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OSHA'S DRAFT SAFETY AND HEALTH PROGRAM RULE

HEARING

BEFORE THE

COMMITTEE ON SMALL BUSINESS HOUSE OF REPRESENTATIVES

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OSHA'S DRAFT SAFETY AND HEALTH PROGRAM RULE

THURSDAY, JULY 22, 1999

U.S. HOUSE OF REPRESENTATIVES,
COMMITTEE ON SMALL BUSINESS,
Washington, DC.

The committee met at 11:05 a.m. in room 2360 of the Rayburn House Office Building, the Honorable James M. Talent (chairman of the committee) presiding.

Chairman TALENT. Good morning.

Our hearing this morning will focus on the Occupational Safety and Health Administration's draft safety and health program rule.

The current version of the draft rule was released in October 1998. OSHA plans to issue a proposed rule based on the draft later this year.

By OSHA's own estimation, the draft rule will require over four million American small businesses to adopt safety and health programs satisfying certain vague requirements, such as "management leadership," "employee participation," "hazard identification and assessment," "hazard prevention and control," "information and training," and "evaluation of program effectiveness."

OSHA claims its rule is flexible, permitting employers to meet the requirements of the rule however they see fit. Unfortunately, the rule isn't flexible. It is vague.

Flexibility and vagueness are not synonymous.

IRS regulations, for example, are vague but nobody believes they're flexible. As any small business entrepreneur will tell you, there are two substantial problems with forcing employers to either comply with vague requirements or risk civil and criminal penalties.

First, a small business acting in good faith has no way to know what specific steps it must take to demonstrate sufficient "management leadership" or "employee participation."

Second, such vague terms provide OSHA inspectors with extraordinary discretion to target and fine employers.

Importantly, a recent study authored by a senior economist at OSHA suggests that the draft rule would not increase the safety of American workers. The study published in the November 1998 Monthly Labor Review indicates that mandatory safety and health programs like those required under this rule are no more effective at reducing occupational injury and illness than voluntary safety and health programs.

Indeed, in 1996, the median occupation injury and illness rate in states with mandatory safety and health programs was greater

than that in states with voluntary programs or no programs at all. Moreover, the median reduction in injuries was greater in states with voluntary programs or no program.

This finding isn't surprising. BLS statistics show that over 75 percent of all businesses, as well as 75 percent of businesses with ten or fewer employees have no recorded occupational injuries or illnesses at all in a given year. Thus, occupational injury and illnesses are concentrated among a relatively few high hazard industries. Many, if not most of those employers, already utilize safety and health programs in order to obtain lower insurance and workers' compensation premiums.

In short, what this rule would do is burden three-quarters of employers and small businesses who sustain no injuries or illnesses. A few high hazard employers already have such programs.

On a related note, I'm very disappointed with the Regulatory Flexibility analysis published by OSHA in support of the safety and health program rule. OSHA flagrantly overestimated the likely benefits of the rule and underestimated the associated compliance costs.

Both Reg Flex and SBREFA afford valuable protections to small businesses and insurance rules that accomplish what they are intended to accomplish. They require OSHA to provide small entities with estimates of the compliance burdens associated with the rule, and then solicit feedback as to how the underlying safety objectives might be effectively achieved at a lesser cost to small employers.

When an agency makes spurious assumptions in cost/benefit data, small businesses lose the underlying protections of the statute. But that's exactly what OSHA did during the safety and health program rulemaking. An independent report commissioned by the SBA Office of Advocacy concluded that "OSHA's costs and benefits methodologies do not provide adequate information on their underlying assumptions; make faulty assumptions; and are fraught with inconsistencies, inaccuracies and missing data."

Here are a few examples. OSHA assumes that the draft Safety and Health Program will lead to a 20 to 40 percent reduction in occupational injury and illness, despite the fact that states imposing mandatory safety and health programs do not have lower occupational injury and illness rates than those without such a requirement, and 75 percent of effective businesses already have an occupational injury and illness rate of zero.

OSHA includes the benefits but not the costs of hazard control in its estimate for the rule.

According to the independent report commissioned by the SBA, hazard control is the most expensive variable associated with the rule, increasing compliance costs by over 50% or over $2 billion annually.

It's just disingenuous to include the benefits supposedly received from hazard mitigation and not the cost to small business of that mitigation.

I want to say, in conclusion, what's so frustrating to me personally about this proposed rule. It seems to me that, both in process and substance, this rule is a return to the old OSHA.

None of us wants OSHA to concentrate on paperwork violations. None of us wants OSHA to proliferate vague new regulations that

invite inspectors to be arbitrary. None of us wants OSHA to use its enforcement resources on honest small employers who simply want guidance in obeying the law. And none of us wants OSHA to hurt small business while accomplishing nothing.

I'm afraid this proposed rule does exactly that, and I agree with the primary recommendation made in the independent report commissioned by the Office of Advocacy.

OSHA should not promulgate the draft safety and health program rule but should rather augment outreach and consultation programs to help employers develop and implement effective safety and health programs on a voluntary basis.

I'm going to defer to my friend, the Ranking Member, for such comments as she may have. I do want to say that we have the head of OSHA here today, another expert witness who undoubtedly will try and disabuse me and the Committee of these notions when he testifies. [Laughter.]

[Mr. Talent's statement may be found in the appendix.]

Chairman TALENT. But it's a pleasure, as always, to recognize the gentlelady from New York for her comments.

Ms. VELAZQUEZ. Thank you, Mr. Chairman, and good morning to everyone. And thank you for holding today's hearing on OSHA health and safety ruling.

A safe work place is not a Democratic or Republican issue. It is an issue of success for American employers and employees.

In that spirit, a Democratic Congress working in conjunction with a Republican Administration created OSHA, the Occupational Safety and Health Administration, to save lives, prevent injuries, and ensure a safe working environment.

OSHA provides a forum where employees, together with employers, have a real say in how this nation's safety policy is written and implemented.

I am sure that everyone in this room will agree that this nation's small businesses strongly support workplace safety. Small business owners want a safe workplace because it means a better environment for their employees, more productivity and, in the end, a successful business.

What frustrates small businesses is that while they support a safe workplace and know that the policy is well-intentioned, they also know their business and the best way to accomplish safety goals.

Small businesses believe in these goals, but often question the way they are implemented. They feel that, given more flexibility, they would be able to achieve the same goals without adversely affecting their business.

It was this type of concern that small businesses expressed to me when OSHA first came out with the Health and Safety plan.

And to be quite honest with you, this plan was not ready for prime time. So OSHA went back to the drawing board using tools such as ERISA to revamp the rule and make it usable for all small businesses.

What we have here today is a much improved product. The issue for the members of this Committee to answer is, does the Health and Safety Program adequately address such issues as the cost to the business, the potential benefit, provide a clear and concise rule.

Is it justified?

I am sure, through today's hearing and others, we can continue to improve this process and ensure that workplaces throughout this country are safeguarded in a smart and effective way.

Although there still is a long way to go in this process, I am confident that this hearing today is a significant step in ensuring that all concerned are listened to and taken into account.

I look forward to hearing from our witnesses on the impact of this very important rule.

Thank you, Mr. Chairman.

Chairman TALENT. I thank the gentlelady for her comments—as always.

Our first witness and our first panel today is Mr. Charles N. Jeffress. He is the Assistant Secretary of Labor for Occupational Safety and Health and has held that position since November, 1997. He has a BA from the University of North Carolina and is a graduate of the Senior Executives Program at the Harvard University School of Government. He was a Deputy Commissioner and Director of Occupational Safety and Health at the North Carolina Department of Labor from 1992 through 1997, and was the Assistant Commissioner of the North Carolina Department of Labor from 1977 through 1992.

Secretary Jeffress, I don't normally go into such detail, but people don't normally have such an impressive bio. I want to introduce you to the members of the Committee. I don't believe you've ever testified here, but it's a pleasure to have you here, and please give us your statement.

STATEMENT OF CHARLES N. JEFFRESS, ASSISTANT SECRETARY OF LABOR FOR OCCUPATIONAL SAFETY AND HEALTH

Mr. JEFFRESS. Thank you very much, Mr. Chairman. I appreciate the opportunity to come and talk with you today.

As evidenced by your comments, Mr. Chairman and Ms. Velazquez, the concerns about safety and health programs and the way OSHA is approaching this as a rule are things that are useful to be aired, helpful to be aired, and I'm delighted to have a chance to tell you from our perspective where we are on this.

As indicated, it is still early in the process and we have a long way to go in terms of public participation in shaping the final rule that we're proposing.

The safety and health programs are simple, systematic approaches to managing workplace safety and health that are widely recognized as fruitful ways to reduce the numbers of job-related injuries and illnesses and the number of job-related fatalities in workplaces.

In developing this rule, OSHA has worked extensively with stakeholders from industry, labor, safety and health organizations, state governments, trade associations, insurance companies, small businesses, people from all walks of life, in addressing the issue how we should best require safety and health programs in workplaces.

The draft rule would require the safety and health programs include five core elements, Mr. Chairman. You referred to some of

these. Management leadership and employee participation; hazard identification and assessment; hazard prevention and control; training; and evaluation of program's effectiveness.

Reduced to their basic level, these elements require an employer to work with its employees to find workplace hazards and fix them, and to ensure that employees and supervisors can recognize hazards when they see them.

Again, simple, straightforward requirements.

OSHA's interest in workplace safety and health programs has grown steadily since the early 1980s when the Agency first initiated its Voluntary Protection Program [VPP] to recognize companies in the private sector with outstanding records in the area of worker safety and health.

It became apparent to us in working with the best of the best, if you will, in American business that these worksites which had achieved injury and illness rates markedly below other companies in their industries, relied on safety and health programs to produce these kinds of results.

At VPP worksites, which today routinely achieve injury and illness rates as much as 60 percent below the average for their industries, safety and health programs have become self-sustaining systems that are fully integrated into the day-to-day operations of the facility.

At these worksites, worker safety and health is a fundamental part of the company's business, a value as central to the success of the company as producing goods and services or earning a fair profit.

We have applied what we've learned about safety and health programs from VPP companies and our other stakeholders to smaller businesses, the area of interest to this Committee, through the addition of the agency's Safety and Health Achievement Recognition Program, also called SHARP, which we direct at high hazard businesses with fewer than 250 employees.

OSHA has found that the programs implemented by these small businesses have reduced total job-related injuries and illnesses by an average of 45 percent and lost worktime injuries and illnesses by an average of 75 percent.

A few examples. Mereen-Johnson Machine Company worked with its 95 employees in Minneapolis, implemented a program and achieved a lost workday injury rate 60 percent below the industry average.

Applied Engineering, Inc., a manufacturer of specialties materials with 74 employees, located in Yankton, South Dakota, reduced its lost workday injury rate from 6.0 in 1993 to 0.0—not lost time injuries—in 1997, a success the company's president attributed to the implementation of a safety and health program.

The search for straightforward common sense approaches to worker protection has led many businesses to implement safety and health programs, it has motivated business associations to adopt their own model programs, and to recommend these model programs to members.

The National Federation of Independent Business's Ohio Chapter (NFIB) developed a comprehensive document entitled "Workplace

Safety Program Guidelines," which explains to NFIB members how to design and implement an effective safety and health program.

The guidelines include the same elements that OSHA has identified as keys to a successful program. According to the NFIB guidelines, and I quote, serious accidents or injuries can be very disruptive to any successful operation and to lives of the people involved.

An important step that an employer can take to effectively prevent these losses is the development of an organized safety plan or accident prevention program.

Earlier this year, the National Association of Manufacturers (NAM), in testimony before the Senate Subcommittee on Employment, Safety, and Training, echoed the sentiments of those who proclaim the value of safety and health programs.

At the hearing, Robert Cornell from Mon Valley Petroleum in McKeesport, Pennsylvania, told the Subcommittee, and again, I quote, "today we have an effective safety program resulting in fewer injuries and reduced workers' compensation costs."

Mr. Cornell's company used a comprehensive analysis of its safety and health violations and proactive employee involvement to address potential hazards. As a result, they reduced lost workdays from 70 in the early 90s to zero from 1995 through 1998.

These examples included companies that implemented programs voluntarily but the results from mandatory programs are equally impressive, Mr. Chairman.

Data from the four States with mandates covering most employers and OSHA's enforcement experience, show overwhelmingly the effectiveness of this approach.

The General Accounting Office (GAO), in 1992, concurred with earlier OSHA assessments of the value of comprehensive safety and health programs.

Since OSHA last testified before this Committee regarding this issue, a Small Business Advocacy Review panel has reviewed our draft proposed rule, as required by the Small Business Regulatory Enforcement Fairness Act [SBREFA].

The version analyzed by the SBREFA panel was different, as you indicated, from the one that we described to you when we last testified before your Committee.

For example, when we testified before you two years ago, our draft called for employers to conduct hazard assessments at a frequency, and I quote, "appropriate to safety and health conditions at the workplace."

Mr. Chairman, you suggested that there was some vagueness in our proposal. OSHA concurred with that. We revised the draft and presented the SBREFA panel one that provided that such assessment should occur at least every two years, and when changes in workplace conditions indicate that a new or increased hazard may be present.

The Agency also added a grandfather clause to the version of the draft proposal provided to the SBREFA panel. The grandfather clause responded to concerns raised here in this Committee and various other small businesses who already operate effective programs and should not be required to change them.

