INVESTIGATING OSHA'S REGULATORY AGENDA AND ITS IMPACT ON JOB CREATION

HEARING

BEFORE THE

SUBCOMMITTEE ON WORKFORCE PROTECTIONS

COMMITTEE ON EDUCATION AND THE WORKFORCE

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C O N T E N T S

INVESTIGATING OSHA'S REGULATORY AGENDA AND ITS IMPACT ON JOB CREATION

Tuesday, February 15, 2011
U.S. House of Representatives
Subcommittee on Workforce Protections
Committee on Education and the Workforce
Washington, DC

The subcommittee met, pursuant to call, at 10:03 a.m., in room 2175, Rayburn House Office Building, Hon. Tim Walberg [chairman of the subcommittee] presiding.

Present: Representatives Walberg, Kline, Bucshon, Noem, Ross, Kelly, Woolsey, Payne, Kucinich, and Miller.

Staff present: Kirk Boyle, General Counsel; Casey Buboltz, Coalitions and Member Services Coordinator; Ed Gilroy, Director of Workforce Policy; Ryan Kearney, Legislative Assistant; Brian Newell, Press Secretary; Molly McLaughlin Salmi, Deputy Director of Workforce Policy; Linda Stevens, Chief Clerk/Assistant to the General Counsel; Loren Sweatt, Professional Staff Member; Aaron Albright, Minority Deputy Communication Director; Tylease Alli, Minority Hearing Clerk; Daniel Brown, Minority Staff Assistant; Jody Calemine, Minority Staff Director; Brian Levin, Minority New Media Press Assistant; Kara Marchione, Minority Senior Education Policy Advisor; Richard Miller, Minority Senior Labor Policy Advisor; Megan O'Reilly, Minority General Counsel; Julie Peller, Minority Deputy Staff Director; and Michele Varnhagen, Minority Chief Policy Advisor and Labor Policy Director.

Chairman WALBERG [presiding]. Well, I am told a quorum is present. It is time to begin, so let's begin.

The subcommittee will come to order. Good morning. Allow me to welcome my colleagues and our guests to our first hearing of the Subcommittee on Workforce Protections. The subcommittee oversees a number of federal policies and programs that reach into America's workplaces. The decisions that we make in this subcommittee touch upon the lives of countless workers, employers, and their families.

I look forward to working with my colleague, Lynn Woolsey, the ranking Democrat member of the subcommittee. She has a deep passion for these issues, and no one can question her commitment to worker safety.

I know there will be times when we disagree. We have talked about that. But I have pledged to put forward my best efforts to

find common ground whenever possible. The cause of worker safety is best advanced when we work together.

And so that is why today's hearing will examine the regulatory agenda at the Occupational Safety and Health Administration. Since 1970, OSHA has been charged with enforcing laws that govern worker safety and health by developing rules intended to keep workplaces free from recognized hazards. The regulatory agenda speaks to the Administration's priorities. Worker safety is a goal we all share. However, we have real concerns with the policies and process the Administration has recently proposed to reach that goal.

Over the last 2 years, OSHA has not only attempted to implement several policy changes that would have profound impact on the workplace; it has become an Administration more focused on punishment than prevention. All employers who jeopardize the safety of workers should be held accountable to the fullest extent of the law.

However, punishment is just one piece of enforcing the law. Our goal should be to prevent workplace accidents before they happen, not simply shame an employer once a tragedy has occurred on the job site.

And so that is why I am concerned with the recent actions that suggest the Administration has shifted the balance toward punishment and taken its sights off commonsense rules that promote prevention.

Worker safety is a priority and so, too, is promoting policies that will allow businesses to grow and hire new workers. Needless rules and onerous regulations are often roadblocks to economic growth and job creation, which we all want.

The President has called on his Administration to scour the books in search of policies that undermine private-sector job growth. This subcommittee looks forward to joining that effort in the weeks and months ahead.

I am particularly aware of the urgency of the task before us. My home state of Michigan has been hit hard by recent recession. Currently, the unemployment rate in Michigan stands at 11.7 percent, and even higher in some counties in my congressional district that I represent. We all must be partners in an effort to get the American people back to work.

Our witnesses today will discuss the potential economic and worker safety impact of OSHA's regulatory agenda. We have heard the mantra that good jobs are safe jobs. I agree. But let us ensure that bad policy does not destroy the good jobs we need to create.

At this time, I would like to yield to Congresswoman Woolsey, the ranking member of the subcommittee, for her opening remarks.

[The statement of Mr. Walberg follows:]

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

Good morning. Allow me to welcome my colleagues and our guests to our first hearing of the Subcommittee on Workforce Protections. This subcommittee oversees a number of federal policies and programs that reach into America's workplaces. The decisions we make in this subcommittee touch upon the lives of countless workers, employers, and their families.

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However, punishment is just one piece of enforcing the law. Our goal should be to prevent workplace accidents before they happen, not simply shame an employer once a tragedy has occurred on the job site. That is why I am concerned with recent actions that suggest the administration has shifted the balance toward punishment, and taken its sights of commonsense rules that promote prevention.

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Ms. WOOLSEY. Thank you, Mr. Chairman. And congratulations on your election as chair of this subcommittee.

Chairman WALBERG. Thank you.

Ms. WOOLSEY. It was a very active subcommittee in the last Congress. And I look forward to actually continuing much of the work that we started in, moving forward in this Congress. And I am certain that we are going to have a good working relationship.

I applaud today's focus on OSHA's regulatory agenda, because over the past 4 years, this panel has explored a number of loopholes in OSHA's regulatory safety net. And I am hoping that under your leadership, Mr. Chairman, together we can fix what is needed and bring OSHA into the 21st century.

But first things first. If OSHA comes under assault from the new majority, the fact is, the agency may not be able to carry out its core missions. For example, the 18 percent reduction of OSHA's budget in the Republican Continuing Resolution for fiscal year 2011 would eliminate 415 employees, bringing OSHA to its lowest staffing levels since 1974, likely forcing OSHA to furlough all of its employees for 3 months. This would mean 8,000 fewer workplace hazard inspections and 740 fewer whistleblower discrimination investigations this year alone.

And the deeper one digs, the worse it appears. The Republican funding resolution completely zeroes out OSHA's statistics and in-

formation division. Mr. Chairman, that means no more data collection on workplace health and safety trends, which is critical for targeting hazardous work sites. This cut even shuts down OSHA's website.

The continuing resolution we are currently debating includes cuts to state OSHA programs, including California and Michigan, both of our states, which are under extreme fiscal duress at the moment. It cuts OSHA's safety and health standards by 16 percent, blocking long-overdue rules, like the one to prevent falls at nonconstruction sites.

In other words, Mr. Chairman, the Republican C.R. doesn't just trim OSHA's budget; it absolutely cripples the agency and needlessly jeopardizes safety standards and endangers American workers.

So today's hearing about how OSHA's regulatory agenda affects job creation and investment is truly serious. I strongly believe it is the lack of regulation that has killed workers and their jobs.

Take, for example, a deadly 2009 explosion at the ConAgra Slim Jim plant in Garner, North Carolina. Contractors purged the natural gas line they were connecting to a new industrial water heater, but they didn't smell gas, and they kept venting the pipe for 2.5 hours, until the gas found a spark. Three workers were killed; 71 were injured in that explosion.

Rather than rebuild the section of the plant that was destroyed, ConAgra is consolidating production elsewhere, closing the plant and putting 700 people out of work.

Now, I want you to look at this hose.——

Chairman WALBERG. I will move over, if necessary. [Laughter.]

Ms. WOOLSEY. Had there been OSHA regulations banning indoor gas purging, the contractors would have simply taken a piece of hose like this, a piece of hose like this, and connected it to the gas pipe and vented it outside, away from the building. So everyone has to agree: Had there been such a rule, there would have been no deaths, there would have been no injuries, and 700 people would still have their prized factory jobs in their same area where they live.

Red tape has slowed OSHA's efforts to prevent combustible dust fires and explosions, like the 2008 tragedy at Imperial Sugar and the Indiana dust explosion illustrated at the easel, which is to my right over there. That is what that looked like, that killed the brother of a witness who is here today.

We know the dust explosion problem can be fixed and without damaging competitiveness. Following a string of grain elevator explosions, OSHA issued a grain-handling standard in 1987. Since that rule, there has been a dramatic decline in explosions without any negative economic impact on the grain-handling industry or related small businesses.

So, Mr. Chairman, as we begin our first hearing of the 112th Congress, we have to challenge some of the long-held erroneous assumptions about regulations being bad for profit margins and economic growth. OSHA needs the resources to carry out its mission to protect its workers and to help businesses at the same time.

So, again, I want to thank you and I want to thank the witnesses who are here today, especially those of you who have had to travel

long distances to be with us. I look forward to your testimony. Thank you.

[The statement of Ms. Woolsey follows:]

Prepared Statement of Hon. Lynn Woolsey, Ranking Minority Member, Subcommittee on Workforce Protections

Thank you Mr. Chairman, and congratulations on your election as Chair of this subcommittee.

I applaud today's focus on OSHA's regulatory agenda, because over the past four years, this panel has explored a number of loopholes in OSHA's regulatory safety net, and i'm hoping that under your leadership, together we can fix what is needed and bring OSHA into the 21st century.

But first things first. If OSHA comes under assault from the new majority, the fact is, the agency may not be able to carry out its core missions.

• For example, the 18% reduction to OSHA's budget in the Republican continuing resolution for fiscal year 2011 would eliminate 415 employees, bringing OSHA to its lowest staffing level since 1974.

• Likely forcing OSHA to furlough all of its employees for 3 months. This would mean 8,000 fewer workplace hazard inspections and 740 fewer whistleblower discrimination investigations this year.

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Mr. Chairman, as we begin our first hearing of the 112th Congress, we must challenge some of these long-held, erroneous assumptions about regulations being bad for profit margins and economic growth. OSHA needs the resources to carry out its mission, protect workers, and help businesses at the same time.

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[1] Safety Bulletin, Dangers of Purging Natural Gas into Buildings, Chemical Safety Board, September 2009.

I want to thank our witnesses for being here today, especially those who had to travel a long distance to be with us, and I look forward to their testimony. Thank you.

Chairman WALBERG. I thank the gentlelady. And I think we are both committed to making sure that these hearings do deal with subjects of great interest, concern, and close to your heart, as well as the rest of the committee.

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

It is now my pleasure to introduce our distinguished panel of witnesses, the first being the Honorable Thomas Sullivan, works in the law firm of Nelson, Mullins, Riley & Scarborough, where he represents clients on a number of regulatory and rulemaking matters, while also serving as the head of the Small Business Coalition for Regulatory Relief. Prior to joining Nelson Mullins, Mr. Sullivan served as the chief counsel for advocacy in the Small Business Administration from 2002 to 2008. Mr. Sullivan earned his JD from Suffolk University Law School and a bachelor of arts in English from Boston College.

We welcome you.

Mr. Stuart Sessions is president of Environomics. Mr. Sessions was formally an analyst and manager with the Office of Management and Budget and Environmental Protection Agency. Mr. Sessions holds a master's of public policy from the Kennedy School of Government at Harvard University and a bachelor of arts and economics from Amherst College. Mr. Sessions is testifying today on behalf of the Coalition for Workplace Safety.

Thank you, and we welcome you.

Ms. Tammy Miser is an advocate for worker safety and founder of United Support and Memorial for Workplace Fatalities, an organization that serves as an advocacy group for individuals affected by workplace-related injury or death, and to add to that, has experienced the impact in her own life.

We welcome you and thank you for being here.

And then, finally, Ms. Jacqueline Holmes works in the law firm of Jones Day, where she focused her practice on litigation involving federal and state regulatory agencies. Ms. Holmes earned a JD from Loyola Law School in Los Angeles, California, and a bachelor in science from the California Institute of Technology. Ms. Holmes is testifying today on behalf of the U.S. Chamber of Commerce.

And we welcome you. Thank you.

Before I recognize each of you to provide your testimony, let me briefly explain our lighting system. You will each have 5 minutes to present your testimony. When you begin, the light in front of you will turn green. When 1 minute is left, the light will turn yellow. And when your time is expired, the light will turn red, and it doesn't get any redder than that.

I promise I won't gavel you down mid-sentence. I probably won't gavel you down, either. But we will make it clear that your time

is expired. But I would ask you that you try to wrap up your testimony when your time has expired.

After everyone has testified, members will each have 5 minutes to ask questions of the panel. I won't make the same promise to members that I won't gavel them down when their time is expired, but I am sure that we can work on that.

With that, let me now turn to our distinguished panel, and let's begin with Mr. Sullivan.

STATEMENT OF HON. THOMAS M. SULLIVAN, ESQ., OF COUNSEL, NELSON MULLINS RILEY AND SCARBOROUGH

Mr. SULLIVAN. Thank you, Mr. Chairman, members of the committee. I am pleased to present this testimony on how OSHA considers the impact on small entities when developing regulatory proposals.

The testimony this morning is not being presented on behalf of any specific clients at my law firm. Rather, my advice today is drawn from my 2 decades of work on small business regulatory issues. I would like to briefly summarize my statement, so I ask that the full written statement be entered into the record.

Thank you.

Chairman WALBERG. So ordered.

Mr. SULLIVAN. The Regulatory Flexibility Act requires agencies to satisfy certain procedural requirements when they plan new regulations, including identifying the small entities to be affected, analyzing and understanding the economic impacts that will be imposed, and considering alternative ways to achieve the regulatory goal, while reducing the economic burden on those entities.

The Reg Flex Act was amended in 1996 by the Small Business Regulatory Enforcement Fairness Act—yes, there is an acronym. That acronym is SBREFA, and SBREFA requires OSHA, EPA, and the newly created Consumer Financial Protection Bureau to convene small-business review panels. I refer to those panels as SBREFA panels. Whatever their planned rules are likely to have a significant economic impact on a substantial number of small entities.

The panel prepares a report containing constructive recommendations for the agency planning the rule, and that report is published with the proposed rule.

So why are there small-business protections in the rulemaking system? Well, there are three basic reasons. One-size-fits-all federal mandates don't work when applied to small business. Small businesses face higher costs per employee to comply with the federal regulations. And small businesses are critically important to the American economy.

First, prevention of one-size-fits-all federal mandates. Many times, federal rules that may work for large corporations simply don't work for small firms. The Regulatory Flexibility Act is supposed to force federal regulators to think about how a small operation would actually comply with a rule and tweak the proposal to make sure that it works for the small business, in addition to the large corporation.

Disproportionate impact that federal rules have on small business. Research published last year pegs the total cost of complying

with federal rules at over $1.75 trillion. That burden amounts to a cost of $15,580 per household, which is more than 1.5 times what households pay for medical care. Most alarming is the fact that in the 4 years studied, the cost of complying with federal rules rose faster than the cost of per household of providing medical care.

Implementation of the Regulatory Flexibility Act at OSHA. In three recent regulatory actions, OSHA appears to be ignoring both the spirit and the legal requirements of the Reg Flex Act. First, OSHA's MSD reporting rule.

In January last year, OSHA proposed that businesses record work-related MSDs in a new column on their OSHA 300 Log. OSHA estimated that the proposed rule would require employers to spend roughly 5 minutes to become familiar with the new rule and 1 minute to record the MSD injury or illness.

This burden estimate is what OSHA used to justify its decision not to move forward with a SBREFA panel. Small businesses felt that OSHA's cost estimate reflected a misunderstanding of how small employers work and the pressure that employers feel writing down a number on a form that is required by the federal government.

The purpose of SBREFA is for OSHA to better understand the impacts its regulations will have and how its cost estimates play out in the real world. OSHA missed that opportunity by deciding to bypass the SBREFA panel process.

The second rule that I can talk about is the proposed changes to the on-site consultation procedures rule. Last September, OSHA proposed changes to the program. And the on-site consultation program is a shining example of how OSHA can evolve from "gotcha" to "help ya."

When OSHA decided to propose changes, it did not convene a SBREFA panel. OSHA, therefore, missed an opportunity to learn directly from small businesses about how changes would affect their participation in the program.

And, finally, OSHA's noise rule. In October, OSHA proposed to change the requirements for employers to control noise exposures. OSHA's proposal last year was to reverse the preference for personal protective equipment and require engineering controls without consideration of cost unless it would threaten a company's "ability to remain in business."

OSHA circumvented the SBREFA panel requirement by declaring its proposal was just revising an interpretation and therefore was not a rule subject to normal rulemaking procedures, including the SBREFA panel requirement. That type of rationale is unfortunate, because it ignored the value of SBREFA panels.

OSHA's policy apparatus suffers—and I will sum up here—when the agency treats the SBREFA process as a legal barrier. The purpose of the Reg Flex Act and the SBREFA amendments is for OSHA to benefit from small-business input, so the agency can fulfill its mission to ensure safe workplaces without unduly burdening small employers. Constructive input by small firms provides OSHA with valuable insight that allows for the agency to draft proposals that will work on Main Street, and OSHA benefits when it embraces the SBREFA process as a constructive dialogue.

Thank you.

