the fines for subsequent violations that are arguably similar anywhere in their company.

Pay Data. In 1999, the Office of Federal Contract Compliance Programs (OFCCP) tried to sneak through a dramatic change in its rules, requiring federal contractors to furnish wide-ranging pay data at an earlier stage of the compliance review process. While the objections from NAM members chastened them for a spell, they have now announced plans to forge ahead. No attempt was made to contact affected parties, and only the dogged persistence of the employer community has triggered a reluctant response.

Stock Options and Overtime Pay. The DOL has recently issued an opinion letter regarding the inclusion of stock options in an hourly employee's base pay. The interpretation requires that the current value of an hourly employee's stock options be estimated and included in the employee's base rate of pay for purposes of calculating overtime. Companies will be required to undertake extremely complicated recalculations in order to abide by the DOL's interpretation. If implemented, this policy will only deter companies from offering stock options to their hourly employees, who would otherwise gain immensely from this benefit.

Clearly this is a major policy choice that is typically made in a legislative context. If it is to be made by an Executive Branch agency, it should be done with notice and an

opportunity for those affected to enlighten the Department of its impact. It is not the kind of policy choice that the DOL should make long after a company has issued stock options to its non-exempt employees. Not surprisingly, increases in employee base pay also inure directly to the benefit of unions to support their organizing and political activities.

Family and Medical Leave Act (FMLA) Interpretations. The DOL issued Opinion Letter FMLA-86 stating that any condition can be a “serious health condition” under the Act if it involves incapacity for more than three consecutive days and qualifying treatment. This opinion letter conflicts with both the FMLA and its regulations. Nevertheless, the Department issued it, and a small manufacturer in Minnesota is now caught in litigation over it. The NAM and other groups have joined in the litigation as well, to underscore the seriousness of the problem and to suggest a result that conforms to the requirements of the statute.

### **Environmental Protection Agency**

New Source Review (NSR) Litigation: The EPA wants to force older facilities -- particularly coal-burning ones -- to install expensive air pollution control equipment. Because for seven years the EPA could not reach this policy objective through regulatory or legislative means, it has unilaterally changed the definition of routine maintenance and repairs under the long-standing NSR regulation, without a rulemaking or a guidance document, but rather through an “Enforcement Alert” on its web site. Now it has sued or brought notices of violation against numerous companies.

The Clean Air Act requires a pre-construction permit before making a modification to a facility that would result in significant new emissions. The Act also explicitly allows companies to do routine maintenance and repair, and allows a company to offset emissions increases with cuts in emissions elsewhere at the facility without triggering New Source Review. For nearly 20 years some companies have maintained their plants and have not triggered NSR.

The EPA’s change in interpretation is purportedly based in part on recent headlines that accused industry of ignoring or cheating on laws designed to protect the

air. The EPA did not reveal to the general public that, to arrive at its conclusions, it had to change the rules -- without rulemaking and in violation of the Clean Air Act.

Now, under the new definition, a long history of standard operating maintenance and repair procedures are alleged to violate the NSR, making industry liable for fines up to \$27,500 a day for the entire period.

Federally Permitted Release: On December 21, 1999, the EPA released an interim Guidance on the definition of the Clean Air Act term "federally permitted release," even though there is a rulemaking proceeding pending at the agency. Under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and the Emergency Planning and Community Right-to-Know Act (EPCRA), companies must report air emissions that exceed a threshold level indicating a potential emergency release, called an RQ (release quantity). In those laws, Congress recognized that some routine air emissions covered by permit limits do not need to be reported on an emergency basis. Congress also recognized the control of hazardous air pollutant emissions can be achieved through a variety of means and that releases controlled by these programs should not be reported on an emergency basis as well.

Unfortunately, the EPA's Guidance effectively eliminates all exemptions for releases that are not covered by permits, in contradiction to the plain language of the statute. The EPA also ignores congressional intent to exempt emissions that are subject to a control program. The EPA has done all of this in a way that sidesteps constitutional protections, short-circuits public participation and offends court precedents.

Periodic Monitoring Guidance: Industry, environmental groups and the EPA negotiated the terms of a rule regarding the monitoring of facility emissions in order to assure that a facility is in compliance with its permits (called the Compliance Assurance Monitoring (CAM) Rule). Less than a year later, the EPA issued Guidance that changes the interpretation of which monitoring results trigger the need to take corrective action to ensure compliance and which results indicate a violation -- completely reversing the findings and regulatory effect of the CAM Rule. Once again, industry has been forced to litigate the issues. Although agency guidance is not normally judicially reviewable, we

have survived a motion to dismiss, indicating that the court believes there is merit to our challenge.

Toxic Release Inventory (TRI): No issue is too small for political appointees at the EPA. The agency has quietly changed the minimum number of employees needed before a company must report under the TRI regulation. The changes came in a 1997 question-and-answer document generally describing the requirements for reporting under TRI. For years, the EPA literature suggested that any facility with fewer than 10 employees was exempt from reporting. Now, with the change of a single sentence in an obscure document, the EPA included sales people who are not even at the facility or may never have even set foot in the facility, but work with the facility, as part of the 10-person threshold. Thus, a company with only six employees at a site must report, if it has four regional salespersons that support the site.

Environmentally Preferable Purchases. The EPA issued guidance in August, 1999, to federal agency procurement officials giving substantial preferences to environmentally friendly government contractors (green purchases). It was prepared by EPA staff in response to Executive Order 13101, which mandated such policies. The EPA ignored many of its own laws in issuing a guidance that establishes pollution prevention criteria without the certainty or protections of a review process. We are pleased to see that Congressman McIntosh submitted a letter to EPA Administrator Browner (September 20, 1999) requesting an explanation why the guidance wasn't submitted to Congress. We too question the guidance, both for its authority and for the propriety of the procedures that were used.

Interim Guidance for Investigating Title VI Administrative Complaints  
Challenging Permits. EPA's Office of Civil Rights on February 5, 1998, issued guidance to provide a framework for the processing of complaints filed under Title VI of the Civil Rights Act of 1964. The EPA made it available on the Internet, and announced the opportunity to submit written comments through an EPA press advisory. Numerous entities, including the NAM, the U.S. Conference of Mayors, the Western Governor's

Association, the National Association of Counties, Black County Officials and others requested that the EPA immediately withdraw the interim guidance. EPA did not comply. Congressman McIntosh also submitted a letter (September 1, 1998) to the General Accounting Office (GAO) seeking clarification on the scope and intent of the interim guidance. The GAO replied on January 20, 1999, stating that the interim guidance is a “rule” under the Congressional Review Act portion of the Small Business Regulatory Enforcement Fairness Act (SBREFA). The EPA has since published in the Federal Register a revised version of the guidance for comment.

CAMU Settlement. As recently as two weeks ago, the EPA offered environmentalists an out-of-court settlement aimed at ending litigation over regulations that would provide needed flexibility to the Resource Conservation and Recovery Act (RCRA). The deal is based on a challenge to a 1993 Corrective Action Management Unit (CAMU) rule, which provided companies the necessary flexibility to minimize the impediments of RCRA to conduct timely and protective cleanup actions for hazardous remediation waste, such as ash. The compromise settlement, which did not involve industry, significantly changes EPA’s regulations, including changes to definitions, standards, monitoring and cleanups. The settlement does not resolve the legal questions surrounding the EPA’s authority to implement CAMUs – it merely avoids a judicial decision on those questions.

None of the examples above involving the EPA are scheduled for clarification through rulemaking.

Mr. MCINTOSH. Thank you, Mr. Baroody. Let me now turn to Professor Anthony of George Mason University. Professor.

Mr. ANTHONY. Thank you, Mr. Chairman. I am a professor of administrative law at George Mason, with an interest in Federal agency use of non-legislative rules. These are documents such as guidances and circulars that were not promulgated through processes like notice-and-comment that Congress has laid down for making rules with the force of law.

The key proposition here is that agencies should not use non-legislative documents like guidances to impose binding requirements on the public. Agencies have no inherent power to make law. They only have the power that Congress gives them. Acts of Congress determine the subject matter on which agencies can act and, more pertinent today, acts of Congress specify the procedures by which the agencies must act.

For making rules that bind people, the Administrative Procedure Act lays down the procedures that the agencies must follow in most cases. These are the familiar notice-and-comment procedures. Sometimes Congress specifies variations on these rulemaking procedures for a particular agency, as in the Occupational Safety and Health Act, but the basic mandate to use statutory rulemaking procedures remains the same.

When an agency follows congressionally required rulemaking procedures, the resulting rule or regulation is called a legislative rule. Today we are concerned with less formal documents like guidances, bulletins, advisories and dear colleague letters, memorandums, manuals, policy statements, press releases, circulars. These are called non-legislative rules. Sometimes the agencies use these non-legislative documents where they should be using legislative rules, as a way to impose new standards or obligations without going through the procedures required by Congress for making rules with the force of law.

Often the practical affect of an informal document is just as rigid and binding as a formally promulgated regulation. This happens when a document establishes fixed criteria that the agency routinely applies, for example, by basing enforcement on the document or requiring that its terms be satisfied before a permit will be granted. And frequently there is little that the affected private parties can do about agency use of non-legislative documents. An applicant for a permit, for example, usually needs the permit right away and can't afford the hassle of challenging the document in court.

Now if agencies could make these low profile documents binding on the public, even just as a practical matter, then they wouldn't need legislative rules made by notice-and-comment.

A guidance or a memo is quick and cheap and often is less vulnerable to review by Congress and the courts than is a regulation. But members of the affected public are hurt. They have no opportunity for input on the agency position. They have no opportunity to get fresh consideration of the position before it is applied to them. And they may have no opportunity to get it reviewed in court.

Fortunately, the law has become firmly established that the agencies, if they want to bind the public, must promulgate regula-

tions that comply with the APA or other legislative rulemaking procedures specified by Congress. If an agency chooses to issue only an informal document, like a guidance or a circular, it must make clear that the document is not binding but is tentative. And the agency must keep an open mind and be prepared to reconsider the policy at the time of its application.

There is one exception. When the document only interprets the language of existing legislation, the agency doesn't have to use notice-and-comment. But the informally issued interpretation does not have the force of law and should not get judicial deference. And thus, until the courts have accepted a non-legislative interpretation, the agency's effort to enforce it may be on shaky ground. But procedurally, it is permissible.

As a matter of good practice, though, in many situations the agency should use notice-and-comment procedures on a proposed interpretation to get public input. Examples are interpretations that would expand the practical scope of the agency's jurisdiction or would alter the liabilities of private parties. Observance of notice-and-comment procedures in situations like these has benefits for both the public and the agency.

Where the unelected agencies make policy, notice-and-comment procedures supply a sort of democratic process which serves as an imperfect substitute for the democratic process of legislation by the people's elected representatives in Congress.

A foundational precept of our system is that officials can't issue decrees without congressional authority. That proposition lies near the heart of our freedoms. It marks a boundary between democracy and autocracy. It is a vital element of our civil liberties.

Thank you.

[The prepared statement of Mr. Anthony follows:]

**UNITED STATES HOUSE OF REPRESENTATIVES**  
**COMMITTEE ON GOVERNMENT REFORM**  
**SUBCOMMITTEE ON NATIONAL ECONOMIC GROWTH, NATURAL**  
**RESOURCES, AND REGULATORY AFFAIRS**

Hearing on Non-Codified Documents  
“Is the Department of Labor Regulating the Public Through the Backdoor?”

2154 Rayburn House Office Building  
Tuesday, February 15, 2000  
1:00 p.m.

Statement of

**Robert A. Anthony**

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**UNITED STATES HOUSE OF REPRESENTATIVES  
COMMITTEE ON GOVERNMENT REFORM  
SUBCOMMITTEE ON NATIONAL ECONOMIC GROWTH, NATURAL RESOURCES,  
AND REGULATORY AFFAIRS  
HEARING ON USE OF NON-CODIFIED GUIDANCE DOCUMENTS  
FEBRUARY 15, 2000**

**TESTIMONY OF ROBERT A. ANTHONY**

**MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE:**

I appreciate the opportunity to appear before you on the important issue of agency use of guidance documents to lay down new requirements.

I am George Mason University Foundation Professor of Law at the George Mason University School of Law in Arlington, Virginia. I have been at George Mason since 1983. From 1964 to 1974 I was an associate professor and then a tenured full professor of law at the Cornell Law School, before being appointed by President Ford to a five-year term as Chairman of the Administrative Conference of the United States, 1974-1979. I have long been active in the Administrative Law and Regulatory Practice Section of the American Bar Association, chairing several committees and serving in section-wide offices from 1985 to 1994. My academic specialty is administrative law.

I have a particular scholarly interest in "nonlegislative rules" issued by federal agencies -- documents such as guidances, circulars, policy statements, bulletins, advisories, memorandums and manuals. These are agency documents that were not promulgated through the processes like notice-and-comment that Congress has laid down for making rules with the force of law.

The key general proposition here is that agencies should not use nonlegislative documents like guidances to impose binding requirements on the public.

Agencies have no inherent power to make law. They only have the power that Congress gives them -- nothing more. Agencies may affect private citizens only to the extent authorized by the Constitution and acts of Congress. That is an essential part of our liberty.

These bedrock propositions govern the agencies' power to issue documents -- like regulations -- that can have the force of law. They also govern documents -- like guidances, bulletins, manuals and policy statements -- that agencies sometimes use to try to bind members of the public, even though they do not have the force of law.

My simple thesis is that an agency can bind the public only in the ways Congress has authorized it to bind the public. Otherwise, even though it is a federal agency, it has no more right to command members of the public than a bullying stranger would have. The agency can exercise no lawmaking powers that Congress has not given it.

Congress determines agencies' lawmaking powers in two distinct ways. First, acts of

Congress specify the subject matter on which the agencies can act. Thus, an agency action is invalid if its subject matter lies beyond the agency's statutory authority. Second – and more directly pertinent to today's hearing -- acts of Congress specify the procedures by which the agencies can act. An agency action is invalid if it is not promulgated in accordance with the procedures required by Congress.

For making rules that bind people, the Administrative Procedure Act lays down the procedures that agencies must follow in most cases. These are the familiar notice-and-comment procedures, which include publication of the proposed rule in the Federal Register, opportunity for the public to submit comments, consideration of the matter presented, and publication of the final rule with an accompanying statement of its basis and purpose. The APA makes exceptions for some subject areas, such as rules relating to military and foreign affairs and government property, grants and contracts. Subject to those exceptions, an agency must follow the procedures laid down in the APA. Sometimes Congress specifies variations on these rulemaking procedures for a particular agency, as in the Occupational Safety and Health Act, but the basic mandate to use statutory rulemaking procedures remains the same. In other words, an agency must obey the procedures required by Congress -- whether those are APA notice-and-comment procedures or special statutory procedures. When an agency follows congressionally required rulemaking procedures and does it right, the resulting rule or regulation is called a "legislative rule."

Today we're concerned, by contrast, with agencies' use of less formal documents – like guidances, bulletins, advisories, Dear Colleague letters, memorandums, manuals, policy statements, press releases and circulars. These are called "nonlegislative rules."<sup>1</sup> There is a legitimate place for these informal nonlegislative rules. But sometimes agencies use these nonlegislative documents where they should be using legislative rules, to force people to do what the agency wants them to do. That is, agencies sometimes issue guidances or circulars or other nonlegislative documents as a way to impose new obligations or standards that have practical binding effect – without going through APA rulemaking or other procedures required by Congress for making rules with the force of law. Such documents are usually issued not by the agency heads but at lower levels, often with no prior notice to or input from the affected public and with little or no supporting explanation or justification.

Unless they actually interpret existing law, these nonlegislative documents are valid only if they are tentative, stating what the agency expects to do in the future, in general, or in particular cases as they may arise. The agency is supposed to afford each affected private party the opportunity to argue for a different position before final decisions are made in their individual cases. In other words, such a document is supposed to be provisional, not binding, and -- as the cases put it -- the agency has to have "an open mind" about applying it.

Sometimes, though, the effect of an informal document on regulated persons may, as a practical matter, be just as rigid and binding as the effect of a fully-promulgated regulation. This

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<sup>1</sup> The APA definition of "rules", 5 U.S.C. § 551(4), includes virtually all general agency statements, including even those like memorandums and guidances that do not have the force of law. Please see Robert A. Anthony, "Interpretive" Rules, "Legislative" Rules and "Spurious" Rules: Lifting the Smog, 8 Administrative Law Journal of the American University 1 (1994). I have supplied the Committee copies of this article and of the other relevant articles cited below.

happens when the agency uses the document establish fixed criteria, which the agency is going to routinely or automatically apply – for example, by basing enforcement on the document, or by requiring that its terms be satisfied before a permit or some other sort of approval will be granted to an applicant. Frequently there is little that affected private parties can do about an agency’s routine use of nonlegislative documents to decide cases. An applicant for a permit, for example, usually needs the permit promptly, and can’t afford the time and money and possible agency hassle of challenging the document in court.

If agencies could make these easy-to-issue low-profile documents binding on the public, at least as a practical matter, they wouldn’t need to endure the delay and cost and accountability of issuing a legislative rule. A guidance or a memo is quick and cheap, and often is less vulnerable to review by Congress and the courts than is a regulation. But members of the affected public are hurt: they have no opportunity for input on the agency position, they have no opportunity to get fresh consideration of the position before it is applied to them, and they may have no opportunity to get the document reviewed in court.

Fortunately, in the past twenty-five years or so the law has become firmly established that agencies, if they want to bind the public, must promulgate regulations that comply with APA or other required legislative rulemaking procedures.<sup>2</sup> The agencies used to make the circular argument that they hadn’t issued their guidances and bulletins and memos as legislative rules, so those documents didn’t have to go through the APA procedures for legislative rules. But the courts have rejected that argument, and insist that, where the agency tries to make a document binding (even only in a practical way), it has to obey legislative rulemaking procedures. If the agency chooses to issue only an informal document like a guidance or a circular, it must make clear that the document is not binding but is tentative, and it must keep an open mind and be prepared to reconsider the policy at the time of its application. These propositions flow directly from the APA and are now well established in the case law.

There is one exception to the proposition that an agency may not attempt to make an informal nonlegislative document binding as a practical matter. That is when the agency document interprets the language of existing legislation.<sup>3</sup> The legislation being interpreted is usually a statute, but it can also be an already existing legislative rule (a regulation) that has the force of law. It is not procedurally invalid for an agency to informally announce an interpretation and try to give it binding effect, even though the document cannot legally bind the courts or the public. The agency doesn’t have to use notice-and-comment, provided the interpretive document genuinely derives its meaning from the meaning of the existing statute or regulation. The theory is that the agency is not making new law, but is merely spelling out existing positive law already laid down in a statute or in a regulation. The informally issued interpretation does not have the force of law, and (as I understand

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<sup>2</sup> Please see Robert A. Anthony, Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like – Should Federal Agencies Use Them to Bind the Public?, 41 Duke Law Journal 1311 (1992). See also Administrative Conference of the United States Recommendation 92-2, Agency Policy Statements, 1 C.F.R. § 305.92-2 (1995), so recommending.

<sup>3</sup> The language being interpreted has to have some tangible meaning, not just empty words like “fair and equitable” or “in the public interest.”

the law) should not get judicial deference under the Chevron doctrine.<sup>4</sup> The courts should form their own independent interpretations and overturn agency interpretations with which they do not agree. Thus, until the courts have accepted a nonlegislative agency interpretation, the agency's efforts to enforce it may be on shaky ground. But, procedurally, it is permissible for an agency to informally issue an interpretation and make it binding in the sense of applying it regularly to private parties, at least until a court holds that the interpretation is incorrect.

As a matter of good practice, however, there are situations in which the agency should use APA notice-and-comment procedures to get public input on a proposed interpretation, and then adopt the interpretation in the form of a regulation.<sup>5</sup> These will be where considerations of fair notice, reliance interests, potential impact or agency accountability are significant. Examples are situations where the agency is considering interpretations that 1) would extend the practical scope of the agency's jurisdiction, 2) would alter the obligations or liabilities of private parties, or 3) would modify the terms on which an agency will grant entitlements.

Observance of notice-and-comment procedures in situations like these has benefits for both the public and the agency. The APA procedures tend to generate better inputs (structured opportunity for comment by the entire public) and better outputs (more fully tested and deliberated). The resulting interpretation has the dignity of a legislative rule with the force of law, eligible for publication as such in the Code of Federal Regulations. Affected persons will know where they stand. A legislative rule is easier to enforce in court than is a nonlegislative document, and is more certain to be accepted by the courts, since as a legislative rule it will receive judicial deference under the Chevron doctrine. And the affected public may be more ready to accept the interpretation if it has had a voice in formulating it. Notice-and-comment rulemaking procedures supply a sort of democratic process for policymaking by the unelected agencies, which serves as an imperfect substitute for the democratic process of legislation by the people's elected representatives in

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<sup>4</sup> Chevron deference results in the courts being bound by the agency interpretation, provided only that it is "reasonable." It is one thing for an agency interpretation to bind the courts when the interpretation has been issued in the form of a legislative rule, promulgated in accordance with Congressionally delegated rulemaking powers and Congressionally required procedures. But agencies should not have the power to bind the courts by their informal interpretations, because Congress hasn't delegated such lawmaking power to them. If agencies did have such power, we would confront something approaching agency dictatorship. Agency heads – or even staff members and regional offices and other functionaries -- could declare the law, simply by issuing informal interpretations which the courts would have to accept if "reasonable." The agencies could dispense with legislative rulemaking for all interpretations and just use informal documents. Please see Robert A. Anthony, Which Agency Interpretations should Bind Citizens and the Courts?, 7 Yale Journal on Regulation 1 (1990); Administrative Conference of the United States Recommendation 89-5, Achieving Judicial Acceptance of Agency Statutory Interpretations, 1 C.F.R. § 305.89-5 (1995). The Supreme Court, however, has expressly deferred consideration of this issue. Chicago v. Environmental Defense Fund, 511 U.S. 328, 339 n.5 (1994).

<sup>5</sup> See Administrative Conference of the United States Recommendation 76-5, Interpretive Rules of General Applicability and Statements of General Policy, 1 C.F.R. § 305.76-5 (1995), recommending use of APA notice-and-comment procedures "[b]efore an agency issues, amends, or repeals an interpretive rule of general applicability . . . which is likely to have substantial impact on the public . . . ."

Congress.

In sum, there are two key questions to test the validity of a nonlegislative document. First, does it interpret existing legislation? If so, notice-and-comment may not be required but in many circumstances will be good practice, beneficial to the agency as well as the public. If the document does not interpret, the second question is, has the agency made it binding on the public (even just in a practical sense)? If so, it is invalid because notice-and-comment or other statutory procedures were not followed.

Most of the time the agencies are conscientious about issuing their documents in the way Congress has authorized. But sometimes they aren't. They try to lay down practically-binding new requirements in low-profile documents like the ones I have discussed today. To do that, in many cases, is not faithful to our system of law.

A foundational precept of our system is that officials can't issue decrees without legislative authority. That proposition lies near the heart of our freedoms. It marks a boundary between democracy and autocracy. It is a vital element of our civil liberties.

Mr. Chairman, I will be happy to answer any questions that you or other members of the Subcommittee may have. Thank you.

Mr. MCINTOSH. Thank you very much, Professor, and particularly for that eloquent statement of the way our freedoms are protected and our structural divisions of power. Let me now turn to Jud Motsenbocker from Muncie, IN, from the perspective of one of the members of the regulated community. Please share with us a summary of your testimony.

Mr. MOTSENBOCKER. Good afternoon, Mr. Chairman and members of the subcommittee.

My name is Jud Motsenbocker and I have been in the construction business since 1957. I have been the president and CEO of Jud Construction since 1968, and I have held many leadership positions in the home building industry on a local, State and national level, including serving as a senior life director of the National Association of Home Builders.

I have served as one of the area vice presidents and I want to thank you for giving me the opportunity to come before you to talk about the non-regulatory guidance documents, specifically those of the Occupational Safety and Health Administration, and how they impact the home building industry. Today I would like to give you some examples of how the non-regulatory guidance documents have become much more than their intended purpose of educating employers and the public.

In effect, they have become regulations without the benefit of lawmaking procedures. Let me give you one which we classify as forced safety committees. In the 1990's, the Indiana Occupational Safety and Health Administration decided that, after an employer was cited for a violation, as part of the settlement agreement, the employer must form an Employee Safety Committee. The employees could choose their representatives and must meet monthly.

The minutes of these meetings are required to be sent to the Commissioner of Labor and kept on file. The context of the minutes could be used against the employer if a future violation was cited. So the future violation would no longer be a serious violation with a maximum fine of \$7,000, but now would be a knowing and willful violation with a maximum fine of \$70,000. Because of the employer's prior knowledge as provided in the minutes of the forced Safety Committee meeting.

Employee committees are valuable. However, in the way in which they were mandated by IOSHA violated the National Labor Relations Act and forced recognition of employee unions. Let me give you another one. Can you imagine a \$1,000 fine for a signature? In the 1990's, when Indiana had a new Commissioner of Labor, employers were being fined for not having the Commissioner's signature on the safety posters at their work site.

Now the posters were there, they were the right size, they were the right color, they had the right verbiage in it, but they didn't have his signature on it. They had the previous signature of the Commissioner on it. This type of activity does not promote safety, only frustration. Mr. Chairman, I am a small businessman. I have 19 employees. This is about the size of the average employer in Indiana.

I am very active in organizations in my industry, perhaps that is why I am here today. I do the very best I can to learn what the requirements are of an employer. I read regulations, newsletters,

explanation of those newsletters, and I continue to pursue information necessary to comply with all the regulations of the Internal Revenue Service, Environmental Protection Agency, OSHA, U.S. Department of Labor, and all the other things that regulate our industry.

I believe that this is my duty and law, but more importantly, the duty to my employees and my community and company. But, how am I to know from within the desk drawers of a bureaucrat may come some advisory letter to change the way that I must comply after I have already done what I believe I need to do, to be in compliance. How may I know what that advisory exists or what is required. Mr. Chairman, let me assure you that I have not read 17,400 pages of documents from 1999, to try to make sure that I have complied. I still meet a payroll on Friday and I still have the obligation to my employees to keep them employed in a safe working condition.

Mr. Chairman, members of the subcommittee, thank you for allowing me to address you today on this important issue. I sincerely hope that changes are made so that employers, employees have the input into the regulatory process and proper notification of compliance requirements. I hope that we can create an environment that assists employers with compliance issues rather than what appears to be the present course of regulations by some government agency. Thank you.

[The prepared statement of Mr. Motsenbocker follows:]

**TESTIMONY OF  
JUD MOTSENBOCKER  
PRESIDENT AND CEO OF JUD CONSTRUCTION  
BEFORE THE SUBCOMMITTEE ON  
NATIONAL ECONOMIC GROWTH, NATURAL RESOURCES, AND  
REGULATORY AFFAIRS  
COMMITTEE ON GOVERNMENT REFORM  
U.S. HOUSE OF REPRESENTATIVES  
FEBRUARY 15, 2000**

Good afternoon, Mr. Chairman and members of the Subcommittee, my name is Jud Motesenbocker. I have been in the construction business since 1957 and have been the President and CEO of Jud Construction since 1968. I have held many leadership positions in the home building industry at the local, state and national levels, including serving as a National Senior Life Director of the National Association of Home Builders (NAHB) and having served as one of its area Vice Presidents. Thank you for giving me the opportunity to come before you to talk about how nonregulatory guidance documents, specifically those from the Occupational Safety and Health Administration (OSHA), are impacting the home building industry.

I believe in the American dream and that every American should have the opportunity to have a decent home, as part of that dream. Providing this opportunity is a challenge that I accept because I care about housing and I care about the communities where I live and raise my family. But providing affordable housing is becoming more and more difficult with each new requirement that I have to meet. As it is, the home building industry is one of the most heavily regulated groups in the nation, which is one of the reasons why the cost of housing – and home ownership – is beyond the reach of millions of Americans. While I understand that effective regulatory programs are necessary in promoting worker safety and public health, I am also concerned about the trend of agencies regulating through the backdoor.

Today, I would like to give you examples of how nonregulatory guidance documents have become much more than their intended purpose of educating employers and the public. In effect, they have become regulations without the benefit of the rulemaking process.

#### **Guidance Documents**

Much of my concern rests not in the substance of guidance documents themselves, but in the way in which these published documents are being used in the field. For example, OSHA published

a manual of Safety and Health Program Management Guidelines. These voluntary guidelines were published as an outreach document with the intent to provide assistance to medium and small businesses that might lack the professional resources necessary to develop adequate safety and health programs. At the time of publication, there was concern that any guidelines issued by a regulatory agency can create confusion with respect to compliance issues. Additionally, many in the employer community were concerned that the guidelines would force companies to comply with the very prescriptive language contained within the document. OSHA's response to this concern was that the guidelines were "not being promulgated as enforceable rules but are being issued as guidelines to assist employers in their efforts to maintain safe and healthful work and working conditions."

While this is reasonable on its face, what follows is why I am concerned about agencies regulating the public through the backdoor. Once the safety and health program guidelines were disseminated to OSHA compliance officers in regional, state, and local offices, employers began to be held responsible for the content of the guidelines. Numerous construction employers received citations because their existing safety and health programs did not contain all of the program elements that were published in the guidelines. And what makes this example even more disturbing is that the original *Federal Register* notice states, "The language in these guidelines is general so that it may be broadly applied in general industry, shipyards, marine terminals, and longshoring activities..." and, "Construction activities are not addressed here..."

So, OSHA developed a guidance document expressly for the purpose of providing assistance to general industry, and maritime employers, yet it then used this document as an enforcement tool to hammer the construction industry.

To date, OSHA has not made a concerted effort to distribute these guidelines to industry or work with small businesses to implement programs based on the information contained in the

document. And, OSHA, to my knowledge, has not conducted a study to determine the impact of such a program on employers of varying sizes in the many different industries regulated by OSHA, yet OSHA inspectors continue to issue citations based on the content of the guidelines.

With this example in mind, OSHA is in the process of developing an even more controversial guidance document entitled *Construction Industry Ergonomics Problems and Practices*. This document was developed by a workgroup of the OSHA Advisory Committee on Construction Safety and Health (ACCSH) without the consensus of the construction industry or the benefit of scientific review. A draft of this document has already been published by several media sources and appears on the OSHA website. Employers across the nation who do not normally participate in the regulatory process are likely to perceive the brochure as an OSHA publication. Most employers have never heard of ACCSH. When they read the articles about the ACCSH brochure they will not differentiate between ACCSH and OSHA. The confusion that will be caused by OSHA placing a draft brochure on its website pales in comparison to what will occur once OSHA formally publishes the document. To believe that an OSHA publication of *Construction Industry Ergonomics Problems and Practices* will serve only as an educational tool appears to me to be incredibly unrealistic.

It is the construction industry's clear experience that there will be enforcement ramifications from this brochure, even if it is classified as "advisory." The booklet will establish in the minds of OSHA's enforcement personnel and others that many construction work practices are in-and-of-themselves "recognized hazards." As a result, the construction industry will be increasingly subject to ergonomics-related general duty clause citations by OSHA enforcement officers across the nation. All of this would happen in the absence of an ergonomics regulation.

I simply cannot afford this "backdoor" approach to regulating.

I applaud the chairman for introducing H.R. 3521, the "Congressional Accountability for Regulatory Information Act," which would require agency heads to disclose that guidance documents are not binding on the public. I would also recommend that the Subcommittee continue along this line and hold OSHA accountable when its guidance documents have the force of law and local OSHA inspectors are allowed to interpret the law on a site by site basis.

**Multi-employer Worksite Citation Policy**

My concern does not only cover the issuance of guidance documents but the internal policies that are developed by OSHA without the benefit of public comment or review through the regulatory process. The most striking example of this practice is the Multi-employer Worksite Citation Policy. This doctrine enables OSHA to cite employers on a construction site for the violations of another employer's employees on that worksite.

It is my belief that OSHA has substantially exceeded its statutory authority with the multi-employer citation policy. There is no section of the Occupational Safety and Health Act that mentions one employer's responsibility for the employees of another employer. OSHA must be limited to the authority that was granted to the Agency under the OSH Act. That authority is clearly defined in the general duty clause of the Act:

***Section 5. Duties***

***(a) Each employer -***

- (1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees;*
- (2) shall comply with occupational safety and health standards promulgated under this Act.*

*(b) Each employee shall comply with occupational safety and health standards and all rules, regulations, and orders issued pursuant to this Act which are applicable to his own actions and conduct.*

Within the OSH Act, Congress did grant OSHA the ability to develop rules and regulations that deal with the inspection process. Any regulation that would be developed, however, must still be based on the premise of the scope of the authority contained in the Act, the employer-employee relationship.

***Section 8. Inspections, Investigations, and Recordkeeping***

*(g)(2) The Secretary and the Secretary of Health, Education, and Welfare shall each prescribe such rules and regulations as he may deem necessary to carry out their responsibilities under this Act, including rules and regulations dealing with the inspection of an employer's establishment.*

To date, OSHA has not issued regulations or promulgated rules holding builders or general contractors liable for violations of other employers. In fact, the current multi-employer citation policy has never been scrutinized by the regulation promulgation process. The policy claims that a builder is responsible even when his or her employees are (1) not exposed to the hazard; and (2) did not create the hazard. This policy unfairly makes builders and general contractors responsible for the employees of subcontractors, even though it is not possible to monitor constantly the activities of the subcontractors, especially on a residential construction site. This policy also does not consider any action taken by a builder or general contractor to require that other employers (i.e. subcontractors) comply with his or her safety program or with safety rules and requirements.

I believe that OSHA needs to take a good look at this policy of citing builders for their subcontractors' violations, even when the builder has no employees exposed to the hazard and has not assumed the liability through a contractual agreement, because it is simply wrong. I hope that the Subcommittee will work to eliminate this practice.

#### **Indiana's Backdoor Regulation**

Most troublesome, this type of backdoor regulating has trickled down to the state and local level, as well. In Indiana, since 1992, the Indiana Occupational Safety and Health division (IOSHA) has adopted a stance that all employers should have Safety Committees. This is a wonderful idea that is likely to result in identification of and elimination of workplace hazards. The problem that arose, however, was in the way that IOSHA "encouraged" the creation of such committees. IOSHA, with no authority other than some internal directive from OSHA, made the creation of employee-controlled committees a condition of fine reduction in both informal and formal hearings. Employee-controlled committees then discussed their results with management, and the management's recognition of such committees as spokespersons for employees created a situation in which a union was recognized. That, far from the stated purpose of the establishment of safety committees, created a risk for employers so large that they were faced with a choice. They could have fines reduced OR they could avoid having a safety committee become a recognized exclusive representative under the National Labor Relations Act. They could not do both because of IOSHA's requirement that the committee be selected by employees and not be employer dominated. This went so far as to include discussions of whose paper and pencils would be used, who provided refreshments and where the meetings would be held. IOSHA was repeatedly advised that their requirements created an Electromation Case situation (an Indiana case in which the U. S. Supreme Court ruled that employee-controlled committees that discussed working conditions with

the employer constituted employer recognition of a union). They obviously did not care. To IOSHA, it was not good enough to have a safety committee. The safety committee had to be of a particular kind.

Even more interesting is that employers have been fined for the most unusual "serious" violations ever known in Indiana. They were cited and fined, some as much as \$1000, for not having a proper IOSHA notice posted on display in the workplace. They had the poster. It was precisely the correct size, shape, color, style of type and was verbatim what the poster was required to be. Their serious violation? It had the signature of the former Labor Commissioner. They were fined – again, some were fined \$1000 – for having an IOSHA poster which did not have the signature of the current commissioner. It made absolutely no difference to the information on the poster or to the readers of the poster whose signature was at the bottom. And yet, it cost some individuals \$1000 even though safety was not the issue.

#### **Conclusion**

Mr. Chairman, I am a small businessperson. I have 19 employees. That is about the size of the average employer in Indiana. I am very active in organizations of my industry. Perhaps that is why I am here today. I do the very best I can to learn what is required of me as an employer. I read regulations and newsletters that explain them. I regularly and continuously pursue information necessary to comply with the myriad of regulations produced by the Internal Revenue Service (IRS), the Environmental Protection Agency (EPA), OSHA, the U.S. Department of Labor and all the other agencies that regulate my industry. I attend seminars presented by my trade associations where the most qualified experts present the most timely topics. I make every effort to be in compliance with all applicable regulations. I believe that is my duty under law, but more importantly, my duty to my employees, my community and my company. But how am I to know

that from within a desk drawer of a bureaucrat may come some "advisory" letter to change the way I must comply after I have already done what I believed I needed to do to be in compliance. How am I to know what "advisories" exist? Or what they require?

Today, in Indiana, you can be charged with a crime for violating a ruling of governmental agencies even though you may not know the ruling exists. Imagine undergoing a government inspection after having made every effort to ensure that you are in compliance with applicable regulations. Imagine that upon the inspector's departure you believe that there will be no citation because the inspector appeared to have found no violations. Then imagine later that a citation was issued in contradiction of what we thought the regulation required based upon an advisory letter issued by some bureaucrat who never heard of us and of whom we had never heard. Sadly, that is what is now occurring and it must be changed.

Mr. Chairman and members of the Subcommittee, thank you for allowing me to address you today on this important issue. I sincerely hope that changes are made so that employers and employees have input into the regulatory process and proper notification of compliance requirements. I hope that we can create an environment that assists employers with compliance issues rather than what appears to be the present course of stealth regulations by some governmental agencies.

Mr. MCINTOSH. Thank you, Jud. And thank you for coming out today for this hearing. Let me now turn to Ms. Dixie Dugan with Cardinal Services Management, Inc. of New Castle. Ms. Dugan, welcome and share with us a summary of your testimony.

Ms. DUGAN. Thank you. Good afternoon, Mr. Chairman and members of the subcommittee.

I am Dixie Dugan, Human Resource Coordinator for Cardinal Service Management, located in New Castle, IN. We are a small private for-profit corporation and our services include group homes and supported living in apartments. We assist and support individuals with developmental disabilities, such as mental retardation.

Of our 175 employees, 144 are direct contact staff. Our direct contact staff provides supervision and training for the individuals served 24-hours a day, 365 days a year. I fully support the original intention of the Family and Medical Leave Act to protect the employees job when serious health matters prevent them from working. When circumstances, such as the birth of a child or adoption occur, the last thing that parents want to worry about is job security.

In the case of serious medical conditions for either the employee or their immediate family member, it is equally important to have sufficient time to recover or assist with the care of a family member. Personally, I utilized the Family and Medical Leave Act during the last few months of my mother's terminal cancer. Because of that availability, I was able to take her to necessary treatments, assist in taking care of her at home, as well as spending precious moments with her in the hospital and in the nursing home.

My sisters and I shared in this responsibility without fear of losing our jobs. This is not a choice I would want anyone to have to face. Cardinal Service Management provided generous paid leave benefits to accommodate our employees before this law was enacted. Especially in this time of a tight labor market, we have to be concerned with meeting the needs of all of our employees. We have every interest in following the existing laws, but hope that some clarification and definition of the Department of Labor's serious health condition interpretations will allow us to do so within the letter of the law.

I am glad that FMLA is here to stay, but the Department of Labor's regulations and interpretations have broadened the act and made compliance difficult. We are concerned that the Department of Labor opinion letters, one, are not readily available to all employers, and two, are going beyond the original intent of the law. In my position as Human Resource Coordinator, I am responsible for informing our employees of this protection, for training our supervisors to identify possible qualifying events, and for making the final determination as to whether the event qualifies under the law.

I am also responsible for coordinating this request with other laws such as the Americans With Disability Act and workers compensation laws, as well as our own company's leave policies. The aspect of determining whether the event is a serious health condition under FMLA has been extremely difficult for our company. In fact, up to this point, we have felt compelled to approve all requests

as long as there is a physician willing to complete the certification form.

The Department of Labor places the burden of designating whether the absence is covered by the FMLA on the employer. The employers must notify employees that leave will be counted toward FMLA leave within just 2 business days. Additionally, the medical certification process required by the Department of Labor for employees and their families is cumbersome.

Under the DOL regulations, a certification form is the only way the employer can verify the leave. The employers cannot call and speak to the doctor or care giver. Since we are responsible for providing direct supervision and support to individuals not able to live independently, we must have staff on duty. It is not merely a matter of saving the work until later or delegating out the critical parts of that. Someone must be there and available to fill that shift.

When employees are legitimately on leave, we find a way to cover for them. However, under DOL opinion letters, unscheduled and unplanned absences and illegitimate leave hurts us. They threaten our ability to serve our clients who are counting on us to be there 24-hours a day. We share this dilemma with many industries where unscheduled and unplanned absences can affect customers and co-workers.

I have found that the Department of Labor's FMLA implementing regulations and opinion letters are overly broad and confusing. I cannot imagine that Congress intended this when the FMLA was passed. When Congress passed the original FMLA it was supposed to be serious health conditions leave, not a national sick leave program or to cover brief conditions. However, those types of conditions became covered when the Department issued its regulations and opinion letters.

One year the Department of Labor said that the cold, the flu and non-migraine headaches were not serious health conditions. The next year they said they could be. This has been very confusing for us as we have tried to comply with the law. These opinion letters are attached to my statement. When employees request federally protected FMLA serious health condition leave for minor illnesses, such as headaches and strep throat, this type of misapplication has a direct impact on the morale of those expected to carry the workload in the employee's absence.

FMLA mis-applications under the Labor Department's interpretations affect operating costs and quality of care. We certainly will not compromise our client's care. In closing, I would like to respectfully request that the Department of Labor revise its opinion letters and implementing regulations to restore the FMLA to its original congressional intent, so that it effectively helps those who need it. I would like to thank the subcommittee for the opportunity to express the concerns of companies who are trying in good faith to comply with the FMLA, but have been perplexed by the Labor Department's interpretations.

This is particularly difficult for small businesses and providers of essential services, such as health care. Thank you for the opportunity to share my experiences and concerns.

[The prepared statement of Ms. Dugan follows:]

CSM

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CARDINAL SERVICE MANAGEMENT INC.

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Testimony of

Dixie Dugan, PHR

Human Resource Coordinator

Cardinal Service Management, Inc.

New Castle, IN

Regarding

**"Is the Department of Labor Regulating the Public Through the Backdoor?"**

On

February 15, 2000

Before the

Committee on Government Reform

Subcommittee on National Economic Growth,

Natural Resources, and Regulatory Affairs

U.S. House of Representatives

Washington, DC 20515

Good afternoon Mr. Chairman and members of the Subcommittee.

I am Dixie Dugan, PHR (certified as a Professional in Human Resources), Human Resource Coordinator for Cardinal Service Management, Inc. in New Castle, Indiana. We are a small, 175 employee, private, for-profit corporation located in four counties in east central Indiana. Our services include group homes and supported living apartments. We assist and support individuals with developmental disabilities such as mental retardation. Of our 175 employees, 144 are direct contact staff. Our direct contact staff provides supervision and training for the individuals served 24 hours a day, 365 days a year.

I fully support the original intention of the Family and Medical Leave Act to protect the employee's job when serious health matters prevent them from working. When circumstances such as the birth or adoption of a child occur, the last thing that parents want to worry about is job security. In the case of serious medical conditions for either the employee or their immediate family member, it is equally important to have sufficient time to recover or assist with the care of a family member.

Personally, I utilized the Family and Medical Leave Act during the last few months of my mother's terminal cancer. Because of that availability I was able to take her to necessary treatments; assist in taking care of her at home as well as spending precious moments with her in the hospital and nursing home. My sisters and I shared this responsibility without fear of losing our jobs. This is not a choice I would want anyone to have to face.

Cardinal Service Management provided generous paid leave benefits to accommodate our employees before the law was enacted. Especially in this time of a tight labor market, we have to be concerned with meeting the needs of all of our employees. We have every interest in following existing laws but hope that some clarification and definition of the Department of Labor's "serious health condition" interpretations will allow us to do so within the letter of the law.

I am glad that the FMLA is here to stay, but the Department of Labor's regulations and interpretations have broadened the Act and made compliance difficult. We are concerned that DOL opinion letters are 1) not readily available to all employers and 2) going beyond the original intent of the law.

In my position as Human Resource Coordinator, I am responsible for informing our employees of this protection, training our supervisors to identify possible qualifying events and for making the final determination as to whether the event qualifies under the law. I am also responsible for coordinating this request with other laws such as the Americans with Disabilities Act and workers' compensation laws as well as our own company's leave policies.

The aspect of determining whether the event is a "serious health condition" under the FMLA has been extremely difficult for our company. In fact, up to this point we have felt compelled to approve all requests as long as there is a physician willing to complete the certification form. The Department of Labor places the burden of designating whether the absence is covered by the FMLA on the employer. Employers must notify employees that leave will be counted toward FMLA leave within just two business days. Additionally, the medical certification process required by the Department of Labor for employees and their family members is cumbersome. I have attached this form to my statement (Attachment 1). Under the Department of Labor's regulations, a certification form is the only way that the employer can verify the leave. The employer cannot call and speak to the doctor or caregiver.

Since we are responsible for providing direct supervision and support to individuals not able to live independently, we must have staff on duty. It is not merely a matter of saving the work until they return or delegating out the critical duties. Someone must fill that shift.

When employees are legitimately on leave we find a way to cover for them; however, under DOL opinion letters unscheduled and unplanned absences and illegitimate leave hurts us. They threaten our ability to serve our clients who are counting on us to be there 24 hours a day. We share this dilemma with many industries where unscheduled and unplanned absences can affect customers and coworkers.

While we are in no means implying that we do not support the original FMLA, we are concerned about the increased work load for coworkers when this federally protected leave is utilized for minor illnesses or vague symptoms that should not rightly be covered by the FMLA.

I have found that the Department of Labor's FMLA implementing regulations and opinion letters are overly broad and confusing. I cannot imagine that Congress intended

this when the FMLA was passed. When Congress passed the original FMLA, it was supposed to be "serious" health condition leave, not a national sick leave program or to cover brief conditions. However, those types of conditions became covered when the Department issued its regulations and opinion letters.

One year the Department of Labor said that the cold, the flu and non-migraine headaches were not serious health conditions. The next year, they said that they could be. This has been very confusing for us, as we have tried to comply with the law. These opinion letters are attached to my statement (Attachment 2 and Attachment 3).

When employees request federally protected FMLA "serious health condition" leave for minor illnesses such as headaches and strep throat, this type of misapplication has a direct impact on the morale of those expected to carry the work load in the employee's absence. Additionally, plaintiff's attorneys and unions have used ambiguities in the Department's interpretations to game the system. FMLA misapplications under the Labor Department's interpretations effect operating costs and quality of care. We certainly will not compromise our clients' care and we do not want to have to cut back on access to care.

In closing, I would like to respectfully request that the Department of Labor revise its opinion letters and implementing regulations to restore the FMLA to its original Congressional intent so that it effectively helps those who need it.

I would like to thank the Subcommittee for the opportunity to express the concerns of companies who are trying in good faith to comply with the FMLA, but have been confounded by the Labor Department's interpretations. This is particularly difficult for small businesses and providers of essential services, such as health care. Thank you for the opportunity to share my experiences and concerns.

Certification of Health  
Care Provider  
Family and Medical Leave Act of 1993

U.S. Department of Labor **Attachment 1**  
Employment Standards Administration  
Wage and Hour Division



1. Employee's Name	2. Patient's Name (if different from employee)
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The attached sheet describes what is meant by a "serious health condition" under the Family and Medical Leave Act. Does the patient's condition<sup>1</sup> qualify under any of the categories described? If so, please check the applicable category.

(1)  (2)  (3)  (4)  (5)  (6)  or None of the above

Describe the **medical facts** which support your certification, including a brief statement as to how the medical facts meet the criteria of one of these categories:

State the approximate **date** the condition commenced, and the probable **duration** of the condition (and probable duration of the patient's present **incapacity**<sup>2</sup> if different):

b. Will it be necessary for the employee to take work only **intermittently** or to work on a **less than full schedule** as a result of the condition (including for treatment described in Item 8 below)? \_\_\_\_\_

c. Give the probable duration:

d. If the condition is a **chronic condition** (condition #4) or **pregnancy**, state whether the patient is presently incapacitated<sup>2</sup> and the likely duration and frequency of **episodes of incapacity**<sup>2</sup>:

e. If additional **treatments** will be required for the condition, provide an estimate of the probable number of such treatments:

f. If the patient will be absent from work or other daily activities because of **treatment** on an **intermittent** or **part-time** basis, also provide an estimate of the probable number of and interval between such treatments, actual or estimated dates of treatment if known, and period required for recovery if any:

g. If any of these treatments will be provided by **another provider of health services** (e.g., physical therapist), please state the nature of the treatments:

<sup>1</sup> Here and elsewhere on this form, the information sought relates only to the condition for which the employee is taking FMLA leave.

<sup>2</sup> "Incapacity," for purposes of FMLA, is defined to mean inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefor, or recovery therefrom.

c. If a regimen of continuing treatment by the patient is required under your supervision, provide a general description of such regimen (e.g., prescription drugs, physical therapy requiring special equipment):

7.a. If medical leave is required for the employee's absence from work because of the employee's own condition (including absences due to pregnancy or a chronic condition), is the employee unable to perform work of any kind? \_\_\_\_\_

b. If able to perform some work, is the employee unable to perform any one or more of the essential functions of the employee's job (the employee or the employer should supply you with information about the essential job functions)? \_\_\_\_\_ If yes, please list the essential functions the employee is unable to perform:

c. If neither a. nor b. applies, is it necessary for the employee to be absent from work for treatment? \_\_\_\_\_

8.a. If leave is required to care for a family member of the employee with a serious health condition, does the patient require assistance for basic medical or personal needs or safety, or for transportation? \_\_\_\_\_

b. If no, would the employee's presence to provide psychological comfort be beneficial to the patient or assist in the patient's recovery? \_\_\_\_\_

c. If the patient will need care only intermittently or on a part-time basis, please indicate the probable duration of this need:

\_\_\_\_\_  
(Signature of Health Care Provider)

\_\_\_\_\_  
(Type of Practice)

\_\_\_\_\_  
(Address)

\_\_\_\_\_  
(Telephone number)

**To be completed by the employee needing family leave to care for a family member:**

State the care you will provide and an estimate of the period during which care will be provided, including a schedule if leave is to be taken intermittently or if it will be necessary for you to work less than a full schedule:

\_\_\_\_\_  
(Employee Signature)

\_\_\_\_\_  
(Date)

A **"Serious Health Condition"** means an illness, injury, impairment, or physical or mental condition that involves one of the following:

1. Inpatient Care

**Inpatient care** (i.e., an overnight stay) in a hospital, hospice, or residential medical care facility, including any period of incapacity<sup>2</sup> or subsequent treatment in connection with or consequent to such inpatient care.

2. Absence Plus Treatment

(a) A period of incapacity<sup>2</sup> of **more than three consecutive calendar days** (including any subsequent treatment or period of incapacity<sup>2</sup> relating to the same condition), that also involves:

(1) **Treatment<sup>3</sup> two or more times** by a health care provider, by a nurse or physician's assistant under direct supervision of a health care provider, or by a provider of health care services (e.g., physical therapist) under orders of, or on referral by, a health care provider; or

(2) **Treatment** by a health care provider on **at least one occasion** which results in a **regimen of continuing treatment<sup>4</sup>** under the supervision of the health care provider.

3. Pregnancy

Any period of incapacity due to **pregnancy**, or for **prenatal care**.

4. Chronic Conditions Requiring Treatments

A **chronic condition** which:

(1) Requires **periodic visits** for treatment by a health care provider, or by a nurse or physician's assistant under direct supervision of a health care provider;

(2) Continues over an **extended period of time** (including recurring episodes of a single underlying condition); and

(3) May cause **episodic** rather than a continuing period of incapacity<sup>2</sup> (e.g., asthma, diabetes, epilepsy, etc.).

5. Permanent/Long-term Conditions Requiring Supervision

A **period of incapacity<sup>2</sup>** which is **permanent or long-term** due to a condition for which treatment may not be effective. The employee or family member must be **under the continuing supervision of, but need not be receiving active treatment by, a health care provider**. Examples include Alzheimer's, a severe stroke, or the terminal stages of a disease.

<sup>3</sup> Treatment includes examinations to determine if a serious health condition exists and evaluations of the condition. Treatment does not include routine physical examinations, eye examinations, or dental examinations.

<sup>4</sup> A regimen of continuing treatment includes, for example, a course of prescription medication (e.g., an antibiotic) or therapy requiring special equipment to resolve or alleviate the health condition. A regimen of treatment does not include the taking of over-the-counter medications such as aspirin, antihistamines, or salves, or bed-rest, drinking fluids, exercise, and other similar activities that can be initiated without a visit to a health care provider.

**a. Multiple Treatments (Non-Chronic Conditions)**

Any period of absence to receive multiple treatments (including any period of recovery therefrom) by a health care provider or by a provider of health care services under orders of, or on referral by, a health care provider, either for restorative surgery after an accident or other injury, or for a condition that would likely result in a period of incapacity<sup>2</sup> of more than three consecutive calendar days in the absence of medical intervention or treatment, such as cancer (chemotherapy, radiation, etc.), severe arthritis (physical therapy), and kidney disease (dialysis).

U.S. Department of Labor

Employment Standards Administration  
Wage and Hour Division  
Washington, D.C. 20210

Attachment 2



APR 7 1995

FMLA - 57

The Honorable Ernest F. Hollings  
United States Senate  
Washington, D.C. 20510-4002

Dear Senator Hollings:

This is in response to your letter of March 14 forwarding a copy of a letter from your constituent,

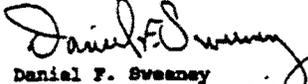
, regarding the Family and Medical Leave Act of 1993 (FMLA). expresses two concerns: that the Department's interpretation of the term serious health condition does not reflect the intent of the Act's authors and is being applied inconsistently; and, that FMLA leave absences may not be counted against an employee for purposes of perfect attendance bonuses or other disciplinary actions.

The FMLA defines serious health condition to mean either "inpatient care in a hospital, hospice, or residential medical care facility" or "continuing treatment by a health care provider." Regulations, 29 CFR Part 825, published as a Final Rule on January 6, 1995 and effective April 6, 1995, state that, unless complications arise, the common cold, the flu, ear aches, upset stomach, minor ulcers, headaches other than migraines, routine dental or orthodontia problems, periodontal disease, etc., are examples of conditions that do not meet the definition of a serious health condition and therefore do not qualify for FMLA leave. The fact that an employee is incapacitated for more than three days, has been treated by a health care provider on at least one occasion which has resulted in a regimen of continuing treatment prescribed by the health care provider does not convert minor illnesses such as the common cold into serious health conditions in the ordinary case (absent complications.) See §825.114(c) of the final FMLA Regulations, 29 CFR Part 825.

With regard to incentive plans rewarding attendance, an employee may not be disqualified solely for having taken bona fide FMLA leave. The statute states that the taking of FMLA leave shall not result in the loss of any employment benefit accrued prior to the date the FMLA leave commences. To the extent an employee had perfect attendance before the FMLA leave begins, the employee is entitled to continue eligibility for perfect attendance upon return from FMLA leave and may not be disqualified from the bonus BECAUSE OF taking FMLA leave. Illnesses that do not meet the definition of a serious health condition do not enjoy FMLA's protection in this regard.

I hope that the above addresses your constituent's concerns and conveys fully the Department's position with respect to these concerns. I would be glad to address any further questions you or your constituent may have.

Sincerely,

  
Daniel F. Sweeney  
Deputy Assistant Administrator

Enclosure

U.S. Department of Labor

Employment Standards Administration  
Wage and Hour Division  
Washington, D.C. 20210Attachment 3

FMLA - 86

December 12, 1996

This is in reference to our letter to you dated April 7, 1995, in connection with an inquiry you received from \_\_\_\_\_, Human Resources Manager for \_\_\_\_\_, in which we expressed the view that an employee who has been incapacitated for more than three days and treated at least once by a health care provider, which results in a regimen of continuing treatment prescribed by the health care provider, may not have a qualifying "serious health condition" within the meaning of the Family and Medical Leave Act (FMLA). Upon further review of this issue and of the conclusion expressed in our letter, we have determined that our letter expresses an incorrect view, being inconsistent with the Department's established interpretation of qualifying "serious health conditions" under the FMLA regulations, 29 CFR Section 825.114.

As you know, "eligible employees" (those who have worked at least 12 months for their employer, at least 1,250 hours over the previous 12 months, and who work at a location where the employer employs at least 50 employees within 75 miles) may take qualifying leave under the FMLA for, among other reasons, their own serious health conditions that make them unable to perform the essential functions of their job, or to care for immediate family members (i.e., spouse, child, or parent) with serious health conditions. The FMLA defines serious health condition as an illness, injury, impairment, or physical or mental condition that involves either inpatient care in a hospital, hospice, or residential medical care facility, or continuing treatment by a health care provider.

The FMLA regulations, at section 825.114(a)(2)(i), define "serious health conditions" to include a period of incapacity (i.e., inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefor, or recovery therefrom) of more than three consecutive calendar days, and any subsequent treatment or period of incapacity relating to the same condition, that also involves:

- (A) Treatment two or more times by a health care provider, by a nurse or physician's assistant under direct supervision of a health care provider, or by a provider of health care services (e.g., physical therapist) under orders of, or on referral by, a health care provider; or

*Working for America's Workforce*

FMLA.86

(B) Treatment by a health care provider on at least one occasion which results in a regimen of continuing treatment under the supervision of the health care provider.

A "regimen of continuing treatment" is defined in section 825.114(b) to include, for example, a course of prescription medication (e.g., an antibiotic) or therapy requiring special equipment to resolve or alleviate the health condition (e.g., oxygen). But the regulations also clarify that the taking of over-the-counter medications such as aspirin, antihistamines, or salves; or bed-rest, drinking fluids, exercise, and other similar activities that can be initiated without a visit to a health care provider, is not, by itself, a regimen of continuing treatment for purposes of FMLA leave.

The FMLA regulations also provide examples, in section 825.114(c), of conditions that ordinarily, unless complications arise, would not meet the regulatory definition of a serious health condition and would not, therefore, qualify for FMLA leave: the common cold, the flu, ear aches, upset stomach, minor ulcers, headaches other than migraine, routine dental or orthodontia problems, periodontal disease, etc. Ordinarily, these health conditions would not meet the definition in 825.114(a)(2), as they would not be expected to last for more than three consecutive calendar days and require continuing treatment by a health care provider as defined in the regulations. If, however, any of these conditions met the regulatory criteria for a serious health condition, e.g., an incapacity of more than three consecutive calendar days that also involves qualifying treatment, then the absence would be protected by the FMLA. For example, if an individual with the flu is incapacitated for more than three consecutive calendar days and receives continuing treatment, e.g., a visit to a health care provider followed by a regimen of care such as prescription drugs like antibiotics, the individual has a qualifying "serious health condition" for purposes of FMLA.

Accordingly, our letter to you of April 7, 1995, which stated that conditions meeting the regulatory criteria specified in section 825.114(a)(2)(i) would not "convert minor illnesses . . . into serious health conditions in the ordinary case (absent complications)," is an incorrect construction of the regulations and must, therefore, be withdrawn. Complications, per se, need not be present to qualify as a serious health condition if the regulatory "more than three consecutive calendar days" period of incapacity and "regimen of continuing treatment by a health care provider" tests are otherwise met. The regulations reflect the view that, **ordinarily**, conditions like the common cold and flu (etc.) would not be expected to meet the regulatory tests, not that such conditions could not routinely qualify under FMLA where the tests are, in fact, met in particular cases.

FMLA 86

We regret any confusion or misunderstanding our earlier correspondence may have caused. If you have further questions or we may provide additional assistance, please have a member of your staff contact Mr. Howard Ostmann of our FMLA Team, at (202) 219-8412.

Sincerely,

**Maria Echaveste  
Administrator**

Mr. MCINTOSH. Thank you very much, Ms. Dugan, for that very compelling testimony. Let me now turn to another one of our citizen witnesses, Mr. Dave Marren, who is with the Bartlett Tree Expert Co. from Roanoke, VA. Mr. Marren.

Mr. MARREN. Good afternoon, Mr. Chairman and members of the committee.

My name is David Marren and I serve as vice president and division manager of the F.A. Bartlett Tree Expert Co. I am responsible for a large portion of my company's tree care operations within the United States, including our utility operations in Indiana. My purpose for appearing before this committee here today is to express our frustration with OSHA's recent pattern of regulating our industry through the use of letters of interpretation, which we feel bypass the notice-and-comment period mandated by the Administrative Procedure Act.

We also feel that the use of letters of interpretation to regulate our industry have resulted in inconsistent enforcement through the country. Recently, there have been two examples that have concerned us. The first example involved OSHA's letter of interpretation that all arborists are loggers subject to the logging industry standard specified in 1910.266. Our industry recognizes significant differences between arborists and loggers and membership directed its concerns to the National Arborists Association. The National Arborists Association then threatened to sue OSHA for effectively changing the logging standard by including our industry without providing us the opportunity for notice-and-comment on the issue.

As a result, OSHA responded over a year ago with a letter revoking its letter of interpretation placing us under the logging standard. However, as of 7 days ago, OSHA's original letter of interpretation that placed us under the logging standard was still posted on the internet for all its compliance officers to follow. While OSHA claims that these letters of interpretation do not have the force of law, we feel that these letters served as a basis for prosecuting members of our industry.

In fact, this became apparent when North Carolina OSHA cited a member of the National Arborists Association expressly relying on the withdrawn Federal OSHA letter of interpretation. Another example of OSHA's misuse of letters involves an OSHA letter of interpretation which effectively changed the specifications in 1910.67 OSHA Standard, which requires all area lift operators to tie into the bucket with a body belt and lanyard.

OSHA's letter of interpretation then required the area lift operators use a full body harness instead of a body belt. Again, our industry directed its concern through the National Arborists Association. The National Arborists Association threatened to sue OSHA for effectively changing its standards without providing us the opportunity for notice-and-comment and OSHA withdrew its letter of interpretation.

While my company uses the full body harness, we agree with the industry that OSHA's use of the letter of interpretation deprives our industry the opportunity to provide meaningful comment on this very important issue. Our contention is that Congress enacted the OSHA Act and the Administrative Procedure Act, which mandate that regulating agencies such as OSHA provide notice-and-

comment before promulgating new regulations or substantially altering existing regulations, so that potentially affected parties would have the opportunity to provide meaningful comment on the subject matter, and so that potentially affected parties would be aware of the regulations governing them. Our concern is that OSHA's continued use of letters of interpretation in the manner described here today, violates OSHA's own requirement to follow the OSHA Act and the Administrative Procedure Act by denying our industry the opportunity to know about substantial changes in the existing laws, and to provide meaningful comment on the changes before they become law.

We feel that this is inherently unfair. Our request is that Congress takes action to ensure that our industry will not be regulated through the use of letters of interpretation. In closing, I would like to state that my company recognizes the positive contributions that OSHA has made to our industry and that we will continue to cooperate with them regarding all regulations and issues that affect our industry.

We are not insensitive to the fact that the opportunity for improving safety in the tree care industry is very much a moving target. We recognize the opportunities for improvement and are committed through the National Arborists Association's extensive involvement with the American National Standards Institute's Z133.1 National Consensus Tree Care Safety Standard, to work with industry, unions and OSHA in a cooperative effort to improve safety on a consensus basis.

We simply ask that this distinguished committee recognize our legitimate concern in this matter and we are confident that you will do what is in the best interest of our employees, our industry and the public at large. Thank you, Mr. Chairman.

[The prepared statement of Mr. Marren follows:]

**STATEMENT OF POSITION PRESENTED BY MR. DAVID MARREN  
OF THE F.A. BARTLETT TREE EXPERT COMPANY ON BEHALF OF THE MEMBERSHIP OF THE  
NATIONAL ARBORIST ASSOCIATION TO HOUSE SUBCOMMITTEE ON  
NATIONAL ECONOMIC GROWTH, NATURAL RESOURCES, AND REGULATORY AFFAIRS  
FEBRUARY 15, 2000**

My Company, Bartlett Tree Expert Company is a member of National Arborist Association (“NAA”).

NAA is the leading trade association in the Nation composed of employers in the tree care and arboriculture business. NAA has over 2,600 member companies, 50 of whom either reside or maintain offices and operations in Indiana, accounting for employment of an estimated 700 persons in Indiana and over 60,000 persons nationally.

NAA member companies have twice been the victims of OSHA’s attempt to change its regulations by letters of interpretation as an end run around the required statutory processes. In each example, NAA was forced to threaten to sue OSHA, to protect members from such abuse, before OSHA, in each instance, revoked its improper letter of interpretation. Both instances are described below.

I. Attempt to Amend the OSHA “Logging Industry” Standard to Place the Tree Care Industry Within It

OSHA long has had a “logging industry” safety standard, 29 CFR 1910.266 (excerpt at Attachment 1-A). It always was applied to *logging*, never to arboriculture or tree trimming. Suddenly, OSHA issued a letter of interpretation, asserting out of whole cloth that the standard applied to tree care employers (OSHA’s letter at Attachment 1-B). NAA wrote OSHA advising that its letter was unfounded and worse, illegal, for which NAA would sue, failing retraction (Attachment 1-C). In response, OSHA recanted (Attachment 1-D). Worse, while OSHA claims these letters of interpretation have no legal force, the fact of the matter is that they serve as the basis for prosecuting our members. For instance, North Carolina OSHA prosecuted one of our

NAA members under its own interpretive bulletin which expressly relied on the withdrawn federal OSHA logging letter of interpretation! (Attachment 1-E).

II. Attempt to Change Line Clearance Tree Trimming Standard's Aerial Lift Fall Protection Requirements Via Letter of Interpretation

The line clearance tree trimming part of the tree care industry protects electric service to the public from interruptions due to trees growing into power lines. NAA's members use aerial lift ("bucket") trucks and diligently use, at a minimum, the OSHA-required body belt and lanyard fall protection mechanism specifically prescribed by OSHA standard 1910.269(g)(2)(v) (Note 1) (which adopts body belt and lanyard requirement of 29 CFR 1910.67, excerpt at Attachment 2-A). Again, suddenly, OSHA issued a letter of interpretation that the body belt and lanyard requirement was being interpreted to now require, instead, use of a "full body harness and fall arrest lanyard" device *exclusively*. (Attachment 2-B). By thus suddenly changing the express body belt and lanyard requirement of the standard to a body harness requirement by fiat rather than by notice and comment, OSHA has prevented the sharing of views of tree industry safety professionals as to the pros and cons of making such a change in standard, which the notice and comment requirement was intended to achieve. Again NAA threatened to sue OSHA for this improper attempt to change the express wording of the standard without prior notice or opportunity for comment (Attachment 2-C), and again OSHA recanted (Attachment 2-D).

What is so disturbing about the use of these letters to change existing OSHA standards is that they evince an intentional pattern of changing standards by fiat without complying with the Notice and Comment provisions of the OSHA statute.

The Notice and Comment provisions of OSHA statute were erected there by Congress as a reflection of concern that OSHA is not the definitive word on safety; that, to the contrary, the best check on arbitrary imposition of wrong-headed regulation on small business is through the

opportunity, via Notice and Comment, to demonstrate to OSHA what makes sense, and what does not, so that the final regulation would be workable and acceptable.

To be sure, once a regulation issues, OSHA may issue a letter of interpretation explaining its meaning or to clarify its intent. We do not quarrel with such appropriate use of letters of interpretation.

The rub is not with clarification of properly adopted regulations. It is, instead, with misusing letters of interpretation to substantively change regulations without notice or opportunity to comment on the change in regulation. Stated more bluntly, our concern is that OSHA uses letters of interpretation as a high handed end-run around congressionally imposed procedures for changing standards, quickly backing off only when a group like National Arborist Association threatens to expose their illegal practice in court. But not every business has a watchdog like NAA to protect its interests. These are two instances. We can only imagine how many more regs get changed through the back door in this fashion in plain disregard of the Notice and Comment and judicial review procedures which Congress has imposed in the OSHA statute for the protection of small business.

One occasion of unlawful change of standard by letter of interpretation, followed by retraction when a court action is threatened, is an abuse which, if the Agency was unsophisticated, could be explained as a mistake. But twice doing so by a sophisticated Agency reflects intentional abuse to evade Congressionally imposed limitations on Agency action, which Congress must curb.

Ironically, while OSHA repeatedly ignores in this fashion the limitations which Congress placed on its authority to change safety regulations, the Agency hammers employers with fines of up to \$70,000 for its claim of the employer repeatedly violating OSHA regulations. Why is it

that Congress lets OSHA hammer small business for repeat violations, but looks the other way when OSHA repeatedly violates the restrictions which Congress placed on OSHA?

Indeed, OSHA's illegal attempt to change standards by letter of interpretation and then withdrawing same upon threat of court challenge is, we think, administered in bad faith: Even though OSHA officially withdrew its letter of interpretation over a year ago which attempted to place the tree care industry under the logging industry standard, that withdrawn letter of interpretation still was on OSHA's web site as recently as last week. – thereby announcing to its hoards of OSHA inspectors nationally the position to cite us under the logging standard. Thus, OSHA has perfected the art of a sham: It withdraws the illegally issued letter of interpretation in the face of threatened lawsuit – to disarm the lawsuit – but then duplicitously leaves the assertedly withdrawn letter on the OSHA web site for enforcement guidance anyway!

My Company, along with our industry represented by NAA, hopes this Committee immediately forces OSHA to comply with the law as diligently as OSHA would have us comply with its regulations.

At the same time, NAA is not insensitive to the fact that the opportunities for improving safety in the tree care industry are very much a moving target. We recognize the opportunities for improvement and are committed, through NAA's extensive involvement with the American National Standards Institute's Z-133.1 national consensus tree care safety standard, to work with industry, unions, and OSHA in a cooperative effort to improve safety on a consensus basis. The problem is not with our commitment to change to improve safety; it is with OSHA attempting to foist on us through the back door of letters of interpretation its notion, springing out of the head of one person who writes a letter, how the law effectively shall be changed, short circuiting the efforts of the ANSI national consensus committee and the methods imposed on OSHA by Congress for effectuating change.

## SPECIAL INDUSTRIES

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hangers to prevent saws from dropping on table.

(5) *Edgers— (i) Location.*

(a) Where vertical arbor edger saws are located ahead of the main saw, they shall be so guarded that an employee cannot contact any part of the edger saw from his normal position.

(b) Edgers shall not be located in the main roll case behind the head saws.

(i) *Guards.*

(a) The top and the openings in end and side frames of edgers shall be adequately guarded and gears and chains shall be fully housed. Guards may be hinged or otherwise arranged to permit oiling and the removal of saws.

(b) All edgers shall be equipped with pressure feed rolls.

(c) Pressure feed rolls on edgers shall be guarded against accidental contact.

(iii) *Antikickback devices.*

(a) Edgers shall be provided with safety fingers or other approved methods of preventing kickbacks or guarding against them. A barricade in line with the edger, if properly fenced off, may be used if safety fingers are not feasible to install.

(b) A controlling device shall be installed and located so that the operator can stop the feed mechanism without releasing the tension of the pressure rolls.

(iv) *Operating speed of live rolls.* Live rolls and tailing devices in back of edger shall operate at a speed not less than the speed of the edger feed rolls.

(6) *Planers— (i) Guards.*

(a) All cutting heads shall be guarded.

(b) Side head hoods shall be of sufficient height to safeguard the head set-screw.

(c) Pressure feed rolls and "pineapples" shall be guarded.

(d) Levers or controls shall be so arranged or guarded as to reduce the possibility of accidental operation.

(f) *Dry kilns and facilities—*

(1) *Kiln foundations.* Dry kilns shall be constructed upon solid foundations to prevent tracks from sagging.

(2) *Passageways.* A passageway shall be provided to give adequate clearance on at least one side or in the center of end-piled kilns and on two sides of cross-piled kilns.

(3) *Doors— (i) Main kiln doors.*

(a) Main kiln doors shall be provided with a method of holding them open while kiln is being loaded.

(b) Counterweights on vertical lift doors shall be boxed or otherwise guarded.

(c) Adequate means shall be provided to firmly secure main doors, when they are disengaged from carriers and hangers, to prevent toppling.

(ii) *Escape doors.*

(a) If operating procedures require access to kilns, kilns shall be provided with escape doors that operate easily from the inside, swing in the direction of exit, and are located in or near the main door at the end of the passageway.

(b) Escape doors shall be of adequate height and width to accommodate an average size man.

(4) *Pits.* Pits shall be well ventilated, drained, and lighted, and shall be large enough to safely accommodate the kiln operator together with operating devices such as valves, dampers, damper rods, and traps.

(5) *Steam mains.* All high-pressure steam mains located in or adjacent to an operating pit shall be covered with heat-insulating material.

(6) *Ladders.* A fixed ladder, in accordance with the requirements of §1910.27 or other adequate means shall be provided to permit access to the roof. Where controls and machinery are mounted on the roof, a permanent stairway with standard handrail shall be installed in accordance with the requirements of §1910.24.

(7) *Chocks.* A means shall be provided for chocking or blocking cars.

(8) *Kiln tender room.* A warm room shall be provided for kiln employees to stay in during cold weather after leaving a hot kiln.

## (9) [Removed]

[Removed at 63 FR 33467, June 18, 1998, effective Aug. 17, 1998]

## (g) [Removed]

## (h) [Removed]

## (i) [Removed]

[(g) through (i) removed at 63 FR 33467, June 18, 1998, effective Aug. 17, 1998]

## (j) [Removed]

[Removed at 61 FR 9241, March 7, 1996]

**§1910.266 Logging operations.**

[Revised at 59 FR 51741, Oct. 12, 1994; amended at 60 FR 47035, Sept. 8, 1995]

(a) *Table of contents.*

This paragraph contains the list of paragraphs and appendices contained in this section.

- a. Table of contents
- b. Scope and application
- c. Definitions
- d. General requirements
  1. Personal protective equipment

2. First-aid kits
3. Seat belts
4. Fire extinguishers
5. Environmental conditions
6. Work areas
7. Signaling and signal equipment
8. Overhead electric lines
9. Flammable and combustible liquids
10. Explosives and blasting agents
- e. Hand and portable powered tools
  1. General requirements
  2. Chain saws
- f. Machines
  1. General requirements
  2. Machine operation
  3. Protective structures
  4. Overhead guards
  5. Machine access
  6. Exhaust systems
  7. Brakes
  8. Guarding
- g. Vehicles
- h. Tree harvesting
  1. General requirements
  2. Manual felling
  3. Bucking and limbing
  4. Chipping
  5. Yarding
  6. Loading and unloading
  7. Transport
  8. Storage
- i. Training
- j. Effective date
- k. Appendices
  - Appendix A—Minimum First-aid Supplies
  - Appendix B—Minimum First-aid Training
  - Appendix C—Corresponding ISO Agreements

(b) *Scope and application.*

(1) This standard establishes safety practices, means, methods and operations for all types of logging, regardless of the end use of the wood. These types of logging include, but are not limited to, pulpwood and timber harvesting and the logging of sawlogs, veneer bolts, poles, pilings and other forest products. This standard does not cover the construction or use of cable yarding systems.

(2) This standard applies to all logging operations as defined by this section.

(3) Hazards and working conditions not specifically addressed by this section are covered by other applicable sections of Part 1910.

(c) *Definitions applicable to this section.*

*Arch.* An open-framed trailer or built-up framework used to suspend the leading ends of trees or logs when they are skidded.

[Sec. 1910.266(c)]

U.S. Department of Labor

Occupational Safety and Health  
Washington, D.C. 20210

ATTACHMENT I-B

Reply to the Attention of:



MAR 4 1998

Amelia Reinert  
Deputy Executive Director  
National Arborist Association, Inc.  
Route 101  
P.O. Box 1094  
Amherst, NH 03031-1094

Dear Ms. Reinert,

I want to thank you meeting with me to discuss the Occupational Safety and Health Administration's (OSHA) Logging Operations Standard (29 CFR 1910.266). The questions you have raised about whether the standard applies to commercial tree trimming and care indicate that this issue needs to be clarified. As such, I will be sending this letter of interpretation to all our field offices. I apologize for any delay in responding to your questions.

There are many types of operations involved in logging. They include, but are not limited to, felling trees, cutting branches off trees and logs, cutting felled trees into logs, chipping branches, and moving felled trees and logs. The hazards that the Logging Operations Standard (29 CFR 1910.266) is intended to address are present in all of these operations. These hazards include the massive weights of tree branches and trees, especially the irresistible momentum of falling, moving or rolling trees and branches. The tools and equipment that employees use to perform these operations, such as chain saws, axes, and chippers, also pose hazards wherever they are utilized in industry. The hazards are even more acute when dangerous environmental conditions, such as severe rain, lightning, strong winds, snow, ice, extreme cold, rough terrain, and remote or isolated work sites, are factored in. "The combination of these hazards presents a significant risk to employees." 59 Federal Register 51672, 51673, Oct. 12, 1994 (Preamble to the final Logging Operations Standard).

The operations, tools, equipment, environmental conditions, and hazards described above are found in commercial tree trimming and cutting operations as well as tree harvesting operations. That is why the Logging Operations standard includes such a broad definition of the operations to which the standard applies:

This standard establishes safety practices, means, methods, and operations for all types of logging, regardless of the end use of the wood. 29 CFR 1910.266 (b)(1).

\* \* \* \* \*

*Logging operations.* Operations associated with felling and moving trees and logs from the stump to the point of delivery, such as, but not limited to, marking, felling, bucking, limbing, debarking, chipping, yarding, loading, unloading, storing, and transporting machines, equipment and personnel from one site to another. 29 CFR 1910.266 (c).

OSHA believes this definition is broad enough to include commercial tree cutting and trimming, operations which OSHA did not expressly exempt from coverage of the Logging Operations Standard. OSHA exempted only two logging operations from coverage of the standard: construction of cable yarding systems and the use of cable yarding systems. 29 CFR 1910.266 (b)(1). Even there, OSHA has specified that tree cutting operations leading up to the use of the cable yarding system are covered by the standard because "the hazards for loggers felling trees exist regardless of how the trees or logs are moved about the work site." 59 Federal Register 51672, 51698. For the same reason, when OSHA decided not to include logging road construction operations in the final standard, the agency said that cutting of trees in preparation of construction activities nevertheless would still be covered by the standard. 59 Federal Register 51699. And OSHA applied the same rationale in including in the standard the cutting trees in preparation for agricultural activities. 59 Federal Register 51699. These examples provide further indication that OSHA's intention in promulgating the Logging Operations Standard was to address hazards associated with cutting trees, wherever those hazards are found, including commercial tree trimming and cutting operations.

In addition, specific provisions in the Logging Operations Standard directed to the particular circumstances of operations such as commercial tree trimming and cutting also show that the standard applies to these operations. For example, OSHA provides two exceptions to the leg protection requirements that are directed to operations such as commercial tree trimming as opposed to tree harvesting. 29 CFR 1910.266 (d)(1)(iv). First, OSHA does not require chain saw operators to wear leg protection if the operator is working from inside a bucket truck, a type of equipment that is not generally used in forest locations. Also, OSHA does not require climbers to wear leg protection while operating a chain saw in a tree if the employer demonstrates that a greater hazard is posed by wearing leg protection in the particular situation.

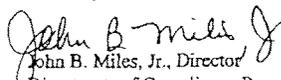
The provisions in the Logging Operations Standard addressing operations near overhead electric lines also are directed to operations such as commercial tree trimming, since it is generally very unlikely that power lines will be found in remote forest locations where tree harvesting operations are performed. 29 CFR 1910.266 (d)(8). Likewise, certain provisions regarding chain saw operation are specifically directed to operations such as commercial tree trimming. For example, the standard provides that chain saws may be started either on the ground or "where otherwise firmly supported." 29 CFR 1910.266 (c)(2)(vi). This alternative was included in the final standard in recognition of the fact that it would be a greater hazard to climb a tree to trim it with a running chain saw. 59 Federal Register 51712. Another example regarding chain saw operation is the exception OSHA provided to the requirement that the operator hold the chain saw with both hands while in use. 29 CFR 1910.266 (e)(2)(viii). In the preamble to the standard, OSHA explained:

OSHA believes there are other situations in which the hazard may be greater if the operator attempts to hold the saw with two hands. For example, when an operator has climbed a tree to top the tree, the operator may not be able to keep his balance if he tries to operate the saw with both hands. In that case, the safest method may be to use one hand to control the saw and the other hand to steady himself. 59 Federal Register 51713.

For all of these reasons, OSHA again states that the Logging Operations Standard applies to operations such as commercial tree trimming and cutting. OSHA believes that the equipment requirements, safe work practices and training provisions included in the Logging Operations Standard will significantly reduce the risks that workers, such as commercial tree trimmers, face and will reduce the injuries that occur as a result of exposure to the hazards associated with cutting and trimming trees.

Once again, we appreciate your time and interest in coming in to discuss these important workplace safety and health issues. If you have further questions regarding this matter, please feel free to contact me or Russelle McCollough on my staff at 202-219-8031.

Sincerely,

  
John B. Miles, Jr., Director  
Directorate of Compliance Programs

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May 6, 1998

Mr. Charles N. Jeffress  
Assistant Secretary of Labor  
U.S. Department of Labor  
Occupational Safety and Health Administration  
200 Constitution Avenue, NW  
Washington, DC 20010

Re: National Arborist Association/Misapplication  
of Logging Standard to Tree Care Work

Dear Assistant Secretary Jeffress:

We have been retained by National Arborist Association ("NAA") to commence an action against OSHA in the United States District Court for the District of Columbia, seeking a declaratory judgment and injunctive relief against OSHA's newly announced intention administratively to apply the 29 C.F.R. 1910.266 "logging industry" standard to the arborist industry. The gravamen of the intended court suit would be that OSHA's action violates the Administrative Procedure Act, 5 U.S.C. §553, *et seq.*, by announcing the application of such substantive rules upon arborists without prior notice and opportunity for comment required under the APA, and also by the Agency engaging in arbitrary and capricious action. NAA prefers, if possible, amicably to resolve this matter without litigation. We therefore propose a meeting with you and a member to the Solicitor's staff to explore whether resolution can be found. If OSHA is agreeable to such a meeting, we would delay filing suit pending such discussions.