Several recommendations in the SBREFA panel's report, after they concluded their review, suggested that OSHA further clarify certain portions of its rule in our company analysis.

For example, the panel suggested OSHA should clarify, in our preamble, how the Safety and Health Program Rule interacts with other OSHA rules, with the existing requirements of the general duty clause and with National Labor Relations Act requirements.

OSHA is responding to these issues as we prepare our proposal for publication in the Federal Register.

For example, the draft provided the SBREFA panel required training to be provided, evaluations to be performed, "as often as necessary."

Instead, we are now considering language calling for review when the employer has reason to believe that all or part of the program is ineffective.

These changes should both clarify that an employer need not guess when reevaluation or new training should be conducted, but instead must exercise reasonable care in this, as they are required to do under all other portions of our regulations and Tort law, for that matter.

In addition, this change puts the burden of proof on OSHA, should lack of training or evaluation be considered a possible violation of the rule.

The Agency is also further evaluating the accuracy and transparency of our cost estimates, and we plan to solicit comments and raise in the preamble of the proposed rule regulatory alternatives for consideration.

In addition, when any final rule is published, OSHA will provide a variety informational and outreach materials to simplify compliance. Materials will include checklists, model programs, decision logics, and an Internet-based expert advisor to help employers determine how to comply and when they have met their regulations under the rule.

We will even refer to model programs that have been adopted and published by trade associations, unions, and others, as examples of programs that meet the requirements of the rule.

Some small business stakeholders have questioned whether the rule should be universally applicable. OSHA believes there's strong evidence to support such coverage.

Stakeholders have expressed a similar point of view. For example, John Cheffer of the Travelers Insurance Company testified before the National Advisory Committee on Occupational Safety and Health, and I quote:

"We consider any proposed safety and health standard to be the centerpiece from which all other rules and standards flow, in effect, the ultimate safety and health guideline document for the nation. If that view is accepted, by its very nature it must be generic, flexible, and universally applicable."

Another reason for applying the rule to establishments of all sizes is the risk currently posed to employees working in small businesses. Although small businesses with ten or fewer employees account for only 15 percent of employment in this country, 30 percent of all work-related fatalities reported to BLS in 1997 occurred in these workplaces.

Fifteen percent of employees but 30 percent of fatalities in businesses with fewer than ten employees.

By comparison, businesses with 100 or more employees accounted for only 20 percent of all work-related fatalities.

Based on these numbers, the risk of fatalities in businesses with ten or fewer employees is four to five times higher than the risk of fatalities in businesses with 100 or more employees.

Although most stakeholders, as OSHA does, oppose exempting small businesses from coverage, they agreed with OSHA that every effort should be made to ease compliance burdens for small businesses.

The assistance materials we are developing will meet that need.

In conclusion, Mr. Chairman, safety and health programs already make a significant difference in the lives of many of our nation's workers, and in the financial bottom line of many of our businesses.

We're designing a rule that provides a general framework for employers to follow, but leaves each individual employer free to add a workplace-specific procedure, and to adopt management practices that suit the characteristics of that particular workplace.

We are committed to working with employers of all sizes, both during and after the development of this rule, to ensure that the rule provides sufficient flexibility, that our guidelines and compliance-assistance information provide suitable information to meet the compliance needs of employers and to assure that workers are protected.

[Mr. Jeffress' statement may be found in the appendix.]

Chairman TALENT. Thank you, Mr. Jeffress. I appreciate you summarizing your testimony.

I'm going to go into a couple areas, then I'm going to go on to the other members, and I may have more questions later.

Let me get to the heart of what I see as the problem here, and you referred to it extensively in your testimony.

You recite, as support for this mandatory safety and health program rule, the fact that many small businesses, and businesses in general, have had effective voluntary safety and health programs about which they are very enthusiastic.

You mentioned the NFIB of Ohio, for example. They do have a very effective voluntary program. I have a survey from their membership that indicates that 80 percent of the NFIB membership supports the use of voluntary programs, and a similar number opposes the use of mandatory programs.

What I want to suggest to you and get your comment on—and then go into some specific examples of what I'm talking about—is why they should have this distinction. I don't believe it's because they say they're for voluntary programs but they really don't care about safety. Then they don't want the mandatory programs because at heart they don't care about what happens in the workplace.

I don't think that's the case for most of them: It is the case for some.

I think it's very important that OSHA is there for those that don't give a hoot about worker safety.

The reason I mention this to you—and I'm going into this long comment before my question. Personally, I want you to keep working on this, but I think if you go down this road—which is the wrong road—you're just going to get further and further away from where you want to be.

I don't think this model is going to work, and here's why.

These small businesses don't think these mandatory situations and these mandatory rules work. If the rule specifically requires a series of things businesses have to do: two meetings a month, training seminars and this sort of thing, then it's going to mandate specific requirements. As I think you recognize, when you say you don't want a one-size-fits-all approach, it is because it requires a whole lot of things that in thousands of workplaces will not have any relationship to worker safety and drives up costs without achieving anything. This you say you don't want to accomplish, and I understand that.

On the other hand, if it's vague and just says, "okay, have some training." Then, what you do is you simply create an invitation for arbitrariness in terms of what the inspectors do. The small businesses have no understanding of what they have to do to comply with the law.

So, there's no way around it with these mandatory systems. You're either going to be requiring a lot of things that aren't going to be of any significance in a lot of places, or you're creating a situation where there is no law.

In essence, you make the inspector the policeman, the judge the jury. Now, I know you're a reasonable person with long experience in this. That's one of the reasons I want to know your personal reaction to that.

Mr. JEFFRESS. Thank you, Mr. Chairman.

I suspect that the answer to that survey of 80 percent of the businesses opposing a mandatory rule of that type would not have been very different if the survey had been about a mandatory rule of any other type.

Most of us would rather do things of our own volition than be required to do something. I don't believe that answer is unique to safety and health programs.

I suspect it would be true of anything.

The good news for those folks is that if 80 percent of them favor the voluntary program, and are implementing that voluntary program as designed, then they are grandfathered, and this mandatory rule would not require them to do anything different from what they're doing today.

So the idea of this standard, by putting that grandfather clause in that you and other members of this Committee support, and by referencing programs that work, programs that have all the required elements like the NFIB program, allows employers to continue doing what they are doing voluntarily, the things that work.

Chairman TALENT. They are only grandfathered in if the meet the requirements of the rule, so they're only grandfathered in if they would satisfy the rule in the first place. That's not a grandfather clause.

Mr. JEFFRESS. Sure that's a grandfather clause. It means they don't have to change anything in what they're doing. They can keep doing it exactly.

Chairman TALENT. They don't have to change it if it would comply with the rule anyway.

Mr. JEFFRESS. We will be referencing the model programs like the NFIB program, saying if you're doing what this program requires, if you're doing what this program recommends, if you're performing the elements of this program, you don't have to change a thing.

This allows us to target those people who are not putting programs in place to create programs.

Chairman TALENT. This gets back to another problem. What we have here is your assurances—and I respect you—if Charles Jeffress was walking into every workplace in this country to enforce this rule, and we could clone you. However, you're not going to be walking in, and I'm not here trying to slam OSHA inspectors.

You have to understand where the average small business person is coming from.

Because I'm going to get to this in a second, and I promise the Committee I'm not going to do what I did a month or two ago and take 40 minutes with my questioning.

When I do care about something, I do like to get into it, but I will defer soon.

Let me take my brother for instance—as people who are regular attendees of these hearings know——

[Laughter.]

Mr. JEFFRESS. But since I'm here for the first time——

Chairman TALENT. If you are a regular attendee of these hearings and you're not on the Committee, I suggest you get a life, okay? [Laughter.]

My brother owns a tavern. He and my sister-in-law pretty much run this place. First of all, keep in mind—and this is a partial list—he's dealing with the Division of Liquor Control. Have you ever dealt with the Division of Liquor Control?

Mr. JEFFRESS. Fortunately, no.

Chairman TALENT. He's dealing with the IRS, he's dealing with the public health people, he's dealing with a lot of very sincere, zealous people like you, each of them doing their own thing, and doing this all by himself.

So he is spending an awful lot of time dealing with these people, and what you're now saying to him is, "Here is a set of requirements." And, I'm going to go into—in just a second—how he's supposed to interpret this stuff.

"And we promise you that we're going to be reasonable in enforcing this." But the truth of it is, as far as he knows, somebody could walk into his front door, and what that person says at that time is the law, and my brother doesn't know what that person's going to say.

I mean, you just have to understand, you talk to them on the ground, this is what they will tell you. So, this is another thing that he goes to bed at night thinking about: "Right now, no matter what I do, I'm not in compliance with the law."

You see?

And it doesn't achieve anything. It doesn't accomplish anything in terms of worker safety.

Let me go through some of these things. You tell me how, if you were my brother, you'd do this, okay?

"Demonstrating management leadership of the program. "Okay," establishing a program responsibilities of managers, supervisors and employees."

If he has a program that satisfies this core element establishing the program responsibilities of managers, supervisors and employees, he's fine.

So is an oral communication with them enough?

Mr. JEFFRESS. Yes, sir.

Chairman TALENT. You're absolutely certain of this?

Mr. JEFFRESS. Yes, sir.

Chairman TALENT. It doesn't say that here.

Mr. JEFFRESS. No, sir, it doesn't. It does say that if he has less than ten employees, he doesn't have to put anything in writing.

How many employees does he have?

Chairman TALENT. I think it depends on whether you count part time or not. I think you do count part time. He may have more than ten, but let's assume he has less than ten, so he doesn't have to put it in writing.

But if he's questioned, he's got to prove he did it.

Mr. JEFFRESS. Actually, if he's questioned, we actually ask the employees if they know the safety precautions they should be taking. Then he's got a program that works.

Chairman TALENT. If I was his lawyer, and for some purposes, I am——

[Laughter.]

Mr. JEFFRESS. I bet that's a tough job.

Chairman TALENT. If you were his attorney—I don't know if you are an attorney—wouldn't you advise him to keep records so that he could prove this if he had to?

Mr. JEFFRESS. No, I wouldn't. If he says that he has done this, since I'm not an attorney, I don't have to provide that advice but if he says he has done this, and employees know what to do, the only way that OSHA could issue any citations is if OSHA could prove he didn't do it.

He does not have the burden of proof to prove that he did it. We have the burden of proof to prove that he didn't. And if his employees know how to protect themselves, there's no reason for OSHA to go there.

I will agree with you, Mr. Chairman. I think one of the most difficult things for OSHA to do, once we propose this rule and adopt this rule, will be to help train our employees on how to evaluate safety and health programs fairly.

What is an effective program?

Our compliance officers are used to enforcing the rules and looking at the specification rule that you referred to earlier, where it's easier to judge whether there's a violation or not.

If there's no barrier to protect someone from falling off an open-sided platform, it's easy to judge.

How do you judge whether there's enough employee involvement? That's much more difficult to judge.

So there is going to be a challenge for OSHA to look at how do we apply this, how do we evaluate programs, how do we assure the reasonableness of our compliance officers, the thousand federal and the thousand state folks that are out there, consistency and reasonableness of those compliance officers in applying this rule.

I agree with you. I think that is a challenge we have. I think it's not only a challenge to the safety and health programs.

When we go to ergonomic rules, they also will be program-directed. Some of our earlier rules hinted at this, the process safety and management rules that has a communications standard.

OSHA is moving away from specification rules and towards rules that require systems to be put in place, and we have to move from teaching compliance officers simply to cite specific violations to analyzing and evaluating systems.

That is a challenge for us.

Chairman TALENT. And if you fail in that challenge, it's the business people who pay.

Do you see what I'm getting at?

Mr. JEFFRESS. I submit to you, if we fail in that challenge, it's the employees who are getting hurt who will pay as well.

Chairman TALENT. That assumes that compliance with the challenge would actually reduce the number of incidents at the workplace, which is another aspect of this.

You're saying he would not have to communicate in writing because the rule does not require recordkeeping for employers with less than ten employees.

Mr. JEFFRESS. Correct.

Chairman TALENT. You see, I would read that as saying, "you don't have to keep records of what you have done. You don't have to keep records of the fact that you sent them something in writing, but it still may mean you have to send them something in writing".

Mr. JEFFRESS. No, it very specifically allows that not to happen. As a matter of fact——

Chairman TALENT. It says, "recordkeeping of what you have done." It doesn't mean that you don't have to do anything in writing.

Mr. JEFFRESS. In small businesses, I believe in my counsel to the small business, the most effective way for an owner, for a manager—and it's generally the owner—to communicate to the employees that safety is important is to have the direct conversations, is to have the interaction between the owner and manager.

The reason it doesn't happen in larger businesses is, once you get above 50, 60 employees, it becomes more difficult for the owner to know every employee, to have conversations with every employee.

But the most effective way would be direct conversations, rather than something in writing that the employee may or may not know whether you're serious about it.

Chairman TALENT. I tend to agree, but I don't know that that's how this is going to be interpreted on the ground: "provide managers, supervisors and employees with access to relevant information and training."

Okay, so what does "training" mean?

Would my brother have to bring an expert in? Would he have to send them to some kind of school? Does he have to provide training?

And this is serious because, you know, I'm not an expert at running a tavern, but I've spent a fair amount of time in this one. [Laughter.]

Chairman TALENT. For example, in my evaluation of the hazards, they cut lemons and limes. Now if a person's been a bartender for ten years, and my brother hires him, does he have to train him how to cut lemons and limes?