[The statement of Mr. Sullivan follows:]

Prepared Statement of Hon. Thomas M. Sullivan, Esq., of Counsel, Nelson Mullins Riley and Scarborough

Mr. Chairman and Members of the Committee, I am pleased to present this testimony on how the Occupational Safety and Health Administration (OSHA) considers the impact on small entities when developing regulatory proposals. My name is Tom Sullivan. I am an attorney with the law firm of Nelson Mullins Riley & Scarborough, LLP and I run the Small Business Coalition for Regulatory Relief.[1] This testimony is not being presented on behalf of any specific clients. Rather, my advice to the Committee today is drawn from my two decades of work on small business regulatory issues.

My first job in Washington was with the U.S. Environmental Protection Agency (EPA). I served under both Administrator Bill Reilly and Administrator Carol Browner. After learning about regulatory policy development from within government, I joined the Washington office of the National Federation of Independent Business (NFIB). In February 2002, I was unanimously confirmed to head the Office of Advocacy at the U.S. Small Business Administration (SBA).[2] The Office of Advocacy is responsible for overseeing the Regulatory Flexibility Act.[3] I served as Chief Counsel for Advocacy until October 2008.

OSHA must consider the impact on small entities prior to issuing a new regulation

The Regulatory Flexibility Act requires federal agencies to satisfy certain procedural requirements when they plan new regulations, including: (1) identifying the small entities that will be affected, (2) analyzing and understanding the economic impacts that will be imposed on those entities, and (3) considering alternative ways to achieve their regulatory goal while reducing the economic burden on those entities.[4] The Regulatory Flexibility Act was amended in 1996 by the Small Business Regulatory Enforcement Fairness Act (SBREFA).[5] SBREFA requires OSHA, EPA, and the Consumer Financial Protection Bureau (CFPB) to convene small business review panels (I refer to the panels as "SBREFA panels ") whenever their planned rules are likely to have a significant economic impact on a substantial number of small entities. SBREFA panels include representatives from SBA's Office of Advocacy, the Office of Management and Budget's Office on Information and Regulatory Affairs (OIRA) and the agency proposing the rule. The panel prepares a report containing constructive recommendations for the agency planning the rule and that report is published with the proposed rule.

The need for small business protections in the federal rulemaking system

There are three basic reasons for the Regulatory Flexibility Act.

- one-size-fits-all federal mandates do not work when applied to small business; and
- small businesses face higher costs per employee to comply with federal regulation; and
- small businesses are critically important to the American economy.

Prevention of one-size-fits-all federal mandates

Many times federal regulations that may work for large corporations simply do not work for small firms. I remember working with Brian Landon on the ergonomics regulation when it was being developed in the late 1990's. Brian owned and operated a carwash in Canton, Pennsylvania. Parts of the ergonomics regulation distinguished between the employees who worked on equipment and employees who were in charge of paperwork and accounting. As is the case in many small businesses, Brian did all the jobs. And, his most trusted employees also performed multiple tasks, some clerical and some operational. The ergonomics regulation spelled out duties for equipment maintenance employees that were very different from those responsibilities for employees in charge of paperwork. Brian continually asked OSHA for help to figure out which classification would apply to him—and never really got an answer. Sometimes we forget that our country has millions of small enterprises that are at various stages of automation. For instance, when there is a new labeling requirement, a tendency is to naively think that compliance with a regulation mandating changes to labels can be accomplished with little effort through a computer program. The Regulatory Flexibility Act is supposed to force federal regulators to think about how a small operation would actually comply, realizing that it may not be as simple as entering information into a computer.

The disproportionate impact federal regulations have on small business

Research published in September by Nicole Crain and W. Mark Crain of Lafayette College updates three previous studies on the impact of federal regulations on small business.[6] The report is entitled, "The Impact of Regulatory Costs on Small Firms," and it provides a look at the regulatory burden in 2008. The total cost of complying with federal regulations was over $1.75 trillion. The burden amounts to a cost of $15,586 per household which is more than 1½ times what households pay for medical care. Most alarming, is the fact that in the four years studied, the cost of complying with federal regulations rose faster than the per-household cost of medical care.

The Crain study found that small businesses shoulder costs that are 36% more than their larger business competitors. Firms with fewer than 20 employees pay $10,585 per employee per year and firms with 500 or more employees pay $7,755 per employee to comply with federal regulations. The cost difference is most severe when looking at compliance with environmental regulations, with the smallest firms paying 4 times the amount per employee than the largest businesses.

The research provides data for a common sense reality in a small business owner's world. Small businesses generally do not have vice presidents for safety and health to figure out OSHA rules. They do not have accounting departments to navigate changes to the tax code. Even if small businesses hire accountants to prepare their taxes, the owners take hours sweating the details because it is their signature on the IRS forms. Nor do small firms usually employ occupational health experts and safety engineers to keep up with OSHA rules and the more than 22,000 national consensus standards that exist in the United States. The task of figuring out volumes of federal requirements often falls on the small business owners themselves, taking more time for them than it would for regulatory experts. Since time is money—it costs the small businesses more.

The intention of the Regulatory Flexibility Act and, in particular the SBREFA panel process, is to bring small entities directly into an advisory role with agencies so that final regulations reflect an accurate understanding of how compliance can cost small firms more.

The importance of small business to the U.S. economy

Recent figures show there are more than 27.3 million small businesses in the United States.[7] They represent over 99% of the employer firms in the United States, employ half of the private sector employees, and produce 13 times more patents per employee than large research & development firms.[8] Of particular importance is the job-creation aspect of entrepreneurship. Small firms accounted for 65% of the 15 million net new jobs created between 1993 and 2009. Data show that since the 1970's small businesses hire two out of every three jobs and the Ewing Marion Kauffman Foundation likes to point out that in the last 30 years, literally all net job creation in the United States took place in firms less than five years old.[9]

History of the Regulatory Flexibility Act

One of the top five recommendations from the 1980 White House Conference on Small Business was for a law requiring regulatory impact analysis and a regular review of regulations. That recommendation became reality when President Jimmy Carter signed the Regulatory Flexibility Act into law on September 19, 1980. The Regulatory Flexibility Act directed all agencies that use notice and comment rulemaking to publicly disclose the impact of their regulatory actions on small entities and to consider less burdensome alternatives if a proposal was likely to impose a significant impact. The law authorized SBA's Chief Counsel for Advocacy to appear as amicus curiae in Regulatory Flexibility Act challenges to rulemakings and it required SBA's Office of Advocacy to report annually on agencies' compliance with the Regulatory Flexibility Act.

In 1996, Congress considered changes to the Regulatory Flexibility Act. Again, there was a White House Conference—and that conference's top recommendation was to strengthen the Regulatory Flexibility Act by directing small business participation in rulemakings and to allow for judicial review of agency compliance. President Clinton signed SBREFA in March of 1996.[10] Those amendments to the Regulatory Flexibility Act established formal procedures for the EPA and for OSHA to receive input from small entities prior to the agencies proposing rules.[11]

In August of 2002, President Bush signed Executive Order 13272, Proper Consideration of Small Entities in Agency Rulemaking.[12] The Executive Order directed SBA's Office of Advocacy to train regulatory agencies on how to comply with the RFA and further instructed agencies to consider the Office of Advocacy's comments on proposed rules. The Small Business Jobs Act signed five months ago codified the

Executive Order's requirements for agencies to respond to the Office of Advocacy's comments in final rules.[13]

There was one recent additional amendment to the Regulatory Flexibility Act. An amendment authored by Senators Olympia Snowe and Mark Pryor was adopted as part of the Dodd-Frank financial regulatory reform law. That amendment requires the newly created Consumer Financial Protection Bureau (CFPB) to undergo a SBREFA panel process when issuing rules, the same requirement that has applied to EPA and OSHA since 1996.[14]

What is required by the Regulatory Flexibility Act

The basic spirit of the RFA is for government agencies to analyze the effects of their regulatory actions on small entities and for those agencies to consider alternatives that would allow agencies to achieve their regulatory objectives without unduly burdening small entities.

The RFA covers all agencies that issue rules subject to the Administrative Procedure Act (APA). The RFA requires agencies to publish an initial regulatory flexibility analysis (IRFA) unless the promulgating agency certifies that the rule will not have a significant impact on a substantial number of small entities.[15] The IRFA is supposed to be a transparent small business impact analysis that includes discussion of alternatives that can accomplish the stated objectives of the rule while minimizing impact on small entities. In the case of EPA, OSHA, and the CFPB, a SBREFA panel aids the agency's analysis and discussion of alternatives. This transparent analysis and exchange of information with small entities is published with the agency's proposed rule, educating stakeholders who participate in the notice and comment process.

The availability of an IRFA allows for a more informed notice and comment process that can guide an agency's formulation of its final rule. Under the RFA, an agency's final rule must contain a final regulatory flexibility analysis (FRFA) if it published an IRFA with its proposal. The FRFA is basically a public response to issues raised in the IRFA.

Implementation of the Regulatory Flexibility Act at OSHA

Under the Regulatory Flexibility Act, an agency either certifies that a proposed rule has no significant economic impact on a substantial number of small entities or the agency prepares an IRFA on the proposal. When OSHA decides to prepare an IRFA, the agency convenes a SBREFA panel to obtain pre-proposal input from small entities. In three recent regulatory actions, OSHA appears to be ignoring both the spirit and the legal requirements of the Regulatory Flexibility Act. Even if OSHA is able to certify that a regulation will not have sufficient impact to warrant a SBREFA panel, the agency always has the option to voluntarily use the SBREFA panel process to gain insight from the small business community.

1. Proposed Occupational Injury and Illness Recording and Reporting Requirements Rule (MSD Reporting Rule):[16]

In January of last year, OSHA proposed that businesses record work-related musculoskeletal disorders (MSDs) in a new column on their OSHA 300 Log. When OSHA proposed the rule, it certified under the Regulatory Flexibility Act that the rule, if promulgated, would not have a significant economic impact on a substantial number of small entities.[17] OSHA estimated that the proposed rule would require employers to spend roughly 5 minutes to become familiar with the new rule and one minute pre MSD injury or illness to record the MSD in the new column on the OSHA 300 Log. This burden estimate is what OSHA used to justify its decision to move forward with the rule without a SBREFA panel.

Small businesses strongly disagreed with OSHA on its estimate of how much the rule would cost. Recording an MSD in a column is not as simple as just transcribing a number. Under the rule, employers would be required to diagnose whether the injury or illness is a MSD and whether it is work-related. Keep in mind that after several years of study and research, experts are unable to reach consensus over the definition of an MSD, yet small business owners would be expected to make a diagnosis of the injury or illness and determine whether it is work related—in less than 5 minutes. That burden estimate reflected a clear misunderstanding of how small employers work and the pressure of legal liability employers feel when writing down a number on a form required by the federal government.

The purpose of SBREFA panels is for OSHA to better understand the impacts its regulations will have and how its cost estimates play out in the real small business world. OSHA missed that opportunity by deciding to bypass the SBREFA panel process.

2. Proposed changes to On-Site Consultation Procedures rule:[18]

Last September, OSHA proposed changes to the criteria under which participants in the agency's On-site Consultation program could be subject to enforcement action by OSHA inspectors. The On-site Consultation program is a shining example of how OSHA can evolve from "gotcha" to "help ya." Under the program, small businesses can request a free consultation with a state-certified consultant. The consultant identifies hazards and provides advice on how to address them.

Part of the program's success is derived from the understanding that information uncovered by the voluntary inspection is not shared with OSHA enforcement if the identified hazards are corrected. OSHA's proposal last September threatened to break down the barrier between the On-site Consultation program and OSHA's enforcement program. I doubt OSHA wanted to push small firms out of its On-Site Consultation program, but the agency lacked an appreciation for how the changes would impact small business's willingness to participate. OSHA did not convene a SBREFA panel prior to proposing the changes to its consultation agreements program despite the On-site Consultation program's focus on small business. OSHA, therefore, missed an opportunity to learn directly from small businesses about how changes would affect their participation in the program. Through a SBREFA panel, OSHA would have heard how the agency could achieve its goal, without scaring away small businesses from a program that has improved workplace safety in thousands of small businesses.

3. Proposed Interpretation of OSHA's Provisions for Feasible Administrative or Engineering Controls of Occupational Noise:[19]

In October, OSHA proposed to change the requirements for employers to control noise exposures. Currently, OSHA requires engineering and administrative controls to prevent hearing loss if personal protective equipment (PPE) such as earplugs is ineffective in reducing workplace noise to acceptable levels or if such controls can be implemented for less cost than PPE. OSHA's proposal last year was to reverse the preference for PPE and require engineering controls without consideration of cost unless it would threaten a company's "ability to remain in business."[20]

OSHA circumvented the SBREFA panel requirement by declaring its proposal was just revising an interpretation and, therefore, was not a new rulemaking subject to normal rulemaking procedures, including the SBREFA panel requirement. That type of rationale was unfortunate because it ignored the value of SBREFA panels. A SBREFA panel could have informed OSHA that PPE has proven effective in reducing harmful exposure to noise in the workplace and that driving employers away from the preference for PPE could actually increase danger. Also, a SBREFA panel could have informed OSHA about the cost considerations of engineering controls. Maybe OSHA wanted to see what engineering controls were "feasible" for small manufacturers. The way to find out was to convene a SBREFA panel, not to declare that "feasible" is anything short of causing a business to close its doors and go out of business.

Conclusion

In the examples of OSHA's proposed MSD reporting rule and OSHA's proposed changes to its On-site Consultation program, SBA's Office of Advocacy wrote to the agency and shared the concerns voiced by the small business community.[21] In both letters, the Office of Advocacy publicly criticized the failure by OSHA to incorporate flexibility for small business in their proposals. Even though OSHA recently pulled back its plans to go ahead with the noise rule and the MSD reporting rule, the Committee is justified in its concern that OSHA is moving forward with regulatory policy that will impact the small business community in a way that ignores their input. OSHA's policy apparatus suffers when the agency treats the SBREFA process as a legal barrier. The purpose of the Regulatory Flexibility Act and the SBREFA amendments is for OSHA to benefit from small business input so the agency can fulfill its mission to ensure safe workplaces without unduly burdening small employers. Constructive input by small firms provides OSHA with valuable insight that allows for the agency to draft proposals that will work on Main Street. OSHA benefits when it embraces the SBREFA process as a constructive dialogue.

ENDNOTES

[1] See *http://www.SBCRR.com.*

[2] See *http://www.sba.gov/advocacy.*

[3] Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164 (1980), amended by the Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, 110 Stat. 857 (1996) (codified as amended at 5 U.S.C. §§ 601-612), also amended by § 1100 G of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 2112 (July 21, 2010).

[4] Keith W. Holman, The Regulatory Flexibility Act at 25: Is the Law Achieving Its Goal?, 33 Fordham Urban Law Journal 1119 (2006).

[5] Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, 110 Stat. 857 (1996).
[6] Nicole V. Crain and W. Mark Crain, The Impact of Regulatory Costs on Small Firms, written for the Office of Advocacy, U.S. Small Business Administration (September 2010), available at *http://www.sba.gov/advocacy/853/2016.*
[7] Office of Advocacy, U.S. Small Business Administration, Frequently Asked Questions (January 2011), available at *http://www.sba.gov/advocacy/7495.*
[8] Id.
[9] John Haltiwanger, Business Dynamics Statistics Briefing: Jobs Created from Business Startups in the United States, Ewing Marion Kauffman Foundation (January 2009), available at: *http://www.kauffman.org/research-and-policy/bds-jobs-created.aspx.*
[10] Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, 110 Stat. 857 (1996).
[11] See, 5 U.S.C. §609.
[12] Executive Order 13272, Proper Consideration of Small Entities in Agency Rulemaking, 67 Fed. Reg. 53461 (August 16, 2002).
[13] Small Business Jobs Act of 2010, Pub. L. No. 111-240, §1601 (September 27, 2010).
[14] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, §1100G (July 21, 2010).
[15] See, 5 U.S.C. §605(b).
[16] 75 Fed. Reg. 4728 (January 29, 2010).
[17] 75 Fed. 4736.
[18] 75 Fed. Reg. 54064 (September 3, 2010).
[19] 75 Fed. Reg. 64216 (October 19, 2010).
[20] 75 Fed. Reg. at 64217.
[21] Susan M. Walthall, Acting Chief Counsel for Advocacy, letter to OSHA Assistant Secretary David Michaels, (March 30, 2010). Available at: *http://www.sba.gov/content/letter-dated-033010-department-labor-occupational-safety-and-health-administration.* Winslow Sargeant, Chief Counsel for Advocacy, letter to OSHA Assistant Secretary David Michaels, (November 2, 2010). Available at: *http://www.sba.gov/content/letter-dated-110210-department-labor-occupational-safety-and-health-administration.*

Chairman WALBERG. Thank you, Mr. Sullivan.
Moving on to Mr. Sessions?