By way of background, our research indicates that the current §1910.266 logging standard had its genesis in the predecessor 29 C.F.R. 1910.266 "pulpwood logging" standard. By notice of proposed rulemaking, 54 F.R. 18798, OSHA proposed to extend this standard from pulpwood logging only, to the entire logging industry; and thereby to expand its protections to all loggers in the Nation. This notice of proposed rule making contained no suggestion whatsoever of proposing to apply its terms to the tree care industry. This announced proposed limited focus to the logging industry only -- without any indication of

Mr. Charles N. Jeffress  
 May 6, 1998  
 Page 2

application to the tree care industry -- repeatedly was restated in OSHA's semi annual agenda of regulatory activity (commencing 48 F.R. 47538), citing such limited logging industry object (both by text description, as well as by SIC Code).

Apart from the very absence of fair notice of intended application to the arborist industry, and of consequent deprivation of statutory opportunity to comment on same in the proposed rulemaking process, other factors reinforce NAA's perception of unfair, arbitrary, treatment by OSHA: Thus, during the very period of pendency of promulgation of the §1910.266 logging standard, OSHA *simultaneously* was promulgating comprehensive standards for safety in the line clearance tree trimming industry under then-pending 29 C.F.R. 1910.269(a),(r). NAA was deeply involved in development of that standard (see extensive references to NAA's involvement in preamble to final rule, 59 F.R. 4320, *et seq.*), having fully participated in promulgation hearings in Washington, DC and Los Angeles, and having submitted numerous materials to that Record. Yet never throughout that promulgation was there any hint by OSHA of tree care work *also* being the object of contemplated coverage by a logging standard proposal.<sup>1</sup> In fact, any suggestion to the contrary would have been non-sensical inasmuch as safety standards then being developed for line clearance tree work under §1910.269 (foot protection, for instance) were being targeted to tree care and, indeed, were adopted different in substance from that being adopted for logging. And, respectfully, when Compliance Director John B. Miles met with NAA on July 21, 1997 to discuss industry concerns towards continuing to develop a positive relationship with the tree care industry in the interest of safety, he specifically assured NAA's representatives that OSHA intended *not* to apply the logging standard to tree care work and stated that a Program Directive shortly would issue to that effect. But then Compliance Director Miles issued a letter of March 4, 1998 to NAA, precisely to the *opposite* result. Indeed, not only did Mr. Miles' letter contradict his oral assurances (above) to NAA, but it also contradicted Mr. Miles' own field memorandum of March 12, 1996 that tree cutting for the purpose of electric utility line work was governed by §1910.269 and "is not covered by the Logging Standard".

Compliance Director Miles' letter to NAA states OSHA's intent to apply the logging standard to tree care stems from the Agency's interpretation of the meaning of the definition of "logging" in §1910.266 -- that, in effect, it arguably also "fits" tree care. To be sure, OSHA is free to determine enforcement policy and standards interpretations unencumbered by the APA's notice and comment procedures. However, an agency cannot, in the name of such interpretive license, thereby effectively swallow APA's notice and comment procedures altogether by extending a regulation to cover an industry which never had fair notice that *its* interests were the intended object of a proposed standard or fair opportunity to comment on

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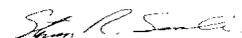
<sup>1</sup> Indeed, in contrast to the semi annual agenda announcements of limited groups affected by the logging standard's proposal, the tree care promulgation was, at the same time, announced more broadly to impact "multiple sectors". See e.g. 58 F.R. 56580.

Mr. Charles N. Jeffress  
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same. See, e.g. National Mining Assn. v. Mine Safety and Health Administration, 116 F.3d 520, 530-531 (D.C. Cir. 1997, and cases cited therein); American Trucking Assns. v. Secy. of Labor, 955 F.Supp. 4 (D.D.C. 1997). Respectfully, this is not mere enforcement policy, it is an impermissible end-run around the APA at best, and an attempted sandbag of this industry at worst.

We look forward hearing from you or from counsel whether a meeting to attempt to resolve these issues amicably may be useful. We would appreciate hearing from you by May 26th regarding scheduling such a meeting, and would agree not to file suit pending such meeting. NAA prides itself in its long and constructive relationship with OSHA in the interests of employee safety. The Association therefore hopes that dysfunctional litigation in this matter can be avoided.

Sincerely,  
**SEMLER & PRITZKER**



Steven R. Semler

SRS/sp

cc: John B. Miles, Jr., Director of Compliance  
Joseph M. Woodward, Associate Solicitor  
The Honorable Kay Bailey Hutchison, Member, United States Senate  
The Honorable James M. Jeffords, Member, United States Senate  
The Honorable Cass Ballenger, Member, United States Congress  
Arthur Rosenfeld, Chief Counsel, Senate Labor and Human Resources Committee

ATTACHMENT 1-D

**U.S. Department of Labor**

Assistant Secretary for  
Occupational Safety and Health  
Washington, D.C. 20210



JUN 22 1998

Amelia Reinert  
Deputy Executive Director  
National Arborist Association, Inc.  
Route 101  
P.O. Box 1094  
Amherst, New Hampshire 03031-1094

Dear Ms. Reinert:

The purpose of this letter is to withdraw the Occupational Safety and Health Administration's (OSHA) response dated March 4, 1998 (copy enclosed) to your correspondence of July 23, 1997, regarding compliance issues raised by the National Arborist Association.

We would like to consider these issues again, in dialogue with your organization, to ensure safety and health in the commercial tree care industry.

Sincerely,

A handwritten signature in black ink, appearing to read "Emzell Blanton, Jr.", written over a horizontal line.

Emzell Blanton, Jr.  
Deputy Assistant Secretary

Enclosure

North Carolina Department of Labor  
Division of Occupational Safety and Health  
Raleigh, North Carolina

Field Information System  
SN/OPN

Operational Procedure  
Notice 88C

**Subject: North Carolina Special Emphasis Program to Reduce the Number of Injuries and Death Associated with Tree Felling and Related Activity**

- A. Purpose.  
This notice reestablishes a North Carolina Special Emphasis Program (SEP) to address the hazards associated with tree felling and related activity. This effort will include safety inspections and specific consultation and education and training activities.
- B. Scope.  
Tree felling activity includes limbing, bucking, marking, and cutting logs of trees to length as well as felling. Covered operations include but are not limited to logging, tree trimming, felling of trees in preparation for construction activity such as the building of roads or trails, preparation for agricultural activity, sawmilling, and storm debris cleanup and removal. Tree felling activity could reflect Standard Industrial Classification (SIC) Codes 0783, 1629, 2411, 2421, and those codes representing the public sector. This notice is applicable throughout North Carolina.
- C. Action.  
This Operational Procedure Notice (OPN) provides for special emphasis inspections in accordance with GS 95-136.1(2) due to a high rate of work related deaths.
- D. Background.  
North Carolina initiated the state's first special emphasis inspection program for tree felling operations in 1994 in response to an increasing number of fatalities and serious injuries associated with tree felling and related activity. Through consultation, education and training, and compliance activity, the SEP had a significant impact on reducing the number of fatalities relating to tree felling. In 1993, the state experienced 13 fatalities in tree felling operations, while the number dropped to only three deaths in 1994. The special emphasis program was not extended beyond 1995. The years 1996 and 1997 have seen the number of tree felling fatalities increase to a level near that of 1993. In 1996 there were 12 fatalities and 11 in 1997. In response to the increasing number of fatalities over the past two years, the tree felling special emphasis inspection program has been resumed. This SEP will address tree felling and include activity associated with continuing storm cleanup projects. Funds are now being made available to cities, towns, and counties to address secondary cleanup sites not previously scheduled for cleanup. Part of the SEP educational process will be to make public sector instrumentalities aware that subcontractors hired for storm cleanup involving tree felling and related activity are

covered under applicable OSHA standards, including Logging Operations.

- E. Expiration.  
This SEP shall remain in effect until canceled by the Director.
- F. Training and Consultative Activity.  
The Bureaus of Training and Outreach, and Consultative Services shall provide training and consultative efforts to address the hazards associated with tree felling and related activity.
- G. Inspection Activity.  
Each District Office shall conduct inspections under this state special emphasis program.
1. Scheduling.
    - a. The Division shall develop a list of establishments (worksites) likely to be covered by this special emphasis program. Inspection sites can be randomly selected for inspection from this list using a random numbers table. As new sites are added, they should be randomized for inspection. SIC codes most likely to be included in this list are 0783, 1629, 2411, 2421, and those codes representing the public sector.
    - b. The randomly selected establishments designated for inspection under this special emphasis program will be included with the usual assignment list distributed to each Safety District Supervisor on a periodic basis.
  2. Referrals.
    - a. In response to the high visibility and mobile nature of tree felling operations, any serious hazards observed shall normally be investigated immediately by the Safety Compliance Officer (SCO) who observes them after consulting with the District Supervisor as Compliance Bureau procedures require. Serious safety hazards observed by the Health Compliance Officer (HCO) shall be referred to the Bureau of Safety Compliance.
    - b. Because many tree felling operations are located in remote locations where the observation of hazards from public areas would not be possible, whenever a SCO observes or receives information regarding a site where tree felling may be taking place but no violation is observed, the SCO and the District Supervisor shall determine if the site needs to be immediately scheduled for inspection or added to the list of establishments to be randomly selected for inspection. Such determination shall be based on but not limited to the following criteria: the resources available for inspecting the site, the size of the operation, the prior history of the operator if known, and/or the likelihood that the site will be abandoned before it could be randomly selected for inspection.

- c. For tree felling operations associated with storm cleanup, the Bureau Chief of Safety Compliance may request that specific searches be conducted to locate the cleanup sites. This would include contact with public sector instrumentalities.

3. MIS Coding.

The OSHA-1 form for all inspections conducted as a result of this special emphasis program shall be coded as local emphasis program inspections in block 25C and marked "TREE FELLING."

H. Applicability of 1910.266 Logging Operations

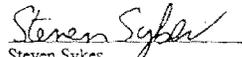
- 1. All activities under this OPN shall be considered covered under standards for Logging Operations 1910.266. This clarification is provided to give those employees and employers subject to the OPN, as well as the SCOs conducting inspections, clear guidance on which rules the Division will apply to the various working conditions addressed by the OPN through the special emphasis inspection program.
- 2. OSHA standard 1910.266 applies to employers and employees using all types of tree cutting and logging equipment or techniques. Employers engaged in storm reconstruction work, debris removal, site clearing in preparation for construction work, and other covered operations are expected to adhere to the "vertical" Logging Operations standard. In addition, the standard, and a subsequent interpretative memo from Federal OSHA dated March 4, 1998, also specify that the requirements apply "regardless of the end use of the wood".

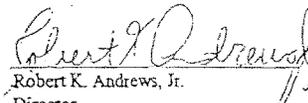
I. Evaluation of Program.

1. Bureau Chiefs' Responsibilities.

- Bureau Chiefs affected by this special emphasis program shall submit to the Director by June 30, 1999, an evaluation report to include at least the following:
  - a. Bureau Chief of Safety Compliance:
    - (1) Number of inspections.
    - (2) Number of citations and violations issued.
    - (3) Impact on the number of fatalities in tree felling activities.
    - (4) Standards cited.
    - (5) Scheduling problems, such as locating work sites or establishments for this special emphasis program.
    - (6) Number of safety and health programs improved or implemented.
    - (7) Overall assessment of this special emphasis program including the impact on other Bureau activities, and the goal of eliminating hazards associated with tree felling.
    - (8) Standard promulgation recommendations.

- b. Bureau Chief of Consultative Services:
  - (1) Description of outreach efforts implemented.
  - (2) Assessment of the impact of outreach efforts.
  - (3) Number of employers and employees affected.
  - (4) Number of consultative visits conducted.
  - (5) Types of hazards observed.
  - (6) Number of safety and health programs improved or implemented.
  - (7) Standard promulgation recommendations.
  
- c. Bureau Chief of Training and Outreach:
  - (1) Description of outreach efforts implemented.
  - (2) Assessment of the impact of outreach efforts.
  - (3) Number of training sessions conducted.
  - (4) Number of employers and employees affected.
  - (5) Standard promulgation recommendations.
  - (6) Number of safety and health programs improved or implemented.

  
Steven Sykes  
State Plan Coordinator

  
Robert K. Andrews, Jr.  
Director

6/4/98  
Date

demonstrated his ability to perform his duties safely at his level of training.

(36) *System operator/owner.* The person or organization that operates or controls the electrical conductors involved.

(37) *Telecommunications center.* An installation of communication equipment under the exclusive control of an organization providing telecommunications service, that is located outdoors or in a vault, chamber, or a building space used primarily for such installations.

*Note:* Telecommunication centers are facilities established, equipped and arranged in accordance with engineered plans for the purpose of providing telecommunications service. They may be located on premises owned or leased by the organization providing telecommunication service, or on the premises owned or leased by others. This definition includes switch rooms (whether electromechanical, electronic, or computer controlled), terminal rooms, power rooms, repeater rooms, transmitter and receiver rooms, switchboard operating rooms, cable vaults, and miscellaneous communications equipment rooms. Simulation rooms of telecommunication centers for training or developmental purposes are also included.

(38) *Telecommunications derricks.* Rotating or nonrotating derrick structures permanently mounted on vehicles for the purpose of lifting, lowering, or positioning hardware and materials used in telecommunication work.

(39) *Telecommunication line truck.* A truck used to transport men, tools, and material, and to serve as a traveling workshop for telecommunication installation and maintenance work. It is sometimes equipped with a boom and auxiliary equipment for setting poles, digging holes, and elevating material or men.

(40) *Telecommunication service.* The furnishing of a capability to signal or communicate at a distance by means such as telephone, telegraph, police and fire-alarm, community antenna television, or similar system, using wire, conventional cable, coaxial cable, wave guides, microwave transmission, or other similar means.

(41) *Unvented vault.* An enclosed vault in which the only openings are access openings.

(42) *Vault.* An enclosure above or below ground which personnel may enter, and which is used for the purpose of installing, operating, and/or maintaining equipment and/or cable which need not be of submersible design.

(43) *Vented vault.* An enclosure as described in paragraph (s) (42) of this section, with provision for air changes using exhaust flue stack(s) and low level air intake(s), operating on differentials of pres-

sure and temperature providing for air flow.

(44) *Voltage of an effectively grounded circuit.* The voltage between any conductor and ground unless otherwise indicated.

(45) *Voltage of a circuit not effectively grounded.* The voltage between any two conductors. If one circuit is directly connected to and supplied from another circuit of higher voltage (as in the case of an autotransformer), both are considered as of the higher voltage, unless the circuit of lower voltage is effectively grounded, in which case its voltage is not determined by the circuit of higher voltage. Direct connection implies electric connection as distinguished from connection merely through electromagnetic or electrostatic induction.

**§1910.269 Electric power generation, transmission, and distribution.**

[1910.269 added by 59 FR 4437, January 31, 1994; corrected by 59 FR 33660, 33662, June 30, 1994]

*Note:* OSHA is staying the enforcement of the following paragraphs of §1910.269 until November 1, 1994: (b)(1)(ii), (d) except for (d)(2)(i) and (d)(2)(iii), (e)(2), (e)(3), (j)(2)(ii), (l)(6)(iii), (m), (n)(3), (n)(4)(ii), (n)(8), (o) except for (o)(2)(i), (r)(1)(vi), (u)(1), (u)(4), (u)(5). OSHA is also staying the enforcement of paragraphs (n)(6) and (n)(7) of §1910.269 until November 1, 1994, but only insofar as they apply to lines and equipment operated at 600 volts or less. Further, OSHA is staying the enforcement of paragraph (v)(1)(xii) of §1910.269 until February 1, 1996.

[1910.269 Stay note added by 59 FR 33660, June 30, 1994]

(a) *General.*

(i) *Application.*

(j) This section covers the operation and maintenance of electric power generation, control, transformation, transmission, and distribution lines and equipment. These provisions apply to:

(A) Power generation, transmission, and distribution installations, including related equipment for the purpose of communication or metering, which are accessible only to qualified employees;

*Note:* The types of installations covered by this paragraph include the generation, transmission, and distribution installations of electric utilities, as well as equivalent installations of industrial establishments. Supplementary electric generating equipment that is used to supply a workplace for emergency, standby, or similar purposes only is covered under Subpart S of this Part. (See paragraph (a)(1)(ii)(B) of this section).

(B) Other installations at an electric power generating station, as follows:

(1) Fuel and ash handling and processing installations, such as coal conveyors.

(2) Water and steam installations, such as penstocks, pipelines, and tanks, providing a source of energy for electric generators, and

(3) Chlorine and hydrogen systems;

[1910.269(a)(1)(i)(B)(3) corrected by 59 FR 33662, June 30, 1994]

(C) Test sites where electrical testing involving temporary measurements associated with electric power generation, transmission, and distribution is performed in laboratories, in the field, in substations, and on lines, as opposed to metering, relaying, and routine line work;

[1910.269(a)(1)(i)(C) corrected by 59 FR 33662, June 30, 1994]

(D) Work on or directly associated with the installations covered in paragraphs (a)(1)(i)(A) through (a)(1)(i)(C) of this section; and

[1910.269(a)(1)(i)(D) corrected by 59 FR 33662, June 30, 1994]

(E) Line-clearance tree-trimming operations, as follows:

(1) Entire §1910.269 of this Part, except paragraph (r)(1) of this section, applies to line-clearance tree-trimming operations performed by qualified employees (those who are knowledgeable in the construction and operation of electric power generation, transmission, or distribution equipment involved, along with the associated hazards).

(2) Paragraphs (a)(2), (b), (c), (g), (k), (p), and (r) of this section apply to line-clearance tree-trimming operations performed by line-clearance tree trimmers who are not qualified employees.

(ii) Notwithstanding paragraph (a)(1)(i) of this section, §1910.269 of this Part does not apply:

[1910.269(a)(1)(ii) introductory text corrected by 59 FR 33662, June 30, 1994]

(A) To construction work, as defined in §1910.12 of this Part; or

(B) To electrical installations, electrical safety-related work practices, or electrical maintenance considerations covered by Subpart S of this Part.

*Note 1:* Work practices conforming to §§1910.332 through 1910.335 of this Part are considered as complying with the electrical safety-related work practice requirements of this section identified in Table 1 of Appendix A-2 to this section, provided the work is being performed on a generation or distribution installation meeting §§1910.303 through 1910.308 of this Part. This table also identifies provisions in this section that apply to work by qualified persons directly on or associated with installations of electric power generation, transmission, and distribution.

[Sec. 1910.269(a)(1)(ii)(B)]

and for rescue of employees from such spaces.

[Editor's note: 1910.269(c)(2) and (3) are stayed temporarily. See Note at beginning of this section.]

(2) *Training.* Employees who enter enclosed spaces or who serve as attendants shall be trained in the hazards of enclosed space entry, in enclosed space entry procedures, and in enclosed space rescue procedures.

(3) *Rescue equipment.* Employers shall provide equipment to ensure the prompt and safe rescue of employees from the enclosed space.

(4) *Evaluation of potential hazards.* Before any entrance cover to an enclosed space is removed, the employer shall determine whether it is safe to do so by checking for the presence of any atmospheric pressure or temperature differences and by evaluating whether there might be a hazardous atmosphere in the space. Any conditions making it unsafe to remove the cover shall be eliminated before the cover is removed.

Note: The evaluation called for in this paragraph may take the form of a check of the conditions expected to be in the enclosed space. For example, the cover could be checked to see if it is hot and, if it is fastened in place, could be loosened gradually to release any residual pressure. A determination must also be made of whether conditions at the site could cause a hazardous atmosphere, such as an oxygen deficient or flammable atmosphere, to develop within the space.

(5) *Removal of covers.* When covers are removed from enclosed spaces, the opening shall be promptly guarded by a railing, temporary cover, or other barrier intended to prevent an accidental fall through the opening and to protect employees working in the space from objects entering the space.

(6) *Hazardous atmosphere.* Employees may not enter any enclosed space while it contains a hazardous atmosphere, unless the entry conforms to the generic permit-required confined spaces standard in §1910.146 of this Part.

Note: The term "entry" is defined in §1910.146(b) of this Part.

(7) *Attendants.* While work is being performed in the enclosed space, a person with first aid training meeting paragraph (b) of this section shall be immediately available outside the enclosed space to render emergency assistance if there is reason to believe that a hazard may exist in the space or if a hazard exists because of traffic patterns in the area of the opening used for entry. That person is not pre-

cluded from performing other duties outside the enclosed space if these duties do not distract the attendant from monitoring employees within the space.

Note: See paragraph (j)(3) of this section for additional requirements on attendants for work in manholes.

[1910.269(c)(7) Note corrected by 59 FR 33662, June 30, 1994]

(8) *Calibration of test instruments.* Test instruments used to monitor atmospheres in enclosed spaces shall be kept in calibration, with a minimum accuracy of  $\pm 10$  percent.

(9) *Testing for oxygen deficiency.* Before an employee enters an enclosed space, the internal atmosphere shall be tested for oxygen deficiency with a direct-reading meter or similar instrument, capable of collection and immediate analysis of data samples without the need for off-site evaluation. If continuous forced air ventilation is provided, testing is not required provided that the procedures used ensure that employees are not exposed to the hazards posed by oxygen deficiency.

(10) *Testing for flammable gases and vapors.* Before an employee enters an enclosed space, the internal atmosphere shall be tested for flammable gases and vapors with a direct-reading meter or similar instrument capable of collection and immediate analysis of data samples without the need for off-site evaluation. This test shall be performed after the oxygen testing and ventilation required by paragraph (e)(9) of this section demonstrate that there is sufficient oxygen to ensure the accuracy of the test for flammability.

(11) *Ventilation and monitoring.* If flammable gases or vapors are detected or if an oxygen deficiency is found, forced air ventilation shall be used to maintain oxygen at a safe level and to prevent a hazardous concentration of flammable gases and vapors from accumulating. A continuous monitoring program to ensure that no increase in flammable gas or vapor concentration occurs may be followed in lieu of ventilation, if flammable gases or vapors are detected at safe levels.

Note: See the definition of hazardous atmosphere for guidance in determining whether or not a given concentration of a substance is considered to be hazardous.

[1910.269(e)(11) Note corrected by 59 FR 33662, June 30, 1994]

(12) *Specific ventilation requirements.* If continuous forced air ventilation is used, it shall begin before entry is made and shall be maintained long enough to ensure that a safe atmosphere exists

before employees are allowed to enter the work area. The forced air ventilation shall be so directed as to ventilate the immediate area where employees are present within the enclosed space and shall continue until all employees leave the enclosed space.

(13) *Air supply.* The air supply for the continuous forced air ventilation shall be from a clean source and may not increase the hazards in the enclosed space.

(14) *Open flames.* If open flames are used in enclosed spaces, a test for flammable gases and vapors shall be made immediately before the open flame device is used and at least once per hour while the device is used in the space. Testing shall be conducted more frequently if conditions present in the enclosed space indicate that once per hour is insufficient to detect hazardous accumulations of flammable gases or vapors.

Note: See the definition of hazardous atmosphere for guidance in determining whether or not a given concentration of a substance is considered to be hazardous.

[1910.269(e)(14) Note corrected by 59 FR 33662, June 30, 1994]

(f) *Excavations.* Excavation operations shall comply with Subpart P of Part 1926 of this chapter.

(g) *Personal protective equipment.* (1) *General.* Personal protective equipment shall meet the requirements of Subpart I of this Part.

(2) *Fall protection.* (i) Personal fall arrest equipment shall meet the requirements of Subpart M of Part 1926 of this Chapter.

[1910.269(g)(2)(i) revised by 59 FR 40729, August 9, 1994]

(ii) Body belts and safety straps for work positioning shall meet the requirements of §1926.959 of this Chapter.

(iii) Body belts, safety straps, lanyards, lifelines, and body harnesses shall be inspected before use each day to determine that the equipment is in safe working condition. Defective equipment may not be used.

(iv) Lifelines shall be protected against being cut or abraded.

(v) Fall arrest equipment, work positioning equipment, or travel restricting equipment shall be used by employees working at elevated locations more than 4 feet (1.2 m) above the ground on poles, towers, or similar structures if other fall protection has not been provided. Fall protection equipment is not required to be used by a qualified employee climbing or changing location on poles, towers, or similar structures, unless conditions, such as, but not limited to, ice, high winds, the design of the structure (for example, no

[Sec. 1910.269(g)(2)(v)]

provision for holding on with hands), or the presence of contaminants on the structure, could cause the employee to lose his or her grip or footing.

[1910.269(g)(2)(v) corrected by 59 FR 33662, June 30, 1994]

**Note 1:** This paragraph applies to structures that support overhead electric power generation, transmission, and distribution lines and equipment. It does not apply to portions of buildings, such as loading docks, to electric equipment, such as transformers and capacitors, nor to aerial lifts. Requirements for fall protection associated with walking and working surfaces are contained in Subpart D of this Part. Requirements for fall protection associated with aerial lifts are contained in §1910.67 of this Part.

**Note 2:** Employees undergoing training are not considered "qualified employees" for the purposes of this provision. Unqualified employees (including trainees) are required to use fall protection any time they are more than 4 feet (1.2 m) above the ground.

(vi) The following requirements apply to personal fall arrest systems:

(A) When stopping or arresting a fall, personal fall arrest systems shall limit the maximum arresting force on an employee to 900 pounds (4 kN) if used with a body belt.

(B) When stopping or arresting a fall, personal fall arrest systems shall limit the maximum arresting force on an employee to 1800 pounds (8 kN) if used with a body harness.

(C) Personal fall arrest systems shall be rigged such that an employee can neither free fall more than 6 feet (1.8 m) nor contact any lower level.

(vii) If vertical lifelines or droplines are used, not more than one employee may be attached to any one lifeline.

(viii) Snaphooks may not be connected to loops made in webbing-type lanyards.

(ix) Snaphooks may not be connected to each other.

(h) *Ladders, platforms, step bolts, and manhole steps.*

(1) *General.* Requirements for ladders contained in Subpart D of this Part apply, except as specifically noted in paragraph (h)(2) of this section.

(2) *Special ladders and platforms.* Portable ladders and platforms used on structures or conductors in conjunction with overhead line work need not meet paragraphs (d)(2)(i) and (d)(2)(iii) of §1910.25 of this Part or paragraph (c)(3)(iii) of §1910.26 of this Part. However, these ladders and platforms shall meet the following requirements:

(i) Ladders and platforms shall be secured to prevent their becoming accidentally dislodged.

(ii) Ladders and platforms may not be loaded in excess of the working loads for which they are designed.

(iii) Ladders and platforms may be used only in applications for which they were designed.

(iv) In the configurations in which they are used, ladders and platforms shall be capable of supporting without failure at least 2.5 times the maximum intended load.

(3) *Conductive ladders.* Portable metal ladders and other portable conductive ladders may not be used near exposed energized lines or equipment. However, in specialized high-voltage work, conductive ladders shall be used where the employer can demonstrate that nonconductive ladders would present a greater hazard than conductive ladders.

(i) *Hand and portable power tools.*

(1) *General.* Paragraph (i)(2) of this section applies to electric equipment connected by cord and plug. Paragraph (i)(3) of this section applies to portable and vehicle-mounted generators used to supply cord-and plug-connected equipment. Paragraph (i)(4) of this section applies to hydraulic and pneumatic tools.

(2) *Cord- and plug-connected equipment.* (1) Cord-and plug-connected equipment supplied by premises wiring is covered by Subpart S of this Part.

(ii) Any cord- and plug-connected equipment supplied by other than premises wiring shall comply with one of the following in lieu of §1910.243(a)(5) of this Part:

(A) It shall be equipped with a cord containing an equipment grounding conductor connected to the tool frame and to a means for grounding the other end (however, this option may not be used where the introduction of the ground into the work environment increases the hazard to an employee); or

(B) It shall be of the double-insulated type conforming to Subpart S of this Part; or

(C) It shall be connected to the power supply through an isolating transformer with an ungrounded secondary.

(3) *Portable and vehicle-mounted generators.* Portable and vehicle-mounted generators used to supply cord- and plug-connected equipment shall meet the following requirements:

(i) The generator may only supply equipment located on the generator or the vehicle and cord- and plug-connected equipment through receptacles mounted on the generator or the vehicle.

(ii) The non-current-carrying metal parts of equipment and the equipment grounding conductor terminals of the receptacles shall be bonded to the generator frame.

(iii) In the case of vehicle-mounted generators, the frame of the generator shall be bonded to the vehicle frame.

(iv) Any neutral conductor shall be bonded to the generator frame.

(4) *Hydraulic and pneumatic tools.*

(i) Safe operating pressures for hydraulic and pneumatic tools, hoses, valves, pipes, filters, and fittings may not be exceeded.

**Note:** If any hazardous defects are present, no operating pressure would be safe, and the hydraulic or pneumatic equipment involved may not be used. In the absence of defects, the maximum rated operating pressure is the maximum safe pressure.

(ii) A hydraulic or pneumatic tool used where it may contact exposed live parts shall be designed and maintained for such use.

(iii) The hydraulic system supplying a hydraulic tool used where it may contact exposed live parts shall provide protection against loss of insulating value for the voltage involved due to the formation of a partial vacuum in the hydraulic line.

**Note:** Hydraulic lines without check valves having a separation of more than 35 feet (10.7 m) between the oil reservoir and the upper end of the hydraulic system promote the formation of a partial vacuum.

(iv) A pneumatic tool used on energized electric lines or equipment or used where it may contact exposed live parts shall provide protection against the accumulation of moisture in the air supply.

[1910.269(i)(4)(iv) corrected by 59 FR 33662, June 30, 1994]

(v) Pressure shall be released before connections are broken, unless quick-acting, self-closing connectors are used. Hoses may not be kinked.

(vi) Employees may not use any part of their bodies to locate or attempt to stop a hydraulic leak.

(j) *Live-line tools.*  
(1) *Design of tools.* Live-line tool rods, tubes, and poles shall be designed and constructed to withstand the following minimum tests:

(i) 100,000 volts per foot (3281 volts per centimeter) of length for 5 minutes if the tool is made of fiberglass-reinforced plastic (FRP), or

(ii) 75,000 volts per foot (2461 volts per centimeter) of length for 3 minutes if the tool is made of wood, or

[Sec. 1910.269(j)(1)(ii)]

(a) Designated personnel continuously available while the powered platform is in use; and

(b) Designated personnel on roof-powered platforms, undertaking emergency operation of the working platform by means of the emergency operating device located near the hoisting machine.

(iv) The emergency communication equipment shall be one of the following types:

(a) Telephone connected to the central telephone exchange system; or

(b) Telephones on a limited system or an approved two-way radio system, provided a message during the time the powered platform is in use.

(d) *Type T powered platforms*—(1) *Roof car*. The requirements of paragraphs (c)(1) through (c)(5) of this Appendix shall apply to Type T powered platforms.

(2) *Working platform*. The requirements of paragraphs (c)(6) through (c)(16) of this Appendix apply to Type T powered platforms.

(i) The working platform shall be suspended by at least two wire ropes.

(ii) The maximum rated speed at which the working platform of self-powered platforms may be moved in a vertical direction shall not exceed 35 feet per minute.

(3) *Hoisting equipment*. The requirements of paragraphs (c)(17) and (18) of this Appendix shall apply to Type T powered platforms.

(4) *Brakes*. Brakes requirements of paragraph (c)(19) of this Appendix shall apply.

(5) *Hoisting ropes and rope connections*.

(i) Paragraphs (c)(20)(i) through (vi) and (viii) of this Appendix shall apply to Type T powered platforms.

(ii) Adjustable shackle rods in subparagraph (c)(20)(vii) of this Appendix shall apply to Type T powered platforms, if the working platform is suspended by more than two wire ropes.

(6) *Electrical wiring and equipment*. (i) The requirements of paragraphs (c)(22) (i) through (vi) of this Appendix shall apply to Type T powered platforms. "Circuit protection limitation," "powered platform electrical service system," all operating services and control equipment shall comply with the specifications contained in Part 2, section 26, ANSI A120.1-1970.

(ii) For electrical protective devices the requirements of paragraphs (c)(22) (i) through (viii) of this Appendix shall apply to Type T powered platforms. Requirements for the "circuit potential limitation" shall be in accordance with specifications contained in Part 2, section 26, of ANSI A120.1-1970.

(7) *Emergency communications*. All the requirements of paragraph (c)(23) of this

Appendix shall apply to Type T powered platforms.

[1910.66 OMB control number removed by 61 FR 5508, Feb. 13, 1996]

**§1910.67 Vehicle-mounted elevating and rotating work platforms.**

(a) *Definitions applicable to this section*—(1) *Aerial device*. Any vehicle-mounted device, telescoping or articulating, or both, which is used to position personnel.

(2) *Aerial ladder*. An aerial device consisting of a single- or multiple-section extensible ladder.

(3) *Articulating boom platform*. An aerial device with two or more hinged boom sections.

(4) *Extensible boom platform*. An aerial device (except ladders) with a telescopic or extensible boom. Telescopic derricks with personnel platform attachments shall be considered to be extensible boom platforms when used with a personnel platform.

(5) *Insulated aerial device*. An aerial device designed for work on energized lines and apparatus.

(6) *Mobile unit*. A combination of an aerial device, its vehicle, and related equipment.

(7) *Platform*. Any personnel-carrying device (basket or bucket) which is a component of an aerial device.

(8) *Vehicle*. Any carrier that is not manually propelled.

(9) *Vertical tower*. An aerial device designed to elevate a platform in a substantially vertical axis.

(b) *General requirements*. (1) Unless otherwise provided in this section, aerial devices (aerial lifts) acquired on or after July 1, 1975, shall be designed and constructed in conformance with the applicable requirements of the American National Standard for "Vehicle Mounted Elevating and Rotating Work Platforms," ANSI A92.2-1969, including appendix, which is incorporated by reference as specified in §1910.6. Aerial lifts acquired for use before July 1, 1975 which do not meet the requirements of ANSI A92.2-1969, may not be used after July 1, 1976, unless they shall have been modified so as to conform with the applicable design and construction requirements of ANSI A92.2-1969. Aerial devices include the following types of vehicle-mounted aerial devices used to elevate personnel to job-sites above ground: (i) Extensible boom platforms, (ii) aerial ladders, (iii) articulating boom platforms, (iv) vertical tow-

ers, and (v) a combination of any of the above. Aerial equipment may be made of metal, wood, fiberglass reinforced plastic (FRP), or other material; may be powered or manually operated; and are deemed to be aerial lifts whether or not they are capable of rotating about a substantially vertical axis.

[1910.67(b)(1) amended by 61 FR 9235, March 7, 1996]

(2) Aerial lifts may be "field modified" for uses other than those intended by the manufacturer, provided the modification has been certified in writing by the manufacturer or by any other equivalent entity, such as a nationally recognized testing laboratory, to be in conformity with all applicable provisions of ANSI A92.2-1969 and this section, and to be at least as safe as the equipment was before modification.

(3) The requirements of this section do not apply to firefighting equipment or to the vehicles upon which aerial devices are mounted, except with respect to the requirement that a vehicle be a stable support for the aerial device.

(4) For operations near overhead electric lines, see §1910.333(e)(3).

[1910.67(b)(4) revised by 55 FR 32014, August 6, 1990]

(c) *Specific requirements*—(1) *Ladder trucks and tower trucks*. Before the truck is moved for highway travel, aerial ladders shall be secured in the lower traveling position by the locking device above the truck cab, and the manually operated device at the base of the ladder, or by other equally effective means (e.g., cradles which prevent rotation of the ladder in combination with positive acting linear actuators).

(2) *Extensible and articulating boom platforms*. (i) Lift controls shall be tested each day prior to use to determine that such controls are in safe working condition.

(ii) Only trained persons shall operate an aerial lift.

(iii) Belting off to an adjacent pole, structure, or equipment while working from an aerial lift shall not be permitted.

(iv) Employees shall always stand firmly on the floor of the basket, and shall not sit or climb on the edge of the basket or use planks, ladders, or other devices for a work position.

(v) A body belt shall be worn and a lanyard attached to the boom or basket when working from an aerial lift.

[Sec. 1910.67(c)(2)(v)]

U.S. Department of Labor

Occupational Safety and Health  
Washington, DC 20210

ATTACHMENT 2-B

Reply to the Attention of: DCP/GICA/PAC



DEC 13 1999

Steven R. Semler, Esq.  
Semler & Pritzker  
National Arborist Association  
Suite 610  
5301 Wisconsin Ave., NW  
Washington, D.C. 20015

DEC 14 1999

DEC 14 1999

SEM &amp; PRITZKER

Dear Mr. Semler:

Thank you for your August 25, 1999 letter to the Occupational Safety and Health Administration's (OSHA's) Directorate of Compliance Programs concerning fall protection in aerial lifts. Specifically, you requested an interpretation as to what type of fall protection is required for arborists working from aerial lifts. The interpretation provided in this letter supersedes and replaces all prior OSHA general industry interpretations on the subject matter.

#### Electric power generation, transmission and distribution work (§1910.269)

In all of its newer standards, OSHA has been requiring body harnesses, as opposed to body belts, for protection against falls because they provide far more effective protection from fall hazards. Accordingly, when OSHA developed its standard for electric power generation, transmission, and distribution, it adopted, through §1910.269(g)(2)(i), the specifications for personal fall arrest equipment set out in Subpart M of 29 CFR 1926, OSHA's standard for fall protection in construction. These specifications require the use of body harnesses rather than body belts and lanyards. When arborists are engaged in line clearance tree trimming work, they must adhere to these specifications.

An option would be the use of a restraint system. A restraint system prevents a worker from being exposed to any fall. If the employee is protected by a restraint system, either a body belt or a harness may be used. When a restraint system is used for fall protection from an aerial lift or a boom-type elevating work platform, the employer must ensure that the lanyard and anchor are arranged so that the employee is not potentially exposed to falling any distance.

#### Positioning Devices and Aerial Lift Work

The only time a body belt may be used where there may be a fall is when an employee is using a "positioning device." In Subpart M of the construction standards for fall protection, a "positioning device system" is defined as a body belt or body harness system rigged to allow an employee to be supported on an elevated vertical surface, such as a wall (or a pole), and work with both hands free while leaning. Therefore, in line clearance tree trimming work, a positioning device may be used only to protect a worker on a vertical work surface. These devices may permit a fall of up to 2 feet (0.6 m). Since line clearance tree trimmers in bucket trucks, scissor lifts, and boom-type elevating work platforms are on a horizontal surface, a positioning device may not be used for those workers.

Since January 1, 1998, several electric utilities have reported successful conversion to body harnesses in place of body belts for use in aerial lifts. The utilities' comments have stressed the importance of selecting a body harness that is comfortable and adjusting it properly to the specific employee. OSHA strongly encourages the use of body harnesses rather than body belts for fall protection.

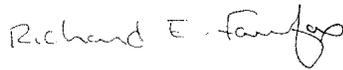
**All other General Industry work**

For all other General Industry work performed in an aerial lift, fall protection requirements are found in Part 1910.67, Vehicle Mounted Elevating and Rotating Work Platforms. Part 1910.67(c)(2)(v) states: "A body belt shall be worn and a lanyard attached to the boom or basket when working from an aerial lift." At a minimum, employers must comply with these requirements. Employers should be mindful, however, that body harnesses are generally superior to body belts in preventing injuries from falls. Accordingly, OSHA believes that conscientious employers should and will switch to the use of body harnesses.

We hope you find this information helpful. Please be aware that OSHA's enforcement guidance is subject to periodic review and clarification, amplification, or correction. Such guidance could also be affected by subsequent rulemaking. In the future, should you wish to verify that the guidance provided herein remains current, you may consult OSHA's website at <http://www.osha.gov>.

This letter will be disseminated to all of OSHA's Regional and Area offices. I thank you for your interest in Occupational Safety and Health and I look forward to implementation of our mutual goal of a safer and more healthful workplace for all arborists. If you have any further questions please contact the Office of General Industry Compliance Assistance at 202-693-1866.

Sincerely,

A handwritten signature in cursive script that reads "Richard E. Fairfax".

Richard E. Fairfax, Director  
Directorate of Compliance Programs

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**CEOs:**  
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National Arborist Association  
Amherst, NH 03031  
(800) 733-2622

January 12, 2000 - FAX COPY

Mr. Richard E. Fairfax, Director  
Directorate of Compliance Programs  
U.S. DEPARTMENT OF LABOR  
Occupational Safety and Health Administration  
200 Constitution Avenue, NW  
Washington, DC 20210

Dear Mr. Fairfax:

We respectfully request that OSHA immediately rescind its December 13, 1999 letter addressed to Steven Semler, the National Arborist Association's legal counsel, to forestall a planned judicial challenge by NAA to the letter's attempt to bypass the statutorily required notice and comment procedure required for changing an existing regulation.

After due consideration of your interpretation, in close consultation with Mr. Semler as well as the members of NAA's Board of Directors and Governmental Affairs Committee, we would like to outline the concerns we have with this interpretation.

1. Most substantively and centrally, the letter utterly fails to take any cognizance whatsoever - let alone reconcile - the fundamental basis for our inquiry - being the express meaning to be given to the §1910.269(g)(2)(v)(Note 1) provision that the requirements of the fall arrest paragraph do not apply to line clearance tree trimmer aerial lift work but instead are governed by the (body belt and lanyard) requirements of 29 CFR 1910.67 (see attached). The letter proceeds to ignore the existence of this "Note 1" exemption, as though it did not even exist in §1910.269, even though this "Note 1" regulation provision was the central basis of our inquiry. Respectfully, we simply do not understand how the response can ignore the regulation at issue, which drives the inquiry in the first place. This is especially so given that the letter contradicts this provision of the existing regulation. This is even more incongruous in that the letter contains, as an additional attachment thereto labeled "NAA's position" - an extensive legal analysis from NAA, the central tenet of which is that the "Note 1" exemption contained in §1910.269(g)(2)(v) bars, as a matter of law, the contrary assertion that body harness requirements are imposed in derogation of the plan prescription therein for body belts and lanyards. Not only does "Note 1" expressly make body belts applicable in lieu of harnesses; but OSHA has publicly so stated that body belts and lanyard continue to apply for line clearance tree trimming. See OSHA bulletin dated November 26, 1997 attached hereto.



Dedicated to the Advancement of Commercial Tree Care Businesses

2. The attachments provided with the letter add more confusion to the letter's meaning. Thus, the "GICA version" draft response attachment specifically confirms that body belts are permitted in such circumstances. Similarly, the "Crowley" version attachment expressly concludes that a body harness is not required. The rationale of the "Pipkin version" attachment simply cannot be discerned. In any event, tellingly, but again ignored in your letter's analysis, is the very Record of promulgation of Subpart M -- which you apparently assert served to eliminate the subject 1910.269 "Note 1". That Record, in turn, reflects that while 1910.269 specifically was amended to change the paragraph "(g)" incorporation of Subpart E, to the new Subpart M (see 59 Fed Reg. #0672), it did nothing to disturb continued vitality of the "Note 1" exception thereto contained in the same paragraph. Thus, this compellingly highlights that OSHA purposefully amended 1910.269, while at the same time purposefully continuing the effectiveness of the "Note 1" exception; hence that OSHA could have, but affirmatively chose not to, use the occasion to change "Note 1" when it otherwise amended the very same paragraph of 1910.269 in which "Note 1" appears. In these circumstances, OSHA's attempt to abrogate "Note 1" by letter of interpretation, when OSHA elected not to do so when otherwise amending the same paragraph of the regulation, forcefully demonstrates the facial lack of compliance with statutory requirements for modifying standards.

3. The letter appears to suggest a dichotomy which is inexplicably discriminatory--allowing body belt and lanyards for arborists working from aerial lifts in non-line clearance tree work, but not for those doing the same tree work incident to power lines. This makes no sense to NAA, since §1910.67 applies body belts and lanyards to all aerial lift tree work, and §1910.269(g)(2)(v)(Note 1) specifically confirms that standard applies to line clearance tree work as well. Neither standard recognizes any basis for this discriminatory treatment.

4. Lastly, at an OSHA tree industry "stakeholders" meeting in Washington, D.C. on August 10-11, 1999, OSHA's representative David Wallis specifically announced that OSHA was planning to publish in the Federal Register a notice of revision of Part 1926 Subpart V and would include therein a proposed deletion of §1910.269(g)(2)(v)(Note 1) for line clearance tree trimming. Your letter thus seeks to accomplish through a letter of interpretation that which OSHA's representatives concede is properly planned to be subjected to the Notice and Comment process. This highlights your letter's apparent end run around statutory requirements expressly recognized by OSHA as being the applicable procedure to be followed.

In order to protect NAA members' rights, we are forced to assume the letter intends to "interpret" the imposition of a "body harness," rather than "body belt" requirement in the subject circumstances. If your letter therefore intends to state that arborists performing line clearance tree trimming in aerial lifts are required to use body harnesses instead of complying with "Note 1" provision for the §1910.67 (body belt and lanyard) requirements to apply to such work, then NAA believes, in that event, that the subject letter amounts to an illegal attempt to change the plain meaning of "Note 1" without "Notice and Comment" required by §6(b) of the OSHA statute and the Administrative Procedure Act, as to which NAA will file a judicial action to enjoin. For it is plain that a regulation cannot be so fundamentally changed without notice and opportunity for comment, under the guise of merely "interpreting" the regulation.<sup>1</sup> Moreover, Agency action must be reasoned.<sup>2</sup> We do not believe the subject letter complies with these requirements.

If we chose to file such action in the United States Court of Appeals under the OSHA statute, we statutorily have until February 12, 2000 to do so. Therefore, NAA respectfully requests that you advise us by January 28, 2000 of your decision to rescind the subject letter pending further review, or, alternatively, to definitively clarify it by then.

<sup>1</sup> *National Mining Assn. v. MSHA*, 116 F3d 520 (DC Cir. 1997); *Paralyzed Veterans of America v. DC Arena*, 117 F3d 579, 588 (DC Cir. 1997) (agency may not escape notice and comment obligations by attempting to impose new substantive obligations under guise of issuing interpretive rules of existing regulation).

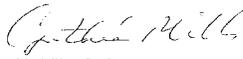
<sup>2</sup> *JSG Trading Corp. v. USDA*, 175 F3d 536, 544-5 (DC Cir. 1999), applying APA and quoting *Greater Boston Television Corp. v. FCC*, 444 F2d. 841, 852 (DC Cir. 1970): "An agency changing its course must apply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored, and if an agency glosses over or swerves from prior precedents without discussion it may cross the line from the tolerably terse to the intolerably mute."

NAA does not wish to engage in litigation, because it is counterproductive to cooperating towards our mutual interest in promoting employee safety. Should OSHA wish to change the provisions of §1910.269, the statute provides an orderly process for doing so. If, as a result of that process, after opportunity for input from NAA and consideration of same by OSHA in an accountable fashion required by Congress, a revision is decided, NAA will of course comply. But NAA cannot permit the Agency, acting under the limited license to interpret its regulations, to swallow the process altogether by changing the meaning of the regulation by fiat.

We therefore respectfully urge OSHA to notify us by January 28, 2000, of its action on this request, failing which NAA will be forced to seek judicial recourse. All documents referred to herein are incorporated herein by reference.

NAA looks forward to hearing from you and to cooperating rather than litigating with OSHA.

Respectfully submitted:  
NATIONAL ARBORIST ASSOCIATION

  
Cynthia Mills, CAE  
Executive Vice President

cc: Charles N. Jeffress, Assistant Secretary of Labor for OSHA  
R. Davis Layne, Deputy Assistant Secretary of Labor for OSHA  
Henry Solano, Esq., Solicitor of Labor  
Paul Cyr, Office of the Directorate of Compliance Programs, OSHA  
Steven R. Semler, Semler & Pritzker, NAA Labor Counsel  
Peter Gerstenberger, Director of Safety & Education, National Arborist Association  
John R. Wright, President, National Arborist Association  
The Honorable Michael B. Enzi, Chair, Employment, Safety, and Training Subcommittee of the Senate Health, Education, Labor and Pensions Committee  
The Honorable Cass Ballenger, Chair, Subcommittee on Workforce Protections, House Education and the Workforce Committee

U.S. Department of Labor

Occupational Safety and  
Washington, D.C. 20210

ATTACHMENT 2-D

Reply to the Attention of:



Cynthia Mills, CAE  
National Arborist Association  
P.O. Box 1094  
Amherst, NH 03031-1094

Dear Ms. Mills:

The Directorate of Compliance Programs is hereby withdrawing its December 13, 1999 letter to you concerning fall protection in aerial lifts. The letter was written in response to your August 25, 1999 letter requesting clarification of the Occupational Safety and Health Administration's position on this issue.

The Occupational Safety and Health Administration is currently reviewing its policy as to what type of fall protection is required for arborists working from aerial lifts. Accordingly, we have made the decision to withdraw the letter.

We regret any inconvenience this may have caused you. If you have further questions, please feel free to contact the Office of General Industry Compliance Assistance at 202-693-1850.

Sincerely,

Richard E. Fairfax, Director  
Directorate of Compliance Programs

RECEIVED

JAN 31 1999

SECRETARY OF LABOR

Mr. MCINTOSH. Thank you very much, Mr. Marren, you have raised some questions that we will explore further in this hearing of what happens when something is withdrawn. How do we, how does the public know what the status is. Let me now turn to Ms. Adele Abrams. Ms. Abrams, thank you very much for coming today, share with us a summary of your testimony.

Ms. ABRAMS. Thank you, Mr. Chairman and members of the subcommittee.

My name is Adele Abrams and I am an attorney with Patton, Boggs in Washington, DC, practicing occupational safety and health law. I am also a Washington Representative for the American Society of Safety Engineers and I am a professional member of ASSE's National Capital Chapter.

ASSE is the oldest and the largest society of safety professionals in the world. It represents nearly 33,000 safety professionals and also serves as the Secretariat of seven ANSI Committees, which develop voluntary consensus standards in the safety and health area. Our testimony focuses on how ASSE views the administrative procedures used by OSHA and also by the Mine Safety and Health Administration, MSHA, when issuing letters of interpretation, memoranda, procedural documents and other policy statements.

And we have also submitted a longer statement which we ask to be included in the hearing record.

ASSE's members probably request and receive more letters of interpretation from OSHA and MSHA than those of any other organization involved with safety and health. The interpretative documents and policy statements are a significant part of both the agency's compliance and consultation assistance activities.

ASSE supports and encourages the issuance of information that assists employers in complying with OSHA and MSHA standards and ensures the safety of their workers. ASSE's members make decisions on a daily basis that literally have life and death consequences. And the actions they choose to take may be guided by such cutting edge information. Therefore, it is in the best interest of safety and health in the work place that such information be available readily, both for publication and broadcast on the agency's Websites.

We hope that the subcommittee will not overlook the positive benefit that these interpretative materials can have for small businesses. Small business compliance assistance is of growing interest to ASSE and we have long encouraged Federal agencies to dedicate more resources to this area. ASSE's members, the consultants that are members of ASSE and small business employers routinely seek guidance from OSHA, MSHA and NIOSH to obtain interpretative statements concerning particular subject areas.

Overall results have been excellent in getting such guidance from OSHA and MSHA, although in some cases there have been significant delays in issuing a response. Generally, however, the information provided assists business in implementing their occupational safety and health program in an effective and efficient manner.

Both employees and employers receive direct benefit from this win-win approach and consequently ASSE strongly recommends that OSHA and MSHA continue to provide and disseminate interpretative materials publicly. Although they are not legally binding,

some of the agency's more formal interpretative documents, such as MSHA's Program Policy Manual and the OSHA directives that are labeled as CPLs, can be instructive in determining how an agency interprets a standard or regulation and how they have done so in the past.

These documents are often utilized by the courts to determine whether an enforcement action is reasonable and the degree of deference that should be accorded based upon the consistency of an agency's interpretation. We believe the agency should make it clear to the public that such guidance documents are of a non-binding nature and the agencies must guard against extending the scope of existing standards and regulations through such interpretative materials. Although safety and health professionals and attorneys are aware that interpretative materials are not legally binding, the public may not be clear on this point.

And therefore, OSHA, MSHA and other agencies should consider issuing a statement to this effect on future materials that are intended by the agency to be interpretative policies, rather than substantive rules. We understand the chairman's new legislation, H.R. 3521, addresses this issue. It appears to be a reasonable approach and we look forward to hearing the debate on this legislation.

In summary, although ASSE's overall experience with agency interpretative materials has been very positive, there can be significant improvement. We encourage OSHA and MSHA to work with organizations such as ASSE, more pro-actively when addressing such issues. There is a greater need for synergy in both the public and private sectors when writing interpretative materials. And from its standards work, ASSE has the expertise to do so and is more than willing to work with these agencies.

Finally, in order to remain exempt from formal rulemaking requirements under the Administrative Procedure Act, interpretative documents cannot go beyond the plain language of the standard or create a secret rule. And if an agency desires to impose new obligations or burdens on the regulated community, it must engage in formal notice and comment rulemaking.

The APA's procedures provide employers, employees and safety professionals with the opportunity to offer OSHA and MSHA valuable input and to share real world experience. The end result is an improved regulatory structure and enhancement of safety and health. And with that final statement, I thank you for your time and I will be pleased to answer any questions you might have.

[The prepared statement of Ms. Abrams follows:]

**AMERICAN SOCIETY  
OF SAFETY ENGINEERS**

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847 699-2929  
FAX 847 296-3769



**TESTIMONY OF  
AMERICAN SOCIETY OF SAFETY ENGINEERS ("ASSE")**

**On the Matter of:**

**"Is the Department of Labor Regulating the Public  
Through the Backdoor?"**

**Presented by**

**Adele L. Abrams, Esq., Patton Boggs LLP**

**February 15, 2000**

Chairman McIntosh and Esteemed Members of this Committee: My name is Adele Abrams. I am an attorney with Patton Boggs LLP, Washington, DC, who represents the American Society of Safety Engineers (“ASSE”) at the national level. I am also a professional member of ASSE’s National Capital Chapter. In addition to practicing occupational safety and health law, I am an MSHA-certified instructor, conduct workplace safety audits, and am recognized in the *National Registry of Safety Professionals and Other Registrants*.

It is an honor for me to represent ASSE, which is the oldest and largest Society of safety professionals in the world. Founded in 1911, ASSE represents almost 33,000 dedicated safety professionals and serves as Secretariat of seven American National Standards Institute (“ANSI”) Committees, developing voluntary consensus safety and health standards used by both government agencies and the private sector. ASSE is dedicated to excellence, expertise, and commitment to the protection of people, property, and environment on a worldwide basis.

Today, my testimony focuses on how ASSE views the administrative procedures used by the Occupational Safety and Health Administration (“OSHA”) and the Mine Safety and Health Administration (“MSHA”) when issuing letters of interpretation, memoranda, procedural documents, and other policy statements. We are also submitting a longer statement, which we ask to be included in the hearing record.

The membership of the Society probably requests and receives more letters of interpretation from OSHA and MSHA than those of any other organization involved with occupational safety and health. These interpretative documents and policy statements are a significant part of both agencies’ compliance and consultation assistance activities.

ASSE supports and encourages the issuance of information that assists employers in complying with OSHA and MSHA standards and ensuring the safety of their workers. Our members make decisions on a daily basis that literally have life and death consequences, and the actions they choose to take may be guided by such cutting-edge information. It is in the best interests of safety and health in the workplace that such information be available rapidly, both through publication and broadcast on the agencies' websites.

We hope that this subcommittee will not overlook the positive benefit that such interpretative materials can have for small businesses. Small business compliance assistance is of growing interest for our members, and we have long encouraged federal agencies to dedicate more of their resources to this area. Many of ASSE's 2,300 members in the Consultants Division work with small businesses, advising them on safety and health issues. Both consultants and employers routinely write to OSHA, MSHA and the National Institute for Occupational Safety and Health ("NIOSH") to obtain interpretative statements concerning particular subject areas.

ASSE also notes that while overall results have been excellent in getting guidance from OSHA and MSHA, in some cases there have been significant delays in issuing a response. Generally, however, the information provided assists businesses in implementing their occupational safety and health program in an efficient and effective manner. Both employees and employers receive direct benefit from this "win-win" approach. Consequently, ASSE strongly recommends that OSHA and MSHA continue to provide and disseminate interpretative materials publicly, in order to provide much-needed guidance and clarification.

Although not legally binding, some of the agencies' more "formal" interpretative documents – for example, MSHA's program policy manual and OSHA's numerous Directives (such as the "CPLs") -- are instructive in determining how

an agency has interpreted a standard or regulation in the past. We should not forget that they are also utilized by the courts to determine whether an enforcement action is “reasonable” and the degree of deference that should be accorded based on the consistency of the agency’s interpretation of a particular standard. The agencies should, however, make it clear to the public that these “guidance” documents are of a non-binding nature, and guard against extending the scope of existing standards and regulations through such interpretative materials.

ASSE notes that guidance documents can be non-binding and still provide real value. Since the Society is secretariat of seven (7) ANSI committees, and regularly writes letters of interpretation for such standards, we can directly attest to the importance in maintaining such a process. However, although safety professionals (and attorneys) are aware that interpretative materials are not legally binding, the public may not be clear on this point. Therefore, OSHA, MSHA and other agencies should consider including a statement to this effect on all future materials that are intended to be interpretative policies, rather than substantive rules. Chairman McIntosh’s new legislation, *The Congressional Accountability for Regulatory Information Act of 2000* (H.R.3521, Section [4-b]), addresses this very issue. This appears to be a reasonable requirement and we look forward to hearing the debate on this legislation.

In summary, although ASSE’s overall experience with agency interpretative materials has been very positive, and surveys indicate that ASSE members generally view the agency’s policy process as an asset, that does not mean that there cannot be significant improvement. We encourage OSHA and MSHA to work with organizations such as ASSE more proactively when addressing such issues. There is a greater need for synergy in both the public and private sectors

when writing interpretative materials. From its standards work, ASSE has the expertise to do so and is more than willing to work with these agencies.

Finally, in order to remain exempt from formal rulemaking under the Administrative Procedure Act (“APA”), interpretative documents cannot go beyond the plain language of the standard or create a “secret” rule. If an agency desires to impose new obligations or burdens on the regulated community, it must engage in formal “notice-and-comment” rulemaking. The APA’s rulemaking procedures provide employers, employees and safety professionals with the opportunity to offer OSHA and MSHA valuable input and share real-world experience. The end result is an improved regulatory structure and enhancement of safety and health.

With that final statement, I thank you for your time today and would be pleased to answer any questions that you may have.

**AMERICAN SOCIETY  
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February 15, 2000

The Honorable David McIntosh  
Chairman, House Subcommittee on National Economic  
Growth, Natural Resources, and Regulatory Affairs  
1610 Longworth House Office Building  
Washington, DC 20515-1402

**ASSE STATEMENT**

**"Is the Department of Labor Regulating the Public Through the Backdoor"?  
The Congressional Accountability for Regulatory Information Act of 2000 (H.R.3521)**

Dear Chairman McIntosh:

The purpose of this statement to inform you of ASSE's position concerning the Subcommittee's February 15, 2000, hearing: *Is the Department of Labor Regulating the Public Through the Backdoor?* Our statement also addresses H.R. 3521, *The Congressional Accountability for Regulatory Information Act of 2000*.

**Introduction**

The American Society of Safety Engineers (ASSE), is the oldest and largest Society of Safety Professionals in the world. Founded in 1911, ASSE represents nearly 33,000 dedicated safety professionals. Included in this membership are Certified Safety Professionals, Professional Engineers, ergonomists, academicians, fire protection engineers, system safety experts, industrial hygienists, physicians, occupational nurses, and an impressive collection of other disciplines, skills, and backgrounds. ASSE is dedicated to excellence, expertise, and commitment to the protection of people, property, and environment on a world-wide basis.

ASSE serves as Secretariat of seven (7) American National Standards Institute Committees (ANSI) developing safety and health standards which are used by private sector organizations as well as state/Federal governmental agencies such as MSHA, OSHA, etc. ASSE members also sit on over forty (40) additional standards development committees and the Society sponsors educational sessions on standards development. The Society also has eleven (12) technical divisions consisting of: Construction, Consultants, Engineering, Environmental, Health Care, Industrial Hygiene, International, Management, Public Sector, Risk Management and Insurance, Mining, and Transportation. The ASSE members included in these divisions are leaders in their field, with the knowledge and expertise needed to move safety and health forward on a global level.

ASSE Insights on the Hearing

ASSE has great interest in the hearing issue: *Is the Department of Labor Regulating the Public Through the Backdoor?* We will focus on how our members view the administrative procedures used by OSHA and MSHA when issuing letters of interpretation, memoranda, and other policy statements.

Our members may well request and receive more letters of interpretation from OSHA and MSHA than any other organization involved with occupational safety and health. Letters of interpretation, memoranda, and other policy statements are a significant part of the agencies' compliance and consultation assistance activities. This is something ASSE has, and always will, strongly support. It is important to employers, employees, and safety professionals that measures be taken to encourage publication of such information. Our members make decisions on daily basis, that could literally have life and death consequences, that are drawn from such cutting edge information. It is in the best interests of enhancing safety and health in the workplace that such information be readily available.

What should be of significant interest to you and the members of your esteemed subcommittee is the positive benefit such interpretative materials can have for small businesses. We believe small business is of importance to the long term security of the U.S. economy. ASSE has a Consultants Division with approximately 2,300 members. These consultants work with a significant number of small business (having under 75 employees) on safety and health issues. Safety and health consultants, as a practice, will routinely write to OSHA and other safety and health agencies for interpretative statements on behalf of their small business clients. The results have generally been excellent in that cutting edge information is received, small businesses are able to enhance their occupational safety and health program in an efficient and effective manner, and both employees and employers receive direct benefit. We see such a program as win-win for all of those involved.

ASSE strongly recommends interpretative materials should continue to be written and posted as public information since they do provide needed guidance and clarification. Some of the best safety and health materials we have seen can be of a non-binding nature. Since the Society is secretariat of seven (7) ANSI committees, and regularly writes letters of interpretation for our standards, we can directly attest to the importance in maintaining such a process. In addition, safety professionals are aware that interpretative materials are generally not binding.

ASSE Insights on H.R.3521 - Section [4-b]

The problem appears to be how to inform the general public on the difference between a binding substantive rule and public guidance information. Chairman McIntosh has introduced legislation, *The Congressional Accountability for Regulatory Information Act of 2000* (H.R.3521), which addresses this very issue.

We look forward to hearing the debate on this legislation, but point out that our overall experience with the interpretative materials published by OSHA and MSHA has been very positive. We know from past surveys and questionnaires that ASSE members generally view the process as an asset. However, that does not mean that there cannot be significant improvement. The Society has spoken out before in the past on the need for the agencies to work with organizations like ASSE on a more proactive basis when addressing such issues. We believe there is a greater need for synergy in both the public and private sectors when writing interpretative materials.

ASSE takes the position that OSHA and MSHA should continue to issue and make public interpretative documents and memoranda, and compliance assistance materials, so long as such documents: (1) are treated as "non-binding" from a legal perspective and are so marked in the future; (2) do not impose new substantive requirements that go beyond the plain language of the standard or regulation; and (3) are not used by the agency for enforcement purposes. The courts uniformly conclude that if an agency labels a document as "interpretative," it cannot be enforced in the same manner as a substantive rule. If an agency wants to enforce an "interpretation" that imposes a new, binding requirement, it must go to formal "notice-and-comment" rulemaking.

The impression of some ASSE members is that OSHA and MSHA have, on occasion, attempted to craft new regulatory requirements through interpretative documents. The courts have rejected such requirements as an invalid exercise of rulemaking authority, in violation of the Administrative Procedure Act. Although the courts will defer to the agency's regulatory interpretation "as long as it is reasonable," this deference is greater when the "interpretation" was previously set forth in writing and lesser when the interpretation is announced for the first time through an enforcement action or differs significantly from a prior published interpretation. We believe the key issue for consideration is: Does the "interpretative" requirement naturally flow from the standard's preexisting language, or does it impose a new compliance obligation that our members will be responsible for implementing in the workplace?

Although OSHA and MSHA do submit their interpretative materials to the Solicitor of Labor for review, this is not necessarily indicative of a desire to have it "stand as a legal basis" for OSHA action. Rather, it suggests that the agency does not want to depart from previously established interpretations or from precedential case law. Finally, it should be noted that the courts eschew finding that an agency is estopped from reversing a previously announced, non-binding interpretation. Thus, an employer or other member of the public relies upon agency "interpretation" at its own peril (although the existence of such a document supporting an employer's position can be helpful evidence with respect to negligence in an enforcement action). Similarly, OSHA can use a previously published interpretation as evidence that a current consistent enforcement posture is legitimate and in accordance with its longstanding interpretation of a standard or regulation.

#### Conclusion

In order to remain exempt from formal rulemaking under the Administrative Procedure Act, agency interpretative documents cannot go beyond the plain language of the standard or create a "secret" rule. If an agency desires to impose new obligations or burdens on the regulated community, it must engage in formal "notice-and-comment" rulemaking. These formal rulemaking procedures provide employers, employees and safety professionals with the opportunity to offer OSHA and MSHA valuable input and share real-world experience. However, non-binding interpretative documents also provide valuable compliance assistance to employers, workers, and safety and health professionals. By utilizing both formal substantive rulemaking and informal guidance, in a way that passes legal muster and affords adequate notice to the public as to the nature of a particular document, the end result will be an improved regulatory structure and enhancement of safety and health.

Representatives of the Society, ASSE's Governmental Affairs Committee, will be visiting Washington, DC on April 4, 2000. We hope to be able to meet with you and your staff in order to again discuss these issues.

We thank you for your attention to this matter, and if we can be of assistance, please feel free to contact the Society.

Sincerely Yours,

A handwritten signature in black ink, appearing to read 'F. Perry', written in a cursive style.

Frank H. Perry, PE, CSP  
Society President, 1999-2000

Copy To: ASSE Board of Directors  
ASSE Council on Professional Affairs  
ASSE Governmental Affairs Committee  
ASSE Contact List

Mr. MCINTOSH. Thank you very much, Ms. Abrams. Let me now ask a question. And what I think we will do in the process of this is rotate back and forth between the majority and the minority on 5 minutes of questioning. And so I will begin on our side. Question for Mr. Solano.

Now, as I mentioned in my opening statement, in 1973, the Vice President had his Reinventing Government Initiative and President Clinton issued his Executive order. Has that caused a change in the Department's approach toward issuing guidance? Is there no more emphasis on issuing guidance than there was prior to that?

Mr. SOLANO. What I would say is that the Department clearly embraces the notion and the benefit of providing meaningful compliance assistance. I am not in position to compare before or after, I just would say that it is a valuable and important part of our mission in addition to enforcement.

Mr. MCINTOSH. Well, maybe I will come to Mr. Baroody and maybe he will have some reflections on before. But there has been a dramatic increase. I mean if you look just from 1996 to 1998, there are 16 boxes in that period. And then in 1999 alone there is another 15 boxes, which is a huge increase in just 1 year. What is going on there? What is the need for those?

Mr. SOLANO. Well, first of all you did indicate a very important date. In 1996, in the SBREFA legislation Congress specifically mandated in Section 213 that we provide compliance assistance to small businesses. So it is clear that we are trying to fulfill and meet that directive from Congress. In addition, it is a part of a growing, important process of providing meaningful, helpful compliance assistance. So it is a combination.

Mr. MCINTOSH. Is 1999, typical? Can we anticipate that from 2000, and on, or is that an unusually high number?

Mr. SOLANO. Well the compliance assistance has a number of different aspects to it. The chairman and others have alluded to the boxes. Out of the boxes that are there, approximately one-third is press releases, which were required to be submitted as a part of our response to this subcommittee's request. Approximately half related to information that was part of OSHA's Technical Institute, and consists of the training materials which is used to train our Compliance Officers.

At least 90 percent of the attendees at the Technical Institute are the Inspectors. I think approximately 10 percent may be private individuals who we permit and encourage to be there. So a large part of that is—

Mr. MCINTOSH. What percent of that would be made public either on being posted on the Internet or in some other way a publication?

Mr. SOLANO. Well all of it—

Mr. MCINTOSH. Obviously the press releases are.

Mr. SOLANO. I can't give a percentage. What I can tell you is OSHA is in the process, is continuing to pursue making available, not just because of the Freedom of Information Act requirements, which talk about reading rooms for public documents, making available as much of its information on the Internet. That is part of, not only just providing compliance assistance in particular circumstances, but being an open government.

And OSHA is making more information publicly available and continuing to try and increase and improve how it makes public information and compliance assistance available.

Mr. MCINTOSH. But is it consistent? Are there some letters that are there and some aren't? And, if so, how do they choose which ones go on the Internet?

Mr. SOLANO. It is an effort that they are making to bring as much in a manageable and coherent way onto the internet. OSHA is moving as quickly as it can in that direction. Obviously not everything may be on there, but it is attempting to be open and in that process assist the public and provide public documents, not only in its official repositories but on and through the Internet.

Mr. MCINTOSH. Have you ever had anybody in the agency ask you do we have to post this on the Internet?

Mr. SOLANO. I have never had any particular question as to must it or must it not be posted on the Internet. As I understand the Freedom of Information Act, including amendments made by Congress, at least the indices for what is listed under FOIA as the reading room documents, which by law is the repository of public information, must be on the Internet.

We are trying to go beyond that in a positive way, in a helpful way. And that is what we are attempting to do.

Mr. MCINTOSH. Good, I think that is good. I would urge you to come up with some internal guidance document as to which things go on and which don't, so that everybody can operate under those standards. And it is a new territory. I encourage you to work on that.

Mr. SOLANO. And I thank the chairman for his observation and I will take that back to the Department.

Mr. MCINTOSH. Let me Mr. Baroody on that same line, did agency prior to the Reinventing Government Initiative, issue this type of guidance in as great a frequency or in as many problems with policy setting?

Mr. BAROODY. I can speak impressionistically, Mr. Chairman. I think that guidance clearly of the sort that all of us would agree is important, that is compliance assistance guidance, issued certainly during my experience at the Labor Department. But it is my clear impression that it issued in much, much lesser volume. By how much, I can't hazard a guess, but it was I think a fraction of this volume.

And there was a deliberate effort made, during my experience at the Department, to make sure that the confusion or reinterpretation or changes in law that are subject of concern before this committee did not occur. So my impression is first that the volume has increased, but what impresses us—

Mr. MCINTOSH. Would a disclaimer help make sure that there weren't uses where they were trying to interpret or change the standard?

Mr. BAROODY. I think it would, with the caveat that we are constantly impressed in American manufacturing with the agility of the legal mind in America. So how durably helpful this may be, you know better than I as a question.

Mr. MCINTOSH. Real quickly, since my time is up, Mr. Solano, do you see a problem with trying to put the disclaimer on those documents?

Mr. SOLANO. It depends on the nature of the document, the purpose and the intent of the documents. It is not clear that a one size fits all approach would be helpful in advisory opinions where people, including some of the members of the panel here have specifically asked for an answer to a particular set of facts. And I think it was touched on, even in your remarks, when we provide compliance assistance, the best interpretation based upon the act and the regulations is given. To have a disclaimer on the advisory letter may be confusing and contrary to the very purpose sought by the person who asked the question and wanted some sense of certainty and clarity.

And then the question becomes, in the enforcement area, what may or may not be the implication of our trying to give our best interpretation with a disclaimer and a matter later in enforcement litigation. So again, I think we should look at this carefully and thoughtfully. We do provide disclaimers where appropriate. We will look at that process. We will continue to work on improving that process. But a one size fits all approach may raise more concerns than the benefit, which is a worthwhile benefit, which might be obtained.

Mr. MCINTOSH. Well, I think a useful compromise would be where you don't feel the disclaimer applies. Where you are in fact interpreting the statute then follow the process in the Congressional Review Act and before issuing it make sure it is submitted to Congress. I mean that way, sure, you don't want to put it on every piece of document because sometimes you are trying to explain and interpret the law.

Mr. SOLANO. May I respond, Mr. Chairman?

Mr. MCINTOSH. Yes.

Mr. SOLANO. Again, I think the implicit assumption, and I have heard it said here, is that we engage in backdoor-rulemaking; creating legal, binding obligations and avoiding the Administrative Procedure Act. That is not our policy. That is not our practice. And we comply with the Administrative Procedure Act and the Congressional Review Act.

So I hope that it is not misunderstood that that compliance is there. Now we can indeed—

Mr. MCINTOSH. I have to respectfully disagree. I mean there has been instance after instance that is coming up recently where you all have made very substantive decisions in documents that were not submitted to Congress, they weren't put into the Federal Register and you have had to withdraw them because people pointed out that is a substantive change in the law and we never had a chance to talk about it.

That is a problem. And we need to develop procedures that prevent that from happening. Yes—

Mr. SOLANO. Well, I have answers to that because, first of all, most of the examples that were given were squarely within the heartland of what Congressman Hyde and Senator Nichols stated in the Congressional Record were exempt under the Congressional Review Act. These advisory letters or opinion letters, are like the

IRS examples provided by these Members of Congress. And the examples here were responses to specific requests, giving our best interpretation.

Now there are some instances when we were asked to reconsider them. And when we were asked to reconsider them, we did. And that is different from saying we are not complying with the Congressional Review Act. That is inherent in the process of when we are looking at a particular set of facts and the differences that people may have on the interpretation to be given to the act and the regulations.

Mr. MCINTOSH. Well, let me just, because my time is expired, be very clear on the Congressional Review Act because I wrote the provision that eventually was enacted in there. And it was very much intended to include anything, including advisory opinions, that had a future effect and were interpreted or created a binding legal obligation. And so it is when the public is confronted for the first time with a new obligation that we need to make sure it goes through the process so you have got input, you have got a chance for debate back and forth on the issue.

And then the agency makes a very considered opinion under the law. And that is really what the Congressional Review Act was intended to strengthen under the Administrative Procedures Act. These are examples that are troubling there. They were new understandings of the law. They were perceived as being burdensome by the regulated community. And that is the problem we need to address. The disclaimer may not be a panacea, it may not solve that problem, as Mr. Baroody said.

But we have got to look at this whole process and find a way to make sure that doesn't happen. Let me now turn to Mr. Kucinich and for his period of questioning.

Mr. KUCINICH. Thank you very much, Mr. Chairman. When you are speaking in terms of disclaimers, I would also like to refer back to Mr. Baroody's testimony quoting Jefferson about making sure that the language is plain and firm as to command assent. So if we get to that point of disclaimers, clarity and when disclaimers would be appropriate is something that needs to be considered so as not to create more of a problem than we had in the first place.

I think the fact that Mr. Baroody is in the unique position of having been in both the public sector and the private sector, that your presence here is meaningful and I had a couple of questions about the concern about backdoor rulemaking being a widespread problem. I think in one example you talked about this administration, the Department of Labor, changing its enforcement policy through a compliance directive, changing its interpretation to what qualifies as a repeat violation without going through the formal rulemaking procedure. One of the things I was wondering, as you have been going through that, is in your experience as the Assistant Secretary for Policy at the Department of Labor, were there any instances when the Department changed enforcement policy through a compliance directive instead of going through the official rulemaking procedure? I would just like to see if this is a creature of the institution or if its something that is kind of new.

Mr. BAROODY. My recollection, as I said in the earlier question, is that there were some guidances issued that may even have in-

volved at least a clarification of legal interpretation. I don't suggest that it didn't happen. I do suggest that we, and as I said, tried to approach those quite deliberately. I think there is a contrast between that and the more recent experience.

And I don't mean to cast aspersions about the lack of deliberation, but the very volume of activity this committee is considering suggests that much more of it is being done and the possibility for reflection on it is less than we tried to achieve when I was there.

Mr. KUCINICH. You know I am particularly interested in, you spoke about, the ergonomics rule.

Mr. BAROODY. Yes.

Mr. KUCINICH. And that it is my understanding the administration is going through a formal rulemaking procedure but you believe the administration should have provided for a longer comment period?

Mr. BAROODY. Quite a bit longer, yes sir. This is a very substantial rule.

Mr. KUCINICH. I would like to draw now on your expertise as a member of the Department of Labor. Were there any instances when the Department established ergonomics policies without using notice-and-comment procedures.

Mr. BAROODY. There was some voluntary guidance, as I recall, offered by OSHA at the Department at the time, if I could expand for a minute. That became, during OSHA's experiment during the Cooperative Compliance Program, the basis for an attempt by OSHA to impose on employers a certain category of employers, in fact not all, through the backdoor, if I could use the phrase, the requirement that they either accept the ergonomics voluntary guidance as a requirement, in effect, in their work force, or face the certainty of inspections.

When the court deliberated over that, the court found, as we had urged them to, that that was overstepping OSHA's responsibility.

Mr. KUCINICH. You know, it is interesting to hear you say that in the context of what I understand happened in 1990, when in August the Department proposed ergonomics program management guidelines for meat packing plants and didn't go through a formal rulemaking process. Now in 1990, in August, were you still at the Department?

Mr. BAROODY. In 1990, in August, to be——

Mr. KUCINICH. When those guidelines were set?

Mr. BAROODY [continuing]. To be precise, I believe, I was certainly still at the Department. I believe that my term as Assistant Secretary for Policy had by then ended.

Mr. KUCINICH. Well, the only reason I mention it is because it may be that this concern that you have expressed, and I think it is well taken, about whether or not a proposed rulemaking, a formal proposed rulemaking has occurred prior to going into issuing these, what amount to directives. It seems to me that it may happen in administrations of every political stripe.

And the value of this meeting is that as we go forward, we could face again this challenge of whether or not the proposed rulemakings have had enough of an opportunity to be considered and that policies not be pursued without issuing appropriate notice-and-comment procedures. My concern is that we not leave this

hearing with the idea that somehow this phenomenon of rule-making and of directives, which could be quite vexing, I understand, on the private sector, is new to this administration.

Because there is always going to be a dynamic tension between the regulators and the regulated. But the idea of congressional intent here is to make sure that that tension exists in order to have a process of regulation which works. You, gentlemen and ladies, bring to us this experience which helps us to make sure that the process is working more effectively. On one hand, without frustrating regulation and on the other hand, without making it so onerous that it doesn't work anyway.

So I think we see a balancing that can occur here and certainly the public is served. I just had, could I have a couple of extra minutes?

Mr. MCINTOSH. By all means, go ahead and finish your line of questioning.

Mr. KUCINICH. When you were testifying, Mr. Barody, I was wondering, no actually this would relate to, I think, Mr. Motsenbocker. I was hearing your testimony about your experience. You have 19 employees, is that right?

Mr. MOTSENBOCKER. That is correct.

Mr. KUCINICH. And when was the last time that OSHA, in your State, inspected your work place, how long ago was that?

Mr. MOTSENBOCKER. I am going to tell you and this is by memory, so I could be off by some. Probably 5 years.

Mr. KUCINICH. OK, and were you cited?

Mr. MOTSENBOCKER. No, I was not.

Mr. KUCINICH. Oh, congratulations. So there are no fines or anything?

Mr. MOTSENBOCKER. There was some things that were cleared up. Probably the biggest problem I had in that whole scenario was that the gentleman was there for 2 weeks in a 2,700 square restaurant that had burnt. And his comment was, it was in January, and his comment was, it is cold outside and it is warm in here. And he sat at a table for 2 weeks while we worked in the facility. So it was very frustrating for—

Mr. KUCINICH. I imagine it would be. Were you fined though?

Mr. MOTSENBOCKER. No, we were not fined.

Mr. KUCINICH. So there is no—

Mr. MOTSENBOCKER. That is correct.

Mr. KUCINICH. OK, well that is instructive and, you know, I appreciate you coming here from Indiana to testify. And I think the importance of hearing from people such as yourself who have to deal with the practical consequences, you know, it is important. I also think it is important when you bring to us information about the attempts to comply.

And that is the same thing that Ms. Marren, I think, was getting at. That you want to comply, right?

Mr. MOTSENBOCKER. Yes, I think, we don't have a problem, "with OSHA per se." There are a lot of good safety factors in there that we should have been doing a long time ago. I don't have a problem with that.

Mr. KUCINICH. Sometimes it helps, right?

Mr. MOTSENBOCKER. That is correct. My problem is that I think we have gotten to something else that maybe should be brought up, if I may. And the point being that, when these directives are put out, the people who are enforcing them are the ones who are changing what the meaning is down on the local levels. And I think what those, when that becomes a problem to us, that they say, this is the law.

And we have to prove that it is not the law. We have to go into the situation to try to find out whether it has been promulgated properly.

Mr. KUCINICH. I think that, my guess is that would be a problem that everyone that is being regulated has and that is that, well, do you really mean that? And you hope they don't if it is something that is not favorable. But I appreciate all of you coming here and I thank the Department for the work it is doing. Thank you.

Mr. MCINTOSH. Thank you, Mr. Kucinich. I am going to now recognize the vice chairman of the Committee, Mr. Ryan, and ask if he will yield me, say a minute and a half to followup on that?

Mr. RYAN. Yes, please, by all means.

Mr. MCINTOSH. I think Jud has raised a very interesting and important question and maybe, Mr. Solano, you can tell me what the Department's official position is. Are these guidance documents something that should be used to inform an Inspector's judgment when he is making a decision under the General Duty Clause, about whether somebody is in compliance?

Mr. SOLANO. Let us understand that directives cover the whole range of the act and the regulations. The General Duty Clause is but one part for which guidance documents may provide some assistance to the Inspector as to what to look at concerning the implications of the General Duty Clause. What I would say is—

Mr. MCINTOSH. Are they allowed to use these interpretive letters or other documents and say, here, this is what we think under the General Duty you should be doing?

Mr. SOLANO. Let me, as I said early on, in terms of enforcement for citation purposes, they are to cite for failure to comply with the act and the regulations, the substantive regulations. To the extent that the directives may be of some assistance in terms of interpretation, they are not to cite based upon a violation of the directive. It is based upon the legislative or the quasi-legislative function of the substantive rules and the act.

Directives may assist them. The other benefit is the more the directives are put on the Internet and made available, then the employers have the direct interpretation available to them. Again, citations or enforcement are not based upon or cited in regard to the directives but on the act and the regulations and the standards.

Mr. MCINTOSH. And do you send out guidance to the inspectors that under the General Duty Clause they can't use those as a definition of what the general duty is?

Mr. SOLANO. There is a specific directive that says pursuant to section 9 of the act which says that the enforcement is to be based upon the act and the regulations and the standards which have been duly adopted. That is the direction in the instruction to all OSHA Inspectors.

Mr. MCINTOSH. But it doesn't tell them don't use these non-regulatory documents in interpreting the regulation.

Mr. SOLANO. Again, the non-codified documents are an expression and interpretation of the substantive rules and regulations. It may assist them so that they may be informed on the interpretations, but when it comes down to applying the facts and the circumstances and determining whether or not to issue a citation, they are to rely on the act, the regulations and the standards. The duly, legally binding adoptions of Congress and OSHA.