You see? We laugh at this, but if my brother's going to take all this seriously, if he has time to know what's happening and take it seriously, and he's looking around his tavern for hazard identification—which is a whole other thing—that's what he's going to look at.

Does he have to provide somebody like that with training and does he have to bring somebody in to train them? Does he have to look up on the Internet or some other place the best way of cutting lemons and limes to avoid cutting yourself?

I don't know. I haven't talked to him. He probably gets some cuts that way.

The truth is, we don't know what he has to do.

Mr. JEFFRESS. In terms of training, there's no requirement that any specific type of training be done. The requirement is that the employer look at what the hazards are in that particular business in the tavern.

If there is a problem with cuts, then you need to look at that hazard. If there's a problem, as I've read some of your earlier stories, with lifting beer kegs, you need to look at the hazards, and talk to the employees about the hazards.

You've got somebody that's been doing it for ten years. You watch them do it a couple of times, they know how to do it, you're done.

You find someone who comes in new, and you find that they don't know the difference between a sharp knife and a dull knife, they put the knife in a location they're likely to rub up against it after they're finished, obviously you've got to do some work training that employee.

Chairman TALENT. What you're saying is what we really want people to do is use common sense in this, right?

See, I agree with that. But the way you get people to use common sense is to provide incentives for them to want to use common sense.

That's not what bureaucracies produce. And no matter how much, how sincere you are, and how much you try and train people, you are managing a bureaucracy.

I could bring in hundreds and hundreds of people who will tell you the experiences that they've had. This is not intended to be critical of your compliance officers, okay?

I've talked with a lot of them too. I know what they're trying to accomplish. It would be very similar.

Let me just ask you this. Why wouldn't it be similar to if the state legislature wanted to say, "Look, we're going to eliminate all the specific rules for driving. We just want you to be careful, and we're being very flexible here. You decide what 'careful' means.

But if a police officer decides that you're not being 'careful' and wants to write you a ticket, here's you remedy. You can appeal this to an administrative panel and up to a court and eventually they may decide that you were 'careful', notwithstanding what the police officer decided, but that's going to cost you tens of thousands of dollars. The assurance you have is we're going to train the police officers and we're going to make sure they don't go out there and abuse their authority."

Now as a driver, would you like that kind of a system?

Mr. JEFFRESS. There have been people who have suggested that OSHA should only adopt this rule and repeal all the rest of our rules because this rule should be the fundamental guideline for every business.

I don't believe that. I think it's important that we have specific guidance and specific rules where we have specific hazards and we know what best practices are.

What this rule does is to say, in addition to here's the guidelines, here are the regulations, here are the rules on specific hazards.

We found it's important to have a system in place so that you manage safety, just like you manage productivity, like you manage quality. It's important to have a system in place to manage safety.

And our findings, based on business experience, are that when people put systems in place to manage safety, they greatly reduce their injuries, they greatly reduce their costs of workers' compensation, costs as a result of injuries.

Those are the kinds of findings that Congress expects us to act on when we find things that make a difference in the workplace.

So I don't believe that we should abolish all the individual rules. I don't think we should eliminate all the specification standards. I believe it is important, having recognized that systems make a difference, to require that systems be in place.

Chairman TALENT. I recognize the gentlelady from New York.

Ms. VELAZQUEZ. Thank you, Mr. Chairman.

Mr. Jeffress, can you please explain to us, for the benefit of the members of the Committee, where are you on this rule, and what steps need to be taken before you adopt a final rule?

Mr. JEFFRESS. Yes, ma'am.

OSHA has a draft proposed rule that we have put on the Internet so everyone in the public that's interested can look at it, and comment on it.

And we've been through the SBREFA process.

Our next step is to make the modifications in the rule as the SBREFA panel recommended, and to submit it within the Executive Office Branch for review.

Our expectation is that this review will be completed and we will publish the proposal for public comment about the end of this year, of this calendar year.

Following that publication, we will have months of time for people to comment in writing, for people to attend public hearings, and respond to us at those hearings, as to what problems they see with the rule, what alternatives they would suggest.

In our publication, we will post several alternatives and ask for advice on those alternatives, and anticipate again several months of hearings and responding to those hearings.

So that the final publication of the final rule is, I would guess, at least 18 months away.

Ms. VELAZQUEZ. What you are telling me is that we are far from finished?

Mr. JEFFRESS. Yes, ma'am.

Ms. VELAZQUEZ. Mr. Jeffress, if the benefits of this program are in fact so much greater than the cost, as you maintain, why do you think so many small businesses have not adopted them voluntarily?

And if there is a good reason why you believe that these programs have to be mandatory, rather than at the discretion of the employer?

Mr. JEFFRESS. Yes, ma'am.

The Congress, in 1970, in adopting the OSHA Act had concluded that the Workers' Compensation, the economic incentives, if you will, for reducing injuries and illnesses weren't sufficient. That the country needed a program of governmental mandates to move employers beyond where we were, just based on economic incentives and have mandates for better performance.

Since that time, since 1970, the fatality rate's been cut in half, injuries and illnesses, while they have gone up and down at different times, we have a trend of declines in each of the last five years. We're now at the lowest level on record.

I believe that Congress was accurate that in fact a government program of mandated behavior with respect to safety and health makes a difference.

There is at least a three-to-one benefit in terms of safety and health programs from the economic analyses that are available, from the company reports that come to us. Every dollar that a company invests in safety and health, they save at least three dollars, and the VPP companies will report four, five and six dollar savings for every dollar invested in safety and health programs.

Many small businesses, as the Chairman indicated, are dealing with so many different things, they can only deal with what's right in front of them at the time.

And what we're asking with this rule, and I think what we're asking on safety and health generally, is to take a longer view, realize that there is a payback on safety and health, and invest in that payback.

So we believe that the OSHA program has worked, the OSHA Act has worked. It has worked by mandating improvements where we know that those make a difference.

Here's a case where we firmly believe that safety and health programs will make a difference.

Ms. VELAZQUEZ. Many small businesses have expressed that they do not have the resources nor the expertise to comply with the OSHA rule.

If you disagree with this, please tell us why you disagree with this. How will small business find out what they have to do? Will they need private consultants? Will OSHA consultation be available during the implementation period?

Mr. JEFFRESS. Yes, ma'am. OSHA consultation will be available. Congress has funded and OSHA has provided for the last 20 years

free consultation programs available to small businesses in every state in the country.

Rather than do this through OSHA employees, we contract directly with state labor departments to provide that. But any business with fewer than 250 employees can have a free on-site consultation.

The consultant comes on site, helps that owner evaluate what the problems are, helps design a plan that corrects for those hazards. There are no penalties, there are no fines, there's no cost. It's free of charge.

About three years ago, we started working with these staffs in the 50 states of these consultants on safety and health program systems. We're ahead of ourselves on the consultation side than we are on the rulemaking side.

And the consultants have had training in what constitutes an effective program, how to help the employer set up an effective program, how to evaluate one. So these consultants are trained and ready today, and are working today to work with small businesses to put these in place.

In addition to that free on-site assistance from trained professionals, we also will be providing materials information. The Internet is becoming an increasingly popular way to communicate.

We had over 17 million hits on our Internet site last month. As a matter of fact, one of the advisors specifically for small businesses on recognizing hazards in your business has been so popular with small businesses that the National Federation of Independent Business has put a hot link between their Internet site and our Internet site specifically to refer their members to this Internet advisor on how to recognize the hazards of your business.

We will use both publications, the Internet, and free, on-site consultation to assist businesses to meet this.

Ms. VELAZQUEZ. Mr. Jeffress, the Chairman made reference to this, and I'm going to ask the same question because so many small businesses have expressed their concern to me, so I want to reinforce this issue.

And that is that they have argued that this rule will give OSHA inspectors free rein to cite them for offenses, even though you explained that the burden of proof is on OSHA, is on the inspector to prove and to show that they haven't been complying, the employers.

What type of controls will OSHA have in place to ensure that fair and compassionate enforcement will be in place?

Mr. JEFFRESS. The first step is to ensure employers that this safety and health program rule applies to those hazards which are already covered under the OSHA Act.

We are not asking employers to go beyond the OSHA Act to look for things that aren't otherwise covered, that aren't otherwise already recognized, either through explicit standards or the general duty clause that recognizes generally accepted industry practices.

So the first reassurance is that we're not looking for people to discover things that we haven't otherwise already drawn attention to or industry practices haven't already drawn their attention to in terms of what's covered.

Secondly, there's no double jeopardy here. It's not that employers can be cited for a specific hazard and then also cited for failure of a program just because that hazard exists. There's not going to be double jeopardy.

The third, as I mentioned to the Chairman, we have a specific course for safety and health program evaluation that we are developing for our compliance officers on how to do this and how to do this well.

Every compliance officer in the nation will have that course and will have been trained in how to apply the standard in a fair and effective way.

So we're trying to provide reassurance to the businesses, as well as trying to train our employees on how to apply it appropriately.

Ms. VELAZQUEZ. Mr. Jeffress, did you have an opportunity to read the testimony that will be provided by other witnesses today?

Mr. JEFFRESS. That testimony was only provided to us 15 minutes before this hearing, so I'm afraid I've not had a chance to read the testimony of the other witnesses. I am generally aware of the PPE evaluation of the analysis done for the safety and health program rules.

Ms. VELAZQUEZ. Would you please comment on that?

Mr. JEFFRESS. In doing the economic analysis of our rule, we have gone to great lengths to look at what are the costs to businesses of implementing safety and health programs.

We have taken the actual information provided to us by businesses into that cost. We've gone so far as to analyze the cost in 300 different industries, in seven different sizes of employers within those 300 different industries.

I'm very confident in the analysis that has been done and I think it's a rigorous analysis.

Dr. Beale will be here later today, as well, and he can comment on the rigor and the accuracy of that analysis.

In looking at the report done by PPE, and again, Dr. Singh will be here to defend that to you, and you'll hear more from here about that.

I find their analysis is much more simplistic.

For example, instead of using 300 different industries and seven different employment sizes, they used a national average to look at the impact on the businesses.

Statistically they used the median cost of workers' compensation claims instead of the average or the mean cost of workers' compensation claims to compute numbers.

One thing I've learned in dealing with lawyers and economists is you can find people who believe strongly in directly opposite things.

You probably are going to have that situation before you today in terms of the PPE analysis and Dr. Beale's analysis.

I will tell you, though, that I have looked at the assumptions we have used.

I've looked at the way the calculations are done, and while I am not an economist, I have confidence in what we have done.

I believe the PPE analysis is flawed.

Ms. VELAZQUEZ. Thank you. Thank you, Mr. Chairman.

Chairman TALENT. Let me just follow up on a couple of things.

You mentioned one of the reassurances that small business people have is the protection of the specific requirements regarding hazards so that if they haven't violated another rule, they're not in violation of this one.

Go ahead.

Mr. JEFFRESS. I actually said, if there is a violation of another rule, it is not, by definition, also a violation of this. There won't be double jeopardy. There may in fact be an ineffective safety and health program, but that will not be an absolute statement simply because there's another violation.

Chairman TALENT. So an employer can be in violation of this rule while having a workplace that's perfectly safe with regard to the other rules?

Mr. JEFFRESS. If there's no violation of other rules, Mr. Chairman, I don't believe there's any way in the world OSHA would cite or could sustain a citation if they did, of the safety and health program rule.

Chairman TALENT. This is a separate rule, and it has separate obligations apart from the other substantive ones?

Mr. JEFFRESS. It has separate obligations.

Chairman TALENT. If it's totally linked to the other rules, why require it?

Mr. JEFFRESS. My point is, in terms of keeping hazards from occurring, we believe systems make a difference. If you don't have any violations of any other rules, I suspect your system is effective.

It would be very difficult for us to prove the system is ineffective if there are no violations.

Chairman TALENT. You're saying that absent proof of the violation of a substantive hazard, the system works. What if somebody doesn't have a system and they don't have any other violations?

Mr. JEFFRESS. You posit that that is in fact the case. I would suggest to you, Mr. Chairman, that that's not my experience.

Chairman TALENT. But this covers four million small businesses, right? A lot of those people are small employers in occupations that are not very hazardous. They don't have any kind of formal safety and health system—anything approaching what you're talking about.

They may not have accidents at the workplace.

Are you assuming that the only way somebody can be accident-free at the workplace is if they have a safety and health program with your five core elements in it?

Mr. JEFFRESS. You just changed. You said no accidents at the workplace. Earlier, we were talking about whether there were any violations.

Chairman TALENT. All right, no violations.

Mr. JEFFRESS. There is a substantial difference, Mr. Chairman, as you pointed out. A high percentage of businesses have no accidents, and that's impressive and that's important. We don't find that high a percentage of businesses that have no violations.

The potential for accidents exists at most businesses in America.

Chairman TALENT. I think now I understand. An inspector can walk into any workplace in the country and find a violation or a substantive hazard.

So on the ground, they understand this, Mr. Jeffress. So the point is if he thinks the safety and health program is in violation of this rule, he can just find something else, and on that basis, to fine everybody.

Mr. JEFFRESS. That's not what I said. I very specifically said the existence of a violation by itself of another specific standard was not necessarily an indication of a violation of the safety and health program rule.

Chairman TALENT. But you see, what you have to understand, this is a law here. To the average person, that's how they confront this. It requires them to do certain things. It's very hard to determine what it requires them to do, but it requires them to do it.