STATEMENT OF STUART SESSIONS, PRESIDENT, ENVIRONOMICS, INC., TESTIFYING ON BEHALF OF THE COALITION FOR WORKPLACE SAFETY

Mr. SESSIONS. Good morning, Mr. Chairman and members of the Subcommittee on Workforce Protections. Thank you for inviting me here to testify specifically on OSHA's recent proposal regarding the noise exposure standard and the potential impact of this proposal on job creation. This is one of OSHA's three actions that Tom Sullivan just referred to.

I am here on behalf of the Coalition for Workplace Safety. The coalition has retained me to analyze the potential cost and economic impacts if OSHA were to finalize this proposed new reinterpretation of the term "feasible" as it applies to the noise standard.

I want to share with the subcommittee today some initial results from two recent analyses of this new reinterpretation by OSHA that have been conducted by the coalition and its members. The two analyses are, number one, a series of case studies.

I have been working with a number—about a dozen different companies to evaluate what the impact of OSHA's proposal would be on their operations. How much would it cost each of these companies? How much would the new interpretation revise what they need to do in terms of meeting the noise standard? And what would these compliance costs mean to these businesses in terms of their competitive position and in terms of jobs?

The second piece of research is a large survey that has been done by the National Association of Manufacturers, in which they asked their manufacturing members what the impact of OSHA's proposal would be on their operations and on their competitive position. And

NAM obtained more than 315 lengthy responses to this questionnaire on the impact of the OSHA proposal.

I have combined data from these two sources, my case studies and the NAM survey, along with other data to attempt to estimate what the overall impact on the national economy would be if OSHA's proposal were finalized, the impact in particular in terms of costs and in terms of jobs.

I draw four conclusions from these analyses, and I would like to share these conclusions with the subcommittee. First, the proposed OSHA noise reinterpretation would affect a large number and very broad range of American businesses and their employees. Most companies involved in manufacturing, most involved in construction, and many involved in transportation have employees exposed to noise levels at which the OSHA reinterpretation would apply.

In addition, there are many other businesses that do various other activities, including lawn care, tree service, automobile repair, warehousing, anything involving maintenance and repair of large, noisy equipment that would also be affected by OSHA's proposal. In total, I estimate that somewhere between 2 million and 7 million workers would be affected by OSHA's proposal, and their employers would similarly be affected.

Second conclusion: The costs for American business to comply with OSHA's proposed new policy would be very high. OSHA estimated long ago that the average highly exposed worker who is exposed to a level of noise at which this proposal would have an impact, OSHA estimated that the average cost per engineering controls—engineering controls alone to protect that worker would average about $4,000 per worker per year.

The NAM survey provides more recent information than OSHA's old estimate on the cost per worker. And the NAM survey estimates costs for engineering controls alone as a protective approach of somewhere between $2,000 and $10,000 per year per highly exposed worker.

Under the current policy, employers are allowed to protect workers via a combination of engineering controls, administrative controls, and hearing protection—earmuffs, earplugs, and the like—and typically earmuffs and earplugs are far less expensive than engineering controls.

So OSHA's policy essentially requires employees to spend on the order of this $2,000 to $10,000 per employee, rather than the much lesser sums that they can spend to protect employees via hearing protection alone.

If we put these costs of $2,000 to $10,000 per worker per year together with the number of exposed workers, the total cost for OSHA's proposal, as I estimate it, is somewhere between $1 billion and $27 billion per year. This amount, if it were to be a cost of a regulation, would trigger the requirements for Executive Order 12866 and economic analysis of significant regulations, and it would trigger the SBREFA requirements that Mr. Sullivan referred to for small-business panels, et cetera. OSHA essentially sidestepped these procedural safeguards by issuing this as an administrative interpretation rather than a regulation.

Conclusion number three: OSHA's proposed new interpretation and these costs would have a substantial negative impact on U.S.

jobs and competitiveness. We have done a little bit of work to run the estimated compliance costs through a national model that predicts the macroeconomic impacts of compliance costs. Actually, we haven't run them through the model; we have analogized from a recent run of the model on it, a different, similar regulation.

And we estimate that the impact on the nation's employment, if OSHA's proposal were to be finalized, would be a loss of somewhere between 10,000 and 220,000 jobs.

Final conclusion number four. All of this would be for relatively little benefit in terms of improved hearing protection for workers. Two points.

One, currently the number of reportable work-related hearing losses for highly exposed workers is very low. The current system of—the current regulation and OSHA's previous interpretation of the noise standard are working, less than 0.6——

Chairman WALBERG. I would ask you to wrap up.

Mr. SESSIONS. Fifteen seconds. Less than 0.6 percent of workers are currently—have evidence of a work-related hearing loss. Under the current system, that is less than the number of—the percentage of the general population that has such hearing losses.

So there isn't a problem in the first place that the regulation would be addressing. And, secondly, the regulation would have minimal impacts in reducing—or the proposal would have minimal impacts in reducing this already low rate of hearing loss.

Thank you, sir.

[The statement of Mr. Sessions follows:]

Prepared Statement of Stuart L. Sessions, President, Environomics, Inc.

Good morning, Mr. Chairman and Members of the Subcommittee on Workforce Protections. Thank you for inviting me today to testify on OSHA's recent proposal regarding the noise exposure standard and the potential impact of the proposal on job creation.

I am Stuart Sessions, President of the consulting firm Environomics, Inc. I am here today representing the Coalition for Workplace Safety (CWS). The Coalition for Workplace Safety is a group of associations and employers who seek to cost-effectively improve workplace safety. The Coalition has retained me to analyze the potential costs and economic impacts if OSHA were to finalize their proposed new interpretation of the term "feasible" as it applies to the Agency's standards for occupational exposure to noise.

As an economist, I have worked for more than 30 years in analyzing how a wide variety of environmental, health and safety regulations and administrative actions may affect the U.S. economy. Roughly half of my work in analyzing the economic impact of environmental, health and safety requirements has been as a Federal government employee or contractor, and about half has been as a consultant to private industry.

OSHA proposed its reinterpretation of the noise standard as a policy interpretation and not specifically as a regulation. Nevertheless, this proposed action is typical of how a new government requirement, whether achieved by formal regulation or simply as a declaration of policy by the agency that enforces the regulations, can affect the U.S. economy and jobs.

I want to share with the Subcommittee today some initial results from two recent analyses of OSHA's proposed noise reinterpretation by CWS and its members. These analyses have not yet been completed, and they may well not be completed, since OSHA has withdrawn its proposed new interpretation. These analyses, however, focus directly on the Subcommittee's concern about how OSHA's requirements may affect job creation I expect that our preliminary findings from these analyses will be of interest and I have no expectation that the thrust of these analyses will change in a material way. The two analyses are:

1. Case studies. I have been working with about a dozen different companies on case studies of what the OSHA proposal would mean to their operations. The case studies examine how each of these employers complies with the OSHA noise stand-

ard now, what they would have to do differently if the proposed interpretation were finalized, and how much compliance with the new interpretation would cost them. And then, the case studies proceed to analyzing the impacts of these compliance costs: what would these compliance costs mean to these businesses and their competitive position, and what would the costs mean in terms of jobs? Would some of the current employees of these companies lose their jobs because the companies become less competitive and lose business, or might the noise compliance measures open new opportunities for these businesses and perhaps result in increasing numbers of jobs in the future?

2. NAM survey. The National Association of Manufacturers (NAM) has conducted a large survey of its member companies with regard to the companies' hearing protection programs for their employees and the potential impact of the OSHA noise proposal. NAM asked a broad set of questions of the companies, including similar questions as in my case studies about the costs and economic consequences of OSHA's proposed new interpretation. NAM has obtained more than 315 responses to their survey from manufacturing companies.

In addition to reporting today on some of the results from my case studies and the NAM survey, I have combined data from these and other sources and have estimated the overall potential impact on the national economy of OSHA's noise reinterpretation in terms of costs and in terms of jobs. While I readily admit that my estimates are rough and uncertain, they contrast with the complete absence of any economic analysis conducted by, or at least made public by, OSHA.

I draw four conclusions from this set of analyses—from the combination of my case studies, the NAM survey, and the national aggregate analysis:

1. The proposed OSHA noise interpretation would affect a large number and very broad range of American businesses and their employees.

2. The costs for American businesses to comply with OSHA's proposed new policy would be very high.

3. OSHA's proposed new interpretation would have substantial negative impacts on U.S. jobs and competitiveness.

4. All this would be for relatively little benefit in terms of improved hearing protection for workers.

Before I explain these conclusions in more detail, I would like to summarize what OSHA's proposed noise reinterpretation would have required.

OSHA has long had a standard that prescribes 90 decibels as the maximum average noise level to which a worker may be exposed over an 8-hour work shift. OSHA has for several decades maintained the policy that an employer can comply with this 90 decibel standard through whatever combination of three noise-limiting approaches that the employer finds is cost-effective. The three noise-limiting approaches include what are known as: 1) Engineering controls; 2) Administrative controls; and 3) Personal protective equipment. "Engineering controls" include measures to reduce noise by engineered means such as mufflers on noisy equipment, sound-deadening enclosures for noisy equipment, redesigning or changing equipment or processes so as to make them less noisy, and so forth. "Administrative controls" include measures such as rotating a worker's tasks so as to limit the fraction of his work shift that the worker spends performing activities with high noise levels. "Personal protective equipment", or PPE, includes such things as ear plugs or ear muffs that reduce the amount of noise exposure the individual worker receives despite whatever level of ambient noise surrounds the worker. In general, reducing a worker's noise level is substantially less costly through use of personal protective equipment than through engineering controls or administrative controls.

OSHA's noise standard does not treat these three means of reducing a worker's noise exposure equivalently. The standard requires an employer to limit exposure to 90 decibels first by implementing all feasible engineering and administrative controls. Only then, after all feasible engineering and administrative controls have been implemented, can an employer add personal protective equipment in order to get below the 90 decibel limit. The key in how OSHA has sensibly implemented for many years this preference for engineering and administrative controls lies in how OSHA has interpreted the term "feasible" as a limitation on the engineering and administrative controls that will be required. OSHA has long interpreted the word "feasible" as meaning "cost-effective relative to PPE". Those engineering and administrative controls that are defined as feasible and required to be implemented first consist only of those that are cost-effective relative to PPE. Or, said in a different way, if PPE is effective in limiting workers' noise exposure to less than 90 decibels and is less costly than engineering and administrative controls, the employer can choose to implement PPE rather than more costly engineering and administrative controls.

In the fall of last year, though, OSHA proposed to reinterpret the term "feasible" as it applies in the noise standard. OSHA proposed to reinterpret "feasible" to mean "capable of being done" instead of meaning "cost-effective". Under OSHA's proposed new interpretation, then, in seeking to limit noise exposures to below 90 decibels, an employer would need to implement all possible engineering and administrative controls without regard to cost unless the employer can show that the engineering and administrative controls would threaten the employer's ability to remain in business. Under the proposed new interpretation, the limit on required engineering and administrative controls would change from only those that are cost-effective to all such controls that are available short of putting the employer out of business.

Obviously OSHA's proposed new interpretation of the term "feasible" would greatly increase the required use of engineering and administrative controls relative to PPE in reducing noise exposures. I and the Coalition for Workplace Safety have been working to estimate the costs and economic impacts that would result from OSHA's proposed new policy. I would like to summarize the four conclusions that I have drawn from our analyses thus far.

1. The proposed OSHA noise interpretation would affect a large number and very broad range of American businesses and their employees.

There are a wide variety of tools, machines, vehicles and processes that can generate noise exceeding 90 decibels: saws, hammers, punches, presses, sanders, burners, boilers, blowers, crushers, generators, compressors, aircraft, trucks, busses, locomotives, boats, compressed air, combustion, abrasive blasting, welding and many, many more. Workers operating or maintaining these items, or performing other tasks in the vicinity of these items, can be exposed to noise that may exceed an average of 90 decibels across an 8-hour work shift.

I have reviewed various data sources in order to develop a rough estimate for the number of employees that are exposed above 90 decibels and that therefore could be affected by OSHA's proposed reinterpretation. I have organized these estimates by industry:

• Manufacturing. In regulatory impact analyses that OSHA developed in the late 1970s/early 1980s to support potential changes to the noise standard, the Agency estimated that 19.4% of all production employees in manufacturing industries (SIC codes 20 through 37, plus SIC 49, utilities) work in settings with average ambient noise exceeding 90 decibels. This estimate is rather old, but is apparently the most recent comprehensive estimate that OSHA has developed. Noise exposures in manufacturing have likely been reduced since OSHA's estimate. I will assume in my calculations that the fraction of manufacturing production workers now exposed above 90 decibels is somewhere between the roughly 20% that OSHA estimated 30 years ago and 2%, a level one-tenth as high.

• Construction (SIC 15-17). A large recent noise survey for residential construction trades found for virtually every job category that at least 10% of full-shift samples exceeded 90 decibels (roofer, framing carpenter, finish carpenter, excavator, drywall installer, brick mason and helpers, landscaper, miscellaneous trades). Exposures among commercial construction workers are higher than among residential workers, while exposures among heavy/public works construction workers are likely also to be higher. Any particular construction worker's noise exposure can vary significantly from shift to shift as a function of how much of the shift he spends using or near a noisy tool. A brick mason, for example, may spend a large share of one shift using a noisy brick saw, but may not use the saw at all on the next shift. The result is that the fraction of construction workers who are occasionally exposed above 90 decibels for a shift substantially exceeds the fraction of all full-shift samples that exceed 90 decibels. I will assume that somewhere between 20% and 50% of all construction workers are occasionally exposed above 90 decibels, in contrast to the roughly 10% or so of all construction worker samples that exceed 90 decibels.

• Transportation (SIC 40-49). Workers around concentrations of transportation vehicles, particularly aircraft, can be exposed to noise levels exceeding 90 decibels. I will assume that the fraction of non-office transportation workers exposed above 90 decibels is similar to that for manufacturing production workers; somewhere between 2% and 20%.

• Other industries. There are many additional industries where workers can often be exposed at average levels exceeding 90 decibels, such as lawn care, tree service, automobile repair, maintenance and repair of large, noisy equipment, and warehousing. These other industries likely account for many fewer highly exposed workers than manufacturing, construction and transportation. I have not sought to estimate the likely much smaller numbers of highly exposed workers in additional industries.

Combining recent employment figures for manufacturing, construction and transportation with estimates of the percentages of each industry's workers that are ex-

posed to average noise levels exceeding 90 decibels, I estimate that there are some 2 to 7 million workers currently exposed at such levels. These workers and their employers would be directly affected by OSHA's proposed new interpretation.

I have provided a table at the end of this testimony that shows these estimates and summarizes how I proceed further to calculate the costs and job impacts of OSHA's proposed policy.

2. The costs for American businesses to comply with OSHA's proposed new policy would be very high.

OSHA has not estimated what the costs would be for the additional engineering and administrative controls that would be necessitated by the policy. The most recent nationwide cost estimates that OSHA has developed involving additional noise controls can be found in the regulatory impact analyses in the late 1970's/early 1980's that I referred to earlier. At that time, OSHA estimated the costs for additional technologically feasible engineering and administrative controls sufficient to reduce ambient noise to 90 decibels or less as the equivalent of $4,037 per affected employee per year in 2010 dollars. Said another way, OSHA estimated for each employee exposed to ambient noise levels exceeding 90 decibels that the cost of engineering and administrative controls to reduce these levels to 90 decibels or below would average $4,037 per year. This cost estimate is OSHA's most recent, but it is still roughly 30 years old.

A much more current estimate for the costs of the engineering and administrative controls necessitated by OSHA's proposed reinterpretation can be developed from the NAM survey results and my case studies. Across these two data sources, 45 companies or facilities have estimated both the number of their employees exposed to average ambient noise levels exceeding 90 decibels and the costs of available engineering and administrative controls to reduce these exposures. The resulting estimates for the cost of the proposed OSHA policy per affected employee span a very wide range, all the way from less than $1 per employee per year to more than $200,000 per employee per year. The median estimate from the case studies and NAM's survey is $2,950 per affected employee per year, while the average across the 45 companies or facilities is $18,137 per employee per year. I believe that this average figure is skewed by several very high estimates of cost per employee that represent situations where costly controls would reduce noise exposures for very few workers, and that these controls might not actually be implemented in practice. I will assume that the controls more likely to be implemented in practice might average somewhere between about $3,000 and about $10,000 per employee per year. This range brackets the figure that OSHA derived previously of about $4,000 per affected employee per year.

These represent my estimated costs per affected worker of OSHA's proposed new policy for manufacturing industries specifically. (Both OSHA's estimate and the NAM survey that provided most of my cost data addressed manufacturers only.)

I would expect that the cost per affected worker for transportation industries would be roughly similar to these estimated costs for manufacturing industries. I thus will assume an identical range of between $3,000 and $10,000 per affected employee per year.

For construction industries, I believe that these costs for engineering and administrative controls would be much lower than for manufacturing, perhaps only one-tenth as much. Most of the engineering controls for construction involve changes to small equipment—less noisy saws, compressors, jackhammers, etc., in contrast to manufacturing where the noise-reducing measures would often involve changes to large machines, entire process lines or significant portions of a shop floor. For my very rough total national cost estimate for OSHA's proposed policy, I estimate the cost per affected worker in construction industries at one-tenth that for manufacturing, and thus roughly $300 to $1,000 per worker per year.