Mr. MCINTOSH. Thank you. I return to Mr. Ryan for his questioning period.

Mr. FORD. I move that Mr. Ryan get a full 5 minutes, sir.

Mr. MCINTOSH. Without objection.

Mr. RYAN. Thank you very much. I would like to ask you, Professo Anthony, a few questions if I may. I would like to go back to the crux of the matter, so to speak. It seems that, you know, we have all these hearings in Congress about the reaction to regulatory actions. We have constituents, and I hope we can have some people from Wisconsin sometime up here. But it seems that we have these hearings all the time. You are from Wisconsin?

Mr. ANTHONY. My wife is from Wisconsin.

Mr. RYAN. That is half as good. But we sit here and we react constantly to legislative and non-legislative rules. And I would like to ask you, as a Professor who studies these things, to go back to how did this all begin? Where did the delegation issue arise? Is it the so-called sick chicken case, the Schechter Poultry case that opened the door for delegation to arise?

Can you just for the benefit of educating the Internet public and those of us here, tell us how this door got opened and tell us about the constitutionality of a delegation of power from the legislative branch to the executive branch? I know it is a pretty wide open question, but I think there is some interesting follow-ups to be taken from that.

Mr. ANTHONY. Well, I will give that a try, Mr. Ryan. That is a big issue. Of course, the constitution vests the legislative power in the Congress in Article 1. And it has been true through the course of history that, and increasingly that Congress has been giving power to agencies to make law in accordance with delegated power. The delegation, in order for an agency to validly make a law, has to have two parts. The agency has to have the authority over the subject matter and it also has to have the authority to issue documents, usually legislative rules, regulations that have the force of law.

And unless Congress has given this lawmaking power to the agency, the agency is acting beyond the scope of its authority. And if it issues documents that don't have the backing of the congressional authority that I have mentioned, then they can be invalidated and they are invalidated. The practice of delegation has grown since the Schechter Poultry case of 1935, stupendously, so that the power to legislate is now largely in the hands of agencies and away from Congress where it was lodged originally by the Constitution.

There are those who feel that that has gone too far. There are those who feel that particular delegations have gone too far. And

while recent cases with only a couple of exceptions have tended to affirm the power of Congress to delegate broadly, the problem still remains. And it is, in my opinion, a major problem of our system of government. As my remarks earlier indicated, although they weren't addressed to the non-delegation problem, Congress should make the laws.

And anything the agencies do should be strictly and scrupulously within the authorities that Congress has given them. And sometimes I would even criticize Congress for going too far in giving powers to the agencies to make law. The excessive delegation problem.

Mr. RYAN. Having said that, can you specifically address the non-legislative rules and how you believe they seem to be a backdoor way around Congress legislating and the executive agencies administering these rules? Specifically, how do you think the nature of the non-legislative rulemaking process helps executive agencies get around that?

Mr. ANTHONY. Well, they are not supposed to get around it. The Administrative Procedure Act is understood, I think, by everyone. And we haven't had, as far as I can tell, any disagreement on this here at the panel. That if agencies promulgate documents that go beyond a fair interpretation of the existing law, then they must use notice-and-comment procedures. They must use legislative rule-making procedures, that is procedures to generate documents that have force of law because Congress has given the agency the power to issue rules that have the force of law.

It is a lot cheaper, it is a lot easier, and it is a lot faster to issue some kind of a bulletin or memorandum, maybe in the field, maybe at a lower level within the headquarters agency. And sometimes that temptation is succumbed to.

Mr. RYAN. If I could, because I see the light moving. I think from the consumer point of view, from those who are on the receiving ends of these regulations, they are not always, it is not always very clear whether this is guidance or whether this is a legislative rule. I would like to direct the question to Mr. Baroody. Your organization has recently, successfully completed some legal actions on this delegation issue.

Could you give me just a brief update on the constitutionality today on the delegation issue going back to the Schechter Case and where you stand on this issue and your basic interpretation of the whole delegation issue as these recent court rulings materialized?

Mr. BAROODY. In all humility, no. I am neither a lawyer nor a constitutional expert. I would suggest to you that the, this non-delegation problem is a problem that is not brand new. It didn't emerge full blown in the 1990's. It is a problem with a long history. We would suggest that the real problem of volume that concerns us is not the sheer and impressive volume of the guidance that has come out of the agencies during the 1990's, but the increased volume.

It is our clear experience and perception of this guidance that it goes beyond compliance assistance to making rules, changing rules, interpreting the law and changing the law. That we think, as I said in my opening statement, poses concerns on a lot of different fronts, not least constitutional and legal. But when it comes to the

concerns of our members, I think many of them would say what Mr. Motsenbocker has said. That, when it comes to trying to run a business and understand, given that you are predisposed to want to comply with the law, how to comply with the law is an ever-changing kaleidoscopic experience.

Much of this gets down to simple definition. I mentioned a change in the definition of repeat violation, which has to do, admittedly, with multi-state situations. And we are talking about larger companies there. But Ms. Dugan mentioned FMLA. The issue there is one of simple definition. And let me just tell you, Mr. Ryan, for all of our members, whether they are large or small, the confusion inheres in a situation like the following:

Where within a 2-year period, the Department variously defined minor ailments as follows. They “are,” “ordinarily are not,” they “definitely are,” they “may be” and they “never are” serious health conditions under the act. It is impossible to comply with the best rule in the world with that ever-changing experience. That doesn’t get to the constitutional question, Mr. Ryan, I apologize.

Mr. RYAN. I think it is important to raise these issues. I think the recent court rulings that your firm has received are very, very instructive. They shed a whole new light and set a new precedent for this whole issue of delegation. It is important, I think, that we recognize that blame or whatever you may call it, can be spread to everybody. Congress passes extremely vague laws. We pass these vague laws and go home and extol the values of these vague laws, only to be on the receiving end of these laws when we represent our constituents.

And the problem we are finding is that the spirit of these laws are not necessarily being taken as intended. The spirit of the laws are not necessarily being followed through upon and they change. And now it is a case where we have the executive agencies actually writing the full force of laws that are affecting our constituents in, as you mentioned, very, very vague and ambiguous terms.

I think it is important to scale this back and, you know, widen the view of this issue and look at exactly how laws are written in the Federal Government. How they are carried through and whether or not those laws take into account the original intent of the legislation that we actually pass here in Congress.

While that is something that I think is highlighted with this hearing, what we are seeing here with this hearing and many, many others is that we are on the receiving end constantly of a flawed legislative system whereby laws are written by executive agencies that are not representative of the people through elections. And it is something that we all should take a look at.

And I can tell, Mr. Solano, you had some strong opinions on that just from looking at your face. I know my time is up but I would like to hear your thoughts on this, if you could.

Mr. MCINTOSH. We will gladly extend the gentleman’s time, I think it would be interesting to hear Mr. Solano’s comments.

Mr. SOLANO. Again, I just want to indicate and affirm we comply with the Administrative Procedure Act. We comply with the Congressional Review Act. We do not engage in creating substantive, legally binding obligations through backdoor rulemaking. We do that through the front door, through adopting rules and regula-

tions. When called upon in a long-established process of providing interpretive guidance to particular facts, we do, so under the APA, and under the CRA, through interpretive guidance or statement of particular applicability.

That means that when asked by a member of the public, including the regulated community, to give an opinion of what the act and the regulations provide for, we do respond. We think that is appropriate and we respond to the best of our ability to give the interpretations, but we do not use that vehicle as an indirect way to create legally binding obligations or substantive rules and regulations. That is not our policy. I believe that is not our practice.

So, now, to the extent that we can all improve our performance and our conduct, we embrace that and we endorse being clear and complying with the law.

Mr. RYAN. But, let me ask you this. Let me take a followup on that if I can, Mr. Solano. Since the 1996, enactment of the CRA, did the Solicitor's Officer clear guidance of each of these documents over here to my left prior to its issuance by the Department?

Mr. SOLANO. Again, I tried to give the characterization of the documents. One-third of the documents are press releases. At some form or in some ways because of the day-to-day interaction of our staff with the agencies we may have, depending on the nature of it, reviewed it and provided assistance to the individuals. Press releases are not covered under the Congressional Review Act as documents to be submitted.

I indicated that about half of them are training documents from the OSHA Training Institute. We assist our clients in providing and reviewing that information that was intended for instructional purposes. Again, the day-to-day interaction is one where we give the agencies the best advice we can. In that day-to-day interaction, I believe we comply with the Administrative Procedure Act and the Congressional Review Act. I can't guarantee 100 percent accuracy. I don't know of any organization, public or private, which could. But we strive hard and I believe we are very good at complying with the law and the spirit of the law.

Mr. RYAN. And you did read all of the training documents? It seems to me that the training documents explain how you tell people how to comply or not comply with the laws.

Mr. SOLANO. As I said, the training documents are documents for the training of our inspectors.

Mr. RYAN. Sure.

Mr. SOLANO. We are aware that these are people outside of the inspectors accepted to be in the Training Institute. There is an interaction between OSHA and Solicitor Office staff. I can't say that every page was reviewed. But through that strong working relationship with very competent professionals, and I think Mr. Baroody indicated that he believes that in the Department of Labor, when he was there and I would say while I have been there, we had and have very strong, committed, very excellent professionals who strive to comply with the law.

Mr. RYAN. Well, striving is good, but doing it is another thing, I think. But I appreciate your testimony.

Mr. MCINTOSH. Let me switch back to Mr. Ford and then we will come back.

Mr. RYAN. Thank you very much.

Mr. MCINTOSH. Mr. Ford.

Mr. FORD. I was enjoying Mr. Ryan.

Mr. MCINTOSH. You are welcome to yield him some of your time if you want.

Mr. FORD. Let me thank the panelists and thank all my colleagues and certainly thank the chairman for calling the hearing. I think it is important to note, I sincerely appreciate all the testimony. We have had some, obviously, some difference of opinions and, even here on this panel and certainly amongst the witnesses. But I do sense that there is a commitment on the part of all on the panel, or there is a belief rather on all the panel that we do need work place and safety rules, first off.

And two, we need an agency to ensure that these things are done right. But we certainly don't want them to impose unnecessary burdens on business people. I was struck by, first of all, the impressive way that the NAM's representative, your testimony, sir. In, I guess the first page you mentioned, really the inside cover, the key to economic growth and you cite some impressive statistics. The U.S. rated No. 1 in global competitiveness by the Switzerland-based Institute for Management Development.

U.S. manufacturing productivity growth averaging more than 4 percent during 1996 and 1997. How that is an improvement and increase. You talk about no sector of the economy, including the government, coverage including the government provides health care insurance coverage to a greater percentage of its employees. A sign to me that things are going extremely well.

I was even struck by the gentleman from Indiana, the construction company manager. And some of my construction management folks were on the Hill today to lobby on the Fair Act and some other issues which you might in town as well to do, sir. I was also struck in your testimony when you said that as it is, the home building industry is one of the most heavily regulated groups in the Nation, which is one of the reasons why the cost of housing and home ownership is beyond the reach of millions of Americans.

I would just say that we are undergoing, as both sides of the aisle on this Congress will take credit for, one of the greatest and most unprecedented eras of economic growth and prosperity. I would also note that in addition to home builders being one of the most heavily regulated industries, one of the other reasons, at least in the African-American community and the Hispanic community that home ownership is beyond the reach of millions of Americans has nothing to do with the regulation of the home building issue.

It also has something to do with redlining and the way credit and access to capital might be determined. But I appreciate the issues that you raise. I would ask the professor, as well as asking the Solicitor to the extent that the professor may know. I appreciate him walking through, really tracing the history for us of how non-legislative documents or the delegation of power came about.

I am a graduate of the University of Michigan Law and we like Cornell and George Mason too, but I had a good professor to walk through some of these issues as well. But Mr. Solano, you mentioned that the Department of Labor holds employers responsible for the content of DOL guidelines. And you said that employers,

when they request information, are guided, that when employers want guidance they are happy when they receive it. Do you have evidence of this happiness that you are talking about and can you say how employers are happy to hear about these things?

Mr. SOLANO. Congressman Ford, let me first of all, I want to just be very precise in the words used. We hold employers responsible not for the guidance but for the act and the regulations and the standards. And I may have misunderstood the phrase you used.

Mr. FORD. I apologize.

Mr. SOLANO. There are some documents that evidence this and there is a particular institute, I would have to get the name for you, that indicated that they do appreciate the interaction that we have. I think even the witness, Ms. Abrams, indicates that there is a give and take process under the auspices of compliance assistance that both parties find mutually beneficial.

Mr. FORD. Do you have any you can just submit to the record, just so we might be able to have some evidence of that, sir?

Mr. SOLANO. I don't have, let me please submit it, if I may, if that is OK without objection?

[The information referred to follows:]



**SUMMIT TOWER SERVICES, INC.**  
Tower Erection . Installation of Lines, Antennas, Microwaves

99502

Mr. Charles Jeffress  
Assistant Secretary of Labor  
Occupational Safety and Health Administration  
200 Constitution Ave., N.W.  
Room 5-2315  
Washington, DC 20210

May 13, 1999

April 22, 1999, Safety Seminar

Dear Mr. Jeffress:

During the latter part of March and early part of April, Mr. Tom Pontuti, assistant area director for the OSHA Cleveland, Ohio area office, and I discussed holding a joint safety meeting at our facility in Stow, Ohio.

The result, OSHA and Summit Tower Services, Inc. hosted a seminar on April 22, 1999, specifically geared toward issues involving the tower industry. We concentrated on tower safety issues including fall protection, accessing towers and hoisting personnel. The speakers, Rob Medlock, area director, and Tom Pontuti, assistant area director from the OSHA Cleveland, Ohio Office directed the meeting and spoke eloquently to a group of about 63 people from companies ranging as far away as Texas, Florida, and Pennsylvania. There were representatives from a variety of tower contractors, engineers, tower site owners, crane owners and operators, and hoist manufacturers. The meeting was kept informal so as all questions could be answered and addressed. Rob and Tom did a magnificent job answering questions, directly and to-the-point, keeping the interest of everyone in attendance.

Since the seminar, I have received an overwhelming response from the people in attendance. They've all stated how much information they received and how their opinion of OSHA has changed. One person called to thank us, because he had a visit from OSHA the following week and found it was nice to be able to see a familiar face, as well as, know exactly what information the compliance officer would need. The inspection went smoothly (and without any citations). I feel this example makes a statement that there are companies, other than ours, that are concerned about safety issues and want to be in compliance with OSHA's guidelines. Fortunately, this has been made possible by our area office reaching out to the industry.

Summit Tower Services, Inc. is a member of the National Association of Tower Erectors (NATE) and we feel very fortunate to be working along with Rob and Tom, and all of the other great people at the Cleveland Area OSHA Office, in this on-going effort to educate and promote safety within the tower industry. We hope that you could pass along this concept to districts all around the country, so that they may also work together with OSHA to prevent accidents and promote safety.

Should you have any questions and/or comments, or if you would like to further discuss our seminar, please feel free to contact me at (330) 572-2200.

Respectfully submitted,

SUMMIT TOWER SERVICES, INC.

Jocko Vermillion  
Vice President and Safety Director

Jvljp

cc: Mr. Michael Connors  
Mr. Tom Pontuti  
Mr. Rob Medlock

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MAY 17 1999

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**WASTE MANAGEMENT**

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Morrisville, PA 19067  
(215) 736-9400  
(215) 736-3205 Fax

June 24, 1999

Certified Mail  
Z 420 580 591

U.S. Department of Labor  
Occupational Health & Safety Administration  
Gateway Building, Room 2100  
3535 Market Street  
Philadelphia, Pennsylvania 19104

Attn: Marie Cassidy  
Assistant Region Director

Subject: Waste Management, Inc. Pennsylvania Region  
Supervisor Safety Training

Dear Ms. Cassidy:

On behalf of Waste Management's Pennsylvania Region, I would like to thank you for accommodating our request for a speaker at our May 5, 1999 and May 6, 1999 supervisor safety training meetings. Rayleen Mulholland's presentation was excellent both in content and delivery. She had the full attention of our supervisors and facility managers. I truly believe Rayleen's review of safety and health program management guidelines accomplished our Company's goal of conveying a supervisor's responsibility, authority and accountability under the Act.

We appreciate the time, effort and commitment that you, Ms. Mulholland and the Department extended on our behalf.

Sincerely,

Ray Delfino  
Environmental, Health & Safety Manager

C: Rayleen Mulholland, OSHA

NVF COMPANY • YORKLYN, DELAWARE 19735 • 302.239.5231  
U.S. MAIL



SEP 15 1998

REPLY TO KENNETT PLANT:  
MULBERRY & LAFAYETTE STREETS  
KENNETT SQUARE, PENNSYLVANIA 19348  
Code 215 444-2800

*LEA Good show!*  
*FXE Jim!*  
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*Henry* *Boone*

400 W. Mulberry St.  
Kennett Square, PA 19348  
Office of Corporate Safety and Health

September 11, 1998

U.S. Department of Labor  
Occupational Safety and Health Administration  
Room 2100 Gateway Bldg.  
3535 Market St.  
Philadelphia, PA 19104  
Attn: Mr. James Henry

Dear Mr. Henry,

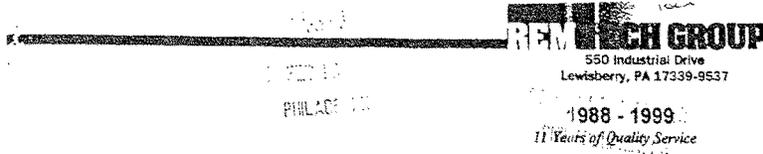
On behalf of NVF Company, Kennett Operations, I would like to thank you for helping us revise our safety and health compliance requirements for contractors and subcontractors. The literature you mailed me and the advice you gave me over the telephone provided the information I needed to acquire a better understanding of how to protect NVF Company from any liability, should a contractor employee become ill or injured on our facility.

Over the next few months, NVF Company is removing nine underground storage tanks and six above ground storage tanks. We will be replacing these with a safer, more environmentally friendly storage system for our resins and solvents. Needless to say, this project requires a great deal of pre-planning and preparedness of my own. Therefore, I can use all of the help I can get.

In addition to the established NVF Company Contractor Safety Responsibilities, the contract companies will be developing a separate safety and health plan for these projects. Because of your assistance, I now have a better understanding of what NVF Company requires in the Safety and Health plan from these particular contractors.

Once again, thank you for your assistance.

Sincerely,  
*Nicholas P. Sebastiani*  
Nicholas P. Sebastiani  
Corporate Safety Manager, NVF Company



February 11, 1999

Regional Administrator  
US Department of Labor/OSHA Reg 3  
3535 Market Street  
Suite 2100  
Philadelphia, PA 19104

RE: Thanks For The Assistance

Dear Sir or Madam:

This letter is long overdue.

I want to express my thanks for the assistance Desiree Laidlow and, more recently, Carol Ennis have provided to me over the last few years.

The video lending library is a great resource which I have been able to use many, many times in training programs which I have put on for our company, REMTECH Group. Whenever I call or even stop by without an appointment, I have always been greeted pleasantly and my concerns have been addressed promptly and completely.

This week I found out with only a few days' notice that I had a training program to perform for which I needed OSHA's videotapes. When I called to speak with Desiree Laidlow, I found out she was off that day and would be back too late to meet my deadline. So, Carol Ennis handled the request. She told me she was in the middle of something and would be leaving shortly for the day but that if I faxed in my request for videos, she would do her best for me. In less than an hour (and apparently only a short time before she was to leave), Ms. Ennis had pulled the videos for me and overnighted them to me.

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This is kind of service I've *always* gotten from Ms. Laidlow and Ms. Ennis. They are a great credit to your organization and I thought that they deserved some recognition.

At the risk of sounding patronizing, you should also know that every other person I've met or spoken with at the Philadelphia office has mirrored the professional demeanor and genuine concern for my situation I've received from Ms. Laidlow and Ms. Ennis. Too often I have been met at other agencies by indifference or worse, the attitude that I was somehow imposing on that person's time (when they were hired to serve the public!). I can't help but think that such attitudes (good or bad) originate with management. So, you, too, are to be complimented.

Thanks, again.

Sincerely,

A handwritten signature in black ink, appearing to read "Brett Robinson", written over a horizontal line.

Brett Robinson, CHMM  
Vice President

11  
✓ C:LV

**PHILLIPS PETROLEUM COMPANY**  
BARTLESVILLE, OKLAHOMA 74004  
918 651-1101

January 5, 2000

JOHN C. MIHM, P.E.  
Senior Vice President  
Downstream Technology and  
Project Development

Mr. John B. Miles, Jr.  
Regional Administrator  
Department of Labor  
Occupational Safety & Health Administration  
525 Griffin Street, Room 602  
Dallas, TX 75202-5024

Dear Mr. Miles:

I was particularly impressed with the ability of Carlos Reynolds, Marianne McGee, and Gerald Kennedy to review our Safety and Health programs in a very detailed manner while spending only a relatively brief time on site. They were clearly well versed in their areas of expertise and provided a strong focus to the audit activities. In addition, the team was also able to conduct over 100 formal and informal interviews to obtain an accurate impression of the strong employee participation in the safety program at Phillips. The entire audit team worked in a very professional and cordial manner.

The OSHA team provided constructive criticisms in areas including contractor safety programs, lockout/tagout, asbestos and lead paint practices, and specialty training that will enhance our overall HE&S-program. The team is to be congratulated for further improving our strong safety and health program. We appreciate their openness and willingness to share ideas.

It is of great importance to us to have your experts' review our program because of their experience with others and their willingness to share Best in Class ideas. It is also very motivating for our employees and our management team to make your Best Practices checklist in the Employee Involvement category. As you know, our employees' efforts are what make our program successful.

I also want to compliment your SGE program. I believe it adds tremendously to our improvement effort. Mr. Kennedy did a great job as did Mr. Reynolds and Ms. McGee.

Sincerely,



JCM:am

cc: Bill Klingbeil  
Marianne McGee

Gerald Kennedy  
Carlos Reynolds

Mr. MCINTOSH. Yes, let me in fact ask unanimous consent that we hold the record open for 10 days for that submission and any other submissions the panelists would want to make. We may, in addition, have the staff on either side, some additional questions that we will send to you and keep the record open for those answers. Seeing no objection, so ordered.

Mr. FORD. Some of the, many of the witnesses, rather, gave examples of a guidance that they were provided in an inappropriate manner. That concerns me too, and I must say there is a perception here in Washington and probably fueled by us in Washington and believed by many around the country that because those of us are Democrats have to support the Democratic administration, Republicans have to bash on that.

I must say we do a pretty good job of affirming that up here at times, but just, out of curiosity, would you mind responding to that, Mr. Solano, in terms of this inappropriate manner that, in which guidance might have been provided to not only some of the witnesses, but I would imagine Mr. Baroody and others may speak for many of their members and others around the country.

Mr. SOLANO. Well, part of the reason why, Congressman Ford, I was very particular on the language even in the nature of the question is, it is that precision that I think is very helpful and very important to dispel the notion of backdoor rulemaking or creating legally binding effect in terms of directives or guidance. The repeat violation example that was used. In fact, that is not a creature of a substantive rule or a change of the rights and obligations of members of the regulated industry to comply with the law.

It is really a part of what happens for violation in the sanction or the enforcement side, so that is not a change in the substantive obligations under the act or the regulations. It is an enforcement piece which is like an enhanced penalty, which I am very familiar with having been in law enforcement as the U.S. attorney for Colorado.

And in particular, in 1992, prior to this administration that principle was utilized and applied to one industry as an enforcement strategy by the prior administration. What happened was that same principle, which did not change the rights and obligations to comply with the act, but is again an enforcement strategy, was extended to others. But again, that is an enforcement practice which is not backdoor rulemaking. So that is one example.

In terms of the commercial tree trimming, my comment to that is again at the request of the regulated community we tried to give our best interpretation, in response to the questions and the facts provided. When they raised a question about that interpretation we agreed to revisit that interpretation. That is a part of the interchange, the give and take that goes when we try to give our best interpretation.

I view that as not a method of backdoor rulemaking, it is an engagement, at the specific request of the regulated community, to try and give an interpretation. And when there is a question about it, it is appropriate to be open, to reconsider and rethink. So those two examples, to me, represent a clarification of what happened. That is just a brief response to the question.

Mr. FORD. Mr. Chairman, if you wouldn't mind, thank you, Solicitor. And if I could have Mr. Baroody, he looks as if he is itching to say something.

Mr. MCINTOSH. Certainly.

Mr. BAROODY. I appreciate it, Mr. Ford. And with all due respect to the Solicitor of Labor and I am given to understand he is due a great deal of respect. I think that his substantive, his recent, his previous answer is interesting to all of us in this town, in this room, and those of us who must be concerned with the way the law is written and some technical requirements.

But the sum total result for a lot of my members and the business community generally is confusion nonetheless. If it is a settled matter of compliance enforcement policy, that the definition of repeat violation for years has been implemented on a one-plant basis, and then it turns out to be implemented on a multi-plant, multi-state comparison basis, it makes it very difficult for conscientious employers concerned about the safety of their employees and complying with the law, to know where to go.

A different example. It took 2 years for the Occupational Safety and Health Administration to respond to the inquiry from an employer in Texas about his obligations if people worked at home under his authority. The very fact that the Department published that letter, which as I said in my opening statement had reference to the obligations of all employers, and put it on the Internet, which we have all agreed is a good thing to do, was an implicit signal to all employers that, if they had their people in their work force work at home, they were subject to the very confusing requirements in the letter.

When the letter was withdrawn, as I said, it only compounded the confusion. But I think the issuance of the letter in the first place created the confusion and represented an extension of interpretations of the law so significant as to basically amount to a reinterpretation of the law. And the effect it induces on employer, after employer, after employer, is to tell them they ought not get into this changing work place, the changing modern work place, by contemplating having people work at home—even if it meets work/family concerns that many workers have. Or it promises to enhance productivity. So that is the problem we are talking about.

Mr. FORD. My time is up, but let me just say, when you talk about the repeat OSHA violations, I think it is important to note that the company has violated more than once. So the change here, to my understanding, was different plants. It is not as if we are, I understand some of what the Solicitor is saying and I think it is important to note, as much as I understand what you are saying, Mr. Vice President, and appreciate and respect it.

We are still talking about violations and by the same token, the fact that the way it is being enforced, I mean it doesn't really change the substance. If you break the law, you break the law. It is just they reduce the number of times you can break the law—

Mr. BAROODY. Yes, sir, but—

Mr. FORD [continuing]. They are now looking at a multi-plant. And just because you are at another plant, because you are in the plant in Memphis versus Nashville, there is still a violation. And as much as I understand what you are saying, I do think it is im-

portant for the committee to note that because I think we get a little confused at times.

Mr. BAROODY. If I may, just one point.

Mr. FORD. Yes, sir.

Mr. BAROODY. It is more than a semantic change or a compliance change. It has everything to do with the level of fines that can be imposed for "repeat violations."

Mr. FORD. But they are, I think that perhaps the adjective used to describe it, it is a repeat violation that we are talking about. Thank you, Mr. Chairman.

Mr. MCINTOSH. Let me interject real quickly, because I think this is an important discussion. The intent of the repeat violation provision is to have a very, very serious punishment if somebody is operating a plant cited for something and then fails to change it as they go forward. They are in my book a bad actor and we ought to come down on them like a ton of bricks. And I think that is what the intent of that rule is.

What, as I understand it, Mr. Baroody is saying is if somebody operates plants in different parts of the country, that second plant is not a bad actor, they just haven't had somebody come in and tell them this is the way you should be doing it.

Mr. FORD. But they all are part of the same company. I would imagine if, just like your congressional Office in Washington and mine back in Memphis, you may have multiple ones. If there is a mistake made not taking messages and you were in the District Office, I would imagine that, I mean there are uniform policies that people ought to take messages for you in both of your offices.

Mr. MCINTOSH. Right, but keep in mind, and I have been in a lot of these companies in my District where they are run essentially autonomously in one place, and it may be part of a large conglomerate, and run autonomously in another one. So we have got to be careful what we do in trying to do it. Ultimately, I think Mr. Baroody's point is you could come out either way, but do it in a way that you have notice-and-comment and everybody can—

Mr. FORD. In that I was just making a point about repeat violations. But I appreciate that.

Mr. BAROODY. If I may, the point in my prepared testimony was almost exactly what the chairman suggests. Honest people could differ as to which of the two definitions and policies, based on the definition, were preferable. The issue, as I framed it, and believe is the issue before the committee, is how an agency of the government of the United States can go from one policy to another without telling anybody. Without going through notice-and-comment rulemaking.

Mr. FORD. Right. Can I, my only point with that is they are still part of the same company. And I don't allow people in my Washington office that use profanity with constituents and allow them in my District office too. I mean there is pretty much a uniform policy. And as much as I understand what you are saying, I mean without a doubt I understand that the way the economy and the way companies are formed today and certainly with this Internet boom, I mean you can, you can have companies, obviously plants all across the Nation and really sit in one little cubby hole and control a company with the access of a computer and technology.

But my only point is that it should be a uniform policy. And to the extent that we can ensure that the Department of Labor understands that and appreciates that and passes rules that enforce it consistently, I think that is fair. The substance of a rule being changed, Mr. Baroody, I would totally agree, but I am a little puzzled when we talk about the enforcement change because it is still, I mean what is wrong in one plant is wrong in another.

And I would hope that the plant would say, gosh, we have gotten away with it once here, we have got six more because we have six additional plants. And I wouldn't dare accuse the business community of doing that. But one could walk away, after listening to the comments of some of those, and perhaps that was not the intent of what you are saying. But one could walk away construing that. And I am certain that the chairman, or Mr. Ryan or even any of the witnesses or any of your members would agree with that. But you can walk away from that with construction.

Mr. BAROODY. Well, if I may, Mr. Chairman. It may be that if we had the opportunity for extended conversation about the one policy or the other, we would agree. Clearly consistency is important, I agree with you, Mr. Ford. All we are saying is that in addition, continuity is important, I think. Consistency 1 day to the next is also important. But all we are really saying here is that such compliance policies should be discussed, and they should be discussed not just within the walls of the Labor Department, but among Labor Department officials and the public at large and the regulated community.

And in this case, this change, which had great import, was never discussed.

Mr. MCINTOSH. Let me, and then I am going to recognize Mr. Ryan again since he requested it. Let me ask you, and you can be very brief on this, Mr. Solano, if you choose. The merits aside on that particular policy, why wouldn't or why didn't the Department decide to use a notice-and-comment process to make that shift?

Mr. SOLANO. Let me be very precise because Mr. Baroody has indicated that notice-and-comment, because it was a substantive rule, applied. And our position is, is that it did not. The underlying compliance with the act was the same before and after the change from just one industry in 1992, to the larger group. So, as far as we are expected to comply with the law, the notion of how many chances they might, whether on one side or larger, be able to not have to face the prospect of enhanced penalty is different than rules requiring notice-and-comment.

Mr. MCINTOSH. But, why wouldn't you want to use that anyway?

Mr. SOLANO. Well, what I am indicating is, with all the choices for enforcement, for every manner with which we choose to enforce the regulations, the notion that before we enforce we must get notice-and-comment approval from the regulated community is not appropriate. The question becomes at what point in time do you do it and do you not. We would consider, and we do in some instances, provide notice-and-comment, not because we are required to, but because we want to obtain the opinions when it is helpful.

We are doing that on the voluntary protection program. OSHA is doing that, as an example. There can't be an ironclad rule for every circumstance.

Mr. MCINTOSH. I was just wondering if you had a good reason for it and I haven't heard one, to be honest with you. If I were sitting in your chair, I would say let us do this. That way we let everybody know the fines are going to increase effectively for repeat offenses.

Ms. DUGAN. Mr. Chairman, may I—

Mr. MCINTOSH. And you have your intended effect of making people be more careful.

Mr. SOLANO. Again, and I am going to be very clear. The change happened prior to this administration. I am being asked to defend the choice of notice-and-comment or notice, which is another procedure, in the past. There are times that we have, in this current administration, provided notice-and-comment, not because it is rule-making. And I have tried to give you examples. The VPP Program, our self-audit program in OSHA, where in fact if an employer self-audits how we will treat the results—

Mr. MCINTOSH. By the way, feel free to criticize your predecessors. I mean the key is to try to get to good government and so I appreciate that. Ms. Dugan, you had a comment.

Ms. DUGAN. Yes, I would like to add a comment, to bring it back to the discussion that I am interested in on FMLA. With the opinion letters I am very concerned that all employers do not have access to those opinion letters, yet we are expected to comply with changing definitions. And I would really like for the FMLA to correct some of the problems that we are experiencing at this point in time before we consider additional changes to FMLA.

One of those being going back to the original intent of the law related to the serious health condition and the definition of that. And I thank you for your time.

Mr. MCINTOSH. Thank you. I appreciate that. Mr. Ryan.

Mr. RYAN. Mr. Baroody, I wanted to ask you a question about part of your testimony. On Page 5 you call for strengthening the Congressional Review Act and the need for Congress to non-delegate its own lawmaking authority to the agencies leaving less room for agency discretion and abuse of discretion. In what ways do you think we should strengthen the Congressional Review Act, and specifically in my home State of Wisconsin we had a procedure in our State government where we have a bi-cameral committee which reviews final rules and regulations before they actually become published and become effective to make sure that they somewhat jive with the original intent of the legislation.

There is a bill here before us today in Congress, I think it is called the Congressional Responsibility Act, co-sponsored by J.D. Hayworth, a colleague of ours. Have you looked at that piece of legislation specifically and what other ideas did you have for strengthening the Congressional Review Act?

Mr. BAROODY. Well I haven't looked at it in detail, no sir. Let me say that the process that the Congressional Review Act represents and codified in the statute I think has had the effect of telling the agencies that they either have to do less, do it differently or do it by other means, which may be one of the reasons why we have the concern that is before this committee today.

If one has to bring rules before Congress before they can take effect, but one can achieve by other means what you might in an ear-

lier day have sought to achieve through a rulemaking, it may be that the Congressional Review Act has opened that backdoor, if you will. So provisions to strengthen it by recognizing that and trying to, I think, strengthen what is already in the original act, as I understand it, the broader, more expansive definition of rulemaking and maybe to get a clearer administration-wide policy statement from OMB to that effect that makes it clear that the agencies really need to bring everything before Congress unless there is a compelling reason that they can convince themselves they do not have to do that.

That would strengthen the act and address the sort of defensive response, if I can use that descriptive term, of the agencies. Well, perhaps that is an answer to your question. I hope so.

Mr. RYAN. Thank you.

Mr. FORD. Would the gentleman yield for just 1 second.

Mr. RYAN. Sure.

Mr. FORD. Just for Mr. Baroody, if you don't mind. Mr. Baroody, I was just a little bit intrigued just sort of thinking about our last conversation regarding the changing of enforcement. You served as, under President Reagan, God bless him right now and belated happy birthday to him.

Mr. BAROODY. Yes.

Mr. FORD. You served under President Reagan for most of his second term?

Mr. BAROODY. That is correct.

Mr. FORD. While you were Assistant Secretary for Policy, and forgive me for not knowing all of the rest of the titles, did you not change the policy, did it not, I quote, egregious policy which changed the whole policy—

Mr. BAROODY. Yes, sir, we did.

Mr. FORD [continuing]. By allowing the Department to assess greater penalties when a number of employees were endangered by the same underlying violation.

Mr. BAROODY. We did.

Mr. FORD. I didn't go to George Mason or Cornell. Explain to me how that is different from what we were just criticizing—

Mr. BAROODY. In all candor, an awful lot of my members would not, for the reasons I have already cited, see much of a difference. I don't suggest to you that the second term of the Reagan administration, just because I was there, was a golden age.

Mr. FORD. Neither am I, but I am just curious.

Mr. BAROODY. But I would suggest to you that there was much less of the kind of guidance, reinterpretation activity that we saw in the 1990's, in the latter 1980's, at the Labor Department. I don't suggest it never occurred, and for example, on guidance we worked collaboratively with HHS when we didn't think it would be possible to make rules governing blood borne pathogens to put out guidance governing blood borne pathogens because the problem was real and becoming more dramatically a concern by day.

So I don't suggest we never acted this way. We did, from time-to-time, I suppose. But I do think that we, if you will indulge me, I didn't want to go without acknowledging that the Solicitor correctly states my view. Some of the finest public servants I have ever known I encountered at the Department of Labor. And I feel

very strongly about that. I learned from them. And some of them were in Mr. Solano's department, the Solicitor's Office.

I learned from them, but not only from them, that one category of question that was always asked was what was legally permissible. What we sought to do as the management team that ran the Labor Department was introduce into the debate other questions beyond mere legal permissibility. It wasn't just what could we on the advice of lawyers, get away with doing or justify. It was what should we do particularly if what we were serious about was advancing health and safety as opposed to something else.

So thank you for giving me that opportunity to agree with Mr. Solano's characterization of the public servants at the Labor Department. It is a blessed Department in that respect.

Mr. FORD. Mr. Chairman, I didn't mean to be critical at all to Mr. Assistant Secretary, I was just curious as to the difference and you helped to explain it. I understand your goal, as I am sure all of our goals here is to try to get to a point where we don't have, the public, particularly the business community, is not faced with sort of a changing set of objectives in terms of health and safety for the workers.

Mr. BARODY. And I understand that to be the goal of this subcommittee. I really appreciate the opportunity to seek to further you in pursuing that goal.

Mr. MCINTOSH. Thank you. Let me turn now and recognize Mr. Kucinich for a round of questions.

Mr. KUCINICH. Thank you, Mr. Chairman. I was looking over a booklet from the U.S. Department of Labor Occupational Safety and Health Administration on the issue of sling safety. Slings being used to help move materials along. There is a disclaimer on the inside of this booklet right here and I would like to quote from this disclaimer. It says,

This information booklet is intended to provide a generic, non-exhaustive overview of a particular standards-related topic.

This publication does not itself alter or determine compliance responsibilities which are set forth in OSHA standards themselves and in the Occupational Safety and Health Act. Moreover, because interpretations and enforcement policy may change over time, for additional guidance on OSHA compliance requirements, the reader should consult current administrative interpretations and decisions by the Occupational Safety and Health Review Commission and the courts.

Is there anyone here that takes issue with this kind of a disclaimer? OK, now, let me continue. Let us suppose that this disclaimer simply said—

Mr. MCINTOSH. By the way, while the gentleman is finding that, let me note that would have been in the 8 percent that the staff counted as having a disclaimer. And I think you have found a very good example of that.

Mr. KUCINICH. But, well, and I appreciate the Chair's recognition that this is a very good example. And let us contrast this particular disclaimer here with a disclaimer which would say, simply, "no general applicability of future effect," or that "the document has no general applicability or future effect and is not binding on the public." I think that for those who are familiar with the issue of sling safety you want to know a little more about how to take the context of this.

And too, my concern, Mr. Chairman, is that we don't lessen the impact of this kind of a bulletin for the public by putting a disclaimer on it that might, in effect, lead people to believe, well, not give them the full understanding of what this bulletin represents, on one hand. And on the other hand, perhaps give them to believe that the information in here is in fact not, that there is no legally binding information there.

I would like to ask Mr. Solano some questions about this. When someone calls the Department of Labor for advice, for instance when they call to find out if the minimum wage applies to one of its employees, do you believe that the Department of Labor ought to clarify legal advice by saying that it is not legally binding or would this create confusion?

Mr. SOLANO. In that example, I think it might be confusing to the individual because they would want to ask for specific guidance and they would believe that they could, in some ways, take the information as helpful to them. Saying that we believe—

Mr. KUCINICH. That is just our next round of activity. I would like to go on and ask another question. When the Federal policy is stated in a bumper sticker, for example, I think it is the National Transportation and Safety Board or the Highway Safety Board has a policy which encourages people to buckle up. Would it create confusion if a little line was at the bottom of that which said it wasn't legally binding?

Mr. SOLANO. I think that goes to the question of should one size fit all and is there an appropriate circumstance for—

Mr. KUCINICH. Well, that is the point, should one size fit all?

Mr. MCINTOSH. Our campaign bumper sticker that has a little small print, paid for and authorized by.

Mr. KUCINICH. I don't know about that, but I am admiring the fact that one-third of those documents over there are press releases. We could probably learn something from the Department of Labor.

Mr. MCINTOSH. By the way, let me clarify that my staff tells me they don't think it is a third, as they were reviewing it. But you are asking a good question. Let me clarify also for the record, the statute that we are trying to work on in this is not intended to say one size fits all or you have to have a particular language that you use in the disclosure. And I think this is a good idea and my view is more is better.

Mr. KUCINICH. And I appreciate the Chair saying that and I think it is important that it comes out of this hearing that we are not saying one size fits all and that there are some cases where a simple disclaimer may suffice and others where it clearly will not. And in some cases, perhaps, a disclaimer at all is subject to question. I would like to, again, ask Mr. Solano if a small business person asks for compliance assistance and in response the Department of Labor quoted applicable statutory language and then added a stamp, in effect, stating that the document has no general applicability or future effect, it is not binding on the public.

Is it possible that a small business person could be under the misimpression that the underlying statutory language quoted in the letter is not legally binding?

Mr. SOLANO. I would be concerned that the person might assume, when we restate the standard or when we say exactly what the language of the act or the rule or standard says and we have that disclaimer, they might believe that they were free not to comply.

Mr. KUCINICH. I have one final question and that is, as SBREFA specifically states that the guidance it requires does not create new legal obligations, but it may be used to determine the reasonableness of a fine or a penalty. If a guidance letter has a stamp indicating that it has, you know, the proposed incantation, is it possible that a person reading the letter could be under the misimpression that it could not be used in court for any reason?

Mr. SOLANO. It is indeed possible that that could be an interpretation and that would be unfortunate.

Mr. KUCINICH. I raise these questions, Mr. Chairman, in the context of my deep respect for the Chair and gratitude that we brought these fine witnesses here. And in concern that as we struggle to deal with this in the context of the Congressional Review Act and the Administrative Procedure Act, that we move forward in a bi-partisan way to try to craft some language which may be of assistance to our friends in the private sector, but not in any way serve to undermine the spirit of the laws which we have taken part in passing.

Mr. MCINTOSH. I appreciate that. Let me say, in general, the intent here would be to, where appropriate, and I would like to see it in more places than not, tell the public what the agency's position is on these documents and, they are telling us they don't have legal effect, find a way of disclosing that to the public as they receive those documents. Let me now re-yeild and turn to Mr. Barr who has joined us. And I hope I don't need to use all of that.

But in terms of the guidance documents on the work at home, the one that caused all the controversy was a November 15th guidance document that has been withdrawn by Secretary Herman on January 5th. My question goes to Mr. Solano. The process within the agency when things like that are withdrawn, and I am hoping the staff will put up there the document.

In this case it was removed from the Website, but there are three other at-home guidance documents that our staff found. One on October 7th, 1993, one of June 19th, 1995, and one on February 21st, 1997. The question I have got is have those all been removed from the Website? I understand some of them are still on there with the words, under review, or some notice about being under review on the Website. And what is the policy of the agency as they withdraw these to make sure that there isn't this lingering misunderstanding by the employees or the public?

Mr. SOLANO. In response to your question as Assistant Secretary Jeffress indicated, the original letter that was the subject of controversy, the 1999 letter, overstated policy, that was withdrawn. He also indicated to the extent that there were other advisory opinions that related to the topic, they would be the subject of review. The first two that you identified have a notation on them consistent with his testimony that until the directive comes out that they are under review. The February 1997 document that you reference, and I had a copy of it in front of me just briefly, I got it just as I came into the hearing.

It appears to deal with home construction, not the topic of home work places. And to the extent that that is the case, then it would not necessarily be covered. But again, Assistant Secretary Jeffress said—

Mr. MCINTOSH. So that is still in effect?

Mr. SOLANO. Well, it deals with, as I understand it, home construction, not work-at-home, either home office or a manufacturing in a home. It dealt with the unrelated topic of construction of homes. But again, Assistant Secretary Jeffress said when the directive comes out we will review all advisory opinions to see that they comply and are consistent with the statement of the enforcement policy. Those that do not will be either rescinded or modified. Those that still are correct interpretations will be continued.

So that review process will be undertaken. I take seriously the comment, we will look at it. As I said, I just got notification of this letter as I sat down in this chair. We will look at it and, if it is appropriate to put an advisory statement on it, we will do so.

Mr. MCINTOSH. Good. And I would encourage you to work with the Secretary to come up with a procedure in which you deal with all of these to make the public aware. And some of them will be easy, as you pointed out, if they are indeed press releases. But others are more complex and I think it would be helpful for the agency moving forward to quickly put that into place.

Mr. SOLANO. Mr. Chairman, I appreciate the comments. I will directly take your comments directly to the Secretary and the senior officials of the Department. Thank you.

Mr. MCINTOSH. Great. Thank you very much. We do have a vote going on and, Mr. Ford, did you have any other question that you wanted for the panelists? I am wanting to close this by saying thank you to you all being here. We do have some other questions. I have several I didn't get to today, but I think we have covered this in great detail. And frankly, I think it is an area where Congress needs to have greater oversight to make sure the agencies are narrow in their use of these guidance documents so that they are truly helping the customer and not a backdoor way of regulating.

I appreciate everybody, especially those who traveled from afar to come here. You helped us very much illuminate this issue and its effect on people outside of the beltway. And so I appreciate that greatly. With that, I will now close the hearing and we shall be in adjournment.

Thank you.

[Whereupon, at 3:34 p.m., the subcommittee was adjourned.]

[The prepared statement of Hon. Helen Chenoweth-Hage and additional information submitted for the hearing record follow:]

**Statement of Congressman Helen Chenoweth-Hage**  
**Subcommittee on National Economic Growth,**  
**Natural Resources and Regulatory Affairs**  
**Committee on Government Reform**  
 B377 Rayburn House Office Building  
 February 15, 2000

Thank you, Chairman McIntosh. I would like to thank the Subcommittee for exploring the Department of Labor's role in the use of nonregulatory guidance documents. The subject of this hearing, "*Is the Department of Labor Regulating the Public Through the Back Door,*" will provide valuable and important insight into the creeping hand of the federal regulatory Leviathan.

Mr. Chairman, as you know, the Department of Labor has been consistent in issuing nonregulatory guidance documents that are often not clearly identified as not legally binding regulations. However, more disturbing is the fact that the Department of Labor has ignored some of the requirements of the 1996 Congressional Review Act. One of the important requirements of this law is the mandate that each agency submit any rules that have a legal effect to Congress. It simply amazes me that the Department of Labor was able to 'overlook' this requirement many time in its 1,641 guidance documents.

Mr. Chairman, as I'm sure you remember, Mr. G. Edward Deserve of the Office of Management and Budget appeared before this committee on June 17, 1998. At that time, he said,

"The Congressional Review Act had the strong support of President Clinton. It was signed on March 29, 1996. By passing this law, Congress acknowledged and assumed more responsibility for its continuing role in the regulatory system. For too long, Congress passed laws, taking credit for mandating clean air, or a safe workplace, only to question or even criticize the agency rule that implements the law. With this law, Congress will see what it has authorized, and can speak to any regulatory actions that it thinks are not true to its intent."

Mr. Chairman, it is impossible for Congress to conduct better oversight of the laws we pass if the Executive Office refuses to implement this law. The Department of Labor 'overlooked' this law many times in its 1,641 guidance documents. The Department of Transportation 'overlooked' this law many times in its 1,225 guidance documents. But then, surprises of surprises! The Environmental Protection Agency 'overlooked' this law many times in its 2,648 guidance documents!

This is unacceptable. Americans are tired of the government simply dictating new regulations and orders. We live in a Constitutional Republic based on the rule of law. The wisdom of the Founders recognized that government agencies have no authority to assert binding requirements beyond what Congress has expressly delegated to them.

Mr. Chairman, I am afraid we have reached a point that our liberty is threatened when government agencies regulate outside the procedures Congress has established to secure our liberty. The Department of Labor seems to mimic this approach, legislating through guidance documents and other non-codified dicta.

Mr. Chairman, thank you for scheduling this hearing today. I believe it is an important step in addressing the problems of executive agencies attempting to legislate through surreptitious means. This practice must stop, and I believe this subcommittee hearing will help in this respect.

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For Immediate Release  
 March 30, 1999

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### EPA Admits 'Guidance' Documents Not Binding on Public

WASHINGTON -- In response to a request by House Government Reform Subcommittee Chairman David McIntosh, the Environmental Protection Agency has acknowledged that the scores of so-called "guidance" documents it issues each year have no legal effect and are not binding.

McIntosh last December asked EPA to identify which guidance documents it will submit to Congress pursuant to the Congressional Review Act, which requires major rules to be submitted to Congress before they take effect. Under CRA, which McIntosh authored in 1996, rules are broadly defined to include not only regulatory actions subject to statutory notice and comment but also other agency actions that contain statements of general applicability and future effect designed to implement, interpret, or prescribe law or policy.

McIntosh said EPA's admission will aid America's businesses of all sizes as they comply with federal environmental laws.

"America's businesses large and small can breathe a sigh of relief," McIntosh said. "Businesses not only have to keep up with federal regulations but also with the so-called guidance documents that often accompany them. In reality, EPA has for years tried to create new regulations through the backdoor by couching them as only guidelines. Now EPA won't be able to take this secretive route."

Lisa Friedman, EPA's acting principal deputy general counsel, wrote McIntosh on March 2 that "EPA does not intend its policy statements and guidance documents to be binding and they have no binding legal effect on the public." In a footnote, Friedman also wrote that "if such documents do contain binding legal requirements, EPA considers them within the scope of the CRA and submits them to Congress."

Last December McIntosh also requested a legal analysis by EPA to support its position for any documents EPA does not intend to submit to Congress. EPA's initial Jan. 29 response failed to provide the requested legal analysis.

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BY FACSIMILE

The Honorable Carol M. Browner  
Administrator  
Environmental Protection Agency  
401 M Street, S.W.  
Washington, D.C. 20460

Dear Administrator Browner:

I am writing to express my concerns about the Environmental Protection Agency's (EPA) decision not to submit its "Final Guidance on Environmentally Preferable Purchasing for Executive Agencies" (64 FR 45810) to Congress under the Congressional Review Act (CRA).

May I assume that EPA did not submit its final guidance to Congress because, as a guidance document, it is "non-binding"? In a March 2, 1999 letter to me, EPA stated the following legal opinion regarding its guidance documents not submitted under CRA: "EPA does not intend its policy statements and guidance documents to be binding and they have no binding legal effect on the public."

While I agree with EPA's legal opinion that guidance documents are not legally binding, some agencies have at times acted as though an uncodified guidance has the force of law. In addition, agency interpretative rules, general statements of policy, and guideline documents may have major economic effects. For these reasons, the CRA was intended to cover all agency actions of general applicability and future effect, as I will further explain below.

In the case at hand, EPA's guidance interprets Executive Order 13101, "Greening the Government Through Waste Prevention, Recycling and Federal Acquisition" (63 FR 49643), which *requires* each agency to implement procurement policies that give preference to environmentally friendly products. Specifically, Section 101 of the Executive Order instructs agencies to "incorporate water prevention and recycling in the agency's daily operation and work to increase and expand markets for recovered materials through greater Federal Government preference and demand for such products."

Federal Government purchases are estimated to add more than \$200 billion to the national economy annually; therefore, the final guidance would easily qualify as a major regulatory action. Thus, the new environment-based procurement policies may have significant unintended and/or negative effects on the national economy. Congressional review seems essential.

The authors of CRA intended for such major guidance documents to be subject to Congressional review. The legislative history of CRA states that "Although agency interpretive rules, general statements of policy, guideline documents, and agency policy and procedure manuals may not be subject to the notice and comment provisions of section 553(c) of title 5, United States Code, these types of documents are covered under the Congressional review provisions of the new chapter 8 of title 5" (Statement of Rep. McIntosh, March 28, 1996, Cong. Rec. at H3005).

Since the proposed guidance requested public comments in 1995, EPA should have requested another round of public comments on its guidance before it was finalized. For several reasons, many comments dating from 1995 may not be current. For example, new research on life cycle assessment may be available, which would provide new information to assess various procurement policy designs. Without current comments from Congress and interested parties, the final guidance could be based on outdated methodologies, which may result in more expensive and less environmentally friendly procurement programs.

The need for Congressional review of the final guidance is underscored by the large number of comments (136) submitted under the proposed guidance (60 FR 50722). In fact, 53 percent of the comments (73) submitted to EPA were critical of the proposed guidelines. In general, these comments reflected the numerous problems associated with creating objective criteria to define an environmentally preferable purchase that will not unfairly discriminate against particular products. One comment from the Chemical Manufacturers Association was even concerned that, as a result of the new procurement policy, "federal agencies will arbitrarily ban certain products from federal procurement."

Comments opposing the final guidance also found that the principles in the final guidance did not adequately consider local environmental conditions. Without more specific criteria, the final guidelines could make it difficult for regional governmental offices to purchase products friendly to local environments *and* comply with Federal procurement guidelines. The Chemical Specialties Manufacturers Association, for example, state that, "a one-size-fits-all approach for environmentally preferred procurement would present significant problems for purchasing agents such as varying local environmental conditions."

Comments from domestic and international companies found that the final guidance could result in discrimination against certain types of businesses, leading to national and international trade disputes. In particular, concerns were raised that there was no objective way to determine environmentally preferable products without the use of discriminatory national "eco-seal" programs. For example, the Coalition for Truth in

Environmental Marketing Information argued that, "In practice, eco-seal systems often favor local manufacturers over international competitors by virtue of the way criteria are determined. It is particularly difficult for products/packaging from small businesses or developing countries to qualify for eco-seals."

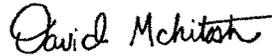
I find that EPA's August 23, 1999 response to the comments did not adequately address the concerns of parties who argued that EPA should "delay, withdraw, or abandon the proposed framework because no scientifically accepted method exists for determining environmental preferability . . ." EPA's statement that, "We do not agree with the commenter's points that the EPA did not justify the selection of environmental attributes or specify methodologies for determining environmental preferability," is unpersuasive. It does not fully address concerns that the final guidance is overly vague and provides no specific risk-assessment-based methodology for choosing one product over another. Although EPA argues that such concerns can be alleviated through pilot procurement programs, it makes no specific assurance that stakeholders will be able to participate in the step-by-step development of any such programs.

For these reasons and the problems stated above, pursuant to the Constitution and Rules X and XI of the United States House of Representatives, please explain why EPA has not submitted its final guidance to Congress for review under the CRA. Additionally, please clarify if EPA considers this uncodified guidance to be binding or not.

EPA's response should be delivered to the House Subcommittee staff in B-377 Rayburn House Office Building by no later than September 30, 1999. If you have any questions about this letter, please contact Professional Staff Member Joel Bucher at (202) 225-4407.

Thank you for your attention to this matter.

Sincerely,



David M. McIntosh  
Chairman  
Subcommittee on National Economic Growth,  
Natural Resources and Regulatory Affairs

cc: The Honorable Dan Burton  
The Honorable Dennis Kucinich



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

OCT 6 1999

OFFICE OF  
GENERAL COUNSEL

Honorable David M. McIntosh  
Chairman, Subcommittee on National Economic Growth,  
Natural Resources, and Regulatory Affairs  
House of Representatives  
Washington, DC 20515-6143

Dear Chairman McIntosh:

This letter provides a response to your letter of September 20, 1999, to Administrator Carol Browner in which you asked why the Environmental Protection Agency (EPA) did not submit its "Final Guidance on Environmentally Preferable Purchasing for Executive Agencies" ("Final Guidance") to Congress under the Congressional Review Act (CRA).

As you know, EPA consistently has interpreted the CRA to apply only to agency actions that contain binding legal requirements, regardless of what those documents are titled, or whether those documents are subject to statutory notice-and-comment rulemaking requirements. Thus, it is EPA's practice to submit to both Houses of Congress and to the Comptroller General under the CRA not only final rules promulgated by the Agency, but also documents labeled "guidance" that contain binding legal requirements, unless the documents are expressly exempted from CRA coverage pursuant to 5 U.S.C. § 804(3).

EPA did not submit the Final Guidance to Congress for review under the CRA because the Final Guidance is written, and EPA treats it, as a non-binding guidance document. In Executive Order 13101, "Greening the Government Through Waste Prevention, Recycling and Federal Acquisition," signed on September 14, 1998, President Clinton directs each agency to incorporate waste prevention and recycling in its daily operations by, among other things, identifying and purchasing environmentally preferable products and services. Section 503(a) of E.O. 13101 directs EPA to develop guidance to address environmentally preferable purchasing, and section 503(b) states that "[a]gencies are encouraged to immediately test and evaluate the principles and concepts contained in the EPA's Guidance."

EPA, as directed by E.O. 13101, developed the Final Guidance to assist agencies in meeting their obligations under E.O. 13101. As contemplated by E.O. 13101, the Final Guidance does not create any legally binding requirements. Rather, the Final Guidance provides a broad framework of issues to consider in environmentally preferable purchasing in the Federal government setting, by discussing five guiding principles developed by EPA: 1) Environment +

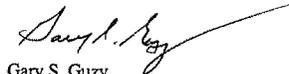
Price + Performance = Environmentally Preferable Purchasing; 2) Pollution Prevention; 3) Life Cycle Perspective/Multiple Attributes; 4) Comparison of Environmental Impacts; and 5) Environmental Performance Information.

More specifically, the Final Guidance encourages agencies to award contracts to companies that take environmental concerns into account, to consider pollution prevention in the interest of reducing pollution and reducing the cost of waste disposal and cleanup, to purchase products and services with as few negative environmental impacts in as many life cycles as possible, to compare the various environmental impacts among competing products or services, and to acquire comprehensive, accurate information about the environmental characteristics of products and services to better evaluate whether one product or service is more or less damaging than another. In addition, the Final Guidance recommends steps that each agency can take, and provides a list of resources that agencies may find useful in implementing environmentally preferable purchasing. EPA was careful to use only discretionary language in the Final Guidance so that its non-binding nature would be readily apparent to the agencies, that is, agencies retain discretion in making purchasing decisions.

As stated above, the Final Guidance, as contemplated by E.O. 13101, merely suggests and describes the methods by which agencies can comply with E.O. 13101. The Final Guidance does not include any legally binding requirements, nor does it confer any legally enforceable right on any party.

Thank you for your inquiry regarding our Final Guidance on Environmentally Preferable Purchasing for Executive Agencies. Please feel free to contact me at 260-8040, or have your staff contact Leslye Fraser at 564-5536 if we may provide you with any additional information.

Sincerely,



Gary S. Guzy  
General Counsel

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REINHOLD SANDERS, VERMONT,  
 INDEPENDENT

For Immediate Release  
 October 8, 1999

Contact: Barbara Kahlow  
 (202) 226-3058

**EPA Admits Environmental Purchasing Guidelines 'Not Binding'**

WASHINGTON – In response to a request by House Government Reform Subcommittee Chairman David McIntosh, the Environmental Protection Agency's General Counsel Gary Guzy admitted Wednesday that its new guidelines for Federal purchases have no legal effect and are not binding.

EPA's "Final Guidance on Environmentally Preferable Purchasing for Executive Agencies," would have required Federal agencies to begin implementing new procurement policies with complicated new rules for determining the environmental soundness of the products it purchases.

In an October 6<sup>th</sup> reply to Subcommittee Chairman McIntosh, EPA also said it did not submit the final guidance to Congress for review, as mandated by the Congressional Review Act, because the guidance did not contain binding legal requirements. EPA admitted that its guidance "merely suggests" and that agencies were just "encouraged" to "test and evaluate the principles and concepts" in EPA's guidance.

"Small businesses can breathe a sigh of relief," said McIntosh, (R-IN). "Business will not be subjected to arbitrary and capricious changes in the way Washington makes purchases. To preserve agency accountability to Congress, EPA cannot be permitted to unilaterally implement such wide-sweeping policies that raise the cost of Government. Taxpayers must be assured that their money is spent in a manner that is acceptable to Congress."

The Federal Government annually procures more than \$200 billion in goods and services from the private sector.

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BERNARD SANDERS, VERMONT  
 INDEPENDENT

October 8, 1999

**BY FACSIMILE**

The Honorable Henry Solano  
 Solicitor  
 Department of Labor  
 200 Constitution Avenue, N.W. - Room S2002  
 Washington, D.C. 20210

Dear Mr. Solano:

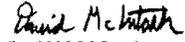
This letter begins our investigation of your agency's use of non-codified documents (such as guidance, guidelines, manuals, and handbooks) and your agency's explanation within each of them to ensure the public's understanding of their legal effect.

Pursuant to the Constitution and Rules X and XI of the United States House of Representatives, please provide the Subcommittee with the following information: (a) a complete compendium in the exact format shown in the Attachment to this letter (in both a paper version and on a computer disc), and (b) a copy of each non-codified document, including a highlighted and tabbed reference to the specific explanation in the document itself regarding its legal effect.

Your response should be delivered to the Subcommittee majority staff in B-377 Rayburn House Office Building and the minority staff in B-350A Rayburn House Office Building not later than noon on Friday, November 19, 1999. If you have any questions about this request, please call Professional Staff Member Barbara Kahlow on 226-3058.

Thank you for your attention to this request.

Sincerely,



David M. McIntosh

Chairman

Subcommittee on National Economic Growth,  
Natural Resources, and Regulatory Affairs

Attachment

cc: The Honorable Dan Burton  
The Honorable Dennis Kucinich



U.S. Department of Labor

Office of the Solicitor  
Washington, D.C. 20210

November 16, 1999

Mr. Marlo Lewis, Staff Director  
Subcommittee on National Economic Growth,  
Natural Resources and Regulatory Affairs  
Committee on Government Reform  
U. S. House of Representatives  
Washington, D.C. 20515-6143

Dear Marlo:

Thank you for the opportunity to meet with you, Barbara Kahlow, and Heather Henderson last Friday to discuss Chairman McIntosh's October 8, 1999 request for the Department's "non-codified documents (such as guidance, guidelines, manuals, and handbooks) and your agency's explanation within each of them to ensure the public's understanding of their legal effect". We also appreciate your agreement to limit the search at this time to responsive documents issued by the Occupational Safety and Health Administration (OSHA) between January 1 and October 8, 1999.

While we now have a somewhat better understanding of the Subcommittee's investigative objectives, we are still uncertain of the specific agency practices that are being scrutinized. Ms. Kahlow indicated that the Subcommittee has received complaints about OSHA. It would certainly be useful to know more information about these complaints so that OSHA can examine and, if appropriate, make changes in the way it provides guidance to the public. More fundamentally, we continue to believe that there can be far less burdensome and disruptive means -- both from the Subcommittee's and the Department's standpoint -- to study and evaluate whatever agency practices may be of concern. To this end, I believe that a continuation of discussions on these issues can be constructive and would also urge, as we did on Friday, that Minority staff be included in subsequent meetings.

During Friday's meeting, you asked that we provide you a response to two questions:

- 1) *What steps has the Department undertaken to timely comply with the Subcommittee's October 8, 1999 request?*

Upon receiving the letter, the Department immediately began to take steps to comply with the Subcommittee's request. A core group of attorneys and support staff in the Office of the Solicitor has been meeting almost daily since receipt of the Chairman's letter to study and manage the request. In addition, I immediately informed the Department's Executive Staff that we had received the request and impressed upon them the need to timely respond to the Subcommittee. They have been regularly reminded of the request and been encouraged to promptly identify difficulties they were encountering in responding.

Our initial problem, which still remains, is the vagueness and resulting potential breadth of the request. As we discussed, there is not universal agreement as to the meaning of "non-codified...guidance, guidelines, manuals, and handbooks". Given the hundreds of offices that would be involved in the search, it was important that a consistent approach be developed in the Department. In addition, since the request could potentially cover hundreds of thousands of pages of documents, the Department needed to develop a plan of document collection, review, inventory, and storage. We promptly consulted with document management and computer support personnel within the Department to prepare for this task.

We felt that it was essential to complete these initial steps before Departmental employees actually began the search. We initiated the search by contacting and convening the network of Freedom of Information and Privacy Act Coordinators in each of the Department's agencies and assigning them principal responsibility for the searches. These employees are familiar with records management in their agencies and are frequently used to coordinate records searches within their agency in response to FOIA requests and court orders. We also involved the Solicitor's Office at both the National and Regional levels to assist the agencies. We also met separately with the FOIA Coordinators, the SOL National Office Divisions, and by teleconference with the SOL Regional Offices. We continue to meet with these groups and others involved in the search.

These meetings resulted in the identification of the very legitimate problems that led us to contact you on November 5, 1999 to request the meeting that occurred last Friday, to attempt to reasonably narrow the request to manageable proportions.

2) *When does the Department believe that it can comply with the Subcommittee's request, as modified, to cover OSHA guidance issued between January 1 and October 8, 1999?*

I again appreciate your willingness to initially limit your request to OSHA guidance within the time period indicated above. Even with these limitations, fulfilling your search request is still a massive effort. There are headquarters offices, 10 regional offices, and 87 area offices within OSHA. In addition, OSHA's Office of Training and Education in Des Plaines, Illinois maintains a very large library of training material used to instruct members of the public. To be fully responsive to your request, each of these locations would have to complete a thorough search. I realize that you were trying to be helpful in limiting the search to 1999 guidance. However, documents are not routinely arranged in chronological order. It is much more typical that our guidance is arranged in a more useful, subject-matter basis (*e.g.*, occupational exposure to lead, construction-site scaffolding, etc.) Thus, agency employees would necessarily have to search all documents in a given area to locate only those issued in 1999. It is our best estimate that it would take until Friday, December 3 for OSHA to complete its initial search and collect all of the documents in a central location at our headquarters. This estimate assumes that OSHA's leadership would be diverting a substantial number of employees from their program-related duties in order to fulfill your document request.

Much more problematic than even the identification, reproduction, and review of documents is your request to tab and highlight portions regarding their legal effect, and to fill out the compendium attached to the Chairman's letter. At this time, and until the search is completed, any estimate would be pure guesswork since we do not know the final volume of documents that

are involved. However, if pressed to give an estimate, OSHA advises that it would aim to complete these additional tasks by Thursday, December 30.

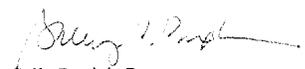
In this regard, I particularly ask that you reconsider your demand that we provide hard copies of materials that are available on the OSHA Internet Site. OSHA has estimated that it has the equivalent of 25,000 pages of material on its Internet site. Despite your apparent belief, it does not separately maintain hard copies of all items on the Internet. Upon request, we print and provide selected portions to those who do not have access to a computer or otherwise request them. The whole purpose of putting this material on the Internet is to make information about government programs more easily, quickly, and inexpensively available to the public than making them come to a government office or otherwise tracking down hard copies. Clearly, this is the direction we have been encouraged to pursue by the Congress, the President, and the public.

For these reasons, I want to strongly reiterate my suggestion that we arrange for you and your staff initially visit the offices at OSHA's headquarters at which guidance is kept. OSHA staff are willing to devote the necessary time for you to gain a realistic appreciation of the volume and types of material that are potentially subject to your request, and provide you hard-copies of documents that you need. Following that visit, I think it would be useful to have another meeting between our staffs to discuss how we can be responsive to the Subcommittee without unnecessarily devoting massive amounts of resources to this effort.

Finally, I am troubled by the underlying assumption in Friday's discussion that a large volume of informal guidance by an agency is, in itself, a problem. To the contrary, the Congress, through enactments such as the Small Business Regulatory Enforcement Act, has required the Department to give such assistance to the public. We have produced and developed much information for the public to explain existing requirements in user-friendly and user-accessible formats. Often, there are multiple issuances on the same basic subject so that they can be tailored to the specific information needs of individuals and groups. Our efforts are ongoing, have been well-received, and we plan to continue with them.

Again, I and the other Department of Labor representatives appreciated the opportunity to meet with you. Please contact Stephen Heyman, Deputy Assistant Secretary of Congressional and Intergovernmental Affairs, at 693-4600 to follow-up on any aspects of this letter or arrange further discussions.

Sincerely,



Sally Patricia Paxton  
Deputy Solicitor for National Operations

cc: Elizabeth Munding

U.S. DEPARTMENT OF LABOR  
OFFICE OF THE SOLICITOR  
WASHINGTON, D.C. 20210



December 3, 1999

**VIA FACSIMILE AND HAND DELIVERY**

Mr. Marlo Lewis  
Staff Director  
House Government Reform Subcommittee on National  
Economic Growth, Natural Resources, and Regulatory Affairs  
B-377 Rayburn House Office Building  
Washington, D.C. 20515

Dear Marlo:

I am writing to update you on our progress relating to the production of documents requested in Chairman McIntosh's letter to Henry Solano dated October 8, 1999.

As you know, based on conversations between your staff and the Department, we understand that there was an agreement to make responsive documents from the period January 1, 1999 to October 8, 1999 (hereinafter, "first production") available to the Subcommittee beginning on Monday, December 6, 1999. The Subcommittee staff has continued to insist on production of some documents today. To that end and in accordance with Barbara Kahlow's most recent request, I am enclosing five (5) sample documents for your review. We also agreed that each week we would make additional documents available until this first production was completed. We indicated that we hope to complete this first production on or before December 23, 1999.

In subsequent electronic and telephonic conversations, we learned that, despite our collective efforts to use the first production as a tool to reduce the volume of documents required to be produced, the Subcommittee will insist on a complete production of documents from OSHA during the period March 1996 through December 1998 (hereinafter "second production"). We had hoped from our initial meeting with you on November 12<sup>th</sup>, that by producing documents from OSHA for the period January 1 to October 8, 1999, we would enable your staff to make a better assessment of what other documents you would need in the future. Despite the fact that no documents have as yet been reviewed by your staff, I now understand that, irrespective of what is in the first production, the Subcommittee now insists on receiving all responsive OSHA documents dating from March 1996 to October 1999. I appreciate, however, that one outcome of your staff's review of the first production may be that it will no longer be necessary for us to tab and highlight documents in the second production as requested in the Chairman's October 8<sup>th</sup> letter.

Letter to Mr. Marlo Lewis  
December 3, 1999  
Page 2 of 3

As we have discussed with your staff, we are undertaking this second production as expeditiously as possible. We will, of course, make every effort to make this second round of documents available as early as practicable, and estimate that, assuming we do not have to tab or highlight the remaining documents, we can complete this second production by the middle of January. In spite of our estimate, I understand that the mid-January date is not acceptable to your staff and that you insist that we "submit the computerized listing" for all documents for the period March 1996 to October 1999 by December 31, 1999.

While it may be possible to produce the list of documents earlier than the documents themselves, as you will no doubt understand, the production of the list of documents is necessarily inextricably linked to the physical production of the documents themselves. In other words, asking us to produce the list by December 31<sup>st</sup> is akin to asking us to produce the documents themselves by December 31<sup>st</sup>.

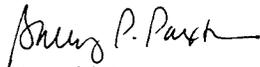
Accordingly, while we will make every effort to complete the second production as expeditiously as possible, at this point it simply may not be possible for us to do so by December 31<sup>st</sup>. As part of our ongoing efforts to cooperate with this investigation, however, we will begin production of documents from the second production once we have completed the 1999 production. We will also make every effort to complete the second production by mid-January 2000. In order to accommodate your staff's request for a more expeditious second production, we are also amenable to producing documents on a "rolling" basis each week, as we are doing in the first production, until completion. With each production, we will provide the Subcommittee with a complete listing of the documents being produced at that time. Upon completion of the entire first and second productions, we will make one single list of all documents produced.

Finally, your staff has requested that we provide you with the "estimated cost of contractor assistance with this task, broken down by component (i.e., assembling the documents, preparing the computerized list, tabbing the documents, etc.)." As you know, this information was not requested in the Chairman's October 8<sup>th</sup> letter to Henry Solano. In accordance with customary practice when new information is requested, we would simply ask that this request be made to us in a letter from the Chairman. Once we have received this request, and the production of documents is completed, we will make this information available to the Subcommittee.

Letter to Mr. Marlo Lewis  
December 3, 1999  
Page 3 of 3

Thank you for your continuing cooperation in this matter. Please feel free to contact Steve Heyman in the Office of Congressional and Intergovernmental Affairs at (202) 693-4600 if you have any questions or need additional information.

Sincerely,

A handwritten signature in black ink, appearing to read "Sally P. Paxton". The signature is fluid and cursive, with a long horizontal stroke at the end.

Sally Patricia Paxton  
Deputy Solicitor

Enclosures

cc: Elizabeth Munding

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ONE HUNDRED SIXTH CONGRESS

## Congress of the United States

### House of Representatives

#### COMMITTEE ON GOVERNMENT REFORM

#### 2157 RAYBURN HOUSE OFFICE BUILDING

#### WASHINGTON, DC 20515-6143

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INDEPENDENT

December 3, 1999

### BY FACSIMILE

The Honorable Henry Solano  
Solicitor  
Department of Labor  
200 Constitution Avenue, N.W. - Room S2002  
Washington, D.C. 20210

Dear Mr. Solano:

This letter responds to a letter just received from Deputy Solicitor Sally Paxton about our investigation of your agency's use of non-codified documents and your agency's explanation within each of them to ensure the public's understanding of their legal effect. On October 8, 1999, I asked you to provide a compendium listing all of the Department's non-codified documents and a copy of each non-codified document by November 19<sup>th</sup>.

During a November 12<sup>th</sup> meeting with Ms. Paxton and other Department staff, the Subcommittee staff agreed to narrow the scope of my request to only non-codified documents issued from March 1996 (when the Congressional Review Act was enacted) to October 1999 by the Occupational Safety and Health Administration (OSHA). They also agreed that the Department could begin by providing OSHA's 1999 documents. After the Subcommittee's review of these documents, the prior-issued documents would still need to be provided but might not need to include a tabbed indication of your agency's explanation of their legal effect.

On November 16<sup>th</sup>, the Department responded that the initial search would be completed by December 3<sup>rd</sup> (today) and that the rest should be available on December 30<sup>th</sup>. In response to my request for speedier production, a November 29<sup>th</sup> e-mail from Department staff indicated that 1999 production would be completed by December 23<sup>rd</sup> and that the prior year documents would be provided by mid-January 2000.

At 6:10 P.M. today, December 3<sup>rd</sup>, the Department provided only five sample documents. Today's letter also curiously stated that, after the Subcommittee's review of OSHA's 1999 documents, I could "make a better assessment of what other documents [I] would need in the future." On the contrary, our review will not narrow my document request because I am

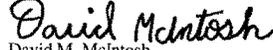
interested in the entire universe of documents the public receives. The Subcommittee's review of the 1999 documents will only help us decide if the Department needs to tab the legal effect information in each document issued prior to 1999. Therefore, I expect the Department to provide all non-codified documents issued by OSHA during the March 1996-October 1999 period. I asked for a compendium of these documents by December 31<sup>st</sup>, nearly three months after my initial request. It is inconceivable to me that the Department will be unable to provide this compendium by December 31<sup>st</sup>.

Today's letter also asked that I send a formal request for you to indicate the estimated cost of contractor assistance with this task, broken down by component. My October 8<sup>th</sup> letter did not request this information because I never dreamed that the Department would assign this task to non-departmental personnel. I assumed that each agency within the Department centrally managed its non-codified documents and that the Department legally reviewed each prior to its issuance to ensure that it clearly provided an explanation within the document to ensure the public's understanding of its legal effect. Therefore, please also indicate what percent of OSHA's non-codified documents issued from March 1996-October 1999 were not reviewed prior to their issuance by the Department's legal staff. Please also provide the contractor assistance cost information and legal review information no later than December 31<sup>st</sup>.

If you have any questions about this request, please call Professional Staff Member Barbara Kahlow on 226-3058.

Thank you for your attention to this request.

Sincerely,



David M. McIntosh

Chairman

Subcommittee on National Economic Growth,  
Natural Resources, and Regulatory Affairs

cc: The Honorable Dan Burton  
The Honorable Dennis Kucinich

U.S. Department of Labor

Office of the Solicitor  
Washington, D.C. 20210

*not 12/16/99  
By MELS...*



*w/c 804 13, 720254  
D.S.C.*

December 17, 1999

Hon. David M. McIntosh, Chairman  
Subcommittee on National Economic Growth  
Natural Resources and Regulatory Affairs  
Committee on Government Reform  
U.S. House of Representatives  
Washington, D.C. 20515-6143

Dear Chairman McIntosh:

I am writing to report that the enclosed documents, boxes 14 through 16, conclude the first stage of the Department's response to your October 8, 1999 request for OSHA's non-codified public guidance documents. This first stage covers those documents which were issued during the period of January 1 through October 8, 1999, in accordance with the Department's agreement with the Subcommittee staff. This delivery of the final three boxes of 1999 materials contains 405 documents, comprising approximately 4010 pages of material. As you requested, we have highlighted and tabbed specified passages relating to the legal effect of the material. In addition, a compendium of all documents produced to date, in the format you requested, accompanies this delivery. The sixteen boxes submitted for this first stage include a total of 805 documents, comprising approximately 17,400 pages.

As we have advised the Subcommittee staff, the Department has already commenced the remaining search, review, and indexing of such non-codified guidances for the final stage of the Department's response covering the period of March 29, 1996 through December 31, 1998. We are working diligently to achieve our goal of early completion of this demanding effort. In the event that additional requested materials relating to the first stage come to our attention during preparation of the final stage, they will be included.

Finally, in your December 3, 1999 letter, you requested the estimated cost of contractor assistance with this effort and other information. Please be assured we will provide cost and other information to you following completion of this final stage of the response.

Your staff members may contact Steve Heyman or, in his absence, Rondalyn Kane in our Office of Congressional and Intergovernmental Affairs at (202) 693-4600, with any questions.

Sincerely,

Sally Patricia Paxton  
Deputy Solicitor

Enclosures

cc: Dennis J. Kucinich, Ranking Minority Member

# 1999 Congressional Index

Congressional Exhibit Number	Box Number	Title of Non-Codified Document	Date of Issuance	Submitted to Congress under CRA?	Legally Binding?*	FR Citation or None	Number of Pages
001	1	Introduction to Industrial Hygiene for Safety Personnel #121A	01/01/1999	N	N	none	438e
002	1	OSHA Respiratory Standard	01/01/1999	N	N	none	50e
003	1	News Releases - Philadelphia Regional Area	09/22/1999	N	N	none	31e
004	1	Principles of Industrial Ventilation, Course #221	01/01/1999	N	N	none	94e
005	1	Powered Industrial Truck Operator Training Standard - Training and Reference Materials	05/12/1999	N	N	none	55
006	2	An Ergonomics System Aimed at Preventing Back Injuries in Health Care	01/01/1999	N	N	none	4
007	2	Ergonomics: The Essential Element for Effective Back Injury Prevention for Healthcare Workers	01/01/1999	N	N	none	3
008	2	Steel Erection	02/10/1999	N	N	none	7

Friday, December 17, 1999

Page 1 of 101

\* Under the Occupational Safety and Health Act, only requirements found in the Act itself, or in standards or regulations promulgated under the authority of the Act, are legally binding on the public.

e = Estimate of pages

### 1999 Congressional Index

Congressional Exhibit Number	Box Number	Title of Non-Codified Document	Date of Issuance	Submitted to Congress under CRA?	Legally Binding?*	FR Citation or None	Number of Pages
801	16	OSHA Emphasizes Fall and Electrical Safety during October	09/09/99	N	N	none	9
802	16	Appendix A Questions and Answers	01/01/99	N	N	none	11
803	16	Memorandum for Richard S. Terrill	08/05/99	N	N	none	3
804	16	Document re: Hazard Alert: Use of Seatbelt While Operating Forklifts	03/03/99	N	N	none	1
805	16	Letter to Saipan Tribune Building	08/16/99	N	N	none	4
<b>TOTALS</b>				<b>0</b>	<b>0</b>		<b>17,400</b>

12/1/99 8:23

### 1996 - 1998 Congressional Index

Congressional Exhibit Number	Box Number	Title of Non-Codified Document	Date of Issuance	Submitted to Congress under CRA?	Legally Binding?*	FR Citation or None	Number of Pages
806	17	Welcome to OSHA's Safety Pays	01/01/96	N	N	none	31e
807	17	Caring Till it Hurts	01/01/96	N	N	none	31e
808	17	Colorado Centennial Program	01/01/96	N	N	none	14
809	17	The New OSHA: Partnerships	01/01/96	N	N	none	6
810	17	The New OSHA: Getting a G.R.I.P.	01/01/96	N	N	none	11
811	17	TEEN T.A.L.K.	01/01/96	N	N	none	19
812	17	Multi-Employer Worksite Policy	01/01/96	N	N	none	1

\* Under the Occupational Safety and Health Act, only requirements found in the Act itself, or in standards or regulations promulgated under the authority of the Act, are legally binding on the public.  
e = Estimate of pages

### 1996 - 1998 Congressional Index

Congressional Exhibit Number	Box Number	Title of Non-Codified Document	Date of Issuance	Submitted to Congress under CRA?	Legally Binding?*	FR Citation or None	Number of Pages	
1635	30	Course 326--Health Hazards in the Construction Industry for Safety Personnel	01/01/96	N	N	none	400e	
1636	30	Course 313--Current OSHA Publications	01/01/96	N	N	none	438e	
1637	31	Course 600--Collateral Duty Course for Other Federal Agencies	01/01/96	N	N	none	475e	
1638	31	Course 335	01/01/96	N	N	none	400e	
1639	31	Course 201--Hazardous Materials	01/01/96	N	N	none	406e	
1640	31	Remarks of Gregory Watchman	01/01/96	N	N	none	5	
1641	31	OSHA Speeches	01/01/96	N	N	none	20	
<b>TOTALS</b>							<b>0</b>	<b>21,356</b>

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INDEPENDENT

January 5, 2000

**BY FACSIMILE**

The Honorable Henry Solano  
Solicitor  
Department of Labor  
200 Constitution Avenue, N.W. - Room S2002  
Washington, D.C. 20210

Dear Mr. Solano:

As part of our continuing investigation of your agency's use of non-codified documents, I am requesting certain information about the Occupational Safety and Health Administration's (OSHA) November 15, 1999 non-codified guidance letter to T. Trahan of CSC Credit Services on OSHA's policies concerning employees working at home. On October 8th, I asked you to provide a compendium listing all of the Department's non-codified documents and a copy of each non-codified document, including your agency's explanation, if any, within each document to ensure the public's understanding of its legal effect.

On January 3, 2000, I received the second installment of OSHA's 1,641 non-codified documents for the March 1996 (when the Congressional Review Act (CRA) was enacted) to October 1999 period. Your office acknowledged that none of the 1,641 documents were submitted for Congressional review under the CRA and that none of the 1,641 documents had any legal effect. Unfortunately, OSHA's explanation within the documents themselves was not always clear on this absence of any legal effect.