And I can go through other questions, if you want: how often they need to have meetings with employees in order to satisfy the requirements about regularly communicating, what it means to say, "provide ways for employees to become involved in hazard identification?"

As a practical matter, a compliance officer can come here, and he can say, "As regards to your business, this standard of regular communication means a meeting once a month. You haven't had a meeting once a month here—a violation of the rule."

There is nothing that small employer can do about it. This is why when you're talking about burdens of proof, it's not so much a question of whether you've proved a violation of the standard, it's a question of what the standard is.

This isn't law. I mean, this says go have a program which, if Charles Jeffress was in here and looked at, he would think it's a good program. It's not law. It's a vague kind of requirement that's backed up by the coercive power of the OSHA statute.

You see why people would view that as unfair, as potentially a threat to them?

Mr. JEFFRESS. Mr. Chairman, I would submit to you that most of the code of laws and the code of behavior in this country is based on a reasonable person test. What would a reasonable person do?

Every businessman and every businesswoman in operation in this country that has a business has that responsibility to behave in a way a reasonable person would.

It's in the common law, it's in the Tort law, that's the standard of judgment.

What is a reasonable person to do. What's a reasonable person expected to do. Within other OSHA rules, there's language such as, in the construction area, with respect to safety and health programs.

It now says, the Rule now says that employers shall implement such programs as may be necessary. Various language like frequent and regular inspections.

There are questions that have been raised about the language like, in close proximity or near. Those kinds of terms are interpreted in terms of what a reasonable person would interpret them. All those terms have been upheld by the Review Commission and by the courts.

Are they vague? No, I think they are flexible. Other folks will see them as vague, but they are all going to be interpreted in terms of the reasonable person test.

And as I say, I believe OSHA has responsibility to train our compliance officers in a way that a consistent interpretation of what a reasonable person would expect is applied. I think that's the challenge we have.

But the alternative, to move away from reasonable person kinds of tests, as you indicated, the alternative to go to precisely, exactly what you have to do, and one rule that fits every workplace would be an impossible burden for American business.

It's much more important, I think, and much more expected, a code of behavior that people are used to accommodating to have a reasonable person test.

Chairman TALENT. How often would you say a reasonable bar owner would meet with his people in order to satisfy the requirement of "regular communication?"

Mr. JEFFRESS. It depends on how many hazards he's had, how many accidents he has. You know, if you're having a series of accidents, you're probably going to talk to them every week.

On the other hand, if you've been accident-free all year, you're going to remind them once a year or so that this is an important thing to do.

Chairman TALENT. It depends on the overall context and how you ought to respond in an overall context. And who makes that judgment about how you should respond in the overall context?

Mr. JEFFRESS. The employer has to make that decision. It's the employer's business and the employer makes that decision.

Chairman TALENT. But once you set up a legal standard, you have somebody deciding whether the employer's response was adequate and who as a practical matter—for the average John and Jane Doe small employer—is the person who's going to oversee that?

Mr. JEFFRESS. The employer makes that decision. If a compliance officer, up on complaint, believes that the decision was not made reasonably, then the compliance officer is going to discuss that with the employer. It may end up a citation, it may end up a discussion.

Chairman TALENT. One other thing. You went into the cost/benefit analysis, and I'm just curious about something.

I intend to get mostly into this with Dr. Beale and Mr. Singh because they're the experts, and that will be the next panel.

As I understand it, in determining that mandatory rules would have benefits, you looked at the experiences, or OSHA looked at experiences in four states that had such mandatory requirements for five years that covered most employees.

Mr. JEFFRESS. Yes.

Chairman TALENT. Why the five years?

Mr. JEFFRESS. A couple of reasons. One, we know, even though we'd like to think that everybody listens to everything OSHA says, that it usually takes a while when a law is passed or a rule is passed, for people to realize what their obligations are and to put things in place.

Secondly, like any other system, safety and health program management systems don't have immediate impact. It takes a while for employees to believe, it takes a while for the training to occur, it takes a while to see the benefits or the impact of those.

So we believe that a longer period of analysis is appropriate for analyzing the impact of any particular role.

Chairman TALENT. The five-year figure, as opposed to six years or seven or three or four?

Mr. JEFFRESS. Five years seems to be a reasonable amount of time to expect an impact.

Chairman TALENT. What did "covering most employees mean?" More than half?

Mr. JEFFRESS. Actually, I think most of the laws are written for all employers, but then there exceptions because the OSHA Act may not apply to all employers.

Chairman TALENT. And if you don't know this level of detail?

Mr. JEFFRESS. I'll be happy to get back to you on that, but in looking at the laws, themselves, the laws say all employers, but we're very much aware that most OSHA acts, including the federal OSHA Act, have exemptions for some employers.

Chairman TALENT. How did you account for actions in some of those states that might have reduced injuries—other rules, regulations, workers' comp decisions, incentives or whatever?

Mr. JEFFRESS. It's impossible to discount for every other conceivable thing that may have had an impact, but these four states with mandatory programs, over a period of time, had significantly better performance than the national average.

Chairman TALENT. Which did you discount for?

Mr. JEFFRESS. I'm not aware that we discounted for anything.

Chairman TALENT. It could have been something entirely unrelated to the mandatory safety and health program that produced the result then, couldn't it?

Mr. JEFFRESS. There could well be other things that had impacts.

Chairman TALENT. Which states without mandatory safety and health programs did you compare those four states to?

Mr. JEFFRESS. We compared it to the national average performance for all states.

Chairman TALENT. And you just looked at a national average for all states including those that had mandatory safety and health programs?

Mr. JEFFRESS. For all states including those that had these programs, including some that had programs that applied. On a subset of employers, we took a national average and compared these four states to them.

Chairman TALENT. Did you compare it to any control group of states that just didn't have any mandatory safety and health programs?

Mr. JEFFRESS. I'm not aware of our having done that. You could pick out a particular state that either had a better performance or a worse performance, I'm sure.

There may be individual states that may have had better or worse performance. There may have been other factors out there that are important as well. I hope that OSHA, in the course of its existence, can continue to look at what improves——

Chairman TALENT. You see what I'm getting at?

Mr. JEFFRESS. I believe I do. [Laughter.]

Chairman TALENT. The control group you compared this to was a national average including all states, those that had mandatory

programs, those that didn't have mandatory programs, those that had partial and not otherwise, and you just told me that you didn't like the SBA economic analysis because they didn't differentiate, and just used broad numbers.

But you used that in the control group that you compared this to, didn't you?

Mr. JEFFRESS. But we isolated out those states, every state that had a mandatory program for all or almost all employees.

Chairman TALENT. That met your five-year requirement that seemed right and that covered most employees, and you're not sure what "covering most employees" meant.

Mr. JEFFRESS. If that's really important to you, I will get you precisely the requirements of each of these four states, Mr. Chairman.

Chairman TALENT. You're the one who said you looked at it, you're familiar with it, and you thought it was pretty good.

It seems to me what you did is similar to testing a drug where you give one control group the drug, and then you compare that against another group comprised of people who take the drug, people who don't have the drug, and some of whom received a partial amount of the drug but not as much as you gave the control group.

That wouldn't be a very valid analysis, would it?

Mr. JEFFRESS. No other state or group of states had a mandatory program that had five years experience, Mr. Chairman.

Chairman TALENT. If you just look at gross figures, which your economist did, Mr. Svensen, I think, in *Occupational Injury and Illness Rates 1992–96*, you can see why they fell. It's on page 47, and I can give you a copy if you want.

He compares states that have mandatory safety and health programs under Workers' Comp, states with mandatory safety and health programs under state OSHA, states with voluntary safety and health programs under Workers' Comp, and states without comprehensive safety and health program requirements.

The injury rates fell both in mean and median. Percent changes were greatest in the states that had no comprehensive safety and health program requirements.

Mr. JEFFRESS. I'll be happy to get an analysis of that back to you. I'm not going to sit here and try to read and analyze it for you.

Chairman TALENT. I didn't expect you to. I'll have this put in the record.

It seems to cast some doubt on the validity of OSHA's Reg Flex analysis.

I will recognize Mr. Bartlett next.

Mr. BARTLETT. Thank you very much.

In another life, I was a small businessman. We ran a company that did land development and home construction for a number of years, so I'm very familiar with this area.

Let me ask you first why, on page 7, you made the comment that Mr. Cornell did not testify on behalf of OSHA's proposal?

Mr. JEFFRESS. Right. That hearing was not on the safety and health program proposal. He was not testifying about mandatory safety and health program rules. He was simply testifying as to obviously the effectiveness and the belief they had that the safety and health programs did work for them.

Mr. BARTLETT. But he was testifying at what sort of an event?

Mr. JEFFRESS. It was a Senate subcommittee hearing.

Mr. BARTLETT. But the fact that you were developing this rule was not a discussion at that meeting?

Mr. JEFFRESS. That meeting was on a number of OSHA issues. This particular rule may or may not have come up. I wasn't present at the hearing. I don't want to tell you that it did or did not come up.

Mr. BARTLETT. But you referred to his comment because he indicated the existence of a health and safety program?

Mr. JEFFRESS. The effectiveness of the program for his workplace, right. He was not in any way endorsing this rule or any particular rule. He was simply saying safety and health programs work, and that's what people tell us all across the country that they work, and that's really what I was referring to here.

Mr. BARTLETT. I believe that. And I believe that every small business, whether they have a formal safety and health program or not, have one. Because if one of my employees got hurt, I was the most concerned person about that. I lost—many of them were my friends. I had a friend who was hurt. I lost a member of the team. I couldn't replace him because if I got somebody, they were not a member of the team, and productivity went down. When somebody got hurt, I was hurt because productivity went down.

So I had every incentive to make sure that my employees didn't get hurt.

You said that small companies that account for 15 percent of the employees account for 30 percent of the work-related fatalities.

Were you comparing companies of the same type?

Now if you have two companies, and one of them is a roofing contractor with less than ten employees, and frequently they have less than ten employees, and the other contractor you're talking about is a telemarketing company, which has 400 people sitting in a booth at a telephone, where would you expect to find the most fatalities?

Mr. JEFFRESS. Beyond what I presented to you, we have done a further analysis within the construction industry in particular, of small firms versus large firms, where we're just looking at construction industry firms. It's even more pronounced in the construction industry that the fatality rate, if you will, is much, much higher for small firms than for large firms.

Mr. BARTLETT. Doing exactly the same thing?

Mr. JEFFRESS. Yes, sir.

Mr. BARTLETT. I would need to see those, because some occupations are just hazardous. Putting roofs on houses is more hazardous than carpenters building a house, and there's nothing you can do to change that.

Mr. JEFFRESS. Right. But we were looking just within the construction industry, what some employers in that industry experienced, and the small employers in fact have a fatality rate much higher than the large ones.

Mr. BARTLETT. The Chairman indicated, in his opening remarks, and I think he referred to it again later, that states without regulations had less injuries.

How do you account for the fact that states without mandatory programs had less injuries?

If that's true, then why would we want to be proposing mandatory programs? Why wouldn't we want to look at those states that had the lower injuries to find out why they had lower injuries in spite of the fact that they didn't have these mandatory programs?

Mr. JEFFRESS. I would be delighted to have further research into what are successful experiences and what contributes to successful experiences, and I want to learn from all of that.

As the Chairman indicated, there are a lot of factors beyond just safety and health programs that affect a state's performance.

As you suggest, different people doing different kinds of work are going to result in significant different injury rates.

So there are a lot of different things that contribute to that. And I assure you that OSHA continues to look at and analyze what can we learn from, what can we show that makes a difference.

And we will act. That's what's happened with ergonomics. We have found significant problems with ergonomic injuries and we're acting in that area.

So we will continue to look for what makes a difference between safe workplaces and unsafe ones, and when we find something, we'll act upon it.

Mr. BARTLETT. Let me suggest that the answer may lie in the difference between investing in health and safety and investing in compliance.

When you have mandatory compliance, your primary focus is going to be on not getting fined. If you don't have mandatory compliance, I can tell you, as a small business owner, my major focus was on providing a safe workplace.

Now I'm not sure that those are synonymous. I think if you are forcing people into compliance that they may not have the energy remaining to really focus on a safe workplace. And don't you think that may be the reason that states without mandatory compliance have a safer workplace than states with mandatory compliance?

Mr. JEFFRESS. When I took this job in North Carolina, the first time I had a job directing an OSHA program, a good friend of mine, who was a safety and health director for a furniture company, invited me to speak to his supervisors, and he introduced me by saying he wanted me to know that he thought, as a safety and health program director, he had two jobs. One was to assure compliance with OSHA, one was to prevent accidents. And he didn't think one had anything to do with the other.

I think you're saying something similar to that.

Mr. BARTLETT. I think that's right.

Every businessman that I know wants a safe workplace for all the reasons that have been mentioned here. And you've only got so much energy, so many dollars, so many hours in the day, and you're going to focus your attention on something.

And if you have a choice of focusing your attention on a safe workplace, and compliance and you know you're going to be fined, you're going to be put out of business, and I know small businesses that have been put out of business by exorbitant fines for rather trifling violations, by the way, you're going to focus your attention on that.

And you may not have the time, the energy, and the dollars remaining to focus your attention on what's really important; that is, providing a safe workplace.

You see, if it's true, sir, that the states which have no mandatory compliance have a safer workplace, wouldn't you therefore conclude that the promulgation of this rule would be counterproductive?