To develop an estimate for the total national cost of OSHA's proposed policy, we can multiply each of these figures on the cost per affected employee by the estimates I discussed earlier for the number of employees in different industries that are exposed to ambient workplace noise exceeding 90 decibels. In total, we get a national cost estimate for OSHA's proposed noise reinterpretation that is somewhere in the range from $1.2 billion dollars per year to $27 billion dollars per year. The total national cost is nearer the higher end of this range if we assume OSHA's figure to the effect that nearly 20% of manufacturing production workers are in work settings with ambient noise levels exceeding 90 decibels, while the figure is near the lower end of this range if we assume conservatively that only one-tenth as many workers are exposed to high noise levels as OSHA estimated.

An annual cost of somewhere between $1.2 and $27 billion is quite large relative to most other new requirements that the Federal government imposes on private industry. Only a few Federal regulations, typically fewer than five per year over the

several decades that OMB has been keeping records, impose a burden of this magnitude on the economy. This figure reflects all Federal regulations for all purposes—environmental protection, homeland security, transportation safety, consumer protection, etc., as well as occupational health and safety. OSHA's proposed new policy on noise would be among the most expensive new requirements that the Federal government considers each year.

This is a very large cost for a policy that OSHA proposed to adopt by simply declaring it, without meeting the due process sorts of requirements that would apply if the policy reinterpretation were instead to be a regulation. If OSHA's reinterpretation were to have been proposed as a regulation, as many would say it should have been, at a cost of more than a billion dollars per year this initiative would have been subject to the following important requirements:

• Executive Order 12866. The Executive Order requires any agency proposing a regulation that would cost more than $100 million to prepare a regulatory impact analysis (RIA). In the RIA, OSHA would need to: 1) Provide a clear and thorough explanation of the need for the proposed action; 2) Explicitly estimate the benefits and costs and economic impacts of the proposal; and 3) Fairly consider alternatives to the proposal.

• The Small Business Regulatory and Enforcement Fairness Act (SBREFA). OSHA's proposal would undoubtedly have a significant impact on a substantial number of small businesses. As such, pursuant to the requirements of SBREFA, OSHA would need to: 1) Analyze the impact of the proposed policy on small businesses specifically; 2) Convene a panel of small business representatives that would provide the Agency with advice on how potentially to reduce the impact of the proposal on small businesses; and 3) Consider a range of alternatives that would reduce the economic burden on small businesses.

By attempting to issue the noise standard interpretation as a policy declaration instead of a regulation, OSHA avoided all these procedural safeguards. OSHA avoided the need for analyzing costs and benefits and considering alternatives under Executive Order 12866. Indeed, the Office of Information and Regulatory Affairs was not even informed of this proposal. OSHA avoided the need to examine impacts on small businesses and the need to consider alternatives that might reduce these impacts. In my view, avoiding these requirements for analysis, disclosure and transparency makes for poor public policy.

3. OSHA's proposed new interpretation would have substantial negative impacts on U.S. jobs and competitiveness.

The companies responding to the NAM survey and those involved in the case studies have offered a variety of comments on what OSHA's proposed new interpretation would mean for their businesses. I will quote some responses to the question of whether OSHA's proposal would affect the company's competitive position:

• Foreign imports (even from Canada) are coming in at lower delivered cost. Labor content is already more than 25% of each sales dollar. More labor inefficiency [from administrative controls] will push us far higher.

• I would shut down.

• Most of our facilities agreed that given the estimated costs required to comply, they would in many cases either contract the work to outside suppliers (who would have to meet the same requirements) or consider moving the work out of the U.S.

• Cost increases would significantly increase cost for two processes where there is already significant and growing competition from China.

• Added costs with no commensurate increase in efficiency or output make us even less competitive than we are against the Chinese who have no such requirements to hamper them.

• The changes would have to be paid for. With already slim margins it would almost certainly require an increase in our product cost. It is already difficult to compete with foreign competitors on a cost basis. We can't and won't produce product for free or at a negative margin.

• Negative impact. We would have to invest precious assets in equipment that actually negatively affects productivity.

• We would shift more of our production overseas.

• We would attempt to fully automate the noisy process so it would not need an operator who would be exposed to the noise.

• As we continue to spend money on new and existing compliance requirements the cost to do business goes up each year. It gets tougher to stay competitive especially with the overseas markets because you can't pass these costs on to the customers.

• It would cost us a lot of unnecessary money. We are a small company and it would be a hit to our bottom line for sure, but our competitors would have the same issues so we'd all lose money together at least.

• There is no return on that investment. We don't see hearing loss now, so why invest any money in it?
• Our competition would be investing their money into projects that make them lower cost producers.
• Significant distraction from what we need to do to stay competitive in a globalized manufacturing economy.
• Implementing all feasible engineering and administrative controls would be a very expensive exercise that would have significant safety and financial consequences.

The great majority of the responses forecast an important negative impact on the responding company's competitiveness.

In answer to another question on whether OSHA's proposed new approach would cause the company to reduce its number of employees in the U.S., 70% of the respondents said "yes" and 30% said "no".

In my view, the best way to quantitatively estimate the ultimate economic impact from a broad new requirement such as OSHA's noise reinterpretation is to use a national economic forecasting and policy simulation model. The estimated industry-by-industry compliance costs from the new requirement are loaded into the model, and the model then predicts the particular industries that will be winners and losers and the overall impacts on GNP, employment and other economic variables of interest. We have not yet run such a model to estimate the impacts that would ensue from OSHA's proposed noise reinterpretation, but I believe that we can reasonably extrapolate from the recent results when such a model was run for a comparable potential new requirement.

The REMI Policy Insight Model is one of the most respected national economic forecasting models that is used to estimate the aggregate economic impacts from significant new spending initiatives, whether the initiatives involve private industry compliance spending such as may be required by a regulation, or investment spending such as might be associated with a governmental stimulus program. The REMI model was recently run to estimate the impact of EPA's proposed national regulation to tighten the air quality standard for ozone. EPA's potential requirement regarding ozone and OSHA's potential requirement regarding noise are qualitatively similar: both affect primarily the manufacturing and transportation industries, both will have broad national impact, and both have costs estimated to exceed a billion dollars per year. The recent REMI run for EPA's proposed ozone standard found that a net of about 8 U.S. jobs would be lost for every million dollars per year in compliance costs. Applying this factor to the compliance costs that we estimate for the proposed OSHA noise reinterpretation, we project a net loss of somewhere between about 10,000 and 220,000 U.S. jobs if OSHA's noise proposal were to be finalized.

4. All this would be for relatively little benefit in terms of improved hearing protection for workers

I would like to make two points here:

• First, it does not appear that work-related hearing loss is a frequent problem now, under OSHA's existing and long-standing noise regulation and enforcement policies.
• Second, it seems unlikely that OSHA's proposed policy shift would significantly reduce the already low rate of work-related hearing loss.

The current rate of work-related hearing loss is low

OSHA's noise standard requires an employer to operate a hearing conservation program if any employees are exposed to an average noise level exceeding 85 decibels. A hearing conservation program must include monitoring of ambient noise levels and employee noise exposures, provision of hearing protectors, annual audiometric testing of employees, specific follow-up activities if the annual audiogram shows indication of hearing loss, and more. The employer must provide hearing protection devices to all employees exposed above 85 decibels, and must both provide and require the use of hearing protection devices for all employees exposed above 90 decibels. And, as I discussed previously, the employer must also implement all feasible engineering and administrative controls to reduce exposures exceeding 90 decibels.

Among the companies responding to NAM's survey, more than 90% have employee exposures exceeding 85 decibels and operate a hearing conservation program as they are required to do under the noise standard. I want to emphasize these two important characteristics of the vast majority of the companies that have responded to the NAM survey. These companies: a) Have relatively high noise exposures (employees exposed over 85 decibels); and b) Take measures to protect their employees by operating the hearing conservation programs that OSHA requires. These companies

provide an ideal test for how well OSHA's longstanding approaches are performing in protecting workers' hearing. These companies have the relatively high noise levels that OSHA is concerned about, and they have been implementing the programs that OSHA mandates. What is the result in terms of hearing loss among the exposed workers at these companies?

The answer from the NAM survey is that these companies show very low rates of worker hearing loss. For the year 2010, 132 companies provided information on both the number of their employees exposed above 85 decibels and the number of employees that showed evidence of work-related hearing loss (a "Standard Threshold Shift" or STS). The percentage of these relatively highly exposed workers that had a recordable STS was only 0.59% (184 with STS out of 31,074 employees exposed above 85 decibels among the 132 companies that responded). This incidence of STS is very low.

This already low rate of work-related hearing loss is unlikely to decline much further with OSHA's proposed policy shift

Most companies in my case studies (and additional companies in the NAM survey) reported that the feasible engineering and administrative controls they would implement under the proposed OSHA policy shift would not be sufficient to reduce current exposures exceeding 90 decibels to below 90 decibels. PPE would continue to be required for these employees, despite the additional engineering and administrative controls. Under current OSHA requirements and policy the rate of work-related hearing loss among highly exposed workers is low and depends substantially on the efficacy of PPE—this situation would change little if OSHA changed its policy as proposed.

Summary of Conclusions

1. The proposed OSHA noise interpretation would affect a large number and very broad range of American businesses and their employees.
2. The costs for American businesses to comply with OSHA's proposed new policy would be very high.
3. OSHA's proposed new interpretation would have substantial negative impacts on U.S. jobs and competitiveness.
4. All this would be for relatively little benefit in terms of improved hearing protection for workers.

Thank you for the opportunity to participate in this hearing.

ESTIMATED COST/YR OF OSHA'S PROPOSED NEW INTERPRETATION OF FEASIBILITY FOR NOISE STANDARD

Sector	Current or typical # of workers	Percent in "line," non-office jobs	Percent of "line" workers needing controls because of ambient exposures >90 dBA		Cost/yr of engr/admin controls per worker exposed >90 dBA		Estimated total cost for OSHA policy (in $billions/yr)		Estimated jobs impact of OSHA policy	
			High estimate	Low estimate	High estimate	Low estimate	High estimate	Low estimate	High estimate	Low estimate
Manfacturing	14,000,000	60%	19%	2%	$10,000	$3,000	$16	$0.5	−130,368	−3,911
Construction ...	10,000,000	90%	50%	20%	$1,000	$200	$5	$0.4	−36,000	−2,880
Transportation	6,500,000	50%	19%	2%	$10,000	$3,000	$6	$0.2	−50,440	−1,513
Total	.....	.....	6,760,100	2,026,010	.....	.....	$27	$1	−216,808	−8,304

Chairman WALBERG. Thank you, Mr. Sessions. I apologize for not catching the red light sooner. Since this is my first chairman duties, I am more used to listening and enjoying what I am hearing or reacting to what I am hearing. But that won't continue long, and the next two witnesses I certainly will give some latitude, but my—you know, I am from a red state, so it looks just normal. But we will try to keep the time here. Thank you.

Moving on to Ms. Miser?

STATEMENT OF TAMMY MISER, EXECUTIVE DIRECTOR, UNITED SUPPORT AND MEMORIAL FOR WORKPLACE FATALITIES

Ms. MISER. Chairman Walberg and members of the subcommittee, thank you very much for asking me to be here today. My name is Tammy Miser, and I have traveled from Lexington, Kentucky, to give you a very personal story of why OSHA regulations are needed.

In 2003, my brother Shawn Boone, was 33 years old, and he was killed in an aluminum dust explosion. The company, Hayes Lemmerz, they produced aluminum wheels. They had had fires on a regular basis, and protocol was that they let the fires burn down and then they go back in and re-light the chip melt furnace. And they were also instructed not to call the fire department, because it was costing them too much money to do this.

So that is what they did. And my brother went back in to collect his tools in the furnace room, and there was an explosion. This explosion caused aluminum dust to rain down from the rafters and the equipment, and there was a second, more intense explosion.

This explosion actually left my brother blind with third-degree burns over most of his—at least 90 percent of his body, is what they were saying. Shawn was still conscious. He was still aware of what was going on. And some say that in between his cries for help he was joking about a fishing trip. It was just the kind of guy he was. He was a really wonderful guy.

So when we were able to actually—he had no clue what condition his body was in, because he couldn't see. And we think that that is probably why he was able to get through it and he was conscious in knowing what was going on.

But when we finally were able to see him, his face was splitting, he was swollen, his body was raw, and they refused to bandage his body. And I had been with him for a lifetime. He was my brother. And I could only recognize him by a few freckles on his face and—and this is the hardest thing that a family can face, truly.

And many can't take this. And in 2007, my youngest brother drove halfway across the United States with a few photos of Shawn and the phone records of the night he was killed tucked in his Bible. He proceeded to shoot himself in the head. And I can't say that this incident alone caused my brother to take his life, but I know that he was not able to handle it, and that was what was on his mind.

The argument that the regulations kill jobs, and I just really feel that it is just nonsense. There have only been two OSHA regulations in the past 10 years, crane and derricks and chromium. Both only affect a fraction of the U.S. businesses. As I talk to families around the country, I don't see this huge avalanche of regulations. It is more like a drought.

Rules that protect construction workers from dying in confined spaces has been on the regulatory agenda for 15 years. This little guy here, Steven Lillicrap, he was only 21 years old when he was pulled in to the cables of 100-ton crane. OSHA had been working on revising outdated crane standards for 10 years.

But this rule came too late for Steven. It was finally issued in July and is expected to prevent 22 deaths and 175 injuries and mil-

lions of dollars in property damage per year. The benefits far outweigh the costs of this rule.

The U.S. Chemical Safety Board warned OSHA in 2006 about combustible dust handlers. And it is not well known—but in 2002, the year before my brother was killed, they had also let OSHA know that this was an issue. So if just the National Fire Protection Association consensus standards were mandatory, my brother would still be here, and others would still be here today.

In 2008, the Imperial Sugar refinery dust explosion killed 14 workers and injured 36. And some of these were severely injured, severe burns. And the means to prevent this was well-known. Some companies choose to gamble with workers' lives because there are no OSHA standards.

When preventable disasters strike in the workplace, they not only take a huge toll on the injured and their families, but workers can lose their jobs and communities suffer. In 2009, the Sunoco refinery in Pennsylvania, the company decided not to rebuild after their explosion. Fifty workers were laid off. That same year, ConAgra's Slim Jim plant exploded. Three workers were killed, and 71 were injured. Before the disaster, 700 people were employed there. Now the place is closing.

A contractor working for ConAgra using a dangerous blowout procedure that purged natural gas in the indoor work environment is what had caused this. It was well known, that if OSHA had prevented—if OSHA could have prevented this with governing and rulemaking, this would have never happened.

There is no price tag that can be put on seeing your husband walk your daughter down the aisle or seeing your baby born. I have talked to family members that have had children and their husbands are gone. Their babies are never going to know their father. It is nothing like seeing your child graduate from college or holding your grandbaby.

I respectfully ask this subcommittee to not just look on one side of the ledger of the costs, but remember the benefits of the OSHA rules for workers, responsible employers, and families and communities.

Thank you.

[The statement of Ms. Miser follows:]

Prepared Statement of Tammy Miser, United Support and Memorial for Workplace Fatalities

CHAIRMAN WAHLBERG, RANKING MEMBER WOOLSEY AND MEMBERS OF THE SUBCOMMITTEE: My name is Tammy Miser. I am the founder of United Support and Memorial for Workplace Fatalities (USMWF). Our not-for-profit organization offers support, guidance, resources, and advocacy to empower family members who have lost a loved one from work-related injuries or illnesses. We work with other organizations, government agencies, and businesses as a catalyst for positive change to ensure safe and healthy working conditions for all.

My brother Shawn Boone worked at the Hayes Lemmerz plant in Huntington, Indiana where they made aluminum wheels. The plant had a history of fires, but workers were told not to call the fire department. My brother and a couple coworkers went in to relight a chip melt furnace. They decided to stick around a few minutes to make sure everything was ok and then went back to gather tools. Shawn's back was toward the furnace when the first explosion occurred. Someone said that Shawn got up and started walking toward the doors when there was a second and more intense blast. The heat from that blast was hot enough to melt copper piping. Shawn did not die instantly. He laid on floor smoldering while the aluminum dust continued to burn through his flesh and muscle tissue. The breaths that he took

burned his internal organs and the blast took his eyesight. Shawn was still conscious and asking for help when the ambulance took him.

Hayes Lemmerz never bothered to call any of my family members to let us know that there was an explosion, or that Shawn was injured. The only call we received was from a friend of my husband, Mark, who told them that Shawn was in route to a Ft. Wayne burn unit. (Mark also worked at the plant.) When Mark asked the hospital staff where Shawn was, we found that no one even bothered to identify him. We were told that there was a "white, unidentified male" admitted to the unit. When Mark tried to describe Shawn, the nurse stopped him to say that there was an unidentified male with no body hair and no physical markings to identify. So my Shawn was ultimately identified only by his body weight and type.