With respect to OSHA's November 15, 1999 guidance letter in response to Mr. Trahan's August 21, 1997 request for information, please answer each of the following questions:

Q1. During the over two-year development period of the guidance, was any notice of its policy development published in the Federal Register?

Q2. Was the proposed guidance subject to prior public notice and comment? If not, why not?

Q3. Will the final guidance issued in November 1999 be published in the Federal Register and, if so, when?

Q4. Was the final guidance submitted to Congress under the CRA? If not, will it be submitted to Congress and, if so, when?

Q5. Is the final guidance legally binding? If so, please indicate the precise language in the guidance that provides your agency's explanation of its legal effect.

Q6. What is the precise statutory authority, if any, for OSHA to regulate employees working at home?

Q7. What alternatives did the Department consider before issuing the guidance, which states, "The OSH Act applies to work performed by an employee in any workplace within the United States, including a workplace located in the employee's home."

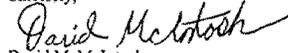
Q8. In response to the question, "Is the employer responsible for compliance with the home itself?" the guidance in part states "if work is performed in the basement space of a residence and the stairs leading to the space are unsafe, the employer could be liable if the employer knows or reasonably should have known of the dangerous condition." What is your agency's estimate of the costs associated with the entire guidance, including this provision? If unknown, why did the Department not prepare a cost estimate prior to issuance?

Q9. Due to the public outcry about this guidance, is the Department planning to revoke or revise this policy? If so, what is the timetable?

Your response should be delivered to the Subcommittee majority staff in B-377 Rayburn House Office Building and the minority staff in B-350A Rayburn House Office Building not later than noon on Wednesday, January 12, 2000. If you have any questions about this request, please call Professional Staff Member Barbara Kahlow on 226-3058.

Thank you for your attention to this request.

Sincerely,



David M. McIntosh  
Chairman

Subcommittee on National Economic Growth,  
Natural Resources, and Regulatory Affairs

cc: The Honorable Dan Burton  
The Honorable Dennis Kucinich  
The Honorable Dick Armey  
The Honorable Tom DeLay

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ONE HUNDRED SIXTH CONGRESS  
**Congress of the United States**  
 House of Representatives

COMMITTEE ON GOVERNMENT REFORM  
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 January 10, 2000

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 INDEPENDENT

**BY FACSIMILE**

The Honorable Alexis M. Herman  
 Secretary  
 Department of Labor  
 200 Constitution Avenue, N.W. - Room S2018  
 Washington, D.C. 20210

Dear Madam Secretary:

This letter follows up on my December 3, 1999 request to the Solicitor for information about a contract let by the Department of Labor (DOL) to identify all non-codified documents issued by the Occupational Safety and Health Administration's (OSHA) from 1996 to 1999. I asked for a response by December 31<sup>st</sup>. Since no reply was in hand, the Subcommittee on National Economic Growth, Natural Resources, and Regulatory Affairs staff asked the Department to simply provide the name of the contractor by 2 p.m. on January 7, 2000 for use in a meeting. Surprisingly, your staff has not provided this simple information and remains unwilling to provide it except as part of a complete answer to my December 3<sup>rd</sup> letter.

Pursuant to the Constitution and Rules X and XI of the United States House of Representatives, I request that you provide the name of the contractor **by noon tomorrow**. In addition, please provide the following information by Tuesday, January 25, 2000 about this procurement in a supplemental reply to the information being provided in response to my December 3, 1999 letter.

Q1. Was the contract competitively let? If not, why not? If there was a competition, please provide a copy of DOL's Request for Proposals or its equivalent.

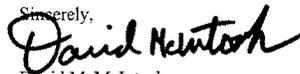
Q2. If competitively awarded, please provide information about the competing bids, including the name of each bidder and each associated bid.

Q3. Please provide a copy of the entire procurement documents for the awardee, including the bid, the contract itself, all terms and conditions of the award, and all information provided by the contractor to DOL that was not later provided to the Subcommittee.

Q4. Was DOL satisfied with the contractor's performance? If not, why not?

Your response should be delivered to the Subcommittee majority staff in B-377 Rayburn House Office Building and the minority staff in B-350A Rayburn House Office Building. If you have any questions about this request, please call Professional Staff Member Barbara Kahlow on 226-3058.

Thank you for your attention to this request.

Sincerely,  


David M. McIntosh  
Chairman  
Subcommittee on National Economic Growth,  
Natural Resources, and Regulatory Affairs

cc: The Honorable Dan Burton  
The Honorable Dennis Kucinich

U.S. DEPARTMENT OF LABOR  
OFFICE OF THE SOLICITOR  
WASHINGTON, D.C. 20210



January 11, 2000

The Honorable David M. McIntosh, Chairman  
Subcommittee on National Economic Growth  
Natural Resources and Regulatory Affairs  
Committee on Government Reform  
U.S. House of Representatives  
Washington, D.C. 20515-6143

Dear Chairman McIntosh:

I am writing in response to your December 3, 1999 and January 10, 2000 letters. These letters concern the Department's response to your October 8, 1999 request for non-codified public guidance documents issued by the Occupational Safety and Health Administration during a period of time subsequently defined as March 29, 1996 to October 8, 1999. The entire submission, delivered to the Subcommittee in five separate shipments, consisted of 31 cartons containing 1,641 documents, comprising approximately 38,756 pages of material. Certain electronic materials were also included. As you requested, we highlighted and tabbed specified passages relating to the legal effect of the material. In addition, a compendium of all documents produced, in the format you requested, has been supplied in both paper and computer diskette form.

As you know, the Department sought to negotiate with the Subcommittee greater containment of the cost associated with these activities through more targeted document disclosure. Such measures as gathering representative samples, greater Subcommittee reliance on the readily accessible OSHA website, Subcommittee review of documents in a reading-room setting, targeted tabbing and highlighting of documents, and other refining measures could have significantly reduced both the cost and magnitude of the document production, while still providing the Subcommittee with the information it needed.

In your December 3, 1999 letter, you requested information about the Department's cost of contractor assistance in responding to your request for production. While we have not yet received a final invoice, we understand the costs under that task order are expected to be \$23,600. Compliance with the Subcommittee's request necessitated the search for documents in 77 OSHA regional and area offices, as well as the National Office, OSHA Technical Institute, and two OSHA Technical Centers. In order to assemble, tab and highlight, and complete computerized data entry on 1,641 documents within the limited time frame established by the Subcommittee, we were required to open a task order with an existing contractor. That contractor was Eastern Research Group, Inc., a company located at 110 Hartwell Avenue, Lexington, Massachusetts 02421.

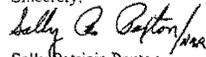
Finally, your December 3, 1999 letter also requested that we provide information on the degree of review of OSHA's non-codified documents by the Department's legal staff prior to issuance. You requested that the response specifically address the documents issued from March 1996 - October 1999 and that the response be stated as a percentage. Because of the breadth of the scope of your

request, the types of documents submitted by the Department to your Subcommittee included publications and issuances ranging from highly technical training manuals to press releases, as well as publications targeted to highly trained occupational safety and health expert audiences, conference handouts, brochures, and correspondence. As a result of this broad range of documents, issued over a nearly four-year period, a precise answer to your question cannot be reconstructed, although I can assure you that there is a close working relationship between OSHA and its lawyers.

The large amount of guidance materials provided to the Subcommittee demonstrates OSHA's deep and longstanding commitment to help the American public achieve greater health and safety results in the workplace. These efforts contribute greatly to enhanced national occupational safety and health.

Your staff members may contact Steve Heyman in our Office of Congressional and Intergovernmental Affairs at (202) 693-4600, should they have any questions or require additional information.

Sincerely,



Sally Patricia Paxton  
Deputy Solicitor

cc: The Honorable Dan Burton  
The Honorable Henry A. Waxman  
The Honorable Dennis J. Kucinich

DAN BURTON, INDIANA  
CHAIRMAN  
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INDEPENDENT

January 31, 2000

**BY FACSIMILE**

The Honorable Henry Solano  
Solicitor  
Department of Labor  
200 Constitution Avenue, N.W. - Room S2002  
Washington, D.C. 20210

Dear Mr. Solano:

In continuance of our investigation of your agency's use of non-codified documents, I would appreciate your views on Section 4 of H.R. 3521, the "Congressional Accountability for Regulatory Information Act of 2000." There will be some discussion of this proposal at our February 15, 2000 hearing entitled "Is the Department of Labor Regulating the Public Through the Backdoor?"

Your response should be delivered to the Subcommittee majority staff in B-377 Rayburn House Office Building and the minority staff in B-350A Rayburn House Office Building no later than 1:00 p.m. on Friday, February 11, 2000. If you have any questions about this request, please call Professional Staff Member Barbara Kahlow on 226-3058.

Thank you for your attention to this request.

Sincerely,



David M. McIntosh  
Chairman  
Subcommittee on National Economic Growth,  
Natural Resources, and Regulatory Affairs

cc: The Honorable Dan Burton  
The Honorable Dennis Kucinich

2/3/00

U.S. Department of Labor

Solicitor of Labor  
Washington, D.C. 20210

FEB 3 2000

The Honorable David M. McIntosh  
Chairman  
Subcommittee on National Economic Growth,  
Natural Resources, and Regulatory Affairs  
Committee on Government Reform  
U.S. House of Representatives  
Washington, D.C. 20515-6143

Dear Chairman McIntosh:

I am writing in response to your January 5, 2000 letter to me concerning the Occupational Safety and Health Administration's November 15, 1999 letter to T. Trahan of CSC Credit Services. Before answering the specific questions raised in your letter, I should discuss intervening developments, with which you are likely familiar.

OSHA's letter to Mr. Trahan was withdrawn on January 5, 2000. On January 28, 2000, OSHA Assistant Secretary Charles Jeffress testified before the Subcommittee on Oversight and Investigations of the Committee on Education and the Workforce, concerning the issues raised by the Trahan letter. A copy of his testimony is enclosed. It includes a clear and detailed reiteration of OSHA's enforcement approach in this area.

As Assistant Secretary Jeffress explained, "OSHA holds employers responsible only for work activities in home workplaces other than home offices, for example, where hazardous materials, equipment, or work processes are provided or required to be used in an employee's home." In his words, "we have not inspected offices in homes; we do not inspect offices in homes; and we have no intention of inspecting offices in homes."

With respect to the Trahan letter, Assistant Secretary Jeffress made plain that it mistakenly "suggested OSHA policy where no such policy exists" and that the Department's "internal clearance mechanisms for reviewing such letters failed to raise this issue to the appropriate level." As does Assistant Secretary Jeffress, I regret the confusion that the Trahan letter caused. I hope that this confusion has now been dispelled.

\* \* \*

You posed nine questions concerning the Trahan letter. I believe that recent developments, including the testimony of Assistant Secretary Jeffress, have addressed the concerns that underlie those questions. Nevertheless, below I set out and respond to each question:

1. *During the over two-year development period of the guidance, was any notice of its policy development published in the Federal Register?*

No notice related to the Trahan letter was published in the Federal Register. Insofar as the letter inadvertently suggested the existence of some OSHA policy other than the longstanding approach described by Assistant Secretary Jeffress, it was mistaken.

2. *Was the proposed guidance subject to public notice and comment? If not, why not?*

The Trahan letter was not issued for public notice and comment in a preliminary or proposed version. Under the Administrative Procedure Act, the letter (which, as stated below, was not legally binding) was not subject to public notice and comment.

3. *Will the final guidance issued in November 1999 be published in the Federal Register and, if so, when?*

The Trahan letter will not be published in the Federal Register. As explained, the letter was withdrawn on January 5, 2000.

4. *Was the final guidance submitted to Congress under the CRA? If not, will it be submitted to Congress and, if so, when?*

The Trahan letter was not submitted to Congress under the CRA before its withdrawal on January 5, 2000. It will not be submitted to Congress.

5. *Is the final guidance legally binding? If so, please indicate the precise language in the guidance that provides your agency's explanations of its legal effect.*

The Trahan letter, which was withdrawn on January 5, 2000, was not legally binding.

6. *What is the precise statutory authority, if any, for OSHA to regulate employees working at home?*

As the recent testimony of Assistant Secretary Jeffress explained, OSHA has not inspected offices in homes, does not inspect offices in homes, and has no intention of inspecting offices in homes. Rather, OSHA holds employers responsible only for work activities in home workplaces, other than home offices, where hazardous materials, equipment, or work processes are provided or required to be used in an employee's home.

The statutory authority for this longstanding practice is based on the Occupational Safety and Health Act of 1970. Section 2(b) of the Act of 1970 declares the purpose of the Act to be "to

assure so far as possible every working man and woman in the Nation safe and healthful working conditions." Section 4 provides that the Act applies to "employment performed in a workplace" in the United States. Section 5(a)(1) provides that every employer has a duty to "furnish to each of his employees employment and a place of employment which is free from recognized hazards." There is no provision in the Act that excludes workplaces that are located in a home.

7. *What alternatives did the Department consider before issuing the guidance, which states, "The OSH Act applies to work performed by an employee in any workplace within the United States, including a workplace located in the employee's home."*

In preparing the Trahan letter, OSHA staff focused on answering the questions posed by the employer and did not consider other alternatives. As explained above, however, the statement was mistaken insofar as it suggested OSHA policy where no such policy exists. The response to Question No. 6 explains the statutory authority for OSHA's approach in this area.

8. *In response to the question, "Is the employer responsible for compliance with the home itself?" the guidance in part states "if work is performed in the basement space of a residence and the stairs leading to the space are unsafe, the employer could be liable if the employer knows or reasonably should have known of the dangerous condition." What is your agency's estimate of the costs associated with the entire guidance, including this provision? If unknown, why did the Department not prepare a cost estimate prior to issuance?*

Prior to the issuance of the Trahan letter, the Department did not prepare an estimate of the costs associated with the letter, which was withdrawn on January 5, 2000. As stated above, the letter was not legally binding. It was perceived by OSHA staff to be a matter of providing compliance assistance to a particular employer, for which a cost estimate would not normally be necessary or appropriate.

9. *Due to the public outcry about this guidance, is the Department planning to revoke or revise this policy? If so, what is the timetable?*

As you know, the Department withdrew the Trahan letter on January 5, 2000. The enclosed statement of Assistant Secretary Jeffress articulates the Department's longstanding approach in this area. Within thirty (30) days, OSHA will draft and disseminate a directive to OSHA staff that reiterates this approach. In a meeting with Senator Enzi and members of his Subcommittee, and in testimony before the Subcommittee on Oversight and Investigations of the Committee on

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Education and the Workforce, Assistant Secretary Jeffress expressed his willingness to make the directive available to them before it is disseminated.

\*\*\*

I hope that this letter has fully addressed your questions. If you or your staff need further information, please contact Steve Heyman of the Department's Office of Congressional and Intergovernmental Affairs at (202) 693-4600.

Sincerely,

A handwritten signature in black ink, appearing to read "Henry L. Solano", with a long horizontal flourish extending to the right.

Henry L. Solano  
Solicitor of Labor

Enclosure

cc: Hon. Dennis Kucinich

**STATEMENT OF CHARLES N. JEFFRESS  
ASSISTANT SECRETARY FOR OCCUPATIONAL SAFETY AND HEALTH  
U.S. DEPARTMENT OF LABOR  
BEFORE THE  
SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS  
COMMITTEE ON EDUCATION AND THE WORKFORCE  
HOUSE OF REPRESENTATIVES**

**January 28, 2000**

Mr. Chairman, Members of the Subcommittee:

Thank you for this opportunity to clarify the Occupational Safety and Health Administration's policies regarding home-based worksites. I would like to reiterate at the outset that the Department of Labor strongly supports telecommuting and telework. As Secretary Herman has said: "Family-friendly, flexible and fair work arrangements, including telecommuting, can benefit individual employees and their families, employers and society as a whole." OSHA has taken no action -- nor will it take any action -- that would discourage this form of work.

As you know, the purpose of the Occupational Safety and Health Act of 1970 is to "assure so far as possible every working man and woman in the Nation safe and healthful working conditions..." (Sec. 2(b)). The OSH Act applies to "employment performed in a workplace" in the United States (Sec. 4). Furthermore, every employer has a duty to furnish to each of its employees "employment and a place of employment which is free from recognized hazards." (Sec. 5(a)(1)). There is no provision in the law that excludes workplaces that are located in a home. However, as I will explain, OSHA holds employers responsible only for work

activities in home workplaces other than home offices, for example, where hazardous materials, equipment, or work processes are provided or required to be used in an employee's home.

As a normal course of business, OSHA provides technical assistance to employers. We responded by letter to more than 1,900 requests last year. Congress has encouraged -- even required -- OSHA to provide compliance assistance, and employers have told us that they appreciate the help. These letters are intended to clarify the law in response to an employer's circumstances, not to establish broadly applicable new policies.

However, OSHA's November 15, 1999, letter led to some confusion about the issue of safety and health issues relating to work performed at home. To correct that, and to provide certainty to employers about our policy, we are taking this opportunity to clearly state our enforcement policy in a way that more accurately reflects our longstanding practice, as follows:

1. We believe the OSH Act does **not** apply to an employee's house or furnishings;
2. OSHA will not hold employers liable for work activities in employees' home offices;
3. OSHA does not expect employers to inspect home offices;
4. OSHA does not, and will not, inspect home offices;
5. Approximately 20 percent of employers, because of their size or industry classification, are required by the OSH Act to keep records of work-related injuries and illnesses. These employers continue to be responsible for keeping such records, regardless of whether the injuries occur in the factory, on the road, in a home office, or elsewhere, as long as they are work-related.

6. Where work other than office work is performed at home, such as manufacturing operations, employers are responsible for hazardous materials, equipment, or work processes which they provide or require to be used in an employee's home;
7. OSHA will only conduct inspections of hazardous home workplaces, such as home manufacturing, when OSHA receives a complaint or referral.

Current OSHA rules are consistent with these principles, and we would expect future rules would be as well. The bottom line is, as it has always been, that OSHA will respect the privacy of the home and expects that employers will as well.

In clarifying OSHA's policy on home offices, it is important to remember OSHA's primary mission: to reduce injuries, illnesses and fatalities among America's workers. More than 6,000 workers died on the job in our country last year, and OSHA has serious work to do in high hazard workplaces. We target our limited staff and resources to workplaces with high injury and illness rates as identified in our employer surveys and in our strategic plan.

While respecting the privacy of the home, we should keep in mind that certain types of work at home can be dangerous. Two examples from the State of California illustrate this point. First, in May 1998, 17 people were injured when fireworks being manufactured in a home exploded and destroyed the house. Second, investigations in California last year revealed that at least a dozen Silicon Valley electronics manufacturers had assigned piece work assembly to employees working in their homes. The operations commonly involved the use of lead solder and acid flux, and investigators found the home workers unprotected from hazards relating to the inhalation of soldering fumes.

Mr. Chairman, OSHA performs approximately 35,000 inspections per year. We have identified to date three cases when OSHA actually entered an employee's home to conduct inspections:

**Manns Bait Manufacturing (1978):** An employee of this Eufaula, Alabama company worked at home casting lead head jigs for fishing lures. Surrounded by her children, she poured and trimmed the jigs at the family's kitchen table. She had no training in lead hazards, nor was she aware that exposure could result in miscarriage or birth defects, damage to the central nervous system and delays in cognitive development for children. The inspection found the kitchen surfaces to be contaminated, placing the entire family at risk.

**Capco, Inc. (1985):** Employees of this Grand Junction, Colorado company were removed from their jobs building electronic capacitors after an OSHA inspection in 1984 revealed high blood lead levels. Afterwards, they began working for the company off-site at their homes. In response to complaints from seven workers, OSHA inspected the homes of three employees in 1985. Compliance Officers found workers using unguarded crimping machines, which could result in amputations. Workers were also handling adhesives without protective gloves, which could lead to dermatitis, liver damage or cancer.

**B & B Metal Processing (1991):** Employees at this Newton, Wisconsin company processed scrap metals. In 1991, after an employee was admitted to the hospital to treat

high blood levels of lead, based on a complaint, OSHA inspected and found lead exposure levels 100 times the permissible exposure level. Because the company failed to provide shower rooms for workers or laundering facilities for their lead-contaminated clothing, workers were required to take contaminated clothing home. Workers encouraged OSHA to inspect their homes for possible contamination.

I regret the confusion caused by the letter of November 15. Let me state that we have not inspected offices in homes; we do not inspect offices in homes; and we have no intention of inspecting offices in homes. The letter suggested OSHA policy where no such policy exists, and I regret the unintended consequences it caused. Our internal clearance mechanisms for reviewing such letters failed to raise this issue to the appropriate level.

As you know, Secretary Herman has announced a national dialogue on telecommuting. The Secretary has had talks with individual labor and business leaders over the past three weeks, and she will continue to meet with a variety of individuals to explore the broad social and economic effects of telecommuting. In addition, at Secretary Herman's request, the National Economic Council plans to convene an interagency working group that will include the Department of Commerce, the Small Business Administration, and other agencies to examine these issues.

Our economy and the modern workplace are undergoing revolutionary changes. Telecommunication in the information age is changing the way millions of Americans communicate, commute and work. Over the last several years, this Administration and the Congress have joined together to encourage these changes, many of which have proved beneficial

to the economy, to the environment, and to families. Clearly, we have an obligation to ensure that OSHA's role reflects the new realities of the workplace.

We look forward to continued partnership with the Congress on this and other issues that are so important to America's working families.

I thank you again for this opportunity to testify today and clarify OSHA's policy related to home-based worksites.

U.S. Department of Labor

Office of the Solicitor  
Washington, D.C. 20210

FEB 7 2000

The Honorable David M. McIntosh, Chairman  
Subcommittee on National Economic Growth,  
Natural Resources and Regulatory Affairs  
Committee on Government Reform  
U.S. House of Representatives  
Washington, D.C. 20515-6143

Dear Chairman McIntosh:

I am writing in further response to your letter of January 10, 2000, which requested information regarding the contractor that helped OSHA expedite its response to your information request.

As you know, compliance with the Subcommittee's request necessitated the search for documents in 77 OSHA regional and area offices, as well as the National Office, OSHA Technical Institute, and two OSHA Technical Centers. The entire submission, delivered to the Subcommittee in five separate shipments, consisted of 31 cartons containing 1,641 documents (plus an additional 750 letters from OSHA's Web Page listed as only two document records), comprising approximately 38,756 pages. Certain electronic materials were also included. As you requested, we highlighted and tabbed specified passages relating to the legal effect of the material. In addition, a compendium of all documents produced, in the format you requested, was supplied in both paper and computer diskette form.

The underlying assumption of your letter is that the Department let a new contract in order to comply in a timely manner with the Subcommittee's extensive document request for the period covering March 29, 1996 through October 8, 1999. In reality, in order to assemble, tab and highlight, and complete computerized data entry of records within the limited time frame established by the Subcommittee, OSHA used the services of an existing contractor. The contractor was asked to develop the new database required by the Subcommittee's request, handle physical intake of documents identified and provided by OSHA's national and field offices, assist with the physical tabbing and highlighting of documents, and conduct miscellaneous organizational tasks associated with processing the 31 boxes of documents for the Subcommittee in the time frame established by the Subcommittee.

The responses to your four specific questions follow.

*Q1. Was the contract competitively let? If not, why not? If there was a competition, please provide a copy of DOL's Request for Proposals or its equivalent.*

No new contract was let to facilitate the Subcommittee's document request. Rather, OSHA issued two task orders for an existing contractor to conduct the required work.

Copies of the task orders are attached. The underlying contract was competitively bid. A copy of the *Request for Proposal* relating to the underlying contract is attached.

*Q2. If competitively awarded, please provide information about the competing bids, including the name of each bidder and each associated bid.*

OSHA issued two task orders for an existing contractor to conduct the required work. Because this was an existing contract, there were no other bidders on this specific project. The original contract was, however, competitively bid.

*Q3. Please provide a copy of the entire procurement documents for the awardee, including the bid, the contract itself, all terms and conditions of the award, and all information provided by the contractor to DOL that was not later provided to the Subcommittee.*

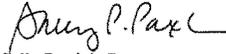
As described above, OSHA issued two task orders for an existing contractor to complete the Subcommittee's document request within the time frame established by the Subcommittee. Copies of the task orders and underlying contract are attached.

*Q4. Was DOL satisfied with the contractor's performance? If not, why not?*

DOL was satisfied with the contractor's performance. The contractor produced a professional work product within the available time. The contractor was highly organized, worked hard to meet the deadlines imposed by the Subcommittee and was able to prepare shipments of more than 38,000 pages of material to the Subcommittee within established time frames.

Your staff members may contact Steve Heyman in our Office of Congressional and Intergovernmental Affairs at (202) 693-4600, with any questions.

Sincerely,



Sally Patricia Paxton  
Deputy Solicitor

Enclosures

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ONE HUNDRED SIXTH CONGRESS

**Congress of the United States**  
**House of Representatives**

COMMITTEE ON GOVERNMENT REFORM  
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INDEPENDENT

February 16, 2000

**BY FACSIMILE**

The Honorable Henry Solano  
Solicitor  
Department of Labor  
200 Constitution Avenue, N.W. - Room S2002  
Washington, D.C. 20210

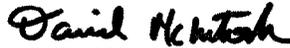
Dear Mr. Solano:

This letter follows up on yesterday's hearing on the Department's use of non-codified documents and your agency's explanation within each of them to ensure the public's understanding of their legal effect. Please provide answers to the attached questions for the hearing record not later than noon on Thursday, March 9, 2000. In addition, please prepare a revised compendium including all 3,374 documents not later than noon on Thursday, March 16, 2000. Under the column entitled "Title of Non-Codified Document," please ensure that each title is understandable to the public.

Your response should be delivered to the Subcommittee majority staff in B-377 Rayburn House Office Building and the minority staff in B-350A Rayburn House Office Building. If you have any questions about this request, please call Professional Staff Member Barbara Kahlow on 226-3058.

Thank you for your attention to this request.

Sincerely,



David M. McIntosh  
Chairman  
Subcommittee on National Economic Growth,  
Natural Resources, and Regulatory Affairs

Attachment

cc: The Honorable Dan Burton  
The Honorable Dennis Kucinich

- Q1. Gore's Reinventing Government. Since 1993, Vice President Gore has led a "Reinventing Government" initiative, including implementation of President Clinton's 1993 Executive Order 12862, entitled "Setting Customer Service Standards."
- a. Has the Vice President's Reinventing Government initiative changed the way DOL has approached issuing guidance?
  - b. The Occupational Safety and Health Administration (OSHA) issued 15 boxes worth of guidance during the 3-year 1996-98 period and 16 boxes worth of guidance in 1999 alone. To what extent is this explosive growth driven by the "customer service" orientation of the Reinventing Government initiative?
  - c. What do you estimate was the annual volume of guidance during the preceding 12-year Reagan-Bush period?
- Q2. Absence of Indication of No Legal Effect. We asked the Department of Labor (DOL) to tab and highlight all statements within OSHA's guidance documents that inform the public of the legal effect of the documents. Our investigation revealed that only 8% of the 1,176 guidance documents issued by OSHA during 1999 had any indication of their legal effect (although many of them were unclear), and 92% had no indication whatsoever. Also, only 5% had any indication of their legal effect at the beginning of the document, which is the logical and most useful place for such a statement. For example, DOL's first guidance document (with 1,267 pages) has a footnote indication about legal effect on page 582. Additionally, the Department admitted that none of the 3,374 OSHA guidance documents issued since the 1996 enactment of the Congressional Review Act (CRA) were submitted to Congress for review and none have any legal effect whatsoever.
- a. Since the 1996 enactment of the CRA, did the Solicitor's office clear each guidance document prior to its issuance by the Department? If not, why not? What percent of the Department's guidance documents was reviewed by at least one attorney in the Solicitor's office prior to issuance?
  - b. Since our investigation of OSHA's 1999 guidance documents revealed that only 8% have any indication of legal effect, what is your estimate of the percent of guidance documents issued throughout the whole Department since 1996 without any indication of legal effect?
  - c. Is any bureau within the Department doing an especially good job or poor job presenting this essential information to the public? Which are doing a poor job?
  - d. What controls does the Solicitor's Office have in effect to remedy this problem?
    - (1) For all guidance documents issued after the October 1999 start of our investigation?

(2) For all guidance documents issued after the 1996 CRA and before the October 1999 start of our investigation?

(3) When will each of these guidance documents be appropriately revised to ensure the public understands they do not have any legal effect?

(4) If they will not be revised, how do you plan to clarify their legal standing to the public?

e. What is your estimate of the costs to the Department of producing the 3,374 guidance documents?

f. How many employees were involved in producing the 3,374 guidance documents? How many FTEs were involved in this production?

g. What is your estimate of the costs to the regulated public of DOL's 3,374 guidance documents?

Q3. OMB's CRA Guidance.

a. Do you see a need for the Office of Management and Budget (OMB) to expand its CRA guidance to ensure that the agencies submit all guidance documents with any general applicability or legal effect to Congress for review, as required by law?

b. Do you see a need for OMB to expand its CRA guidance to ensure that the public understands that agency guidance documents not submitted to Congress under the CRA are not legally binding?

c. Do all DOL bureaus understand that, under the CRA, interpretive rules, policy statements, policy clarifications, guidance, guidelines, policy directives, enforcement policies, opinion letters, question-and-answer documents, and other such documents with any general applicability or future effect need to be submitted to Congress for review?

d. If clear within DOL, do you believe that the other agencies are entirely clear about what documents need to be submitted to Congress under the CRA?

Q4. Possible Statutory Fix. On January 24, 2000, I introduced H.R. 3521 which includes a proposed statutory fix to ensure the public's understanding of the legal effect of agencies' noncodified guidance documents. The proposal is to state a Miranda-type disclaimer on the first page of each guidance document. On January 31st, I wrote the General Counsels of the Department of Transportation and EPA and you, asking for the Administration's official views by February 11th.

- a. What is your view of this proposal (in Section 4, entitled "Disclosure of Nonbinding Effect of Guidance Documents")?
- b. Do you have any other ideas for a statutory fix to ensure the public's understanding?
- Q5. OSHA's Work-At-Home Guidance. On January 5, 2000, I wrote you a letter about OSHA's November 15, 1999 guidance document regarding work-at-home employees, which was withdrawn by Secretary Herman later on January 5th. Why has the Department not withdrawn its October 7, 1993, June 19, 1995, and February 21, 1997 work-at-home guidance documents on this subject?
- Q6. OSHA's Arborists Guidance.
- a. Please explain why DOL issued and then why DOL withdrew its March 4, 1998 and December 13, 1999 guidance documents relating to arborists. The 1998 interpretation letter remained on DOL's website for years after it was withdrawn; in fact, it was only removed earlier this month, possibly in anticipation of the February 15, 2000 hearing.
- b. Was the threat of lawsuits by the National Arborist Association the principal reason for the June 22, 1998 and January 31, 2000 withdrawals?
- c. Isn't leaving withdrawn interpretation letters on your website just another backdoor method of regulating industry?
- d. Did you ever post the two withdrawal letters on your website? If not, why not?
- Q7. Withdrawn Guidance.
- a. Besides OSHA's 1999 work-at-home guidance and OSHA's 1998 and 1999 arborists guidance, what other DOL guidance documents have been withdrawn since March 1996 and under what circumstances?
- b. Did DOL ever post these other withdrawal letters? If not, why not? Please provide complete details for each case for the record.
- Q8. Application of PSM Standard to Oil and Gas Production Facilities. On November 4, 1999, OSHA rescinded three earlier letters of interpretation (8/26/92, 5/5/93 & 11/4/93) which excluded oil and gas production facilities from the Process Safety Management (PSM) standard (29 CFR 1910.119). After industry questioned OSHA's policy change, pointing out its inconsistency with OSHA's May 29, 1998 policy interpretation, OSHA withdrew its November 4, 1999 memorandum. On December 20th, OSHA issued a new memorandum (curiously dated November 20th) which removed the objectionable policy change. Please explain DOL's policymaking process, which resulted in three rescissions, one inconsistency, and one withdrawal on the same subject all within a one-month period.

- Q9. Family and Medical Leave Act Guidance. On April 7, 1995, the Employment Standards Administration (ESA) issued an interpretive letter, stating that the common cold, the flu, etc., are minor illnesses and are not covered by the Family and Medical Leave Act (FMLA). Then, on December 12, 1996, ESA changed its mind and issued a letter stating that the common cold and the flu are “serious health conditions” if they last more than three consecutive calendar days and involve continuing treatment (such as an antibiotic or a follow-up doctor’s appointment).
- a. Would you say that the 1996 letter contradicts the language and intent of the FMLA -- especially in light of the House Report which stated, “The term ‘serious health condition’ is not intended to cover short-term conditions for which treatment and recovery are very brief”?
- b. Isn’t that exactly the kind of change in interpretation (i.e., an interpretation that changes an individual’s or organization’s rights or obligations) that should be submitted to Congress under the CRA and undergo Administrative Procedure Act (APA) notice-and-comment rulemaking procedures?
- Q10. Stock Options Guidance. Stock options are increasingly an important part of compensation, especially for new high technology companies. On February 12, 1999, ESA issued a Fair Labor Standards Act (FLSA) nonregulatory guidance opinion letter applying the overtime requirements of the Act to a stock option program proposed by an employer for his employees.
- a. Since the exact value of stock options is often difficult to determine, wouldn’t the easiest way for employers to comply be to stop offering stock options for employees subject to the overtime requirements?
- b. Shouldn’t a regulatory policy change such as this be subject to public notice and comment?
- Q11. Ergonomics Guidance and Enforcement.
- a. Since OSHA has not yet issued a rule on ergonomics, why did OSHA issue nearly 25 ergonomics guidance documents in 1999?
- b. Are you satisfied that it is clear to the regulated public that those documents have no legal effect?
- c. Has the Solicitor’s Office reviewed the 37 guidance documents on OSHA’s Ergonomics website to ensure that the public is clear about the absence of any legal effect for them? If not, why not?

d. Despite the fact that DOL has no ergonomics rule, how many enforcement actions against employers has DOL taken for ergonomics problems?

e. Have any penalties and fines been issued against these employers? If so, what is the total assessment to date?

f. The National Legal Center for the Public Interest stated that, “[u]p to 1994 [OSHA] issued more than 430 citations for alleged ergonomics hazards.” What is the relationship between DOL’s not-legally-effective guidance documents and its enforcement actions? Do employers feel an unlegislated compulsion to comply with the guidance documents?

Q12. Augmentation of DOL FTEs by Use of Contractors. On December 3, 1999, we questioned DOL about its using a contractor to compile its OSHA nonregulatory guidance documents instead of doing the job with its own employees. On February 7, 2000, DOL finally provided a copy of its contract for this work. DOL added tasks to an existing contract instead of competing the work. The nearly \$1 million existing contract with Eastern Research Group, renewable for 4 additional 1-year periods, asks the contractor to perform services for OSHA on a “task order” basis. Tasks include analyzing data, assessing economic impact, estimating benefits, conducting evaluations, and doing other regulatory work.

a. How many contractors does DOL use to augment its 17,000 FTEs?

b. What is the total number of dollars awarded to contractors for work which could be done by DOL employees?

c. What role did the Eastern Research Group or any other contractor have in developing DOL’s proposed ergonomics rule?

Q13. Guidance for Ann Landers-Type Questions. On September 23, 1999, OSHA issued guidance relating to a possible injury as a result of being struck by a bucket when it is being lowered to the ground. On June 16, 1999, OSHA issued guidance relating to a scene depicted in a newspaper photograph. On December 31, 1998, OSHA issued guidance relating to use of western hard hats “because hot items could fall into the brim.” On December 11, 1996, OSHA issued guidance on whether an employer could be cited by OSHA when an employee trained in first aid panics in an emergency situation. Do you feel that the Department’s reply to these Ann Landers-type “what if” letters is an appropriate expenditure of taxpayer dollars?

Q14. Types of OSHA Guidance Documents. To assist us in better understanding DOL's submission, please complete the following table. Please include each category of guidance issued during the 1993-1999 study period and included in the 38,756 pages of guidance submitted to us.

Category of Guidance	# of the Documents 3/96-10/99	# of Pages
Compliance directives		
Compliance guides		
Interpretation letters & memos		
Manuals		
News releases		
Question-and-answers		
Training manuals		
...		
...		
...		
<b>TOTAL</b>	<b>3,374</b>	<b>38,756</b>

U.S. Department of Labor

Solicitor of Labor  
Washington, D.C. 20210

MAR 16 2000

The Honorable David M. McIntosh  
Chairman  
Subcommittee on National Economic Growth,  
Natural Resources, and Regulatory Affairs  
Committee on Government Reform  
U.S. House of Representatives  
Washington, D.C. 20515

Dear Chairman McIntosh:

This letter responds to your request for our views on section 4 of H.R. 3521, entitled "Congressional Accountability for Regulatory Information Act of 2000."

Section 4, which has the heading "Disclosure of Nonbinding Effect of Guidance Documents," would amend the Congressional Review Act to provide:

The head of an agency shall include on the first page of each statement published by the agency that is not a rule a notice that the statement has no general applicability or future effect (or both), as applicable, and is not binding on the public.

We understand that section 4 is intended generally to ensure that the public is not misled regarding the effect of agency documents (such as guidance, guidelines, manuals, and handbooks).

The Department of Labor does not mislead the public in our guidance documents. These documents are not used or meant to create or modify legal obligations or rights. The Department only enforces statutes and regulations; it does not take enforcement action for failure to follow information contained in guidance. Where appropriate we do include disclaimers in our documents. For example, disclaimers are used to avoid confusion when a document contains a description of best practices that might be misconstrued by the intended audience as a statement about the requirements of the law.

While we understand the intent of this section, we have serious concerns that it could impede our administration of the Nation's labor laws. A mandatory, one-size-fits-all disclaimer on the first page of all of our statements that are not rules could have the unintended consequence of causing confusion among employers

and workers regarding their rights and obligations, instead of providing clarity.

As I indicated in my testimony before your Subcommittee, issuing guidance to our stakeholders is an important part of our responsibility to faithfully execute the laws that Congress has passed. Our guidance takes many forms - oral advice, electronic aids, posters, and written materials including brochures, fact-sheets, letters responding to individual inquiries, and guidance and policy documents. Companies, labor organizations, individuals, and others regularly ask for guidance, which we routinely provide. Congress has expressed its own endorsement of this practice by enacting the Small Business Regulatory Enforcement Act (SBREFA), of which the Congressional Review Act was a part, which requires agencies to issue guidance materials to encourage voluntary compliance. SBREFA requires that we strike a balance between enforcement and compliance assistance by encouraging voluntary compliance through outreach and assistance.

We believe that including a disclaimer on all statements that are not rules under section 804 of the Congressional Review Act would hinder our efforts to administer the law.

For example, a disclaimer on a poster that encourages workers to comply with the Occupational Safety and Health Act by wearing protective clothing or equipment, such as a respirator or ear protection, could diminish the effectiveness of the poster's message.

It would be equally troubling if we were required to affix the words "this is not binding on the public" to statements intended to inform workers and employers of their rights and obligations under laws such as the Family and Medical Leave Act, the Fair Labor Standards Act, and the Employee Retirement Income Security Act. These are typically situations where a document restates or quotes statutes or regulations. Therefore, a disclaimer could create confusion, not clarity, and be counterproductive. Members of the public ask for this information not only to learn what their duties or rights are, but also to learn how the Department intends to enforce the law. Their desire for a clear answer that provides them with direction could be frustrated if a disclaimer were included. As a result, enactment of section 4 could be a step backward from efforts to encourage more voluntary compliance.

Thank you for the opportunity to comment on this matter. The Office of Management and Budget advises that there is no

objection to the transmission of this report from the standpoint of the Administration's program.

Sincerely,

A handwritten signature in black ink, appearing to read "Henry L. Solano", with a long horizontal flourish extending to the right.

Henry L. Solano

**U.S. Department of Labor**Solicitor of Labor  
Washington, D.C. 20210

MAR 16 2000

The Honorable David M. McIntosh  
Chairman  
Subcommittee on National Economic Growth,  
Natural Resources, and Regulatory Affairs  
Committee on Government Reform  
U.S. House of Representatives  
2157 Rayburn House Office Building  
Washington, DC 20515-6143

Dear Chairman McIntosh:

I am writing in response to your February 16, 2000 letter, which followed the Subcommittee's February 15 hearing on the use of non-codified documents by the Department of Labor. Your letter included fourteen numbered questions, which with their parts and sub-parts comprise more than 45 questions in all. Answers to your questions (which are reproduced in full) appear below.

Before addressing your questions, let me repeat the Department's position on the use of non-codified documents: They are an integral part of helping the public comply with the laws that Congress has passed. Indeed, Congress has required federal agencies to provide compliance assistance on request. Section 213 of the Small Business Regulatory Enforcement Fairness Act (SBREFA) states in part that:

Whenever appropriate in the interest of administering statutes and regulations within the jurisdiction of an agency which regulates small entities, it shall be the practice of the agency to answer inquiries by small entities concerning information on, and advice about, compliance with such statutes and regulations, interpreting and applying the law to specific sets of facts supplied by the small entity. . . .

Of course, federal agencies (including the Department) have long followed this valuable practice. The documents issued in response to public requests do not create new law or change existing law. They do, however, lead to a better understanding of the labor laws by the regulated community, and ultimately to better protections for workers and their families.

\* \* \*

*Q1. Gore's Reinventing Government. Since 1993, Vice President Gore has led a "Reinventing Government" initiative, including implementation of President Clinton's 1993 Executive Order 12862, entitled "Setting Customer Service Standards."*

*a. Has the Vice President's Reinventing Government initiative changed the way DOL has approached issuing guidance?*

As I testified, it has long been the policy of the Department to provide guidance to companies, labor organizations, individuals, and others. For decades, the Department has endeavored to educate and inform members of the public about their rights and obligations under the laws and regulations administered by the Department. The enactment of SBREFA's requirements to provide compliance assistance, and the reinvention initiatives of this Administration, have reinforced our commitment to this important activity.

*b. The Occupational Safety and Health Administration (OSHA) issued 15 boxes worth of guidance during the 3-year 1996-98 period and 16 boxes worth of guidance in 1999 alone. To what extent is this explosive growth driven by the "customer service" orientation of the Reinventing Government initiative?*

Compliance assistance is a key part of OSHA's mission. In recent years, Congress through the appropriations process, has encouraged the agency to place more emphasis on compliance assistance. Moreover, as the representative of the American Society of Safety Engineers testified at the hearing, there is a strong demand for this type of guidance.

However, many of the documents provided in the boxes are unlikely to be viewed by the regulated public as "guidance" or "compliance assistance." For example, approximately one-half of the total volume of documents provided to the Subcommittee for 1999, and one-half of the volume of boxes for the entirety of 1996-98, were comprised of course materials for classes taught at OSHA's training institute. Since these course materials are regularly updated, and one-half of them coincidentally happened to be updated during 1999, the number of boxes is not a reliable method of determining the amount of compliance assistance that OSHA provides during a particular time period.

*c. What do you estimate was the annual volume of guidance during the preceding 12-year Reagan-Bush period?*

We are unable to provide a reasonable estimate of the annual volume of guidance during the preceding 12-year Reagan-Bush period. However, then, as now, guidance to employers, employees and other members of the public was regularly provided when requested and the practice was considered helpful.

*Q2. Absence of Indication of No Legal Effect. We asked the Department of Labor (DOL) to tab and highlight all statements within OSHA's guidance documents that inform the public of the legal effect of the documents. Our investigation revealed that only 8% of the 1,176 guidance documents issued by OSHA during 1999 had any indication of their legal effect (although many of them were unclear), and 92% had no indication whatsoever. Also, only 5% had any indication of their legal effect at the beginning of the document, which is the logical and most useful place for such a statement. For example, DOL's first guidance document (with 1,267 pages) has a footnote indication about legal effect on page 582. Additionally, the Department admitted that none of the 3,374 OSHA guidance documents issued since the 1996 enactment of the Congressional Review Act (CRA) were submitted to Congress for review and none have any legal effect whatsoever.*

*a. Since the 1996 enactment of the CRA, did the Solicitor's office clear each guidance document prior to its issuance by the Department? If not, why not? What percent of the Department's guidance documents was reviewed by at least one attorney in the Solicitor's office prior to issuance?*

In previous correspondence on this issue, we indicated that due to the broad range of documents issued by OSHA over the nearly four-year period since enactment of the Congressional Review Act, a precise answer to your question cannot be reconstructed. As Deputy Solicitor Sally Paxton's January 11, 2000 letter to you stated, OSHA's guidance documents submitted to your Subcommittee from that period ranged from highly technical training manuals to press releases, conference handouts, and correspondence. There is a close working relationship between OSHA and its lawyers. As a general matter, where legal review of a document is warranted it is sought and provided.

*b. Since our investigation of OSHA's 1999 guidance documents revealed that only 8% have any indication of legal effect, what is your estimate of the percent of guidance documents issued throughout the whole Department since 1996 without any indication of legal effect?*

We do not have an estimate of the percentage of guidance documents issued by the Department of Labor since 1996 that contain legal disclaimers. It is the Department's policy to include disclaimers in appropriate circumstances. For instance, OSHA has included disclaimers on advisory materials where guidance might otherwise be misinterpreted as a safety or health standard, rule, or order. OSHA's numerous information booklets and small employer guides typically bear disclaimers on the first page. Examples of Labor Department documents that include disclaimers include advisory opinions and information letters issued by the Pension and Welfare Benefits Administration, which are documents issued under formal procedures and are routinely relied upon by the regulated community.

*c. Is any bureau within the Department doing an especially good job or poor job presenting this essential information to the public? Which are doing a poor job?*

We believe the Department and its agencies are conveying information on the legal effect of non-codified documents to the public in an appropriate manner. While sometimes an explicit disclaimer is appropriate, in other situations it would only be confusing.

*d. What controls does the Solicitor's Office have in effect to remedy this problem?*

*(1) For all guidance documents issued after the October 1999 start of our investigation?*

*(2) For all guidance documents issued after the 1996 CRA and before the October 1999 start of our investigation?*

*(3) When will each of these guidance documents be appropriately revised to ensure the public understands they do not have any legal effect?*

*(4) If they will not be revised, how do you plan to clarify their legal standing to the public?*

As indicated in my response to the prior question, we believe the Department and its agencies are conveying information on the legal effect of non-codified documents to the public in an appropriate manner. As I stated at the Subcommittee's hearing, we are continually working to improve our processes. We do not believe, however, that there is public uncertainty about the legal effect of non-codified documents. We have no plans to revise existing guidance documents or to clarify their legal standing.

*e. What is your estimate of the costs to the Department of producing the 3,374 guidance documents?*

There is no reasonable or reliable way to estimate the costs to the Department of producing guidance documents. The Department's guidance takes many forms – brochures, fact sheets, press releases and opinion letters are just a few examples. Since each type of guidance is unique, and developed over a period of time, we are unable to estimate their production costs or the number of staff involved in their production.

*f. How many employees were involved in producing the 3,374 guidance documents? How many FTEs were involved in this production?*

Please see the response to Question 2(e) above.

*g. What is your estimate of the costs to the regulated public of DOL's 3,374 guidance*

*documents?*

These guidance materials do not impose new costs on the public since they simply communicate information concerning the underlying statutes, rules and regulations administered by the Department.

**Q3. OMB's CRA Guidance.**

*a. Do you see a need for the Office of Management and Budget (OMB) to expand its CRA guidance to ensure that the agencies submit all guidance documents with any general applicability or legal effect to Congress for review, as required by law?*

No. Overall, the OMB guidance is very helpful to DOL agencies.

*b. Do you see a need for OMB to expand its CRA guidance to ensure that the public understands that agency guidance documents not submitted to Congress under the CRA are not legally binding?*

No.

*c. Do all DOL bureaus understand that, under the CRA, interpretive rules, policy statements, policy clarifications, guidance, guidelines, policy directives, enforcement policies, opinion letters, question-and-answer documents, and other such documents with any general applicability or future effect need to be submitted to Congress for review?*

The Department is committed to complying with the provisions of the Congressional Review Act and is doing so in a responsible way, consistent with the law. As I described in my statement, since the passage of the CRA, the Department has taken steps to ensure it is fully implemented.

*d. If clear within DOL, do you believe that the other agencies are entirely clear about what documents need to be submitted to Congress under the CRA?*

We are not in a position to speak for other agencies or speculate about their understanding of the CRA, either generally or with respect to specific documents.

**Q4. Possible Statutory Fix. On January 24, 2000, I introduced H.R. 3521 which includes a proposed statutory fix to ensure the public's understanding of the legal effect of agencies' noncodified guidance documents. The proposal is to state a Miranda-type disclaimer on the first page of each guidance document. On January 31st, I wrote the General Counsels of the Department of Transportation and EPA and you, asking for the Administration's official views by February 11th.**

*a. What is your view of this proposal (in Section 4, entitled "Disclosure of Nonbinding*

*Effect of Guidance Documents")?*

A complete answer to this question is being provided in a separate letter responding to your January 31 letter.

*b. Do you have any other ideas for a statutory fix to ensure the public's understanding?*

We believe the Department and its agencies are conveying information on the legal effect of non-codified documents to the public in an appropriate manner.

*Q5. OSHA's Work-At-Home Guidance. On January 5, 2000, I wrote you a letter about OSHA's November 15, 1999 guidance document regarding work-at-home employees, which was withdrawn by Secretary Herman later on January 5th. Why has the Department not withdrawn its October 7, 1993, June 19, 1995, and February 21, 1997 work-at-home guidance documents on this subject?*

As OSHA explained in its testimony presented to the House Education and the Workforce Subcommittee on Oversight and Investigations on January 28, 2000, the agency withdrew the letter on January 5, 2000, was reviewing all other related correspondence for consistency, and would withdraw any letters that were inconsistent. The letters of October 7, 1993 and June 19, 1995 to which you refer remain posted on the OSHA Web page, but with a clear explanation that they are under review. The explanation also refers readers to OSHA's January 25, 2000 Congressional testimony on the subject. On February 25, 2000, OSHA issued an enforcement directive formalizing the policy first stated in OSHA's congressional testimony, which will aid in reviewing all correspondence for consistency. A copy of the directive is attached for your reference.

The letter dated February 21, 1997 is focused on the subject of home construction rather than working at home. It merely states that OSHA regulations do not apply to residential properties, but then focuses on construction standards. Therefore, we do not believe that it is relevant to the telecommuting issues raised by the November 15, 1999 letter.

*Q6. OSHA's Arborists Guidance.*  
*a. Please explain why DOL issued and then why DOL withdrew its March 4, 1998 and December 13, 1999 guidance documents relating to arborists. The 1998 interpretation letter remained on DOL's website for years after it was withdrawn; in fact, it was only removed earlier this month, possibly in anticipation of the February 15, 2000 hearing.*

In response to a written inquiry from the National Arborist Association (NAA), and after meeting with representatives of NAA, OSHA's Directorate of Compliance Programs issued the March 4, 1998 letter interpretation on applicability of the logging standard. In a letter dated May 6, 1998, NAA raised questions about the interpretation it received from OSHA in response to its inquiry. Consequently, the agency conducted a further review.

The review concluded with a June 22, 1998 letter to the NAA, which in its entirety stated, "The purpose of this letter is to withdraw the Occupational Safety and Health Administration's (OSHA) response dated March 4, 1998 ... to your correspondence of July 23, 1997, regarding compliance issues raised by the National Arborist Association. We would like to consider these issues again, in dialogue with your organization, to ensure safety and health in the commercial tree care industry."

Eight days later, on July 1, 1998, the Director of Compliance Programs issued a memorandum to all Regional Administrators and State Designees which stated, in part "Any proposed citations by Federal OSHA offices for §1910.266 (logging) violations to employers in SIC 0783 must be submitted to and approved by the Director of Compliance Programs before issuance" (copy attached). This policy was shared with the NAA with the understanding that OSHA cannot require State Plan States to adhere to the Federal policy. The North Carolina enforcement action referred to in the testimony provided to the Subcommittee by David Marren of Bartlett Tree Expert Company was brought by the occupational safety and health agency in that State Plan State, not by OSHA.

The series of events leading to the removal of the 1998 letter of interpretation from the OSHA website follows below. On or about December 20, 1999, OSHA's compliance staff responsible for this issue initiated a review of all interpretations on OSHA's Web Page that dealt with arborists, logging, and aerial lifts, to ensure they were accurate and up-to-date. All were reviewed over the next few weeks. During that time (on December 30), a representative of NAA informed OSHA that the March 4, 1988 letter had never been removed from the Web Page. OSHA's staff then "flagged" the letter to be removed. On January 24, 2000, OSHA's staff submitted a written request to have the March 8 letter removed, and notified the NAA of this action. Three days later, OSHA staff received an e-mail from NAA thanking them for responding on the matter. (See attached correspondence). All of these actions were unrelated to and predated any knowledge by anyone in OSHA of Mr. Marren's testimony before the Subcommittee.

The December 13, 1999 letter of interpretation on fall protection in aerial lifts was issued in response to a written request from the NAA dated August 25, 1999. After the NAA's January 12, 2000 response to OSHA's December 13 letter, OSHA was persuaded that the standard on this point was sufficiently ambiguous to warrant reconsideration of the December 13 letter. The letter was withdrawn on January 28, 2000.

*b. Was the threat of lawsuits by the National Arborist Association the principal reason for the June 22, 1998 and January 31, 2000 withdrawals?*

No.

*c. Isn't leaving withdrawn interpretation letters on your website just another backdoor method of regulating industry?*

No. Unfortunately, oversights sometimes occur. We attempt to minimize them and rectify them as soon as we realize they have occurred. In the few cases where mistakes were brought to OSHA's attention, the agency took appropriate steps to respond.

*d. Did you ever post the two withdrawal letters on your website? If not, why not?*

The June 22, 1998 withdrawal letter was sent to the NAA, informing the association of the withdrawal. It was also communicated to all Regional Offices, State Designees, and the field through the memorandum dated July 1, 1998, from John Miles, Director, Directorate of Compliance Programs. The June 22, 1998 letter was not posted on OSHA's website because OSHA had intended to remove the March 4, 1998 letter. The December 13, 1999 letter of interpretation was never posted on the Web. Therefore, there would have been no reason to post the January 29, 2000 letter of withdrawal.

*Q7. Withdrawn Guidance.*

*a. Besides OSHA's 1999 work-at-home guidance and OSHA's 1998 and 1999 arborists guidance, what other DOL guidance documents have been withdrawn since March 1996 and under what circumstances?*

OSHA conducts ongoing maintenance to ensure that letters posted on the Web provide current and accurate information. Letters that give duplicative, superseded, or unclear information are archived or edited. Before any new letter is posted, it is reviewed and compared against interpretations already on-line. In addition, OSHA performs special reviews of guidance posted when standards are amended, therefore rendering prior guidance obsolete. In addition, during the course of using OSHA's website, OSHA staff and other website users also actively identify individual letters that appear out-of-date. When OSHA is notified of such letters, they are reviewed and archived or edited as appropriate. Because our maintenance system does not categorize letters as "withdrawn" within the meaning of your question, it is necessary to conduct a manual review of potentially relevant letters. In response to your question, OSHA is conducting that review. We will provide additional information to the Subcommittee when that review is completed. Also in this regard, please see the answer to the next question.

*b. Did DOL ever post these other withdrawal letters? If not, why not? Please provide complete details for each case for the record.*

See response to Question 7(a), above.

*Q8. Application of PSM Standard to Oil and Gas Production Facilities. On November 4, 1999, OSHA rescinded three earlier letters of interpretation (8/26/92, 5/5/93 & 11/4/93) which excluded oil and gas production facilities from the Process Safety Management (PSM) standard (29 CFR 1910.119). After industry questioned OSHA's policy change,*

*pointing out its inconsistency with OSHA's May 29, 1998 policy interpretation, OSHA withdrew its November 4, 1999 memorandum. On December 20th, OSHA issued a new memorandum (curiously dated November 20th) which removed the objectionable policy change. Please explain DOL's policymaking process, which resulted in three rescissions, one inconsistency, and one withdrawal on the same subject all within a one-month period.*

In late 1998, OSHA concluded that the three-referenced oil and gas production interpretation letters on OSHA's website needed to be clarified because they did not draw a sufficient distinction between oil and gas drilling facilities (which are **not** covered by the PSM standard) and oil and gas production facilities (which **are** covered by the PSM standard). For this reason, OSHA removed these three subject letters from the website and began work on a new interpretation. This re-evaluation culminated in the November 4, 1999 memorandum which was issued and posted on OSHA's website.

Shortly thereafter, OSHA realized that one sentence in the November 4, 1999 memorandum, describing the scope of the PSM exemption for "normally unoccupied remote facilities" was not based on the PSM rulemaking record. OSHA then replaced that memorandum with one that was identical except that the erroneous sentence was deleted. Although this memorandum was signed and dated on December 20, 1999, as noted on website's 'Search Results' page, the version posted on OSHA's website was erroneously dated November 20, 1990.

On March 7, 2000, OSHA informed the American Petroleum Institute that, although the standard was never intended to contain an exemption for oil and gas well production operations, it intends to perform a new economic analysis to determine whether compliance with the PSM standard is feasible for these operations. OSHA will not enforce the standard at these operations until this analysis is completed. To avoid confusion, the December 20, 1999 memo, which stated that oil and gas well production operations are subject to the PSM standard, will also be withdrawn.

Copies of the original memoranda and the website documents are attached for your review.

- Q9. *Family and Medical Leave Act Guidance. On April 7, 1995, the Employment Standards Administration (ESA) issued an interpretive letter, stating that the common cold, the flu, etc., are minor illnesses and are not covered by the Family and Medical Leave Act (FMLA). Then, on December 12, 1996, ESA changed its mind and issued a letter stating that the common cold and the flu are "serious health conditions" if they last more than three consecutive calendar days and involve continuing treatment (such as an antibiotic or a follow-up doctor's appointment).*

*a. Would you say that the 1996 letter contradicts the language and intent of the FMLA --*

*especially in light of the House Report which stated, "The term 'serious health condition' is not intended to cover short-term conditions for which treatment and recovery are very brief"?*

No. The Department's regulations (at 29 CFR 825.114) provide, among other things, that an employee has a serious health condition if the condition involves a period of incapacity of more than three consecutive calendar days, and also requires either two or more visits to a health care provider or one visit which results in a regimen of continuing treatment, such as a course of prescription medicine. These regulations were promulgated after two rounds of notice-and-comment and careful consideration of the legislative history, including in particular the provision you have cited, as well as the additional statements that conditions considered serious required absences "on a recurring basis or for more than a few days." The Department believes this legislative history supports a "bright line" test. The "more than three days" requirement was drawn from a waiting period imposed in certain circumstances before benefits are paid for temporary disability under the Federal Employees' Compensation Act and many State workers' compensation laws. With regard to the common cold, the flu, and a number of other ailments, the Department's regulations further state that such conditions would not ordinarily meet the test unless complications arise.

The December 12, 1996 letter, like other opinion letters, responded to a series of questions raised by an employer seeking compliance advice. In the course of replying to this letter, the Department determined that its earlier letter explaining the application of the definition of serious health condition was in error, and the letter was withdrawn. The 1996 letter and the regulations both focus on the consequences of a medical condition -- in terms of "incapacity" and "continuing treatment" -- not the diagnosis given.

It continues to be the Department's view that its regulation, and the non-binding letter explaining its application in the particular circumstances raised, are fully consistent with the language and intent of the FMLA. It is our view that such a "bright-line" test, based on objective criteria, provides greater predictability for both employers and employees than a subjective determination of the seriousness of a particular condition affecting a particular individual. On March 3, 2000, the United States Court of Appeals for the Eighth Circuit upheld the Department's interpretation of the statute, observing that "DOL's objective test . . . clearly is a permissible construction of the statute." Thorson v. Gemini, Inc., No. 99-1656/99-2059 (March 3, 2000). A copy of this decision is enclosed.

*b. Isn't that exactly the kind of change in interpretation (i.e., an interpretation that changes an individual's or organization's rights or obligations) that should be submitted to Congress under the CRA and undergo Administrative Procedure Act (APA) notice-and-comment rulemaking procedures?*

No. The letter you are referring to was not binding. The letter was simply the

Department's compliance advice to an employer on the application of the statute and its regulations to a number of specific questions raised by the employer. It thus fell within the exception in the CRA for rules of particular applicability. The letter is very similar to the agency opinion letters referred to in post-enactment statements by members of Congress discussing the CRA.

*Q10. Stock Options Guidance. Stock options are increasingly an important part of compensation, especially for new high technology companies. On February 12, 1999, ESA issued a Fair Labor Standards Act (FLSA) nonregulatory guidance opinion letter applying the overtime requirements of the Act to a stock option program proposed by an employer for his employees.*

*a. Since the exact value of stock options is often difficult to determine, wouldn't the easiest way for employers to comply be to stop offering stock options for employees subject to the overtime requirements?*

Employer decisions about the forms and amounts of remuneration to offer may be governed by a number of business factors. For example, we have been advised that employers commonly offer stock options to attract and retain a high quality work force. Furthermore, employers frequently offer nondiscretionary bonuses to employees notwithstanding the fact that such bonuses must be included in the regular rate. While some employers may decide that offering stock option plans to employees may not be a good business decision based solely on the FLSA consequences, many others may decide -- for sound business reasons -- that their purposes in offering broad-based stock option plans are more important despite the potential FLSA consequences.

On March 2, 2000, Wage and Hour Administrator T. Michael Kerr testified on this issue before the Subcommittee on Workforce Protections of the House Committee on Education and the Workforce. In that testimony, Mr. Kerr stated that the Department of Labor has been reviewing the broader policy questions involved in the relationship between stock option programs and overtime pay. As a result of that review, the Department recommends that Congress amend Section 7(e) of the FLSA to include bona fide stock option programs in the items excludable from overtime calculations.

*b. Shouldn't a regulatory policy change such as this be subject to public notice and comment?*

No. The February 12, 1999 opinion letter did not constitute a "regulatory policy change," nor did it constitute a legislative rule subject to APA notice-and-comment requirements. The letter was simply the Department's advice on the application of its regulations under existing law, concerning whether a particular form of compensation must be included in the regular rate on which the overtime premium is paid under the specific stock option plan proposed. The letter did not conclude -- and it is not the Department's position --

that all stock option plans must be included in the regular rate.

*Q11. Ergonomics Guidance and Enforcement.*

*a. Since OSHA has not yet issued a rule on ergonomics, why did OSHA issue nearly 25 ergonomics guidance documents in 1999?*

OSHA publishes extensive voluntary guidance concerning safety and health to assist employers and employees in their voluntary efforts to reduce hazards in their workplaces. The Occupational Safety and Health Act directs OSHA not only to promulgate occupational safety and health standards but to "consult with and advise employers and groups of employers ... as to effective means of preventing occupational injuries and illnesses." Section 21(c). Because a large proportion of the nation's occupational injuries and worker compensation claims are related to ergonomic hazards, the public demand for information about ergonomics is not surprising. While the development and issuance of a standard addressing ergonomics has been a time-consuming process, OSHA cannot and should not wait until a standard is in place to carry out its equally important statutory mission to make hazard information, technical guidance, and promising strategies for reducing ergonomic stress available to the many interested members of the public who request it.

*b. Are you satisfied that it is clear to the regulated public that those documents have no legal effect?*

When there is a possibility a reader might mistake a non-binding voluntary compliance assistance document for a binding regulatory requirement, OSHA provides appropriate disclaimers. We have no basis to conclude that it is not clear to the public that those documents have no legal effect.

*c. Has the Solicitor's Office reviewed the 37 guidance documents on OSHA's Ergonomics website to ensure that the public is clear about the absence of any legal effect for them? If not, why not?*

Because of public interest and concern about ergonomic hazards, OSHA provides a wide variety of ergonomics-related information on its homepage. Such information includes, among other things: news releases and other information about the status of this rulemaking and opportunities for public participation; statistics and studies concerning the prevalence of ergonomic injuries; sources and schedules for training in recognition and avoidance of work-related musculoskeletal disorders; the preamble, proposed text, health effects and economic analysis for the pending ergonomics standard; and suggestions of "best practices" and other technical information useful to small employers voluntarily seeking to reduce ergonomic injuries. Significant guidance documents such as, for example, the Ergonomic Program Guidelines for Meatpacking Plants, receive Office of Solicitor review and clearance, as do all documents relating to OSHA's ongoing

rulemaking on ergonomics. On the other hand, purely technical information furnished for voluntary compliance purposes may not require clearance by the Solicitor's Office.

*d. Despite the fact that DOL has no ergonomics rule, how many enforcement actions against employers has DOL taken for ergonomics problems?*

OSHA's November 1999 *Federal Register* notice on ergonomics stated that OSHA estimates that 550 citations had been issued under the general duty clause for ergonomic hazards.

*e. Have any penalties and fines been issued against these employers? If so, what is the total assessment to date?*

Since October 1996, the only period for which we have precise data, a total of \$170,804 in penalties have been assessed in connection with citations for ergonomic hazards. This amount includes one penalty of \$143,000 which was assessed in a major enforcement action against a large employer in the food processing industry.

*f. The National Legal Center for the Public Interest stated that, "[u]p to 1994 [OSHA] issued more than 430 citations for alleged ergonomics hazards." What is the relationship between DOL's not-legally-effective guidance documents and its enforcement actions? Do employers feel an unlegislated compulsion to comply with the guidance documents?*

The Occupational Safety and Health Act provides that employers may be cited only for violating the Act itself, or a standard, rule or order duly promulgated under the Act. It is a fundamental principle of OSHA law that letters, program directives or other informal guidance issued by OSHA do not have the force of law and cannot be the basis for an OSHA enforcement action. While we cannot know what views individual employers may hold on this subject, few members of the public have ever complained to OSHA about having been misled about the effect of an OSHA compliance assistance document.

*Q12. Augmentation of DOL FTEs by Use of Contractors. On December 3, 1999, we questioned DOL about its using a contractor to compile its OSHA nonregulatory guidance documents instead of doing the job with its own employees. On February 7, 2000, DOL finally provided a copy of its contract for this work. DOL added tasks to an existing contract instead of competing the work. The nearly \$1 million existing contract with Eastern Research Group, renewable for 4 additional 1-year periods, asks the contractor to perform services for OSHA on a "task order" basis. Tasks include analyzing data, assessing economic impact, estimating benefits, conducting evaluations, and doing other regulatory work.*

*a. How many contractors does DOL use to augment its 17,000 FTEs?*

The Department does not use contractors to “augment” federal staff. Rather, contractor personnel are engaged, where appropriate, to perform a variety of functions and tasks, and provide specialized expertise under different circumstances, which is consistent with sound business practices. The total value of these contracts for FY 1999 was \$160 million.

*b. What is the total number of dollars awarded to contractors for work which could be done by DOL employees?*

Traditionally, the Department has utilized contracts and contractor personnel under several circumstances to perform a variety of tasks. First, the Department has always utilized contractors to perform certain kinds of commercial activities. Examples of these functions include guard and security services, building renovation services, janitorial services and buildings and grounds maintenance. Federal staff are not used to perform these types of functions, which is consistent with the *Federal Activities Inventory Reform Act of 1998* (Public Law 105-270) and OMB Circular A-76.

Second, on a case-by-case basis, the Department also requires the use of support service contractors with specialized expertise that currently does not exist in sufficient numbers to meet a specific need. For example, while the Department might have staff with skill to monitor research activities and program evaluations, contractors are engaged to perform lengthy program evaluations of major programs, such as Job Corps and research in areas such as pension policy. The Department, as well as other Federal agencies, has also used contractors in the information technology area because of the traditional difficulty in recruiting and retaining quality Federal staff.

Third, there is an occasional need to engage contractor personnel to perform specific tasks during peak workloads within restricted time-frames, and when it would not be practical or cost effective to hire federal staff. Under each of these circumstances, the Department and its agencies will make a decision based on its best business judgement about how to accomplish the work at hand.

In FY 1999, the Department awarded \$109 million to contractors for these types of services.

*c. What role did the Eastern Research Group or any other contractor have in developing DOL's proposed ergonomics rule?*

The Eastern Research Group did not draft any portion of OSHA's proposed rule on ergonomics. They and other contractors assisted OSHA by gathering and producing ergonomic, survey and other data to help the agency conduct its required analyses. The proposed standard itself was not developed by any contractor.

*Q13. Guidance for Ann Landers-Type Questions. On September 23, 1999, OSHA issued guidance relating to a possible injury as a result of being struck by a bucket when it is being lowered to the ground. On June 16, 1999, OSHA issued guidance relating to a scene depicted in a newspaper photograph. On December 31, 1998, OSHA issued guidance relating to use of western hard hats "because hot items could fall into the brim." On December 11, 1996, OSHA issued guidance on whether an employer could be cited by OSHA when an employee trained in first aid panics in an emergency situation. Do you feel that the Department's reply to these Ann Landers-type "what if" letters is an appropriate expenditure of taxpayer dollars?*

Based upon the description contained in the question, OSHA has attempted to identify the documents referred to in this question. Please let us know if we have misidentified documents. We have also enclosed copies of the above-referenced letters for the record. A summary of the letters follows below:

- The September 23, 1999 document addressed the potential hazard presented when a "personnel bucket" of an "aerial lift truck" is lowered to a ground. The "personnel bucket," as the context of the letter makes clear, is part of a large piece of mechanized equipment weighing several hundred pounds that is used to lift and lower workers. It is not, as the question may imply, an ordinary "bucket"– i.e., a pail – used to carry small amounts of material.
- The June 16, 1999 document addressed a somewhat similar issue. A company noticed a newspaper photograph which appears to show an individual riding in a boatswain's chair connected to a hydraulic crane's load line, and requested information on whether this kind of approach was permitted under OSHA's requirements. The agency noted that it would be inappropriate to comment on the scene in the photograph since it did not know all the relevant details of the operation depicted, but reviewed in the letter its requirements for lifting personnel with a crane.
- The December 31, 1998 document involved the interpretation of OSHA's standard on head protection in construction, 29 C.F.R. 1926.100. The issue was whether "western hard hats" -- hard hats that resemble a cowboy hat -- comply with this standard, given the concern that "hot items could fall into the brim and get caught or the brim could be struck by something and would cause the hat to easily fall off the employee's head."
- The December 11, 1996 document addressed not only the question you mention, but also questions concerning an employer's obligation to have individuals trained to render first aid and reliance on dialing "911" in emergency situations.

In each of these instances, it appears that OSHA staff responded to letters sent to the agency based upon good-faith inquiries from the public involving the application of OSHA's standards to perceived safety and health hazards. Consistent with the spirit of

SBREFA Section 213 (cited above), agencies probably should err on the side of providing – rather than withholding – compliance assistance when asked to do so by a member of the public. It is possible to conceive of compliance questions so far-fetched or otherwise unreasonable that a federal agency should treat them cursorily, if at all. I do not believe that the letters you cite fall into that category; instead, I think OSHA’s replies were an “appropriate expenditure of taxpayer dollars.”

*Q14. Types of OSHA Guidance Documents. To assist us in better understanding DOL’s submission, please complete the following table. Please include each category of guidance issued during the 1993 (sic) - 1999 study period and included in the 38,756 pages of guidance submitted to us.*

We appreciate the willingness of your staff to discuss narrowing these requests somewhat because the burden on the Department of these two databases would be significant and time-consuming. Pursuant to conversations between our staffs, we are working on these charts and will forward them to you when they are complete.

\* \* \*

Please contact Steve Heyman in our Office of Congressional and Intergovernmental Affairs at (202) 693-4600 if you have questions or need additional information.

Sincerely,  
  
Henry L. Solano  
Solicitor of Labor

Enclosures

cc: The Honorable Dennis Kucinich



OSHA Directives  
CPL 2-0.125 - Home-Based Worksites.

◀ OSHA Directives - Table of Contents

- Record Type: Instruction
- Directive Number: CPL 2-0.125
- Subject: Home-Based Worksites.
- Information Date: 02/25/2000

## A large graphic featuring the OSHA logo on the left and the words "OSHA INSTRUCTION" in a very large, bold, sans-serif font to its right. Below the logo and text, it reads "U.S. DEPARTMENT OF LABOR" and "Occupational Safety and Health Administration".

DIRECTIVE NUMBER: CPL 2-0.125	EFFECTIVE DATE: February 25, 2000
SUBJECT: Home-Based Worksites	

ABSTRACT

**Purpose:** This instruction provides guidance to OSHA's compliance personnel about inspection policies and procedures concerning worksites in an employee's home. This instruction supersedes all previous statements and guidance on the subject.

**Scope:** OSHA-wide

**References:** OSHA Instruction CPL 2.103, Field Inspection Reference Manual (FIRM)  
OSHA Instruction CPL 2.115, Complaint Policies and Procedures;  
OSHA Instruction STP 2.22A, State Plan Policies and Procedures Manual.

**State Impact:** State Adoption not Required, See Section IV.

**Action Offices:** National, Regional, and Area Offices.

**Originating Office:** Directorate of Compliance Programs.

**Contact:** William J. Smith or  
Helen Rogers (202-693-1850)  
Directorate of Compliance Programs  
Frances Perkins Building, N-3603  
200 Constitution Avenue, NW  
Washington, DC 20210

By and Under the Authority of  
Charles N. Jeffress  
Assistant Secretary

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- II. Scope
- III. References
- IV. Federal Program Change
- V. Action
- VI. Definitions
  - A. **Home-Based Worksite**
  - B. **Home Office**
- VII. Background
- VIII. Policy for Home Offices
- IX. Policy for Other Home-Based Worksites

X. Other Requirements

I. Purpose. This instruction provides guidance to OSHA's compliance personnel about inspection policies and procedures concerning worksites in an employee's home. This instruction supersedes all previous statements and guidance on the subject.

II. Scope. This instruction applies OSHA-wide.

III. References.

OSHA Instruction CPL 2.103, Field Inspection Reference Manual (FIRM);  
OSHA Instruction CPL 2.115, Complaint Policies and Procedures;  
OSHA Instruction STP 2.22A, State Plan Policies and Procedures Manual (SPM).

IV. Federal Program Change. This instruction describes a Federal Program Change for which State adoption is not required.

NOTE: In order to effectively enforce safety and health standards, guidance to compliance staff is necessary. Therefore, although adoption of this instruction is not required, States are expected to have enforcement policies and procedures which are at least as effective as those of Federal OSHA.

V. Action Offices.

- A. Responsible Office. Directorate of Compliance Programs.
- B. Action Offices. Regional, Area, and District Offices and State Plan States.
- C. Information Offices. Consultation Project Offices.

VI. Action.

OSHA Regional Administrators, Area Directors, and National Office Directors will ensure that the policies and procedures regarding employee home-based worksites set forth in this instruction are followed.

VII. Definitions.

- A. **Home-Based Worksite**: The areas of an employee's personal residence where the employee performs work of the employer.
- B. **Home Office**: Office work activities in a home-based worksite (e.g., filing, keyboarding, computer research, reading, writing). Such activities may include the use of office equipment (e.g., telephone, facsimile machine, computer, scanner, copy machine, desk, file cabinet).

VIII. Background.

The Department of Labor strongly supports telecommuting and telework. Family-friendly, flexible and fair work arrangements, including telecommuting, can benefit individual employees and their families, employers, and society as a whole.

The purpose of the Occupational Safety and Health Act of 1970 (OSH Act) is to "assure so far as possible every working man and woman in the Nation safe and healthful working conditions..." (Section 2(b)). The OSH Act applies to a private employer who has any employees doing work in a workplace in the United States. It requires these employers to provide employment and a place of employment that are free from recognized, serious hazards, and to comply with OSHA standards and regulations (Sections 4 and 5 of the OSH Act). By regulation, OSHA does not cover

individuals who, in their own residences, employ persons for the purpose of performing domestic household tasks.

OSHA respects the privacy of the home and has never conducted inspections of home offices. While respecting the privacy of the home, it should be kept in mind that certain types of work at home can be dangerous/hazardous. Examples of such work from OSHA's past inspections include: assembly of electronics; casting lead head jigs for fishing lures; use of unguarded crimping machines; and handling adhesives without protective gloves.

**IX. Policy for Home Offices.**

OSHA will not conduct inspections of employees' home offices.

OSHA will not hold employers liable for employees' home offices, and does not expect employers to inspect the home offices of their employees.

If OSHA receives a complaint about a home office, the complainant will be advised of OSHA's policy. If an employee makes a specific request, OSHA may informally let employers know of complaints about home office conditions, but will not follow-up with the employer or employee.

**X. Policy for Other Home-Based Worksites.**

OSHA will only conduct inspections of other home-based worksites, such as home manufacturing operations, when OSHA receives a complaint or referral that indicates that a violation of a safety or health standard exists that threatens physical harm, or that an imminent danger exists, including reports of a work-related fatality.

The scope of the inspection in an employee's home will be limited to the employee's work activities. The OSH Act does not apply to an employee's house or furnishings.

Employers are responsible in home worksites for hazards caused by materials, equipment, or work processes which the employer provides or requires to be used in an employee's home.

If a complaint or referral is received about hazards at an employee's home-based worksite, the policies and procedures for conducting inspections and responding to complaints as stated in OSHA Instruction CPL 2.103 (the FIRM) and OSHA Instruction CPL 2.115, will be followed, except as modified by this instruction.

**XI. Other Requirements.**

Employers who are required, because of their size or industry classification, by the OSH Act to keep records of work-related injuries and illnesses, will continue to be responsible for keeping such records, regardless of whether the injuries occur in the factory, in a home office, or elsewhere, as long as they are work-related, and meet the recordability criteria of 29 CFR Part 1904.

Other than clarifying the policy on inspections and procedures concerning home-based worksites, this instruction does not alter or change employers' obligations to employees.

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[OSHA National News Release](#)

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[◀ OSHA Directives - Table of Contents](#)

U.S. Department of Labor

Occupational Safety and Health Administration  
Washington, D.C. 20210

Reply to the Attention of:



JUL 1 1998

MEMORANDUM FOR: REGIONAL ADMINISTRATORS  
STATE DESIGNEES

THROUGH: *Barbara Blanton*  
PAULA O. WHITE, Director  
Federal-State Operations,

FROM: *John B. Miles, Jr.*  
JOHN B. MILES, Jr., Director  
Directorate of Compliance Programs

SUBJECT: Enforcement Policy Regarding Arborists, SIC 0783  
(Ornamental Shrub and Tree Services)

The purpose of this memorandum is to clarify OSHA's citation and enforcement policy regarding employers in SIC 0783 (Ornamental Shrub and Tree Services).

In 1997, the National Arborist Association expressed to OSHA concerns about the application of 29 CFR 1910.266, Logging Operations, to employers in SIC 0783. Some employers in that SIC code have been cited for violations of 1910.266 within the past few years. In a letter dated March 4, 1998 (copy attached), OSHA responded to the National Arborist Association, indicating circumstances under which 1910.266 would be applicable.

On June 22, 1998, OSHA withdrew that response in a letter from Deputy Assistant Secretary Blanton (copy also attached), noting that we would like to consider these issues again, in dialogue with the National Arborist Association, to ensure safety and health in the commercial tree care industry. OSHA met with the Association on that date, and both parties agreed to work cooperatively in further discussions regarding effective means for attaining that end. Current plans call for additional discussions between OSHA and the Association starting in August, to address the appropriate safety and health obligations of employers in the commercial tree care industry, including applicable OSHA standards.

Until these discussions have produced further resolution of the compliance issues affecting arborists, citations for violations of 1910.266 shall not be issued to employers in SIC 0783 who are not engaged in logging operations. Any proposed citations by Federal OSHA offices for 1910.266 violations to employers in SIC 0783 must be submitted to and approved by the Director of Compliance Programs before issuance.

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We would appreciate input on this subject from Regional Administrators and State Designees. Comments should be directed to Richard Fairfax, Deputy Director of Compliance Programs, at 202-219-9308.

Attachments

**National Arborist  
Association**

# Memo

**To:** Paul Cyr, Directorate of Compliance Programs  
**From:** Peter Gerstenberger (via fax)<sup>1</sup>  
**CC:** Cynthia Mills, CAE; Steven Semier; James Allard  
**Date:** 12/30/99  
**Re:** Appropriateness of information on OSHA's web site

---

Greetings, Paul. While scanning OSHA's web site today, I noticed that John Miles' interpretation that the Logging Standard applies to commercial tree trimming is still posted. This interpretation is dated 3/04/98.

We find this very misleading, since Miles' interpretation was withdrawn by then Deputy Assistant Secretary Blanton in a June 22, 1998 letter to Amelia Reinert in our office (please see accompanying copy).

This erroneous information is confusing to the public as well as to OSHA's own compliance officers. On a related subject, we also found to our dismay that 13 Pulpwood Logging (1910.268) *Federal OSHA* citations were issued against Ornamental Shrub and Tree Services (SIC 0783) from October 1998 through September 1999.

We respectfully request that you delete the withdrawn letter of interpretation from the OSHA web site, or at least provide us with a prompt explanation for why it remains there.

Best wishes for a happy, healthy, prosperous New Year.

---

<sup>1</sup> NAA Director of Safety & Education  
P.O. Box 1094, Amherst, NH 03031-1094  
1-800-733-2622 Fax: 603-672-2613  
e-mail: peter@natlab.com

U.S. Department of Labor

Assistant Secretary for  
Occupational Safety and Health  
Washington, D.C. 20210



JUN 22 1998

Amelia Reinert  
Deputy Executive Director  
National Arborist Association, Inc.  
Route 101  
P.O. Box 1094  
Amherst, New Hampshire 03031-1094

Dear Ms. Reinert:

The purpose of this letter is to withdraw the Occupational Safety and Health Administration's (OSHA) response dated March 4, 1998 (copy enclosed) to your correspondence of July 23, 1997, regarding compliance issues raised by the National Arborist Association.

We would like to consider these issues again, in dialogue with your organization, to ensure safety and health in the commercial tree care industry.

Sincerely,

A handwritten signature in black ink, appearing to read "Emzell Blanton, Jr.", is written over a horizontal line.