Mr. JEFFRESS. My response to Dave Masters was, if that's what his view of his job was, my view of my job was to make those two relate, to see that they're closer related, to see to it that the causes of accidents are in fact the things that are addressed through OSHA rules.

Looking at what makes workplaces safer, looking at individual experiences, looking at the hundreds of employers who we've worked with in the SHARP program, the hundreds of employers we worked with in the VPP programs.

It's very, very clear that putting in place safety and health systems makes a difference because that system allows you, as the employer, to look at okay, what is it that are hazards here in our workplace that are hurting my employees, and address those things.

I believe we're really headed the same place, Mr. Bartlett, giving that employer the permission and giving that employer the obligation to address what hazards exist in their workplace and correct those hazards is what will make those employees safer.

I believe that's what OSHA ought to be about.

Mr. BARTLETT. I've talked to a lot of contractors in our district, and I will tell you that they are more terrorized by OSHA inspections than they are an IRS audit.

Is that how you want them to react to your inspectors?

Mr. JEFFRESS. No. My preference, by far, is that they have confidence in the safety of their sites and that they wouldn't be afraid for me to walk on, or a compliance officer, or you, or anyone else.

Mr. BARTLETT. In plain clothes, I would like you to accompany me to talk to some of these people. You will find that they are more terrorized by your inspectors than they are by an IRS audit.

And I would submit, if that's the case, we've got a problem with your agency.

Mr. JEFFRESS. I welcome your invitation.

Mr. BARTLETT. One last thing, Mr. Chairman.

You made the remark about those who don't care about worker safety. There may be a few companies that don't care about worker safety, but aren't there, Mr. Jeffress, a lot of sources that will bring them to the point that they're going to care about worker safety?

First of all, there is criminal negligence, if in fact they have been negligent in providing a safe workplace, that works. There's all the trial lawyers. There's the cost of insurance that goes up. There's Workers' Compensation costs that go up.

Aren't there a lot of incentives to bring those few companies that might not be interested in a safe workplace to the point where they're going to be interested in a safe workplace or they're not going to be in business?

That's to say nothing of the fact that they have a reputation for not having a safe workplace and they're not going to be able to hire anybody.

Today, we have more jobs than we have workers. Don't you think that market forces will accomplish better what you want to accomplish?

Mr. JEFFRESS. Congress found in 1970 that those market forces were not providing that. President Nixon agreed with them, and we ended up with the OSHA Act. I believe it's important that we continue to enforce the OSHA Act.

Mr. BARTLETT. If one looks back through history, Congress has not always done the right thing, sir. [Laughter.]

Mr. JEFFRESS. I submit to you neither has OSHA.

Chairman TALENT. I just want to remind Mr. Jeffress that Congress passed SBREFA. That was signed by the President also. We'll get more into that later.

Mrs. McCarthy?

I'll just say I always hesitate to enforce the five-minute rule on the members when I've been flagrantly violating it myself. [Laughter.]

So I haven't been, but we do have two more panels. I just want to remind the members of that.

Mrs. MCCARTHY. You always do it when it's my turn. [Laughter.]

Chairman TALENT. That's not true because you never take up your five minutes. Please, as much time as you want.

Mrs. MCCARTHY. I will not this time.

Number one, I thank you for informing us and picking up on basically almost all the questions that have been asked.

I want to go a little bit different, but I think we'll pick up more on what some of the members have brought up.

I go along with small businesses. They are petrified when someone from OSHA comes in.

What I'm going to ask you is, what kind of training are you giving your inspectors, and what kind of recourse do the employers have if there is an inspector out there that is being a bully or certainly being unfair to that employer?

Because I think that's important, you know. As with any business, you're not going to have some good people in there, but it also comes down to how can we make sure that our inspectors are a little bit more friendly to our small employers?

Mr. JEFFRESS. In the course of compliance officers' initial training, we require a basic compliance course. The basic compliance course for all compliance officers includes a code of conduct, if you will—not by that name—but the way to behave in terms of conducting an inspection.

And there is an expectation on our part that our compliance officers are courteous, are fair, and are very clear in what they are communicating in terms of what the procedures are.

For those occasions where an employer feels like he or she has been poorly treated by a compliance officer or when a compliance officer has abused the authority, the employer has the right, under our rules, to ask for a meeting with the supervisor, with the area director, if you will in that area office to discuss the issues that are presented.

Again, there's no penalty, there's no cost to the employer for doing this. I'm happy to report to you that 90 percent of the cases where a compliance officer has cited a violation and where the em-

ployer believes that the compliance officer has done so inappropriately, 90 percent of those cases are resolved by settlement discussions with our area director, to the satisfaction of both OSHA and the employer.

Where an employer believes, at that level, that it isn't sufficient, the employer can contest, and at that point has to file a formal contest. And there's an administrative law judge process through the OSHA Commission, which is independent of OSHA, to make that determination as to whether the citation was appropriate or not.

But 90 percent of them get resolved in what we call our informal settlement agreement process, which is no cost, and where the employer and the director or supervisor for that area sit down and discuss what the compliance officer may or may not have found.

Chairman TALENT. Next is Mrs. Kelly.

Mrs. KELLY. Thank you, Mr. Chairman.

Mr. Jeffress, I don't know a whole lot about your background but I'd like to know, have you ever worked in the construction industry?

Mr. JEFFRESS. Three summers, and then my first job out of college was a carpenter's helper.

Mrs. KELLY. So you were on the working end of a hammer, pickaxe, shovel, whatever it took, is that right?

Mr. JEFFRESS. Fortunately, it was a hammer most of the time.

Mrs. KELLY. I want to know, when you're talking about that, you know from your own personal experience what it's like to be in the field wielding a hammer. If somebody walked up to you and said, you've got to wear a hard hat, goggles, gloves, et cetera, would you wear them if it was hot like it is today?

Mr. JEFFRESS. If someone demonstrates to me that there's a hazard here and something's going to fall on my head and could hurt me, I'm going to wear that hard hat.

Mrs. KELLY. Mr. Jeffress, did you wear a hard hat? You're young enough to be on the job when that was in effect.

Mr. JEFFRESS. I did.

Mrs. KELLY. Every day?

Mr. JEFFRESS. Whenever there was a fall hazard, my boss says wear a hard hat, and I did.

Mrs. KELLY. Was your boss there every day to tell you to wear a hard hat, or did he tell you once and then expect you to remember that?

Mr. JEFFRESS. I was pretty low on the chain. I had a lot of bosses there. [Laughter.]

Mrs. KELLY. Did they remind you, Mr. Jeffress?

Mr. JEFFRESS. Not always.

Mrs. KELLY. That's exactly my point. I think you understand. We can do a lot, you can do a lot. But the problem is when you get right down in the field, trying to help people protect themselves is not always the easiest thing.

Now, you are talking about people, about OSHA managing safety. Now, if this safety system is in a small family business constructing a few houses, as Mr. Bartlett was talking about, I want to know if you were a part of the family, would you always wear a hard hat?

I'm not so sure. And I'm very concerned because I don't see where you, sitting here in Washington, writing legislation, can affect those people in small family businesses out there who need to protect themselves.

I'm wondering why we are talking about—and I quote you here—you said that you maybe should repeal all other OSHA rules in favor of this one that you're talking about. Yet, I see here, in reading what you're talking about, very vague standards, and I don't see a whole lot here in localized education.

What could you do about that?

Mr. JEFFRESS. I agree wholeheartedly with you that OSHA's history has been to rely on the enforcement tool to assure compliance and to change behavior. And that we are derelict in not having done enough in the education and training arena.

I believe it's very important that OSHA correct this balance and do more in the education and training arena.

Mrs. KELLY. Is that written into here?

Mr. JEFFRESS. The President's proposal to this Congress, pending today before your Appropriations Committee for a major expansion for OSHA is for education and training to put full time education training folks in every area office OSHA has around the country. No inspection responsibilities. Does not have the ability to cite or fine people but to teach and to train.

We want one person with every area office to be available and accessible to American businesses. We need to do that. I agree with you.

I would hope that this Congress would support that request.

Mrs. KELLY. I want to go to something that you mentioned earlier, and that's Mr. Cornell's Senate testimony.

Mr. Cornell has a business and it's in the petroleum, the Mon Valley Petroleum industry. And I'm reading from his testimony right now.

What he said was, "we found the language was not reader-friendly," when he was talking about the guidelines established by OSHA here. "We found the language was not reader-friendly and was, in fact, impossible for a layperson to understand. I think for the small business person to understand and then try to comply with OSHA is very frustrating."

I further want to quote from a letter that he sent that says, "I do not believe for a minute that OSHA's plan to impose a one-size-fits-all safety and health program regulation that directly conflicts with specific needs and existing safety program of Mon Valley Petroleum will improve health and safety in our facilities. Rather, such a regulation would intrude into the management of our business by imposing a federally mandated structure for managing our safety and health program and compromising the initiatives Mon Valley has taken. * * *"

Now you quoted him as being supportive of what you were trying to do, and is this what he's saying to us here in this letter?

With your permission, Mr. Chairman, I'd like to enter that in the record.

Chairman TALENT. Sure.

[The information may be found in the appendix.]

Mrs. KELLY. And his testimony in front of the Senate in the record.

[The information may be found in the appendix.]

Mrs. KELLY. That's contradictory. How do you stand for that?

Mr. JEFFRESS. I believe you misquoted me, ma'am. I did not say he supported what we were trying to do. I said he supported the program of safety and health programs, that he believes they make a difference and he does, and he gave the Senate information that's included in that testimony about how impressive a change and how important it had been to his company.

That's what's important here. Do you believe that safety and health programs make a difference. We've gone beyond what was in the original proposal here, and said, for companies that have effective safety and health programs in place, that meet the basic obligations, they'll be grandfathered in.

So companies that are doing a good job and have their basic obligations in place will not have to change what they're doing.

That change was made after the last testimony before this committee.

Mrs. KELLY. Well I think he, in his testimony, from what I'm just reading here, implied that what you've written is extraordinarily vague. And I think that's the trouble he showed when he was writing this letter, and in his own testimony.

One thing that I found vague in what you said was, you said you had done cost studies. First, I heard what I thought was 300 industries, and then I heard what I thought was 700 industries.

Which is it?

Mr. JEFFRESS. A cost study is a nationwide study. In doing the analysis, we looked at 300 different industries. Within the industries, we then looked at seven sizes of employers. The smallest employers fewer than ten up to 20. We looked at different sizes of employers, so you have seven classes of employers based on employment size, and then 300 different industries.

Mrs. KELLY. I've run out of time, and there's a lot more I'd like to ask you.

I would like permission, Mr. Chairman, to submit some questions, written questions to Mr. Jeffress because there's a lot here that you and I really, I'd like to sit down and talk with you about.

Mr. JEFFRESS. I'd be happy to do that.

Mrs. KELLY. But I'd like to do it by submitting questions to you, getting the answers, and then we can talk.

Mr. JEFFRESS. I'd be happy to respond in writing, and meet with you as well.

Chairman TALENT. Ms. Christian-Christensen.

Ms. CHRISTIAN-CHRISTENSEN. Thank you, Mr. Chairman.

I want to apologize for coming late, and also missing most of your spoken testimony.

When I came in, you were saying that for every one dollar spent, three dollars is saved.

Is this also true for those smaller companies of under ten employees?

Do you feel it's true even for them, even though their incidence of injuries on the job is far less than those with more employees?

Mr. JEFFRESS. It is true. It is an aggregate figure. As the Chairman indicated, and many of you have referred to, there are a large number of employers that have no injuries this year, and they may have no injuries next year. And it may be the third or fourth year where they have an injury and someone else doesn't have that injury that year.

So the three dollar return on investment for each dollar invested is an aggregate figure. I can't tell you that it would be true every year. But I can tell you, over a period of time, for businesses it will be true.

Ms. CHRISTIAN-CHRISTENSEN. I'm a physician, so I had some patient protection, employee protection regulations.

Mr. JEFFRESS. The pathogen standards?

Ms. CHRISTIAN-CHRISTENSEN. Yes. And we have so many regulations, I can understand what Mr. Bartlett was talking about.

And in your response, it was a job in North Carolina, you said you were going to try to bring them together.

Were you successful in that?

Because I think it's important that we do see adhering to the rule, whatever it ends up being, and protecting our employees is one and the same, and not an additional burden.

Mr. JEFFRESS. I agree with you. I think that is very important.

I'd like to believe, in the five years I was in North Carolina, we did bring those a little closer together. You'll have to ask other folks for their opinion, as well.

The other thing I would emphasize is I believe safety and health is in fact fluid, and I certainly hope that OSHA is, as we learn more that we make modifications.

The bloodborne pathogens standard is one area where knowledge has been growing tremendously and we need to make some modifications to that, and we'll be making some based on the experiences people have reported to us.

What we're proposing here in terms of the safety and health program rule is in fact our best analysis, our best proposal based on what we've heard so far. We will modify it based on what we hear next year in the hearings and written comments.

But even so, it's going to need to be responsive, and it will need to be revisited from time to time. We need to continue to stay current and be responsible to people's experience.

Ms. CHRISTIAN-CHRISTENSEN. Thank you.

Thank you, Mr. Chairman.

Chairman TALENT. I just have a couple of more questions. Then we're going to release you, Mr. Jeffress, and go on to the next panel. I appreciate your patience very much.