We drove five hours to Indiana wondering if it really was Shawn, hoping and praying that it wasn't. This still brings about guilt because I would not wish this feeling on anyone. We arrived only to be told that Shawn was being kept alive for us. The onsite pastor stopped us and told us to prepare ourselves, adding he had not seen anything like this since the war. The doctors refused to treat Shawn, saying even if they took his limbs, his internal organs were burned beyond repair. This was apparent by the black sludge they were pumping from his body.

I went into the burn unit to see my brother. Maybe someone who didn't know Shawn wouldn't recognize him, but he was still my brother. You can't spend a lifetime with someone and not know who they are. Shawn's face had been cleaned up and it was very swollen and splitting, but he was still my Bub. My family immediately started talking about taking Shawn off of life support. If we did all agree, I would be ultimately giving up on Shawn. I would have taken his last breath, even if there was no hope and we weren't to blame. I still had to make that decision. To watch them stop the machines and watch my little brother die before my eyes.

But we did take him off and we did stay to see his last breath. The two things I remember most are Shawn's last words, "I'm in a world of hurt." And his last breath.

This has been the hardest thing my family has had to deal with until 2007. My youngest brother drove half way across the United States with a few photo's and phone records of the night Shawn was killed that he had tucked into his bible. Tommy then proceeded to shoot himself in the head. I can't say that Shawn's death alone caused my brother to take his own life, but I know for a fact he couldn't deal with it and that was what was on his mind.

The U.S. Chemical Safety and Hazard Investigation Board (CSB) said the explosion that killed Shawn probably originated in a dust collector that was not adequately vented or cleaned. The dust collector was also too close to the aluminum scrap processing area. Hayes Lemmerz management allowed dust to accumulate on overhead beams and structures which caused a second, more massive explosion. The CSB concluded that had the company adhered to the National Fire Protection Association's standard for combustible metal dust, the explosion would have been minimized or prevented altogether.[1]

During my own struggle for information about the OSHA investigative process, it became clear that family member victims of workplace fatalities needed a place to get information and support. That's how USMWF was formed. We are a virtual community of individuals with the shared experience of losing a loved one from a work-related injury or disease. Thousands of family members across the U.S. suffer profoundly because of our nation's inadequate regulatory system and its failure to protect workers' fundamental right to a safe and healthy worksite.

The buzz is that OSHA regulations are bad for business and kill jobs. This is nonsense. There have only been 2 new OSHA regulations in the last 10 years: crane and derricks, and hexavalent chromium. Both only affect a fraction of U.S. businesses. As I talked to families from around the country who have lost loved ones from workplace hazards, I don't see an avalanche of new OSHA regulations. It's more like a drought. For example, a rule to protect construction workers from dying in confined spaces has been on OSHA's regulatory agenda for 15 years.

Steven Lillicrap was only 21 years old in February 2009 when he was fatally pulled into the cables of a 100-ton crane. OSHA had been working to revise its outdated crane safety standard for 10 years, but the new rule came too late for Steven. It was finally issued last July and is expected to prevent 22 deaths, 175 injuries, and millions of dollars in property damage per year. The benefits far outweigh the $154 million cost. When you look at the few standards that OSHA has issued over

[1] U.S. Chemical Safety and Hazard Investigation Board. Investigation Report Aluminum Dust Explosion, Hayes Lemmerz International, Huntington, Indiana, October 29, 2003. Report No. 2004-04-I-IN, September 2005.

its 40 year history, the benefits always exceed the costs. And those are only the benefits you can quantify.

The CSB warned OSHA in 2006 about combustible dust hazards. Had the National Fire Protection Association (NFPA) standard been implemented, as a mandatory regulation instead of a voluntary consensus code, my brother Shawn and many others would still be here today. In 2008 the Imperial Sugar refinery explosion killed 14 workers and 36 were burned. The means to prevent these deadly explosions is well known. And preventing dust explosions has been done before, such as in grain handling facilities. Prior to OSHA's 1978 safety standard, there were about 20 explosions per year in grain elevators. Today, there are only about six. Yet some companies choose to gamble with workers' lives because there is no OSHA standard and failing to act gives them a competitive advantage over more responsible companies.

When preventable disasters strike in the workplace, they not only take a huge toll on the injured and their families, but workers can lose their jobs and the community suffers.

Some disasters occur because employers fail to comply with safety regulations. After the 2009 explosion at the Sunoco refinery in Pennsylvania, the company decided not to rebuild its ethylene unit. Fifty workers were laid off.[2] Had there been better compliance with OSHA's process safety management requirements, it would never have happened.

Some disasters occur because of inadequate regulations. In 2009, Con Agra's Slim Jim plant exploded, 3 workers were killed and 71 were injured. A contractor was using a procedure that purged natural gas into the indoor work environment, instead of purging the gas out of doors and using an explosivity detection meter. This disaster could have been prevented if OSHA had regulations requiring natural gas to be purged out of doors. The CSB found that OSHA doesn't have specific rules for natural gas purging, nor are there voluntary codes.[3] Because there is no OSHA regulation, there have been too many explosions of this nature in commercial and industrial facilities.

The lack of regulations not only killed 3 workers at the ConAgra plant, it also killed jobs. Before the disaster 700 people worked at the factory. Now the factory is closing. Rather than rebuild the damaged portion of the plant, the company is consolidating production elsewhere.[4]

The T-2 gasoline additive factory near Jacksonville, Florida had a runaway reaction in December 2007 involving highly reactive sodium metal. The explosion killed 4 and injured 32, including 28 at surrounding businesses. Pieces of the building were found a mile away. An investigation by the CSB found that the reactions could have been prevented if OSHA's process safety management standard covered reactive hazards. Sadly, the owner of the T-2 factory was among those killed by the explosion. Three adjacent businesses had to relocate from the industrial area, and a fourth business—a trucking company—was put out of business due to the damage.

There's no price tag that can be put on seeing your husband walk your daughter down her wedding aisle, or seeing your son graduate from college, or holding a grandchild. The economic disruption to a family who loses a breadwinner is never offset by workers' compensation benefits. Workplace safety regulations and even-handed enforcement help level the playing field for employers who do the right thing versus those who take the low road.

A one-sided look at the costs of OSHA rules, but excluding the benefits, does a disservice to workers, responsible employers, families and communities.

Chairman WALBERG. Thank you, Ms. Miser. And thank you for your courage. And thank you for sharing this with us. I think it certainly punctuates the purpose of this subcommittee and the importance that we have as we carefully look at all the surrounding issues. Thank you.

Ms. Holmes, thank you for being here.

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[2] Logue T. Sunoco to lay off 40-50, close ethylene complex. Daily (Delaware) Times. July 7, 2009.

[3] U.S. Chemical Safety and Hazard Investigation Board. Urgent Recommendations on Gas Purging. August 2010.

[4] Nagem S, Wolf AM. Slim Jim plant's demise to put 450 out of work. NewsObserver.com. March 4, 2010.

STATEMENT OF JACQUELINE M. HOLMES, ESQ., OF COUNSEL, JONES DAY, TESTIFYING ON BEHALF OF THE U.S. CHAMBER OF COMMERCE

Ms. HOLMES. Thank you, Chairman Walberg, Ranking Member Woolsey, and members of the subcommittee. I appreciate you inviting me to testify today.

Before I summarize my own testimony, I would like to say that I was very touched, as I am sure we all were, by Ms. Miser's statement. And I, too, appreciate her being here. It is always a tragedy when someone loses their life in the workplace.

And I refer in my statement, as I believe you did, as well, Chairman Walberg, in your opening statement, to the shared goal of worker safety that is shared by businesses and workers, and it really is a shared goal. The question, really, that we want to look at is, what is the best way to achieve that goal in the most cost-effective way?

By way of background, for purposes of my own testimony, I am an attorney with the Washington, D.C., office of Jones Day, where I have practiced in the OSHA area since 1994. I am pleased to be here today on behalf of the United States Chamber of Commerce, which represents the interests of over 3 million businesses of all sizes and in all sectors; 96 percent of the chamber's members are small businesses who employ 100 or fewer employees.

It may seem surprising to some members of the subcommittee that we are here—that many of us are here testifying today about proposals that OSHA has withdrawn, such as, for example, the noise standard reinterpretation. But we believe it is important to do so, because these proposals reflect a troubling pattern of efforts by the agency to impose substantial burdens on American business without regard to the cost of those efforts or their efficacy in improving worker health and safety or, indeed, in the case of the noise standard, whether there is a problem that requires solving in the first place. This is contrary to OSHA's own interpretation of its statutory mandates.

Understanding that OSHA regulations can be very costly, the courts and—itself impose very substantial burdens on OSHA when it chooses to regulate. OSHA must first identify a problem that creates a significant risk of harm in the workplace. It must, second, establish that its proposal will substantially reduce that risk. It must, third, show that its proposal is economically and technologically feasible. And it must, fourth, show that it selected the most cost-effective means of achieving the health and safety objective that the standard sets. The act, of course, does not require a formal cost-benefit analysis, but that does not mean that costs can be ignored.

I would like to focus briefly on the last requirement that I mentioned, which is the requirement of cost-effectiveness, in other words, that OSHA select the most cost-effective means to achieve its regulatory goals. This is echoed by President Obama's recent executive order, which suggests that agencies should use the least burdensome means to achieve its regulatory ends. Those two concepts are really quite similar.

OSHA has embraced this interpretation of the act. It did so in the early 1990s to assure the federal courts that the OSH ACT did

not represent an unconstitutional delegation of authority to the agency.

But OSHA completely ignored this requirement for purposes of its reinterpretation of the noise standard. Instead, it charged ahead with its reinterpretation without any effort to consider whether what it was proposing was the most cost-effective means of achieving its objectives. And given the information that Mr. Sessions has presented to the subcommittee a few moments ago, it seems quite clear that the methods that OSHA selected are not the most cost-effective.

The problem with OSHA's reinterpretation of the noise standard, however, runs even deeper than its failure to select the most cost-effective alternative. Indeed, its failure to study the cost is only the beginning.

In proposing its reinterpretation, OSHA also made no effort whatsoever even to identify that there was a problem that required solving. To be sure, it pointed to hearing loss generally as a workplace health and safety issue, which we would all agree that it is, but it failed to examine the scope of the problem or whether current efforts are reducing it. Had it done so, it would have seen occupational hearing loss cases have consistently declined since they have been separately reported on employer injury and on the logs.

You can see on the charts that are up on the screen that we have a declining trend since 2003 when OSHA mandated that employers separately report these types of injuries and illnesses.

These results suggest employers are doing quite well in reducing occupational exposure to noise. Noise, like some other—noise like other—some other exposures occurs both in the workplace and out of the workplace. And over the same period, noise exposures have—outside the workplace have exploded, the advent of iPods, Bluetooth headsets. People are constantly wired for sound. And the fact that we still are seeing a decrease in occupational exposure suggests that employers are doing a pretty good job.

Thus, the data suggests employers are really working—and employer efforts are working to reduce hearing loss cases. "If it ain't broke, don't fix it" is not an enforceable maxim of administrative law, but it is not a bad place to start.

So here we are. OSHA hasn't demonstrated any obvious problem that requires solving, gave no examination whatsoever to the costs of this proposal. On top of that, the agency made the proposal at a time of substantial unemployment.

It is, in effect, telling American industry that it has to expend resources retrofitting its factories rather than hire new employees and increase production. And because OSHA didn't propose to change the exposure levels that are acceptable under the noise standard, but simply to require engineering controls rather than personal protective equipment in the first instance, it was doing so to achieve exactly the same noise exposure levels as are currently achieved through less expensive means.

Even if OSHA came up with a legal basis to support its actions—and it hasn't done so yet—that doesn't mean it should take these actions now without any consideration for how it may impact the U.S. economy.

While we appreciate that OSHA has withdrawn this proposal and committed to a number of steps, such as increased outreach, a lack of outreach was not the problem with the proposal. The problem is the lack of common sense and an overabundance of arrogance. There is no evidence that OSHA even believed it necessary to assess seriously whether there was a problem that required fixing, to study the cost, or to consult with the business community before making this change, and these failures led them to propose something that was bad policy, plain and simple.

If the law allows OSHA to take such steps—and I am skeptical that it does—that law should be changed. And if this is how the agency intends to use the agency that it has, it should not be given any more.

Thank you very much.

[The statement of Ms. Holmes follows:]

Prepared Remarks of Jacqueline M. Holmes

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

February 15, 2011

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[3] 29 U.S.C. § 652(8).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II. "Reinterpreting" the Noise Standard

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

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

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

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

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

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

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

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

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

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

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

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

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

III. A Solution in Search of a Problem

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

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[17] 29 U.S.C.§ 655(b).

[18] 29 U.S.C. § 652(8).

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

[20] 29 U.S.C. § 655(b)(5).

[21] *Id.*

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

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

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

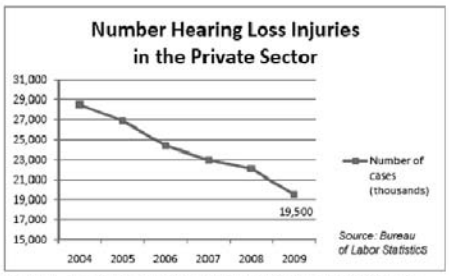

Figure 1—Hearing Loss Injuries have been declining steadily since being added to OSHA 300 Log form.

[23] 29 U.S.C. § 652(8).

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

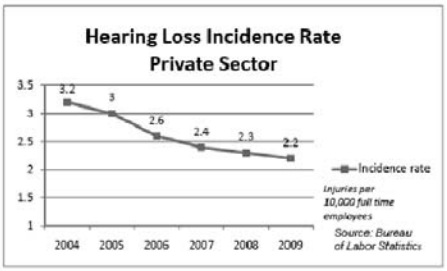

Figure 2—Hearing Loss Injury Incidence Rates have been declining steadily since being added to the OSHA 300 Log form.

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

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

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

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

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

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

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

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

[28] *Id.* at 668.

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

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

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

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

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

IV. MSDs: Another Example of Ill-Considered Regulation

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

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

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

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

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

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

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

[33] 29 U.S.C. § 657(c)(2).

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

[35] 5 U.S.C. § 605(b).

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

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Chairman WALBERG. Thank you, Ms. Holmes. Appreciate the testimony of the witnesses and look forward to further statements and developing the concepts during the course of the questioning.

And those questions will have 5-minute time span. And I will be much more attentive to that now, since we are starting fresh at this point, and so let me begin.

Mr. Sullivan, in your testimony, you discussed OSHA's on-site consultation program and the changes the agency proposed that could compromise this proactive safety program run by OSHA. Can you explain how the changes OSHA proposed would be detrimental to small businesses?

Mr. SULLIVAN. Thank you, Mr. Chairman. I am happy to.

It is actually very simple. And my impression of the changes is mostly gained from my work when I was at the National Federation of Independent Business. The success of OSHA's on-site consultation program largely is due to the understanding by the small-business community that violations and problems that are found will not be shared with the enforcement side of the shop, especially if those problems are solved.

And, I mean, isn't that the reason that we are here and talking about this, is that we want solutions to these problems to fix the different problems? And that barrier between the on-site consultation and enforcement encouraged small businesses to come in and say, "You know, I am not sure if we have it quite right. Can you help me?"

And the proposed changes break down that barrier between the on-site consultation program and the enforcement program. OSHA wants to share—now share information between those two programs. And in my experience working with small businesses, that will have an absolutely awful effect on the program, because small businesses will no longer want to participate in a program where they may be subject to enforcement without having the chance to fix the problem.

Chairman WALBERG. Thank you.

Mr. Sessions, the noise proposal takes issue with the way economists undertake cost-benefit analysis. One of your conclusions suggests that, had this proposal gone forward, there would have been—and I quote—"relatively little benefit" in terms of improved hearing protection for workers.

Can you explain how you reached your cost-benefit analysis conclusion?

Mr. SESSIONS. There are two halves to that conversation. The first half is essentially the point that Ms. Holmes was talking about, also, which is that the problem is—the problem of work-related hearing loss is relatively well managed and further declining. The rate of reported work-related hearing loss incidents is very low and declining.

So the problem in the first place isn't all that large. The particular approach OSHA proposed for further reducing that low level of hearing loss will not significantly further reduce it. Under current policy, employers use hearing protection for a very large share of the hearing—personal hearing protection devices for a very large share of the protection that workers get. And under OSHA's proposal, the engineering controls that would be required would still not typically reduce noise levels sufficiently to eliminate the need for hearing protection.

So currently, hearing protectors are a large share of the protection. And even after OSHA's proposal, they would continue to be a large share of the protection. So the problem isn't all that large in the first place. And the reduction that would be achieved by OSHA's proposal is not particularly substantial.

Chairman WALBERG. Okay. Going on from that, several of your answers, Mr. Sessions, you received in your survey of manufacturers would give anyone cause for concern. The idea that a proposal would cause manufacturers to shut down or move, work offshore as

a result of the proposed reinterpretation would further exacerbate the problems in the economy.