Emzell Blanton, Jr.  
Deputy Assistant Secretary

Enclosure

**Cyr, Paul**

---

**From:** Cyr, Paul  
**Sent:** Monday, January 24, 2000 10:28 AM  
**To:** 'peter@natlarb.com'  
**Subject:** Your Dec. 30 fax

Good morning Peter. Hope you had a happy holidays. I just got back to work and got your Dec. 30 fax and have initiated action to pull the Miles memo off the internet. I will email you when it is pulled so you can check to be sure. Sorry I missed the Z133 meeting...I was out of town. I will talk to you soon...Paul  
Paul Cyr

Directorate of Compliance Programs  
Office of General Industry Compliance Assistance  
Francis Perkins Building  
Room N3107  
200 Constitution Ave., N.W.  
Washington, D.C. 20210  
(202) 693-1866

**Cyr, Paul**

---

**From:** Peter Gerstenberger[SMTP:peter@natlarb.com]  
**Sent:** Thursday, January 27, 2000 10:18 AM  
**To:** Cyr, Paul  
**Subject:** Re: Your Dec. 30 fax

Hi Paul. Thank you for responding on this matter.

I know I can speak for others when I tell you that you were missed at the last ANSI Z133 meeting. We held another very productive meeting. The next meeting, by the way, is April 20. My guess is that the Standard will go out for public comment after that meeting, preparatory to publication of the revision, so 4/20 will be an important meeting to attend if your schedule allows.

Paul, there are two separate groups studying crane use in tree care operations with the ultimate goal of strengthening the language in Z133. One is a sub-group of the NAA Safety Committee (John Hendicksen is chair of that), the other is a "Mobile Equipment" subgroup of Z133. The NAA group will be submitting recommendations to the Z133 group, who will in turn make recommendations to the full Z133 for consideration in April.

I know your Directorate is very concerned about this issue, as we are. It would be very helpful if you could articulate what OSHA's specific areas of concern are relative to crane use so that we can be sure to address them. Could you please try to respond on this by mid-February? I am coordinating the efforts on behalf of the NAA Safety Committee.

Thanks again, Paul.

At 10:28 AM 1/24/00 -0500, you wrote:  
>Good morning Peter. Hope you had a happy holidays. I just got back to work  
>and got your Dec. 30 fax and have initiated action to pull the Miles memo  
>off the internet. I will email you when it is pulled so you can check to be  
>sure. Sorry I missed the Z133 meeting...I was out of town. I will talk to  
>you soon...Paul  
>Paul Cyr  
>  
>Directorate of Compliance Programs  
>Office of General Industry Compliance Assistance  
>Francis Perkins Building  
>Room N3107  
>200 Constitution Ave., N.W.  
>Washington, D.C. 20210  
>  
>(202) 693-1866  
>  
>  
Peter Gerstenberger  
Director of Safety & Education  
National Arborist Association  
1-800-733-2622  
peter@natlarb.com  
<http://www.natlarb.com>

U.S. Department of Labor

Occupational Safety and Health Administration  
Washington, D.C. 20210

Reply to the Attention of:

DCP/GICA/MLM/G#1479



MAR 7 2000

Mr. Mark Rubin  
Upstream General Manager  
American Petroleum Institute  
1220 L Street, Northwest  
Washington, DC 20005-4070

Dear Mr. Rubin:

This is in response to your February 1, 2000, letter to me, and to the discussions my staff and I have had with you and members of API's Process Safety Management (PSM) Production Task Group (Task Group) about the applicability of OSHA's PSM standard to oil and gas production facilities. We appreciate the opportunity to discuss your concerns.

First, I wish to thank you and the Task Group for your concern about the safety and health of employees who work at production facilities. Your offer to develop an API-recommended practice on production safety is very encouraging. My office looks forward to the opportunity to provide input during that process. I also appreciate the Task Group's offer to assist OSHA in developing a Hazard Information Bulletin for start-up operations at production facilities. This phase of operation presents significant hazards and your organization's expert input to a Hazard Information Bulletin would be of great value in addressing these hazards in a timely fashion.

As a result of our discussions, OSHA has examined the regulatory history of the PSM standard in greater detail. Our investigation has confirmed our position that the standard was never intended to contain an exemption for oil and gas well production operations, and, specifically, that the oil and gas well drilling and servicing exemption was not intended to cover production operations.

Our investigation has also disclosed, however, that the only component of SIC Code 13, which covers oil and gas well production operations, that was included in OSHA's determination that compliance with the standard is feasible is SIC Code 1321. Most of the production operations we have been discussing here are found in SIC Code 1311.

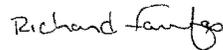
Longstanding legal precedent establishes that OSHA may not enforce a standard unless it has made a determination that compliance with the standard is both technologically and economically feasible. *United Steelworkers v. Marshall*, 647 F.2d 1189 (D.C. Cir. 1980). Therefore, until OSHA makes such a determination, we will not attempt to apply the PSM standard to oil and gas well production operations.

As in other cases, OSHA will utilize a notice and comment procedure to determine whether compliance with the standard is feasible for affected employers. As part of this process, we will also seek public comment on appropriate phase-in dates for compliance with the standard by affected employers. It is the agency's hope that API and its members will participate fully in this process.

In light of this process OSHA has decided to withdraw its December 20 memorandum to Regional Administrators. The continued effectiveness of that memorandum could confuse both the affected public and OSHA's own employees with regard to OSHA's current enforcement position. Instead, OSHA will issue new guidance explaining that the standard will not be applied to oil and gas well production operations pending a determination pursuant to the notice and comment procedure.

However, we do remain concerned about process hazards at the oil and gas well production operations affected by this action. We urge API and its members to pay particular attention to those hazards, and look forward to working with you and the task group on the recommended practice for safety at oil and gas well production facilities. We also look forward to your input on an OSHA Hazard Information Bulletin for production facility start-up safety, and to receiving your comments on the economic analysis OSHA will undertake. If you have any questions, please call me at 202-693-2100 or Mike Marshall at 202-693-1850.

Sincerely,



Richard Fairfax, Director  
Directorate of Compliance Programs Assistance

cc: D. Layne  
David Deal, API Office of General Counsel

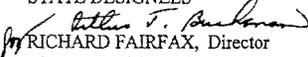
U.S. Department of Labor

Occupational Safety and Health Administration  
Washington, D.C. 20210

Reply to the Attention of:



DEC 20 1999

MEMORANDUM FOR: REGIONAL ADMINISTRATORS  
STATE DESIGNEES  
FROM:  RICHARD FAIRFAX, Director  
Directorate of Compliance Programs  
SUBJECT: Rescission of November 4, 1999 Memorandum on  
PSM Applicability to Oil/Gas Production Facilities

The November 4, 1999 memorandum to Regional Administrators and State Designees on PSM applicability to oil/gas production facilities is rescinded. OSHA's policy on this issue is contained in the attached memorandum.

For your information, the change in the current memorandum is related to *normally unoccupied remote facilities* (NURFs). The last sentence in the third-to-last paragraph in the November 4<sup>th</sup> memorandum related to *daily visits* at NURFs has been deleted.

cc: R. Layne, P. White

Attachment

U.S. Department of Labor

Occupational Safety and Health Administration  
Washington, D.C. 20210

Reply to the Attention of:



DEC 20 1998

MEMORANDUM FOR: REGIONAL ADMINISTRATORS  
STATE DESIGNEES

FROM: *Richard Fairfax*  
RICHARD FAIRFAX, Director  
Directorate of Compliance Programs

SUBJECT: PSM Applicability to Oil/Gas Production Facilities

The following question and answer clarifies the applicability of OSHA's standard *Process Safety Management of Highly Hazardous Chemicals; Explosives and Blasting Agents* (PSM), 29 CFR 1910.119, to oil and gas production facilities, including common point oil and gas separation facilities. OSHA is issuing this clarification as a result of numerous questions it has received, some arising out of its investigation of a 1998 accident that killed several employees at a common point oil and gas separation facility.

**Question**

Does the PSM standard (29 CFR 1910.119) apply to oil and gas production facilities, including oil, gas, and water separation facilities operating in conjunction with the producing well?

**Response**

If at least 10,000 pounds or more of flammable liquids or flammable gases are contained in an oil and gas production process, the production facilities described above are covered by the PSM standard. Covered production activities that are included in the term *process* can include, but are not limited to:

- the handling and on-site movement of flammable gas or flammable liquids through interconnected equipment;
- the separation of oil, gas or water by means including, but not limited to:
  - a) high and low pressure separators;
  - b) gravity water separation conducted inside in-process tanks; and
  - c) heat treaters;
- the compression of the flammable gas from a lower to higher pressure; and
- the other chemical and physical processing activities which are interconnected with, or proximate to, the covered process.

OSHA has stated in previous interpretation letters that production facilities, including related oil, gas, and water separation facilities, are excluded from PSM coverage under the oil and gas well drilling and servicing exemption, 29 C.F.R. § 1910.119(a)(2)(ii). Several factors, however, demonstrate that the conclusions reached in these letters are erroneous. As a result, these letters are hereby rescinded.

The letters in question fail to take into account the distinction between wells in production and those undergoing initial drilling or in a servicing status.<sup>1</sup> Production, as recognized by the petroleum industry, is a phase of well operations that deals with bringing well fluids to the surface, separating them, and then storing, gauging and otherwise preparing the product for the pipeline. This production phase occurs after a well has been drilled, completed, and placed into operation, or after it has been returned to operation following workover or servicing. A completed well includes a "Christmas tree" (control valves, pressure gauges and choke assemblies to control the flow of oil and gas) which is attached at the top of the well where pressure is expected. It is at this point, the top of the well, where the covered PSM process begins. The distance between separation equipment and the well is not a factor when determining PSM applicability for production facilities.

Oil well drilling and servicing is distinct from production and covers activities related to the initial drilling of a well and later, maintenance work necessary to maintain or enhance production. Normally, such operations are occurring if a drilling rig or truck mounted rig or mast is present on the well. Oil well drilling and servicing includes the following activities:

- 1) the actual drilling and associated activities of the well;
- 2) Well completion activities (i.e. activities and methods necessary to prepare a well for the production of oil and gas).
- 3) Well servicing (i.e. the maintenance work performed on an oil or gas well to improve or maintain the production from a formation already producing. Usually it involves repairs to the pump, rods, gas-lift valves, tubing, packers and so forth); and
- 4) Workover activities (i.e. the performance of one or more of a variety of remedial operations on a producing oil well to try to increase production. Examples of workover operations include deepening, plugging back, pulling and resetting liners, squeeze cementing and so on.

OSHA proposed to address the specific hazards presented by these activities through a distinct standard, *Oil and Gas Well Drilling and Servicing*; *Proposed Rule*, 48 Fed.Reg. 57202

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(December 28, 1983).<sup>2</sup> It was in anticipation of this standard becoming a final rule that OSHA included the oil and gas well drilling and servicing exception in the PSM standard, thereby reserving the far more comprehensive Oil and Gas Well Drilling and Servicing standard as the primary means to address the “uniqueness” of that activity. *See* 57 Fed.Reg. 6356, 6369 (February 24, 1991). By including production in this exception, the letters in question directly contradict OSHA’s stated preference to cover production and oil and gas well drilling and servicing in separate and distinct standards.

The rulemaking history of the PSM standard also supports OSHA’s determination that production facilities are not included in the oil and gas well drilling and servicing exception. As described above, the unique nature of the hazards in oil and gas well drilling and servicing were reemphasized during the PSM rulemaking when OSHA exempted oil and gas well drilling and servicing in anticipation of a standard covering these activities. Several commentators additionally urged OSHA to include production facilities in this exception. Production facilities, however, were always intended to be covered under PSM as demonstrated by OSHA’s decision to reject this suggestion.

If raised by the employer, OSHA compliance personnel should consider if the “normally unoccupied remote facility exception” (NURF) to PSM coverage [29 C.F.R. § 1910.119(a)(2)(iii)] applies to oil and gas production facilities. For the NURF exception to apply, the facility must be geographically remote from all other buildings, processes or persons and neither within the boundaries nor contiguous to other operations of the employer. *See* 57 Fed.Reg. at 6372. Employees may visit remote sites periodically to check operations, and to perform maintenance and operation activities.

In summary: 1) oil and gas well production facilities which contain a threshold quantity or greater amount of a highly hazardous chemical (i.e, flammable liquids and gasses) are covered by PSM; 2) oil and gas well drilling and servicing are not covered by the PSM standard; and 3) the NURF exception may apply to some production facility operations.

As this memorandum demonstrates, OSHA’s re-examination of an issue may result in the clarification or correction of previously stated enforcement guidance. If you have any further questions, please feel free to contact the Office of General Industry Compliance Assistance at 202-693-1850.

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<sup>2</sup>OSHA is currently determining whether to place this standard back on its rulemaking agenda.

U.S. Department of Labor

Occupational Safety and Health Administration  
Washington, D.C. 20210

Reply to the Attention of: DCP/GICA/MLM



NOV - 4 1998

MEMORANDUM FOR: REGIONAL ADMINISTRATORS  
STATE DESIGNEES

FROM: *Richard Fairfax*  
RICHARD FAIRFAX, Director  
Directorate of Compliance Programs

SUBJECT: PSM Applicability to Oil/Gas Production Facilities

The following question and answer clarifies the applicability of OSHA's standard *Process Safety Management of Highly Hazardous Chemicals; Explosives and Blasting Agents* (PSM), 29 CFR 1910.119, to oil and gas production facilities, including common point oil and gas separation facilities. OSHA is issuing this clarification as a result of numerous questions it has received, some arising out of its investigation of a 1998 accident that killed several employees at a common point oil and gas separation facility.

Question

Does the PSM standard (29 CFR 1910.119) apply to oil and gas production facilities, including oil, gas, and water separation facilities operating in conjunction with the producing well?

Response

If at least 10,000 pounds or more of flammable liquids or flammable gases are contained in an oil and gas production process, the production facilities described above are covered by the PSM standard. Covered production activities that are included in the term *process* can include, but are not limited to:

- the handling and on-site movement of flammable gas or flammable liquids through interconnected equipment;
- the separation of oil, gas or water by means including, but not limited to:
  - a) high and low pressure separators;
  - b) gravity water separation conducted inside in-process tanks; and
  - c) heat treaters;
- the compression of the flammable gas from a lower to higher pressure; and
- the other chemical and physical processing activities which are interconnected with, or proximate to, the covered process.

OSHA has stated in previous interpretation letters that production facilities, including related oil, gas, and water separation facilities, are excluded from PSM coverage under the oil and gas well drilling and servicing exemption, 29 C.F.R. § 1910.119(a)(2)(ii). Several factors, however, demonstrate that the conclusions reached in these letters are erroneous. As a result, these letters are hereby rescinded.

The letters in question fail to take into account the distinction between wells in production and those undergoing initial drilling or in a servicing status.<sup>1</sup> Production, as recognized by the petroleum industry, is a phase of well operations that deals with bringing well fluids to the surface, separating them, and then storing, gauging and otherwise preparing the product for the pipeline. This production phase occurs after a well has been drilled, completed, and placed into operation, or after it has been returned to operation following workover or servicing. A completed well includes a "Christmas tree" (control valves, pressure gauges and choke assemblies to control the flow of oil and gas) which is attached at the top of the well where pressure is expected. It is at this point, the top of the well, where the covered PSM process begins. The distance between separation equipment and the well is not a factor when determining PSM applicability for production facilities.

Oil well drilling and servicing is distinct from production and covers activities related to the initial drilling of a well and later, maintenance work necessary to maintain or enhance production. Normally, such operations are occurring if a drilling rig or truck mounted rig or mast is present on the well. Oil well drilling and servicing includes the following activities:

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OSHA proposed to address the specific hazards presented by these activities through a distinct standard, *Oil and Gas Well Drilling and Servicing; Proposed Rule*, 48 Fed.Reg. 57202 (December 28, 1983).<sup>2</sup> It was in anticipation of this standard becoming a final rule that OSHA included the oil and gas well drilling and servicing exception in the PSM standard, thereby reserving the far more comprehensive Oil and Gas Well Drilling and Servicing standard as the primary means to address the "uniqueness" of that activity. See 57 Fed.Reg. 6356, 6369 (February 24, 1991). By including production in this exception, the letters in question directly contradict OSHA's stated preference to cover production and oil and gas well drilling and servicing in separate and distinct standards.

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In summary: 1) oil and gas well production facilities which contain a threshold quantity or greater amount of a highly hazardous chemical (i.e, flammable liquids and gasses) are covered by PSM; 2) oil and gas well drilling and servicing are not covered by the PSM standard; and 3) the NURF exception may apply to some production facility operations.

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## OSHA Search Results Page

"drilling and 1910.119" matched 8 document(s).




Score	Title
***	<a href="#">06/29/1994 - HHC's as it applies to employer obligation to obtain and evaluate information regarding the contract employer's safety performance and programs.</a>
***	<a href="#">11/08/1995 - Applicability of 29 CFR 1910.119 Process Safety Management (PSM) Standard to the Manufacture of Explosives Required Under 29 CFR 1910.109(k)(2)</a>
***	<a href="#">12/20/1999 - PSM coverage of oil and gas production and separation facilities.</a>
***	<a href="#">02/02/1993 - Outer Continental Shelf lands--OSHA and the U.S. Coast Guard.</a>
***	<a href="#">09/27/1994 - Process Safety Management of Highly Hazardous Chemicals as it may apply to more than 250 pounds thionyl chloride stored on your work site.</a>
***	<a href="#">01/06/1995 - Information concerning the interpretation of terms, phrases, and definitions pertaining to Process Safety Management.</a>
***	<a href="#">09/16/1993 - Summary report on OSHA inspections conducted at superfund incinerator sites.</a>
***	<a href="#">11/27/1995 - Challenge Testing as a Substitute for Annual Refresher Training.</a>

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**OSHA Standards Interpretation and Compliance Letters  
12/20/1999 - PSM coverage of oil and gas production and  
separation facilities.**

**[OSHA Standard Interpretation and Compliance Letters - Table of Contents](#)**

- **Record Type:** Interpretation
- **Standard Number:** 1910.119(a); 1926.64(a)
- **Subject:** PSM coverage of oil and gas production and separation facilities.
- **Information Date:** 12/20/1999

November 20, 1999

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<sup>2</sup>OSHA is currently determining whether to place this standard back on its rulemaking agenda. [\[Back to text\]](#)

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**BNA, Inc.**

# Daily Labor

REPORT

No. 46  
Wednesday, March 8, 2000  
ISSN 1522-5968

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**Text  
Documents**

**Family Leave  
Eighth Circuit's Decision in Thorson v. Gemini Inc.**

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 99-1656/99-2059

Katherine A. Thorson,

Appellee,

v.

Gemini, Inc.,

Appellant.

Equal Employment Advisory Council;

Society for Human Resource Management;

National Association of Manufacturers,

Amici on Behalf of Appellant,

Secretary of Labor,

Amicus on Behalf of Appellee.

No. 99-1708

Katherine A. Thorson,

Appellant,

v.

Gemini, Inc.,

**Appellee.**

Equal Employment Advisory Council;

Society for Human Resource Management;

National Association of Manufacturers,

Amici on Behalf of Appellee,

Secretary of Labor,

Amicus on Behalf of Appellant.

**Appeals from the United States**

District Court for the

Northern District of Iowa.

Submitted: November 18, 1999

Filed: March 3, 2000

Before BOWMAN, LAY, and HANSEN, Circuit Judges.

BOWMAN, Circuit Judge.

Gemini, Inc., appeals from the orders of the District Court granting judgment and awarding damages to Katherine A. Thorson<sup>1</sup> on her claim under the Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601-2654 (1994) (FMLA or Act). Thorson cross appeals, challenging certain aspects of the damages award. We affirm.

## I.

Thorson began working in the packing and shipping department of Gemini's plant in Decorah, Iowa, in September 1986. Acceptable absenteeism at Gemini was limited to five percent of an employee's scheduled work hours in a rolling twelve-month period. The limit covered all absences (except those for scheduled vacation, holidays, or approved leaves of absence), regardless of cause and including absences for illness. Those employees with excessive absenteeism (greater than five percent) were subject to termination.

Thorson left work on Wednesday, February 2, 1994, complaining of diarrhea and stomach cramps and went to see a physician. She was absent from work on Thursday and Friday, and returned Monday, February 7, with a note from her doctor (presumably written at her February 2 visit) indicating "no work" until Monday, February 7. On Monday, she worked only a few hours before returning to the doctor with stomach pain. The doctor ordered tests for Friday, February 11, suspecting either a peptic ulcer or gallbladder disease. The test results were normal. Thorson returned to work on Monday, February 14, again with a doctor's note stating "no work" until February 14. Thorson worked that week but was terminated on February 18 for absenteeism exceeding five percent of her scheduled work hours during the previous twelve months. On March 9, another doctor determined that Thorson had a small hiatal hernia, mild antral gastritis that could be managed with antacid, and duodenitis, all stress-related.

In January 1995, Thorson filed a complaint in the District Court against Gemini alleging various violations of state and federal law, including a claim under the FMLA. Under the Act, an eligible employee is entitled to twelve weeks of unpaid leave during any twelve-month period for any of several reasons, including "a serious health condition that makes the employee unable to perform the functions of the position of such employee." 29 U.S.C. § 2612(a)(1)(D); *see id.* § 2611(2)(A) (defining eligible employee). The employee is entitled to be restored to her job (or to an equivalent position) upon her return to work after taking FMLA leave. *See id.* § 2614(a). Further, the employee's FMLA absences cannot count against her under her employer's "no fault"

attendance policy. See 29 C.F.R. § 825.220(c) (1999). Thorson claimed she was entitled to FMLA leave for her February 1994 absences, and therefore she should not have been terminated for excessive absenteeism.

The District Court granted summary judgment to Gemini on all counts of Thorson's complaint. As to her FMLA claim in particular, the court concluded that Thorson could not prove that the illness at issue was a "serious health condition," as she claimed. Thorson appealed, but only the adverse judgment on her FMLA claim. This Court reversed and remanded "to give the parties an additional chance to argue, and the district court another chance to determine, whether Thorson's condition meets the regulatory criteria for a serious health condition" in light of a Department of Labor (DOL) opinion letter that was released while Thorson's appeal was pending. *Thorson v. Gemini, Inc.*, 123 F.3d 1140, 1141-42 (8th Cir. 1997).

Revisiting the issue with the benefit of the DOL opinion letter, the District Court<sup>2</sup> concluded that Thorson's illness in February 1994 was indeed a "serious health condition" within the meaning of the FMLA. See *Thorson v. Gemini, Inc.*, 998 F. Supp. 1034 (N.D. Iowa 1998). The court granted summary judgment to Thorson on the issue of liability and denied Gemini's motion for summary judgment. The case then proceeded to trial before Magistrate Judge Jarvey<sup>3</sup> on the issue of damages. The Magistrate Judge awarded Thorson \$49,591.86 plus interest, costs, and attorney fees, but no liquidated damages. Gemini appeals and Thorson cross appeals.

## II.

In its appeal, Gemini raises issues relating both to the question of FMLA liability and to the trial on damages. We address each in turn.

### A.

Gemini contends that the District Court erred in granting summary judgment to Thorson on the question of FMLA liability because Thorson did not have a "serious health condition" within the meaning of the Act.<sup>4</sup> Our review of a district court's decision to grant summary judgment is de novo, and we apply the same standard as the district court. See *Wayne v. Genesis Med. Ctr.*, 140 F.3d 1145, 1147 (8th Cir. 1998). That is, we will affirm if, upon review, we agree that there are no genuine issues of material fact and that Thorson is entitled to judgment as a matter of law. See Fed. R. Civ. P. 56(c).

We look first to the language of the statute as Congress enacted it for a definition of "serious health condition." As relevant here, the FMLA defines the phrase as "an illness, injury, impairment, or physical or mental condition that involves ... continuing treatment by a health care provider." 29 U.S.C. § 2611(11)(B). It is undisputed that Thorson had an "illness" or a "physical ... condition," so we focus our attention on what is required to prove "continuing treatment by a health care provider." To answer that question, we consult the regulations prescribed by the Secretary of Labor and the definition of "serious health condition" therein. *Id.* § 2654 (directing Secretary of Labor to "prescribe such regulations as are necessary to carry out" the Act). As we shall see, it was the DOL's decision that "serious health condition" should be defined by an objective test that could be applied consistently based on the facts of each case.

In June 1993, the Secretary first promulgated the interim final rule, effective August 5, 1993, also the effective date of the Act for most affected employers and employees. See The Family and Medical Leave Act of 1993, 58 Fed. Reg. 31,794 (1993) (interim final rule). The final rule appeared in the Federal Register on January 6, 1995, with an effective date of April 6, 1995.<sup>5</sup> See 60 Fed. Reg. 2180 (1995) (final rule); *id.* 16,382 (noting change in effective date and reporting corrections).

The interim final rule was the only official guidance available to Gemini (or to anyone else) at the time Thorson was terminated in February 1994. Thus, if we find the final rule in direct conflict with the interim rule, we do not see how we can give the later version of the rule retroactive effect when no retroactive intent has been expressed. *Cf. Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 209 (1988) ("[A] statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms."). On the other hand, the expanded final regulations, to the extent they merely amplify the language of the interim regulations, may provide valuable guidance to us as we apply the law to the facts here. In addition, the parties have directed our attention to the legislative history for congressional exposition on the FMLA and to DOL opinion letters for the agency's interpretation of its own regulations. It is axiomatic that neither of these resources provides controlling authority for our inquiry, but, again, they may provide helpful insight. We will explain the relative weight we give to these sources of possible clarification or explication as we consider each of them.

This is the definition of "serious health condition," as relevant to Thorson's claim, that appears in the interim final rule: "For purposes of FMLA, 'serious health condition' means an illness, injury, impairment, or physical or

mental condition that involves: ... [a]ny period of incapacity requiring absence from work ... of more than three days, that also involves continuing treatment by ... a health care provider." 29 C.F.R. § 825.114(a)(2); see *id.* § 825.800 (definitions). On its face, then, the interim final rule sets forth three objective requirements that must be met before Thorson can be deemed to have had a "serious health condition": she must have had a "period of incapacity requiring absence from work," that period must have exceeded three calendar days, and she must have had "continuing treatment by ... a health care provider" within that period.

Before we proceed, we must clear up some confusion in this case about what are fact questions and what is to be decided by a court as a matter of law when determining whether an individual has a "serious health condition" within the meaning of the FMLA. Gemini takes seemingly inconsistent positions on this issue in its main appellant's brief. On the one hand, Gemini declares that the "district court erred in denying Gemini's motion for summary judgment because, as a matter of law, [Thorson's] condition was not protected by the statute." Brief of Appellant Gemini at 17 (emphasis added). On the other hand, citing *Victorelli v. Shadyside Hospital*, 128 F.3d 184, 190-91 (3d Cir. 1997), Gemini says, "It was for the factfinder to decide whether [Thorson's] condition is a serious health condition under the FMLA." Brief of Appellant Gemini at 36 (emphasis added).

Having considered the issue, we conclude that this is one of those ubiquitous mixed questions of fact and law. As we noted above, the regulations implementing the FMLA (as relevant here) set out an objective test for a FMLA "serious health condition." It is for the fact-finder to look at the record and decide if the evidence supports the elements of that test. Once the fact-finder has affirmatively found the necessary facts, the conclusion that a plaintiff had a "serious health condition" is inescapable as a matter of law. Therefore, if there are no genuine issues raised as to those facts, which are all material, then summary judgment on the question of "serious health condition" will likely be appropriate (at least if determining whether the plaintiff had a "serious health condition" will conclusively determine liability, as in this case). With this framework in mind, we consider the factors comprising the objective test and the evidence in the record of this case to determine if the District Court was correct in granting summary judgment to Thorson. We forgo our discussion of incapacity for the time being and consider first whether Thorson underwent the "continuing treatment" required for a "serious health condition." We also note that it is without dispute that Thorson's absence for her February 1994 illness exceeded three calendar days, so we will not belabor that part of the test.

"Continuing treatment," as relevant here, means that "[t]he employee ... is treated two or more times for the injury or illness by a health care provider. Normally this would require visits to the health care provider ... ." 29 C.F.R. § 825.114(b)(1); *id.* § 825.800 (definitions). Under this definition, and given the undisputed evidence in this case, it is clear that Thorson's illness of February 1994 met the "continuing treatment" part of the definition of "serious health condition" under the FMLA interim final rule: she saw a physician on February 2 and February 7, and had tests performed on February 11, all while she was absent from work due to illness.

The final regulations expound upon and rearrange some of the language that appeared in the interim regulations, but they do not change the substance of the rule. See *Hodgens v. General Dynamics Corp.*, 144 F.3d 151, 162 n.6 (1st Cir. 1998) (noting agreement with Third Circuit's conclusion in *Victorelli* that standard for FMLA "continuing treatment" is "essentially the same" in both sets of regulations). In the final regulations, "serious health condition," as relevant to Thorson's case:

means an illness, injury, impairment, or physical ... condition that involves:

...

(2) *Continuing treatment* by a health care provider. A serious condition involving continuing treatment by a health care provider includes ... :

(i) A period of *incapacity* (*i.e.*, inability to work ... due to the serious health condition, treatment therefor; or recovery therefrom) of more than three consecutive calendar days, and any subsequent treatment or period of incapacity relating to the same condition, that also involves:

(A) Treatment two or more times by a health care provider ... . 29 C.F.R. § 825.114(a)(2)(i)

(A); see *id.* § 825.800 (definitions).<sup>6</sup> "Treatment ... includes (but is not limited to) examinations to determine if a serious health condition exists and evaluations of the condition."

29 C.F.R. § 825.114(b); see *id.* § 825.800 (definitions). Reserving for the moment, as we have said, the question of Thorson's "incapacity" (which has become a part of the "continuing treatment" test in the final rule),

Thorson otherwise had the requisite "continuing treatment" during her February illness under the objective standard set forth in both rules. This is essentially without dispute. Gemini nevertheless argues that, given the ultimate diagnosis of only minor ailments, Thorson did not have a FMLA-qualifying "serious health condition" - regardless of whether the illness met the objective criteria set forth in the regulations.

As Gemini notes, the final rule expands upon the interim final rule with this statement: "Ordinarily, unless complications arise, the common cold, the flu, ear aches, upset stomach, minor ulcers, headaches other than migraine, ... etc., are examples of conditions that do not meet the definition of a serious health condition and do not qualify for FMLA leave." 29 C.F.R. § 825.114(c); *see id.* § 825.800 (definitions). Gemini would have us declare that Thorson's illness was not a "serious health condition" because an upset stomach and a minor ulcer - the final diagnosis of the February 1994 illness - are on the list of conditions that, at least ordinarily, "do not meet the definition ... and do not qualify for FMLA leave."

On April 7, 1995, the DOL issued an opinion letter that iterated the above-quoted language from § 825.114(c) of the final rule and concluded:

The fact that an employee is incapacitated for more than three days, has been treated by a health care provider on at least one occasion which has resulted in a regimen of continuing treatment prescribed by the health care provider does not convert minor illnesses such as the common cold into serious health conditions in the ordinary case (absent complications).

Op. FMLA-57 (Apr. 7, 1995).<sup>7</sup> But then, in an opinion letter dated over a year and a half later, the DOL referred to this sentence from the 1995 letter and said, "This statement is an incorrect construction of the regulations and must, therefore, be withdrawn." Op. FMLA-86 (Dec. 12, 1996). According to the DOL, "[c]omplications, per se, need not be present for a condition to qualify as a serious health condition if the regulatory ... period of incapacity and regimen of continuing treatment by a health care provider tests are otherwise met." *Id.* The letter goes on to emphasize the objective nature of the test: "The regulations reflect the view that, ordinarily, conditions like the common cold and flu (etc.) would not routinely be expected to meet the regulatory tests, *not* that such conditions could not qualify under FMLA where the tests are, in fact, met in particular cases." *Id.*

Thorson insists that we must apply the 1996 letter to her case. Indeed, we remanded to the District Court the first time this case was on appeal for further argument in light of that letter, which was issued while the appeal was pending. And generally we do defer to the opinions of the agency charged with promulgating rules for and enforcing congressional enactments. "Our task is not to decide which among several competing interpretations best serves the regulatory purpose. Rather, the agency's interpretation must be given 'controlling weight unless it is plainly erroneous or inconsistent with the regulation.'" *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) (quoting *Udall v. Tallman*, 380 U.S. 1, 16-17 (1965) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945))). Nevertheless, we are far less inclined to yield to agency opinion if the administrative agency's interpretation of a matter appears to be inconsistent, as in this case (to say nothing of the issues that would arise should we decide to regard either a 1995 opinion letter or a 1996 opinion letter as determinative of liability for an alleged 1994 violation, if such letter were in conflict with the plain language of the regulations that were in effect at the time of the purported violation). *See id.* at 515.

But even without deferring to the DOL's opinions (either one of them), we conclude that Thorson received "continuing treatment" under the objective standard set forth in the regulations, and thus her illness satisfied this part of the "serious health condition" test. Subjectively, it may be that Thorson's condition was not "serious" in the usual sense of the word. Nevertheless, until February 11, her physician believed Thorson could have a potentially serious condition, and it was not until March 9, after Thorson had been terminated from her job at Gemini, that a diagnosis definitively ruled out her physician's initial suspicions. Thorson was sufficiently ill to see a physician two times in a period of just a few days and that is all that the plain language of both the interim and final rules requires for "continuing treatment."

Gemini then broadens its argument to attack the regulations themselves, asserting that they are inconsistent with congressional intent. If "Congress has directly spoken to the precise question at issue," then we will not defer to the agency's interpretation to the extent that it is inconsistent with the "unambiguously expressed intent of Congress." *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842, 843 (1984). On the other hand, "if the statute is silent or ambiguous," then the agency's construction of the legislation is entitled to deference, providing it "is based on a permissible construction of the statute." *Id.* at 843. Gemini contends that Congress has "spoken directly" to the issue of a FMLA "serious health condition," citing this statement from the Senate Report on the bill:

The term "serious health condition" is not intended to cover short-term conditions for which treatment and recovery are very brief. It is expected that such conditions will fall within even the most modest sick leave policies. Conditions or medical procedures that would not normally be covered by the legislation include minor illnesses which last only a few days ...

S. Rep. No. 103-3, at 28 (1993), *reprinted* in 1993 U.S.C.C.A.N. 3, 30. The Report continues with a non-exclusive list of "serious health conditions," such as heart attack, cancer, stroke, appendicitis, pneumonia, heart bypass surgery, back surgery, and pregnancy. The type of gastrointestinal distress that Thorson ultimately was determined to have is not among the examples given. On the other hand, the Senate Report noted that "[t]he definition of 'serious health condition' ... is broad and intended to cover various types of physical and mental conditions." *Id.*

We do not believe this legislative history assists Gemini all that much. While Congress may have "expected" that minor illnesses "normally" would not come within the definition of "serious health condition," that does not mean such ailments can never be FMLA "serious health conditions." Further, a non-exclusive list of ailments that might qualify as "serious health conditions" that does not include Thorson's final diagnosis does not preclude FMLA leave for her absence.<sup>8</sup> She missed work for more than a "few days" on the advice of a doctor. Thorson's treating physician originally thought she might have a peptic ulcer or gallbladder disease, conditions that could have been quite serious in any sense of the word.

But even if we thought the legislative history would be helpful to Gemini's position, we would reject the contention that it should prevent us from deferring to the DOL's interpretation of the statute as expressed in the regulations. Despite Gemini's argument to the contrary, we do not see this legislative history as Congress speaking "directly" to the question of what constitutes a "serious health condition." The Act's definition of "serious health condition," which is without question Congress speaking "directly" to the issue, is broad and does not include any examples of conditions that either do or do not qualify as FMLA "serious health conditions." See *supra*, at 5-6 (quoting statutory definition of "serious health condition"). There is no express statutory language that parallels the legislative history Gemini cites. In any case, the DOL's objective test for "serious health condition," which avoids the need for employers - and ultimately courts - to make subjective decisions about statutory "serious health conditions," clearly is a permissible construction of the statute. See *Chevron*, 467 U.S. at 843. Under the DOL's definition, it is possible that some absences for minor illnesses that Congress did not intend to be classified as "serious health conditions" may qualify for FMLA protection. But the DOL reasonably decided that such would be a legitimate trade-off for having a definition of "serious health condition" that sets out an objective test that all employers can apply uniformly. See *Pauley v. Bethenergy Mines, Inc.*, 501 U.S. 680, 699 (1991) ("Having determined that the Secretary's position is entitled to deference, we must decide whether this position is reasonable."). It is true that honest (or less than honest) errors by health care providers and fraud or abuse by employees are potential problems, given the objective nature of the test. Yet, as we discuss in the next part of this opinion, in further defining "serious health condition" to require an "incapacity requiring absence from work," Congress and the DOL have devised protections for the employers that choose to use them. See 29 C.F.R. § 825.114(d) (1993) ("The scope of 'serious health condition' is further clarified by the requirements of the Act that the health care provider may be required to certify ... that 'the employee is unable to perform the functions of the position of the employee.'").

Under the regulatory test promulgated by the DOL in the interim final rule, as interpreted in light of the final rule and relevant DOL opinions, there are no genuine fact issues on the question of whether Thorson received "continuing treatment" under the FMLA for her February 1994 illness. Thus, she met this part of the test for a "serious health condition."

#### B.

Gemini contends that, even if Thorson met the "continuing treatment" part of the definition of "serious health condition," she has not shown that her condition resulted in an "incapacity requiring absence from work." 29 C.F.R. § 825.114(a)(2) (1993). It may well be that Thorson's illness did not actually require that she be absent from work, but because the company did not resort to the protections for employers provided by the FMLA to address just this sort of situation, there is no genuine issue of fact on this part of the "serious health condition" question.

An employee need not invoke the FMLA by name in order to put an employer on notice that the Act may have relevance to the employee's absence from work. See *id.* § 825.302(c) (1993). "Under the FMLA, the employer's duties are triggered when the employee provides enough information to put the employer on notice that the employee may be in need of FMLA leave." *Browning v. Liberty Mut. Ins. Co.*, 178 F.3d 1043, 1049 (8th Cir.), *cert. denied*, 120 S. Ct. 588 (1999). Thorson was absent for more than three days with notes from

her physician, written on two different occasions within that period of absence, indicating that she was not to work. At that point, Gemini became obligated either to count Thorson's absence as FMLA leave under the "serious health condition" provision or to follow the procedures set out in the statute and the regulations designed to prevent employee abuse of the Act. *Cf. Bailey v. Amsted Indus., Inc.*, 172 F.3d 1041, 1046 n.6 (8th Cir. 1999) (concluding that employee's notice obligations under the FMLA were not met where employee's written medical excuses "were only given after the fact in response to disciplinary proceedings, not 'as soon as practicable' after the missed work"). That is, Gemini could have initiated the FMLA's certification process before summarily terminating Thorson. See 29 U.S.C. § 2613; 29 C.F.R. § 825.305 (1993). Had it done so, it may have been able to determine that Thorson did not have a "serious health condition" within the meaning of the FMLA.

Under the regulations,<sup>9</sup> an employer is permitted to require an employee who might be qualified to receive FMLA leave to provide a certification issued by the employee's health care provider, detailing such information as the diagnosis and the date and duration of the condition. See 29 C.F.R. § 825.306(a) (1993). The "certification must also include either a statement that the employee is unable to perform work of any kind, or a statement that the employee is unable to perform the essential functions of the employee's position." *Id.* § 825.306(b). To prevent abuse of FMLA leave, the employer may require a second opinion from a health care provider of the employer's choice and at the employer's expense. *Id.* § 825.307(a). In the event the first two opinions conflict, a third, binding opinion may be obtained from a health care provider agreed to by both parties, again paid for by the employer. *Id.* § 825.307(c). The responsibility to request FMLA certification is the employer's. Gemini never sought such certification, notwithstanding that Thorson had timely presented her employer with two notes from her physician indicating, without further explanation, that she was not to work until certain dates.

We agree with the District Court that, in these circumstances, Gemini cannot show that there is a genuine issue of fact regarding Thorson's incapacity during the February absences, although it may have been able to do so (or even to prevail on this issue) had it availed itself of the protections provided for within the FMLA. As it was, in defending against Thorson's motion for summary judgment, Gemini had to rely upon a physician's evaluation of Thorson performed many months after the termination and for purposes of this litigation, which stated that there was no obvious reason Thorson should have missed work in February 1994, and upon a psychologist's opinion, based on an evaluation made two years after Thorson's termination, that Thorson's physical problems were manifestations of a psychological problem. In the face of the contemporaneous notes from Thorson's physician indicating that she was not to work, we agree with the District Court that Gemini cannot show, with its evaluations made long after the fact, that there remains a genuine issue of material fact on the question of Thorson's capacity to perform her job.

Given the sum of our conclusions regarding the three-part definition of "serious health condition" under the FMLA, as that definition applies to the undisputed facts of this case, we conclude that the District Court was correct in granting Thorson summary judgment on the issue of FMLA liability.

### C.

For its next point on appeal, Gemini contends that the Magistrate Judge erred in excluding the testimony and report of Gemini's expert Dr. Jane Cerhan, a neuropsychologist, on the question of damages. The court granted Thorson's motion in limine and excluded the evidence. We review the decision to exclude evidence for a clear and prejudicial abuse of the trial court's discretion. See *Allen v. Entergy Corp.*, 193 F.3d 1010, 1015 (8th Cir. 1999).

"Gemini's position was that [Thorson's] mental condition made her unemployable, and thus evidence of her condition should have been considered when determining damages." Brief of Appellant Gemini at 37. Dr. Cerhan's testimony and report, presented to the Magistrate Judge in an offer of proof, made it clear that she believed Thorson to have a problem with somatization. That is, Dr. Cerhan thought that, over the years, Thorson's mental states (e.g., depression, stress) had been converted into physical symptoms (e.g., stomach pain and other ailments). The court granted Thorson's motion in limine because Gemini had designated the expert to testify about Thorson's alleged emotional or mental suffering, not about her alleged unemployability as a limitation on damages. See Trial Transcript at 274. The Magistrate Judge also indicated that he had read the report and noted the emphasis the report placed on the lack of emotional harm suffered by Thorson as a result of losing the job at Gemini. See *id.* Although the Magistrate Judge did not explicitly say as much, it appears Dr. Cerhan's testimony and report were excluded under Federal Rule of Civil Procedure 26(a)(2)(B) because she was not designated as an expert on the question of damages and because the pretrial report prepared by Dr. Cerhan did not "contain a complete statement of all opinions to be expressed." The court said, "I do see references to somatization on the last page of her report, but the references in the report are references to the reasons why she did not believe that the Plaintiff has suffered emotional harm." Trial Transcript at 274. Moreover, there was a question of relevance. The issue of emotional harm to Thorson, or the lack thereof, related to a non-FMLA claim and was out of the case long before the trial on damages.

Further, even if the evidence should have been allowed, the exclusion of Dr. Cerhan's testimony and report was not prejudicial to Gemini. We note, as did the Magistrate Judge, that Dr. Cerhan did not suggest the conclusion for which Gemini claims it wanted the evidence admitted. In neither her report nor her proffered testimony did Dr. Cerhan conclude, or even imply, that Thorson's "mental condition made her unemployable." Brief of Appellant Gemini at 37. Dr. Cerhan merely stated that a somatization problem might well result in attendance issues at work. Thorson's history of excessive absenteeism before, during, and after her employment with Gemini was fully a part of the record, and the Magistrate Judge duly noted Thorson's attendance problems at Gemini and at later places of employment. See Order of Feb. 2, 1999, at 4-5. In these circumstances, we cannot say that the court "exclude[d] evidence of a critical nature, so that there is no reasonable assurance that the [fact-finder] would have reached the same conclusion had the evidence been admitted," *First Sec. Bank v. Union Pac. R.R.*, 152 F.3d 877, 879 (8th Cir. 1998) (quoting *Adams v. Fuqua Indus., Inc.*, 820 F.2d 271, 273 (8th Cir. 1987)) (alterations ours), especially where, as here, the court has assumed the role of fact-finder in a bench trial.

We hold that the Magistrate Judge did not abuse his discretion to the prejudice of Gemini in excluding Dr. Cerhan's testimony and report from the trial on damages.

#### D.

Gemini's final issue on appeal, that Thorson should not collect costs and attorney fees upon a reversal on the question of liability, is obviously of no force in the face of our affirmation of the District Court's decision to grant summary judgment to Thorson on the issue of FMLA liability.

#### III.

We turn now to the issues raised by Thorson in her cross-appeal, all of which relate to the Magistrate Judge's award of damages.

#### A.

Thorson first claims she was entitled to an award of liquidated damages. Under the FMLA, the defendant employer "shall be liable to any eligible employee affected by a violation of the Act] ... [for] an additional amount as liquidated damages equal to the sum of the amount" of other damages and interest awarded pursuant to § 2617(a)(1)(A)(i) and (ii) of the Act. 29 U.S.C. § 2617(a)(1)(A)(iii). But there is an exception to this otherwise mandatory call for liquidated damages. If the employer can "prove[] to the satisfaction of the court that the" FMLA violation "was in good faith and that the employer had reasonable grounds for believing" that its behavior was not in violation of the FMLA, then the court in its discretion may decline the award of liquidated damages. Id. The court here found the necessary good faith, and opted in its discretion to deny Thorson liquidated damages. We review for an abuse of that discretion.

The Magistrate Judge concluded that Gemini acted in good faith in believing that firing Thorson was not a violation of the FMLA. As the court pointed out, the law was relatively new and had been in effect for just over six months when Gemini terminated Thorson's employment. The owner and president of Gemini (who was the final arbiter of the decision to fire Thorson) was aware of the new law and had made efforts to get a copy of the interim regulations so as to include information about the FMLA in the March 1994 revision of Gemini's employee manual. It is true that Gemini neglected to ask Thorson for certification of her "serious health condition," and that omission has proved to be a problem for Gemini on the question of FMLA liability. But it does not demonstrate that Gemini acted in bad faith in terminating an employee who had a history of excessive and disruptive absences. Moreover, when the District Court looked at the facts of this case the first time, without the benefit of the DOL's 1996 opinion letter, it granted summary judgment for Gemini on Thorson's claim. We agree that the District Court's first decision on liability is compelling evidence of Gemini's objectively reasonable belief, to the extent such belief may be relevant, that it was not violating the FMLA when it terminated Thorson. The Magistrate Judge did not clearly err in finding that Gemini has met its burden of proving that those who had responsibility for Thorson's termination acted in good faith and with reasonable grounds to believe they were not violating the FMLA when they terminated Thorson. Therefore the court did not abuse its discretion in declining to award liquidated damages to Thorson.

#### B.

Thorson contends that the Magistrate Judge erred because he did not include in the backpay award any amount for lost overtime wages. Thorson had worked an average of sixty-five hours of overtime in 1992 and 1993, and argues that the court should have included overtime pay for sixty-five hours per year in the award of backpay. For its part, Gemini asserts that any award of overtime backpay should be reduced by the value of the hours of work lost as a result of Thorson's absenteeism.

Thorson's contention that she would have worked overtime in each of the four-plus years between February 1994 and the time of the trial on damages in August 1998, had she remained at Gemini, is speculative, and the number of any such overtime hours is even more so. We see no error in the court's failure to award an amount for overtime backpay that would be little more than guesswork.

#### C.

The focus of Thorson's challenge to the amount of frontpay awarded is a job she had with Northern Engraving in Spring Grove, Minnesota, beginning in January 1997. She worked at Northern for fourteen months and then quit because six months earlier she and her husband had moved to another town, increasing the length of her commute to Northern. She also testified that she did not like the night shift or the amount of overtime she was expected to work, and that she had found other employment. As the court noted, however, she soon left that other employment, claiming that it bothered her back, but did not reapply to Northern. The Magistrate Judge found that Thorson's pay rate at Northern was increasing much faster than it had been at Gemini. The court decided that, within one year from the trial on damages, Thorson would have been making the same wage at Northern, had she stayed, as she was making when she left Gemini, with similar benefits. The Magistrate Judge awarded Thorson an hourly wage differential of \$0.96 for one year of straight time (no overtime) as frontpay. Thorson challenges the amount on several grounds. Because frontpay is an equitable remedy, we review the court's decisions regarding such a remedy for an abuse of discretion. See *Smith v. World Ins. Co.*, 38 F.3d 1456, 1466 (8th Cir. 1994) (ADEA case); *Stanley v. Chilhowee R-IV Sch. Dist.*, 5 F.3d 319, 322 (8th Cir. 1993) (§ 1983 case).

Thorson insists that, as a part of the frontpay award, she is entitled to one year's overtime pay and one year's profit sharing, calculated for the year that would begin upon the end of the trial on damages. We think the overtime frontpay claim is even more speculative than the claim for overtime backpay. As for the claim for profit sharing, Thorson seeks \$2114.23, an amount evidently based on the profit-sharing information available at the time of trial, or soon after, for Gemini's then most recent fiscal year (1997-98). The court awarded Thorson \$8318.75 in lost profit-sharing benefits, in a category separate from either backpay or frontpay. We will assume this was for the backpay period alone (the court did not include its calculations in its order), and that no amount was included for profit-sharing "frontpay." In any event, as with the overtime issues, we conclude that the court did not abuse its discretion because it chose neither to predict that, for the year following the trial on damages, Gemini would be profitable and would continue to share profits with its employees, nor to divine the amount of profit sharing that might have been due Thorson had she still been employed at Gemini.

Thorson further claims that the pay differential for the award of frontpay should be \$2.12 per hour based on the pay she received at the last job she had before trial, a one-week job she acquired through a temporary agency, and that she should receive frontpay for twelve years, until she reaches age sixty-two, instead of for one year. We disagree. The court was fully justified in choosing a pay differential based on Thorson's job at Northern Engraving; it was a factory job like the one she had at Gemini, it was the job she held the longest between February 1994 and trial, and she left it voluntarily. Further, the Magistrate Judge's finding that Thorson's salary at Northern would have matched her predicted salary at Gemini within one year is not clearly erroneous. Thus the court's decision to award one year of frontpay at a rate of \$0.96 per hour, based on factual findings that are not clearly erroneous, was not an abuse of the court's discretion.

#### D.

Finally, Thorson challenges the Magistrate Judge's decision to reduce her damages for failure to mitigate. Again, we discern no clear error in the court's calculations. See *Kehoe v. Anheuser-Busch, Inc.*, 96 F.3d 1095, 1106 (8th Cir. 1996) (reviewing mitigation finding for clear error in ADEA case). The court reduced the award not only by the amounts she actually earned (or, in the case of unemployment compensation, collected) during the backpay period, but also because of decisions she twice made to quit employment voluntarily, when the working conditions of those positions were not unreasonable.<sup>10</sup> Given Thorson's post-Gemini work history (and her surprising inability to find entry-level work even in the booming economy until her unemployment insurance expired, twice), it could be argued that the Magistrate Judge was generous in not reducing the backpay award further for Thorson's failure to mitigate. In any case, we see no error in the court's decision on mitigation.

#### IV.

The judgment and orders of the District Court and the Magistrate Judge are affirmed in all respects.

<sup>1</sup> Gemini states in its brief that Thorson indicated at trial a preference for the surname Rindels (she married and changed her name after suit was filed), and so Gemini used the name Rindels throughout its briefs to refer to the plaintiff (although Gemini's counsel called her "Ms. Thorson" at trial). Thorson's own brief, however, uses the name under which the case was filed (Thorson). The caption has not been changed in the District Court, to our knowledge, or in this Court. For the sake of consistency and to avoid any confusion, we will refer to the plaintiff as Thorson.

<sup>2</sup> The Honorable Michael J. Melloy, Chief Judge, United States District Court for the Northern District of Iowa.

<sup>3</sup> The Honorable John A. Jarvey, United States Magistrate Judge for the Northern District of Iowa, hearing the case with the consent of the parties pursuant to 28 U.S.C. § 636(c) (1994 & Supp. III 1997). The parties waived any right they may have had to a jury trial on the issue of damages.

<sup>4</sup> Because we are affirming the District Court on Gemini's claim that the court erred in granting summary judgment to Thorson on the question of FMLA liability, it is not necessary for us to address separately Gemini's argument that the court should have granted Gemini's motion for summary judgment.

<sup>5</sup> The interim final rule, The Family and Medical Leave Act of 1993, 58 Fed. Reg. 31,812 (1993), was codified at 29 C.F.R. pt. 825. The 1993 Code of Federal Regulations (CFR) (revised as of July 1, 1993) was the first CFR in which the interim final rule appeared. It is to this 1993 edition of the CFR that we refer when discussing that rule.

The final rule, the Family and Medical Leave Act of 1993, 60 Fed. Reg. 2237 (1995), replaced the interim rule at 29 C.F.R. pt. 825. As of July 1999, the final rule had not been amended since the 1995 promulgation, so when citing the final rule we refer to the most recent volume of the CFR available for Title 29, part 825, the 1999 edition (which in fact is the 1998 revision because none of the regulations that appear in the volume were amended between July 1998 and July 1999).

We will append the dates of the CFR to our citations of the rules only when there might be some confusion as to which version we refer.

<sup>6</sup> The only difference between the interim and the final regulations that arguably is of substance is the requirement that the statutory absence from work exceed three **consecutive** days. Again, there is no dispute that this was the case for Thorson in February 1994.

<sup>7</sup> The letter refers to an alternate definition of "continuing treatment" found in the regulations, besides the one supported by the facts of this case, that requires a prescribed regimen of ongoing treatment instead of treatment two or more times by a health care provider. See 29 § C.F.R. 825.114(b)(2) (1993). We will assume, as has everyone else who is on the record in this case, that the letter refers not only to the "regimen of continuing treatment" part of the regulatory test but also to the "treatment two or more times by a health care provider" part of the test.

<sup>8</sup> Incidentally, this was a list that the DOL considered making part of the final rule. In reporting the final rule, the DOL stated:

The Department did not consider it appropriate to include in the regulation the "laundry list" of serious health conditions listed in the legislative history because their inclusion may lead employers to recognize only conditions in the list or to second-guess whether a condition is equally "serious", rather than apply the regulatory standard.

60 Fed. Reg. 2180, 2195 (1995).

<sup>9</sup> In the circumstances of this case, any differences between the interim and final regulations in the areas of notice and certification are not significant.

<sup>10</sup> Thorson quit a number of jobs in the period between leaving Gemini and the trial, but the Magistrate Judge reduced the backpay award for failure to mitigate on only two of the voluntary terminations. Evidently, the court found persuasive Thorson's intimations that the working conditions were unreasonable at the other jobs she quit (e.g., she did not feel she had the proper training for home health care of a young patient; inspecting raw eggs made her feel nauseated; she did not like handling cash at a convenience store at night, especially when she heard of the murder of a convenience store clerk not far away). 

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U.S. Department of Labor

Occupational Safety and Health Administration  
Washington, D.C. 20210

Reply to the Attention of:



JUN 16 1999

OSHA Document

Mr. J. Robert Harrell  
 President  
 Safety Management Services  
 4012 Santa Nella Place  
 San Diego, California 92130-2291

Exhibit

Number: 1169-15-Construction

Re: Hoisting personnel on a boatswain's chair with a crane

Dear Mr. Harrell:

This is in response to your letter of October 16, 1998 addressed to Russell B. Swanson, Occupational Safety and Health Administration (OSHA), in which you ask questions about federal OSHA requirements with respect to a scene depicted in a newspaper photograph. The picture shows an individual riding in what appears to be a boatswain's chair connected to a hydraulic crane's load line. We apologize for the lateness of our response.

You ask us to comment on the OSHA requirements for lifting personnel on a crane, whether this may be done using a boatswain's chair, and whether the photograph shows violations of OSHA requirements. It would be inappropriate for us to comment specifically on the scene in the photograph since we do not know all the relevant details of the operation depicted. However, we can comment generally on lifting personnel on a crane.

Section 1926.550(g)(2) provides that "the use of a crane...to hoist employees on a personnel platform is prohibited" unless the employer establishes that the "erection, use, and dismantling of conventional means of reaching the work site, such as a personnel hoist, ladder, stairway, or aerial lift, elevating work platform or scaffold, would be more hazardous or is not possible because of structural design or work site conditions." OSHA interprets this provision generally to preclude hoisting personnel on a crane unless these circumstances are present and unless they are hoisted in a personnel platform.

If the employer establishes that providing employee access by means other than hoisting is not possible or presents a greater hazard than hoisting by crane, then hoisting may be used. However, when hoisting workers in a personnel platform, a number of safety requirements apply. These are listed in Section 1926.550(g). Note that one of these requirements is that no lifts be made on another of the crane's load lines while personnel are suspended [Section 1926.550(g)(6)(viii)].

The employer may use a boatswain's chair instead of a personnel platform in two circumstances. First, if the employer can demonstrate that use of a personnel platform is infeasible due to circumstances at the work site, a boatswain's chair may be used if it is the safest feasible

alternative. Second, if the employer can demonstrate that use of a personnel platform would be unsafe. In that event, the employer must either apply to OSHA for a variance or be able to show that a variance would be inappropriate.

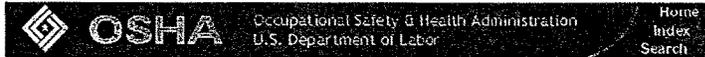
When using a boatswain's chair, the requirements in 1926.452(o) must be met, and a fall arrest system must be provided [Section 1926.451(g)(1)(i)]. You state in your letter that "crane manufacturers do not allow shock loading of the boom, [so] the use of a vertical life line attached to the crane's boom or load line would be out of the question." Under §1926.451(g)(3), the fall protection must meet the requirements in §1926.502(d). One of those requirements, §1926.502(d)(15), requires that the anchorage be capable of withstanding a 5,000 pound load or have a safety factor of two. If the crane used cannot withstand that load (as imposed in an arrested fall), then the fall arrest system may not be anchored to the crane. In addition, the employer must take precautions to ensure that the employee in the chair would not contact the structure being worked on while being hoisted.

If you require any further assistance, please do not hesitate to contact us again by writing to: Directorate of Construction - OSHA Office of Construction and Compliance Assistance, Room N3621, 200 Constitution Avenue, N.W., Washington, D.C. 20210.

Sincerely,



Russell B. Swanson  
Director, Directorate of Construction



## OSHA Standards Interpretation and Compliance Letters

### 12/31/1998 - Acceptability of western style hard hats.

[← OSHA Standard Interpretation and Compliance Letters - Table of Contents](#)

- **Record Type:** Interpretation
- **Standard Number:** 1926.100;1926.95
- **Subject:** Acceptability of western style hard hats.
- **Information Date:** 12/31/1998

December 31, 1998

MEMORANDUM FOR: Mr. John Jones  
Region V- Indiana OSHA

FROM: Russell B. Swanson, Director  
Directorate of Construction

SUBJECT: Western Hard Hats

This is in response to your e-mail requesting an interpretation regarding 29 CFR 1926.100, Head Protection. You asked if western hard hats [hard hats with brims] comply with the requirements of this standard. More specifically, you had concerns that the hat presents a hazard because hot items could fall into the brim and get caught or the brim could be struck by something and would cause the hat to easily fall off the employee's head.

Section 1926.100(a) provides that a hard hat must be used to protect against head injury from impact, or from falling or flying objects, or from electrical shock and [electrical] burns. Section .100(b) provides that a helmet for protection against impact and penetration of falling and flying objects must meet the requirements of ANSI Z89.1-1969. Therefore, as long as a helmet meets the 1969 ANSI standard, the helmet is sufficient for purposes of protecting against impact and penetration hazards of falling and flying objects.

A western hard hat complies with the 29 CFR 1926.100 standard for protection against falling and flying objects as long as it meets the requirements of ANSI Z89.1-1969. The impact testing requirements of ANSI Z89.1-1986 are even more specific than the 1969 version of the standard. Since the revised standard is, in effect, more rigorous, our position is that a hard hat that meets the criteria of the revised standard also meets the 1926.100 requirement for falling and flying object protection. The possibility that an object might strike the brim and cause the helmet to come off does not alter the fact that a helmet meeting the ANSI standard meets the section .100(a) requirement for falling object impact protection.

If there is a danger of head injury from something other than falling and flying objects, the employer is obligated under .100(a) to provide head protection against that hazard as well. There is no reference to the ANSI standard in 1926.100 with respect to protecting against these other impact hazards. If these other impact hazards are present, the employer must ensure that the head protection will protect against them. Because of the wide variety and circumstances of these other types of hazards, we cannot say, as a general matter, whether western style hard hats would protect against those other hazards. The protection provided by a western style hat in this regard only comes into question where those hazards are present.

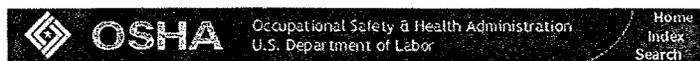
Section 1926.100 does not address burn hazards posed by hot objects. Where an employee is exposed to such hazards, an employer would have to provide protection under 29 CFR 1926.95 (personal protective equipment). There may be circumstances where a hard hat with a brim would make it more difficult for an employer to protect the employee against the burn hazard, or where the brim would increase that hazard. In such a case a brim on a hard hat would be inappropriate. However, we cannot say that, as a general rule, a brim would necessarily increase the risk of being burned (in some situations it might provide protection against a burn).

Products should not bear labels that declare the product has "been approved by OSHA" when the product meets the requirements of an OSHA standard since OSHA does not endorse products.

If you require further assistance, please do not hesitate to contact us again by writing to: Directorate of Construction -- Office of Construction Standards and Compliance Assistance, Room N3621, 200 Constitution Avenue, N.W., Washington, D.C. 20210.

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◀ [OSHA Standard Interpretation and Compliance Letters - Table of Contents](#)



## OSHA Standards Interpretation and Compliance Letters

### 12/11/1996 - Interpretation of the First Aid standard.

[◀ OSHA Standard Interpretation and Compliance Letters - Table of Contents](#)

- **Record Type:** Interpretation
- **Standard Number:** [1910.151](#)
- **Subject:** Interpretation of the First Aid standard.
- **Information Date:** 12/11/1996

December 11, 1996

Mr. Gregory M. Feary  
 Scopelitis, Garvin, Light & Hanson  
 Attorneys at Law  
 Suite 1777  
 10 West Market Street  
 Indianapolis, Indiana 46204-2971

This letter is a follow-up to the conversation that a member of my staff, Ms. Renee Carter, had with Ms. Karol Copper-Boggs, of your firm, regarding the Occupational Safety and Health Administration's (OSHA) interpretation of the First Aid standard, 29 CFR 1910.151.

Ms. Boggs explained to Ms. Carter that a client of your firm had some concerns regarding OSHA's interpretation of 29 CFR 1910.151. Ms. Carter's recollection of the questions asked of her by Ms. Boggs is as follows:

Question #1: "Must an employer have individuals trained to render first aid?"

Answer: Yes. The OSHA requirement at 29 CFR 1910.151(b) states, "In the absence of an infirmary, clinic, or hospital in near proximity to the workplace which is used for the treatment of all injured employees, a person or persons shall be adequately trained to render first aid. First aid supplies approved by the consulting physician shall be readily available."

OSHA's regulation does not set specific response time requirements for the term "near proximity", however, in areas where accidents resulting in suffocation, severe bleeding, or other life-threatening or permanently disabling injury or illness are likely, a 3 to 4 minute response time, from time of injury to time of administering first aid, is required. In other circumstances, i.e., where a life-threatening or permanently disabling injury is an unlikely outcome of an accident, a longer response time, such as 15 minutes, is acceptable. The rationale for requiring a 4 minute response time is brain death when the heart or breathing has stopped for that period of time.

Question #2: "If an emergency situation were to occur where first

aid was necessary and a trained employee were to panic, forgetting all of their training, and no first aid or improper first aid was administered could

the employer be cited?"

Answer: If a **trained** employee were to panic in an emergency situation and not administer first aid or administer improper first aid, OSHA would not cite the employer. The employer would have met his obligation under the standard by having individuals trained to render first aid. The standard only requires employees to be trained in first aid, but does not address the actual performance of first aid in an emergency situation. Please note, however, that OSHA would conduct an investigation, if deemed necessary, to ensure that proper training certification, e.g., First Aid and CPR certificates were in order.

Question #3: "Would an employer be in violation of OSHA's First Aid standard if the employer were to issue a policy which recommends that employees call "911" in emergency situations?"

Answer: The purpose of first aid is to give injured employees some level of medical attention as quickly as possible to bridge the gap between the accident and full medical treatment. Therefore, the rendering of first aid should be encouraged by trained employees in addition to calling "911." Thus, an employer would not be in violation of OSHA's First Aid standard by issuing such a policy statement as long as the policy does not discourage the rendering of first aid by trained employees.

I hope this letter is responsive to your concerns. If we can be of further assistance please contact Renee Carter at 202-219-8041, x106.

Sincerely,

Raymond E. Donnelly, Director  
Office of General Industry Compliance Assistance

November 19, 1996

Ms. Renee Carter  
Directorate of Compliance  
Occupational Safety and Health Administration  
200 Constitution Ave. NW  
Washington, D.C. 20210

Re: First Aid Training Statute 29 C.F.R. 1910.151

Dear Ms. Carter:

Recently, Karla Cooper-Boggs of my office discussed with you the Occupational Safety and Health Administration's ("OSHA") interpretation of the first aid training statute, 29 C.F.R. 1910.151. Outlined below is our understanding of that conversation.

You indicated that an employer must ensure that a number of its employees are trained in accordance with 29 C.F.R. 1910.151, but that the employer is not required to ensure that the trained employee actually performs first aid. You stated that OSHA would not issue citations to the employer if its trained employee(s) rendered first aid improperly, or not at all.

It is also our understanding that an employer will not violate OSHA regulations by issuing a policy which recommends that employees call "911" in emergency situations, and that trained

employees should attempt to administer first aid at their discretion so long as such a policy does not discourage the rendering of first aid by a trained employee.

Please send me a letter as soon as possible confirming that our understandings outlined above are accurate. If you have any questions, please contact me.

Very truly yours,

Gregory M. Feary

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[◀ OSHA Standard Interpretation and Compliance Letters - Table of Contents](#)



## OSHA Standards Interpretation and Compliance Letters

### 09/23/1999 - Protection of ground-level workers from lowering of aerial lift bucket.

[◀ OSHA Standard Interpretation and Compliance Letters - Table of Contents](#)

- **Record Type:** Interpretation
- **Standard Number:** 1910.67;1926.453
- **Subject:** Protection of ground-level workers from lowering of aerial lift bucket.
- **Information Date:** 09/23/1999

September 23, 1999

Judson S. Ludeking  
Contractors Risk Management, Inc.,  
Post Office Box 211  
Concord, New Hampshire 03302-0211

Dear Mr. Ludeking:

Thank you for your August 18, 1999 letter in which you described a hazard apparently not addressed by any specific OSHA standard, but which you believe might be cited by OSHA under the General Duty Clause of the Act. The hazard you described was that employees working at ground level in the vicinity of an operating aerial lift truck were exposed to possible injury as result of being struck by the personnel bucket when it is being lowered close to the ground.

In your letter you posed two related questions. In your first question you asked if OSHA would cite a company whose employees were exposed to this hazard. In your second question you inquired whether installation, on the aerial lift, of a device which would activate an audible alarm whenever the personnel bucket was being lowered, would "address the exposure sufficiently to eliminate any possible citations for the crushing exposure."

To your first question, the only answer I can offer is that OSHA might issue a citation for such an exposure if all necessary elements of a general duty clause violation were found to be present in a particular work citation. That is, the hazard could result in serious injury, sufficient industry or employer knowledge of the hazard was present, and the employer was aware that employees were exposed to the hazard. Since this hazard is not addressed by any specific OSHA standard or by the applicable industry consensus standard (ANSI A92.2), the determination of whether or not there is sufficient employer knowledge present to justify and support a citation for this hazard would necessarily be based on information, obtained during an OSHA inspection, that is specific to the particular employer and work situation. Consequently, the question of whether or not OSHA would issue a citation for this hazard must be decided on a case-by-case basis.

Regarding your second question, the installation of an audible device to warn employees that the bucket was being lowered would not, by itself, be viewed as acceptable abatement of the hazard. Since we know of no empirical evidence that installation of such a device would eliminate (or even reduce) the hazard, for the reasons that follow, we are not prepared to

agree that it would.

As you pointed out in your letter, OSHA construction standards do accept a reverse signal alarm as an abatement method for protecting employees from the hazard presented by a rearward moving vehicle which has a restricted view to the rear. At first glance, it might seem that the situations are analogous, the difference being only horizontal versus vertical movement. But the situations differ in a way that is significant. In the case of the backing vehicle with a restricted view to the rear, it is not possible for the operator to see if a pedestrian employee is in the vehicle's path. Use of a spotter or reverse signal alarm may be the only feasible or practical means to reduce the hazard. The vehicle operator can not eliminate the hazard simply by backing the vehicle cautiously.

However, operators of an aerial lift bucket can look over the side of the bucket and see whether or not someone is working beneath them and close enough to be endangered by downward movement of the bucket. Therefore, it is our view that the most effective method for protecting employees from the hazard at issue is for the employer to ensure, through appropriate training and supervision, that aerial lift operators exercise the same caution when moving the bucket that is expected of them when they are moving the truck. That is, that they do not move the bucket unless they can see that it is safe to do so.

We should also point out some of the limitations of audible warning alarms. The effectiveness of audible alarms tends to diminish over time as workers get accustomed to the noise. We would expect this phenomena to be especially problematic in work situations where the employees are continually exposed to the alarm throughout their work shift, such as, when working next to a bucket truck, since they are normally stationary when the aerial bucket is in operation, and not moving in and out of the area as is often the case with vehicles equipped with conventional back-up alarms. We are aware of accidents wherein employees were seriously injured by backing vehicles which were equipped with functioning back-up alarms.

Beside the tendency of the human brain to temporarily tune out re-occurring noise, other factors that can result in workers not hearing an audible motion alarm include: a high ambient noise level (such as that resulting from the operation of chain saws and chippers next to the bucket truck), and the wearing of hearing protection. And, of course, some workers may already have a hearing impairment that could prevent them from hearing an audible motion alarm.

Another concern we have with reliance on an audible alarm is that employees operating the aerial bucket might conclude that the presence of this device obviates the need for them to look in the direction of movement before moving the bucket. We have seen where the installation of back-up alarms on equipment, such as fork trucks, when combined with inadequate training and supervision, can lead truck operators to assume pedestrian employees will get out of their way as soon as the back-up alarm sounds, and to begin moving the truck without first turning to look in the direction of travel.

We hope you find this responsive to your inquiry. Should you have any other questions concerning this matter, you are invited to contact Geoff McKinstry, Safety Specialist, at (617) 565-9893. We thank you for your interest in occupational safety and health.

Sincerely,

Ruth McCully  
Regional Administrator

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[◀ OSHA Standard Interpretation and Compliance Letters - Table of Contents](#)

U.S. Department of Labor

Solicitor of Labor  
Washington, D.C. 20210

MAR 16 2000

The Honorable David M. McIntosh  
Chairman  
The Honorable Dennis Kucinich  
Ranking Minority Member  
Subcommittee on National Economic Growth,  
Natural Resources, and Regulatory Affairs  
Committee on Government Reform  
U.S. House of Representatives  
Washington, DC 20515-6143

Dear Chairman McIntosh and Congressman Kucinich:

During the Subcommittee's February 15, 2000 hearing, Congressman Ford invited me to supply for the record the Department of Labor's views on issues raised by other witnesses that may not have been fully aired at the hearing. He also requested that I provide examples of letters from employers who have praised OSHA's compliance assistance efforts; a sampling of such letters is enclosed.

With your permission, I would like to address a few significant issues of most direct concern to the Department of Labor. Other issues will be addressed separately, in response to written questions posed by Chairman McIntosh after the hearing. Time and resource constraints prevent a discussion of every issue where the Department would dispute the facts or the opinions offered by a witness.

At the outset, let me repeat that the Department is not engaging in "backdoor rulemaking." We are committed to complying with the laws that govern the rulemaking process. We routinely consult stakeholders in developing the Department's policies and initiatives. And we make every effort to provide the public with the compliance assistance it asks for, just as the Small Business Regulatory Enforcement Fairness Act requires. On occasion, specific guidance may cause confusion, but the general practice of providing compliance assistance is both well-established and entirely legitimate.

\* \* \*

Compensable Time in the Meatpacking Industry under the Fair Labor Standards Act

In his testimony, Mr. Michael Baroody of the National Association of Manufacturers cited a Wage and Hour opinion letter addressing the issue of compensable time under the Fair Labor Standards Act (FLSA) in connection with putting on, taking off, or washing protective safety

equipment used in the meatpacking industry. The letter stated that time spent in these otherwise compensable activities cannot be excluded from hours worked by the terms of, or practice under, a collective bargaining agreement.

Mr. Baroody asserted that the December 1997 letter was issued "in response to a UFCW [United Food and Commercial Workers] inquiry" and that the Department "not only abrogated collectively bargained contract provisions, it contradicted its own position in two court cases it had just litigated." This assertion is inaccurate.

The opinion letter was issued in response to a request from both the union and a major employer in the industry requesting clarification of the scope of Section 3(o) of the FLSA. The Department met with both union and industry representatives before the letter was issued. The letter was the first statement by the Wage and Hour Administrator on this issue.

The correctness of the Department's interpretation is now at issue in cases involving the Department. In a recent order, Chief Judge Richard P. Matsch of the United States District Court for the District of Colorado "agreed with the interpretation . . . stated in the opinion letter." Salazar v. Monfort, Inc., No. 98-M-2653 (D. Colo. filed Jan. 14, 2000).

#### Office of Federal Contract Compliance Programs and Pay Data

In an attachment to his testimony, Mr. Baroody stated that "[i]n 1999, the Office of Federal Contract Compliance Programs (OFCCP) tried to sneak through a dramatic change in its rules, requiring federal contractors to furnish wide-ranging pay data at an earlier stage of the compliance review process."

Without addressing Mr. Baroody's claims on the substance of the proposal, OFCCP in fact fully complied with the procedures mandated by the Paperwork Reduction Act, which included public notice through successive publications in the Federal Register. There was ample opportunity for public comment, and a number of contractors did comment on the proposal, through law firms and organizations. Following the second Federal Register notice, and prior to a third notice and comment period, both the Department and the Office of Management and Budget met with affected industry parties.

#### Repeat Violations under the Occupational Safety and Health Act

In his testimony, Mr. Baroody stated that "[q]uietly, through compliance directive and without notice to employers much less notice and comment rulemaking, in 1998 OSHA redefined repeat violations. . . ." OSHA did not issue a compliance directive on this issue in 1998. As I stated in my testimony, the last modification to its enforcement policy was made in 1992, during the Bush Administration.

The Occupational Safety and Health Act provides for certain penalties against an employer who

“repeatedly violates” requirements under the Act and OSHA regulations. 29 U.S.C. §666(a). For many years – consistent with a 1979 decision (*Pollatch*) of the independent Occupational Safety and Health Review Commission – OSHA has interpreted the Act to allow OSHA to consider an employer’s earlier violations at other worksites when proposing penalties for a repeated violation at a different worksite. That interpretation had also been judicially upheld. George Hyman Constr. Co. v. Occupational Safety & Health Review Comm’n, 582 F.2d 834, 837-38 (4<sup>th</sup> Cir. 1978)

As a matter of enforcement policy, before 1992 OSHA only applied this position to companies (e.g., the construction industry) with non-fixed worksites. In 1992 – not 1998 – OSHA eliminated the distinction between fixed and non-fixed worksites. Improvements in information retrieval facilitated this change.

A 1998 judicial decision upholding a repeated-violation penalty, Caterpillar, Inc. v. Herman, 154 F.3d 400 (7<sup>th</sup> Cir. 1998), examined OSHA field guidance manuals with respect to the repeat-violation issue and raised the question of whether the manual instructions were intended as an interpretation of what a repeat violation is, or merely reflected “an intent to establish enforcement priorities.”

Later that year, the National Association of Manufacturers wrote OSHA, seeking clarification on the question raised by the court. It was provided in a July 13, 1999 letter from Assistant Secretary Charles Jeffress, who observed:

The Agency . . . has chosen not to cite for repeated violations as fully as its interpretation of the term would allow. Thus, under OSHA’s current enforcement policy, the Agency normally looks at a company’s nationwide history only with respect to high gravity serious violations – violations where there is a high probability of death or serious physical harm to an employee. In the Agency’s view, it is this type of violation that an employer, once cited, should be particularly diligent in eliminating at all of its facilities.

This letter explained OSHA’s existing enforcement policy. It did not redefine repeat violations.

OSHA Safety and Health Program Management Guidelines and the Construction Industry

The testimony of Mr. Jud Molsenbocker of Jud Construction raised issues concerning OSHA’s Safety and Health Program Management Guidelines, suggesting that construction industry employers were cited for failing to comply with the guidelines, which were not intended to cover construction.

In fact, since 1971, there has been an OSHA regulation, 29 CFR 1926.20(b), requiring construction industry employers to establish safety and health programs. If construction

employers are cited for failure to have a proper safety and health program, then the basis for the citation can only be this and related regulations. OSHA guidelines are not legally binding and are not used as the basis for citations. Employers, of course, have the right to contest OSHA citations before the independent Occupational Safety and Health Review Commission, whose decisions in turn are reviewable by the federal appellate courts.

#### OSHA Multi-Employer Worksite Policy

In his testimony, Mr. Motsenbocker expressed the “belief that OSHA has substantially exceeded its statutory authority with the multi-employer citation policy.” In fact, OSHA’s long-standing policy is consistent with the language and the goals of the Occupational Safety and Health Act.

Under OSHA’s policy, employers who create or control violative conditions can be held liable even if their own employees are not exposed. But employers are only expected to exercise reasonable diligence to prevent and discover violations by subcontractors. They should not be cited for violations they could not reasonably be expected to prevent or detect.

For more than two decades, OSHA’s policy has been repeatedly upheld by the independent Occupational Safety and Health Review Commission and by the federal courts. Universal Constr. Co. v. Occupational Safety & Health Review Comm’n, 182 F.3d 726, 729 (10<sup>th</sup> Cir. 1999); United States v. Pitt-Des Moines, Inc., 168 F.3d 976, 983 (7<sup>th</sup> Cir. 1999); Teal v. E.I. DuPont de Nemours & Co., 728 F.2d 799 (6<sup>th</sup> Cir. 1984); Beatty Equip. Leasing v. Secretary of Labor, 577 F.2d 534 (9<sup>th</sup> Cir. 1978); Marshall v. Knutson Constr. Co., 566 F.2d 596 (8<sup>th</sup> Cir. 1977); Brennan v. Occupational Safety & Health Review Comm’n (Underhill Constr. Co.), 513 F.2d 1032 (2d Cir. 1975); Grossman Steel & Aluminum Corp., 4 O.S.H. Cases (BNA) 1185 (Rev. Comm’n 1976).

#### Advisory Committee on Construction Safety and Health and Ergonomics

Mr. Motsenbocker’s testimony raised concerns about a draft document, *Construction Industry Ergonomics Problems and Practices*, developed by the OSHA Advisory Committee on Construction Safety and Health (ACCSH). He contends that the presence of this document on OSHA’s website may confuse the public because those reading it might believe the document constitutes OSHA policy. Despite Mr. Motsenbocker’s alarm, there should be no public doubt about the origin or status of this document.

As it appears on OSHA’s website, the document bears a heading which reads “The following is a product of the Construction Advisory Committee, not OSHA, and does not represent OSHA policy.” The document is explicitly identified as an unedited draft.

Mr. Motsenbocker stated that the document “was developed . . . without the consensus of the construction industry.” If the implication is that industry employers are not represented on the Advisory Committee, it is mistaken. The purpose of the Advisory Committee is precisely to

ensure that the views of employers, among other stakeholders, are heard.

OSHA Lock-Out/Tag-Out Rules and the Non-delegation Doctrine

Mr. Baroody's testimony cited litigation involving OSHA's lock-out/tag-out rule in urging a reinvigoration of the non-delegation doctrine. A fuller description of the litigation may be instructive, since the testimony might be read to suggest that the non-delegation doctrine somehow casts doubt on OSHA's regulatory work. That is not the case.

The lock-out/tag-out rule at issue was promulgated during the Bush Administration in 1989. When the rule was challenged on the basis of the non-delegation doctrine, OSHA – also during the Bush Administration – offered a view of its delegated authority under the Occupational Safety and Health Act that was criticized by the U.S. Court of Appeals for the District of Columbia Circuit. UAW v. OSHA, 938 F.2d 1310 (D.C. Cir. 1991).

Following a remand to OSHA, the rule was upheld by the court, on the basis of a new construction of the OSH Act published in the Federal Register in March 1993. In the court's words, "[a]s construed by OSHA, the Act guides its choice of safety standards enough to satisfy the demands of the nondelegation doctrine." UAW v. OSHA, 37 F.3d 665, 669 (D.C. Cir. 1994).

\* \* \*

I very much appreciate the opportunity to supplement the record with respect to these issues. I would be pleased to provide the Subcommittee with additional information about the matters addressed here.

Sincerely,



Henry L. Solano

Enclosures

cc: Hon. Harold E. Ford, Jr.

Statement on Non-Codified  
Documents by the Dept. of Labor  
February 15, 2000  
Congressman Harold Ford, Jr.

On October 28th of last year, on National Telework Day, I sat in the Education and Workforce Committee's hearing on the status of "telework" in the United States.

We discussed the impact that new technologies were having not only on the American workplace, but also on the American family.

We discussed how new technologies enabled parents to spend more time with their children.

We heard projections that as telework increased, pollution, congestion, and sprawl would decrease.

It is rare to see such a bi-partisan consensus on a labor issue. In 1994 President Clinton issued a statement to create a more family friendly federal workforce, a workforce which now contains 60,000 employees who telecommute at least one day a month.

In an analysis of telecommuting, the General Service Administration found that telecommuting "produces a more efficient use of time" and therefore "translates into better customer service and better ability to get things done."

With all these advantages to workers, families, and communities unanimously noted I was as shocked as anyone to read of the OSHA advisement on telework.

That letter seemed to reincarnate the era of big government. Although the workplace had changed, our bureaucratic culture had not.

That is why I was heartened when the advisory was withdrawn. When the Education and Workforce Subcommittee on Oversight and Investigations held a hearing on the letter of advisement I was fully reassured.

I was reassured because I learned that the Department of Labor had no plans, and would never have plans to carry out home office inspections. In fact, the only times homes were inspected were over a decade ago- and that was because minors were making fireworks, and a woman was smelting lead in her kitchen.

I was also reassured to learn that advisement letters do not have the force of law. The offices which compose these letters do not then mandate their enforcement. They are what they are designated- advice.

Advisement letters are how we can assure that our government is responsive. They get to the root of what effective government is, customer service.

By providing prompt and courteous service, executive branch and administrative offices can curtail costs to businesses and the public.