I want to go a little bit more into the cost/benefit analysis which is going to be the subject of the next panel.

I just want to establish something with you as a factual basis here that two experts seem to disagree about.

Part of what you hope is going to happen as a result of this rule is that the safety and health program people institute will lead them to identify and remove hazards at the workplace.

That's correct, right?

Mr. JEFFRESS. Yes.

Chairman TALENT. Now obviously, there's going to be some cost to removing those hazards?

Mr. JEFFRESS. Yes, sir.

Chairman TALENT. To bring it down to the I chose to use here, if my brother, as a result of his inspection at the workplace, decides that the knives that they're using present an extra hazard when they cut things up, he may have to out and buy new knives. That's the cost of the hazard removal.

Just so we're on the same page with what we're talking about.

Now did OSHA, in its Reg Flex analysis, take into account, as a cost of the rule, the cost of that hazard removal or not?

Mr. JEFFRESS. We did.

Chairman TALENT. So you did not omit that cost of hazard removal?

Mr. JEFFRESS. We did not omit that. It's taken against the benefits, if you will, what are the benefits to an employer of putting a safety and health program in place.

Those benefits have been decreased by the cost involved in correcting the hazards.

Chairman TALENT. If that's the case, then my reference to that in my opening statement was incorrect. That's one of the reasons I wanted to establish the validity of Mr. Singh's point.

Mr. JEFFRESS. I made a check here because I wanted to make sure that I'd done that.

Chairman TALENT. Now why does Mr. Beale in his testimony—and this is a classic case of having so much information that you can't find anything here. I remember reading in Dr. Beale's testimony—and he'll be able, obviously, to testify on his own behalf—he said, "For the purpose of assessing the economic feasibility of the proposed rule, it's appropriate to consider only the costs that are directly attributable to the rule.

The legally correct way to do this is to assume that the regulated entities are already in compliance with other regulations, and thus to exclude costs of coming into compliance in instances when they in fact are not already in compliance.

Thus, for the purpose of assessing economic feasibility of a regulation costs of hazard control required by other regulations are properly omitted, and OSHA did so."

Was he just wrong in saying that?

Mr. JEFFRESS. In terms of offsetting the costs and benefits, we did offset those costs, so the benefits are reduced by the amount of those costs in terms of attributing—and that's in the cost/benefit analysis, but in analyzing the costs and in analyzing the benefits, we did reduce the benefits by those costs.

Chairman TALENT. But you just didn't have a separate line item that includes the net. When you say benefits, you mean net benefits?

Mr. JEFFRESS. That's correct.

Chairman TALENT. The costs of replacing steak knives, et cetera?

Mr. JEFFRESS. In terms of the costs of this rule, Dr. Beale is right. Those costs are in fact theoretically attributable to the other rules that already exist.

I don't want to double count the costs but we did reduce the benefit of this rule because our presumption is that these employers

who have these violations, who have these hazards, and are not correcting them, will now correct them as a result of this rule.

But, you know, we need to attribute those costs. They need to correct them because of the previous specifications. They just won't do that. My suspicion is they won't do it until this rule is put into place.

Chairman TALENT. I just want to make sure I know, as a matter of fact, what you did. You understand why I'm going into this?

So when you say the costs of hazard control required by other regulations are properly omitted from your Reg Flex analysis, that's just not correct as a matter of fact. You did not omit that from your Reg Flex analysis.

Mr. JEFFRESS. We did not attribute to this rule those costs, but we did claim them, as benefits for this rule. We reduced the benefits claim for this rule by those amount of costs.

Chairman TALENT. So you didn't include them, but you included them in netting out the benefits, and I don't care how you did it.

Mr. JEFFRESS. We didn't claim them as Dr. Beale said. We did not show them as a cost of this rule, but we reduced the benefits because those are going to be incurred.

Chairman TALENT. Now I will tell you this. I read the Reg Flex analysis, but did not read it in the detail that staff read it, it's not really evident from it that you did net that out.

I accept you, since you say you did.

Mr. JEFFRESS. I think that was pointed out in the SBREFA final process as well. We'll make that clearer.

Chairman TALENT. I think it also makes it more difficult to review whether you were correct in computing the total costs when you don't have a separate line item.

What I'd like to do is prepare a series of questions for you about your Reg Flex analysis based on Mr. Singh's review of it, put those to you in writing, and I hope that you will respond in depth.

Mr. JEFFRESS. We will.

Chairman TALENT. It's important to me, observing Reg Flex, which was passed by the Congress and signed by the President, is as important for OSHA as enforcing the OSHA law, which was passed by the Congress and signed by the President.

And so I will expect detailed and to-the-point responses. I don't want to have to do this in another hearing. So if you do it in writing, it would make a big difference.

Mr. JEFFRESS. We will respond.

Chairman TALENT. I think I'll save my questions about the economic analysis for the economists when they get up here.

Unless anybody else has a question?

[No response.]

Chairman TALENT. Thank you, Mr. Jeffress for being here.

I'll ask the second panel, and just for the convenience of the members, the second panel is going to be Dr. Beale and Mr. Singh. Then we will have a third panel with the other two people.

I know we're changing this, but I think it's the right way of packaging it.

[Pause.]

I will not go through the bios of these two distinguished witnesses. They each have long records of experience in their relevant fields.

I do thank both witnesses for coming. We're looking forward to their testimony and their dialogue.

Without any further comment, I'll just introduce Mr. Jasbinder Singh, currently the president of Policy Planning & Evaluation, Inc.

STATEMENT OF MR. JASBINDER SINGH, PRESIDENT, POLICY PLANNING & EVALUATION, INC., HERNDON, VA

Mr. SINGH. Thank you, Mr. Chairman.

I will read my written testimony, not verbatim, but concentrating on some of the tables that I've presented.

And then perhaps come back into the written testimony as I go along.

I should say thank you for inviting me. It's my privilege to be here to present a summary of our report.

This report, as you know, was prepared for SBA's Office of Advocacy to assist it during the SBREFA process.

I'd like to correct that a little bit. Actually, we've presented a lot of the analysis presented in the report during the SBREFA panel process, but the report actually came I think about 45 or 60 days later.

We reviewed the draft rule and the accompanying documents to determine whether the benefits outweigh the costs of the rule for certain categories of small business, and whether regulatory flexibility can be provided to small business without comprising the goals of the rule.

My company, Policy, Planning & Evaluation, Inc. has prepared such independent reports on more than 15 other federal rules over the last four years, most of them under the SBREFA process.

In addition, we have prepared numerous economic analyses reports on behalf of federal agencies over the last 20 years.

Our report, as you know, is very critical of the preliminary initial regulatory flexibility analysis developed by OSHA as justification for the Safety & Health Program rule.

In my view, and I say that because even now I would say that, after reading Dr. Beale's testimony this morning quickly, that OSHA did not make a good faith effort in analyzing costs and benefits of the Rule, as discussed below.

OSHA has largely ignored the impacts of the rule on small businesses. Moreover, its depiction of total costs and benefits is highly deficient.

I believe OSHA's analysis does not exhibit due diligence. I'd like to add that, in my 15 years, I have never seen any analysis like this.

I'd like to turn your attention to page 5 to this table, which represents—it's not MSD incident rates—this is rates of injury analysis with days away from work.

This is the data taken from the Bureau of Labor Statistics. What we find that is if you go across the establishment-size group of one to ten, this data are divided into four quartiles.

Basically, you take all the businesses in any industry and divide them into four categories, for quartiles of equal size, and then take the average incidence rate in each of those categories.

This analysis that I've listed comes from the Bureau of Labor Statistics. As you can see, the incidence rate in the employee size category 0 to 10 is zero for, 1 to 10 is zero for the first three quartiles.

And then in the fourth quartile, it is 6 injuries per hundred workers.

In 11 to 49, it's zero for the first two quartiles, namely 50 percent of the establishments, and in the 50 to 249 category, it's zero in the first quartile or 25 percent of the businesses.

For other businesses in the third quartile, you can see the highest rate is .5 injuries per hundred workers per year, which means that if you take a firm of I suppose 50 employees, they will experience an injury rate of .4 injuries per hundred workers per year, which amounts to almost one injury every five years.

So there are this large number of businesses that have very, very low injury rates and they will be asked to comply with this rule.

And I'm taking, in this presentation, the incidence rates from the manufacturing sector, which is traditionally considered the highest high hazard sector.

I also would like to spend a couple of seconds on the fourth quartile, which means the 25 percent of the businesses that have a fairly high rate of injury. And I believe that it is this sector to which the health and safety program rule, or for that matter, any of the rules should be addressed or directed.

A firm, maybe a thousand-person firm in the fourth quartile will have like 86 injuries per year. It makes sense to have some sort of a rule or some sort of a systematic way to reduce those injuries.

I believe the fourth quartile here represents many industries or includes data from many industries that have very high hazard rates, as documented by OSHA.

And I would like to go back to my report and just sort of read out some of the industries that we know are small, have a large number of small businesses.

For example, I'd like to say ductile iron foundries, automobile stamping, steel springs, all of these industries have incidence rates as high as 25 injuries per year per hundred workers.

I believe it's those kinds of industries that OSHA should focus on in order to reduce the injuries.

What the data in this table imply is that the vast majority of the small businesses will incur the costs of the rule but derive really no benefit, because the benefit really comes from reduction of injuries, and then from reduction of Workmen's Compensation premiums. That's where the benefit really comes from.

Mr. Jeffress has testified to the effect that a very large number of the fatalities occur in small businesses. And indeed, if you reduce those fatalities, there would be benefits from reduction of those fatalities.

But what is missing perhaps in that is that if you have 30 percent of the fatalities in very small businesses of one-to-ten employee firms, there are millions and millions of those firms.

In any one individual firm, it's unlikely that the fatalities will occur quite often.

I want to go back also to the 49-employee firm that I said there's one injury every five years. So if you take OSHA's assumption about the fact that the injuries were reduced, due to this rule, by 20 to 40 percent, even if I take 20 percent, what we find, using OSHA's estimates of benefits, that that company will save $460 per year.

I believe the cost of the rules, regardless of all the controversies that there are about benefits and costs, will be far more to that small firm than $460 per year.

I have also heard that the injury rates in the BLS data are not adequate because the injuries are under-reported in small businesses.

My response to that would be that tell us how much under reporting is it. Is it a 100 percent, 200 percent, 300 percent. Whatever the under-reporting might be, I would submit to you that for these 75 percent of the businesses, the cost of the rule will far outweigh the benefits of the rule, especially for the first three quartiles of the businesses.

Let me go to the benefits of the program rule. If I may ask you to turn your attention now after page 5, there's no, on the next table, Table 2, OSHA, as I said, the benefit of the rule is directly proportional to the reduction in injury in the businesses.

OSHA assumes here again that the rule will reduce injuries by 20 to 40 percent, and we talked about that, you all talked about that before.

Well, what we did, and I should say that we were brought into the SBREFA panel process, we were given this assignment, and we have no more than maybe 30 days to do our work, whereas the Agency has taken two years, perhaps five years, to develop the rule.

They had adequate time to present their analysis, to document where the benefits are, or for that matter, the costs are. I know Dr. Beale will probably criticize us here, but give us a little break here, if we did make a mistake or two, we had only 30 days and we had to cover a lot of ground.

And even in preparation for this hearing, I spent a very substantial amount of time on the Workers' Compensation program, and I'll comment on that a little later.

If we look in Table 2, if I may turn your attention back to that, I will pick Minnesota as an example here.

Chairman TALENT. Let me say, Mr. Singh, if I could interrupt you for just a second. Why don't you explain Table 2, which I think, as I understand it, part of the heart of your analysis.

Then we'll go ahead to Dr. Beale, because I think the questions that are going to come from the Committee members are going to bring out the other points of the analysis.

If they don't, we can go back later and get them. Since we have votes coming up, I want members to be certain and have a chance.

Go ahead and explain Table 2, then we'll go to Dr. Beale, if we could.

Mr. SINGH. This is the data we could get during the 30-day exercise.

We have the state plans states in which similar program rules have been implemented. And then the non-state programs where such programs are similar to the federal rules, and have not been promulgated. And then there's the sort of national average, and these are the states that we picked up.

What I would like to show is that in Minnesota, and this is why I think that a proper comparison should be made, in Minnesota, in 1991, the injury rate was 8.1. When the program rule went into effect in 1992, it was 8.6. It went up, and in 1993, it went up again. In 1994—sorry, it stayed at the same level. In '95 and '96, it came back down a little bit but it's still well above 1991.

What this says is that it doesn't mean that whatever health and safety program rules they did promulgate increased injuries. It doesn't mean that. It just means that a lot more analysis needs to be done to look at the factors behind why the rates went up and whether in fact the health and safety rule was effective, if at all.

The second thing we did was we also took five years after these rules were promulgated, to see what effect they had. And indeed, in our little sample, the rates did go down 17 percent or so during this five-year period.

But then you take a look at the non-state plans here. We also find in the limited sample again that we had the rates did go down again by about 12 percent or so. And in fact, the other study that the Chairman cited, in that they found that in fact they went down even more than the program rule states.

So really making this comparison or taking this data, just this data, doesn't mean that these health and safety rules will be effective.

But if you go back now, if I may go back in 1985 onward, what you find, if you take a look at the Workmen's Compensation programs and how they have changed, the Workmen's Compensation premium increased very, very rapidly in the early 80s and mid–80s, essentially due to the medical costs.