Are there other proposals that you can point to that would have a similar negative impact? And please be brief.

Mr. SESSIONS. I think that the jury is out on that. OSHA has additional proposals in the works. One is certainly that I am following is the proposal to reduce the worker exposure level to crystalline silica. But we don't know what the specific reduced—tighter standard is that OSHA is going to propose.

And particularly importantly for this and other standards that OSHA has in the works, assuming that OSHA is treating them as regulations, OSHA will accompany the proposed regulation with a full study of, how big is the problem in the first place? What are the costs? What are the benefits? And what are the economic impacts?

And it is essentially those requirements for analysis, for transparency, for disclosure, for estimating the impacts on the economy that give the regulator community and the public the chance to make a reasoned decision on OSHA's regulation and——

Chairman WALBERG. Thank you, Mr. Sessions. I am going to have to break it there to hold myself to the 5-minute time limit.

I will turn it to the ranking member, Ms. Woolsey?

Ms. WOOLSEY. And, Mr. Chairman, I would like to step aside for the ranking member of the full committee.

Oh, we thought you had to leave. Oh, well, thank you.

Tammy, thank you for your testimony. It is nice to have you here again. You are a brave woman.

I want everybody else to realize—that following three combustible dust accidents in 2003, which killed 14 workers—one of them was Tammy's brother—the U.S. Chemical Safety Board investigated. They found that in the 25 years between 1980 and 2005, there had been 281 combustible dust explosions and fires, resulting in 119 fatalities and 718 injuries.

So in 2006, they urged OSHA to issue a comprehensive standard. Yet the recommendation gathered dust until the Obama Administration put it on their regulatory agenda in 2009.

OSHA faces another 4 to 5 years of rulemaking before this can become a standard. At best, it will have a rule 13 years after Tammy's brother was killed. How is this system working for new worker protection rules? And how does it keep employees out of danger, large employers, small employers?

See, as far as I am concerned, if you are an employee, you need to be kept safe. It doesn't matter if you work for a large or small—and, actually, large employers have fewer accidents than the small employers do.

So, Tammy, do you want to respond to—do you have any idea—do any of you have any idea what should be done to speed the process along, other than not having a process?

Ms. MISER. Well, as of right now, they do have—National Fire Protection Association has an actual standard. And that would actually cover a lot of the issues that they are having, because of right now, I mean, we know it is an issue.

And some—I firmly believe that there are some issues that are more urgent, and this would be one of them. I mean, people are

dying. There are explosions. People are losing their businesses. In the House, there is a bill for combustible dust. And if that was to be applied now, at least that would be taken care of. And that would be a start.

Because I think a lot of it is, is there is just—there was just so must buzz and so much going on about what needed to be done and what couldn't be done. And you have seen where people have kind of dropped off, because at first I thought there was going to be a regulation. Well, now there is not.

And I am not saying every company is that way. I had a small business. I had two small businesses. Some people really try, but there are other companies that try to cut corners, and this is one of them.

Mr. SULLIVAN. Congresswoman, you had asked if any of us had suggestions on how to speed the process. I do. And it has to do with OSHA's recent MSD rulemaking.

You know, it is great that OSHA decided to withdraw the rule and say, we would like to talk more with small businesses before we actually move forward. That is great. But 16 months ago, if they had done what the law requires, and that was to have a small-business panel made up of small businesses, then they would be much longer down the process.

Ms. WOOLSEY. Mr. Sullivan, you have already told us that. I mean, let's go to something beyond what should have happened. What can happen, is what I want to know. What can be done now?

Mr. SULLIVAN. OSHA can listen to small businesses at the front end of the process, not 16 months later when it says, okay, we will start over again. I think that that would speed the process, Congresswoman.

Ms. WOOLSEY. Ms. Holmes, I appreciate that you acknowledge that these standards have been withdrawn, and we are sort of beating a dead horse here, the three of you talking about something that has already been stopped. I mean, we are not going to do it that way.

A mistake? Possibly. But let's go forward. Where can we go forward? And what is our next best step so that everybody benefits?

Ms. HOLMES. Well, I think—first of all, I think that there is a reason we are talking about things that have been withdrawn, and that is because they reflect a fundamentally troubling allocation of resources. The notion that OSHA spent resources on the noise reinterpretation when there is—without even looking to see whether there was an issue——

Ms. WOOLSEY. Well, then that was back then. Would you agree that employees of small businesses have the same right to a safe workplace as a large business?

Ms. HOLMES. I certainly agree that worker safety is something that should be of concern to all businesses——

Ms. WOOLSEY. Thank you.

Ms. HOLMES [continuing]. Of all sizes. And I believe that it is of concern to all businesses of all sizes.

Chairman WALBERG. Thank you for your response. The time has expired.

We will move on now to the gentlelady from South Dakota, Ms. Noem.

Ms. NOEM. Thank you, Mr. Chairman.

Well, I would like to follow up on that discussion with Mr. Sullivan in a little bit more of a proactive approach then, since that is where the discussion is going. So does the Small Business Administration ever partner with other agencies, such as OSHA, on regulations in order to better understand the implications or impact of regulations or proposals before they are issued?

Mr. SULLIVAN. Yes. Congresswoman, SBA's Office of Advocacy does just that. A pre-proposal in a dialogue between agencies that is not a public dialogue—it is a helpful, constructive dialogue—the SBA's Office of Advocacy works with agencies, EPA, OSHA, the new Consumer Financial Protection Bureau, in fact, all agencies, to try to make sure that what an agency's going forward with actually makes sense when it comes to a Main Street small business.

When an agency actually takes the advice of SBA's Office of Advocacy, it is a much smoother process. And I think that Congresswoman Woolsey is right. Looking forward, about how you get the process down is where we should be devoting our attention. And if these agencies actually do listen to SBA's Office of Advocacy, it would be a much smoother regulatory process.

Ms. NOEM. So in your opinion, do you feel that these agencies look favorably about that process and they are willing to cooperate as it goes forward?

Mr. SULLIVAN. No, I don't view agencies looking at the process as a constructive dialogue, although there is some hope. Professor Elizabeth Warren, who is in charge of staffing up this new Consumer Financial Protection Bureau, actually has traveled with Senator Snowe up to Maine and said, you know, Senator, even if I wasn't required to consult with small businesses, I would do it, because it makes sense, the type of analysis that should be public makes sense, and she is committed to doing that moving forward with an entirely new regulatory agency.

So if other agencies adopted that approach, I think we would have a much smoother process.

Ms. NOEM. Okay. I have one more follow-up question for Ms. Holmes, if that is possible, real quick. OSHA has several proposals pending that the agency suggested would not be significant regulations and the fact these proposals should have been certified as significant.

So what do you believe would be the outcome, will be on your clients and on their businesses?

Ms. HOLMES. You know, I think that OSHA does, as you suggested, create a number of proposals that they prefer to characterize as insignificant, because that allows them to—they believe, I think—short-cut a lot of the processes. But as Mr. Sullivan has pointed out, that really creates a great deal of trouble at the back side.

If we could have, you know, an honest assessment of what a regulation purports to do, what it is going to require, and how much it is going to cost at the front end, that would, I think, reduce challenges at the back end and would allow those regulations to be put in place, you know, more quickly and more effectively, and that they would be more effective for everyone.

Businesses certainly have a lot to say about what works and what doesn't and what is cost-effective and what isn't, in terms of regulation, and I think that is an area that OSHA would do well to consult about at the front end.

Ms. NOEM. Okay. Thank you.

Thank you, Mr. Chairman.

Chairman WALBERG. Thank you. We will move on to the gentleman from New Jersey, Mr. Payne?

Mr. PAYNE. Thank you very much.

Let me—Mr. Sullivan, Ms. Holmes, there has been a—you know, the dead horse has been beaten. But isn't it sort of the American way to try to use technology, try to use our advance that we have over other nations, by and large, at least in the past, to try to deal with the problem? I mean, it seems like you are saying it is so absurd that there might be some notion on a part of OSHA to use some technological way to try to improve the problem.

I can't understand—and maybe it was—the cost was prohibitive and they decided to withdraw it. But what is so wrong about trying to use technology? That is what we are all about, isn't it?

Mr. SULLIVAN. Congressman, there is nothing wrong with using technology. What I have been trying to impress upon the committee is the need to force a dialogue between the small-business community who may be using that technology and OSHA, in order to come up with a solution.

I will give as an example the SBREFA panel that was convened for the hexavalent chrome rule. And at one point, OSHA was thinking of requiring a venting operation over the chrome plating operation. So, basically, you would have chrome plating and a flow of air directly above the plating to prevent the fumes from reaching the workers.

Well, because of this small-business panel process, a small manufacturer who met with OSHA explained, if you require that, then you put me out of compliance with Environmental Protection Agency rules. And because of that dialogue, they actually worked towards a successful solution.

So it is bringing in the realities of the workplace, sometimes, many times involving advanced technologies that helps OSHA come up with a better rulemaking.

Mr. PAYNE. Okay, let me ask. There has been an affirmative, I think, Ms. Holmes and you, too, Mr. Sullivan, that there has been a reduction in the complaints about hearing. You know, that doesn't necessarily mean that the problem isn't as bad as it was.

I think when you find employees and when you find an unemployment rate of 10 percent, many times employees will forego their own safety, as for reporting noise violations, in order to keep a job. I mean, in other words, what I am saying is that because you say statistically you have empirical data that says that there is less of a problem today does not necessarily mean that the problem isn't as great.

And I will tell you, I worked in a place where there was—I was personnel director where there was noise. It is very difficult to keep compliance. Hard hats will wear hard hats, because they are out in the public and people can see them, if the hat is on or not. How-

ever, in a place where you have over 85 decibels is where you need to have ear protection.

It is very difficult to keep those earplugs on, because, one, they are uncomfortable; two, they are hot when it is in the summertime. Workers really don't like to use them. So you have to really stay on top of them. So I am just simply saying that, because they are less reported numbers don't necessarily mean that the problem isn't as great as it was.

Let me just ask you, Ms. Miser, there has been a request in the new C.R. that the Republicans put forth to cut 15 percent from the OSHA in one area and another really slashes. What do you think this is going to do, the impact on occupational safety, when you don't have inspectors, et cetera?

Ms. MISER. Well, of course, I am not an expert. But it does concern me, because as of right now, it is going to take 100 years to—if they were to inspect every single employer. And the fellow over here was saying, you know, there can't be any communication there. If they do want to get the information, they won't even be able to get it because of that.

And then on top of that, my real concern is the fact that this may affect the state plans. I mean, I don't know. I don't know what the budget is. Kentucky does a pretty good job. They really do. And if their budget is cut, they aren't going to be able to do that. And they are the only plans that cover government employees, these state plans.

And if—I mean, it is a shame. I think every government employee should be—everybody should have the same rights to health and safety in the workplace. But they don't. And I am just really afraid that it is going to cut that back and harm the state plans, who are really doing a good job out there.

Mr. PAYNE. Thank you very much.

Chairman WALBERG. The time has ended. We will move on to the gentleman from Florida, Mr. Ross?

Mr. ROSS. Thank you, Mr. Chairman.

I want to take a little different tact here. I know we are talking about the regulatory impact of OSHA, but I have a concern—and I want to talk about specifically—and to you, Mr. Sullivan, with regard to the muscular skeletal disorders. And the reason I want to do that is because it appears to me that trying to define repetitive trauma and putting the burden on the employer would result in the creation of new causes of action for which an employer could be sued.

For example, ADA. Now that they are made aware of a particular incident or condition that the employee may have, does reasonable accommodation now have to be made? Is there an onus on the employer now to investigate that? Is there an onus on the employer now to investigate a causal relationship?

For example, just because a repetitive trauma condition may occur either as a result of a bad knee or carpal tunnel or something, would that then require the employer to invest in a medical diagnosis of his condition and take a patient history to determine whether such a condition could be causally related to the job requirements or to something else, just maybe even degenerative changes?

And also, when you look at retaliatory terminations, causes of actions for retaliatory terminations—in other words, as an employee, I have been let go for cause, but I don't believe so. I believe it is because I have put on my Log 300 now that I have, you know, a constant pain in my back and, therefore, they are letting me go because they don't want to have to invest further.

So I would appreciate your opinion with regard to the MSDs and the likelihood of a new cause of action may ensue.

Mr. SULLIVAN. Well, Congressman, the thought process you just went through is similar to the thought process a small-business owner would go through when they are looking at whether or not to put an injury or illness onto a log. And to say that that calculation in your mind, even without any type of diagnostics, would take under 5 minutes really gets at a disagreement between small businesses and OSHA over their proposal.

I would actually elevate your concerns even higher, because when you talk about the diagnosis of an injury, you are actually putting the employer potentially in the place of a doctor to make a diagnosis. And so they have to really go through two things. One is to determine whether or not it is an MSD, which sometimes requires a doctor, and it wouldn't be fair to be put that——

Mr. ROSS. It would require a doctor. I mean——

Mr. SULLIVAN [continuing]. Onus on an employer. The other is whether or not it is work-related. And you get into some really sticky situations not only to see if it was part of a weekend touch football game, but, really, whether or not that is any of the employer's business. And so navigating all those sensitivities under the cloud of potential legal liability is a very real concern to small businesses on this proposal.

Mr. ROSS. And, for example, if they left employment and later filed suit for a work-related accident under the workers' compensation rules for carpal tunnel, but they fail to disclose it on their Log 30, then couldn't the employer not be availed to an affirmative defense of a misrepresentation of a physical condition?

Mr. SULLIVAN. All very good concerns that are echoed by the small-business community.

Mr. ROSS. Mr. Sessions, you commented about the noise protection ruling. And more importantly, you indicated that it was done by way of an administrative interpretation, rather than by regulation. Is that something that is normally delivered or promulgated by OSHA, with disregard to the regulatory process?

Mr. SESSIONS. It has been a grey area, both for OSHA and other regulatory agencies, sort of, what is done by regulation and what is done by administrative interpretation, by guidance documents, or by other means that aren't subjected to——

Mr. ROSS. Or by regulatory fiat, as I would say.

Mr. SESSIONS. You know, there are procedural safeguards if an agency is going to do something by formal regulation. SBREFA applies, the executive order for analysis applies, but they don't apply if the agency somehow takes the action under a different guise. And that has been a very difficult issue for a number of years across all regulatory agencies.

Mr. ROSS. Thank you.

Ms. Holmes, just real quickly, because I am running out of time here, I think the greatest balance that we could afford is to make sure that the regulatory environment is as stringent and necessary as possible to maintain a good business environment and also to protect against the incidents which occurred that cost Ms. Miser her brother.

But I—my concern at this point—and I address this to you for your members and dealing with the chamber—have not we lost sight in this regulatory process of the foundation upon which we rely, and that is logic and reason?

Ms. HOLMES. You know, I think we have in many respects, Congressman, because we have, you know, an agency that, again, I said and I meant, what we—what OSHA did in connection with the noise standard is really unbridled arrogance. They did not feel the need to look to see whether there was a problem, whether what they were proposing would fix the problem, or how much it would cost.

We simply can't have that. And they did, in fact, by regulatory fiat, as you suggested, rather than going through a rulemaking process where there would have been——

Mr. ROSS. Thank you. I believe my time is up. Thank you.

Ms. HOLMES. And now I will be quiet.

Chairman WALBERG. Thank you.

We will move on to the gentleman from Indiana, Mr. Bucshon?

Mr. BUCSHON. Thank you, Mr. Chairman. And thanks to the panel.

Just to give you a little background on me, I am a physician, cardiovascular surgeon. I see a lot of patients with their lung problems that have a history of workplace exposure, so I understand that concept. And also, my father was a United Mine Worker and a coalminer underground for many years, so I have also seen that—it from that side.

And my question is from a budgetary standpoint. And would—and anyone on the panel can address this. I mean, in 2008, would anyone say that OSHA was having difficulty with what they were trying to do based on their budget in 2008?

Ms. Holmes?

Ms. HOLMES. From my perspective, Congressman, I don't think they were. I think it is a matter of setting regulatory priorities, as well as, to the extent possible, deferring resources to compliance. The vast, vast, vast majority of employers want very much to do the right thing by their employees. It does not serve any business to lose employees or have employees become injured on the job. It is—in addition to the human factor, which is very important, it is extraordinarily costly. Workers compensation costs are very high. It is good business to work safely.

And in businesses of—the vast, vast majority—and certainly everyone I have had the privilege to represent in my 16 years—has taken that tack, that they want to do the right thing. And I think OSHA has the resources to—I think it is a matter of smart use of resources, candidly.

Mr. BUCSHON. Okay. Thank you.

I yield back.

Chairman WALBERG. He will be right here. I am looking forward to calling on the gentleman who was my chairman the last time I served here before coming back this term, and now the ranking member of the full committee, Mr. Miller?

Mr. MILLER. Thank you very much, Mr. Chairman. My apologies. I am unfortunately having to duck in and out.

Let me just, if I might, see if I can get some clarification. Mr. Sullivan, in your testimony, you are not arguing that the Regulatory Flexibility Act at OSHA is not working? You don't like the way it is being handled in this particular case?