But these agencies must also bear in mind that our goal as public servants is to help our citizens and their businesses obtain the best possible results. The two recent controversial letters; the first on home offices and the second on overtime and stock options, if followed could clearly inhibit profit and prosperity.

That is why I commend the swift action from the Labor Department to clarify and correct these letters. It is also why I commend the legislative redress to these matters that Congress is pursuing.

Thank you all for being here, I look forward to hearing your statements today.

DAN BURTON, INDIANA  
 CHAIRMAN  
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ONE HUNDRED SIXTH CONGRESS  
**Congress of the United States**  
 House of Representatives

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 2157 RAYBURN HOUSE OFFICE BUILDING  
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 JANICE D. SCHMAGOWSKY, ILLINOIS

BERNARD SANDERS, VERMONT,  
 INDEPENDENT

March 21, 2000

**BY FACSIMILE**

The Honorable Henry Solano  
 Solicitor  
 Department of Labor  
 200 Constitution Avenue, N.W. - Room S2002  
 Washington, D.C. 20210

Dear Mr. Solano:

This letter responds to your March 16, 2000 reply to my February 16<sup>th</sup> letter, following our February 15<sup>th</sup> hearing, entitled "Is the Department of Labor Regulating the Public Through the Backdoor?" You indicated that answers to three questions about withdrawn guidance (Q 7a and 7b) and types of guidance (Q 14) will be forthcoming. When will they be submitted to us? Unfortunately, your answers to ten questions (Q 1c, 2a, 2b, 2c, 2d, 2e, 2f, 3c, 11b and 11c) -- about Vice President Gore's Reinventing Government, the absence of an indication of no legal effect, the Office of Management and Budget's Congressional Review Act guidance, and the Department's ergonomics guidance documents -- are largely nonresponsive. Please provide best estimates for each of these questions. Additionally, your answer to Question 4b is not helpful to the Subcommittee. We would like to propose bipartisan legislation to address the very real public confusion problem demonstrated at the hearing. As a consequence, please submit legislative language, which is acceptable to you, to ensure the public's understanding of whether a non-codified guidance document is binding or not.

The 1997 non-codified guidance document, mentioned in Question 5, is not included in the Department's 3,374 documents submitted to the Subcommittee for the March 1996 - October 1999 period. Why not? How many other documents were not submitted in our response to my October 8, 1999 request? When will Labor's December 20, 1999 non-codified guidance document, mentioned in Question 8, be withdrawn?

Your answers to Questions 12a and 12b about the Department's use of contractors are quite troubling. Office of Management and Budget Circular A-76, "Performance of Commercial Activities," and Office of Federal Procurement Policy Letter 92-1, "Inherently Governmental Functions," are quite specific about the restrictive use of contractors only for commercial activities or for "special knowledge and skills not available in the Government." As a

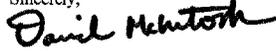
consequence, under which specific legal authority is the Department using contractors “to perform specific tasks during peak workloads” and “when it would not be practical or cost effective to hire federal staff”?

In 1992, the Occupational Safety and Health Administration (OSHA) issued a final rule (57 FR 6356) exempting certain hydrocarbon fuels used solely for workplace consumption as a fuel from its Process Safety Management (PSM) standard (29 CFR §1910.119(a)(1)(ii)(A)). The accompanying preamble stated, “It is our understanding that OSHA’s intention ... was to exclude the enormous number of small business locations across the nation ... Such activities are not the subject of this rule, and this exclusion is entirely appropriate.” On November 23, 1999, OSHA issued an interpretive letter responding to a November 4, 1998 public query, which asked for confirmation that the exemption applied to the company’s manufacture of table glassware. OSHA’s new interpretive letter concluded that the exception does not apply. Since OSHA’s interpretive letter could hurt small business and appears to be inconsistent with OSHA’s codified rule, please explain why DOL did not subject this policy change to public notice and comment rulemaking procedures and Congressional review under the Congressional Review Act.

Your responses should be delivered no later than noon on Wednesday, April 5, 2000 to the Subcommittee majority staff in B-377 Rayburn House Office Building and the minority staff in B-350A Rayburn House Office Building. If you have any questions about this request, please call Professional Staff Member Barbara Kahlow on 226-3058.

Thank you for your attention to this request.

Sincerely,



David M. McIntosh  
Chairman

Subcommittee on National Economic Growth,  
Natural Resources, and Regulatory Affairs

cc: The Honorable Dan Burton  
The Honorable Dennis Kucinich

**U.S. Department of Labor**Solicitor of Labor  
Washington, D.C. 20210

APR 20 2000

The Honorable David M. McIntosh,  
Chairman  
Subcommittee on National Economic Growth,  
Natural Resources, and Regulatory Affairs  
Committee on Government Reform  
U.S. House of Representatives  
2157 Rayburn House Office Building  
Washington, DC 20515-6143

Dear Chairman McIntosh:

I write in response to your March 21, 2000 letter, which follows my March 16 letter to you. In my letter, I responded to all of the questions that you had posed in a February 16 letter to me, following the Subcommittee's February 15 hearing on the use of non-codified documents by the Department of Labor. Your new letter asks follow-up questions concerning certain responses, poses new questions, and invites me to submit language for proposed legislation involving disclaimers of legal effect in agency guidance documents.

As you know, the Department's Congressional staff and the Subcommittee's staff are continuing to discuss our responses to Questions 1(c), 2(a), 2(b), 2(e), 2(f) and 4(b) (H.R. 3521). Our responses to your remaining questions follow below.

\* \* \*

Questions 7(a), 7(b) and 14

Your letter asks when additional responses to these questions, which involve withdrawn guidance documents and the creation of a table categorizing guidance documents submitted to the Subcommittee, will be forthcoming. As you know, this is an extremely time-consuming process. We hope to complete our responses to these questions within the next few weeks.

Questions 2(c), 2(d), 3(c), 11(b) and 11(e)

Your letter characterizes my responses to these questions as "largely nonresponsive" and asks for "best estimates" in responding. Our original responses reflected a considered judgment on how best to respond to your questions in good faith, without providing information that was purely speculative and/or that could not be generated without an extraordinary expenditure of resources. I would be happy to explain our reasoning in more detail.

Question 2(c): You asked whether any Department agencies are "doing an especially good job or poor job" in presenting information to the public on the legal effect of guidance

documents. As I expressed in my earlier letter, no Department agency can be singled out on this point.

Question 2(d): This question, with four sub-parts, asked generally about “controls” in the Solicitor’s Office to “remedy . . . the problem” of guidance documents that do not indicate their legal effect. We disagree that there is a widespread problem requiring a legislative solution. In line with past practice, SOL will continue to review guidance documents, as appropriate, and the Department will continue to include disclaimers on such documents, when appropriate.

Question 3(c): This question, as I understood it, asked whether the Department’s agencies understand the requirements of the Congressional Review Act. My original response was intended to convey that they do. Whether a particular document must, in fact, be submitted to Congress under the Act depends on the nature and characteristics of that document, considered in light of the Act’s provisions (including the definition of a “rule” and its exceptions).

Question 11(b): You asked whether I was “satisfied that it is clear to the regulated public that those [OSHA ergonomics guidance] documents have no legal effect.” As I stated in my earlier response, having seen no evidence of widespread public confusion, I am satisfied that it is clear to the public that the documents have no legal effect.

Question 11(c): This question asked whether the Solicitor’s Office had “reviewed the 37 guidance documents on OSHA’s Ergonomics web site to ensure that the public is clear about the absence of any legal effect for them” and “[i]f not, why not.” To restate my original response, SOL reviewed some, but not all, of the documents. Documents that involve purely technical information do not warrant such a review.

Question 5

The second paragraph of your March 21 letter refers to an OSHA guidance document dated February 21, 1997 concerning home construction (not working at home). You state that the document “is not included in the Department’s 3,374 documents submitted to the Subcommittee for the March 1996-October 1999 period” and ask why not. I am advised, however, that the letter appears in Box 23, document 1601, at page 625. I have enclosed a copy of this document as it was originally produced to the Subcommittee.

Question 8

The second paragraph of your March 21 letter also asks when OSHA’s December 20, 1999 memo will be withdrawn. The memo was withdrawn from OSHA’s website on March 22, 2000.

Questions 12(a) and 12(b) (Use of Contractors)

The third paragraph of your March 21 letter, citing the responses to Questions 12(a) and 12(b) in your February 16 letter, asks, “[U]nder which specific legal authority is the Department using contractors ‘to perform specific tasks during peak workloads’ and ‘when it would not be practical or cost effective to hire federal staff?’”

The Department has implemented the long-standing policy regarding the performance of commercial activities which is provided in the Office of Management and Budget (OMB) Circular A-76, as revised in 1999 to provide guidance in implementing the Federal Activities Inventory Reform Act of 1998 (FAIR). The Circular provides the principles and procedures for the acquisition of recurring commercial support activities by Federal agencies. It also provides (in chapter 1, section D, of the A-76 Revised Supplemental Handbook) that “as a matter of policy, the Government shall acquire ‘non-recurring’ commercial activities through contracts with the private sector.”

Both the FAIR and A-76 categorize government agencies’ operations as either (1) commercial activities or (2) inherently governmental functions. OMB defines inherently governmental functions as functions which are “so intimately related to the exercise of the public interest as to mandate performance by public employees.” OMB’s Office of Federal Procurement Policy (OFPP) Policy Letter 92-1 breaks them into two basic categories: (1) the act of governing; and (2) monetary transactions and entitlements. In Appendix B of the policy letter, OFPP provided a nonexclusive list of services and actions which are not inherently governmental functions. These include, to list a few:

- o Services that involve or relate to analyses, feasibility studies, and strategy options to be used by agency personnel in developing policy;
- o Services that involve or relate to the development of regulations;
- o Contractors’ providing support in preparing responses to Freedom of Information Act requests; and
- o Contractors’ providing legal advice and interpretations of regulations and statutes to Government officials.

The Federal Acquisition Regulation, FAR § 37.203, recognizes the distinction between commercial service activities and inherently governmental functions. It provides that an agency may obtain commercial services which support an agency’s policy development, decision-making, management, or administration. This policy permits an agency to use a contractor to help locate documents in responding to a request, but does not permit a contractor to make the decision concerning what documents are sent.

The Department properly has used its contractor to perform actions which are classified as commercial activities. These tasks include the ones you listed in your February 16, 2000 letter: "analyzing data, assessing economic impact, estimating benefits, conducting evaluations, and doing other regulatory work." Therefore, using contractors, to perform "non-recurring" commercial activities during "peak workloads," or "when it would not be practical or cost effective to hire federal staff," is consistent with OMB Circular A-76, FAIR and FAR.

OSHA Process Safety Management Standard and Hydrocarbon Fuels Exemption

Finally, for the first time, your letter cites a November 23, 1999 letter from OSHA, which, in connection with the manufacture of table glassware, addressed the application of an exemption from the OSHA Process Safety Management (PSM) standard for certain hydrocarbon fuels solely for workplace consumption. You contend that the letter "appears to be inconsistent with OSHA's codified rule." You ask "why DOL did not subject this policy change to public notice and comment rulemaking procedures and Congressional review under the Congressional Review Act."

The November 23, 1999 interpretive letter, which was in response to an inquiry from Libbey Glass, was consistent with both long established OSHA policy and the plain meaning of both the Process Safety Management standard preamble and text. The hydrocarbon fuels exception to PSM at 29 C.F.R. § 1910.119(a)(ii)(A) exempts from coverage hydrocarbon fuels used solely for workplace consumption as a fuel, if such fuels are not part of a process containing another highly hazardous chemical covered by the standard. The preamble, the text of the standard, and all prior interpretations specifically limit the application of the exception to situations where the hydrocarbon is used exclusively as a fuel to supply heat or power. As described by Libbey, the process which was the subject of its interpretive request involved the use of a hydrocarbon not as a fuel for heat or power, but instead as an actual part of a process which, in this case, was as an ingredient to create a residue used for the lubrication of glass molds.

Because the hydrocarbon was not being used solely as a fuel as contemplated by both the standard and previous interpretive letters, the letter is consistent with OSHA's rule and does not represent a "policy change." Public notice and comment rulemaking procedures were not required to issue the letter, either under the Occupational Safety and Health Act or under the Administrative Procedure Act, since the letter did not create or modify legal obligations. Submission to Congress under the Congressional Review Act was not required, since the letter was a "rule of particular applicability" under 5 U.S.C. §804(3)(a).

\* \* \*

I hope that my responses, as well as our continuing discussions with your staff, adequately address the issues raised in your March 21 letter. Your staff may contact Steve Heyman of the Department's Office of Congressional and Intergovernmental Affairs at 693-4600 if they need additional information.

Sincerely,  
  
Henry L. Solano

cc: Hon. Dennis Kucinich

Enclosure

File: D:\OshDoc\Interp\_data\interp1996-1998withpagebreaks.txt 12/9/99, 1:15:21PM

02/21/1997 - OSHA does not have regulations that apply to residential properties.  
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OSHA Standards Interpretation and Compliance Letters  
02/21/1997 - OSHA does not have regulations that apply to residential properties.  
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OSHA Standard Interpretation and Compliance Letters - Table of Contents  
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- Record Type: Interpretation
  - Standard Number: 1926.10
  - Subject: OSHA does not have regulations that apply to residential properties.
  - Information Date: 02/21/1997
- 

February 21, 1997  
Mr. Donald S. Sherwood  
Suite 2794  
Box 025216  
Miami, Florida 33102  
Dear Mr. Sherwood:

Your letter to Senator Connie Mack requesting the Occupational Safety and Health Administration (OSHA) regulations that apply to residential properties has been forwarded to us for response.

Please be advised that OSHA does not have any regulations that apply to residential properties, however, OSHA does have regulations that apply to the safety and health of employees while engaged in construction operations. A copy of those regulations--the Occupational Safety and Health Regulations for the Construction Industry (29 CFR 1926) -- is enclosed. These regulations apply to all construction operations, including residential construction. They require employers to protect employees exposed to various hazards during construction activities. The regulations are reprinted once a year and available through the Government Printing Office (GPO). Information on how to order OSHA regulations and standards from GPO is also enclosed.

File: D:\OshDoc\interp\_data\interp1996-1998withpagebreaks.txt 12/9/99, 1:15:21PM

We hope this information is helpful. If we can be of any further service,  
please do not hesitate to contact us.

Sincerely,  
Greg Watchman  
Acting Assistant Secretary

U.S. Department of Labor

Solicitor of Labor  
Washington, D.C. 20210

JUL 18 2000

The Honorable David M. McIntosh  
Chairman  
Subcommittee on National Economic Growth,  
Natural Resources, and Regulatory Affairs  
Committee on Government Reform  
U.S. House of Representatives  
Washington, DC 20515-6143

Dear Chairman McIntosh:

On October 8, 1999, as part of your oversight over agency implementation of the Congressional Review Act, you wrote to me asking for a copy of each Department of Labor (DOL) non-codified document, along with tabbing and highlighting of the material and a compendium providing information concerning the documents. On November 12, 1999, representatives of the DOL and others met with members of the staff of the Subcommittee on National Economic Growth, Natural Resources, and Regulatory Affairs. Among other things, it was agreed at that meeting that DOL could limit its submission to documents from the Occupational Safety and Health Administration at that time. Those documents were provided. At a meeting of a DOL representative, Subcommittee staff and others on May 19, 2000, concerning Section 4 of H. R. 3521, the "Congressional Accountability for Regulatory Information Act of 2000," DOL was asked to provide you with either the remaining documents for DOL or a DOL statement concerning the legal effect and applicability, under the Administrative Procedure Act (APA), of the guidance material that we issue. We were advised by Subcommittee staff that if we provided this statement, we would not be asked to provide you with copies of the non-codified material or the compendium.

The guidance material issued by DOL is not legally binding under the APA. Our guidance could be generally applicable; that does not, however, have any effect on whether it is legally binding. As we understand it, the term "general applicability" is used in the APA to distinguish general situations from very limited or named situations.

We want to stress our concern, however, that providing a simple statement to the general public that any agency guidance is not legally binding could have a very detrimental effect. As a consequence, you support agency discretion to offer, at the beginning of each guidance document, an explanation of the document's legal effect. Your intent is to clarify for the public precisely what is required by law, codified regulation, or other authority, and what is not required. When appropriate, we believe that we do that.

There are many potential problems with providing a simple statement that agency guidance is not legally binding. Let me elaborate on our concern by providing examples of some the problems that this could cause.

First, the guidance material may contain or restate statutory or legally binding regulatory language or may recite legally binding contract language. It could contain all three. For example, we may quote the statute, regulation, or contract directly in a document labeled "Guidance" and then advise the public of suggested ways they can comply. Alternatively, we may issue guidance advising the public of court decisions concerning their obligations in our area of responsibility. The statute, regulation, and contract are legally binding. The court decision may impose legally binding obligations. Providing the public with a simple statement that our guidance is not legally binding may mislead many people concerning their legal obligations.

In addition, the guidance material may be issued in accordance with the Small Business Regulatory Enforcement Fairness Act. That Act requires us to issue documents designated as "small entity compliance guides" to help small entities comply with certain rules. Pursuant to that Act, the guides may be used to establish the reasonableness or appropriateness of fines, penalties or damages. Telling the small entities that the guidance is not legally binding may confuse those not familiar with the complex law on this issue and lead them to believe that the guidance is unreliable or that they should ignore it.

We may publish material that contains factual information such as a weather report and include guidance on how to use that information. That document is not legally binding, but a statute or rule or even tort law may require someone to use that information before taking action. Telling people that it is not legally binding may confuse some who have responsibilities to properly use the information in accordance with other requirements.

In a similar vein, although our guidance may not be legally binding on the public. Simply advising the public that they are not legally bound by this guidance may cause them to violate state or local law.

Providing a general warning that guidance is not legally binding may also send a mixed message to those we are trying to impress with the importance of listening to the message contained in our guidance. For example, we may tell people about the dangers of using drugs. Telling them that our message – which is factually correct – is not legally binding may cause a problem with a vulnerable part of our population, especially our young people.

In addition, the Department may advise the public that they can rely on our guidance. At times, we issue such guidance in response to requests from those who want to know whether, if they act in a certain way, they will be in compliance with a statute or a rule. Our response may tell them "yes, you will be considered in compliance;" that is, based

on what they have told us, we will not take enforcement action against them if they do it that way. It also may help them if they are sued by a third party. Often we make these interpretations available to the general public and tell them that they, too, may rely on them. In many cases, when we issue this guidance, we are agreeing with the requestor's interpretation. Telling the requestor or the general public that despite these statements, the guidance is not legally binding may defeat the very certainty they are seeking. At a minimum, it will create serious confusion over such things as whether we may take enforcement action even if they follow the guidance.

It is important to note that courts generally give deference to a reasonable agency interpretation of its own regulations where there is a question about the meaning of those regulations. If you simply tell people that agency interpretations are not legally binding, many may assume that they can disregard the interpretation regardless of its reasonableness or the likelihood that a court may give it deference. This could result in significant harm to those who are misled.

We appreciate the goals that you are trying to achieve. At the same time, we hope that you will understand our concerns that too simple and generic an approach to this complex issue could have a detrimental effect on the valuable guidance that we provide to the public. We recognize the importance of using guidance properly, and we have taken -- and will continue to take -- appropriate steps to address the concerns that guidance not be used as a substitute for rulemaking and to make the legal effect of our documents clear to the public.

Sincerely,  
  
Henry L. Solano

AN BURTON, INDIANA  
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ONE HUNDRED SIXTH CONGRESS

## Congress of the United States

### House of Representatives

#### COMMITTEE ON GOVERNMENT REFORM

#### 2157 RAYBURN HOUSE OFFICE BUILDING

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BERNARD SANDERS, VERMONT,  
 INDEPENDENT

October 8, 1999

### BY FACSIMILE

The Honorable Nancy McFadden  
 General Counsel  
 Department of Transportation  
 400 7<sup>th</sup> Street, S.W. - Room 10428  
 Washington, D.C. 20590

Dear Ms. McFadden:

This letter begins our investigation of your agency's use of non-codified documents (such as guidance, guidelines, manuals, and handbooks) and your agency's explanation within each of them to ensure the public's understanding of their legal effect.

Pursuant to the Constitution and Rules X and XI of the United States House of Representatives, please provide the Subcommittee with the following information: (a) a complete compendium in the exact format shown in the Attachment to this letter (in both a paper version and on a computer disc), and (b) a copy of each non-codified document, including a highlighted and tabbed reference to the specific explanation in the document itself regarding its legal effect.

Your response should be delivered to the Subcommittee majority staff in B-377 Rayburn House Office Building and the minority staff in B-350A Rayburn House Office Building not later than noon on Friday, November 19, 1999. If you have any questions about this request, please call Professional Staff Member Barbara Kahlow on 226-3058.

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Thank you for your attention to this request.

Sincerely,



David M. McIntosh

Chairman

Subcommittee on National Economic Growth,  
Natural Resources, and Regulatory Affairs

Attachment

cc: The Honorable Dan Burton  
The Honorable Dennis Kucinich





**U.S. Department of  
Transportation**  
Office of the Secretary  
of Transportation

GENERAL COUNSEL

400 Seventh St., S.W.  
Washington, D.C. 20590

December 10, 1999

The Honorable David M. McIntosh  
Chairman  
Subcommittee on National Economic Growth,  
Natural Resources, and Regulatory Affairs  
United States House of Representatives  
Washington, DC 20515-6143

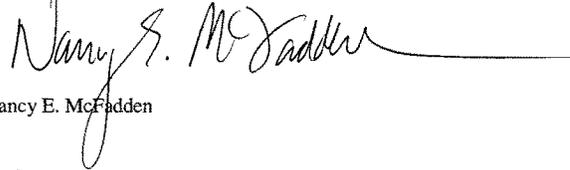
Dear Mr. Chairman:

On October 8, 1999, you wrote to me asking for a copy of each Department of Transportation non-codified document (such as guidance, guidelines, manuals, and handbooks). You also asked that each document be highlighted and tabbed to refer to the explanation in the document regarding its legal effect and for a compendium (in both a paper version and on a computer disc) in the format shown in an attachment to your letter. On November 12, representatives of the Departments of Transportation and Labor and the Environmental Protection Agency met with members of your subcommittee staff; among other things, at that meeting it was agreed that, for now at least, the Department of Transportation could limit its submission to documents from the National Highway Traffic Safety Administration (NHTSA). In response to your request as modified, we are submitting the enclosed documents and the requested compendium. (Those documents that were already provided to your subcommittee staff on December 3, 1999, are identified on the compendium.)

The documents are all of the non-codified documents (such as guidance, guidelines, manuals, and handbooks) that NHTSA has identified as prepared and provided to the public from March 29, 1996 (the date the Congressional review provisions of the Small Business Regulatory Enforcement Fairness Act were enacted) until the date of your letter and that are currently in active use. We have prepared the compendium you requested listing each of the documents. Each document has been given a number that corresponds to a number contained in the "Title" column in the compendium. Each document is also tabbed and highlighted as requested, except to the extent that the format did not permit that; for example, some of our guidance is provided on videotape, and we have no transcript that could be tabbed or highlighted. We have placed a note on such documents providing what information we could.

If you have any questions about the attached, please contact me or our Assistant Secretary for Intergovernmental Affairs, Michael Frazier.

Sincerely,

A handwritten signature in black ink that reads "Nancy E. McFadden". The signature is written in a cursive style and is followed by a horizontal line extending to the right.

Nancy E. McFadden

Enclosures

cc: The Honorable Dennis J. Kucinich

*REC'D 12/29/99*



**U.S. Department of  
Transportation**

**Assistant  
General Counsel  
for  
Regulation and Enforcement**

400 Seventh St. S.W.  
Washington, D.C. 20590

Telephone: 202-366-4723  
Fax: 202-366-9313  
Internet: [neil.eisner@ost.dot.gov](mailto:neil.eisner@ost.dot.gov)

December 27, 1999

Barbara,

Enclosed is a copy of the corrected compendium I mentioned in my earlier note and a new disk.

  
Neil

Enclosures

**National Highway Traffic Safety Administration  
Compendium of All Non-Codified Documents Currently in Active Use**

Title and Number of Non-Codified Document	Date of Issuance	Submitted to Congress under CRA? (Y or N)	Legally Binding? (Y or N)	FR Citation or None	No. of Pages	Comment
<b>Documents containing NHTSA-NTS are from NHTSA's Office of Traffic Injury Control Programs</b>						
Keeping America's Kids Safe Thanks to Law Enforcement and You... It's Working! - NHTSA NTS 12 #3	10/99	N	N	None	7	
NHTSA-NTS-31-48 The Relationship of Alcohol Safety Laws to Drinking Drivers in Fatal Crashes	9/99	N	N	None	24	
NHTSA-NTS-31-46 Evaluation of a Day Reporting Center for Repeat DWI Offenders	8/99	N	N	None	34	
NHTSA-NTS-31-47 Examination of DWI Conviction Rates	8/99	N	N	None	56	
NHTSA-NTS-31-45 In-Vehicle Videotaping of DWI Suspects	7/99	N	N	None	13	
NHTSA-NTS-31-44 A Report to Congress on the Collaboration Between the NHTSA and the National Center on Sleep Disorders Research	6/99	Y	N	None	50	

<sup>1</sup>CRA refers to the Congressional Review Act (5 U.S.C. 801).

<sup>2</sup>Binding means having general applicability and future effect.

VNR School Bus Safety	August 1996	N	N	None		
VNR New Car Assessment Program	June 1996	N	N	None		
VNR Buckle Up America Week	May 1996	N	N	None		
VNR Let Them Through... It Could Be You	May 1996	N	N	None		
TOTAL		Y:0 N: 1,225	Y:0 N: 1,225	12,426		

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 CHAKA FATTAH, PENNSYLVANIA  
 ELIJAH E. CUMMINGS, MARYLAND  
 DENNIS J. KUCINICH, OHIO  
 ROD R. BLADEN, ILLINOIS  
 DAN RYK DAVIS, ILLINOIS  
 JOHN F. TIERNEY, MASSACHUSETTS  
 JIM TURNER, TEXAS  
 THOMAS H. ALLEN, MAINE  
 HAROLDE FORD, JR., TENNESSEE  
 JANICE D. SCHAKOWSKY, ILLINOIS  
 BERNARD SANDERS, VERMONT  
 INDEPENDENT

January 31, 2000

**BY FACSIMILE**

The Honorable Nancy McFadden  
 General Counsel  
 Department of Transportation  
 400 7<sup>th</sup> Street, S.W. - Room 10428  
 Washington, D.C. 20590

Dear Ms. McFadden:

In continuance of our investigation of your agency's use of non-codified documents, I would appreciate your views on Section 4 of H.R. 3521, the "Congressional Accountability for Regulatory Information Act of 2000." There will be some discussion of this proposal at our February 15, 2000 hearing entitled "Is the Department of Labor Regulating the Public Through the Backdoor?"

Your response should be delivered to the Subcommittee majority staff in B-377 Rayburn House Office Building and the minority staff in B-350A Rayburn House Office Building no later than 1:00 p.m. on Friday, February 11, 2000. If you have any questions about this request, please call Professional Staff Member Barbara Kahlow on 226-3058.

Thank you for your attention to this request.

Sincerely,



David M. McIntosh  
 Chairman  
 Subcommittee on National Economic Growth,  
 Natural Resources, and Regulatory Affairs

cc: The Honorable Dan Burton  
 The Honorable Dennis Kucinich



U.S. Department of  
Transportation  
Office of the Secretary  
of Transportation

GENERAL COUNSEL

400 Seventh St., S.W.  
Washington, D.C. 20590

February 22, 2000

The Honorable David M. McIntosh  
Chairman  
Subcommittee on National Economic Growth,  
Natural Resources, and Regulatory Affairs  
Committee on Government Reform  
House of Representatives  
Washington, DC 20515

Dear Mr. Chairman:

On January 31, you wrote to us asking for the views of the Department of Transportation (DOT) on section 4 of H.R. 3521, the

Congressional Accountability for Regulatory Information Act of 2000.

Section 4 of the bill, entitled "Notice of nonbinding effect of agency guidance," would require an agency head to "include on the first page of each statement published by the agency that is not a rule a notice that the statement has no general applicability or future effect (or both), as applicable, and is not binding on the public." Although we appreciate what we understand to be the objective of this provision, we believe that, as drafted, it would cause a great deal of confusion and have significant detrimental effects.

Let me stress at the outset two very important points. First, we believe, and think that our regulated entities would agree, that it is essential for agencies to issue guidance; nothing should be done to discourage agencies from issuing helpful guidance or to cause confusion about the effect of the guidance. Indeed, section 212 of the Small Business Regulatory Enforcement Fairness Act requires agencies to publish compliance guides for some of their rules. Second, we also recognize that guidance can be abused; for example, we understand that a field inspector may incorrectly tell a regulated entity that it must comply with agency guidance.

Because we recognize the importance of guidance as well as the possibility it can be abused, we use it very carefully. In appropriate documents, we do include information similar to that which would be required by section 4. In addition, we periodically remind senior officials of the limitations on the use of guidance. For example, in 1995, the then Acting General Counsel sent a memorandum to senior officials throughout the Department stating the following:

Guidance material is supposed to be just that; it is not supposed to be mandatory. It is argued, however, that many agencies issue guidance to

avoid compliance with the Administrative Procedure Act (APA) as well as OMB review and then try to force regulated entities to comply with it. Others issue it as guidance but their inspectors advise regulated entities that the only compliance that will be accepted is compliance with the guidance. We issue a tremendous amount of guidance material that is not only helpful to our regulated entities but makes our job easier. We must make sure, however, that we are not abusing this material; we cannot treat it as a [binding] rule.

We believe that we have made, and continue to make, a significant effort to use guidance in a way that is beneficial to our regulated entities and others to whom the guidance is directed. For that reason, we are especially concerned that section 4 may have a detrimental effect on our use of this valuable tool.

The language of section 4 presents a number of problems. For example, it would require the notice to be included in "each statement published" by the agency that is not a rule. The title of the section indicates that section 4 concerns only guidance. However, an agency may publish a statement that does not contain guidance. As written, the coverage is extremely broad and the inclusion of the notice in documents such as statistical compilations or studies may cause unnecessary confusion.

The word "published" is also undefined and vague. Confusion is caused because agency statements or guidance may take a variety of forms. We put out statements in the form of bumper stickers, posters, video and audio tapes, buttons, or even logos on stationery. We also issue statements as part of press releases, speeches, or Congressional testimony. We make statements in response to questions at training forums, after Congressional testimony, or over the internet. How to include a notice with these various types of statements raises serious problems. In addition, section 4 could include statements placed on an internet web page or given orally. In this regard, it is not clear what is meant by "include on the first page," since oral statements (and many statements on the internet) are not paginated. However, because section 4 would add its requirements to a new section 803a, which is to be codified in Title 5 of the United States Code, "published" could be interpreted to be limited to "published in the Federal Register," in accordance with other publication requirements of Title 5.

The use of the phrase "has no general applicability" also creates problems and its intended usage in the notice is not clear. The term is used in the APA to distinguish rules that apply to special or unique circumstances from those that apply to general situations. Requiring this statement in guidance that is intended to apply to general situations would cause confusion. Our guidance may be as simple as "buckle up." We want everyone to do it. Including with that message a notice that it does not have general applicability would cause confusion about whether the reader should buckle up. Perhaps the "as applicable" language in section 4 was intended to give us some discretion, but that, too, is not clear.

We also are very concerned about the effect of adding the notice on the graphic presentation of some very simple safety messages we try to get across to the public. Adding the notice, for example, to the simple statement: "Buckle Up" will significantly detract from the clear, easily readable, two-word message. Indeed, the reader may not even see the message. It also may even be impossible to add on some of the formats we use for delivering the message.

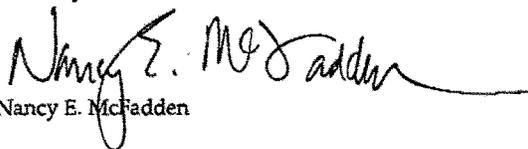
Requiring the notice on many documents will cause other types of problems. For example, we may issue guidance and tell people they may rely on it. Often we issue such statements in response to requests from those who want to know whether, if they act in a certain way, they will be in compliance with a statute or a rule. Our response may tell them "yes, you will be considered in compliance." This not only tells them that we will not take enforcement action against them if they do it that way, but it may also help them if they are sued by a third party. Often we make these interpretations available to the general public and tell them that they, too, may rely on them. The notice required by section 4 may defeat the very certainty the public is seeking; telling the public that they can rely on an interpretation but that it is not generally applicable and is not binding on the public will, at a minimum, create serious confusion and increase litigation.

We may also issue a statement to provide helpful guidance that contains the requirements of a statute or rule verbatim. Alternatively, we may publish material that is not legally binding - e.g., it only contains factual information such as a weather report -- but a statute or rule or even tort law may require someone to use that information before taking action. Again, placing the section 4 notice on a document that contains either of these types of language will cause serious confusion and misunderstanding.

In summary, we appreciate the goal you are trying to achieve but believe that section 4 will create serious problems for the large amounts of valuable guidance material that we provide to the public.

We appreciate the opportunity to comment on this important legislation. The Office of Management and Budget advises that, from the standpoint of the Administration's program, there is no objection to the submission of these views to the Committee.

Sincerely,



Nancy E. McFadden



**U.S. Department of  
Transportation**  
Office of the Secretary  
of Transportation

GENERAL COUNSEL

400 Seventh St., S.W.  
Washington, D.C. 20590

July 17, 2000

The Honorable David M. McIntosh  
Chairman  
Subcommittee on National Economic Growth,  
Natural Resources, and Regulatory Affairs  
United States House of Representatives  
Washington, DC 20515-6143

Dear Mr. Chairman,

On October 8, 1999, as part of your oversight over agency implementation of the Congressional Review Act, you wrote to me asking for a copy of each Department of Transportation (DOT) non-codified document, along with tabbing and highlighting of the material and a compendium providing information concerning the documents. On November 12, 1999, representatives of DOT and others met with members of the staff of the Subcommittee on National Economic Growth, Natural Resources, and Regulatory Affairs. Among other things, it was agreed at that meeting that DOT could limit its submission to documents from the National Highway Traffic Safety Administration at that time. On December 3 and 7, 1999, we provided those documents.

At a meeting of a DOT representative, Subcommittee staff, and others on May 19, 2000, concerning Section 4 of H. R. 3521, the "Congressional Accountability for Regulatory Information Act of 2000," DOT was asked to provide you with either the remaining documents for DOT or a DOT statement concerning the legal effect and applicability, under the Administrative Procedure Act (APA), of the guidance material that we issue. We were advised by Subcommittee staff that, if we provided this statement, we would not be asked to provide you with copies of the non-codified material or the compendium.

The guidance material issued by DOT is not legally binding under the APA. Our guidance could be generally applicable; that does not, however, have any effect on whether it is legally binding. As we understand it, the term "general applicability" is used in the APA to distinguish general situations from very limited or named situations. For example, when we advise the public to "Buckle Up," we are advising everyone that they should wear a seatbelt; that guidance does not require them to wear one.

We want to stress our concern, however, that providing a simple statement to the general public that any agency guidance is not legally binding could have a very detrimental effect. As a consequence, you support agency discretion to offer, at the beginning of each guidance document, an explanation of the document's legal effect. Your intent is to

clarify for the public precisely what is required by law, codified regulation, or other authority, and what is not required. When appropriate, we believe that we do that.

There are many potential problems with providing a simple statement that agency guidance is not legally binding. Let me elaborate on our concern by providing examples of some of the problems that this could cause.

First, the guidance material may contain or restate statutory or legally binding regulatory language or may recite legally binding contract language. It could contain all three. For example, we may quote the statute, regulation, or contract directly in a document labeled "Guidance" and then advise the public of suggested ways they can comply. Alternatively, we may issue guidance advising the public of court decisions concerning their obligations in our area of responsibility. The statute, regulation, and contract are legally binding. The court decision may impose legally binding obligations. Providing the public with a simple statement that our guidance is not legally binding may mislead many people concerning their legal obligations.

In addition, the guidance material may be issued in accordance with the Small Business Regulatory Enforcement Fairness Act. That Act requires us to issue documents designated as "small entity compliance guides" to help small entities comply with certain rules. Pursuant to that Act, the guides may be used to establish the reasonableness or appropriateness of fines, penalties or damages. Telling the small entities that the guidance is not legally binding may confuse those not familiar with the complex law on this issue and lead them to believe that the guidance is unreliable or that they should ignore it.

We may publish material that contains factual information such as a weather report and include guidance on how to use that information. That document is not legally binding, but a statute or rule or even tort law may require someone to use that information before taking action. Telling people that it is not legally binding may confuse some who have responsibilities to properly use the information in accordance with other requirements.

In a similar vein, although our guidance may not be legally binding on the public, as in the example of the "Buckle Up" advice, the public may be required to buckle up under State or local law. Simply advising the public that they are not legally bound by this guidance may cause them to violate State or local law.

Providing a general warning that guidance is not legally binding may also send a mixed message to those we are trying to impress with the importance of listening to the message contained in our guidance. For example, we may tell people about the dangers of using drugs. Telling them that our message - which is factually correct - is not legally binding may cause a problem with a vulnerable part of our population, especially our young people.

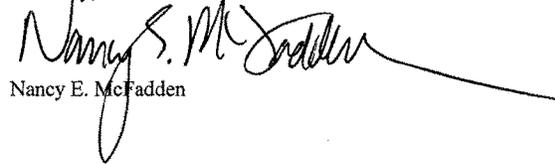
In addition, the Department may advise the public that they can rely on our guidance. At times, we issue such guidance in response to requests from those who want to know

whether, if they act in a certain way, they will be in compliance with a statute or a rule. Our response may tell them “yes, you will be considered in compliance;” that is, based on what they have told us, we will not take enforcement action against them if they do it that way. It also may help them if they are sued by a third party. Often we make these interpretations available to the general public and tell them that they, too, may rely on them. In many cases, when we issue this guidance, we are agreeing with the requestor’s interpretation. Telling the requestor or the general public that, despite these statements, the guidance is not legally binding may defeat the very certainty they are seeking. At a minimum, it will create serious confusion over such things as whether we may take enforcement action even if they follow the guidance.

It is important to note that courts generally give deference to a reasonable agency interpretation of its own regulations where there is a question about the meaning of those regulations. If you simply tell people that agency interpretations are not legally binding, many may assume that they can disregard the interpretation regardless of its reasonableness or the likelihood that a court may give it deference. This could result in significant harm to those who are misled.

We appreciate the goals that you are trying to achieve. At the same time, we hope that you will understand our concerns that too simple and generic an approach to this complex issue could have a detrimental effect on the valuable guidance that we provide to the public. We recognize the importance of using guidance properly, and we have taken - and will continue to take - appropriate steps to address the concerns that guidance not be used as a substitute for rulemaking and to make the legal effect of our documents clear to the public.

Sincerely,



Nancy E. McFadden

cc: The Honorable Dan Burton  
The Honorable Henry Waxman  
The Honorable Dennis Kucinich

DAN BURTON, INDIANA  
CHAIRMAN  
BENJAMIN A. GILMAN, NEW YORK  
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HELEN CHENOWETH, IDAHO  
DAVID VITTER, LOUISIANA

ONE HUNDRED SIXTH CONGRESS  
**Congress of the United States**  
House of Representatives  
COMMITTEE ON GOVERNMENT REFORM  
2157 RAYBURN HOUSE OFFICE BUILDING  
WASHINGTON, DC 20515-6143

Majority (201) 225-5074  
Minority (201) 225-6051  
TTY (201) 225-6852

HENRY A. WALKER, CALIFORNIA  
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THOMAS H. ALLEN, MAINE  
BARBARA FORD, INDIANA  
JANICE D. SCHAKOWSKY, ILLINOIS

BERNARD SANDERS, VERMONT,  
NONVOTING

October 8, 1999

**BY FACSIMILE**

The Honorable Gary S. Guzy  
General Counsel  
Environmental Protection Agency  
401 M Street, S.W. - 2310  
Washington, D.C. 20460

Dear Mr. Guzy:

This letter begins our investigation of your agency's use of non-codified documents (such as guidance, guidelines, manuals, and handbooks) and your agency's explanation within each of them to ensure the public's understanding of their legal effect.

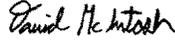
Pursuant to the Constitution and Rules X and XI of the United States House of Representatives, please provide the Subcommittee with the following information: (a) a complete compendium in the exact format shown in the Attachment to this letter (in both a paper version and on a computer disc), and (b) a copy of each non-codified document, including a highlighted and tabbed reference to the specific explanation in the document itself regarding its legal effect.

Your response should be delivered to the Subcommittee majority staff in B-377 Rayburn House Office Building and the minority staff in B-350A Rayburn House Office Building not later than noon on Friday, November 19, 1999. If you have any questions about this request, please call Professional Staff Member Barbara Kahlow on 226-3058.

316

Thank you for your attention to this request.

Sincerely,



David M. McIntosh

Chairman

Subcommittee on National Economic Growth,  
Natural Resources, and Regulatory Affairs

Attachment

cc: The Honorable Dan Burton  
The Honorable Dennis Kucinich





UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

REC'D 12/20/99  
HAND DELIVERED  
5:18 PM

OFFICE OF CONGRESSIONAL AND  
INTERGOVERNMENTAL RELATIONS

DEC 17 1999

Honorable David M. McIntosh  
Chairman, Subcommittee on National Economic Growth,  
Natural Resources, and Regulatory Affairs  
House of Representatives  
Washington, DC 20515-6143

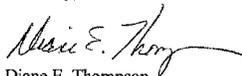
Dear Chairman McIntosh:

Enclosed please find a compendium of non-codified documents prepared in partial response to your letter of October 8, 1999. The associated documents themselves, tabbed and highlighted as requested, and contained in several boxes, are en route to your office through Capitol Police security procedures discussed with your staff.

As you know, EPA has worked with your staff to refine your original request to include only Agency documents produced since the enactment of the Congressional Review Act (CRA). EPA's efforts to improve outreach and assistance to the public and regulated community have resulted in a large number of documents potentially responsive to your request from both our Headquarters and Regional offices. We are continuing to review and tab/highlight additional documents and to compile a complete compendium. We will forward the completed compendium and the remaining documents to you as quickly as possible.

Please contact me if I can be of further assistance, or your staff may contact Mark Stevens, Oversight Counsel at 260-5236.

Sincerely,

  
Diane E. Thompson  
Associate Administrator

Enclosures



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

Rec'd 1/7/00  
HAND DELIVERED

JAN 7 2000

OFFICE OF CONGRESSIONAL AND  
INTERGOVERNMENTAL RELATIONS

Honorable David McIntosh  
Chairman  
Subcommittee on National Economic Growth,  
Natural Resources and Regulatory Affairs  
Committee on Government Reform  
U.S. House of Representatives  
Washington, D.C. 20515

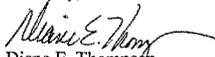
Dear Mr. Chairman:

On December 20, we provided a partial compendium and several boxes of non-codified documents as the first part of the response to your letter of October 8, 1999. Enclosed please find a compendium of non-codified documents prepared as the second part of the response to your October 8 letter. The associated documents themselves, tabbed and highlighted as requested, and contained in several boxes, are en route to your office through Capitol Policy security procedures.

As we noted in our previous response, EPA's efforts to improve outreach and assistance to the public and regulated community have resulted in a large number of documents potentially responsive to your request from both our Headquarters and Regional offices. We are continuing to review and tab/highlight additional documents and to compile a complete compendium. We will forward the final completed compendium and the remaining documents to you as quickly as possible.

Please contact me if I can be of further assistance, or your staff may contact Mark Stevens, Oversight Counsel, at 230-5436.

Sincerely,

  
Diane E. Thompson  
Associate Administrator

Enclosures

DAN BURTON, INDIANA  
CHAIRMAN

BENJAMIN A. FRISMAN, NEW YORK  
CONSTANCE A. MORELLA, MARYLAND  
CHRISTOPHER SHAYS, CONNECTICUT  
LEAH R. ROSENTHAL, FLORIDA  
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HELEN CHENOWETH, TEXAS  
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ONE HUNDRED SIXTH CONGRESS

Congress of the United States  
House of Representatives

COMMITTEE ON GOVERNMENT REFORM  
2157 RAYBURN HOUSE OFFICE BUILDING  
WASHINGTON, DC 20515-6143

MAJORITY (202) 225-5174  
MINORITY (202) 225-5561  
TTY (202) 225-4952

HENRY A. WAXMAN, CALIFORNIA  
RANKING MEMBER

TOM LANTOS, CALIFORNIA  
ROBERT E. WISE, JR., WEST VIRGINIA  
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JANICE D. SCHAKOWSKY, ILLINOIS

BERNARD SANDERS, VERMONT,  
INDEPENDENT

January 31, 2000

**BY FACSIMILE**

The Honorable Gary S. Guzy  
General Counsel  
Environmental Protection Agency  
401 M Street, S.W.  
Washington, D.C. 20460

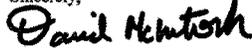
Dear Mr. Guzy:

In continuance of our investigation of your agency's use of non-codified documents, I would appreciate your views on Section 4 of H.R. 3521, the "Congressional Accountability for Regulatory Information Act of 2000." There will be some discussion of this proposal at our February 15, 2000 hearing entitled "Is the Department of Labor Regulating the Public Through the Backdoor?"

Your response should be delivered to the Subcommittee majority staff in B-377 Rayburn House Office Building and the minority staff in B-350A Rayburn House Office Building no later than 1:00 p.m. on Friday, February 11, 2000. If you have any questions about this request, please call Professional Staff Member Barbara Kahlow on 226-3058.

Thank you for your attention to this request.

Sincerely,



David M. McIntosh  
Chairman  
Subcommittee on National Economic Growth,  
Natural Resources, and Regulatory Affairs

cc: The Honorable Dan Burton  
The Honorable Dennis Kucinich



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

FEB 7 2000

OFFICE OF CONGRESSIONAL AND  
INTERGOVERNMENTAL RELATIONS

Honorable David McIntosh  
Chairman  
Subcommittee on National Economic Growth,  
Natural Resources and Regulatory Affairs  
Committee on Government Reform  
U.S. House of Representatives  
Washington, D.C. 20515

Dear Mr. Chairman:

On December 20, we provided a partial compendium and sixteen boxes of non-codified documents as the first part of the response to your letter of October 8, 1999. On January 7, we provided the second part of our response, consisting of a further partial compendium and 10 boxes of documents. Enclosed please find the complete compendium in response to your request; the associated documents themselves, tabbed and highlighted as requested, and contained in several boxes, are en route to your office through Capitol Police security procedures.

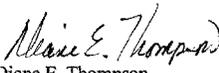
As we noted in our previous responses, EPA's efforts to improve outreach and assistance to the public and regulated community have resulted in a large number of documents potentially responsive to your request from both our Headquarters and Regional offices. The overwhelming majority of these documents are non-codified and non-binding guidance documents, policy statements, interpretive rules, manuals, fact sheets, etc. None of these documents were submitted to Congress and the General Accounting Office (GAO) pursuant to the Congressional Review Act (CRA), since they do not contain legally binding requirements. Some of the non-codified documents in the compendium, however, *do* contain legally binding requirements (e.g., many of the grant guidelines, which are exempt from notice-and-comment rulemaking requirements under section 553(a)(2) of the Administrative Procedure Act); these *were* submitted to Congress and GAO under the CRA and the compendium reflects this.

During the course of preparing a response to this request, we discovered that a number of the documents that contained legally binding requirements had *not* been submitted to Congress and GAO, as required by the CRA and EPA's own procedures. EPA corrected this inadvertent oversight by formally submitting the documents to Congress and GAO and so indicated in the compendium. We are working to improve our internal procedures to ensure complete and timely compliance with the CRA, and we would be happy to brief you or your staff on those efforts at your convenience.

EPA also discovered that there were a number of documents in which we attempted to approve an alternative test method procedure that would be generally applicable to certain sources subject to new source performance standards (NSPS) and/or national emission standards for hazardous air pollutants (NESHAPS), under the Clean Air Act. These attempts to grant regulatory flexibility to regulated sources, however, were not issued through formal notice and comment rulemaking procedures. Accordingly, EPA has concluded that these documents are not legally binding (they have a "N\*" in the "legally binding" column of the compendium, with an explanatory footnote). EPA intends to take appropriate actions to remedy the status of these test methods and, if required by the CRA, will submit them to Congress.

Please contact me if I can be of further assistance, or your staff may contact Mark Stevens, Oversight Counsel, at (202) 564-3707.

Sincerely,

  
Diane E. Thompson  
Associate Administrator

Enclosure

Submital of Non-Codified Documents for Rep. McIntosh 2/4/2000

AAship	Prog Office Table # Title	Date of Issuance	Sub. undef. eqatl	FR Cite	No. of	Comments	
		Y	CFA	Y			
1	OWSAMD7	IMDATA4.TXT - IM Credit File	N	N	None	1	
2	OWSVPCB-97	EPA Policy on Cross-Border Sales of 1997 MY "California" Vehicles	N	N	None	2	
3	OWSVPCB-98	EPA Policy on Cross-Border Sales of 1998 MY "California" Vehicles	N	N	None	2	
4	OWSVPCB-99	EPA Policy on Cross-Border Sales of 1999 MY "California" Vehicles	N	N	None	2	
5	OWSVPCB-100	EPA Policy on Cross-Border Sales of 2000 MY "California" Vehicles	N	N	None	2	
6	10	Guidance on Motor Vehicle Emissions Budgets in One-Hour Ozone Attainment Demonstrations	11/02/99	N	N	None	8
7	OWS-T1610	Guidance on Motor Vehicle Emissions Budgets in One-Hour Ozone Attainment Demonstrations	11/02/99	N	N	None	8
8	11	Environmental Fact Sheet Accelerated Vehicle Retirement Programs	11/01/99	N	N	None	3
9	OWSCOPSEAWD-22	Quality Assurance Project Plan: PM 2.5 Speciation Trends Network	11/01/99	N	N	None	188
10	OWS-T1611	Environmental Fact Sheet Accelerated Vehicle Retirement Programs	11/01/99	N	N	None	3
11	2	Revised Acid Rain Program Policy Manual	10/14/99	N	N	None	350
12	OWSVPCB-02	Olivio response-aftermarket part certification	10/14/99	N	N	None	6
13	OWSCOPSEAWD-23	Particulate Matter (PM 2.5) Speciation Guidance Document (Final Draft)	10/07/99	N	N	None	70

Submitted as a courtesy copy

Totals for Complete Compendium of Non-Codified Documents for Rep. McIntosh 2/8/2000

	Submitted under CRA=Y	Submitted under CRA=N	Legal Binding=Y	Legal Binding=N	No. of Pages
2653 Total Documents	62	2591	119	2524	96,906

2/29/00



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

FEB 25 2000

OFFICE OF  
GENERAL COUNSEL

The Honorable David M. McIntosh  
Chairman  
Subcommittee on National Economic Growth,  
Natural Resources, and Regulatory Affairs  
Committee on Government Reform  
House of Representatives  
Washington, DC 20515-6143

Dear Mr. Chairman:

You asked for the views of the Environmental Protection Agency (EPA) on Section 4 of H.R. 3521, the "Congressional Accountability for Regulatory Information Act of 2000," which you introduced on January 24, 2000.

Section 4 would amend the Congressional Review Act, 5 U.S.C. 801 et seq., by adding a new Section 803a. Section 803a would require agencies to notify readers of the non-binding effect of a very broad spectrum of "published" agency statements and guidance documents. We believe the provision is unnecessary.

As you are aware, EPA issues many kinds of general guidance documents and other statements to help the public and the regulated community understand and comply with the Agency's regulatory programs and requirements. EPA has found that the more tools we use to communicate with regulated entities, our regulatory partners (state, local and tribal governments), and the public at large, the more effective we can be in explaining our programs and anticipating and answering their questions. We believe the regulated community, our regulatory partners, and the public find EPA's extensive communication efforts -- including guidance documents, policy statements, fact sheets, question and answer documents, reports, advisories, letters responding to individual questions, and other means of providing information about our activities -- to be very helpful to and an important part of an effective regulatory program.

We appreciate the need of the regulated community to be able to differentiate between a legally binding document and one that is not. To promote clarity, the Agency currently includes language in many of our non-binding policy statements and guidance documents notifying the readers that such documents are not legally binding. The language in Section 4, however, would require the notice of nonbinding effect to be included in "... each statement published by the agency that is not a rule ..." EPA believes that the coverage of section 4 may be overly broad and the inclusion of the notice in all Agency materials such as fact sheets, analytical reports, and guidances may cause unnecessary confusion, particularly when

the aim of some of the materials is to inform regulated entities about underlying regulatory requirements that are legally binding. Accordingly, we cannot support this legislative measure as drafted.

We appreciate the opportunity to comment on Section 4 of H.R. 3521. The Office of Management and Budget advises that, from the standpoint of the Administration's program, there is no objection to the submission of these views to the Committee.

Sincerely,



Gary Guzy,  
General Counsel

cc: The Honorable Dan Burton  
The Honorable Dennis Kucinich  
The Honorable Henry Waxman

**STATEMENT FOR THE RECORD BY  
ARTHUR G. SAPPER, ESQ.,**

**MCDERMOTT, WILL & EMERY  
WASHINGTON, D.C.**

**BEFORE THE  
COMMITTEE ON GOVERNMENT REFORM,  
SUBCOMMITTEE ON NATIONAL ECONOMIC GROWTH,  
NATURAL RESOURCES, AND REGULATORY AFFAIRS,  
UNITED STATES HOUSE OF REPRESENTATIVES**

**IS THE DEPARTMENT OF LABOR REGULATING THE  
PUBLIC THROUGH THE BACKDOOR? OF COURSE IT IS.**

**FEBRUARY 15, 2000**

**IS THE DEPARTMENT OF LABOR REGULATING THE PUBLIC THROUGH  
THE BACKDOOR? OF COURSE IT IS.  
BY ARTHUR G. SAPPER, ESQ.  
MCDERMOTT, WILL & EMERY  
FEBRUARY 15, 2000**

Mr. Chairman, I am Arthur G. Sapper, a partner in the OSHA Practice Group of McDermott, Will & Emery, the largest and most active such practice group in the United States. I practice administrative law generally, but tend to specialize in appellate litigation and cases arising under the Occupational Safety and Health Act. I am also the former Deputy General Counsel of the Occupational Safety and Health Review Commission, and was for nine years an adjunct professor at Georgetown University Law Center, where I taught a graduate course in occupational safety and health law. I thank the committee for permitting me to place this written statement into the record.

**Does The Labor Department Regulate The Public Through The Back Door?**

The answer to the Committee's question is simple and unassailable: Yes. Every regulatory attorney familiar with the Labor Department knows that agencies such as the Occupational Safety and Health Administration (OSHA), or the Wage-Hour Division, regularly impose new policies through the "back door," *i.e.*, in documents that have not undergone notice-and-comment rulemaking. For example:

- A December 1999 advisory letter from the Employment Standards Administration's Wage and Hour Division, requires the inclusion of stock options as a component of an employee's base pay for the purpose of determining overtime for nonprofessional employees eligible for overtime compensation. The decision

threatens to derail the growing and desirable movement to compensate employees with stock.

- OSHA recently changed its interpretation of a crucial provision of the Process Safety Management Standard, 29 C.F.R. § 1910.119, in a far-reaching memorandum issued originally November 4, 1999, and later modified on December 20, 1999.<sup>1</sup> The letter has resulted in a lawsuit.
- OSHA's policy of how close a hospital must be to a workplace has been defined and refined in interpretation letters, not rulemaking.<sup>2</sup>
- OSHA issues interpretation letters that contradict both OSHA guidance booklets *and* quasi-judicial precedents. For example, OSHA interpretation letters<sup>3</sup> instruct employers to record injuries that OSHA's own publication<sup>4</sup> *and* a decision of the Occupational Safety and Health Review Commission<sup>5</sup> state are not recordable.<sup>6</sup>
- OSHA even tries to impose new policies in citations and even briefs. For example, in *General Motors Corp.*, No. 91-2834 (pending), OSHA has taken the position that employers must conduct machine-specific lockout training – even though such a requirement is not found in the text of the lockout standard (29 C.F.R. § 1910.147), even though its legislative history states that there is no such

<sup>1</sup> Memorandum for Regional Administrators From Richard Fairfax, Director, Directorate of Compliance Programs, *PSM Applicability to Oil/Gas Production Facilities* (November 20, 1999) <[http://www.osha-slc.gov/OshDoc/Interp\\_data/I19991220.html](http://www.osha-slc.gov/OshDoc/Interp_data/I19991220.html)>.

<sup>2</sup> Compare Letter to Gregory M. Feary (December 11, 1996) (3-4 minutes for severe injuries; 15 minutes for less severe) <[http://www.osha-slc.gov/OshDoc/Interp\\_data/I19961211.html](http://www.osha-slc.gov/OshDoc/Interp_data/I19961211.html)> with Letter to Ms. Kay Urtz (January 27, 1976) (3-4 minutes) <[http://www.osha-slc.gov/OshDoc/Interp\\_data/I19760127.html](http://www.osha-slc.gov/OshDoc/Interp_data/I19760127.html)>.

<sup>3</sup> E.g., Letter to L. Kreh (April 4, 1995) <[www.osha-slc.gov/OshDoc/Interp\\_data/I19950404A.html](http://www.osha-slc.gov/OshDoc/Interp_data/I19950404A.html)>.

<sup>4</sup> U.S. DEP'T OF LABOR, RECORDKEEPING GUIDELINES FOR OCCUPATIONAL INJURIES AND ILLNESSES 79 (Sept. 1986).

<sup>5</sup> *Caterpillar, Inc.*, 15 BNA OSHC 2153, 2164 (OSHRC 1993).

<sup>6</sup> See generally A.Sapper, "A Tale of the Goose and the Gander," OCCUPATIONAL HAZARDS (March 1999).

requirement, and even though the cost of the interpretation would greatly exceed the originally estimated cost of compliance with the provision.

**Why Does The Labor Department Do This? Because It Gets The Benefit of The Doubt – and It Shouldn't.**

Why does the Labor Department not make policy in public, notice-and-comment rulemaking, as Congress intended? Because no one is forcing the Labor Department to do so. On the contrary, the federal courts encourage the Labor Department to avoid rulemaking.

The federal courts uphold agency interpretations so long as they strike the courts as “reasonable” – *even if a court thinks that the interpretations are wrong, or that the employer’s interpretation is better*. The courts cite a 1984 Supreme Court decision (*Chevron, U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984)), to give the agency the benefit of any interpretive doubt, not the accused citizen. As a result, the agencies nearly always win.<sup>7</sup> To use a metaphor, the agency’s foot need not be on base; it need only be somewhere in the base path.

The *Chevron* decision holds that, if a statute is ambiguous, a “reasonable” agency interpretation must be upheld. The decision has given administrative agencies enormous power and has had a corrosive effect on the administration of laws:

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<sup>7</sup> This statement applies to all federal agencies, including all Labor Department agencies. As to OSHA’s interpretation of its own standards, the Supreme Court decision in *Martin v. OSHRC (CF&I Steel Corp.)*, 499 U.S. 144 (1991), provides additional occasion for judicial deference. The indisputable (and, in fairness to the Supreme Court, not previously known) error in that decision is identified in A. Sapper, “OSHA and Its Home Office Policy: Ramifications and Implications,” hearing on “OSHA’s Enforcement Policy on Employees Working At Home,” before the Committee On Education And The Workforce, Subcommittee On Oversight And Investigations, United States House Of Representatives (Jan. 28, 2000), available at <[http://www.house.gov/ed\\_workforce/hearings/106th/oi/osha12800/sapper.htm](http://www.house.gov/ed_workforce/hearings/106th/oi/osha12800/sapper.htm)>.

- The *Chevron* approach undermines the rulemaking process. Instead of open and public policy-making, the decision encourages agencies to resolve major policy issues in secretly-written interpretation letters.
- *Chevron* permits agencies to avoid complying with congressionally-imposed requirements (such as “feasibility” and “significant risk”) before imposing new requirements on employers.
- *Chevron* costs the economy billions of dollars that neither Congress in legislation nor any agency in rulemaking intended to impose. For example, in *Cedar Rapids Community School District v. Garret F.*, 119 S.Ct. 992 (1999), the U.S. Supreme Court required schools to pay for a nurse to attend to a handicapped pupil during school hours. The decision was based on an earlier decision that deferred to an agency interpretation, not on a finding that Congress actually intended to impose those costs on schools.
- *Chevron* has the perverse effect of encouraging agencies to write ambiguities into its standards, for ambiguity enhances the agency’s litigating position and permits it to resolve major policy issues through the back door of interpretation. For example, key provisions of OSHA’s recently proposed ergonomics standard repeatedly use the word “reasonable.”<sup>8</sup>
- *Chevron* encourages administrative narrow-mindedness. The recent debacle that the Labor Department created with respect to its home office policy would never have occurred had the agency (OSHA) resolved the matter in notice-and-comment rulemaking. Instead, agency officials spoke only among themselves, unaware of the enormous effect their policy pronouncement would have on the emerging role of telecommuting.
- *Chevron* encourages administrative arrogance. Agency officials treat with impatience employers who try to hold them to the actual words of statutes and regulations. The phenomenon brings to mind the observation, “There is nothing so calculated to make officials and other men disdainful of the rights of their fellow men, as the absence of accountability.”<sup>9</sup>

<sup>8</sup> 64 Fed. Reg. 65768, 66069, 66071-72, 66075-77 (1999), proposing 29 C.F.R. §§ 1910.902 & 1910.906(b)(2)(ii) (standard would apply to “activities and conditions ... *reasonably* likely to cause or contribute to” certain injuries); 1910.921(a) (note) (imposing duty to reduce ergonomic risk factors “in a way that is *reasonably* anticipated to significantly reduce the likelihood that” certain injuries will occur); 1910.921(c) (imposing duty to take steps so that injuries are not “*reasonably* likely to occur”); 1910.945 (crucial definitions use “*reasonably*” five times) (emphases added). These provisions may be found at <<http://www.osha-slc.gov/ergonomics-standard/fedregabbrversion.html>>.

<sup>9</sup> Leon Green, *Public Destruction of Private Reputation – A Remedy?*, 38 Minn.L.Rev. 567, 572-73 (1954), quoted in David W. Robertson, *The Legal Philosophy of Leon Green*, 56 Tex.L.Rev. 393, 436 (1978).

- *Chevron* transferred power from the citizenry to the agencies. It is commonly said that the decision transferred power from the courts to the agencies, but that is only half the truth. Without any discussion, *Chevron* effectively reversed a fundamental premise of statutory interpretation – that if a statute or regulation is ambiguous, the citizen should receive the benefit of the doubt. *Chevron* gives the agency the benefit of the doubt.

#### Was *Chevron* Wrongly Decided?

It was not supposed to be this way. Congress did not intend the courts to be so bound by agency interpretations. To the contrary, Congress stated in the Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.* (“the APA”), that “the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action.” 5 U.S.C. § 706.<sup>10</sup> The provision’s legislative history makes crystal clear that Congress intended courts to construe statutes “independently.”<sup>11</sup> Professor Kenneth Culp Davis, one of the leading authorities on administrative law, observed that the provision unmistakably requires a court to review legal questions *de novo* and follow *its* judgment on the meaning of a statute, not the agency’s.<sup>12</sup>

*Chevron* is also inconsistent with a fundamental tenet of our constitutional order – that “[i]t is emphatically the province and duty of the judicial department to say what the law is.”

<sup>10</sup> The provision states in part:

**Sec. 706. Scope of review**

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. ...

<sup>11</sup> See the review of the legislative history in John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX.L.REV. 113, 193 *et seq.* (1998).

<sup>12</sup> K. Davis, ADMINISTRATIVE LAW OF THE EIGHTIES Ch. 29 (1989) (Supplement to 2d. ed. of treatise) (criticizing *Chevron* at length as, *inter alia*, “repulsive,” exceeding the constitutional power of the Court and violating a “fundamental of democratic government”).

*Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (Marshall, C.J.). Under *Chevron*, the agency declares what the law is, and the courts review only whether the agency's view is "unreasonable." As one scholar has observed, "[*Chevron*] has become a kind of *Marbury*, or counter-*Marbury*, for the administrative state." Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM.L.REV. 2071, 2075 (1990).

Why then did *Chevron* come out the other way? First, because "[t]he *Chevron* court did not trouble itself to consider the APA or any other statutory authority ...." John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX.L.REV. 113, 189 (1998). As Professor Robert Anthony has written, "[T]he Court irresponsibly made no effort to explain how its decision could stand alongside [APA § ] 706. Indeed, it made no mention of [§ ]706 whatsoever."<sup>13</sup> (One reason for this omission might be that the deference issue was not briefed at length.)

Second, the Court was likely searching for a way to relieve the federal courts of the great burden imposed by judicial review of administrative agency actions. Finding the "correct" answer in these cases often required courts to become familiar with complex policy or technical issues. The Court also came to believe that the lower courts were resolving policy issues in the guise of ruling on legal issues, and that the federal courts were not the legitimate body to do so. Thus, the Court wrote, "federal judges – who have no constituency – have a duty to respect legitimate policy choices made by those who do."

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<sup>13</sup> Robert B. Anthony, *Symposium on the 50th Anniversary of the APA: The Supreme Court and The APA: Sometimes They Just Don't Get It*, 10 ADMIN.L.J. AM. 1, 24 (1996).

Third, the agency decision under review in *Chevron* had – unlike nearly all other such decisions – granted relief from regulatory burdens. Hence, the effect of deference in *Chevron* was to was to enhance the freedom of the citizenry. The Court had no occasion to critically examine whether *Chevron*'s sweeping language would be suitable for the usual case, in which the agency decision decreases the freedom of the citizenry. In this sense, *Chevron* exemplifies the maxim that “easy cases make bad law.”<sup>14</sup>

Fourth, and most importantly, the opinion in *Chevron* did not discuss whether its sweeping language is inconsistent with freedom and democracy. Yet, as Professor Kenneth Culp Davis has written, *Chevron* violates a “fundamental of democratic government.”<sup>15</sup>

In a democratic society, law is made by the people – directly, or through their elected representatives or, we are told today, through the actions of agencies in rulemaking. A legal norm not adopted in this manner lacks democratic legitimacy.

Yet, that is just what *Chevron* permits, and even encourages. *Chevron* requires the citizen to obey agency “interpretations” that make no pretense of representing the will of any lawmaking process. An interpretation prevails under *Chevron* if it is merely one of a number of possible intentions that Congress or an agency *might* have intended. Indeed, *Chevron* deference is at its strongest when a statute’s text, structure, purpose and legislative history leave a court with only a hazy idea of what Congress or the agency intended. This is contrary to democratic

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<sup>14</sup> *E.g., O’Bannon v. Town Court Nursing Center*, 447 U.S. 773, 804 (1980) (Blackmun, J., concurring in judgment).

<sup>15</sup> K. Davis, ADMINISTRATIVE LAW OF THE EIGHTIES, Ch. 29.

norms. No legitimate democratic authority can justify a court depriving a citizen of his or her freedom if, after examining the text *and* the legislative history of a statute or regulation, it is unable to state affirmatively that Congress or agency intended to deprive the citizen of that freedom.

Some may object that agencies and courts may legitimately “make law” through what they call “interpretation.” They would be able to cite many supportive court decisions. Such decisions are wrong, for they endorse a wholly untethered process of “interpretation,” *i.e.*, not aimed at respecting the outcome of any legislative or quasi-legislative process. Just as such laws and regulations may not be *passed* in a way that does violence to democratic norms, ambiguities in them may not be *resolved* in a way that does violence to democratic norms. Interpretations of a statute must be aimed at divining the intent of the democratically-elected representatives who passed it, and interpretation of a regulation must be aimed at divining the intent of the rulemakers who adopted it. A rule of construction that ignores Congress’s or the agency’s intention, or requires citizens to respect any other intention, is illegitimate. But that is just what *Chevron* does. It creates a gray zone around every statute and regulation in which courts and regulators can lawlessly deprive the citizenry of their freedom by “interpretation.”

It is time for the Congress to rectify this situation and legislatively overrule the *Chevron* decision. That is the cure for the underlying problem here. Taking the protection of judicial deference away from informal agency documents will go far in discouraging agencies from making rules through the back door.

**How Should *Chevron* Be Overruled?**

What should replace *Chevron*? How should ambiguity be treated? The conventional suggestion is that *Chevron* be overruled by restoring to the courts the power to construe statutes and regulations *de novo*. Such proposals would not solve the problem. They would merely transfer it to another body (the courts) even less democratic than agencies, and would perpetuate a mode of “interpretation” inconsistent with democratic values. A court should be no more entitled than an agency to diminish the citizenry’s freedom through the back door of interpretation.

Ambiguity should henceforth be resolved in favor of freedom. Congress should state that if a regulation, standard or statute is unclear, the benefit of the doubt goes to the person whose freedom the agency seeks to diminish or upon whom the agency seeks to impose a penalty. Such legislation would still permit the courts to give weight to an agency’s interpretation, but only as much weight as the agency’s knowledge or expertise justifies.<sup>16</sup> For example, the agency may present testimony from a rule drafter on what was intended in a regulation. Courts would still apply the usual rules of statutory construction, including the giving of whatever weight the agency interpretation deserves on the facts, and would give effect to what the court believes on *de novo* examination the Congress or the rulemaker originally intended. But if, after all this, the

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<sup>16</sup> In this respect, it would be proper to return, on a limited basis to the rule of *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), where the Supreme Court stated that while the agency’s interpretations are “not controlling,” they “do constitute a body of experience and informed judgment to which courts ... may properly resort for guidance,” and that “the weight” given to the agency’s interpretation “will depend upon the thoroughness evident in its consideration, ... [and] its consistency with earlier and later pronouncements....” Many scholars agree with this view. *E.g.*, Sunstein, p. 6 above; Anthony, note 13 above 10 ADMIN.L.J. at 11 (“Special consideration, yes. Controlling force, no.”).

court is unsure of what was originally intended, then the benefit of that doubt must go to the citizenry, not the agency. This approach would also relieve courts of the burden of coming up with the “correct” answer to complex questions of regulatory interpretation, and would eliminate the gray zone of lawlessness now surrounding our statutes and regulations.

For these reasons, I respectfully suggest that the following language be inserted into a new paragraph (d) in Section 9 of the Administrative Procedure Act, 5 U.S.C. § 558:

*Rule of construction.* Ambiguities in statutes, rules, regulations or orders under which, or for the violation of which, a sanction is or may be sought, shall be resolved in favor of the person against whom the sanction is or may be imposed. (The term “sanction” is defined in 5 U.S.C. § 551(10).)

CHAMBER OF COMMERCE  
OF THE  
UNITED STATES OF AMERICA

R. BRUCE JOSTEN  
EXECUTIVE VICE PRESIDENT  
GOVERNMENT AFFAIRS

1615 H STREET, N.W.  
WASHINGTON, D.C. 20062-2000  
202/463-5310

March 8, 2000

The Honorable David M. McIntosh, Chairman  
Subcommittee on National Economic Growth,  
Natural Resources and Regulatory Affairs  
Committee on Government Reform  
U.S. House of Representatives  
1610 Longworth House Office Building  
Washington, D.C. 20510

Dear Mr. Chairman:

As a longstanding advocate of regulatory accountability, the U.S. Chamber of Commerce applauds your introduction of H.R. 3521, the Congressional Accountability for Regulatory Information Act of 2000. A similar measure, S. 1198, has been reported from the Senate Governmental Affairs Committee and awaits consideration in the full Senate.

H.R. 3521 will ensure that the private sector is made aware that non-regulatory information issued by federal agencies is not legally binding by requiring a disclosure statement on guidance documents. Although guidance documents are issued by agencies to assist companies with compliance issues, regulators often attempt to force regulated parties to meet the provisions specified in the documents. However, guidance documents have not undergone the rigorous Administrative Procedure Act rulemaking process. Therefore, guidance documents cannot limit the flexibility and opportunities for innovation that statutes and regulations provide. H.R. 3521's disclosure requirement clarifies that firms should consider agency guidance, exercise best judgement, and employ innovative regulatory or statutory compliance strategies when appropriate.

Also, H.R. 3521 will ensure that agencies fully consider private sector impacts of rules. If agencies were to propose unnecessarily burdensome and costly regulations, H.R. 3521 effectively empowers Congress to study the impacts and recommend more beneficial or cost effective alternatives.

The U.S. Chamber of Commerce, the world's largest business federation representing more than three million businesses of every size, sector, and region, appreciates your efforts to make the government more accountable to the American people by supporting H.R. 3521.

Sincerely,

  
R. Bruce Josten



ORGANIZATION  
RESOURCES  
COUNSELORS, INC.

February 10, 2000

The Honorable David McIntosh  
United States House of Representatives  
Washington, D.C. 20515

Dear Representative McIntosh:

On behalf of the Organization Resources Counselors, Inc. (ORC), I would like to thank you for scheduling a hearing before the National Economic Growth, Natural Resources, and Regulatory Affairs Subcommittee on the very timely and important issue of whether the "Labor Department is Regulating Through the Back Door." ORC is an international management and human resources consulting firm whose Washington, D.C. office has for over 25 years specialized in providing a wide array of occupational safety and health consulting services to American businesses. Currently, over 150 large (mostly Fortune 500) companies in diverse industries are members of ORC's Occupational Safety and Health Groups. The focus of these groups is to promote effective occupational safety and health programs and practices in business, to facilitate constructive communications between business and government agencies responsible for establishing national occupational safety and health policy, and to advocate responsible business positions to the regulators.

ORC believes that critical to the promulgation of responsible regulation is the requirement, provided by law under the Administrative Procedures Act, that those in the regulated community receive notice of a proposed regulation and have an adequate opportunity to comment. Only through such an open and participatory process can regulators develop fair, reasonable, and effective regulation. Unfortunately, however, over the years, various agencies within the Department of Labor have from time to time sidestepped this fundamental requirement, and have created *de facto* obligations without seeking public input through an appropriate notice and comment process. Letters of interpretation, enforcement policies, and compliance directives, for example, have been used to create or change substantive policy. While ORC recognizes that agencies should offer compliance assistance and interpretive guidance, the agencies must be careful not to create new substantive requirements through their informal actions. When that happens, the regulated community is deprived of its opportunity to comment, and compliance issues and confusion are created.

ORC sincerely applauds your efforts with the upcoming hearing to focus attention on this very important issue. Please do not hesitate to contact us if there is any way we may of assistance as you explore this significant issue.

Very truly yours,

A handwritten signature in black ink, appearing to read "Frank A. White". The signature is written in a cursive style with a large, looping initial "F".

Frank A. White  
Vice President



February 15, 2000

The Honorable David M. McIntosh, Chairman  
National Economic Growth, Natural Resources and Regulatory Affairs Subcommittee  
House Committee on Government Reform  
House of Representatives  
B-377 Rayburn House Office Building  
Washington, DC 20515-6315

**Re: Hearing—"Is the Department of Labor Regulating the Public Through the Backdoor?"**

Dear Chairman McIntosh:

LPA is pleased to submit the enclosed comments in conjunction with the Subcommittee's hearing: *Is the Department of Labor Regulating the Public Through the Backdoor*. We would appreciate it if these comments were included as part of the record for this hearing.

LPA is the nation's leading public policy association of senior human resource executives, representing more than 250 major corporations doing business in the United States. LPA members are companies with business operations in the United States that have more than \$750 million in revenues and more than 2,500 employees. The total number of person employed by LPA member companies in the United States is nearly 13 million Americans, representing more than 12 percent of the private sector workforce.

This issue is particularly important to us, especially in the context of telecommuting and stock options. You and the Members of the Subcommittee should feel free to contact us if we can provide assistance as you consider this issue. Thank you for your consideration of our comments.

Sincerely,



Jeffrey C. McGuinness  
President

LPA, INC. 1015 FIFTEENTH STREET, NW TEL 202.789.8670  
SUITE 1200 FAX 202.789.0064  
WASHINGTON, DC 20004-5608 INFO 202.789.0000

STATEMENT SUBMITTED FOR THE RECORD

BY

LPA, INC.

“IS THE DEPARTMENT OF LABOR REGULATING THE PUBLIC THROUGH  
THE BACKDOOR?”

BEFORE THE  
SUBCOMMITTEE ON NATIONAL ECONOMIC GROWTH, NATURAL  
RESOURCES AND REGULATORY AFFAIRS OF THE  
HOUSE COMMITTEE ON GOVERNMENT REFORM

FEBRUARY 15, 2000  
(00-29)



1015 FIFTEENTH STREET | SUITE 1200  
WASHINGTON DC 20005  
202.789.8670 | FAX 202.789.0064 | WWW.LPA.ORG

## MR. CHAIRMAN AND DISTINGUISHED MEMBERS OF THE SUBCOMMITTEE:

We wish to commend your subcommittee for holding a hearing to examine the use of guidance documents by the United States Department of Labor ("DOL") as a possible backdoor approach to regulating the public. Recent rulings by the U.S. Department of Labor have created considerable concern over the legal effects of such documents, particularly since they are typically generated with little or no opportunity for public input.

LPA is a public policy association of senior human resource executives, representing more than 250 major corporations doing business in the United States. LPA's purpose is to provide in-depth information, analysis, and opinion regarding current situations and emerging trends in labor and employment policy among its member companies, policy makers, and the general public. LPA members are companies with business operations in the United States that have more than \$750,000 million in revenues and more than 2,500 employees. The total number of persons employed by LPA member companies in the United States is nearly 13 million Americans — more than 12 percent of the private sector workforce.

Recently, there has been much discussion about the significance of interpretative letters issued by regulatory agencies such as the DOL. Last month, public interest in the significance of interpretative letters was triggered when one of these letters, issued in November 1999, by the Occupational Safety and Health Administration ("OSHA") of the DOL suggested that employers are liable for the safety and health of employees who work from home. The letter would have affected an estimated 20 million Americans who regularly telecommute from their homes.<sup>1</sup> The DOL rescinded the letter in January. Whereupon, DOL Secretary Alexis Herman stated that the rescinded letter was meant only to address the concerns of the company that had requested the interpretation and that it was not meant as a policy recommendation for businesses across the board.<sup>2</sup> In addition, OSHA Administrator Charles N. Jeffress admitted the agency had overstated its policy on at-home workers.<sup>3</sup>

Similar concern was raised by an advisory opinion issued by the Wage and Hour Division of the DOL that was publicized last month. In that letter, the DOL required an employer to include profits from a stock option program as part of nonexempt workers' base pay for purposes of overtime calculations under the Fair Labor Standards Act ("FLSA").<sup>4</sup> Such an interpretation would impact whether employers continue to offer stock options to hourly workers, a trend which had been proliferating widely. We understand that the DOL is currently reconsidering its interpretative ruling.<sup>5</sup>

These interpretative letters set off a firestorm of opposition from the business community, the public, and legislators, and called into question the relevance of the guidance, its applicability, and its effect on employers. The two recent DOL letters are unusual because of the commotion that they caused. However, it is not out of the ordinary for the DOL and other regulatory agencies to issue such guidance. In fact, regulators have written thousands of pages of such guidance over the years to explain existing policies, clarify obligations, interpret statutes or regulations, give advice, and otherwise dole out information.

The Department of Labor has attempted to deflect the criticism garnered from these recent letters by suggesting that the letters are "based on a unique set of facts and questions" and

“the guidance they provide is also limited to the facts and circumstances presented.”<sup>6</sup> If this were the case, little or not attention would be paid to these rulings by employers and their attorneys. Yet, the reality is those attorneys subscribe to numerous services<sup>7</sup> and literally spend hours poring over these documents to decipher the agency’s view of the law.

The purpose of our testimony is to provide an analysis of the legal effect of administrative opinion letters. However, the practical effect of such letters cannot be understated. Even if an employer believes that the courts may ultimately reach a different conclusion regarding what the law requires, that employer ignores the letter at its own peril.

First and foremost, such rulings are generally binding on the agency itself. For example, in *Prince v. Sullivan*,<sup>8</sup> the Court of Appeals for the Seventh Circuit found that an administrative law judge was required to follow the Social Security Administration’s rulings because they “represent precedent final opinions and orders and statements of policy and interpretations that have been adopted by the Administration.”<sup>9</sup> In addition, when an agency issues an opinion letter and declares that the given interpretation is the one that it will apply, the agency binds the affected private parties as a practical matter, at least until a court reviews the agency’s interpretation.

Thus, DOL investigators regularly use advisory opinion letters when they audit an employer’s operations and cite them in calling the employer’s attention to legal deficiencies in its operations. Meanwhile, the DOL makes its advisory opinion letters available to the public so that other employers can compare their situation to that presented in the opinion letter. Thus, interpretative rules are routinely reviewed as a primary authority of how the agency interprets the law and regulations it enforces. These interpretations impact any employer that reviews the interpretative rule in an attempt to regulate its own conduct. Employers know that if their situation is similar to that of the employer who asked for the advisory opinion, they may be subject to a DOL enforcement action. Meanwhile, employers also know that these letters are scrutinized at least as carefully by plaintiffs’ attorneys, labor unions, and advocacy groups who may use them as a basis for a lawsuit under a statute, such as the FLSA, that provides for a private right of action.

Thus, Congress should be concerned about the weight regulatory agencies apply to their interpretative rules even if they are not reviewed by the courts as they will in any event affect employers who do not proceed beyond the administrative forum.