And again this is my quick read. I should say that I am quite certain when the medical premium is reached, there was a concerted effort made by the employers and by the insurance companies to reduce those premiums and put great restrictions on people in who could qualify for the Workmen's Compensation benefits.

There was a lot of control over which doctors are going to be selected by insurance companies to be able to provide whatever help can be provided, so there were a series of restrictions brought which I believe has led to the reduction in the injury rate eventually.

And I've come across at least five different documents that deal with that particular issue.

So I think even the article that you cited deals with that issue.

If I may just take a couple of more minutes here. OSHA also assumes here that rates nationally will decrease by 20 to 40 percent. The states that have implemented the program, if this is true, have already realized that reduction, which means that in the other 25 states, it must go up by 40 to 80 percent to come up with this average, 20 to 40 percent.

There is nothing in any of this data that would support that.

Chairman TALENT. Why don't you wrap up because we're going to have questions, and this stuff will come out, I assure you.

Mr. SINGH. The other thing I should say is that Workmen's Compensation rules, what you find is, in four percent of the cases that go to litigation and are settled, they are very large settlements, and those settlements are the ones that skew these results of sort of the average compensation claim with OSHA has then used to calculate the benefits.

It's not quite clear to me that this rule will reduce fatalities, that this rule will reduce those lawsuits, or that the lawsuits' settlements will be smaller.

I'd like to say a couple of things about the cost of the rule itself. We find that a lot of the assumptions that OSHA made were unsubstantiated and apparently unreasonable.

For example, the average cost to correct the median-to-high-hazard priority hazard is only $437. I don't want to make a joke of it, but the last time I changed two toilets in my home, it cost more than $500.

Come on, give me a break. This is something that we looked at every aspect of those assumptions and saying, is this real.

Chairman TALENT. I understand your concerns and I shared them when I looked at the Reg Flex analysis.

Let's see what Dr. Beale says.

[Mr. Singh's statement may be found in the appendix.]

Chairman TALENT. Dr. Henry Beale, who is the principal economist for Microeconomic Applications, Inc.

Dr. Beale.

STATEMENT OF DR. HENRY B.R. BEALE, PRINCIPAL ECONOMIST, MICROECONOMIC APPLICATIONS, INC.

Dr. BEALE. I've reviewed the report by PPE. That is principally what I have done.

I am not intimately familiar with the details of OSHA's analysis. I went into it in sufficient depth to double check whether the PPE report made sense or not, and I also have some background that I can comment generally.

And the general comment would be that OSHA's analysis was far more sophisticated than you would have found several years ago.

I find the PPE report to be highly counterproductive to the whole SBREFA process. The SBREFA process, as I understand it, should bring OSHA and industry together at a very early stage in the development of a regulation, so they can share their ideas, their concerns, their analytical first cuts on what a proposed rule will do.

These SBREFA with respect to Reg Flex adds a third and earlier analysis and initial to what was in the previous Reg Flex Act. So that what OSHA did was quite preliminary. It also was not as clear as it might have been, which is an issue.

But the SBREFA process allows a lot of discussion back and forth. To be effective, the process should be open, collegial, and collaborative. And the PPE report intrudes into this process like an attack dog at a Quaker meeting. Its tone is hostile, its analysis is abysmal, its perspective is purely partisan, and it's ready at the drop of a footnote to point the finger of blame.

The implications and conclusions it draws are misguided, misleading or mistaken. And this is not helpful to the SBREFA process or, for that matter, to this Committee.

At a stage where one would want OSHA to share drafts and preliminary analyses while they're still malleable, the PPE report constantly complains about incomplete documentation and information.

And I can assure you that when you do, it's about a 340-industry-by-seven-size-class analysis, the results are voluminous, and not easily written up and summarized.

And if you may be changing things, you don't necessarily write them up and summarize. It's incumbent upon a commentator to talk, and find out what's going on.

But PPE talks as if complete and final results should have been set before them. Had complete and final results been set before them at that earliest stage, there would have been legitimate grounds to complain that all the decisions had already been made.

So it's a Morton's Fork situation for OSHA. At best, the criticisms that PPE makes are premature. However, the misrepresentations of OSHA's analysis are so pervasive that it's difficult to conclude that PPE tried very hard to understand what OSHA did, and it's possible to conclude that they didn't want to understand. And this isn't helpful to the SBREFA process or to this Committee either.

The PPE report completely ignores OSHA's efforts at regulatory flexibility alternatives. And one of the issues that's been discussed here is simply doing a performance standard. That's regulatory flexibility.

The report then advocates two regulatory alternatives of its own, and in discussing the first of these, the PPE report is so intent on tearing apart OSHA's analysis that it does not seem to notice that it has demolished its own case for the alternative.

The alternative in question was a voluntary program, and PPE spends the whole first part of its report in attack mode, trying to show that programs don't work.

And Table 2, which was shown to you, is a perfect example of what I mean by misrepresenting OSHA's analysis. OSHA picked four states with programs that met two criteria. They were comprehensive, and they'd been in place for five years.

PPE started off by completely misrepresenting that by saying that OSHA's analysis was based on 25 states with programs. No. It's different.

Mr. Singh has pointed out to you Minnesota, which was not one of OSHA's four states. While I'm not familiar with Minnesota or some of the other states with less complete programs, I would point out that some of the reasons that the programs were not considered by OSHA included exemption of small businesses and exemption of large numbers of industries.

In fact, the only state in here that OSHA picked was Washington, and these data start after the five-year period for Washington.

North Carolina was another state that OSHA rejected on the grounds that it had only three years of data. But you will notice that the three years of data show a decline.

The reason for picking five years was, when you look at the data, that's when it starts leveling off.

So this is a complete misrepresentation of what OSHA did by way of analysis.

Furthermore, OSHA based its full range not only on the states, which figured in the bottom end, but on industry studies and case studies, a great deal of data which the PPE report does not even mention.

They move that out and spend pages criticizing OSHA for basing a range of things on something OSHA did not use at all.

This is not helpful.

Then, there's the other little issue, the other alternative, which is small businesses, exempt small businesses. Now, in discussing this, PPE essentially assumed its conclusion and ignored all other possibilities, as well as basic probability theory.

I draw your attention to the other table. PPE concludes, from this table, that three-quarters of the industries don't have a problem. That's a complete misunderstanding of the data, which are survey data for a year.

And if you make an assumption that small businesses have the same rate as larger businesses, and in my written testimony, I took a thousand workers and divvied them up two ways: into four firms of 250 employees, and into 250 firms of four employees, which is about the average for the under-ten size class.

At a six percent injury rate, the expected value of injuries is 60 on 1000 employees.

Now, in those small firms, you know that at least 190 of them aren't going to have an injury that year, if 60 injuries occur.

Now this is with the assumption that the injuries are randomly distributed and equal for all workers, and thus for all firms of a given size class, you can't draw the conclusion that Mr. Singh draws, that there are lots of these industries that have no risk.

You can get this table by assuming precisely the contrary. That's not good analysis. It's a statistical artifact which leads to another conclusion of looking at the firm as the unit, when in fact the injury data deal with individuals, and for that matter, the OSH Act protects individuals, okay.

That analysis is not helpful to the SBREFA process nor is it helpful to this Committee.

In its discussion of OSHA's cost methodology, the PPE report bases most of its criticisms on fundamental legal and conceptual errors about the regulatory analysis of cost.

And since I know the Chairman has a question about that, I won't say more here.

The PPE report's most consequential criticism of OSHA's benefits methodology is based on a conceptual error in statistical methodology. When do you use a mean and when do you use a median?

It is proper here to use a mean, not a median as the PPE report insists.

There is a key issue that's identified, for which more analysis is wanted. And that is that you really should look at the effects of a safety and health program, and not start making assumptions about whether it's going to have the same effect or a proportional effect to the pattern of injuries as they occur now.

But PPE is every bit as guilty of making an assumption as OSHA that it criticizes.

Again, that is not helpful to the SBREFA process.

So the PPE report adds nothing useful to the SBREFA process. It promotes trench warfare in a process where flexible give-and-take of discussion is the most productive approach.

I would consider it frankly an embarrassment to the SBA staff, for whom I have worked, by the way, whose credibility as advocates for small business depends on a foundation of solid professional analysis.

Although there are a few, very few, valid issues raised by the PPE report, supporters of SBREFA should shun this report lest they sabotage the process. And critics of OSHA should shun it lest they sort of undermine their own credibility.

At a minimum, the PPE report—well, should be taken with a large quantity of salt.

[Dr. Beale's statement may be found in the appendix.]

Chairman TALENT. Thank you, Dr. Beale. The Committee always appreciates visual aids. [Laughter.]

Chairman TALENT. I don't know how to respond to that, but I will attempt it.

Let me go into a couple of things.

First of all, on the whole issue of whether this was premature as part of the process, my information is that OSHA finished its Reg Flex analysis, it's initial regulatory flexibility analysis in October and completed its initial SBREFA work in December, and then submitted that analysis to the small business community.

And the PPE report was on January 27th. So it's not like, is it, Dr. Beale, that OSHA had not completed its initial stage of analysis? They had the initial regulatory flexibility analysis.

Dr. BEALE. They had completed it. That's correct.

But one of the issues is in that little slip that you just made when you started to say completed its Reg Flex analysis, and then corrected yourself and said initial.

Chairman TALENT. But the point is——

Dr. BEALE. The point is the analysis was completed. It was not as well written-up as it might have been, and PPE did not go beyond the write-up.

The SBREFA process gives opportunity to do precisely that.

Chairman TALENT. Did you ask for additional material, Mr. Singh?

Mr. SINGH. I will answer the question, but I would like to say that Dr. Beale says that he has not read the OSHA data.

Chairman TALENT. Let me just say to both of you, we're going to have some questions here, and it's really important that you let us ask the questions.

Mr. SINGH. I apologize.

Chairman TALENT. Probably nobody here is an expert in economics.

Dr. BEALE. Are you suggesting what we need is a good referee?

Chairman TALENT. I'll be the referee here, okay?

Dr. Beale, what I'm telling you is the give-and-take starts when they release the ERFA, and they did. If the PPE report is wrong, then it's bad because it's wrong. It's not bad because it criticizes

the ERFA report, even in strong terms, unless it criticizes it incorrectly.

If the points they had made had been correct points, you wouldn't be attacking it.

Dr. BEALE. I wouldn't be attacking it in this manner, no.

Chairman TALENT. This a bureaucratic agency, this is not a marriage relationship where we work it out where somebody uses appropriate word pictures or something.

Let me follow up with that because, you see, we've had this problem with OSHA too. I just learned something which, had I known, would have been a significant portion of my questioning of Mr. Jeffress.

The Committee just found out that its estimate of reductions in states that had mandatory safety programs was based on a four-state analysis.

The reason we didn't know it is because the ERFA, on page 2, and I think this is the only reference they have to reductions in states with mandatory programs, only refers to the 25 states that Mr. Singh analyzed.

He didn't know that they based this on an analysis of only four states, and we didn't know it either until the last day or two.

Now how is the small business community supposed to respond to the underlying analysis if nobody knows that was the analysis?

If anybody's here from Secretary Jeffress' office who wants to respond to this, that's fine with me. We didn't know that it was based on these four states, and I guess that's my fault. I should have ferreted through all this stuff.

And Dr. Beale, you may not have known that they didn't release that to other people, but it's perfectly understandable to me that Mr. Singh would base his analysis on these 25 states. Because if you read the ERFA, the only reference to the performance of states that have mandatory plans is to those 25 states. That's on page 2 and 3.

Mr. SINGH. Let me just say something, Mr. Chairman. We asked OSHA which states had the programs already. They would not give us the information. We had been asking them for so many pieces of information and the information was never given.

Chairman TALENT. That's what the Committee was informed.

I'm not saying that there's nothing wrong with the PPE analysis. I suppose there may be, but if the members will look—does everybody have one of these? All OSHA really says here is, "the experience of states and the insurance industry also support safety and health programs as the single most effective tool available to employers to protect their workers. Currently, 25 states have implemented mandatory safety and health program requirements, either through their state occupational safety or health agencies, or Workers' Compensation systems.

OSHA's studies of the impacts of those programs show that for programs covering most firms in the state, job-related injuries and illnesses were 17 percent lower five years after the implementation of rules requiring these programs than they were before issuance of the rules."

They go on in that vein, and then they talk about states that have voluntary programs.

It's quite reasonable to assume that they based their assessment on these 25 states, isn't it?

Dr. BEALE. It is quite reasonable if that's the only thing you use.

Chairman TALENT. That's all we had.

Dr. BEALE. That may be all you had.

Chairman TALENT. But when did you get the four-state analysis?

Dr. BEALE. I have really only come into this picture in the last few weeks.

Chairman TALENT. Let me ask you, when were you hired to do this.

Dr. BEALE. I'm not being paid by OSHA to do this.

Chairman TALENT. I'm not getting into that. You're unbiased.

Dr. BEALE. I first saw this PPE report about a month ago.

Chairman TALENT. When did you find out about the four states?

Dr. BEALE. When I asked.

Chairman TALENT. Do you remember when you asked?

Dr. BEALE. Three or four weeks ago, but I was also given a second document, which is an economic document that is more detailed, and gives that information, which is several months old.

Chairman TALENT. Did we ask them for their economic analysis? I'm going to go through the questions that this Committee asked that Agency. This isn't for you, Dr. Beale.