Mr. SULLIVAN. I believe that the attitude of trying to avoid SBREFA instead of embracing it is cause for concern.

Mr. MILLER. See, that—you are talking about—but it has been in one iteration since the 1980s. You are not arguing that the underlying law is somehow not working? I mean——

Mr. SULLIVAN. I believe that there is an attitudinal problem——

Mr. MILLER. I understand that. I understand that.

Mr. SULLIVAN. There is——

Mr. MILLER. I am asking about the generic law. Apparently you were happy with it 2 years ago.

Mr. SULLIVAN. Actually, I testified last week on measures that should be adopted to——

Mr. MILLER. That is different. I understand that.

Mr. SULLIVAN [continuing]. Improve the law, so——

Mr. MILLER. So what is your testimony?

Mr. SULLIVAN. My testimony is before the committee——

Mr. MILLER. You don't like the way this Administration of OSHA is administering the law?

Mr. SULLIVAN. I have been critical of OSHA's implementation of the Regulatory Flexibility Act past this Administration, when I was working——

Mr. MILLER. Okay, that is—I am trying to figure this out.

Mr. SULLIVAN. Okay. Well, I believe that OSHA has been able to do a better job and continues to be able to do a better job in complying with the Regulatory Flexibility Act.

Mr. MILLER. Mr. Sullivan, in this discussion of the cost of regulation—now, you have obviously chosen to and it is right in your testimony, just to talk about the cost. Are you suggesting there are no benefits of OSHA regulations? There have been no benefits throughout the various administrations of OSHA here?

Mr. SULLIVAN. I am not suggesting that there are no benefits. The reason I focused on cost is because, in that way, it is very clear that small businesses are disproportionately impacted by costs. And the Regulatory Flexibility Act——

Mr. MILLER. Small businesses——

Mr. SULLIVAN [continuing]. Tries to—tries——

Mr. MILLER. Don't small businesses also generate a somewhat higher percentage of the accidents, given—to the small-business employee population?

Mr. SULLIVAN. Congressman, I don't know what the comparison of small-business accidents are compared to large-business. I do know that there is a disproportionate cost on small business when it comes to regulation, and the idea of the—Congressman, could I actually just finish my answer?

Mr. MILLER. I am running out of time. As you know, the chair is being——

Mr. SULLIVAN. I would like to just answer your question, Congressman.

Mr. MILLER. I would like to ask you another question.

Mr. SULLIVAN. Thank you.

Mr. MILLER. Because it goes to the point you are about to make. If they generate 45 percent of the fatalities with 14 percent of the workforce, you might want to check in with them to see what is going on.

Mr. SULLIVAN. I think OSHA wants to issue rules that work on Main Street small business. And in order for it to work, they have to consider the impact and the constructive impact by small business before moving forward with rules.

Mr. MILLER. I would make the point that when you decide you are only going to talk about cost, one, the question is whether or not small business is a generator of fatalities that justifies their consideration by OSHA for rules and, two, that when you talk only about the cost of regulation, somewhere in the testimony there has to be some understanding of what the benefits are, of whether we can arrive at that mutually or not.

There has to be some understanding of that, because you get studies all the time from various insurance companies and others who cover various sectors of our economy about the cost of fatalities, about the cost of the injuries, of the retraining, of the rehabilitation that go on with this.

And so I think—I don't get the——

Mr. SULLIVAN. I think we actually both want the same end point, and that is a smarter regulation at the end of the process. And how they get there——

Mr. MILLER [continuing]. If I only talk about the benefits of the regulation and suggest we start from that basis and you only talk about the costs and suggest that we start from that basis.

Mr. SULLIVAN. Well, actually, I think we get to the same place when OSHA not only asks small business how a rule can be written better to reduce costs, but also to ask——

Mr. MILLER. I understand that.

Mr. SULLIVAN [continuing]. Ask the small employer, hey, this is what we are looking at. Do you think it increases benefits more from a small-business perspective——

Mr. MILLER. So you do give some recognition to the fact that there are benefits to many of these regulations and have been, in terms of saving lives or reducing injuries or cost of businesses?

Mr. SULLIVAN. Of course I do.

Mr. MILLER. Okay.

Mr. SULLIVAN. And I also recognize that the small businesses, in engaging in that dialogue with OSHA, would like to come up with those solutions.

Mr. MILLER. I understand. Okay. Thank you.

Chairman WALBERG. Thank you.

Mr. MILLER. I yield back my time, Mr. Chairman.

Chairman WALBERG. Appreciate that. We have the Chairman of the full committee here, the gentleman from Minnesota, Mr. Kline.

Mr. KLINE. Thank you, Mr. Chairman. I apologize for coming in late. You have probably noticed that—how this place works. It is a bit confusing, as Members are moving back and forth between competing hearings and competing commitments.

I do want to thank all of you for being here today and for your testimony. And I want to give Mr. Sullivan the opportunity to pick up—he was trying to complete an answer to Mr. Miller's question having to do with cost-benefit analysis and assessing the costs of regulations, which fall disproportionately on small businesses.

And I know you were starting to finish that thought, and I would like to give you the opportunity to do that.

Mr. SULLIVAN. Well, thank you, Congressman. There has been a great deal of attention to figures that have to do with the cost of regulation on small firms. And from my opinion, that actually is a separate conversation than what I tried to bring across in my testimony, which is that small businesses are disproportionately impacted.

And that really gets at that federal rules just aren't—they should not be encouraged to be one-size-fits-all. And if OSHA sits down with small business and says, "We would like to solve a problem. How do you, small business, propose that we try to solve this problem?"

Forcing that dialogue is what makes for a better final regulation. And in my opinion, OSHA is not doing a good enough job in having that dialogue.

Mr. KLINE. Thank you. I yield back, Mr. Chairman.

Chairman WALBERG. Thank you, Mr. Kline.

Now we moved to the gentleman from Ohio, Mr. Kucinich.

Mr. KUCINICH. Thank you, Mr. Chairman.

To Ms. Miser—and welcome to you and to all the witnesses—Ms. Miser, your testimony talked about the OSHA crane standard, which will provide a net benefit of $55 million a year, based on lives saves and injuries avoided, yet the Mercatus Institute, a think-tank funded by corporate interests, gives this rule a low score on its regulatory report card.

Now, given the deaths from crane accidents, should OSHA have simply ignored this problem? And isn't it the case that industry also wanted the standard updated?

Ms. MISER. Well, in that particular case, all they would have needed is a spotter, and he would be here today. So, I mean, absolutely not, I don't think that they should. It is a simple solution, and it should have, you know, been done way before that.

And I guess, to me, what you need to do is look at standards that work, standards that are working now. For instance, the grain standard. We know for a fact that it saves lives. You know, it saves—I have the figures here. It says that—and this was by the National Grain and Feed Association. They say that explosions declined 71 percent, injuries by 90 percent, and fatalities by 95 percent.

So, no, I don't. I think that there are times when you have to—standards, and I think that they are very important. And I don't think that they should be given up. I think we should keep pushing until we get it done. And if it takes a little work, if it takes a little talk, that is fine, but let's get to it and let's get it done.

Mr. KUCINICH. Mr. Sullivan, let's discuss fatality rates in small business. The Kauffman-RAND Institute Center for the Study of Small Business and Regulation found that firms with 1 to 19 employees had the highest fatality rate in all sectors, except wholesale trade. They found that firms with more than 1,000 employees had the lowest fatality rates in all industries.

The Census of Fatal Occupational Injuries, which is published by the Bureau of Labor Statistics, reports that 45 percent of all workplace fatalities occur at small businesses which employ between 1 and 9 employees, even though these establishments only employ 14 percent of the workforce.

So, Mr. Sullivan, do you agree that that small-business establishments have on average higher fatality rates than larger establishments? And if not, is the Labor Department data in error?

Mr. SULLIVAN. Congressman Kucinich, I don't disagree with the data. I would be interested in having a subsequent conversation and drilling into that data. I remember when I was working at the Small Business Administration and hearing those statistics and asking, why are they so high? And I believe that the answer uniformly was because of traffic fatalities, which, you know, ironically are outside of the scope of OSHA.

But I think a very serious set of statistics that point out a problem—and I will go back to kind of my—the whole purpose of my testimony, which is to encourage OSHA to sit down with small employers to hammer out rules that work. And when you look at those types of fatality rates, I think it only elevates that type of approach, because they do want to finalize rules that work on Main Street and not have to redo these regulations when fatalities go up.

Chairman WALBERG. Time is expired. I will say thank you to each of the witnesses for taking the time to be here today to share your expertise, your experience, your data, and your heart, as well, on this issue.

And there will be other opportunities that we will aggressively continue to look. And I agree with my ranking member that we want to have an aggressive hearing schedule, as well, to plum the depths of what is involved here. And even the fact with the grain standard, took 7 years to develop that, and we want to encourage more rapid, but we certainly want to encourage vital and useful standards, as well.

Having said that, I would like to recognize Ms. Woolsey, the ranking member, gentlelady from California, to close with her comments.

Ms. WOOLSEY. Thank you, Mr. Chairman.

And it is obvious we have—both sides of this debate are interested and active in participating today. I give you a lot of credit for that. And my subcommittee has been really active for the last 4 years. They want to keep on going.

I really believe that, unless the goal is to underfund and undermine in the long run OSHA, we really can work together, because we have to bring OSHA into the 21st century, period, because all of our workers are depending on us. So thank you very much.

Chairman WALBERG. Thank you, Ms. Woolsey.

Again, thank you to the witnesses for sharing with us today. We will approach these issues differently, I am certain, as we work on

this subcommittee. And all of the issues pertinent to that mix, that creative tension of having jobs, which people need, and an expanded economy, which that can produce, the prosperity, the lifestyle, the happiness, and the safety in carrying out all of these functions in a society that works well together.

But that is a creative tension. And at each time in our history, there are approaches that must be flexible in how we approach it in order to keep the movement forward, as opposed to stopping, which, as we all know, once you stop, you move backwards.

So thank you again for participating. I thank the subcommittee for your involvement, as well. We will have opportunities to continue to explore. I look forward to doing that. We will certainly have OSHA and its representatives in front of us. We look forward to hearing the Secretary tomorrow in hearing, in the full committee, and then moving from that with further testimony from business and industry, from workers, and from the regulators themselves.

So there being no further business, the subcommittee stands adjourned.

[The statement of Ms. Hirono follows:]

Prepared Statement of Hon. Mazie K. Hirono, a Representative in Congress From the State of Hawaii

Today Republicans have called a hearing to argue that the Occupational Safety and Health Agency (OSHA) costs too much and burdens businesses with too much regulation.

The workers in my district and I know better!

I have heard from workers in Hawaii about how OSHA regulations and enforcement reduce injuries and save lives.

One worker at an electric utility company told me of the hazardous conditions she and her team are exposed to every day: electricity, chemicals, high pressure steam and water lines, and high temperature fuel. OSHA's rules and guidelines require regular safety trainings and updates, and ensure that workers wear safety glasses, steel-toed shoes, flame-retardant clothing, chemical hoods, and safety gloves. The goal is NO injuries.

Despite these precautions and wearing the proper equipment, she was burned by sulfuric acid in an accident 15 years ago. When reviewing the work area she was in when the burn occurred, the company's safety department—following OSHA guidelines—determined that additional engineering measures were necessary to prevent future injuries. Fortunately, no future injuries have occurred at this workplace.

Safety guidelines and regulations can help save lives, and so can enforcement.

In another story in Hawaii, lack of sufficient enforcement led to tragic results. In May 2009, an 800-foot tower collapsed at the Hawaiian Cement facility, killing worker Juan Navarro. Subcontractor AG Transport did not have a license, engineering survey, or evacuation plan for the demolition project. The company was fined a paltry $750. This accident could have been prevented, but Hawaii only had 11 state OSHA staffers to inspect and enforce worker safety on construction projects across all 7 of our inhabited islands.

In September of 2010, the U.S. Department of Labor (DOL) found that under former Governor Linda Lingle, Hawaii had under-funded and systematically neglected its state Occupational Safety and Health Act plan (OSHA state plan). As a result, Hawaii did not have enough workplace inspections or on-site consultations to keep workers safe. Hawaii was the only state in the nation found breaking its state plan obligations.

Unfortunately, for Hawaii and the 27 states/territories with approved state plans, DOL is extremely limited in its authority to help state plans improve. DOL's only option under current law is to completely end the state plan's local control and step in with federal control.

My Ensuring Worker Safety Act (H.R. 571) would allow federal OSHA more flexibility to collaborate with states and improve underperforming state plans, such as Hawaii's. I urge my colleagues to support it.

On the U.S. House floor today, the Republican job-slashing resolution would decimate federal OSHA's budget by $99 billion this year, requiring 3-month furloughs of OSHA employees, then layoffs next year. This is not the way to ensure worker safety.

In reviewing today's witness testimony, I note that those who question OSHA's programs focus on OSHA's costs without discussing the benefits. I would point out the following:

• According to the latest "Death on the Job" report, OSHA regulations and enforcement have saved an estimated 410,000 lives in the 40 years since the Act was passed in 1970.

• Liberty Mutual insurance estimated that the annual direct cost to businesses of work-related injuries and illnesses were $53.4 billion per year, more than $1 billion per week!

• Since 2000, OSHA has reviewed the costs and benefits of its rules 8 times, finding its regulations to reduce accidents and injuries. For example, the review found that OSHA's grain handling standards reduced explosions by 42% and reduced deaths by 70%; sharps injuries were reduced by 88%; and excavation fatalities were reduced by 40%.

Beyond these measurable economic and safety benefits, what value do we place on reducing worker injury, illness, and death? OSHA protections must be upheld and enforced properly to keep our workers safe.

[The statement of Mr. Kucinich follows:]

Prepared Statement of Hon. Dennis J. Kucinich, a Representative in Congress From the State of Ohio

Today's hearing is presented as an examination of the impact of the actions of the Occupational Safety and Health Administration (OSHA) and the alleged negative effect on job creation. Despite having issued only 2 new health and safety standards in the past ten years, OSHA is being cast as a villain that has our economy in its clutches. OSHA is being asked to be more responsive to the needs of small business, while facing $99 million in cuts in the continuing resolution (CR) we are expected to vote on this week.

The unemployment rate is still at record levels. The labor force participation rate is nearly at its lowest level in a generation. There are nearly 5 unemployed workers for every job opening in this country. Millions of Americans are under water on their homes, and so they cannot sell them and they cannot move to pursue better economic opportunities in other parts of this country. Meanwhile, American corporations are sitting on $2 trillion in cash. Much of that $2 trillion it appears is being spent on high-priced industry lobbyists, instead of workers. And we know that worker productivity—the output per worker per hour—has steadily increased over the years, especially in manufacturing and service industries, but the average worker's income has not kept pace. This tells us that employers have the upper hand right now. So this Subcommittee should be focused on the matters under its jurisdiction: are the regulations designed to protect American workers being followed? Can they be improved?

Instead, we have heard examples of the supposed heavy financial and paperwork burden that OSHA regulations impose on small businesses. It is true that American businesses large and small deserve clear workplace safety regulations from their government. But the evidence cannot be ignored that such regulations are absolutely vital to the safety of the American worker. Every year in this country, hundreds of workplace accidents continue to occur, some of which are playing out before our eyes in gruesome detail. But as the fires are put out or the toxic spill cleaned or the toll in human lives is counted, the opponents of workplace safety laws once again take up their call of "overly burdensome regulations."

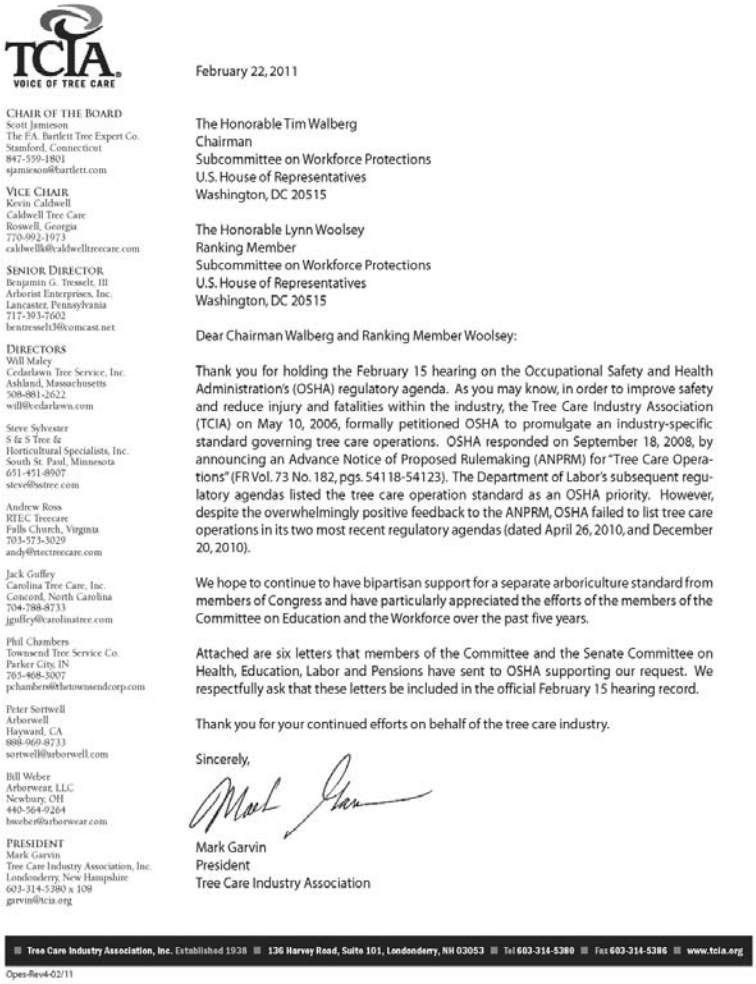
No price tag can be put on the life of a healthy, living American. We cannot credibly demand that OSHA should rededicate itself to more quickly and efficiently serving American businesses while at the same time, extolling the virtues of the complex and time-consuming process OSHA undertakes before any new workplace safety and health standard can be established.