#### ***The Legal Framework of Federal Court Deference to Agency Actions***

The Constitution<sup>10</sup> and the Administrative Procedure Act<sup>11</sup> (“APA”) require that federal regulatory agency action be based on authority granted to the agency by Congress. Although common law courts have a recognized power to create their own authority, as well as to apply the law and fill in gaps in the law, it is contrary to the constitutional scheme for agencies to regulate areas beyond those that Congress authorized.<sup>12</sup>

Determining whether an agency’s asserted authority is within a specifically delegated assignment is subject to numerous rules and principles. *Chevron U.S.A. v. Natural Resources*

*Defense Council, Inc.*,<sup>13</sup> settled the now familiar principle of federal administrative law that a reviewing court must accept an agency's "reasonable" interpretation of a gap or ambiguity in a statute the agency is charged with administering.<sup>14</sup> *Chevron's* importance lies in its adoption of a categorical presumption that silence or ambiguity in an agency-administered statute should be understood as an implicit delegation of authority to the agency. For more than 15 years, *Chevron* deference has preoccupied administrative law scholarship.<sup>15</sup> Moreover, regulatory agencies often interpret this authority expansively. Indeed, LPA has challenged the applicability of the *Chevron* deference standard to adjudicative actions such as those of the National Labor Relations Board where formal rulemaking is absent and the Board is simply applying its own interpretation to the language of the statute.<sup>16</sup>

*Chevron* suggested that the appropriate degree of deference depends on the situation. When Congress explicitly delegates interpretive authority to an agency by leaving a gap in a statutory scheme requiring or permitting an agency to promulgate regulations to fill that gap, there has been an express delegation of authority. In this situation, the agency's interpretive decisions (i.e., its regulations) are given "controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute."<sup>17</sup> Even in the absence of an express delegation to promulgate legislative regulations, deference is appropriate, provided that the agency's interpretation "represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute."<sup>18</sup>

In sum, the degree of deference to be given to an agency's interpretation depends upon what kind of rule or regulation provides the interpretation. Courts must generally give substantial deference to an agency's interpretation of its own regulations.<sup>19</sup> Provided that an agency's interpretation of its own regulations does not violate the Constitution or a federal statute, it must be given "controlling weight unless it is plainly erroneous or inconsistent with the regulation."<sup>20</sup> This deferential standard is afforded "legislative rules," which are interpretations of regulations that have been subjected to "notice-and-comment" procedures of the APA<sup>21</sup> prior to their general adoption and publication.<sup>22</sup>

#### *Lower Deference Accorded Interpretative Rules*

Interpretative rules by an agency, however, are afforded less deference. Interpretative rules have not been subjected to "notice-and-comment," procedures, but instead have been "issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers."<sup>23</sup> The U.S. Supreme Court touched on the issue of the limitations of deference afforded agency interpretative rules in *Martin v. Occupational Safety and Health Review Commission*.<sup>24</sup> In that case, the Supreme Court deferred to an interpretation, embodied in the Secretary of Labor's citation to an employer. The Court explained its holding by distinguishing between those interpretations that are created as an "exercise of the agency's delegated lawmaking power" and those that are not.<sup>25</sup> The Court deferred to the Secretary's citation because it "assume[d] a form expressly provided for by Congress."<sup>26</sup> The decision suggested that other interpretations, particularly those stated as interpretative rules, might be entitled to less deference.<sup>27</sup>

The *Martin* Court did not articulate the standard of review to be applied, but it suggested that interpretations that do not involve an exercise of delegated lawmaking authority would not receive actual deference. This appears to indicate that the Court is instructing the lower courts to apply a variable deference standard. Thus, some agency interpretations would receive actual deference as per the Court's holding in *Chevron*, under which interpretations involving an exercise of delegated lawmaking authority should be accepted provided they are "reasonable" or are not "arbitrary, capricious, or manifestly contrary to the statute."<sup>28</sup> Other agency interpretations, such as interpretative rules, that do not involve an exercise of delegated lawmaking authority would not receive actual deference.<sup>29</sup> Instead, courts should independently determine a provision's meaning, giving the agency's interpretation the weight it deserves considering its persuasiveness.<sup>30</sup>

In sum, interpretative rules do not have the force and effect of law and "are not accorded that weight in the adjudicatory process."<sup>31</sup> The preliminary power of interpretation is in the agency, but the final power of interpretation is in the courts. Although the courts may find such interpretations persuasive and treat them as if they were binding, the courts have discretion to substitute their own judgment on all questions of statutory interpretation.

One problem in determining the weight to afford agency interpretative rules is that many interpretative statements are not issued by agencies in their own names. In many administrative agencies, especially in large ones such as the DOL, it is impossible for the agency head to be involved in day-to-day administration of every regulatory program. Often, the agency head delegates authority to subordinates and is enlisted only when complex or politically sensitive issues arise. As a result, subordinates are forced to make interpretative decisions. Interpretative statements by agency employees, especially subordinates, have been troubling to the courts.<sup>32</sup> Courts disagree about when such statements may be treated as administrative interpretations and when they constitute nothing more than the individuals' personal views.

Moreover, regulatory agencies make many different types of interpretative statements in a variety of contexts. Interpretative rules can be issued in a variety of forms, including affidavits or briefs submitted in litigation, manuals, policy statements, staff instructions, opinion letters, audits, correspondence, informal advice guidelines, press releases, testimony before Congress, internal memorandum, speeches, and explanatory statements in the *Federal Register*.<sup>33</sup> The courts also have difficulty determining which types of interpretative statements should be given deference.

As one court observed:

It is in the nature of a complex administrative bureaucracy to issue a variety of reports, releases, opinions, advisory letters, and other similar statements in performing its task . . . . Statements issued range from formal written pronouncements published in the *Federal Register* through interpretations from top administrators to letters penned by the lowest-level employee.<sup>34</sup>

Upon review of the relevant body of case law, it appears that the weight to be given to an interpretative rule depends on many factors, including the validity of its reasoning, its consistency with other agency pronouncements, by whom in the agency the interpretative rule

was issued, and whether the administrative document was issued contemporaneously with the passage of the statute being interpreted.<sup>35</sup>

*Courts Disagree About How to Treat Interpretative Statements*

Recent litigation and the recent attention to two DOL interpretative letters suggest that the federal courts continue to encounter problems in their attempts to apply deference principles. Despite the discussion above concluding that an interpretative statement is merely advisory and not binding on the courts, there still remains confusion among the lower courts regarding the deference to be paid to these informal statements. In addition, even if the courts apply the appropriate deference standard, they still consider the interpretative statements and often depend on the rule's persuasiveness. The following provides an overview of how various courts have treated such informal interpretative statements.

Sample Cases Where the Courts Have Been Persuaded by the Department of Labor's Interpretative Rule In *Falken v. Glynn County, Georgia*,<sup>36</sup> the Court of Appeals for the Eleventh Circuit remanded a case to the district court after it failed to apply an analysis set forth by the Wage and Hour Division in an opinion letter regarding overtime benefits for emergency medical services ("EMS") responders who are also certified firefighters. The FLSA states that fire protection employees are due overtime only for hours in excess of 212 worked in a 28-day period, equivalent to an average of 53 hours per week.<sup>37</sup> There is no statutory exemption for employees whose sole function is performing EMS duties. Therefore, EMS workers are owed overtime under the ordinary 40-hours standard unless their employer can prove that the EMS workers should be treated as falling within the exemption for employees engaged in fire protection activities. Because the FLSA does not define "fire protection activities" or the manner in which EMS workers may be brought within the exemption, the DOL has implemented regulations providing this analysis. However, in an opinion letter, the DOL concluded that dual-function EMS/firefighters should be evaluated under a different interpretation of the fire protection activities exemption than EMS-only employees. Under this interpretation of the regulations, medical functions would be exempt activity when performed by dual-function EMS/firefighters as defined in the opinion letter, although the same activities would be nonexempt when performed by EMS-only employees.

In *Falken*, the district court applied the EMS-only framework rather than the EMS/firefighters framework as articulated by the DOL opinion letter. The court of appeals stated that it must "defer to the DOL's interpretation of its FLSA regulations unless the interpretation is 'plainly erroneous or inconsistent with the regulation.'"<sup>38</sup> The court found the DOL's application of the fire protection activities exemption to dual-function EMS/firefighters a permissible interpretation of the regulations and the FLSA. Therefore, the court held that the standard set forth in the DOL's opinion letter governed the application of the fire protection activities exemption to dual-function EMS/firefighters.<sup>39</sup> Thus, in *Falken*, the court applied *Chevron* deference to the DOL's interpretative rule.

In *Herman v. NationsBank Trust Co.*,<sup>40</sup> another case from the Court of Appeals for the Eleventh Circuit, the court gave "considerable deference" to the Secretary of Labor's opinion letters and litigation documents that interpret the Employee Retirement Income Security Act ("ERISA") as allowing participants of an employee stock ownership plan to be named fiduciaries

only with respect to allocated shares for which participants give explicit directions. Although NationsBank claimed that the court should not give *Chevron* deference to the Secretary's interpretation of ERISA where that interpretation is espoused only in litigation documents and opinion letters and not in formal regulations, the court disagreed and deferred to the Secretary's interpretation after concluding that it was reasonable.<sup>41</sup>

In *Hoffman v. Sbarro, Inc.*,<sup>42</sup> the District Court for the Southern District of New York ruled on an employer's motion for summary judgment in a case involving whether a restaurant misclassified its managers as exempt "executive" employees, thereby circumventing the FLSA's overtime requirements. In ruling on the motion, the court was required to apply regulations providing that to be paid "on a salary basis," an employee must receive compensation in "a predetermined amount . . . not subject to reduction because of variations in the quality or quantity of the work performed."<sup>43</sup> The regulations further provide, in a subsection commonly referred to as the "window of correction," that in certain circumstances an employer that has made an improper deduction to salary can take corrective action to restore retroactively the employees' exempt status.<sup>44</sup>

In *Hoffman*, the employer claimed that it was eligible for the window of correction and that the employees' claim for overtime benefits should be dismissed. The court, however, in refusing to dismiss the case, deferred to the Wage and Hour Division's interpretation contained in an opinion letter that the window of correction is unavailable to employers that have engaged in a "pattern" of improper deductions.<sup>45</sup> The court found that such an interpretation rationally expressed the view that such employers lacked a "bona fide intent" to treat their employees as exempt.<sup>46</sup> Accordingly, the court denied the motion for summary judgment, stating that whether or not the employer in the case will be entitled to avail itself of the window of correction will depend on whether the facts show that the employer engaged in a "pattern" of improper deductions.<sup>47</sup> Thus, in *Hoffman*, the court gave "extreme deference" to the DOL's interpretative rule.<sup>48</sup>

In *Commonwealth Edison Co. v. Casillas*,<sup>49</sup> the District Court for the Northern District of Illinois deferred to the Secretary of Labor's interpretation of ERISA's preemption provision.<sup>50</sup> The parties in this case disputed whether ERISA preempted the Illinois Disposition of Unclaimed Property Act ("IUPA")<sup>51</sup> and thus prohibited the IUPA from reaching unclaimed pension benefit payments of employee benefit plans covered by ERISA. The plaintiffs sought a declaratory judgment against the Illinois Department of Financial Institutions, finding that ERISA preempts the IUPA. The DOL in an *amicus* brief and an opinion letter stated that ERISA preempts the IUPA and other states' escheat laws. The court stated that such an interpretation by the DOL, "while not conclusive, is entitled to 'great deference.'"<sup>52</sup> In other words, the well-known standard set forth in *Chevron* applies.<sup>53</sup> The court found the DOL's interpretation reasonable, and in deferring to the Secretary of Labor's interpretation, the court granted the plaintiffs' motion for summary judgment.

In *Graziano v. Society of the New York Hospital*,<sup>54</sup> the District Court for the Southern District of New York vacated its finding that the employer's policy of deducting employees' comp and vacation time for partial day absences, where such time was subject to a cash pay-out upon termination of employment, rendered employees nonexempt under the FLSA.<sup>55</sup> The

employer moved for reconsideration of the court's finding and in support of its motion attached two opinion letters from the DOL. These opinion letters stated that the policy of deducting vacation, holiday, and sick pay for partial day absences does not render employees non-exempt under the FLSA, even when such accrued time is subject to a cash pay-out. Upon consideration of the motion for reconsideration and the DOL opinion letters, the court vacated its earlier opinion, stating that it was bound to follow the DOL's interpretation of the applicability of the salary-basis test to the cash-out situation at issue in the case.<sup>56</sup>

In *Bartling v. Fruehauf Corp.*,<sup>57</sup> the Court of Appeals for the Sixth Circuit deferred to the Secretary of Labor's interpretation of a provision of ERISA regarding the duty of a pension plan administrator to furnish certain documents upon the request of a plan participant. ERISA only requires a plan administrator to disclose pertinent documents "upon written request of any participant or beneficiary."<sup>58</sup> The statute does not expressly require disclosure to anyone else. According to the DOL, as articulated in an opinion letter, the information must also be furnished to a third party where the participant or beneficiary has authorized in writing the release of information to such third party.<sup>59</sup> However, absent such authorization, a plan is not required to provide such information.<sup>60</sup> The plaintiffs in *Bartling* argued that attorneys were not required to obtain written authorization to receive the requested information on behalf of the participants or beneficiaries that they represented. The court, while acknowledging the force of the plaintiffs' argument, deferred to the DOL's interpretation contained in the opinion letter and held that the plan administrator was not obliged to disclose any documents to the plaintiffs' attorney without written authorization from the plaintiffs or their beneficiaries.<sup>61</sup>

Sample Cases Where the Courts Have Disregarded the Department of Labor's Interpretative Rule In *Owsley v. San Antonio Independent School District*,<sup>62</sup> an action was brought against a school district pursuant to the FLSA seeking overtime benefits for a group of athletic trainers. The athletic trainers asserted that an opinion letter from the Wage and Hour Division of the DOL represented an agency interpretation that the trainers were nonexempt employees entitled to overtime benefits. The Court of Appeals for the Fifth Circuit stated that "[o]pinion letters, which are issued without the formal notice and rulemaking procedures of the Administrative Procedure Act, do not receive the same kind of *Chevron* deference as do administrative regulations."<sup>63</sup> Thus, while the court considered the opinion letter as persuasive, it held that it had "no obligation to defer to its interpretation."<sup>64</sup> Upon consideration of the letter, the court found that the analysis contained in the opinion letter was inappropriate, particularly in light of the fact that the opinion letter did not deal with the same facts.<sup>65</sup>

In *Kilgore v. Outback Steakhouse of Florida, Inc.*,<sup>66</sup> restaurant servers and hosts brought an action alleging that the restaurant violated the FLSA by requiring servers to place a share of their tips in a tip pool to be distributed between hosts, bus persons, and bartenders. The Court of Appeals for the Sixth Circuit did not find persuasive value in opinion letters issued by the Wage and Hour Division of the DOL that attempted to limit the amount of tips an employer can require an employee to place in a tip pool. The court noted that it "[does] not accord *Chevron* deference to non-binding advisory opinions of an administrative agency."<sup>67</sup> While the court found that the opinions of the Wage and Hour Division have persuasive value "if the position is thoroughly considered and well-reasoned,"<sup>68</sup> the court stated that "the opinion letters here [regarding tip

pooling arrangements] fail to persuade us because they do not explain the statutory source for the limitation that they create."<sup>69</sup>

In *Platak v. Duquesne Club*,<sup>70</sup> the District Court for the Western District of Pennsylvania applied the *Chevron* standard to a Wage and Hour Division opinion letter, which, like the opinion letters at issue in *Kilgore*, stated that tip-pooling arrangements can violate the minimum wage provisions of the FLSA. As the court did in *Kilgore*, this court refused to defer to the agency's interpretation of the regulation at issue because it did not find the interpretation reasonable, stating that the interpretation was not supported by the plain language or purpose of the statute or regulation.<sup>71</sup>

In *Reich v. Gateway Press, Inc.*,<sup>72</sup> the Court of Appeals for the Third Circuit determined that opinion letters issued by the DOL regarding the "small newspaper exemption" of the FLSA<sup>73</sup> were unpersuasive and declined to defer to the agency's interpretations. The court stated:

Normally we must give considerable weight to agency interpretations expressed in opinion letters. Such weight need not be given, however, when the interpretations are, like these, inconsistent, not contemporaneous to the enactment of the statute, and stale (the most recent one in this case being twenty-four years old).<sup>74</sup>

Still, the court stated it must give some weight to the opinion letters, and that full deference was appropriate to the extent the opinion letters had common ground.<sup>75</sup> The court did find a consistent theme running through each of the opinion letters suggesting that a single publisher may publish more than a single newspaper with an aggregate circulation of more than four thousand and still come within the scope of the small newspaper exemption of the FLSA. The court concluded that this interpretation of the exemption was entitled to deference.<sup>76</sup>

### Conclusion

As all these cases show, the legal effect of interpretative rulings by the DOL and other federal agencies is not clear-cut. While interpretative rulings certainly are not accorded the same deference as formal rulemaking, it is also evident that courts may and often do defer to them. More importantly, as we noted at the outset, it is essential that your subcommittee keep in mind that, in the real world, disputes over the interpretation of the law only occasionally get resolved by the courts. Moreover, while such actions may very well be successfully challenged in the courts, knowing this provides small comfort to the employer with limited resources. More often, it is the view of a government compliance officer or a plaintiffs' attorney against that of the employer and its attorney. Thus, unless the employer is willing to spend enormous resources to get his or her "day in court," chances are matters will be settled on the basis of what the federal agency has declared to be the law.

Obviously, this becomes a serious problem when the agency moves beyond interpretations that are clearly dictated by the language of the statute or regulations (or the courts' interpretations thereof) and expands the law into new areas. When an agency does not

merely interpret, but sets forth new substantive law, the agency should observe the notice-and-comment procedures laid out in the APA, which serve the important purpose of providing fair and effective administrative process.<sup>77</sup> We encourage your subcommittee to consider this problem and any available mechanisms for reigning in those federal agencies who are bent upon shaping the law to fit their own agenda.

Thank you for your consideration of our views.

## Endnotes

- <sup>1</sup> Frank Swoboda and Kristin Downey Grimsley, *OSHA Covers At-Home Workers; Companies Liable for Safety of Telecommuters*, Washington Post, January 4, 2000, at A-1.
- <sup>2</sup> Frank Swoboda, *Labor Chief Retreats on Home Offices; OSHA Position Drew Criticism*, Washington Post, January 6, 2000, A-1; Nancy Rivera Brooks and Marla Dickerson, *OSHA Drops Home Office Safety Order; Labor Agency Reacts to Outcry*, Los Angeles Times, January 6, 2000, C-1.
- <sup>3</sup> Steven Greenhouse, *Home Office Isn't Liability for Firms, U.S. Decides*, New York Times, January 28, 2000, at A-13.
- <sup>4</sup> Nancy Rivera Brooks, *Advisory May Imperil Worker Stock Options*, Los Angeles Times, January 22, 2000, at A-1.
- <sup>5</sup> Nancy Rivera Brooks, *Labor Dept. to Revisit Advice on Stock Options as Part of Base Pay*, Los Angeles Times, February 3, 2000, C-3.
- <sup>6</sup> Letter from Wage and Hour Administrator T. Michael Kerr to LPA President Jeffrey C. McGuinness, January 11, 2000.
- <sup>7</sup> See, e.g., Wages & Hours Manual 6A (BNA); Occupational Safety & Health Reporter (BNA).
- <sup>8</sup> 933 F.2d 598 (7<sup>th</sup> Cir. 1991).
- <sup>9</sup> *Id.* at 602 (quoting 20 C.F.R. § 422.406 (b)(1) (1990)). See also *Morton v. Ruiz*, 415 U.S. 199, 235 (1974) (“Where rights of individuals are affected, it is incumbent upon agencies to follow their own procedures.”).
- <sup>10</sup> U.S. Const. art. I, § 8, cl. 18.
- <sup>11</sup> 5 U.S.C. §§ 551-559 (1994). In particular, note § 558(b), which provides that “[a] sanction may not be imposed or a substantive order issued except within jurisdiction delegated to the agency and as authorized law.” *Id.* at § 558(b).
- <sup>12</sup> However, this matter is not without challenge. Some critics question whether agencies are actually recipients of regulatory power subject to “dynamic statutory interpretation.” See Cass R. Sunstein, *Is Tobacco a Drug? Administrative Agencies as Common Law Courts*, 47 Duke L.J. 1013, 1020 (1998).
- <sup>13</sup> 467 U.S. 837 (1984).
- <sup>14</sup> *Id.* at 843-44.
- <sup>15</sup> For articles defending *Chevron* deference, see, e.g., Laurence H. Silberman, *Chevron – The Intersection of Law & Policy*, 58 Geo. Wash. L. Rev. 821, 823 (1990); Antonin Scalia, *Judicial Deference to Agency Interpretations of Law*, 1989 Duke L.J. 511, 516-17 (1989); Richard J. Pierce, Jr., *Chevron and Its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions*, 41 Vand. L. Rev. 301, 303 (1988); Peter L. Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 Colum. L. Rev. 1093, 1121-22 (1987); Kenneth W. Starr, *Judicial Review in the Post-Chevron Era*, 3 Yale J. on Reg. 283, 307-09 (1986). For viewpoints critical of *Chevron*, see, e.g., Mark Seidenfeld, *A Syncopated Chevron: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes*, 73 Tex. L. Rev. 83 (1994); Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 Yale L.J. 969, 998 (1992); Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin. L. Rev. 363, 377 (1986); Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 Colum. L. Rev. 452 (1989); Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 Harv. L. Rev. 421, 465-69 (1987); Abner J. Mikva, *How Should Courts Treat Administrative Agencies?*, 36 Am. U. L. Rev. 1, 79 (1986).
- <sup>16</sup> Daniel V. Yager & Joseph J. LoBue, *Is the Chevron Deference Standard Too High-Octance for the NLRB?*, 23 Emp. Rel. L.J. 67 (Spring 1998). See also *Bob Evans Farms v. NLRB*, 163 F.3d 1012, 1019 (7<sup>th</sup> Cir. 1998) (application of *Chevron* deference to NLRB adjudication denied).
- <sup>17</sup> *Chevron*, 467 U.S. at 844.
- <sup>18</sup> *Id.* at 845 (quoting *United States v. Shimer*, 367 U.S. 374, 383 (1961)).
- <sup>19</sup> *Thomas Jefferson University v. Shalala*, 512 U.S. 504, 512 (1994).
- <sup>20</sup> *Stinson v. United States*, 508 U.S. 36, 45 (1993) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)). See also Kenneth Culp Davis & Richard J. Pierce, Jr., *Administrative Law Treatise* § 6.3 (3d Ed. 1994).
- <sup>21</sup> 5 U.S.C. § 553. The APA mandates not only that the agency make written findings describing the regulation's basis and purpose, 5 U.S.C. § 553(c), but it also mandates publication of and comment upon the proposed rule, *id.* at § 553(b)(3), (c), prior to the adoption of the agency's interpretation.
- <sup>22</sup> *Shalala v. Guernsey Memorial Hosp.*, 514 U.S. 87, 99 (1995).
- <sup>23</sup> *Id.* at 99 (quoting *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979)).
- <sup>24</sup> 499 U.S. 144 (1991).
- <sup>25</sup> *Id.* at 156-57.

<sup>26</sup> *Id.* at 157.

<sup>27</sup> *Id.*

<sup>28</sup> *Chevron*, 467 U.S. at 844.

<sup>29</sup> *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). In *Skidmore*, the Court stated:

We consider that the rulings, interpretations and opinions of the Administrator under this [Fair Labor Standards] Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

*Id.* at 140.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* See also *Reno v. Koray*, 515 U.S. 50, 61 (1995) (“internal agency guideline, which is akin to an ‘interpretative rule’ that ‘do[es] not require notice and comment’ . . . is still entitled to some deference”).

<sup>32</sup> As one court noted, “[a]lthough common sense tells us that the utterance of a lower-echelon agency employee should not be accorded weight equal to the formal interpretation of an agency chief, the case law does not suggest clear standards by which to distinguish the different types of statements.” *Diaz v. INS*, 648 F. Supp. 638, 645 (E.D. Cal. 1986).

<sup>33</sup> Jamie A. Yavelberg, Note, *The Revival of Skidmore v. Swift: Judicial Deference to Agency Interpretations After EEOC v. Aramco*, 42 Duke L.J. 166 (1992); Robert A. Anthony, *Which Agency Interpretations Should Bind Citizens and the Courts?*, 7 Yale J. on Reg. 1, 2 (1990). See, e.g., *Masters, Mates & Pilots Pension Plan v. USX Corp.*, 900 F.2d 727, 732 n.4 (4<sup>th</sup> Cir. 1990) (expressing concern about deferring to interpretations rendered by agency counsel, but deferring to positions taken in an *amicus curiae* brief concluding that they reflected the agency’s rather than the counsel’s view); *Vietnam Veterans of Am. v. Secretary of Navy*, 843 F.2d 528, 540 (D.C. Cir. 1988) (affidavits of the President of the Army’s Discharge Review Board and the Chief of the Air Force’s Discharge Review Board submitted as evidence).

<sup>34</sup> *Diaz*, 648 F. Supp. at 645.

<sup>35</sup> See, e.g., *Morton*, 415 U.S. at 237; *Skidmore*, 323 U.S. at 140. See also *Auer v. Robbins*, 519 U.S. 452, 462 (1997) (the fact that the Secretary of Labor’s interpretation of the FLSA came to the Court in the form of a legal brief did not, in the circumstances of the case, make it unworthy of deference where “there [was] no reason to suspect that the interpretation [did] not reflect the agency’s fair and considered judgment on the matter in question”).

<sup>36</sup> 197 F.3d 1341 (11<sup>th</sup> Cir. 1999).

<sup>37</sup> See 29 C.F.R. § 553.201(a).

<sup>38</sup> *Falken*, 197 F.3d 1341 (quoting *Auer*, 519 U.S. at 461).

<sup>39</sup> *Id.*

<sup>40</sup> 126 F.3d 1354 (11<sup>th</sup> Cir. 1997), *cert. denied*, 525 U.S. 816 (1998).

<sup>41</sup> *Id.* at 1363-64, 1368.

<sup>42</sup> 982 F. Supp. 249 (S.D.N.Y. 1997).

<sup>43</sup> *Id.* at 251 (quoting 29 C.F.R. § 541.118(a)).

<sup>44</sup> See 29 C.F.R. § 541.118(a)(6).

<sup>45</sup> *Hoffman*, 982 F. Supp. at 257.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> 1998 U.S. Dist. LEXIS 7236 (N.D. Ill. May 12, 1998) (unpublished opinion).

<sup>50</sup> See 29 U.S.C. § 1144.

<sup>51</sup> See 765 ILCS 1025/7.

<sup>52</sup> *Commonwealth Edison Co.*, 1998 U.S. Dist. LEXIS 7236, at \*26 (quoting *Blue Cross & Blue Shield of Florida v. Department of Banking & Finance*, 791 F.2d 1501, 1506 (11<sup>th</sup> Cir. 1986)).

<sup>53</sup> *Id.*

<sup>54</sup> 4 WH Cases 2d (BNA) 286 (S.D.N.Y. 1997).

<sup>55</sup> See 29 C.F.R. § 541.118.

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- <sup>56</sup> *Graziano*, 4 WH Cases 2d (BNA) at 288 (citing *Auer*, 519 U.S. at 461).
- <sup>57</sup> 29 F.3d 1062 (6<sup>th</sup> Cir. 1994).
- <sup>58</sup> See 29 U.S.C. § 1024(b)(4).
- <sup>59</sup> *Bartling*, 29 F.3d at 1072.
- <sup>60</sup> *Id.*
- <sup>61</sup> *Id.*
- <sup>62</sup> 187 F.3d 521 (5<sup>th</sup> Cir. 1999).
- <sup>63</sup> *Id.* at 525.
- <sup>64</sup> *Id.*
- <sup>65</sup> *Id.*
- <sup>66</sup> 160 F.3d 294 (6<sup>th</sup> Cir. 1998).
- <sup>67</sup> *Id.* at 302 (quoting *Mid-America Care Found. v. NLRB*, 148 F.3d 638, 642 (6<sup>th</sup> Cir. 1998)).
- <sup>68</sup> *Id.* at 303 (citing *Skidmore*, 323 U.S. at 140).
- <sup>69</sup> *Id.* (citing *Brock v. Louvers & Dampers, Inc.*, 817 F.2d 1255, 1258 (6<sup>th</sup> Cir. 1987) (cautioning that unexplained agency constructions of their enabling statute have little persuasive value); *Dole v. Continental Cuisine, Inc.*, 751 F. Supp. 799, 803 (E.D. Ark. 1990) (holding that a tip-out requirement that resulted in servers tipping out 40% of their tips did not violate the FLSA and refusing to follow the opinion letters because “[t]he Court can find no statutory or regulatory authority for the Secretary’s opinion”).
- <sup>70</sup> 961 F. Supp. 835 (W.D. Pa. 1995), *aff’d*, 107 F.3d 863 (3<sup>rd</sup> Cir. 1997), *cert. denied*, 522 U.S. 934 (1997).
- <sup>71</sup> *Id.* at 839-40 (applying *Chevron* standard).
- <sup>72</sup> 13 F.3d 685 (3d Cir. 1994).
- <sup>73</sup> 29 U.S.C. § 213(a)(8).
- <sup>74</sup> *Gateway Press*, 13 F.3d at 692-93 (citations omitted).
- <sup>75</sup> *Id.* at 693.
- <sup>76</sup> *Id.* at n.9.
- <sup>77</sup> See generally Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?*, 41 Duke L.J. 1311 (June, 1992).

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*Rec'd 6/13/00*



EXECUTIVE OFFICE OF THE PRESIDENT  
OFFICE OF MANAGEMENT AND BUDGET  
WASHINGTON, D.C. 20503

June 12, 2000

THE DIRECTOR

The Honorable David M. McIntosh  
Chairman, Subcommittee on National Economic Growth  
Natural Resources, and Regulatory Affairs  
Committee on Government Reform  
U.S. House of Representatives  
Washington, D.C. 20515-6143

Dear Mr. Chairman:

Thank you for your letter of April 14, 2000, enclosing additional questions from the Subcommittee as a follow-up to your April 12, 2000 hearing on the Paperwork Reduction Act. Our response is enclosed.

If you would like any additional information, please contact us at your convenience.

Sincerely,

A handwritten signature in black ink, appearing to read "Jacob J. Lew".

Jacob J. Lew  
Director

Enclosures

cc: The Honorable Dan Burton  
The Honorable Dennis Kucinich

FOLLOW-UP QUESTIONS AND ANSWERS FOR  
PAPERWORK REDUCTION ACT HEARING  
April 12, 2000

*Q1. a. On December 6, 1999, the Subcommittee asked 28 departments and agencies to identify any specific paperwork reduction candidates added by the Office of Management and Budget (OMB) during a six-month period in 1999 (from July 1st to December 31st). The agencies reported no candidates added by OMB from the 7,563 possibilities. Why should Congress continue to fund OMB's Office of Information and Regulatory Affairs (OIRA), which was established by the Paperwork Reduction Act (PRA) of 1980?*

Answer: OIRA was established as a statutory office under the Paperwork Reduction Act of 1980 (1980 PRA) (P.L. 96-511). The 1980 PRA was recodified in the Paperwork Reduction Act of 1995 (P.L. 104-13). The 1995 PRA places primary responsibility for compliance with both the procedures and goals of the Act with the head of each agency (to be delegated to the Chief Information Officer (CIO) of the agency). In fact, the long title of the 1995 PRA is "A bill to further the goals of the Paperwork Reduction Act to have Federal agencies become more responsible and publicly accountable for reducing the burden of Federal paperwork on the public, and for other purposes." As Senator Nunn said upon introduction of the bill in the Senate, "This legislation reemphasizes the fundamental responsibilities of each Federal agency to minimize new paperwork burden by thoroughly reviewing each proposed collection of information for need and practical utility, the Act's fundamental standards. The bill makes explicit the responsibility of each Federal agency to conduct this review itself, before submitting the proposed collection of information for public comment and clearance by OIRA."

The response of the 28 agencies must be understood in the context of the 1995 PRA. OIRA is responsible for exercising oversight of agency information collection requests under the 1995 PRA. When an agency performs its duties well, independently reviewing whether the collection meets the standards of the Act, there is less need for OMB to question its decisions.

Even so, in the course of reviewing agency paperwork clearance requests, OIRA staff will offer suggestions on how the draft information collections can be improved. If, in the course of these reviews, OIRA staff become aware of more systemic issues, the OIRA staff may offer to work with the Office of the Chief Information Officer (CIO) directly to offer training or other support to have the CIO make improvements in the information collections. Such ongoing support underscores the fact that OIRA is performing the role intended by the authors of the 1995 PRA, to reemphasize each agency's own processes, reinforce the authority of the CIOs, and oversee each agency's Information Resources

Management (IRM). OIRA's close working relationship with the agencies often improves the quality of individual paperwork clearance requests.

OIRA also works closely with agencies as they develop significant agency rulemakings. Under Executive Order No. 12866, OIRA has specific responsibilities in regulatory planning, coordination, and review to ensure consistency with the Administration's regulatory philosophy and principles. In its reviews of draft regulations, OIRA seeks to promote Federal regulatory policies that maximize net social benefits and take into account effects on the private and public sectors. The basic objectives of OIRA's regulatory review activities are to increase the value of information provided by agencies on the economic impacts of regulatory policies, improve the quality of agencies' analytic basis for regulatory decisions, and better inform decisionmakers and the public. For economically significant regulations (those that are estimated to impose at least \$100 million in costs, benefits, and/or transfers), OIRA works with agencies to obtain the best estimates of net benefits for the agency action, as well as for any reasonable alternatives. For other significant regulations, OIRA ensures that agencies identify and justify the alternative that maximizes net benefits and, where appropriate, identifies and discusses any other reasonable alternatives considered.

OIRA makes other important contributions as well. Under the PRA, OIRA has the statutory lead on numerous other aspects of IRM, including setting policy and overseeing agency implementation in the areas of information dissemination, statistical policy and coordination, records management; privacy and security, and information technology. It performs well in these areas.

OIRA also carries out responsibilities under other statutes:

- The Unfunded Mandates Reform Act of 1995: Title II of this Act requires that each agency, before promulgating any proposed or final rule that may result in expenditures of more than \$100,000,000 in any year by State, local, and tribal governments, or by the private sector, must conduct a detailed cost-benefit analysis and select the least costly, most cost-effective or least burdensome alternative. Each agency must also seek input from State, local, and tribal government. OIRA monitors agency compliance with Title II, provides CBO with periodic submissions of agency analytical statements for covered regulations, and publishes an annual report on agency compliance with Title II.
- The Clinger-Cohen Act of 1996 (ITMRA): This Act requires OMB to develop government-wide policy and guidance to assist and oversee agencies in implementing the Act. OMB must: (1) examine agency capital

investment proposals for information technology; (2) oversee the establishment and evaluate the effectiveness of agency CIOs; and (3) oversee multi-agency and government-wide procurement programs for information technology. The Act directs OMB to report annually on the benefits of Federal information technology investments. As part of its oversight under the Act, OMB coordinates the work of the Information Technology Resources Board and similar groups to assist agencies in evaluating and improving major information technology systems investments; promotes the effective use of information technology across agency lines in order to reduce costs and improve government effectiveness and customer service; and supports the CIO Council. In carrying out these responsibilities, OMB has issued guidance to agencies. It assists the CIO Council in producing its strategic plan, continues to support a variety of other interagency groups, and has evaluated single and multi-agency information system investment proposals using its budget oversight processes.

- The National Technology Transfer and Advancement Act of 1995: Under the National Technology Transfer Act Amendments of 1996 (P.L. 104-113), all Federal agencies must use voluntary consensus standards in their procurement and regulatory activities. A Federal agency may elect to use a government-unique standard in lieu of a voluntary consensus standard if the head of each such agency or department transmits an explanation to OMB. To implement the law, OMB issued revisions to Circular A-119. During its regulatory review process, OIRA works with agencies to identify situations where they should rely on voluntary consensus standards rather than developing a government-unique standard.
- Prepare and Submit an Accounting Statement and Report to Congress on the Costs and Benefits of Federal Rules and Paperwork: In the report, OMB/OIRA estimates the total annual costs and benefits (including quantifiable and nonquantifiable effects) of Federal rules and paperwork, in the aggregate, by agency and agency program, and by major rule. OMB also analyzes the impacts of Federal regulation on State, local, and tribal government, small business, wages, and economic growth and to make recommendations for reform. The report is subject to notice and comment by the public before it is submitted to Congress. In addition, OMB must issue guidelines to agencies to standardize measures of costs and benefits and the format of the accounting statements. The reports and the guidelines are subject to peer review before submission to Congress.
- Government Paperwork Elimination Act – Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999 (P.L. 105-277):

OMB, in consultation with the Department of Commerce and other appropriate bodies, must develop procedures for the use and acceptance of electronic signatures by Federal agencies within 18 months of enactment. The procedures must:

- be compatible with accepted standards;
- not inappropriately favor one industry or technology;
- ensure an appropriate level of reliability;
- provide for electronic acknowledgments; and
- allow multiple signature methods for large-volume filings.

To accomplish this, OMB/OIRA has developed guidance for dissemination to the agencies. Within 5 years, agencies must have electronic filing, recordkeeping, disclosure, and signature capabilities in place. In consultation with the Department of Commerce, OMB will be responsible for ongoing monitoring of the use of electronic signatures for paperwork reduction and electronic commerce and will report periodically on the agencies' efforts.

- Regulatory Flexibility Act Amendments: The Regulatory Flexibility Act was amended in 1996 by the Small Business Regulatory Enforcement Fairness Act. Under the Act, EPA and OSHA must convene a review panel for major rules prior to their formal proposal. The review panel consists of the agency, SBA, and OIRA and is charged with soliciting input from small business owners on the proposed rule. The panel produces a report outlining its analysis of and recommendations for minimizing or eliminating the small business impacts. OIRA participates actively in a number of such panels each year.
- Congressional Review of Agency Rulemaking: The Congressional Review Act directs Federal agencies to submit all final rules to Congress before they take effect. Before they do so, OIRA determines whether or not regulations meet the statute's definition of "major." The Congressional Review Act imposes certain procedural requirements when an agency submits a final rule that has been designated by OMB as major. OMB has issued guidance to agencies on transmitting final rules to Congress and has developed a standard reporting form for this purpose.

*b. On December 6, 1999, the Subcommittee asked 28 agencies to identify any substantive changes in agency PRA submissions made by OMB during the same six-month period in 1999. The Subcommittee analyzed the agency replies by reviewing OMB's actual PRA dockets. The result was that OMB only made three substantive changes, which resulted in a trivial amount of burden reductions -- a mere 1,915 hours. Why has OIRA during the Clinton Administration taken such a passive role in stopping burdensome paperwork proposals which exceed specific statutory prescriptions? Again, why should Congress continue to fund OMB's OIRA, which was established by the PRA of 1980?*

Answer:

As stated above, OMB works closely with the agencies, often prior to the formal review and approval of information collections under the PRA. The PRA grants OIRA authority to review paperwork clearance requests based upon their individual merits. As OIRA stated in the Information Collection Budget of the United States Government, FY 1999:

The 1995 PRA in its core paperwork-review provisions recognizes that, for a burden reduction target to be "practicable," the target must be consistent with the ability of agencies to carry out their statutory and program responsibilities. While an underlying goal of the 1995 PRA is to minimize Federal paperwork burden on the public it also affirms the importance of information to the successful completion of agency missions and charges OMB with the responsibility of weighing the burdens of information collection on the public against the practical utility it will have for the agency. Specifically, the 1995 PRA provides that "[b]efore approving a proposed collection of information, the [OMB] Director shall determine whether the collection of information by the agency is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility." (FY 1999 ICB, p. 22)

The OIRA review involves more than simply evaluating whether the draft information collection is needed, has practical utility, and imposes minimum burdens on the respondent. OIRA review of proposed surveys, for example, often involves an evaluation of the statistical methodology that the agency proposes to us to ensure that the responses will be statistically valid. For collections of information that are subject to the Privacy Act, OIRA reviews the required privacy notices to ensure that they are appropriate for the data request involved. OIRA staff also consider whether or not a data request would be implemented in ways consistent and compatible, to the maximum extent practicable, with the existing reporting and recordkeeping practices of those who are to respond. In all reviews, OIRA staff emphasize the need for data requests to be written using

plain, coherent, and unambiguous terminology and be understandable to respondents.

If an information collection that an agency submits for OMB review meets the practical utility and burden criteria under the PRA, as well as the other standards set forth in the PRA, then OMB will approve it in accordance with the PRA, notwithstanding the effect of this collection on overall burden reduction targets. This is consistent with the direction given to OMB by the 1995 PRA.

In view of OIRA's many important contributions, we believe that Congress should continue to fund OMB's OIRA.

*c. Since President Clinton's regulatory reviews Executive Order 12866 specifies certain disclosure requirements for OIRA to follow "to ensure greater openness, accessibility, and accountability in the regulatory review process," including revealing changes made by OMB during the course of OMB's review, why is OIRA resisting the Subcommittee's request to disclose OMB's role in its review of agency paperwork submissions?*

Answer:

As OIRA has noted in its correspondence with the Committee, OMB believes that "substantive changes" to a collection of information are "made by OMB" only when OIRA disapproves the collection or when the agency withdraws the collection from review. In response to the Committee's request, OIRA has provided the Committee with information about those collections that OIRA has disapproved or that an agency has withdrawn. We do not view changes as being "made by OMB" when an agency, during the course of OIRA review, makes a change to its proposed collection and OIRA approves the revised collection. In such cases, the change is made by the agency, not by OIRA. Throughout the entire history of the PRA, including the Reagan and Bush Administrations, it has never been OIRA's practice to make a case-by-case determination on each such change as to whether the agency or OIRA should be given "credit" for the change. OIRA believes that instituting such a practice now would impair its administration of the PRA.

*Q2. The Internal Revenue Service (IRS) accounts for nearly 80 percent of the total government-wide paperwork burden on the American public. Even after the Subcommittee's April 15, 1999 hearing, on March 24, 2000, OMB replied that it continued to only have one staff member devoted part-time to work with the IRS on burden reduction initiatives and to review IRS paperwork submissions for OMB PRA approval. Why hasn't OMB increased its staffing devoted to IRS paperwork? And, what changes did OMB make in IRS's December 1999 proposed ICB submission to reduce paperwork burden in 2000? If none, why, especially after the Subcommittee's April 15, 1999 hearing and its extensive correspondence with OMB since then?*

Answer: One OIRA policy analyst has staff responsibility for the Department of the Treasury and several other agencies. That individual reviews IRS paperwork, and is assisted by other OIRA officials and staff members when necessary. OMB has not increased OIRA's staffing level for IRS paperwork review because it believes that this level is appropriate given OIRA's overall staffing level and the need to work with all agencies, including Treasury, to balance the practical utility of information collections against the burden imposed. This staffing level for IRS paperwork remains what it was when the Paperwork Reduction Act was first enacted in 1980, and what it was throughout the Reagan and Bush Administrations.

In reviewing Treasury's December 1999 ICB submission, OIRA worked to correct errors in OMB's computerized inventory of Treasury's information collections, some of which were the responsibility of IRS. Based on this review, we revised and published Treasury's FY 1999 burden inventory. OIRA also reviewed Treasury's planned FY 2000 burden changes and determined that the information that Treasury provided accurately reflected its efforts to reduce burden and implement new statutory requirements.

Q3. *Sixty of the most burdensome paperwork requirements - each totaling over 10 million hours of the public's time - equal 85 percent of the total government-wide burden on the public. These 60 include some that are ripe for review and some that have not been reviewed at all during the two Clinton-Gore terms. For example, OMB's docket for the 12th biggest, imposing nearly 80 million hours on the regulated public - Labor's Process Safety Management (PSM) of Highly Hazardous Chemicals - indicates many public complaints with the paperwork and many public recommendations for change. A second example is FDA's Investigational New Drug (IND) Regulations - the 40th biggest, imposing over 17 million hours on the regulated public. OMB's docket shows no changes in paperwork for this FDA requirement during the two Clinton-Gore terms. Which of the 60 are being targeted by OMB for reduction in the rest of the Clinton Administration? Has OMB considered awarding a contract for an analysis of opportunities for reduction in these 60 paperwork requirements? If not, will OMB do so? Please provide for the hearing record the dates of the last substantive revision of each of the top 60 and the number of hours reduced as a result of that revision effort. Please do not include any adjustments (e.g., correction re-estimates of burden or changes in use not due to an affirmative agency action) in the number of hours reduced. Please indicate this information in the attached chart.*

Answer: OMB reviews the 60 most burdensome collections as rigorously as it does all of the other collections it reviews. Under the procedures established by the PRA, OIRA reviews individual paperwork clearance requests from the agencies on a transaction-by-transaction basis. These requests are made whenever an agency wants to create, revise, or extend the OMB approval of an information collection. Many of these requests are made at the end of the three-year approval period when the agency asks that OMB's approval be extended another three years. When a submission is made, OIRA staff apply the PRA criteria to determine whether or not to approve the agency request to conduct or sponsor the collection of information. When a pending collection request imposes a significant burden, OIRA staff pay particular attention to the agency's stated efforts to reduce burden, as well as its justification for the collection and its explanation of why it has "practical utility." We note that, between now and September 30, 2000, eight of the 60 most burdensome collections are due to expire (please see Exhibit 1, enclosed). We expect that the sponsoring agencies will be submitting requests to OMB for extensions of these eight collections, and plan to carefully review them.

We also note that the roundtable dialogue sessions in OMB's Information Initiative have been exploring topics involving several of the top 60 collections. The IRS is conducting roundtables on self-employed tax burden and employment tax burden. The data standards underlying HCFA's proposed Medicare/Medicaid Health Insurance are on the agenda of an interagency information technology

roundtable. The Department of Transportation has agreed to consider listening sessions regarding its proposed drug and alcohol rulemaking and its driver's hours of service rulemaking as part of the initiative.

OMB has no current plans to hire an outside contractor to analyze the 60 most burdensome paperwork requirements to identify opportunities for burden reduction. OMB has established procedures for reviewing all information collections subject to the PRA. It believes that the current level of staff and budget resources devoted to implementing these procedures is adequate and appropriate. These levels are reflected in the President's FY 2001 budget request.

We are providing the information you requested on the last substantive revision of each of the top 60 collections, including the date and the number of hours reduced (please see Exhibit 2, enclosed).

*Q4. a. In an appendix to this year's Information Collection Budget (ICB) report to Congress, OMB admits at least 710 violations of the PRA; last year OMB reported 872 violations. What is OMB's estimate for the total number of hours of paperwork associated with the violations last year and this year -- paperwork unlawfully imposed on the public without valid OMB PRA approval? Please provide for the hearing record OMB's estimated paperwork hours for each of this year's 710 violations. If OMB is unable to provide this information for any specific violation, please explain the precise circumstances that prevent OMB from estimating the paperwork burden hours caused by the violation.*

Answer: In response to this question, we have provided Exhibit 3, enclosed. This exhibit is equivalent to the chart we provided to you before. Basically, it provides the burden estimates for those information collections which were previously approved, and for which the OMB approval lapsed. Specifically, we have included with this response a table listing, for each OMB control number listed in Appendix B of the FY 2000 ICB, the burden hours for the collection as approved at the ends of FY 1998 and FY 1999, and, for reinstatements, as currently approved.

OMB does not have an estimate for the total number of burden hours associated with all of the violations listed in the tables in Appendix B. Some of the violations listed are not on this table because the collection has never been submitted to OMB for approval and thus there exists no information about prior or currently approved burdens in either our docket or computerized database. For one-time collections that were in violation, we do not anticipate ever having this information. For other collections, we will have this information when the collection is submitted for reinstatement of OMB's previous approval.

*b. OMB's earlier government-wide paperwork reduction accomplishment estimates for the Clinton-Gore Administration were inflated, erroneously counting as reductions both agency re-estimates of burden and illegal forms in current use. What are OMB's estimates for the "corrected" government-wide paperwork burden in FY 1996, 1997, 1998 and 1999 -- i.e., corrected to no longer count violations of law and adjustments as program changes?*

Answer: The information published in the Information Collection Budget of the United States Government, Fiscal Year 1999, for FY 1998 and in the Information Collection Budget of the United States Government, Fiscal Year 2000, for FY 1999 are "corrected" and do not count violations of law or adjustments as program changes.

OMB has not prepared "corrected" figures for FY 1996 or FY 1997, nor has OMB ever prepared such "corrections." As contemplated by the 1995 PRA, its measure

of burden reduction compares the changes each year solely against the previous year's published total. This approach reflects Congressional intent, as expressed in the Conference Report on the 1995 PRA: "The conferees note that the Government-wide paperwork reduction goal is calculated on the basis of a 'baseline' which is the aggregate paperwork burden imposed during the prior fiscal year" (H. Rpt. 104-99).

*c. When OMB established its paperwork accounting system, OMB made annual adjustments to the paperwork hours base, a practice that discouraged the false counting of re-estimates or illegal burdens as reductions. When did OMB change its accounting system approach to no longer make annual adjustments and why did it do so?*

Answer: Each year since 1981, OMB has published an ICB that estimates the aggregate annual hours expended by respondents in answering Federal information collections during the prior fiscal year and presents the aggregate change in burden expected during the coming fiscal year. The baseline is the total burden of those Federal information collections that are approved by OMB under the PRA as of the beginning of the coming fiscal year (i.e., the fiscal year on which a given ICB is reporting).

To develop the ICB, OMB asks each agency to estimate how much the total burden hours will decrease or increase for that agency during the course of coming fiscal year. OIRA reviews the agency estimates and discusses with agencies possibilities for burden reductions and quality improvements. As part of this review process, OIRA helps agencies correct errors in OMB's computerized inventory of information collections to ensure that the baseline is accurate. After OIRA concludes its review, OMB states, in the ICB, the agency's baseline burden hour total and the agency's burden hour target for the end of the coming fiscal year.

Q5. *OMB's just-issued ICB report identifies for each illegal agency information collection the date when its OMB approval, if any, expired. Incredibly, four illegal collections still in use date from 1978 to 1989, i.e., from 11 to 22 years ago. For example, the State Department's "Statement of Non-Receipt of Passport" dates back to 1978. Should Congress consider sanctions for agency policy officials who knowingly and repeatedly violate the PRA or who do not promptly correct violations of law? If not, what does OMB recommend?*

Answer: We share your concern about the number of agency violations of the PRA. In response to the violations that OMB reported in the FY 99 ICB, OIRA sent agency CIOs a memo on May 4, 1999, requesting that they (1) provide a timetable for resolving reported violation, (2) confirm that recently expired collections were not be used without OMB approval, and (3) describe their procedures for avoiding future violations. In addition, OMB's deputy director sent the members of the President's Management Council a copy of the FY 1999 ICB – pointing out the problem of violations – and a copy of the memorandum to the CIOs.

While we have made some progress since then, more is needed. We do not believe that the suggested sanctions are an appropriate response to PRA violations. Congress has other means of carrying out its oversight of any affected agencies. OMB will continue to use administrative remedies to address this issue.

Q6. a. Small Businesses. Since OMB's standard form [OMB 83-I] for agencies to request PRA approval includes a question if small entities will be burdened [#5] (in other words, since this information is readily available to OMB), has OMB prepared a crosscutting analysis of paperwork burdens on small businesses? If not, why not? And, what specific paperwork reduction candidates is the Clinton Administration pursuing for small businesses?

Answer: OMB collects information from agencies on those collections in the active inventory that have a significant impact on small entities. For these collections, agencies respond "Yes" to question 5 of the Form 83-I. Enclosed is a printout generated by our database that provides the OMB numbers, titles, and burden hours of these collections, sorted by agency (see Exhibit 4).

The FY 2000 Information Collection Budget identifies a number of agency initiatives to reduce burdens on small business. For example, many trucking operations are small businesses. The Department of Transportation (DOT) and the Department of Labor (DOL) both have required truck drivers to record their driving time. DOT required the drivers to keep driver logs, while DOL required them to use time records. DOT has decided to rely on DOL's time records. It canceled its regulation with respect to drivers who operate within 100 miles of their normal work site, resulting in a 660,000-hour burden reduction. It has published a proposed rulemaking doing the same thing for intrastate drivers operating further than 100 miles from the work site, which would result in an estimated reduction of 28,000,000 hours.

A growing number of electronic tax filing and payment options are available for small businesses. They may file their employment tax deposits under the Electronic Federal Tax Payment System (EFTPS), which received \$1.3 trillion in tax deposits in FY 1999. In FY 2000, EFTPS will launch an Internet Web Site to allow on-line enrollment, payment, account research and customer service. Employers may file their quarterly Form 941s by phone or, beginning in FY 2000, electronically from their office computer. Partnerships will begin to file Forms 1065 and related Schedule K-1 electronically in March 2000. Many small businesses have pension plans for their employees and must file ERISA Form 5500 annually. The Department of Labor's Pension Welfare Benefit Administration (PWBA), the IRS, and the Pension Benefit Guaranty Corporation share data from Form 5500. The three agencies have conducted an extensive review of Form 5500 resulting in the elimination of unnecessary data. Form 5500 previously has been filed with the IRS. Beginning with 1999 plan year filings in July 2000, Form 5500 will be filed with PWBA and employers will be able to use EFAST, an interactive filing program developed by PWBA. The new processing system reduces employer burden by incorporating consistency and accuracy checks in the electronic filing software. It streamlines the conversion of filer data

into electronic format and yields more accurate and timely data. PWBA estimates plan administrators will save 560,000 burden hours and \$16,351,000 annually. Shipper's Export Declarations (SEDs) are the source for the official U.S. export statistics compiled by the Bureau of the Census. The Department of Commerce has developed an electronic filing system, Automated Export System (AES). DOC conducts extensive marketing to encourage exporters to convert to AES. Paper filing takes about 11 minutes, whereas electronic filing via AES takes only 3 minutes. Significant numbers of exporters are switching from paper to AES.

Several agencies are working on "one-stop shopping" initiatives to reduce burden by using electronic technology to share information across programs and eliminate duplication. In FY 1999 the Foreign Agricultural Service (FAS) launched a Unified Export Strategy (UES), automating its business processes and using the Internet to serve its geographically diverse customers. Thus far, UES and its private sector partners have developed a secure Internet web site and designed special software that allows customers to consolidate 172 different funding requests in 12 export development programs into one comprehensive submission. Customers no longer prepare and submit multiple applications for funding or assistance. The new approach dramatically reduces paperwork by an estimated 11,413 pages annually, saving over 32 staff years at FAX. It also reduces the administrative cost of the FAS programs by over 50%. FAS will continue to improve the system to reduce burden. For example, in FY 2000 FAS will upgrade the software to pre-populate data entry screens so customers will not have to rekey information on new applications unless the data has changed since the customer's last application.

*b. State and Local Governments. Since OMB's standard form [OMB 83-I] for agencies to request PRA approval includes a question if State and local governments will be burdened [11.f] (in other words, since this information is readily available to OMB), has OMB prepared a crosscutting analysis of paperwork burdens on this sector? If not, why not? And, what specific paperwork reduction candidates is the Clinton Administration pursuing for State and local governments?*

Answer: OMB maintains information about collections in the active inventory that have a significant impact on State and local governments. For these collections, agencies indicate "P" on question 11.f of the Form 83-I. Attached is a printout generated by our computerized database that provides the OMB numbers, titles, and burden hours of these collections, sorted by agency (see Exhibit 5).

As described in the FY 2000 ICB, EPA has taken several steps to reduce the reporting burden of small state and local facilities. For example, EPA's Office of Ground Water and Drinking Water requires water systems to report water quality

data. Respondents may use an electronic template on EPA's web site to fill in the data elements or may forward laboratory results electronically to EPA and avoid the burden of re-keying data. EPA will complete all of the reporting for small systems, further reducing their burden.

In 1999 EPA revised its application and permit requirements and forms for facilities that treat domestic wastewater, and generate, treat, or dispose of sewage sludge under EPA's National Pollutant Discharge Elimination System (NPDES). The new applications and forms reduce the information requirements on small publicly owned treatment works.

The Rural Utilities Service is developing a comprehensive Internet-based system to collect, store, use and disseminate RUS data for its electric and telecommunication customers. It will be ready in FY 2000 to collect operating reports.

*Q7. What proportion of all paperwork imposed is for regulatory compliance [OMB 83-I, question #15g]? What specific paperwork reduction candidates is the Clinton Administration pursuing to reduce regulatory compliance burdens on the public? in Labor? in Transportation? in EPA? in the FTC?*

Answer: According to OIRA's computerized database, of the 7,637 currently active information collections, 4,060 are needed for regulatory compliance. These 4,060 collections account for approximately 95 percent of the total paperwork burden of all active collections. The attached Exhibit 6, generated by our database, provides the OMB numbers, titles, and burden hours of the collections in the active inventory for which the primary purpose is regulatory compliance (agencies indicated "P" on question 15.g of the Form 83-I).

In addition to the examples in the answer to Question 6, there are many other examples of burden reduction concerning collections needed for regulatory compliance described in the FY 2000 ICB.

The Federal Motor Carrier Safety Administration (FMCSA) has engaged in an ambitious streamlining initiative for several years. It plans to complete a zero-based review of its motor carrier regulations in FY 2000 which eliminates or combines many regulatory requirements and information collections, and streamlines most of the rest. FMCSA estimates there will be a 90% burden reduction when it completes the review.

Another multi-year effort scheduled for completion in FY 2000 is EPA's initiative to reform the RCRA program. EPA's Office of Solid Waste and Emergency Response (OSWER) expects to publish a proposed regulation that will improve the efficiency of the hazardous waste manifest system and reduce "real-world" paperwork burden and cost by up to 1,360,000 hours and \$78,000,000 annually. EPA also intends to propose a rulemaking in FY 2000 that will reduce RCRA reporting requirements, lengthen periods between facility self-inspections, revise personnel training, streamline land disposal restrictions paperwork, and reduce the data collected by RCRA's biennial report. As proposed, EPA believes that the burden reduction could be 3,300,000 hours.

IRS forms and instructions are responsible for about 80% of the total government burden. The IRS has contracted with Xerox to redesign and simplify tax forms and instructions. For example, for tax year 1999, taxpayers whose only capital gains were from mutual fund distributions

may not need to file Schedule D. Instead gains may be reported directly on Form 1040. The IRS estimates that about 6 million taxpayers will not need to file Schedule D, reducing taxpayer burden by over 1,000,000 hours. Changes in several basic IRS forms (1040, 1040A, 1040EZ, and TeleFile) may be implemented as early as FY 2000, which could have a substantial impact on burden. The availability of electronic reporting reduces burden, even if nothing else in the collection or process changes. For example, the IRS requires employees to report tips to their employers monthly. Most employers now have electronic systems for employees to use to report tips. This has reduced the burden on employees by nearly 65% (16,808,949 burden hours).

The Bureau of Labor Statistics is working to give respondents the option to transmit data electronically by E-mail, Web-based forms, direct transmission from respondent's database, and several prototype systems.

Many agencies are developing "intelligent" software to help customers complete reports. For example, EPA advises us that it is developing interactive, intelligent, user-friendly software called "Toxics Release Inventory Made Easy" (TRI-ME) that will use simple "decision-tree" questions to help facilities determine if they are subject to TRI reporting. The software will calculate releases, complete the forms, serve as a record-keeping device, and provide guidance. It will even check for errors, omissions, and overlooked release sources. EPA estimates that TRI-ME will greatly reduce data quality errors and reduce reporting burden by up to 20% when fully implemented. EPA intends to introduce TRI-ME in FY 2000 with three industries: chemical distributors, petroleum wholesalers, and foundries.

In FY 2000, the Federal Railroad Administration (FRA) plans to amend its Hours of Service Regulation to encourage railroads to collect, maintain and submit hours of service information electronically. FRA believes most railroads will be equipped to do so by December 2001, resulting in a reduction of up to 80% in the time needed for each report and a total annual reduction of about 2,000,000 hours.

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United States Department of Agriculture

Office of the Secretary  
Washington, D.C. 20250

*Rec'd 7/24/50*

May 19, 2000

The Honorable David M. McIntosh, Chairman  
Subcommittee on National Economic Growth,  
Natural Resources, and Regulatory Affairs  
Committee on Government Reform  
U.S. House of Representatives  
B-377 Rayburn House Office Building  
Washington, D.C. 20515-6143

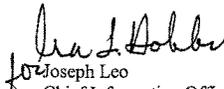
Dear David:

This is in response to your letter of April 14, 2000, requesting the Department of Agriculture's (USDA) recommendations for changes in laws that impose unnecessary or overly burdensome paperwork. USDA staff continue to work to prepare the final response to your letter. Please know that USDA is anxious to provide input into the Subcommittee's work on this issue and we appreciate the opportunity to do so.

So that USDA's recommendations are thorough and include the advice of all USDA agencies, we are soliciting from each agency its particular statutory citations, proposed changes, and rationale for each recommendation. I assure you that we will expedite this process and send you the information you have requested as soon as possible. In the meantime, please do not hesitate to call me, at 720-8833, or have your staff call Chris Moody in USDA's Office of Congressional Relations, at 720-7095, for updates on the status of this project or for answers to any other questions you may have.

I am sending an identical response to Congressman Kucinich, who joined you in sending the April 14 request.

Sincerely,

  
for Joseph Leo  
Chief Information Officer

06/01/00 THU 17:04 TEL

001



**UNITED STATES DEPARTMENT OF COMMERCE**  
The Assistant Secretary for Legislative  
and Intergovernmental Affairs  
Washington, D.C. 20230

The Honorable David M. McIntosh  
Chairman, Subcommittee on National Economic Growth,  
Natural Resources, and Regulatory Affairs  
Committee on Government Reform  
U.S. House of Representatives  
Washington, D.C. 20515-6145

Dear Mr. Chairman:

Thank you for your letter to Secretary Daley seeking the Department of Commerce's recommendations regarding laws imposing paperwork requirements. The Secretary asked that I respond to this inquiry sent pursuant to your continuing oversight under the Paperwork Reduction Act.

The Department of Commerce has long been a leader in advocating and using market-oriented regulatory approaches in lieu of traditional command-and-control regulations when such approaches offer a better alternative. While not principally a regulatory agency, all regulations and paperwork requirements of the Department are designed and implemented to maximize societal benefits while placing the smallest possible burden on those subject to the requirement.

Sometimes, however, the requirements of a particular information collection by the Department are established in statute. For instance, the Department of Commerce's Bureau of Export Administration has responsibility for implementation of the Chemical Weapons Convention. The Convention and its implementing legislation require that chemical manufacturers make declarations concerning their production of certain chemicals that may serve as a precursor to the development of chemical weapons. *See*, The Chemical Weapons Convention Implementation Act of 1998, 22 U.S.C. 6701 *et seq.* Further, the Census Bureau has legal authority to require information necessary to the production of reports on U.S. economic activity. These reports provide important statistics on all aspects of the economy, and include information on topics such as U.S. gross domestic product, housing starts, and exports. *See*, Title 13, United States Code. Also, the Commerce Department administers the antidumping and countervailing duties laws. These laws are designed to ensure that imports to the United States are traded fairly in our domestic market. Once a petition alleging a violation of these laws is filed, the Commerce Department must acquire information necessary to make a determination regarding the appropriateness of imposing duties. *See*, 19 U.S.C. 1671 *et seq.* and 19 U.S.C. 1673 *et seq.*

06/01/00 THU 17:05 TEL

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Each of these functions is based on a statutorily mandated collection of information. We take very seriously the fact that there is a burden on the private sector associated with the submission of this information. However, we believe that these collections of information are critically important, and would not recommend they be rescinded or changed.

The Commerce Department has in the past and will continue in the future to aggressively pursue information management initiatives with the goal of reducing public burden. For instance, in Fiscal Year 1998, the Census Bureau implemented strategies to limit the burden of business reporting for the Economic Census, which is required by law to be conducted every five years. These strategies resulted in a significant reduction in the total time required of the private sector to provide the information (nearly two million hours saved) as compared to the previous Economic Census. Further, the Department is engaged in several initiatives using new Web-based technologies that will yield future burden reductions. By 2003, the U.S. Patent and Trademark Office will process patent applications completely electronically. The Bureau of Export Administration is completing development of the Simplified Network Application Process (SNAP) that will provide exporters the option of filing an Internet-based export license application. Similarly, the National Oceanic and Atmospheric Administration is developing an electronic fish logbook that will allow fishermen to file required catch data electronically.

I hope that this information is helpful in your Committee's role overseeing implementation of the Paperwork Reduction Act.

Sincerely,



Deborah K. Kilmer



ADMINISTRATION AND  
MANAGEMENT

OFFICE OF THE SECRETARY OF DEFENSE  
1950 DEFENSE PENTAGON  
WASHINGTON, DC 20301-1950

RLO 512/100

APR 27 2000

Honorable David McIntosh  
Chairman, Subcommittee  
on National Economic Growth,  
Natural Resources and Regulatory Affairs  
Committee on Government Reform  
House of Representatives  
Washington, DC 20515

Dear Mr. Chairman:

This is in response to your letter of April 14, 2000, to the Secretary of Defense requesting recommendations for changes in specific laws that impose unnecessary or overly burdensome paperwork.

At this time, the Department of Defense does not propose any recommendations or changes to existing laws. Much of the Department's information burden results from the acquisition process. Specifically, over 92 percent of the current total burden is acquisition related. As part of the ongoing Defense Acquisition Reform Initiative, the Department continues to reengineer its acquisition system, and institute reforms that result in major reductions to information requirements imposed on the private sector. Acquisition reform is key to reducing the regulatory burden and related information collection activities that are imposed on Defense contractors. The Department continually reviews its paperwork burden, so that only the minimum burden is imposed on Defense contractors consistent with sound business practices and public law.

Information collection management is centralized within the Department of Defense under the Director of Administration and Management (DA&M) who is also the Regulatory Policy Officer. Since passage of the Paperwork Reduction Act of 1995, the Department has actively managed information collection and paperwork reduction. This proactive approach has resulted in a total burden reduction of 54 percent from the end of Fiscal Year 1995 baseline. Most of the reduction has resulted from program changes, rather than adjustments. The Department has clearly demonstrated its success in the significant burden reductions, in excess of statutory requirements and timetables, which Defense has achieved on a yearly basis. The Department, with guidance from the Office of Management and Budget, will continue to comply with both the provisions and intent of the Paperwork Reduction Act.

This letter was also addressed to the Honorable Dennis J. Kucinich, ranking member of the Subcommittee. Please let us know if we can be of further assistance. If you have further questions, do not hesitate to contact me.

Sincerely,

D.O. Cooke  
Director



THE SECRETARY OF EDUCATION  
WASHINGTON, D.C. 20202

Rec'd 5/25/00

May 24, 2000

Honorable David M. McIntosh  
Chairman  
Subcommittee on National Economic  
Growth, Natural Resources, and  
Regulatory Affairs  
Committee on Government Reform  
House of Representatives  
Washington, DC 20515-6143

Dear Congressman McIntosh:

Thank you for your letter seeking recommendations for changes in specific laws that impose unnecessary or overly burdensome paperwork and would be good candidates for elimination or reduction. I am sending an identical response to Congressman Kucinich.

Reducing burdensome paperwork and unnecessary regulations has been a continuing priority for us. Over the past years, we have moved aggressively to identify areas for paperwork burden reduction. Two examples of recent reductions we have made are: 1) in FY 1999 we eliminated over 3.2 million hours of burden under the Federal Family Education Loan Program, and 2) this year we will reduce 1.5 million hours in burden by changing reporting requirements for the Ford Federal Direct Loan Program.

I also want to mention the work we have been doing under Section 498B of the Higher Education Amendments of 1998. Many operations and activities are under review to eliminate possible duplicative, nonuniform, or unnecessary regulations and procedures. The original Administration recommendations for the Higher Education Act also contained many simplifications of the student financial aid application process that Congress may want to revisit. For example, we concluded in 1998 that families and the federal government alike would benefit by greatly simplifying the asset tests in financial need analysis, which is in Part F of the Higher Education Act of 1965, as amended.

Another important aspect of holding down unnecessary paperwork and regulations is not permitting them in the first place. The Department uses the negotiated rulemaking process wherever possible to discourage requests for paperwork and regulations that go beyond the legitimate needs of the Department.

In most areas where we have been able to achieve large reductions in burden, moving to new electronic processes has been key in reducing the number of hours it takes our constituents to complete applications, and submit reports and other data. Any changes

Page 2

you can make to existing legislation that would permit more use of technological tools across government programs would go a long way to reduce burden. At this time, we have no specific recommendations beyond that for legislative action. However, we will continue looking for opportunities to reduce the paperwork burden imposed on the public and to clarify the requirements of our requests to improve the quality of the data we collect and to simplify the process.

As we continue our efforts to reduce burden, we will notify you if we identify areas that require specific statutory change.

Yours sincerely,

  
Richard W. Riley

*Rec'd 5/31/00*



**Department of Energy**

Washington, DC 20585

May 19, 2000

The Honorable David M. McIntosh  
Chairman  
Subcommittee on National Economic  
Growth, Natural Resources, and  
Regulatory Affairs  
U.S. House of Representatives  
Washington, D.C. 20515

Dear Mr. Chairman:

This is in response to your letter of April 14, 2000, requesting recommendations in changes in specific laws that impose unnecessary or overly burdensome paperwork and are good candidates for elimination or reduction. We were to indicate the statutory citation, our proposed changes, and the rationale for our proposal.

My staff has conducted an initial review of existing laws and has not identified any candidates applicable to Department of Energy activities that, if amended, would lead to an elimination or reduction in burden. We are continuing our review to make sure we look at all potential candidates for elimination or reduction. We will report any findings to your subcommittee. We appreciate your efforts to reduce the paperwork burden imposed by existing legislation and welcome all improvements in this area.

If you require any further assistance, please contact David Berick, Deputy Assistant Secretary for House Liaison, on 202-586-2254.

Sincerely,

*per Howard Gordon*  
John M. Gilligan  
Chief Information Officer



*Sec's 7/6/00*THE SECRETARY OF HEALTH AND HUMAN SERVICES  
WASHINGTON, D.C. 20201

JUN 20 2000

The Honorable David M. McIntosh  
Chairman  
Subcommittee on National Economic Growth  
Natural Resources and Regulatory Affairs  
Committee on Government Reform  
House of Representatives  
Washington, D.C. 20515-6143

Dear Mr. Chairman:

Thank you for your recent letter requesting specific recommendations for changes to existing laws that would reduce paperwork obligations on the public. We fully share the Subcommittee's concern that unnecessary and overly burdensome paperwork be eliminated. We examined current burden throughout the Department and identified certain specific and significant legislative changes (see enclosure) to programs at the Food and Drug Administration's Center for Food Safety and Applied Nutrition (FDA/CFSAN).

As the enclosed materials indicate, the FDA Modernization Act of 1997 "addressed the goal of removing information collection requirements that no longer were necessary" by eliminating or reducing information collection burdens on regulated industries (a list of these is provided). In addition, the enclosure includes a list of statutory provisions that could be revised or eliminated. One of these proposals would change notification frequency to FDA from every year to every three years for small businesses that want to exercise their right to an exemption from nutritional labeling.

We hope that you will find this information useful in your efforts to reduce the burden on the public. If you have any questions about the enclosed materials, please contact Robert Polson of our Office of Information Resources Management at 202/690-6741. We have also provided these recommendations in a letter to Mr. Kucinich.

Sincerely,

Donna E. Shalala

Enclosure

### **LEGISLATIVE STREAMLINING**

In the face of mounting statutory requirements it will be very difficult for FDA to achieve its five percent burden reduction for each of the next two years, (i.e., the Prescription Drug Marketing Act; the Prescription Drug User Fee Act (PDUFA, 1992, 1997); Reinventing Government (REGO) Initiatives; the Paperwork Reduction Act (1995); the Electronic Freedom of Information Act (EFOIA, 1996), Animal Drug Availability Act (1996), and the Food and Drug Administration Modernization Act (1997)).

The FDA Modernization Act of 1997 has positioned the Agency to fulfill its regulatory and safety requirements as the nation and the world has entered the new millennium. This has had a major impact on how the Agency does business, the specifics have been identified, and are being implemented. The Agency recognizes that regardless of the new Act, opportunities exist for legislative streamlining with the identification of requirements that are no longer useful and impose unnecessary burden on the public.

Much of the FDA Modernization Act of 1997 dealt with updating the FDA review mechanisms and many sections dealt with mandates to streamline the approval process for doing clinical studies, thus speeding up the development and marketing of products. More specifically, certain sections have addressed the goal of removing information collection requirements that no longer were necessary. FDA lists these sections that the FDA Modernization Act eliminated or reduced information collection burdens on the regulated industries.

§§125(a) and (b) no longer require manufacturers to submit their insulin and antibiotic products to FDA for certification.

§126 eliminated certain labeling requirements for prescription drugs.

§213 eliminated medical device reporting for distributors and reduces the frequency of device user facility reports from semiannually to annually.

The Agency identified sections for legislative streamlining, and were least affected by the FDA Modernization Act and would benefit the public most.

To this end, FDA's Center for Food Safety and Applied Nutrition (CFSAN) reviewed and identified statutory provisions of the Food, Drug and Cosmetic Act that could be revised or eliminated:

1. Amend Section 403(q)(5)(E)(i).
  - a. This provision requires small businesses to notify FDA annually if they want to exercise their right to an exemption from nutritional labeling. Industry has criticized this as being too frequent and an inefficient use of FDA resources to file the notification, enter the information into a database, and acknowledge receipt of the notifications every year.
  - b. The Agency has currently received 8,421 notices from small businesses representing an estimated paperwork hour-burden of approximately 67,000 hours. A notification frequency of every 3 years would reduce this paperwork burden on industry approximately one-third or approximately 22,000 hours by reducing the frequency of reports. At the same time, there are statutory and regulatory provisions in effect to ensure that firms or products that

are no longer eligible for exemption will comply with the requirements for nutritional labeling.

- c. Recommend amending Section 403(q)(5)(E)(I) by striking out "During the 12-month period" and inserting in lieu thereof "During the 3-year period."

2. Amend 403(q)(4)(C)(ii)

- a. This provision requires FDA to survey the retail market every 2 years to determine whether retailers are voluntarily providing nutrition information for the most commonly consumed fruits, vegetables, and fish and to issue a report to Congress on its findings.
- b. FDA has conducted under contract, five surveys (1990 baseline, 1992, 1994, 1996, 1998) to determine retailer compliance with the guidelines of the voluntary nutrition labeling program. For each of the surveys, substantial compliance by retailers was met. Although the nutrition labeling is voluntary, close to three-fourths of the retailers have consistently shown a commitment to the program. The frequency of this reporting is an inefficient use of FDA and industry resources and affords little public health protection. However, FDA believes that a survey every four years would be adequate to measure compliance and to encourage retailers to provide nutrition information voluntarily for some food substances, such as raw foods.
- c. Recommend amending Section 21 CFR 343(q)(4)\*C(ii) by striking out "two years" and inserting in lieu thereof "four years."



CHIEF INFORMATION OFFICER

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT  
WASHINGTON, D.C. 20410-3000

*Rec'd 5/22/00*

MAY 17 2000

The Majority Staff Subcommittee  
National Economic Growth, Natural Resources,  
and Regulatory Affairs  
B-377 Rayburn House Office Building  
Washington, DC 20515

Dear Majority Staff Subcommittee:

Thank you for your letter of April 14, 2000, to the Department of Housing and Urban Development (HUD). Your letter requested recommendations for changes in specific laws that impose unnecessary burdensome paperwork and are good candidates for elimination or reduction.

In response to your request, we have conducted an extensive review of HUD's information collection requirements to identify any laws that impose burdensome paperwork requirements. As a result of this review, we do not offer any changes to the current legislation.

We, at HUD, continue our efforts to improve information collection processes that better utilize our information resources to minimize the burden imposed on the Public. We have been successful in significantly exceeding the burden reduction goals mandated by the Paperwork Reduction Act of 1995.

Thank you for your interest in our paperwork reduction efforts.

Sincerely,

A handwritten signature in cursive script that reads "Gloria R. Parker".

Gloria R. Parker  
Chief Information Officer

*LECA 4/26/00*



United States Department of the Interior

OFFICE OF THE SECRETARY  
Washington, D.C. 20240

MAY 26 2000

Honorable David M. McIntosh  
Chairman, Subcommittee on National Economic Growth,  
Natural Resources, and Regulatory Affairs  
Committee on Government Reform  
House of Representatives  
Washington, D. C. 20515

Attention: Barbara Kahlow  
Gabe Rubin

Honorable Dennis Kucinich  
Ranking Member  
Subcommittee on National Economic Growth,  
Natural Resources, and Regulatory Affairs  
Committee on Government Reform  
House of Representatives  
Washington, D. C. 20515

Dear Mr. Chairman and Mr. Kucinich:

This letter is with regard to your letter of April 14 concerning recommendations of this Department for changes in existing laws that impose unnecessary or overly burdensome paperwork and are good candidates for elimination or revision. While we consider this to be a positive undertaking, the Department is not ready for response; the effort is continuing to obtain pertinent material. We will keep in touch with your staff, and will be in contact by no later than June 9 with further status.

Sincerely,

*Lenna Aoki*  
*for* Lenna Aoki  
Director, Congressional and Legislative Affairs



United States Department of the Interior

OFFICE OF THE SECRETARY  
Washington, D.C. 20240

June 14, 2000

Memorandum

TO: Charles Markell  
Office of Legislative Counsel

FROM: Debra E. Sonderman *Debra E. Sonderman*  
Director, Office of Acquisition and Property Management

SUBJECT: **GOVERNMENT REFORM COMMITTEE REQUEST FOR  
RECOMMENDATIONS ON PAPERWORK REDUCTION**

This is in response to the June 9, 2000 Legislative Counsel Referral soliciting recommendations for changes in specific laws which impose unnecessary or overly burdensome paperwork and are good candidates for elimination or reduction. The Office of Acquisition and Property Management proposes changes to the following regulations supported by separate statutes:

**Davis-Bacon Act (40 U.S.C. 276a - 276a-7)**

The Davis-Bacon Act provides that contracts in excess of \$2,000 to which the United States or the District of Columbia is a party for construction, alteration or repairs (including painting and decorating) of public buildings or public works within the United States shall contain coverage ensuring that no laborer or mechanic employed directly upon the site of the work shall receive less than the prevailing wage rates as determined by the Secretary of Labor.

The Department of the Interior and the Governmentwide acquisition communities are in need of support for Davis-Bacon Act reform. The March 29, 1999 issue of *Federal Contracts Report* and the April 1999 issue of *Contract Management* covered House and Senate initiatives to repeal or reform the Davis-Bacon Act. The *Federal Contracts Report* article indicated that the Mechanical, Electrical and Sheet Metal Alliance, in a March 25, 1999 letter to members of the Senate, proposed that rather than repeal the Davis-Bacon Act, the Senate should consider raising the Act's coverage threshold from the current \$2,000 to \$100,000 for new construction and to \$25,000 for renovations.

As a Federal agency which in Fiscal Year 1998, spent over 21 percent of its contracting budget on construction and construction-related work, the Department of the Interior would benefit from Davis-Bacon Act reforms. The *Federal Contracts Report* article quotes a Senate Budget committee spokeswoman as stating that repeal of the Davis-Bacon Act "would save the taxpayers

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an estimated \$4 billion over five years." Based on the experience and comments of our contracting operations personnel, we too, believe that much in the way of savings would be realized through the Act's reform.

Because of its low dollar threshold, the Davis-Bacon Act is very expensive to implement. The administrative costs related to Davis-Bacon Act compliance oversight and reporting are equally burdensome to the Government and its contractors. These costs are not at all proportionate to the total value of the contract actions themselves, and in many cases, especially for contract actions between \$2,000 and \$10,000, may actually exceed the contract award amount. According to Federal Reserve statistics, the purchasing power of one U.S. dollar on March 3, 1931, the day the Davis-Bacon Act was passed into law, is today the equivalent of \$10.73. If the Davis-Bacon Act's 1933 \$2,000 threshold rose with Consumer Price Index, that same \$2,000 would be equal to \$21,460.53 today.

In addition to the realization of potential savings, reform of the Davis-Bacon Act would stimulate competition in the construction contracting area for small and very small businesses. A large proportion of our construction and alteration contracting projects are comparatively small dollar work - much of it under \$100,000. The work is performed in remote locations, e.g., at parks, wildlife refuges, and other areas served by Department of the Interior bureaus and offices. These types of jobs are especially attractive to local small and very small businesses, i.e., the proverbial "Mom and Pop" contracting businesses. Unfortunately, these same businesses are prevented from bidding on our construction/alteration projects because they simply cannot and do not pay their employees the prevailing wage rates required under the Davis-Bacon Act.

**Public Printing and Documents (Title 44 U.S.C. 501)** (Pub. L. 102-392, title II, sec. 207(a), Oct. 6, 1992, 106 Stat. 1719, as amended by Pub. L. 103-283, title II, sec. 207, July 22, 2994, 108 Stat. 1440)

Title 44, section 501 of the U.S. Code prohibits the expenditure of funds by any entity of the executive branch for the procurement of "any printing related to the production of Government publications (including printed forms), unless such procurement is by or through the Government Printing Office." "Printing" as used in section 501 includes "the processes of composition, platemaking, presswork, duplicating, silk screen processes, binding, microform, and the end items of such processes." The prohibition does not apply to individual printing orders costing not more than \$1,000 if: (1) the work is not of a continuing or repetitive nature; and (2) is certified by the Public Printer as being included in a class of work which cannot be provided more economically through the Government Printing Office (GPO).

Requiring certification/waiver by the Public Printer for every comparatively low-dollar, emergency, or incidental duplication requirement under \$1,000 is impracticable, time consuming,

and extremely burdensome. With high quality duplication services available from commercial sources that are open for business 24-hours a day, executive agencies should be authorized to satisfy emergency and incidental duplicating work requirements costing not more than \$1,000 without having to request and obtain a waiver from the Public Printer.

#### **Home-to-Work Transportation (31 U.S.C. 1344)**

Another proposed change is to 31 U.S.C. section 1344 regarding official use of Government passenger carriers by employees between their residences and places of employment ("home-to-work" transportation). Presently, employees may be authorized home-to-work transportation for a period of 15 calendar days. Under certain circumstances, 31 U.S.C. 1344(d)(2) allows for 90-day extensions of home-to-work transportation beyond the initial 15-day period. Only agency heads have the authority to determine and authorize home-to-work eligibility. 31 U.S.C. 1344(d)(3) prohibits agency heads from delegating this authority. In addition, 31 U.S.C. 1344(d)(4) requires agencies to notify Congress of each home-to-work determination and designation. Notifications must include the name and title of the officer or employee authorized home-to-work transportation; the reasons for determinations, e.g., a clear and present danger, emergency, or other compelling operational considerations; and the expected duration of the authorization.

The Department of the Interior, the General Services Administration (GSA), and other Federal agencies support changing the delegation of authority for home-to-work transportation from agency heads to other senior level officials. In particular, the Department of the Interior hopes to eliminate the burdensome requirements related to home-to-work transportation by promoting changes in the delegation of authority and reductions in home-to-work request processing times. Interior receives home-to-work transportation requests under compelling, and often, emergency situations. These situations are of great concern to the Office of Acquisition and Property Management, and we understand requestors' frustration in not receiving prompt resolution to their home-to-work transportation requests.