Last year, the Office of Management and Budget performed a cost-benefit analysis of Federal regulations which showed that the benefits of regulations far outweigh their costs. Between 1999 and 2009, the estimated costs of regulations were between $43 billion and $55 billion, while the estimated economic benefits were between $128 billion and $616 billion. That means, during that ten year period, the cost-to-

benefit ratio of regulations was one-to-two based on OMB's lowest estimations, and one-to-fourteen based on OMB's highest estimations.

The data from the Bureau of Labor Statistics shows that in 2008, 5,214 workers were killed on the job in this country—an average of 14 workers per day. If the CR passes with the proposed cuts to OSHA, , it will have to furlough all employees for the last three months of the fiscal year, and then lay off 415 of its 2335 employees. It will cut OSHA's funding so drastically that it will cripple its ability to function. I intend to do all I can to prevent this from happening.

[Additional submissions of Mr. Walberg follow:]



TCIA
VOICE OF TREE CARE

February 22, 2011

The Honorable Tim Walberg
Chairman
Subcommittee on Workforce Protections
U.S. House of Representatives
Washington, DC 20515

The Honorable Lynn Woolsey
Ranking Member
Subcommittee on Workforce Protections
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Walberg and Ranking Member Woolsey:

Thank you for holding the February 15 hearing on the Occupational Safety and Health Administration's (OSHA) regulatory agenda. As you may know, in order to improve safety and reduce injury and fatalities within the industry, the Tree Care Industry Association (TCIA) on May 10, 2006, formally petitioned OSHA to promulgate an industry-specific standard governing tree care operations. OSHA responded on September 18, 2008, by announcing an Advance Notice of Proposed Rulemaking (ANPRM) for "Tree Care Operations" (FR Vol. 73 No. 182, pgs. 54118-54123). The Department of Labor's subsequent regulatory agendas listed the tree care operation standard as an OSHA priority. However, despite the overwhelmingly positive feedback to the ANPRM, OSHA failed to list tree care operations in its two most recent regulatory agendas (dated April 26, 2010, and December 20, 2010).

We hope to continue to have bipartisan support for a separate arboriculture standard from members of Congress and have particularly appreciated the efforts of the members of the Committee on Education and the Workforce over the past five years.

Attached are six letters that members of the Committee and the Senate Committee on Health, Education, Labor and Pensions have sent to OSHA supporting our request. We respectfully ask that these letters be included in the official February 15 hearing record.

Thank you for your continued efforts on behalf of the tree care industry.

Sincerely,

Mark Garvin
President
Tree Care Industry Association

Congress of the United States
Washington, DC 20515

October 15, 2010

The Honorable Hilda L. Solis
Secretary of Labor
U.S. Department of Labor
200 Constitution Avenue, NW
Room S-2018
Washington, DC 20210

Dear Secretary Solis:

We write to request that the Department of Labor (the Department) put promulgation of an OSHA standard specific for Tree Care Operations back on its regulatory agenda. The Tree Care Industry Association formally petitioned OSHA to promulgate a standard governing tree care operations on May 10, 2006. The Occupational Safety and Health Administration (OSHA) announced an Advance Notice of Proposed Rulemaking (ANPRM) for "Tree Care Operations" on September 18, 2008 (FR Vol. 73 No. 182, pgs. 54118-54123). Over 30,000 arborists were represented in more than 170 submissions to the ANPRM, the vast majority in favor of the regulation. The Department's subsequent regulatory agendas listed the tree care operation standard as an OSHA priority, until the Department's semi-annual regulatory agenda issued on April 26, 2010, which failed to include the much needed tree care regulations.

OSHA's own Strategic Management Plan for fiscal 2003-08 lists tree care among seven industries targeted for significant reductions in illnesses and the tree care industry has consistently been ranked the fourth or fifth most dangerous profession in the U.S., based upon fatality rate. The industry's fatality rate is more than double that of the mining industry in the U.S. Based on the number of fatal accidents reported in the media, in four consecutive summer months the tree care industry quietly replicates the human tragedy of the Upper Big Branch Mine and Deepwater Horizons oil rig disasters combined.

Despite the inherent dangers associated with tree care operations, current OSHA guidance and enforcement for the industry is based on a patchwork of outdated and/or extraneous regulations. The resulting confusion wastes OSHA's resources and leaves tree care workers and employers without clear federal guidance on the specific safety measures needed to mitigate the risks unique to tree care operations.

The tree care industry includes approximately 300,000 hard working men and women who maintain our urban forests by preserving environmentally valuable trees; protect persons and property by removing trees that pose hazards as a result of damage from development or natural causes; restore power and open roads by clearing trees after storms; and maintain vegetation around power lines to minimize future power disruptions. These workers and their 2,000 employers deserve the clarity of an industry specific standard, promulgated at a federal level to ensure their safety. Tree care employers and employees, along with organized labor, equipment

manufacturers and academia have already developed a consensus standard: ANSI Z133.1. Previously, the Department has been asked in writing on August 5, 2008 and on October 16, 2007 to use this consensus standard and expediently move forward with a negotiated rulemaking.

The Department's decision to remove "Tree Care Operations" from the regulatory agenda places tree care workers across the country at risk, disregards multiple bi-partisan requests from Congress to promulgate a rule to safeguard the industry, and continues to misuse the Department's precious resources applying standards from other industries that are inefficient and ineffective for tree care operations. OSHA's stated reason for removing tree care regulations from the agenda is that "existing health and safety standards coupled with the General Duty Clause are sufficient to adequately assure and address worker health and safety protections until such time as resources are available to move forward aggressively on this issue." In sum, OSHA claims the existing patchwork of regulations are adequate to protect tree care workers, even though industry leaders, fatality statistics and public comments say otherwise.

OSHA itself has acknowledged in its Field Operations Manual that "[t]he general duty clause shall be used only where there is no standard that applies to the particular hazard and in situations where a recognized hazard is created in whole or in part by conditions not covered by a standard." In other words, OSHA inspectors should only default to a general duty clause 5(a)(1) citation when their standards are inadequate to address a hazard. Yet, general duty clause citations are the *fourth* most frequently cited OSHA standards for SIC 0783 *Ornamental Shrub and Tree Services* for FY '08-09.

This is a waste of OSHA resources and fails to provide tree care workers and business with clear guidance on accepted safety practices. The OSHA inspector citing under the general duty clause is required to conduct significant research to determine whether the employer is not in compliance with accepted safety practices and known hazards. Not only does this consume additional OSHA resources, it may lead to inconsistent enforcement, confusion over appropriate safety practices and unnecessary litigation. This approach makes little sense where industry leaders and other stakeholders have requested OSHA to move forward with a standard.

We urge you to work quickly to protect the dedicated workers in the tree care industry and put "Tree Care Operations" back on the agenda and move forward with promulgating a rule.

Sincerely,

Carol Shea-Porter
Rep. Carol Shea Porter
Member of Congress

Cathy McMorris Rodgers
Rep. Cathy McMorris Rodgers
Member of Congress

Rep. Lynn Woolsey
Member of Congress

Rep. Joe Wilson
Member of Congress

Rep. Kathy Dahlkemper
Member of Congress

Cc:

The Honorable David Michaels
Assistant Secretary of Labor
Occupational Safety and Health Administration
200 Constitution Avenue, NW
Washington, DC 20210

United States Senate

COMMITTEE ON HEALTH, EDUCATION,
LABOR, AND PENSIONS
WASHINGTON, DC 20510-6300

February 4, 2011

The Honorable Hilda L. Solis
Secretary of Labor
U.S. Department of Labor
200 Constitution Avenue, NW
Room S-2018
Washington, DC 20210

Dear Secretary Solis:

We write again to urge the Department of Labor to initiate a negotiated rulemaking for a safety standard specific to tree care operations. Nearly four years ago, the Tree Care Industry Association formally petitioned the Occupational Safety and Health Administration (OSHA) for a standard governing tree care operations. Since that time, we have worked in a bipartisan way with both this Administration and the previous Administration to establish a negotiated rulemaking process whereby a tree care safety standard can be finalized.

The previous Administration did announce an Advance Notice of Proposed Rulemaking for "Tree Care Operations" on September 18, 2008 (FR Vol. 73 No. 182, pgs. 54118-54123). We were pleased that, for a time, the Department's subsequent regulatory agendas listed this standard as an OSHA priority. Unfortunately, the Department failed to list tree care operations in its two most recent regulatory agendas (those issued on April 26, 2010 and December 20, 2010).

The need for a standard to protect these workers in neighborhoods across the country is clear. The tree care industry employs approximately 300,000 men and women who maintain trees in and around our urban and suburban neighborhoods. Often, these workers protect persons and property by removing trees that may pose hazards by clearing limbs, restoring power, and opening roads after storms. Their often hazardous work brings them close to power lines and electric transformers.

Current OSHA guidance and enforcement for this industry is based on a patchwork of outdated, extraneous, and/or unrelated regulations, including the logging standard. In the absence of a clear standard, tree care workers and employers are without clear federal guidance on the specific safety measures needed to mitigate the risks unique to tree care operations.

Tree care employers and employees, along with organized labor, equipment manufacturers and academia have already developed a consensus standard: ANSI Z133.1. We have already asked the Department in writing on July 28, 2008 and on September 27, 2007 to use this consensus standard as a basis for a negotiated rulemaking.

As Chair and Ranking Member of the Employment and Workplace Safety, we have worked closely for years on mine safety, asbestos exposure, and numerous other occupational safety issues. We remain in agreement that workers in the tree care industry and their 2,000 employers deserve the clarity of an industry specific standard, promulgated by OSHA.

We urge you to return "Tree Care Operations" to the Department's regulatory agenda and move forward with the promulgation of a negotiated rule.

Sincerely,

Senator Patty Murray
Chairman, Senate HELP
Subcommittee on Employment and
Workplace Safety

Senator Johnny Isakson
Ranking Member, Senate HELP
Subcommittee on Employment and
Workplace Safety

Cc:

The Honorable David Michaels
Assistant Secretary of Labor
Occupational Safety and Health Administration
200 Constitution Avenue, NW
Washington, DC 20210

COMMITTEE ON EDUCATION AND LABOR
U.S. HOUSE OF REPRESENTATIVES
2181 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6100

MAJORITY – 202-225-3725
MINORITY – 202-225-4527
http://edlabor.house.gov

August 5, 2008

VIA FACSIMILE: 202-693-6111
The Honorable Elaine L. Chao
Secretary of Labor
U.S. Department of Labor
200 Constitution Avenue, NW
Room S-2018
Washington, DC 20210

Dear Secretary Chao:

We write to request that the Department of Labor immediately withdraw Enforcement Directive CPL 02-01-044 which provides Citation Guidance Related to Tree Trimming and Tree Removal Operations. The directive disregards expressed bi-partisan Congressional support for an OSHA standard addressing the unique risks of the tree care industry and ignores OSHA's own data and expert opinions with respect to safe practices for tree care workers. As a result, the directive puts the 300,000 dedicated tree care workers at increased risk of injuries and fatalities.

On October 16, 2007, we sent you a letter urging the Occupational Safety and Health Administration (OSHA) to immediately initiate the negotiated rulemaking process on a safety standard specific to tree care operations (arboriculture). In that letter, we indicated an arboriculture standard is necessary as OSHA's current guidance and enforcement for the industry are based on a patchwork of outdated, extraneous, inapplicable and conflicting regulations and standards. We noted this is not only inefficient and ineffective for OSHA, but dangerous for arborists, who are often confused as to which standard applies on any given day or situation, and difficult for the small businesses that make up a majority of the industry. On April 8, 2008 we sent a letter to Assistant Secretary Foulke reiterating our strong support for a separate standard for arboriculture and urging OSHA to forward with the rulemaking process, as "swift action is needed to provide clear guidance on safe work practices."

Unfortunately, rather than addressing the problem, the Directive adds to the confusion by applying this patchwork of outdated and/or extraneous regulations in an arbitrary and capricious manner. In doing so, the Directive conflicts with several OSHA state plans that have developed standards specific to arboriculture and the well-recognized safety practices in the industry captured by the

ANSI Z133 consensus standard, which has been developed by experts from employers, employees, organized labor, equipment manufacturers and academia.
For the aforementioned reasons, we urge the Department to immediately withdraw the Directive. Department is scheduled to release an Advance Notice of Proposed Rulemaking on Arboriculture in the near future. We again urge you to move quickly and immediately initiate the negotiated rulemaking process. If the Department feels it needs an interim guidance as the rulemaking progresses, we recommend you look to the state plans that have developed standards specific to arboriculture and the well-recognized safety practices in the ANSI Z133 consensus standard.

Sincerely,

Lynn Woolsey
Chairwoman
Subcommittee on Workforce Protections

Joe Wilson
Ranking Member
Subcommittee on Workforce Protections

Carol Shea-Porter
Member
Subcommittee on Workforce Protections

CC:
VIA FACSIMILE: 202-693-1659
The Honorable Edwin G. Foulke
Assistant Secretary of Labor
Occupational Safety and Health Administration
200 Constitution Ave., NW
Washington, DC 20210

United States Senate
WASHINGTON, DC 20510

September 27, 2007

The Honorable Elaine L. Chao
Secretary of Labor
U.S. Department of Labor
200 Constitution Avenue, NW
Room S-2018
Washington, DC 20210

Dear Secretary Chao:

We write to express our strong support for the May 10, 2006 petition submitted by the Tree Care Industry Association (TCIA) to the Occupational Safety and Health Administration (OSHA) requesting that the Agency promulgate a safety standard specific to tree care operations (arboriculture). We urge the Department to immediately initiate the rulemaking process and take an important step towards increasing safety for more than 300,000 dedicated workers in this important, but hazardous, industry.

Professional arborists maintain our urban forests by preserving valuable trees in cities and towns throughout the United States and protecting mature landscapes and green spaces. Their quick response in the aftermath of a storm to clear trees, help restore power and open our roads is critically important to the people and businesses in the affected areas. Tree care workers also maintain vegetation around power lines to minimize future power disruptions and work with property owners and municipalities to create defensible spaces around structures to mitigate the spread of wildfires in vulnerable areas.

Unfortunately, tree care work is by its very nature one of the most hazardous occupations. Independent research ranks the industry fifth most dangerous in the United States in recent years, based on the frequency of fatal accidents.[1] By one source's estimate, in 2005 the industry suffered 174 fatalities; more than three per week.

OSHA's Strategic Management Plan for fiscal 2003-08 lists tree care among seven industries targeted for significant reductions in illnesses and injuries. Yet, currently, OSHA guidance and enforcement for the industry are based on a patchwork of outdated, extraneous, inapplicable and conflicting regulations and standards. While administratively inefficient and ineffective for OSHA, the status quo is also dangerous for arborists, who are often confused as to which standard applies on any given day or situation. This is particularly difficult for the small businesses that make up a majority of the industry.

[1] Ball, John and Shane Vosberg. "Tree Worker Safety: Which Accidents Occur in our Industry? Arborist News, April 2004. International Society of Arboriculture.

The May 10, 2006 petition references the existing consensus tree care safety standard, the ANSI Z133.1. This standard was developed with the substantial participation and agreement of stakeholders. As such, it presents a good starting point from which to begin a negotiated rulemaking process. We understand that TCIA representatives have met with OSHA several times and urged the Agency to initiate just such a rulemaking process.

We urge the Department to seize this opportunity. It is clear that the justification as well as the means are there for OSHA to work cooperatively with the affected parties to bring greater safety to these dedicated workers.

Sincerely,

Senator Edward Kennedy
United States Senate

Senator Michael B. Enzi
United States Senate

Senator Patty Murray
United States Senate

Senator Johnny Isakson
United States Senate

Cc:

The Honorable Edwin G. Foulke
Assistant Secretary of Labor
Occupational Safety and Health Administration
200 Constitution Ave., NW
Washington, DC 20210

[Additional submission of Ms. Woolsey follows:]

[Whereupon, at 11:25 a.m., the subcommittee was adjourned.]

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