## U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

May 15, 2000

R.C.V.D.  
5/16/00

The Honorable David M. McIntosh  
 Chairman  
 Subcommittee on National Economic  
 Growth, Natural Resources and  
 Regulatory Affairs  
 Committee on Government Reform  
 U.S. House of Representatives  
 Washington, DC 20515-6143

Dear Mr. Chairman:

Thank you for your letter of April 14, 2000 to Attorney General Reno concerning the implementation of the Paperwork Reduction Act of 1995. Specifically, you requested recommendations for changes in specific laws which impose unnecessary or overly burdensome paperwork and are good candidates for elimination or reduction.

The Department currently has 249 active information collections that were approved by the Office of Management and Budget, Office of Information and Regulatory Affairs. Only 12 of the 36 Department Components use Information Collections to meet some of their mission requirements. Further, each Information Collection directly supports one or more of the Component missions mandated by law.

In preparing this response, the Department's Chief Information Officer asked each Component to examine their information collections and determine if the existing laws impose unnecessary or overly burdensome paperwork and would be a good candidate for elimination or reduction. Upon completion of the Component's independent internal review, each Component reported that no Component Information Collection imposed an unnecessary or overly burdensome amount of paperwork on the public, nor would the statute be a good candidate for elimination or reduction.

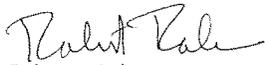
We recognize that in any organization as large as the Department of Justice, improvement and reduction in paperwork burdens is a never-ending challenge. The Department is continually looking for opportunities to streamline our operations and reduce waste, inefficiency, and frustration to the

The Honorable David M. McIntosh  
Page 2

public. If you have specific concerns about paperwork burdens imposed or implemented by the Department, I encourage you to convey them to me immediately. However, at this time, we do not have any specific suggestions to offer you.

Please do not hesitate to contact me, if I may be of further assistance on this or any other matter.

Sincerely,

A handwritten signature in cursive script, appearing to read "Robert Raben".

Robert Raben  
Assistant Attorney General

*Rec'd 5/19/00*

**U.S. Department of Labor**

Office of the Assistant Secretary  
for Administration and Management  
Washington, D.C. 20210

Reply to the Attention of:



**MAY 18 2000**

The Honorable David M. McIntosh  
Chairman  
Subcommittee on National Economic  
Growth, Natural Resources, and  
Regulatory Affairs  
House of Representatives  
Washington D.C. 20515-6143

Dear Mr. Chairman:

This is in response to the Subcommittee's letter of April 14 of this year. The Subcommittee requested our recommendations for changes in specific laws which impose unnecessary or overly burdensome paperwork requirements and are good candidates for elimination or reduction.

The Department is always looking for ways it can reduce paperwork burdens while fulfilling its mission to ensure the Nation has a workforce ready to meet the challenges of the 21<sup>st</sup> century. However, after careful consideration of your request, we have determined that we have no statutory changes to recommend to you at this time. You can be assured, however, that we will continue to closely scrutinize our programs to eliminate or reduce paperwork burdens which are unnecessary or overly burdensome.

Sincerely,

*for*   
PATRICIA W. LATTIMORE  
Assistant Secretary for  
Administration and Management/  
Chief Information Officer



United States Department of State

Washington, D.C. 20520

JUN 30 2000

Dear Mr. Chairman:

This is in response to your letter of April 14 to Secretary Albright, requesting that we review the Department's public paperwork burdens with an eye to suggesting possible burden reductions through revisions to relevant statutes.

Regrettably, we have no comments on revisions to statutes that would result in any significant reduction in public burden.

As you know, Department of State information collections are generally limited in scope, and our programs do not contact the public to the same extent as do the activities of other U.S. Government entities. Our major collections (and burdens) consist of two specific information collections—passport applications and visa applications, which account for well over ninety per cent of our total public burden. The third is a more general area, a number of collections inherited from the former U.S. Information Agency. These latter are primarily evaluation surveys designed to improve U.S. student exchange, scholarship, and educational and cultural grants programs.

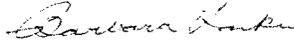
Aside from the burden on the U.S. public as a result of applications for passports, the majority of the Department's public burden falls on foreign nationals. Revisions to passport law, and the Immigration and Naturalization Act would provide burden relief for the public, but also may entail increased risks from terrorist, criminal, or other adverse activities. Conversely, eliminating the foreign public from coverage under the law would reduce reported burden, without lessening the actual foreign public burden. Nevertheless, the Subcommittee may deem it advisable that the law be modified or interpreted to require reporting on only that burden imposed on the U.S. public.

The Honorable

David M. McIntosh, Chairman,  
Subcommittee on National Economic Growth,  
Natural Resources, and Regulatory Affairs,  
House of Representatives.

We hope this information is helpful to you. Please do not hesitate to contact us if we can be of further assistance.

Sincerely,

A handwritten signature in cursive script, appearing to read "Barbara Larkin".

Barbara Larkin  
Assistant Secretary  
Legislative Affairs

*Rec'd 5/26/00*

THE SECRETARY OF TRANSPORTATION  
WASHINGTON, D.C. 20590

May 26, 2000

The Honorable David M. McIntosh  
Chairman, Subcommittee on National  
Economic Growth, Natural Resources and  
Regulatory Affairs  
Committee on Government Reform  
U.S. House of Representatives  
Washington, DC 20515

Dear Mr. Chairman:

This letter is in response to your April 14, 2000, letter requesting recommendations for changes in specific laws that impose unnecessary or overly burdensome paperwork burdens and therefore are good candidates for repeal or amendment.

The Department of Transportation requests that 49 U.S.C. 33112 be considered by the Subcommittee for repeal. Section 33112, Insurance reports and information, mandates an annual report by automobile insurance companies about the theft and recovery of motor vehicles and the effects of this activity on insurance premium levels. Our experience over 16 years since enactment of the requirement in the Motor Vehicle Theft Law Enforcement Act of 1984, as amended by the Anti Car Theft Act (ACTA) of 1992 (P.L. 102-519), makes clear that the report has outlived its usefulness. The auto theft data, which is collected from certain insurance companies, is normally submitted three years after a theft has occurred. By this time, the data is of very limited value to the Department, law enforcement, or the public. Repeal of section 33112 would save the insurance companies an estimated \$1,168,090 and rental/leasing companies an estimated \$99,840 annually. It would also save the agency an estimated \$40,000 committed annually to analyze the data and reduce the burden imposed on the public by 197,390 hours.

The Department has proposed that Congress amend section 49 U.S.C. 20901(a) to eliminate the requirement that railroads' reports to the Federal Railroad Administration regarding accidents and incidents on their properties be notarized, and to create an exception to the requirement that reports be submitted on a monthly basis, by permitting reports to be made at longer intervals, up to quarterly, if no reportable accidents or incidents occur. The notarization requirement causes unnecessary expense and delay, and is an obstacle to filing reports electronically. The requirement for monthly reports is unnecessarily rigid, particularly for small railroads and those who have no events to report. Our proposal would also provide discretion to set different reporting requirements for different classes of railroads and would facilitate electronic filing and a corresponding reduction in paper filings. This proposal has been referred to the Committee on Transportation and Infrastructure for consideration.

We appreciate the opportunity to comment. We continue to analyze agency paperwork burdens and will advise your staff of any additional candidates for repeal or amendment.

Sincerely,



Rodney E. Slater



DEPARTMENT OF THE TREASURY  
WASHINGTON, D.C. 20220

*Rec'd 6/24/00  
From OGC/IRCAAS*

June 22, 2000

The Honorable David M. McIntosh  
Chairman  
Subcommittee on Natural Economic Growth,  
Natural Resources, and Regulatory Affairs  
Committee on Government Reform  
U.S. House of Representatives  
Washington, D.C. 20515

Dear Mr. Chairman:

This responds to your recent letter to Secretary Summers soliciting recommendations for changes to laws that impose unnecessary or overly burdensome paperwork requirements.

The Department of the Treasury strives to minimize paperwork burdens imposed on the public consistent with statutory requirements and sound administrative and enforcement policies. We have identified several statutory provisions that we believe could be amended to reduce paperwork burdens on the public as well as Federal agencies. These are described in the enclosure to this letter. We will continue to review statutes under the Department's jurisdiction and we will advise you if additional provisions are identified.

We appreciate your interest in eliminating unnecessary statutory paperwork burdens and minimizing the burdens of those requirements that are necessary.

Sincerely,

Joan Donoghue  
Acting General Counsel

Enclosures

cc: The Honorable Dennis Kucinich

DEPARTMENT OF THE TREASURY

Recommended Changes to Statutory Provisions that Impose Unnecessary  
or Overly Burdensome Paperwork Requirements

1. Provide Marriage Penalty Relief and Increase the Standard Deduction  
Citation: 26 U.S.C. 63  
Change: Increase the standard deduction for married taxpayers filing a joint return by up to \$1,450 (in 2001 dollars).  
Rationale: This change would increase the number of married taxpayers that can minimize their tax liability by claiming the standard deduction instead of itemizing deductions on their Federal income tax return.
2. Alternative Minimum Tax (AMT) Relief for Individuals  
Citation: 26 U.S.C. 55-59  
Change: Allow dependent personal exemptions and standard deduction in computing AMT.  
Rationale: This change would reduce the number of individual taxpayers subject to the AMT and required to file Form 6251. It would also eliminate the need for taxpayers to itemize deductions for the sole purpose of reducing AMT liability.
3. Simplify and Increase the Standard Deduction for Dependents  
Citation: 26 U.S.C. 63  
Change: Increase standard deduction for dependent filers to the amount of the dependent's earned income plus \$700 (but not more than the regular standard deduction).  
Rationale: This change would reduce the number of dependents required to file a tax return.

4. Simplification of Definition of Child Dependent

Citation: 26 U.S.C. 151

Change: Base the exemption for dependent children on relationship and residency.

Rationale: This change would eliminate the need for taxpayers to maintain extensive records to prove that they support their own children.

5. Index Maximum Exclusion for Capital Gains on Sale of Principal Residence

Citation: 26 U.S.C. 121

Change: Index the maximum amount of gain that can be excluded from gross income when a principal residence is sold.

Rationale: This change would increase the number of taxpayers who are not required to file Schedule D (capital gains), Form 1040, when their principal residence is sold.

6. Tax Credit To Encourage Electronic Filing of Individual Income Tax Returns

Citation: 26 U.S.C. 6012

Change: Provide a temporary credit of \$10 for each income tax return electronically filed and a credit of \$5 for each income tax return filed through Telefile.

Rationale: The change would provide an incentive for taxpayers to avoid the burdens associated with filling out paper returns.

7. Expensing for Small Business

Citation: 26 U.S.C. 179

Change: Expand the circumstances under which expenses can be deducted when incurred instead of depreciated over the useful life of the property.

Rationale: This change would increase the extent to which taxpayers can recover the cost of property on the income tax return for the year in which the property is placed in service rather than as depreciation deductions on Forms 4562 filed each year during the recovery period of the property.

8. Optional Self-Employment Contributions Act Computations
  - Citation: 26 U.S.C. 1401-1403
  - Change: Combine the two optional methods of computing income subject to the self-employment tax into a single method.
  - Rationale: This change would simplify self-employment tax computations for approximately 30,000 taxpayers and would simplify Schedule SE, Form 1040, for the millions of self-employed workers that do not use the optional methods.
  
9. Simplify the Foreign Tax Credit Limitation for Dividends from 10/50 Companies
  - Citation: 26 U.S.C. 901-908
  - Change: Simplify the application of the foreign tax credit limitation by applying the "look-through" approach immediately to dividends paid by a company (other than a controlled foreign corporation or a passive foreign investment company) in which the taxpayer owns at least 10 percent of the voting stock regardless of the year in which the earnings and profits out of which the dividend is paid are accumulated.
  - Rationale: Eliminating the provision under current law requiring the concurrent application of a different test for dividends paid out of pre-2003 earnings and profits will reduce complexity and compliance burdens relating to Form 1118 for U.S. taxpayers participating in foreign joint ventures and foreign investment through affiliates that are not majority owned.
  
10. Provide Interest Treatment for Dividends Paid by Certain Regulated Investment Companies to Foreign Persons
  - Citation: 26 U.S.C. 1441
  - Change: Treat as interest exempt from withholding upon distribution to foreign investors income received by a domestic mutual fund that invests substantially all of its assets in U.S. debt securities or cash.
  - Rationale: This change would relieve these mutual funds of the obligation to withhold tax on amounts paid to foreign shareholders and file Forms 1042

and 1042-S with respect to amounts withheld.

11. Allow Deduction for Charitable Contributions for Taxpayers who do not Itemize Deductions

Citation: 26 U.S.C. 170

Change: Allow taxpayers who do not itemize deductions to deduct 50 percent of their charitable contributions in excess of \$1,000 (\$2,000 for married taxpayers filing jointly).

Rationale: For taxpayers whose itemized deductions exceed the standard deduction by less than the amount allowed under the proposal, the change would eliminate the need to itemize all deductions on Form 1040, Schedule A.

12. Allow Flexibility in Setting the Return Periods for Small Producers of Wine and Beer That Withdraw Their Product Under Bond for Deferred Payment of Tax

Citation: 26 U.S.C. 5061(d)(1)

Change: Authorize ATF to prescribe by regulation the return period for small producers of wine and beer that withdraw their product under bond for deferred payment of tax.

Rationale: By providing such flexibility ATF will be able to eliminate approximately 90,000 tax returns each year and to reduce its administrative costs by about \$270,000 annually.

13. Reporting Regulations to the Congress

Citation: 5 U.S.C. 801

Change: Eliminate the requirement that Federal agencies transmit a copy of each non-major final rule published in the *Federal Register* to the House, Senate, and General Accounting Office.

Rationale: Transmitting three copies of each non-major final rule published in the *Federal Register* is wasteful and unnecessary. Eliminating this requirement would not affect the congressional disapproval procedures codified at 5 U.S.C. 802 if section 802(b)(2) is amended to provide that "submission or publication date" means the date of publication in the *Federal Register* in the case of a non-major rule published therein.



DEPARTMENT OF VETERANS AFFAIRS  
PRINCIPAL DEPUTY ASSISTANT SECRETARY  
FOR INFORMATION AND TECHNOLOGY  
WASHINGTON DC 20420

JUN 5 2000

The Honorable David M. McIntosh  
Chairman  
Subcommittee on National Economic Growth,  
National Resources and Regulatory Affairs  
Committee on Government Reform  
U.S. House of Representatives  
Washington, D.C. 20515-6143

Dear Mr. Chairman:

The Secretary asked me to reply to your letter concerning recommendations for changes in specific Paperwork Reduction Act laws that impose unnecessary burdens.

The Department of Veterans Affairs (VA) administers an integrated program of benefits and services established by laws for veterans, service personnel, and their dependents and beneficiaries. During fiscal year 2000, these programs will impose approximately 6.91 million "burden hours" on veterans, members of the Selected Reserves and National Guard, and beneficiaries of veterans. These burden hours include providing medical care, compensation, pension, education, vocational rehabilitation and counseling, loan guaranty, insurance and burial benefits. Our recommendations to reduce unnecessary burdens are enclosed.

We have also provided this information to The Honorable Dennis J. Kucinich, Ranking Member of the Subcommittee on National Economic Growth, National Resources and Regulatory Affairs. If there are any questions concerning this matter, please contact me at (202) 273-8842 or have a member of your staff contact Donald L. Neilson, Director, Information Management Service (045A4), at (202) 273-8135.

Sincerely,

A handwritten signature in cursive script, appearing to read "Robert P. Bubniak".

Robert P. Bubniak  
Acting

Enclosure

**Department of Veterans Affairs  
Recommendations for Changes in Specific Paperwork Reduction Act (PRA) Laws  
That Impose Unnecessary Burdens**

**Recommendation 1.** VA recommends that consideration be given to amending 44 U.S.C. Chapter 35 to permit the Director, Office of Management and Budget (OMB) to provide simplified procedures for the approval of information collections required by statute and to permit OMB to approve such collections for up to 5 years.

a. The current process for clearing "information collections" is cumbersome, requiring two or more publications in the *Federal Register* and extensive analysis of the nature and purpose of the "collection" and of "respondent burdens" in multi-level agency and OMB reviews. Virtually the same elaborate processing is required for "collections" required by statute and those undertaken by an agency on its own initiative. Further, regardless of the nature of collection, OMB may not approve a collection of information for a period in excess of 3 years (44 U.S.C. 3507(g)). It is extremely rare that the public would have comments on any information collection published in the *Federal Register*.

b. While protection of the public from information collection abuses by an overzealous government is admirable, these elaborate procedures are an unnecessary waste of resources where the "information collection" is a straight-forward implementation of statutory requirements; for example, requiring simple forms for claiming government benefits, 38 U.S.C. § 501(a)(2), and the filing of appeals following statutory procedures, 38 U.S.C. § 7105.

**Recommendation 2.** All clinical examinations and clinical research should be exempted from the PRA and OMB review.

Although 5 CFR 1320.3(h)(5) excludes clinical examinations and clinical research from the definition of information, the same citation also states that OMB may determine if any specific item constitutes "information." Our experience shows that OMB invokes this clause only when the examination or research concerns a politically sensitive topic such as Persian Gulf, Agent Orange, Prisoner of War, and Radiation Exposure. Due to the health threats involved, this is precisely the type of examination/research that needs to proceed quickly without PRA restrictions or OMB review.

**Recommendation 3.** Information collections with well defined benefit and practical utility, such as applications and claims for benefits, and invoices claiming payment should be exempted from the PRA and OMB review.

Applications and claims for benefits, and invoices claiming payment constitute 88% of the Department's collection of information burden. These collections are required in order to receive a benefit, including entitlements, grants, permits, loans, and contracts. The time required (a minimum of 90 days after agency processing) obtaining OMB approval for a new or revised collection of information hinders VA's ability to respond

quickly to the changing needs of veterans and delays VA implementation of legislative changes. Applications for benefits require only the information needed to make a decision on the request. The veteran or beneficiary dictates when the information is submitted. Since the claim is self initiated there is no other source of similar information and there is no way to reduce the frequency of submission. All instruments used to collect information are reviewed regularly to assure that no extraneous data is requested.

**Recommendation 4.** OMB clearance could be delegated to the agency level for program evaluation surveys being conducted by all federal agencies.

Generally, it takes a minimum of 90 days for agencies to obtain permission from OMB to perform any survey other than a customer satisfaction survey. This will allow departments to assess whether programs are meeting their Congressionally-mandated intent in a shorter timeframe.

REC'd 6/12/00



May 15, 2000

The Honorable David M. McIntosh  
Chairman  
Subcommittee on National Economic Growth,  
Natural Resources, and Regulatory Affairs  
Committee on Government Reform  
2157 Rayburn House Office Building  
Washington, DC 20515-6143

Dear Mr. Chairman:

I am responding to your request of April 14, 2000, concerning recommendations for changes or elimination of existing laws that we feel impose unnecessary paperwork burdens on the Corporation for National Service or the people we serve.

We have no legislative recommendations to make at this time. Our experience in implementing the Paperwork Reduction Act has been positive. Over the years we have taken a number of steps to devolve greater authority to states and grantees and to minimize the burden placed upon them. We will continue to pursue these improvements administratively.

Thank you for the opportunity to comment on the Paperwork Reduction Act.

Sincerely,

A handwritten signature in cursive script that reads "Kevin J. Avery".

Kevin J. Avery  
Director, Congressional and  
Intergovernmental Affairs

*Rec'd 5/23/00*

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

MAY 22 2000

OFFICE OF  
ENVIRONMENTAL INFORMATION

The Honorable David M. McIntosh  
Chairman  
Subcommittee on National Economic Growth,  
Natural Resources and Regulatory Affairs  
Committee on Government Reform  
House of Representatives  
Washington, DC 20515-6143

Dear Mr. Chairman:

Thank you for your letter of April 14, 2000, requesting that the U.S. Environmental Protection Agency (EPA) make recommendations for changes in specific laws which impose unnecessary or overly burdensome paperwork and are good candidates for elimination or reduction. EPA strongly supports the need to reduce burden and is committed to making burden reduction a priority within our Agency. Prior to the enactment of the 1995 amendments to the Paperwork Reduction Act (PRA), Administrator Carol Browner announced that the Agency's goal was to reduce paperwork burden by 25 percent. This effort addressed the full range of the Agency's regulatory programs, including air, water, waste, toxic substances, and pesticides. Although the aggregate total paperwork burden continued to rise because of new requirements, the Agency was able to offset the rise by making changes in other program paperwork requirements.

On January 13, 1997, the Office of Management and Budget (OMB) requested (Bulletin # 97-03) agencies to prepare an Information Streamlining Plan (ISP). This request stated, "Each Agency is to identify specific administrative changes, program restructures, regulatory reinventions, and legislative proposals that will reduce total burden on the public." After a thorough analysis of the Agency's regulations and statutes, EPA did not make any recommendations for changes to any of the environmental laws. EPA did, however, make recommendations for changes to the regulations that implement these laws to reduce paperwork burdens. For example, the Office of Solid Waste initiated a burden reduction effort for the Resource Conservation and Recovery Act program. This involves a comprehensive review of all program record keeping and reporting requirements. EPA plans to propose a rule by the end of this year with significant burden reduction alternatives, that could reduce paperwork burden by as much as 40 percent.

Since the time that EPA prepared the Information Streamlining Plan, Congress enacted the 1996 Amendments to the Safe Drinking Water Act and the Food Quality Protection Act of 1996. After reviewing the provisions of both of these important environmental laws, the Agency has no recommendations for changes in those statutes to reduce reporting burdens.

The Agency continues to look for opportunities to reduce paperwork burdens on the public. On April 27 and 28, EPA held four public meetings as part of an OMB initiative sponsored by the Office of Information and Regulatory Affairs. The purpose of these meetings was to discuss and gain public input on a number of burden reduction initiatives. In addition, the Agency continues to develop its information integration effort that will establish a single, integrated multi-media repository of environmental data and tools. This initiative is designed to promote more efficient ways of providing public health and environmental protection. Two key components of the initiative -- the Central Receiving Facility (CRF) and the Facility Registry System (FRS) -- provide good examples. The CRF includes the infrastructure and procedures needed to centralize and streamline the receipt, validation, storage, and sharing of the environmental data reported to EPA. The CRF will address issues of security, data quality, error prevention and correction, burden reduction, and efficiency in the electronic transmission of data. The FRS is a database to house the Agency's master, authoritative facility identification information. The FRS will provide a single source of facility identification information linked to specific program records and enable integration and multi-media analysis at the unique facility level. It will provide burden reduction by eliminating the need for multiple submissions of facility identification data by regulated entities.

If you have any questions, please contact me or Mark Luttner, Director of the Office of Information Collection, at 260-4030.

Sincerely,



Margaret N. Schneider  
Principal Deputy Assistant Administrator

cc: The Honorable Dan Burton  
The Honorable Henry Waxman



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION  
Washington, D.C. 20507

MAY 22 2000

The Honorable David M. McIntosh  
Chairman  
Subcommittee on National Economic Growth,  
National Resources and Regulatory Affairs  
U.S. House of Representatives  
Washington, D. C. 20515

Dear Chairman McIntosh:

This is in response to your letter of April 14, 2000, to Chairwoman Ida L. Castro requesting that the Equal Employment Opportunity Commission (EEOC) recommend changes to laws that impose unnecessary or overly burdensome paper work and would be suitable for elimination or reduction.

The EEOC does not recommend any change to any of the civil rights laws that the EEOC is responsible for enforcing. We have an established goal of eliminating or refining any requirement which might possibly be construed as unnecessary or overly burdensome. In keeping with this goal we continuously review our regulations and paper work requirements. Where we have found that streamlining is warranted or that the process could be simplified, we have done so. An illustration of this is our computerization of data collection requirements. This option has resulted in a significant overall reduction in the paper work burden.

The EEOC will continue to be vigilant in its efforts to ensure that paper work requirements are kept at the least burdensome level practicable.

We hope this information is helpful to you.

Sincerely,

A handwritten signature in cursive script, appearing to read "William J. White, Jr.".

William J. White, Jr.  
Acting Director of Communications  
and Legislative Affairs

06/16/00 FRI 11:58 FAX 202 646 4370

CONG. &amp; GOVT. AFFAIRS

2/002

Federal Emergency Management Agency *REC'D 6/16/00*

Washington, D.C. 20472

June 7, 2000

OS-PS-RM

The Honorable David M. McIntosh  
 Chairman  
 Subcommittee on National Economic Growth,  
 Natural Resources and Regulatory Affairs  
 House of Representatives  
 Washington, DC 20515-6143

Dear Mr. McIntosh:

This is in response to your April 14, 2000, letter to Director James Lee Witt, Director, Federal Emergency Management Agency. In that letter, you requested recommendations for changes to specific laws that impose unnecessary or overly burdensome paperwork and are good candidates for elimination or reduction.

After careful consideration of your request, we have determined that existing statutes regarding our programs do not impose unnecessary or overly burdensome paperwork on the public. We believe that our requests for information (which may be directly or indirectly required by statute) from the public are essential to the proper administration of FEMA's mission and programs. Without the information, we would not be able to provide the high quality level of service and support to our customers, including disaster victims, state and local governments, etc.

There is another area that has also been considered—those reporting requirements imposed by statute on Federal departments and agencies. Upon a review of House Document No. 103-186, Reports to Be Made to Congress, Part VI, Reports by Independent Agencies, Board, and Commissions, we found that there are several statutes that are no longer valid, yet still require reports to be submitted to Congress. The list of reports for the Federal Emergency Management Agency includes statutory reports that are no longer needed because the statute has been repealed or the report is no longer relevant (see enclosure). Also, for most of the reports listed, we believe that absent a statutory requirement, the Agency would still provide reports and other information to Congress on the activities and status of our programs, annually or as needed.

In addition, we believe that while the purpose and intent of the Paperwork Reduction Act is practical and useful, it has become overly burdensome on the Federal departments and agencies to complete the clearance process to obtain OMB approval in order to use certain data collection instruments. The time, effort, resources and cost to the Agency to comply with the provisions of the Paperwork Reduction Act to obtain OMB clearance is in some cases, higher than the actual development and use of the data collection

06/16/00 FRI 11:59 FAX 202 646 4370

CONG. &amp; GOVT. AFFAIRS

003

instrument. We recommend that during your review, you consider making the definition of an information collection clearer and provide additional exemption categories for data collection instruments that impose minimal burden on respondents (such as: course evaluation forms are used by non-federal students at our National Emergency Training Center in Emmitsburg, MD, or at our Mount Weather Emergency Assistance Center, in Berryville, VA. at the end of a course to evaluate the course or the facilities; or application forms that take 1 hour or less for a respondent to complete when the total burden for one collection is 2,500 hours or less). In addition, we would urge that you consider establishing a burden hour threshold when collections under a certain number of burden hours, e.g., 5,000 hours, would not be subject to the OMB approval process.

Thank you for the opportunity to provide information for your Subcommittee's review and use. If you have any questions, please have a member of your staff contact the Office of Congressional and Legislative Affairs at (202) 646-4500.

Sincerely,



G. Clay Hollister  
Chief Information Officer

Enclosure

cc: The Honorable Dan Burton  
The Honorable Henry A. Waxman

Federal Emergency Management Agency  
 Statutory "Sunset" on Reports to Congress  
 Review of Reporting Requirements Formed by 112<sup>nd</sup> Congress, No. 102-169, Part IV

<i>Subject of Report</i>	<i>Authority</i>	<i>Rating</i>	<i>Expiration/Continuation</i>
<i>Contract covered and covered into with foreign entities in fiscal years 1991 and 1991.</i>	PL 101-614, Sec. 136(f) (104 Stat. 3241)	Not critical	
<i>Chemical and Carbon Conversion</i>			
Crucial insurance program	PL 101-137, Sec. 6(g) (103 Stat. 875)	Repealed	The program is no longer authorized or is operating.
<i>Disasters and Disaster Relief</i>			
National Earthquake Hazard Reduction Program	PL 101-614, Sec. 5 (104 Stat. 3233)	Not critical	
Advisory Committee recommendations made in the Program	PL 101-614, Sec. 7 (104 Stat. 3237)	Not critical	
Activities relating to life prevention and control	42 U.S.C. 5145	Not critical	
Federal assumption of flood insurance program	42 U.S.C. 4071(b)	Not critical	The report relates to a change in the program, involving relationship with the insurance industry and is no longer relevant.
Reviews of Federal and State activities in disaster preparedness and assistance	42 U.S.C. 5156	Not critical	The reference change from "Part A", Industry Program with Federal
National Earthquake Hazard Reduction Program plan	42 U.S.C. 5146(b)(2)(B)	Not critical	Assistance, to "Part B", Continuation Program with Industry
<i>Environmental Protection and Investigation</i>			
Notice of intention to initiate a rulemaking for modification in reporting frequency of chemical release forms	PL 99-499, Sec. 313 (400 Stat. 1745)	Not critical	
<i>Statistical Records, Documents, and Information</i>			
Activities of the Inspector General	PL 94-452, Sec. 5(b) (103 Stat. 2515, 2516)	Exempt	Modify the frequency of the reporting requirement from semiannually to annually.
Reports by Inspector General of particularly serious or flagrant problems, abuses, or deficiencies in the administration of programs and operations.	PL 94-452, Sec. 5(b) (103 Stat. 2515)	Exempt	
<i>Insurance and Insurance Finance</i>			
Activities of the Emergency Food and Shelter Program National Board	42 U.S.C. 11311	Not critical	

Federal Emergency Management Agency  
 Statutory "Sunset" on Reports to Congress  
 Review of Reporting Requirements Listed in House Document No. 103-186, Part IV

National Scientific and Intelligence Operations

Administration of the Strategic and Critical Materials Stock Piling Act

50 U.S.C. 98a-7(a) Not critical

Public Contracts, Procurement, and Expenditure

Civil defense property acquisition,  
 Proposed national defense contract exceeding \$25,000,000

50 U.S.C. app. 2281(b)  
 50 U.S.C. 1531 Repealed  
 Critical

Repealed by the Civil Defense Act.  
 The agency is required to obtain approval from Congress for national defense contracts in excess of \$25,000,000. Although the agency has the authority to award for this type of contract, the agency is required to obtain approval from Congress for the award. Repeal of this authority is not recommended.

Contracts to facilitate the national defense contract, amended, or modified

50 U.S.C. 1434 Repealed

Public Lands and Real Property

Notice of certain proposed real property transactions  
 Real property transactions of between \$5,000 and \$50,000

50 U.S.C. app. 2285(a)  
 50 U.S.C. app. 2285(b) Not critical  
 Not critical

Public Lands

Civil defense operations  
 Interstate civil defense contracts  
 Contributions to States for civil defense equipment and facilities expenses  
 Contributions to States for civil defense personnel and administrative expenses

50 U.S.C. app. 2238  
 50 U.S.C. app. 2281(b)  
 50 U.S.C. app. 2281(c)  
 50 U.S.C. 2241(f) Repealed  
 Not critical

Repealed by the Civil Defense Act.  
 Repealed by the Civil Defense Act.  
 Repealed by the Civil Defense Act.

Public Utilities and Channels

Recommendations for improving or correcting conditions concerning  
 disadvantaged people in the United States

PL 99-88, ch. VI (199 Stat. 333) Not critical

NOTE: The elimination of "This Criteria" has been made for those reports that we believe a statutory requirement is not needed in the Agency to inform Congress about our program activities. The programs would not be significantly impacted if the statutory reporting requirement were eliminated.

National Aeronautics and  
Space Administration  
**Headquarters**  
Washington, DC 20546-0001



Reply to Attn of L:PE:leg:L/2000-00326f

MAY 22 2000

The Honorable David M. McIntosh  
Chairman  
Subcommittee on National Economic Growth,  
Natural Resources, and Regulatory Affairs  
Committee on Government Reform  
House of Representatives  
Washington, DC 20515

Dear Mr. Chairman:

Thank you for your letter of April 14, 2000 to Administrator Goldin, signed jointly with Ranking Member Kucinich, requesting recommendations for changes in laws relevant to paperwork issues. At this time we have no recommendations for changes in specific laws. NASA currently has 31 active collections, which are primarily in the area of procurement and program management.

Over the past five years, NASA has made significant strides in reducing the paperwork burden, largely as a result of procurement reform and the availability of the Internet and similar automated technologies to streamline information flows.

Because the majority of NASA's information collection burden relates to program management, the Agency is constantly finding ways to improve the collection process. In response to the Paperwork Elimination Act, many collections are now available electronically, which saves time and resources.

NASA sees paperwork reduction/elimination initiatives as an ongoing activity and will continue to the maximum extent possible to reduce its total paperwork burden.

Thank you for your interest in our paperwork reduction efforts.

Sincerely,

Edward Heffernan  
Associate Administrator  
for Legislative Affairs

NATIONAL SCIENCE FOUNDATION  
4201 WILSON BOULEVARD  
ARLINGTON, VIRGINIA 22230

*J.M. 5/22/00  
RECV 5/26/00*



May 18, 2000

OFFICE OF THE  
GENERAL COUNSEL

Hon. David M. McIntosh, Chairman  
Subcommittee on National Economic Growth,  
Natural Resources, and Regulatory Affairs  
U.S. House of Representatives  
2157 Rayburn House Office Building  
Washington, DC 20515-6143

Dear Chairman McIntosh:

The Director of the National Science Foundation, Dr. Rita Colwell, asked me to transmit to you the enclosed agency response to your letter of April 14, 2000. NSF's comments respond to your request for agency recommendations for changes in specific laws that impose unnecessary or overly burdensome paperwork and are good candidates for elimination or reduction.

The Foundation recommends Congress clarify that agencies' peer review panels -- panels that provide expertise and scientific evaluation of research proposals -- should not be covered by the Federal Advisory Committee Act (FACA). The policy underlying the FACA strongly indicates it was never intended to apply to peer review. Doing so creates tremendous paperwork and other burdens on science agencies that extensively use peer review in their support of merit-reviewed science research, while doing virtually nothing to further the Act's purposes.

Should you have questions or like further information on this recommendation, please contact D. Matthew Powell, Assistant General Counsel, at 703/306-1060.

Sincerely,

Lawrence Rudolph  
General Counsel

Enclosure

cc: Hon. Dennis Kucinich, Ranking Member

CONGRESS SHOULD ELIMINATE UNNECESSARY PAPERWORK BURDEN BY  
CLARIFYING THAT PEER REVIEW PANELS ARE NOT COVERED BY THE  
FEDERAL ADVISORY COMMITTEE ACT

Summary

There has been a historical expectation, consistent with the National Science Foundation Act of 1950, 42 U.S.C. 1861 *et seq.*, that the NSF would draw upon the scientific community in carrying out its mission. Central to that mission is its funding of basic science and engineering research. Peer review of research proposals from the science and engineering community is fundamental to NSF's merit-based grant making, and is carried out using both individual ad hoc reviews and/or panel reviews.

Proposal review panels can be said to meet the literal definition of "advisory committee" in the Federal Advisory Committee Act (FACA). However, we do not believe that the FACA was intended to apply to peer review groups, but to those groups established or utilized to provide agencies advice or recommendations on identified governmental issues or policies.<sup>1</sup>

Of NSF's 61 chartered committees, 46 or 75%, are review panels for research proposals or other award applications. The other 15, or 25%, are "true" advisory committees that provide general advice on agency issues or policy as contemplated by the Congress in adopting the FACA. The 15 advisory committees have 259 members, while the NSF used over 6,500 review panelists last year on its 46 chartered review panels. Use of review panels at NSF has been increasing in response to both internal and external recommendations and pressures, thus exacerbating the problems of applying FACA to review panels.

Applying FACA requirements equally to peer review panels and general advisory committees has always been awkward. FACA is intended to open to public participation and scrutiny the agencies' receipt of policy or program advice from sources outside the federal government and to prevent undue influence on government policymaking.

FACA simply does not fit peer review panels. Panels provide advice from outside persons, but they are narrowly focused on individual research proposals, not policy. Applying FACA to peer review panels creates meaningless and burdensome paperwork, especially for the small number of science agencies that rely so heavily on peer review. It also creates an appearance of excessive numbers of advisory committees, gives OMB, Congress, and the public a distorted picture of the number of true committees, their operations and their cost, and contributes to inappropriate pressures to reduce the number of "committees." Moreover, the openness so crucial to general advisory committees is inappropriate to panel reviews, and thus does nothing to further the policy goals of the FACA.

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<sup>1</sup> See General Services Administration regulations at 41 C.F.R. 101-6.1003; *Grisby Brandford & Co., Inc. v. United States*, 869 F. Supp. 984, 1001 (D.D.C. 1994).

Congress should clarify that the FACA does not apply to committees of experts whose primary function is to provide expertise and evaluation for use by an agency in selecting among applications for grants. This is consistent with the 1995 Report to the Administrative Conference of the United States, "THE FEDERAL ADVISORY COMMITTEE ACT AND GOOD GOVERNMENT," by Steven P. Croly, Professor of Law at the University of Michigan, and William P. Funk. The Report's first recommendation is that: "Peer review committees providing exclusively technical advice or recommendations, such as those convened by the National Institutes of Health and the National Science Foundation, should be understood not to be governed by the Act." In addition, it is consistent with the results of a 1998 GAO Report on FACA in which reporting agencies that used peer review panels almost uniformly supported exempting peer review panels from most or all requirements "because the nature of the panels' work was incompatible with FACA requirements." See page 10. Copies of relevant parts of both reports are attached.

#### Discussion

NSF's general advice committees are like advisory committees elsewhere -- groups of external experts or representatives who advise NSF on broad program or policy issues, typically including emphases and initiatives in various fields we fund. Such committees fit reasonably comfortably within the scheme of the Federal Advisory Committee Act. But NSF, and other science agencies like NIH, use large numbers of peer review panels that help select among competing proposals for grant funding. In NSF's case, these proposals cover subfields of science, engineering, or science and engineering education.

These peer review panels are like advisory committees in drawing membership from outside the Federal government, but are otherwise quite different. The narrow function they serve in judging among grant proposals is akin to the function technical evaluation panels serve in judging among procurement proposals. Congress did not have review panels in mind when framing the Federal Advisory Committee Act. Neither of the Act's two purposes -- to protect against undue influence by special interest groups over government policy-making, and to allow the public to observe and share in the formulation of government policy and know what influences have affected that policy -- fit peer review. Yet the Act creates major problems for agencies using peer review panels.

#### *Meaningless and Burdensome Paperwork*

The large numbers of review panels multiply the cost of complying with the bureaucratic and paperwork requirements of FACA while serving neither of the Act's two major objectives. For example, for agencies like NSF that process many proposals in short time frames,<sup>2</sup> delays involved in the chartering process, or announcing meetings that are properly closed anyway, can become a serious problem when proposals are awaiting review. A technical mistake or unavoidable delay can be pointlessly costly. Such agencies also incur considerable staff time and expense announcing in the Federal Register meetings of review panels that invariably are closed

<sup>2</sup> NSF reviews about 30,000 proposals per year.

to the public under FACA procedures to protect individual privacy and intellectual property rights, and patent rights. Routinely announcing to the public a class of meeting that is properly closed to the public strikes us as pointless and wasteful.<sup>3</sup> More time is spent compiling data and reports after the agency has already reported on the panel's advice and the agency's decisions to the only persons truly interested in them -- the applicants for grant funds.

Desirable requirements on high profile policy-setting commissions apply reasonably well to agency policy advisory committees. With large numbers of review panels, however, the bureaucratic costs and delays associated with FACA compliance for all these separate panels and reviewers get multiplied, often beyond the ability of small agencies to cope. It is especially onerous on a small agency like NSF that must rely heavily on review panels to do its job. This high cost should be weighed against the lack of value added in achieving the FACA's objectives.

#### *Misleading Numbers*

Treating these numerous peer review panels as FACA committees gives an appearance of excessive numbers of advisory committees. It skews both NSF and government-wide counts of functioning advisory committees, gives OMB, Congress, and the public a distorted picture, and produces inappropriate pressures to reduce numbers of "committees." Much of the increase in committee numbers in the 1990's came, not from any additional real committees, but from agencies like NSF charting peer review panels that never were intended to be covered by the Act.

The freeze on new committee creation was one manifestation of the schizophrenia agencies endure. On the one hand we're told by the Administration, the GAO, and others to use more peer review panels, and on the other to create no new committees and to cut committee costs. These wholly inconsistent signals breed cynicism and force agencies to ignore either their instructions or the law.

Arbitrarily reducing numbers of peer review panels is no more necessary or wise than arbitrarily reducing numbers of evaluation panels for procurement or personnel recruitment. Moreover, the push to include more and more agency peer review panels under FACA was a contributing factor in the arbitrary freeze on all advisory committees.

#### *Openness, Privacy, and Candor*

An additional problem is that, in the case of peer review panels, the broad public participation and access contemplated by the Act both serve much less purpose than in the case of ordinary advisory committees and cause much more difficulty.

With advisory committees generally, public participation and access lets the public observe and share in the formulation of public policy and know what influences have affected it. However,

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<sup>3</sup> NSF applicants have ready access to the date a panel will or has considered their proposal, and that information is available to others on request.

peer reviewers serve as experts, not as representatives of interest groups.<sup>4</sup> In addition, peer review panels do not deal with policy issues, but with specific research or other grant proposals. In so doing they take up information and opinion personal to the individual investigator and research ideas for which the investigator and applicant organization deserve protection against the loss of intellectual property and proprietary rights, and the waiver of patent rights. In short, the openness provisions of FACA do not fit peer review.

We do not argue that review panels should be closed to external scrutiny, only that they call for a different kind of openness than policy advisory committees. The process should be open to an investigator whose proposal is being reviewed. Thus, at NSF we automatically send out to the principal investigator a "panel summary" describing the discussion of the proposal at the review panel, plus any other written external reviews of the proposal. We also release to the principal investigator on request any other document in the proposal file. With such an investigator we make only two narrow exceptions to complete openness: we do not release names of reviewers or panelists in connection with their reviews of specific proposals to protect the candor of the review process, and we do not release information on competing proposals.

But being equally open with third parties about evaluations of individual proposals would tend to invade the personal privacy and give away the ideas of investigators. Hence we close panel discussions of individual proposals -- as do other agencies -- and we withhold from third parties in this and other contexts the contents of reviews that contain personal and professional evaluations of individuals and their work. We also withhold proposals that have not (or not yet) resulted in awards. Employment selection panels and search committees, similarly, do not meet in public session, because the matters they discuss are personal to the applicants, most of whom will be rejected. Nor do technical evaluation panels for procurement meet in the open, or publicly release confidential proprietary information, staff recommendations or panel members' judgments.

The values behind these policies are, of course, congruent with those that underlie the Privacy Act and the exemptions under related open-government laws that protect against invasions of personal privacy and release of confidential, proprietary information valuable to the submitter.

Another particular problem that arises in the case of review panels is the need to protect reviewer panelists from lobbying or even harassment by disgruntled, unsuccessful applicants, and thereby preserve the candor of panelists' advice. Most people think highly of themselves, rating themselves and their work among the top ten percent or even the top one percent in their fields. Many are upset or angry when others rate them less highly -- doubly so when, as in proposal review, stakes are high for careers and professional pride.<sup>5</sup>

If those who apply for NSF support could identify which review panelists had said what about their records and capabilities or about their proposals, panelists would find themselves subjected

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<sup>4</sup> NSF has a well-developed and longstanding set of conflict of interest rules which it applies to all its peer reviewers, ad hoc mail and panel reviewers alike, whether FACA applies or not.

<sup>5</sup> NSF is able to fund only about 30% of the proposals submitted to it annually.

to "lobbying" pressure, unpleasantness, or even open attack, often unwarranted or at least disproportionate to any offense. To protect themselves, scientists and engineers would either refuse to serve as reviewers or tend to become bland, cautious, and politely diplomatic in their reviews. This would degrade decisions, which are illuminated by direct and bluntly expressed opinions, preferably ones that differ. Thus, we withhold even from investigators the names of reviewers *connected to their review of particular proposals*, though we provide them the full content of reviews or panel summaries.<sup>6</sup>

The openness provisions of the FACA -- its core purpose -- are thus inconsistent with peer review and contrary to the privacy principles of the FOIA and Privacy Act as they apply to peer review.

#### *A Disincentive to Best Peer Review Practice*

In addition to skewing numbers, adding to bureaucracy and costs while failing to contribute to the Act's objectives, and threatening privacy and proprietary rights, the application of the FACA to review panels creates a perverse disincentive to use peer review panels. Agencies can solicit individual written reviews by mail without FACA applying.<sup>7</sup> These reviews can provide good input on the technical merit of proposals. They provide less useful input where comparisons of groups of often diverse proposals must be made. Here review panels are often more useful.

Ad hoc, nonconsensus panels from which the agency seeks the advice of individual panelists may avoid FACA<sup>8</sup> and the problems outlined above. Yet an agency gets fuller value from a review panel's discussion and consensus advice. This fuller value comes at a price that discourages use of panels to their fullest extent.

In summary, these problems with application of the Federal Advisory Committee Act to review panels are not new, but are exacerbated by (1) the one-size-fits-all application of rules that fit policy advisory committees well and review panels not at all; (2) the FACA schizophrenia (use more peer review panels and charter everything, but create no new committees and cut advisory committee costs); and (3) by the perverse disincentive to best peer review practice created by the FACA.

These cumulative problems cement our conviction that a statutory remedy should be adopted to make clear -- consistent with the ACUS Report recommendation -- that the FACA does not apply to expert peer review panels. We recommend the following addition to Section 4 of the Act:

Section 4(c) of the Federal Advisory Committee Act (5 U.S.C. App) is amended by inserting before the period the following: " , or any committee of experts whose primary function is to provide expertise and evaluation for use by an agency in selecting among applications for grants or other assistance awards.

<sup>6</sup> See *Henke v. United States Dep't of Commerce*, 83 F.3d 1445 (D.C. Cir. 1996).

<sup>7</sup> By definition, the FACA applies to group advice, not advice from single individuals.

<sup>8</sup> See 41 C.F.R. 101-6.1004(i).

*Rec'd 5/18/00*

OFFICE OF THE DIRECTOR

UNITED STATES  
OFFICE OF PERSONNEL MANAGEMENT  
WASHINGTON, D.C. 20415

MAY 18 2000

Honorable David M. McIntosh  
Chairman, Subcommittee on National  
Economic Growth, Natural Resources,  
and Regulatory Affairs  
U.S. House of Representatives  
B-377 Rayburn House Office Building  
Washington, DC 20515

Dear Mr. Chairman:

This is in reply to your letter of April 14, 2000, regarding our recommendations for changes in specific laws that impose unnecessary or overly burdensome paperwork.

The Office of Personnel Management recommends the following:

- 1) 44 U.S.C. 3506(c)(2)(A)- Change the mandatory 60-Day Federal Register posting to:
  - a) required only if a new information collection, or
  - b) required if a major revision to a previously cleared information collection.

Rationale: Information collections that have minor or no changes can be cleared much faster. The opportunity for public comment will still be available during the 30-Day Federal Register notice. Because OPM receives no comments on most of its information collections, the 60-Day Federal Register notice adds time and administrative burden to the process. Limiting the 60-Day Federal Register notice to only new or major revisions to existing information collections will give adequate time for public review and comment before implementation.

- 2) Add a new subsection for Expedited Processing:
  - a) issue one 15-Day Federal Register notice;
  - b) OMB will take action within 15 days of the close of the Federal Register notice; and
  - c) follow all other processing procedures as specified in 44 U.S.C. 3507(j)(1) and (2).

Rationale: This new section would return the ability to request expedited processing for those information collections which do not meet the criteria of emergency processing, but warrant faster than normal processing.

Honorable David M. McIntosh

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Thank you for the opportunity to make recommendations on this process. If you have any questions, please contact Cynthia Brock-Smith, Director, Office of Congressional Relations, 202-606-1300.

Sincerely,

  
Janice R. Lachance  
Director

cc: The Honorable Dennis J. Kucinich, Ranking Member, Subcommittee on National Economic Growth, Natural Resources, and Regulatory Affairs

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CHAIRMAN

UNITED STATES  
NUCLEAR REGULATORY COMMISSION  
WASHINGTON, D.C. 20555-0001

REV 5/18/00

May 17, 2000

The Honorable David M. McIntosh, Chairman  
Subcommittee on National Economic Growth,  
Natural Resources, and Regulatory Affairs  
Committee on Government Reform  
United States House of Representatives  
Washington, D.C. 20515-6143

Dear Mr. Chairman:

I am writing in response to your April 14, 2000 request for recommendations for changes to specific laws which appear to impose unnecessary or overly burdensome paperwork requirements and are good candidates for elimination or reduction.

As discussed in the enclosure, the Commission has identified two statutory provisions that we believe could be modified to reduce unnecessary burdens. For each statute, we have given the citation, our proposed change, and the rationale for our proposal. Each of the changes we recommend is aimed either at reducing unnecessary paperwork burdens on individuals, or at minimizing the cost to the agency of maintaining or disseminating information.

Please let me know if you have any questions regarding our recommendations.

Sincerely,

Richard A. Meserve

Enclosure:  
Recommendations for statutory changes  
to reduce unnecessary paperwork

cc: The Honorable Dan Burton

NRC RECOMMENDATIONS FOR CHANGES IN SPECIFIC LAWS WHICH  
IMPOSE UNNECESSARY OR OVERLY BURDENSOME PAPERWORK

*Ethics in Government Act, 5 U.S.C. App. 4, §102.*

The public financial disclosure report (SF 278), which all senior employees must file annually, should be reformed by amending a section of the Ethics in Government Act of 1978 that specifically mandates certain reporting categories (e.g., \$1,001 to \$15,000, etc.). These categories no longer usefully reflect the financial thresholds requiring recusal from participating in certain Government matters.

For example, the first two categories for the reporting of assets are \$1,001-\$15,000 and \$15,001-\$50,000. However, under Office of Government Ethics (OGE) regulations in 5 C.F.R. Part 2640, issued in 1996, an employee can work on a Government matter affecting an entity in which the employee has a financial interest if the value of the interest does not exceed \$5,000; and if the Government matter is generic, such as a rulemaking, then the threshold is raised to \$25,000. Thus, an ethics counselor cannot determine from the form alone whether someone checking, say, the \$1,001-\$15,000 category might need to recuse herself from a matter affecting the entity in which she has an investment. Congress wisely gave OGE authority to determine the thresholds requiring recusal because OGE can update those figures more easily than can Congress. However, in 1978 Congress also established numerical reporting categories that, because they reflect then current dollar values, are no longer always useful in making recusal determinations. We recommend allowing the Office of Government Ethics to establish numerical reporting categories that match its recusal categories.

The same section of the Ethics in Government Act that establishes numerical reporting categories also requires that employees report any U.S. Government assets they own, such as U.S. saving bonds or Treasury notes. We believe that these assets should not be reported, because they clearly do not present a conflict of interest. Similarly, savings, checking, and money market accounts should not be reported. It should be noted that requirements governing what is reported on the confidential financial disclosure reports specifically exclude reporting these accounts and U.S. Government assets.

*Federal Advisory Committee Act, 5 U.S.C. App. 2.*

*Section 10(b)* of the Federal Advisory Committee Act requires that, subject to 5 U.S.C. 552 (FOIA), "the records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, or other documents which were made available to or prepared for or by each advisory committee shall be available for public inspection and copying at a single location in the offices of the advisory committee or agency to which the advisory committee reports until the advisory committee ceases to exist." (After that point, retention and disposition of the committee's records are addressed by other statutes.) Because of the Act's requirements, a statutorily permanent advisory committee, such as the NRC's Advisory Committee on Reactor Safeguards, must retain huge amounts of paper. The following changes in the requirements of section 10(b) would be useful:

The statute should be amended to eliminate from section 10(b) working papers and drafts prepared by an advisory committee or a subcommittee of an advisory committee,

or committee staff or consultants, except when they reflect the final work product of the committee on a topic or agenda item.

The statute should place a time limit of six years on the required availability of other documents listed in section 10(b), except transcripts and minutes, which would continue to be retained for the life of the committee.

The statute should make clear that availability of listed documents through the Public Document Room (PDR) of the agency to which the advisory committee reports satisfies the requirements of section 10(b), even when the PDR is not the only publicly accessible location in which the committee's documents are maintained. (In order that the public may know which documents were made available to the committee with respect to a meeting agenda item, an appendix to the minutes or transcript of the meeting involving that agenda item could be required to list those documents.)

Conforming changes should also be made to *section 8(b)(2)*, which requires each agency's Advisory Committee Management Officer (required to be designated by the head of each agency that has an advisory committee) to "assemble and maintain the reports, records, and other papers" of any committee during its existence, and (to the extent applicable) to the requirement of *section 10(c)* that the minutes of each advisory committee meeting shall contain "copies of all reports received, issued, or approved by the advisory committee."

*Section 13* of the Act requires the Administrator of General Services to "provide for the filing with the Library of Congress of at least eight copies of each report made by every advisory committee and, where appropriate, background papers prepared by consultants." The Librarian of Congress must, in turn, "establish a depository for such reports and papers where they shall be available to public inspection and use." This requirement was enacted at a time when Government-wide use of electronic media was not envisioned. It would now seem appropriate to amend this requirement to permit the provision of one copy electronically to the Library of Congress in lieu of filing eight (paper) copies.

Under *section 14(a)* of the Act, unless Congress provides otherwise with respect to an advisory committee, the committee terminates automatically not later than two years after its establishment, unless renewed. *Section 14(b)(1)* requires that upon the renewal of an advisory committee, the committee "shall file a charter" as provided for a new committee in *section 9(c)*. Except where an item of information required to be included in the original charter has changed significantly, the filing of a brief notice of renewal with those required to receive the charter under *section 9* should be sufficient, and would save paper and time of agency staff. While this saving may appear inconsequential when viewed in the context of one small agency, such as the NRC, the saving may be significant when viewed on a Government-wide basis.



U.S. SMALL BUSINESS ADMINISTRATION  
WASHINGTON, D.C. 20416

OFFICE OF THE ADMINISTRATOR

MAY 22 2000

The Honorable David M. McIntosh  
Chairman  
Subcommittee on National Economic Growth,  
Natural Resources, and Regulatory Affairs  
Committee on Government Reform  
House of Representatives  
Washington, DC 20515

Dear Mr. Chairman:

Thank you for your letter of April 14, 2000, co-signed by Congressman Kucinich, requesting "recommendations for changes in specific laws which impose unnecessary or overly burdensome paperwork and are good candidates for elimination or reduction." The U.S. Small Business Administration (SBA) has no present recommendations for amending the Small Business Act or the Small Business Investment Act. SBA collects data from the public in the following program areas:

- Capital Access. What SBA collects through participating lenders or, in cases of direct loans, from borrowers is needed to ensure eligibility and the likelihood of repayment. Reducing such requirements could increase possible losses. Even so, SBA strives to keep paperwork burdens at a minimum through its programs such as LowDoc, SBA's one-page application, which facilitates authorizing loan guarantees within 36 hours.
- 8(a) Contracting, HUBZones, and Small & Disadvantaged Businesses (SDB). Each program requires applicants to demonstrate a particular status and establish eligibility. As with SBA loan programs, participation is voluntary.

SBA continues to support the policy of the Paperwork Reduction Act by seeking only enough data to ensure that our programs are efficiently and properly delivered. We hope this responds to your inquiry, and we appreciate the opportunity to comment.

Sincerely,

*Aida Alvarez*  
Aida Alvarez  
Administrator

RLD 5/15/00



**SOCIAL SECURITY**  
Office of the Deputy Commissioner

May 12, 2000

The Honorable David M. McIntosh  
Chairman, Subcommittee on National  
Economic Growth, Natural Resources  
and Regulatory Affairs  
Committee on Government Reform  
House of Representatives  
Washington, D.C. 20515

Dear Mr. McIntosh:

This is in response to your letter of April 14 that asked for recommendations for changes in specific laws that impose unnecessary or overly burdensome paperwork.

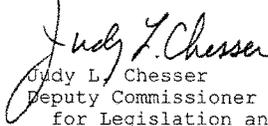
The Social Security Administration (SSA) has made, and continues to make, a serious commitment to reduce the reporting burden placed on the public. We have traditionally attempted to minimize the information burden imposed on the public, while balancing our mission and eliminating fraud, waste and abuse.

In response to your request, we have reviewed all of SSA's legislatively mandated paperwork requirements that result in paperwork burdens being imposed on the public. We did not identify any that could be modified or eliminated.

An identical letter has been sent to Congressman Kucinich.

Please let me know if I can be of further assistance.

Sincerely,

  
Judy L. Chesser  
Deputy Commissioner  
for Legislation and  
Congressional Affairs

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REC'D 5/18/00

FEDERAL COMMUNICATIONS COMMISSION  
Washington, D. C. 20554

OFFICE OF  
MANAGING DIRECTOR

May 15, 2000

The Honorable David M. McIntosh  
Chairman, Subcommittee on National Economic Growth,  
Natural Resources, and Regulatory Affairs  
2157 Rayburn House Office Building  
Washington, DC 20515-6143

Dear Chairman McIntosh:

This letter is in response to your letter to Chairman Kennard, dated April 14, 2000, in which you requested recommendations for changes in specific laws which impose unnecessary or overly burdensome paperwork and are good candidates for elimination or reduction.

The Federal Communications Commission is in the process of completing a Section 257 Triennial Report to Congress to identify and eliminate market entry barriers for small businesses.

In this report, the agency conducted a thorough review of our strategic plan goals, which included a review of regulatory initiatives to remove impediments in specific services. During this review, we identified legislative initiatives which, if adopted, would reduce unnecessary or overly burdensome requirements that are Congressionally mandated. We will be happy to provide a copy of the Triennial Report to your office when it is finalized.

Thank you for your interest in this matter. If you have any further questions, please contact Judy Boley on (202) 418-0214.

Sincerely,



*af* Andrew S. Fishel  
Managing Director

FEDERAL COMMUNICATIONS COMMISSION  
Washington, D. C. 20554

OFFICE OF  
MANAGING DIRECTOR

May 31, 2000

The Honorable David M. McIntosh  
Chairman, Subcommittee on National Economic Growth,  
Natural Resources, and Regulatory Affairs  
2157 Rayburn House Office Building  
Washington, DC 20515-6143

Dear Chairman McIntosh:

This letter is in response to your letter to Chairman Kennard, dated April 14, 2000, in which you requested recommendations for changes in specific laws which impose unnecessary or overly burdensome paperwork and are good candidates for elimination or reduction.

The Federal Communications Commission has completed a Section 257 Triennial Report to Congress to identify and eliminate market entry barriers for small businesses.

In this report, the agency conducted a thorough review of our strategic plan goals, which included a review of regulatory initiatives to remove impediments in specific services. During this review, we identified legislative initiatives which would reduce unnecessary or overly burdensome requirements that are Congressionally mandated. Enclosed is a copy of the final legislative initiatives.

Thank you for your interest in this matter. If you have any further questions, please contact Judy Boley on (202) 418-0214.

Sincerely,



Andrew S. Fishel  
Managing Director

Enclosure

1. **Expedite Processing of Routine Satellite Applications.** This proposal would amend Sections 309(c)(2)(G) and (H), and would add Section 309(c)(2)(I) of the Communications Act. Specifically these changes would authorize the Commission to exempt non-controversial, routine satellite earth station applications from the usual 30-day public notice period. This would, in turn, speed up the processing of routine satellite applications which in 1998 totaled 600, and thus remove a barrier to entry for small businesses that are hampered by the current procedure.
2. **Authorize Pro Forma Transfer of Licenses.** An amendment of Section 310 of the Communications Act would authorize the Commission to adopt a notification procedure for *pro forma* assignments and transfers of licenses and construction permits. The amendment would streamline the Commission's administrative processing of assignment and transfer applications, thereby reducing an administrative burden for small businesses.
3. **Streamline Construction Permit Requirements.** By amending Section 310 of the Communications Act, the current two-step construction permit/license process would be replaced with a single-step, license-only process. This measure would benefit small businesses seeking to enter the broadcasting industry, by simplifying the application process and reducing both legal fees and the pre-license waiting period. This result would promote competition.
4. **Remove Entry Barriers for Information Delivery Technologies.** This proposed legislation would add a new Section 716 to the Communications Act and amend Section 207 of the 1996 Act. The changes would remove entry barriers and expand consumer access to competing providers of multichannel video programming and non-video telecommunications and information services. Such services are provided to apartment houses, condominium buildings, and other multiple dwelling units ("MDUs") when a resident requests service from the service provider. The changes would further authorize the Commission to extend protection over broadband transmit/receive antennae, *i.e.*, small antennae used to receive and to transmit broadband signals. Such transmission includes, but is not limited to, two-way information transmission and/or the transmission of information using data, video, audio, or other digital services or formats. These changes would expand consumer access to and choice of competitive video services and eliminate barriers to competition for telecommunications services and technology, especially for the approximately 25 percent of the U.S. population living in MDUs. Any legislative proposal would provide a mechanism to compensate property owners for the use of their property and to reimburse owners for any damage that results from the installation or removal of facilities.

5. **Authorize Broadcaster Lawsuits Against Unlicensed Broadcasters.** This proposal would amend Section 301(a) of the Communications Act and add to it a new Section 301(b). If enacted, it would confer upon licensed broadcasters a private right of action to seek injunctions against "pirate" broadcasters, i.e. persons broadcasting without a Commission license, within 100 miles of the licensee's city of license. This would help ensure that the possible introduction of a Low Power FM service would not harm existing broadcasters. The measure would also facilitate enforcement of any eventual Low Power FM rules and regulations.
6. **Increase the Statute of Limitations for Forfeiture Proceedings Against Non-Broadcasters.** An amendment of Section 503(b)(6)(B) of the Communications Act would change the statute of limitations on forfeitures against common carriers and other non-broadcasters from one to three years. This would strengthen the effectiveness of the Commission's enforcement program by increasing the time period within which the Commission may issue a notice of apparent liability for a forfeiture to a telecommunications carrier or other non-broadcast entity. This change would facilitate the ability of market competitors to enforce violations of the Commission's Rules by incumbents.
7. **Reform General Forfeiture Authority.** This proposal would amend Sections 504(a) and (b) of the Communications Act. It would authorize the Commission to prosecute to recover forfeitures in federal district court if the U.S. Attorney General has not initiated such action within six months of written notice of an unpaid forfeiture penalty, or, alternatively, initiate a Commission adjudicatory hearing under Section 503(b). The measure would streamline and increase the effectiveness of the Commission's enforcement program by aiding in the recovery of forfeitures payable to the Treasury of the United States.
8. **Expand General Forbearance Authority.** This proposal would amend Section 10(a) of the Communications Act to expand the Commission's authority to forbear from regulation regarding any and all Commission-regulated services rather than regulation of only telecommunications services. This would benefit small businesses by providing the Commission the needed flexibility to implement deregulatory proposals that reduce or eliminate unnecessary regulation for all its services, not just common carrier services. This would further allow the Commission to apply the same pro-competition, deregulatory benefits from common carrier forbearance to other sectors of the communications market, and would conserve government resources to a greater extent than is permissible today.
9. **Provide International Telecommunications Relay Services.**

This is a proposal to amend Section 225 of the Communications Act. It would require foreign as well as interstate communications providers to provide both interstate and foreign telecommunications relay services ("TRS"). In addition, it would fund interstate and foreign TRS on the basis of revenues derived from interstate and foreign communications. The measure would create a mechanism to handle international TRS and ensure that international calls are treated on the same basis as domestic, interstate calls.

10. **Increase Eligible Carriers to Offer Lifeline Assistance.** This proposal would amend Section 254 of the Communications Act by authorizing carriers other than eligible telecommunications carriers to receive universal service support for serving Lifeline and LinkUp customers. This would bring down a barrier to entry by promoting competition and consumer choice and by helping to ensure access to telecommunications services and technology, especially by indigent citizens.

11. **Exempt Instructional Television Fixed Service Applications from Competitive Bidding.** This proposal adds a new Section 309(j)(2)(D) to the Communications Act. It would exempt applications for licenses or construction permits for Instructional Television Fixed Service ("ITFS") stations from the Commission's competitive bidding authority. This would enhance the ability of educational institutions and governmental entities, especially those with limited funds, to utilize ITFS channels for the benefit of their students and the public. An exemption for such institutions and entities from a requirement to bid at auction for spectrum reserved for instructional use would also further broaden access to important communications services and technology.

12. **Create New Tax Incentive Program.** The measure would benefit small businesses by permitting deferral of taxes on any gain from the sales of telecommunications businesses to small telecommunications firms, including disadvantaged firms and firms owned by minorities or women, as long as that gain is reinvested in one or more qualifying replacement telecommunications businesses. In addition, it would provide a tax credit for sellers who offer financing on sales to small telecommunications firms, thereby facilitating sales of small businesses. It would also include strict limits on the size of eligible purchasing firms, the length of time the firm must hold the business purchased, and the dollar value of eligible transactions. This would encourage diversification of ownership in the telecommunications industry, and provide entry opportunities for small businesses, disadvantaged businesses, and businesses owned by minorities and women.

13. **Clarify the Authority of the Telecommunications Development Fund.** This proposal amends Section 309(j)(8)(C) of the Communications Act. The proposal would authorize any down

payments the Commission may require from initially successful auction bidders to be placed in an insured, interest-bearing account with the interest credited to the Telecommunications Development Fund ("TDF") in the same manner as the up-front deposits made prior to the auction. It clarifies the requirement that the up-front deposits were intended to include the down payments. It further clarifies that the TDF is eligible for consideration as a small business investment company. This would enhance the funding of the TDF, established in the 1996 Act to assist small businesses, at no cost to the U.S. Treasury.

14. **Protect Commission Licenses from Bankruptcy Litigation.** This measure would add a new Section 309(j)(8)(D) to the Communications Act. It would clarify that certain provisions of the Bankruptcy Code are not applicable to any Commission license on which payment is owed. The proposal does not relieve any licensee from payment obligations, and does not affect the Commission's authority to revoke, cancel, transfer or assign such licenses. The measure would benefit small businesses, and their customers, by preventing auctioned Commission licenses from being tied up in bankruptcy court, thus allowing the Commission to redistribute licenses to entities that are better able to deploy the spectrum in a timely manner. This would also strengthen the integrity of the Commission's auction process.



FEDERAL DEPOSIT INSURANCE CORPORATION, Washington DC 20429

DONNA TANOUE  
CHAIRMAN

May 11, 2000

Honorable David McIntosh  
Chairman  
Subcommittee on National Economic Growth,  
Natural Resources, and Regulatory Affairs  
Committee on Government Reform  
House of Representatives  
Washington, D.C. 20515

Dear Mr. Chairman:

Thank you for your letter requesting that the Federal Deposit Insurance Corporation recommend changes to specific laws that impose unnecessary or overly burdensome paperwork and could be eliminated or reduced. I can assure you that the FDIC is committed to reducing regulatory burden for the depository institutions whose deposits it insures and it supervises.

As you are aware, the recently-enacted Gramm-Leach-Bliley Act (GLBA) made necessary but sweeping changes to the fundamental legislative structure governing how financial organizations are regulated and supervised. Many depository institutions or their corporate parents are now filing applications to take advantage of GLBA's changes and entering into affiliations that may change the way they report or the regulator to whom they report. While we are continually looking for ways to reduce burden on depository institutions, I believe the best course is to keep a watchful eye on the effects that GLBA may have on institutions, including possibly increasing paperwork burden.

I want to assure you, however, that the FDIC is firmly committed to reducing regulatory burden, including paperwork, and has a strong track record in these areas. As you may be aware, section 303 of the Riegle Community Development and Regulatory Improvement Act of 1994 required the FDIC, in conjunction with the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, and the Office of Thrift Supervision, to review all of its regulations and policy statements. The objective of this review included reducing regulatory burden, including paperwork. The review resulted in rescission or revision of a substantial number of the FDIC's regulations and policies including many that imposed paperwork requirements. As the FDIC and the other federal banking agencies reported to Congress, the review resulted in "a genuine reduction in the regulatory burden for financial institutions." (Joint Report: Streamlining of Regulatory Requirements, submitted to Congress Sept. 23, 1996, p. 3.)

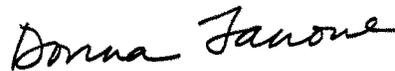
As part of this review, the FDIC looked for, and identified, areas where a revision to a regulation or policy would require a legislative change. While several areas were identified, generally the regulatory requirements did not impose paperwork on regulated entities.

In addition to this one-time requirement, pursuant to section 2222 of the Economic Growth and Regulatory Paperwork Reduction Act of 1996, the FDIC and other banking agencies are required to conduct continuing reviews of the burden imposed by their regulations. The FDIC has established internal procedures for conducting such reviews.

The FDIC takes seriously the need to maintain regulatory burden and paperwork requirements at the minimum level necessary to conduct its functions successfully. This includes determining whether paperwork requirements, if excessive, or unnecessary, are required by statute and not something we can reduce by regulatory action. Keeping this in mind, we have not currently identified any statutes under which we act that impose excessive or unnecessary paperwork requirements.

Thank you again for the opportunity to comment. If we can be of further assistance, please call me at 898-6974 or Alice Goodman, Director of the Office of Legislative Affairs, at 898-8730.

Sincerely,

A handwritten signature in black ink that reads "Donna Tanoue". The signature is written in a cursive, flowing style.

Donna Tanoue  
Chairman



Office of the Chairman

UNITED STATES OF AMERICA  
 FEDERAL TRADE COMMISSION  
 WASHINGTON, D.C. 20580

HAND DELIVERED  
 5/16/00

May 12, 2000

The Honorable David M. McIntosh  
 Chairman, Subcommittee on National Economic Growth,  
 Natural Resources, and Regulatory Affairs  
 Committee on Government Reform  
 United States House of Representatives  
 Washington, D.C. 20515

The Honorable Dennis Kucinich  
 Ranking Member, Subcommittee on National Economic Growth,  
 Natural Resources, and Regulatory Affairs  
 Committee on Government Reform  
 United States House of Representatives  
 Washington, D.C. 20515

Dear Chairman McIntosh and Congressman Kucinich:

This letter responds to your letter of April 14, 2000, requesting the Commission's recommendations about statutory provisions that could be amended to eliminate unnecessary or overly burdensome paperwork requirements. The Commission is responding to your request as an official request of a Congressional Subcommittee, *see* 16 C.F.R. § 4.11(b).

The Commission is sensitive to the need to avoid unnecessary burdens on the public, and regularly reviews its rules to ensure that they do not impose avoidable burdens. We appreciate this opportunity to reexamine the paperwork requirements prescribed by the statutes implemented and enforced by the Commission. We have identified the following statutory provisions that could be amended to eliminate unnecessary paperwork requirements. These provisions appear in the Energy Policy and Conservation Act ("EPCA") and the Textile, Wool and Fur Acts.

**Energy Policy and Conservation Act, 42 U.S.C. § 6291, et seq.**

The Commission believes that three provisions of EPCA impose reporting and disclosure requirements that exceed what is necessary to achieve the statute's purposes.

1. **Requirement that Manufacturers Submit Annual Reports Concerning Lighting and Plumbing Products**

Section 326(b)(4) of EPCA, 42 U.S.C. § 6296(b)(4), requires manufacturers of certain types of home appliances, lighting products, and plumbing products to submit annual reports to the Commission, stating the energy consumption or water use of the product. The statute provides no authority for the Commission to excuse the filing of reports that are not needed for implementation of the statute. The Commission recommends that the statute be amended to exempt certain products from the reporting requirements.

EPCA initially directed the Commission to prescribe rules requiring manufacturers of certain home appliances to label their products with information about energy consumption, and information about the range of energy consumption for comparable products. Pursuant to that directive, the Commission issued the Appliance Labeling Rule (the "Rule"), which requires labels disclosing energy consumption for several categories of home appliances.<sup>1</sup> The Rule requires manufacturers of these products to affix labels showing the energy consumption of the particular model, together with the range of energy consumption of all comparable models. Each manufacturer is responsible for calculating the energy-consumption information for each covered product that it manufactures. The Commission then calculates and publishes the range of comparability for each product category, which manufacturers must include on the labels. The Commission's calculation of these ranges of comparability is based on reports that EPCA requires manufacturers to file.

In 1988 and 1992, Congress amended EPCA to require that the Commission issue rules specifying labeling requirements for certain types of lighting and plumbing products.<sup>2</sup> Unlike home appliances, the required labeling for these products does not include disclosure of ranges of comparability. However, manufacturers are required to file the same annual reports for these products as they are for the appliances initially covered by EPCA. These product reports are of no present use to the Commission, because the Commission does not calculate ranges of comparability for these products or otherwise use the reports to implement EPCA.

The Commission recommends that Congress amend EPCA to dispense with unneeded reporting requirements. The recommended amendment to § 326(b)(4) of EPCA, 42 U.S.C. § 6296(b)(4), appears below, with the suggested new language underlined:

Each manufacturer of a covered product to which a rule under section 6294 of this title [§ 324 of EPCA] applies (but excluding manufacturers of those products listed in section

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<sup>1</sup> The Appliance Labeling Rule appears at 16 C.F.R. Part 305.

<sup>2</sup> The National Appliance Energy Conservation Amendments of 1988, Pub. L. 100-357, 102 Stat. 671 (1988), amended EPCA to add fluorescent lamp ballasts. The Energy Policy Act of 1992, Pub. L. 102-486, 106 Stat. 2776, 2817-2832 (1992), amended EPCA to add showerheads, faucets, water closets, urinals, general service fluorescent lamps, medium base compact fluorescent lamps, and general service incandescent lamps.

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6292(a)(13) - (18) of this title shall annually, at a time specified by the Commission, supply to the Commission relevant data respecting energy consumption or water use developed in accordance with the test procedures applicable to such product under section 6293 of this title [§ 323 of EPCA].

**2. Requirement that Appliance Manufacturers Report Serial Numbers of Appliances**

Section 326(b)(1) of EPCA, 42 U.S.C. § 6296(b)(1), requires manufacturers of all products covered by the Rule to notify the Commission or the Secretary of the Department of Energy ("DOE") of the models in current production and the starting serial numbers of those models, and to provide the same information for all subsequently produced new covered models prior to their production. The original purpose of the requirement was to inform the Commission exactly when in a model line products became subject to the Rule, because products manufactured before the effective date (of the Rule or a subsequent amendment) could still be sold without labels after the effective date.

This requirement is now outdated as to product categories currently subject to the law. Any new entrants to the market will have to comply with the Rule upon starting production, and any new models introduced by currently covered manufacturers also will have to be in compliance. The Commission therefore recommends deletion of the statutory requirement for submission of serial numbers. The recommended amendment to § 326(b)(1) of EPCA, 42 U.S.C. § 6296(b)(1), appears below:

Each manufacturer of a covered product to which a rule under section 6294 of this title [§ 324 of EPCA] applies shall notify the Secretary or the Commission--

- (A) not later than 60 days after the date such rule takes effect, of the models in current production (~~and starting serial numbers of those models~~) to which such rule applies; and
- (B) prior to commencement of production, of all models subsequently produced (~~and starting serial numbers of those models~~) to which such rule applies.

**3. Labeling Requirements for Manufacturers of Lighting Products**

The 1988 amendment to EPCA mandated labeling and marking requirements for fluorescent lamp ballasts, and also established energy conservation standards for these products. Ballasts that do not meet these standards may not be sold in the United States. The Commission believes that the labeling and marking mandated for fluorescent lamp ballasts do not add any benefit beyond the required energy conservation standards.

Section 324(a)(2)(B) of EPCA, 42 U.S.C. § 6294(a)(2)(B), directs the Commission to prescribe rules requiring that all fluorescent lamp ballasts complying with the energy

The Honorable David M. McIntosh and The Honorable Dennis Kucinich -- Page 4

conservation standards, as well as the packaging of such ballasts, be labeled with an encircled "E." The "E" does not provide consumers with any comparative information upon which to base their purchasing decision, because all complying ballasts will bear the mark, and noncomplying ballasts cannot legally be sold domestically.

The Commission recommends, therefore, that Congress amend EPCA so that this directive is deleted from the statute, which would enable the Commission to revise the Rule accordingly. The amendment would consist of deleting § 324(a)(2)(B) in its entirety, and renumbering succeeding sections:

~~(B) The Commission shall prescribe labeling rules under this section applicable to the covered product specified in paragraph (13) of section 322(a) and to which standards are applicable under section 325. Such rules shall provide that the labeling of any fluorescent lamp ballast manufactured on or after January 1, 1990, will indicate conspicuously, in a manner prescribed by the Commission under subsection (b) by July 1, 1989, a capital letter "E" printed within a circle on the ballast and on the packaging of the ballast or of the luminaire into which the ballast has been incorporated.~~

**Textile, Wool and Fur Acts, 15 U.S.C. § 68, et seq.; 15 U.S.C. § 69, et seq.; 15 U.S.C. § 70, et seq.**

These three statutes require that each covered product bear a label showing the product's content, country of origin, and information identifying the manufacturer or other dealer or distributor of the product. 15 U.S.C. §§ 68b(a)(2)(C); 69b(2)(E); 70b(b)(3). Pursuant to rules implementing the statutes, the Commission issues registered numbers (RNs) to qualified applicants residing in the United States who request such a number. These numbers may then be used in lieu of the manufacturer's or other party's name, in order to allow smaller, simpler labels.

Many industry members have advocated a system whereby a single number could be used in all three of the NAFTA countries. Canada has a system of CA numbers, very similar to the RN system. Mexico does not yet have a comparable system, but may develop one in the future. There is also the possibility that the European Union, an industry association, or some other entity would develop an independent system of numbers for international use that is comparable to the Commission's system.

If the Commission were authorized to accept identifying numbers issued in such a system, industry members would be spared the paperwork burdens of submitting multiple applications and placing several identifying numbers on product labels. However, the relevant statutory provisions require that such numbers be both issued and registered by the Commission itself. The Commission could allow use of other systems of identifying numbers if the relevant statutory provisions were amended to read as follows:

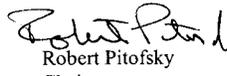
The name, or other identification issued and registered by the Commission, . . . or an identification issued and registered pursuant to an identification system administered by another entity, if the Commission determines that such identification system is

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substantially equivalent to the identification system administered by the Commission.<sup>3</sup>

None of the information in this letter is exempt from mandatory public disclosure under the Freedom of Information Act, 5 U.S.C. § 552. Therefore, the Commission does not request the Committee to give confidential treatment to the letter or enclosed material.

By direction of the Commission.

  
Robert Pitofsky  
Chairman

cc: The Honorable Dan Burton  
The Honorable Henry A. Waxman

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<sup>3</sup> The relevant provision of the Wool Act, 15 U.S.C. § 68b(a)(2)(C), would also require insertion of the phrase "or other identification issued and registered by the Commission."

Rcvd 5/17/00



THE CHAIRMAN

UNITED STATES  
SECURITIES AND EXCHANGE COMMISSION  
WASHINGTON, D.C. 20549

May 16, 2000

The Honorable David M. McIntosh  
Chairman, Subcommittee on National Economic Growth,  
Natural Resources and Regulatory Affairs  
Committee on Government Reform  
U.S. House of Representatives  
2157 Rayburn House Office Building  
Washington, D.C. 20515-6143

The Honorable Dennis J. Kucinich  
Ranking Member  
Subcommittee on National Economic Growth,  
Natural Resources and Regulatory Affairs  
Committee on Government Reform  
U.S. House of Representatives  
1730 Longworth House Office Building  
Washington, D.C. 20515-3510

Dear Chairman McIntosh and Congressman Kucinich:

Thank you for your letter of April 14, 2000 regarding unnecessary and burdensome paperwork requirements. One of my priorities as Chairman has been to make securities regulation more efficient and less burdensome, without sacrificing investor protection.

In fact, the SEC has been aggressive in eliminating unnecessary burdens in recent years. For example, in 1995, the SEC created a Task Force on Disclosure Simplification that recommended eliminating 81 rules and 22 forms and modifying dozens of others. The SEC has adopted most of the Task Force's recommendations. Similarly, the SEC streamlined mutual fund disclosure documents by allowing funds to use a short and concise Fund Profile in "plain English" and making funds remove unnecessary or confusing legal and technical terms from the prospectuses provided to investors. The SEC also maintains a website ([www.sec.gov](http://www.sec.gov)) that gives the public electronic access to agency publications (for example, publications that help small businesses learn about special ways to raise capital that require less paperwork) and company filings, and provides an efficient medium to contact the staff about proposed rules, interpretative questions or investment scams. Electronic access to the SEC reduces the public's need to request information in paper and eliminates time delays in waiting for delivery of information. Furthermore, when developing regulatory initiatives, the SEC always considers how to eliminate archaic burdens, promote market efficiency and competition, while remaining faithful to the investor protection mandate of the federal securities laws.

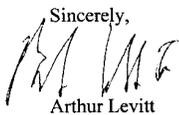
The federal securities regulatory scheme relies on companies disclosing material information on a timely basis as the primary method of informing and protecting investors. This scheme of full and fair disclosure – which Congress enacted in 1933 – has served our nation’s investors and securities markets well. For example, we created a centralized electronic repository of company reports (called EDGAR) that both allows investors ready access to this information and can reduce the burden on companies to provide paper copies. The phenomenal growth of the U.S. securities markets reflects investor confidence in this regulatory scheme.

As you may remember, the SEC testified before your Subcommittee on Natural Resources and Regulatory Affairs on March 17, 1998 and discussed how some aspects of the Paperwork Reduction Act (PRA) may impose unnecessary burdens on administrative agencies trying to engage in informed regulation. For example, the PRA imposes burdens on agencies that want to survey their constituencies regarding how their rules are working. Under the PRA, to gather information from more than nine people or firms, OMB approval is required, as is public “notice.” The approval process can take an additional 30-60 days. This process is required even if an agency is seeking to make regulations less burdensome or to obtain information regarding the costs and benefits imposed by a proposed rule. Even when members of Congress ask us to study a proposal, we are constrained by the PRA from swiftly collecting information. The SEC staff has worked closely with OMB to comply with the PRA on the paperwork burden imposed by proposed rules, but certain PRA requirements can impede more informed government regulation.

The SEC’s testimony suggested two amendments to the PRA to promote more efficient government regulation:

- The PRA should be amended to waive OMB approval of surveys designed to gather information about how rules are working or to collect cost-benefit information in connection with proposed rules; and
- The PRA should be amended to reduce the OMB paperwork preclearance process when agencies are eliminating or streamlining forms or other disclosure requirements.

If you are interested in discussing these suggestions or have any further questions about these matters, please contact Tracey Aronson, the Director of our Office of Congressional and Intergovernmental Affairs, at (202) 942-0010.

Sincerely,  
  
Arthur Levitt