If we asked questions relating to underlying economic analysis that we weren't given, and then Dr. Beale asked for it and he was given it, I'm going to find out why.

And whoever is still here from that Agency can take that back to Mr. Jeffress and tell him. I did not know this until about a half-hour ago. That's my fault in the hearing prep for this.

This Committee is entitled to the underlying economic analysis and I want the underlying economic analysis. If it provides justification for another hearing, we're going to have it.

Because if you read this ERFA, the only thing that you get from this is that they looked at 25 states, and in those 25 states, the reductions in injuries and illnesses were 17.8 percent.

I mean, if that's all we had and that's all they gave us, then that explains the PPE report.

Now let me ask a couple of other questions.

Did they explain, in the information they gave you, why they chose those four states?

Dr. BEALE. Yes.

Chairman TALENT. What were the reasons?

Dr. BEALE. The reasons are, and they've been told to you several times, that they were states with relatively comprehensive programs and five years of data.

Because, when you look at the data, five years is about when it starts leveling off.

Chairman TALENT. Did they go into any more detail than that?

Dr. BEALE. No.

Chairman TALENT. So we can presume that there weren't any other states. I guess we'll have to look through the 46 states to see if there are any others. Did they define what they meant by most employees who were covered?

Dr. BEALE. That I don't know precisely. But my understanding is that they did not have small business exemptions or exempt large numbers of industries.

Chairman TALENT. Did they give you any data on whether they analyzed what happened in states that had no mandatory safety and health programs?

Did they look at states that had no mandatory safety and health programs in the data they gave you?

Dr. BEALE. They were looking at one. They were looking principally at the states that had the complete programs and comparing them against whatever else was going on in the country during the particular five years after each state's program was implemented.

Chairman TALENT. So they compared it to the national average?

Dr. BEALE. They compared it to the national average.

Chairman TALENT. Would you have done it that way without using a control group which had no mandatory safety and health programs?

In other words, they used a control group, some of which had mandatory programs, some of which didn't.

Dr. BEALE. The issue isn't so much whether they have mandatory programs, it's whether, if they had a much earlier mandatory program coming in, because you're looking at the changes over the period of time, so it really doesn't matter if you had mandatory programs or not.

The question is, what other programs were going in at the same time. That in fact is a conservative way to do it because if you had other mandatory programs going in at the same time, that would tend to pull the national average down during that period and make the program that you're looking at look less effective.

Chairman TALENT. But that begs the question.

Dr. BEALE. No, it doesn't beg the question.

Chairman TALENT. It assumes that the mandatory programs bring down the injury rates. Yes, if they bring down the injury rates, then including them in the other states has the effect of lowering that other average against which you're comparing.

But if they don't bring down the injury rates, then it's not a conservative method of analysis, is it?

Dr. BEALE. Then it's neutral.

Chairman TALENT. And what we have from OSHA's own economist is an analysis of the states that he says—and this is OSHA's—do not have mandatory——

Dr. BEALE. You got an analysis that I haven't.

Chairman TALENT. You didn't have that either. I don't think any of us know what we have or don't have, but we're going to find out.

Dr. BEALE. I want to emphasize something when I talk about, when I say premature, and that is that the SBREFA process is not all in writing, okay?

So to rely only on the first stage documents and not to go behind that, and not to discuss it, and not to use the basis of discussion, I mean, it is inconceivable that PPE could have brought up these comments verbally in the SBREFA process without getting answers.

Chairman TALENT. Is there anything in the transcripts of the stakeholder meetings that would bear on the analysis of PPE?

Dr. BEALE. That I'm not sure. But I mean, that's my point. That's partly I say premature. Yes, you are correct in that my real beef is that it's wrong, but the point is to come out with something that says regulatory analysis of OSHA's safety and health program rule, when, as Mrs. Velazquez' question elicited, the thing hasn't even been proposed yet, this is the sort of rhetoric—it's partly rhetorical that we're talking about——

Chairman TALENT. I'm going to defer to Ms. Velazquez. Let me just say that we'll find out. We should be recessing for a vote pretty soon. If I have reacted negatively, and there's some explanation for this, I'll put that on the record.

Dr. BEALE. I understand. And I agree with you to the extent that that one document is not particularly clearly written, and not very illuminating as to what OSHA actually did.

Chairman TALENT. I found it that way also. It is very difficult to tell, for example, whether, I mean, the mistake you made, if it was a mistake, in saying that they omitted, properly omitted the cost of hazard control, was a very understandable mistake based on the ERFA because it doesn't appear from it that they did include the cost of hazard control.

Dr. BEALE. Well, somebody who has done a lot of regulatory analysis needs to understand that distinction. For the purposes of talking about economic feasibility, you use only the costs attributable directly to the regulation.

For the purpose of assessing benefits and costs, you of course want to include all of the costs that are related.

And if I can use an analogy, how do you structure your chapters? Do you have one chapter that says, economic feasibility, and another chapter that says we're balancing benefits and costs?

Well, if you write it that way, that's what OSHA did, and that's what Mr. Jeffress described.

Or do you put all of your costs and have one chapter labeled costs and one chapter labeled benefits?

Now, what the PPE report does is to assume that it was structured the latter way. And to rake OSHA over the coals for omitting costs when in fact the only thing that happened was that OSHA structured its chapters differently——

Chairman TALENT. I would have been very upset if OSHA had included the benefits saved by removing hazards that were discovered as a result of the safety and health rule, and had not included the costs incurred.

Dr. BEALE. I would have been upset too, oh, yes.

Chairman TALENT. Mr. Jeffress now assures us that it did not happen.

Dr. BEALE. It did not happen.

Chairman TALENT. It's difficult to tell on the basis of the ERFA that it didn't happen. So I'm not going to, I'm not here to judge that.

Dr. BEALE. But again, that is a standard enough distinction in benefit cost analysis which is what underlies the legal distinction.

Chairman TALENT. Let me recognize the gentlelady from New York.

Ms. VELAZQUEZ. Thank you, Mr. Chairman.

Mr. Singh, you prepared a report on behalf of the Office of Advocacy?

Mr. SINGH. My company did, yes.

Ms. VELAZQUEZ. When did you submit it?

Mr. SINGH. January 27th.

Ms. VELAZQUEZ. The title of that report is Regulatory Analysis of OSHA's Safety & Health Program Rules.

Mr. SINGH. That's what we titled it as. Perhaps the title ought to be a little different than that, but that is indeed the case.

Ms. VELAZQUEZ. Don't you agree that the title is misleading for someone who does not know?

Mr. SINGH. Now that Mr. Beale has mentioned that, I would say yes.

Ms. VELAZQUEZ. Have you had a chance to discuss the report with the Office of Advocacy?

Mr. SINGH. Yes.

Ms. VELAZQUEZ. Can you share with us what has been the reaction to the report? Did they share it?

Mr. SINGH. I don't know whether we had reaction to the report itself, but when we did these tables here, when we found the data ourselves about what the injury rates were and what the data really meant, that we did discuss closely with the people in SBA, yes.

Ms. VELAZQUEZ. Did the Office of Advocacy share with you that they thought that this report was not balanced?

Mr. SINGH. Was not balanced? Not at all.

Ms. VELAZQUEZ. Okay.

Mr. Beale, you are quite critical of this report prepared by Mr. Singh's firm.

Would you please explain to our Committee how the report misrepresented OSHA's analysis in your view?

Dr. BEALE. I gave you one example, in terms of the fact that they omitted the other two bases on which OSHA did its range of 20 to 40 percent in the section where they are discussing whether some industries are less dangerous than others.

They pretty much assert that OSHA denies this. In fact, that's not the issue at all. Again, it's a question of what is your purpose.

If your purpose——

Mr. SINGH. Let me interrupt and respond one second.

Ms. VELAZQUEZ. Would you please allow him?

Mr. SINGH. Somehow we attack OSHA for this. Our analysis here was simply an analysis of what OSHA presented in its analysis, period. We didn't say that this health and safety program doesn't have a positive effect. We didn't do any of this.

We said this is what OSHA presented. We asked them for a lot of data. They didn't give it to us, and we went out on our own to get the data and present this analysis as a part of this report.

Our objective was simply to see whether OSHA had done a good faith effort, period. Nothing more and nothing less.

Ms. VELAZQUEZ. Mr. Beale, please?

Dr. BEALE. In fact, OSHA is very cognizant. You heard Mr. Jeffress talk this morning about some industries have greater risks than others.

But the point is that when you ask a question about you're going to start to exempt industries, OSHA is concerned with other things than inter-industry differences. In fact, they're concerned about intra-industry differences, and to sort of rake OSHA over the coals for something that they didn't do, which is ignoring the inter-industry difference, and then themselves to ignore OSHA's concerns I think is very seriously misrepresented.

The presentation of the 25 states even is not very good. And again, I'm sorry, I just have a great deal of difficulty.

I know I have worked with the analysts involved in OSHA off and on for 15 years. And I have a great deal of difficulty believing that PPE asked for explanations and didn't get them. I find that very hard to take.

Ms. VELAZQUEZ. Mr. Beale, you also assert that there were legal and conceptual errors in PPE's analysis.

Can you please tell us what do you mean by that?

Dr. BEALE. The legal error is the one we've been talking about, about the costs. This is legal in the sense that if you ask a lawyer about what to do, that's the advice you'll get.

It's conceptual in the sense that from a benefit/cost point of view, you have to be careful to define your baseline in a meaningful way.

Conceptual errors, the statistical treatment, I mean to do this business with the BLS survey data and ignore the basic probability fact that randomness produces the same result I think is a serious conceptual error.

Also the issue of using the mean versus the median. This is about the third time the subject has come up, so as Gertrude Stein on her deathbed once said, or is supposed to have said, "what's the answer." And everybody standing around said, huh.

And she said, "well, then, what's the question?"

And the point is conceptually, you've got to set up the question before you launch into something. Now when you are dealing with risk, when you are dealing with insurance, the tail, the long distributional tail of a skewed distribution is very much part of it.

Workers' Compensation pays out on the basis of claims; it's hard data. And you use the mean. You don't use the median. And you don't try to stick in an argument that says, well, generally speaking, the median is the better representation of an average for a skewed distribution.

No. That is conceptually wrong when you're talking about risk in insurance and that kind of thing.

If you want, under a skewed distribution, to know what's typical, then you would pick the median. But it's an issue of what is the question.

And not to make those distinctions I think is seriously, you know, I have trouble associating that with somebody of Mr. Singh's experience because it's pretty basic.

Ms. VELAZQUEZ. Thank you, Mr. Beale.

Mr. Singh, you say that OSHA offers no alternative for the 75 percent of employers who have no reportable incidences of illnesses or injuries.

This suggests that you have ideas about alternatives which could be offered to them.

What are they?

Mr. SINGH. I think in our report, we basically say that perhaps there should be a voluntary program, but we also qualified with the fact that there are certain small businesses that there are a large number of injuries, and perhaps they should be regulated in some manner.

I should say that that it is not for us, in 30 days, to do the entire analysis for OSHA, as Mr. Beale seems to be criticizing us for. It is for OSHA to do its work and present the analysis in its reports so we have looked, this has all been done very, very fast, and we have not covered all the areas that we could.

But what I do say, given the data, the 75 percent of the people should bear more costs than they would realize the benefits. I don't care whether it's mean or average or whatever you want to take a look at.

You look at their assumptions, you look at their data, it doesn't make any sense.

And I want to go back to one more thing about the fact that he keeps saying there are these 1000 employee firms, 250 of four persons each. In one year, 60 of them will have some injury, whereas 190 will not have those injuries. That's perhaps true if you just stop right there.

But if you go one step further, and you ask yourself, these 60 people who had these injuries, when will they have the next injury? They will have the next injury perhaps ten years from today. But you are in the meantime incurring those costs of implementing it on a yearly basis.

How do you take that into account?

So he criticizes the data in that manner, but that's exactly what I said. If you have an injury every five or six years that you will not realize the benefits of any reduction, even if they're 20 percent, even if they're 40 percent. That is a fact of analysis.

I don't care whether you can tone down the report. It doesn't matter. But the fact is those are the facts, and I don't know why, I'm very surprised that the OSHA people who met with us, my employees who were involved deeply during this brief process, to whom we asked those questions, are not here to say whether they did or did not give us the data.

They sent Mr. Beale to you who has no knowledge of this. I'm a little surprised.

And then he comes in and attacks, in an unreasonable manner.

Ms. VELAZQUEZ. They didn't send Mr. Beale. I brought him here, not OSHA.

Mr. SINGH. Perfectly okay. I'm sorry.

Ms. VELAZQUEZ. Thank you, Mr. Chairman.

Chairman TALENT. I'll recognize Mr. Bartlett, I think.

Mr. BARTLETT. Thank you.

I'd like to ask a question about the median and the mean. If you had a population that had a couple of members of the population that were fairly aberrant, where their performance, their data was markedly different from the others, and if you wanted to know what the typical member of the population looked like, wouldn't the median serve you better than the mean?

Dr. BEALE. For that question, yes.

But that's not the question that's addressed here.

Mr. BARTLETT. I guess that depends on how you ask the question. But I just wanted to make the point that there are times——

Dr. BEALE. Yes, this just doesn't happen to be one of them.

Mr. BARTLETT. That may be a matter of judgment. I am not an expert in this area but I just wanted to make the point that sometimes the median is a better number to use than the mean.

Dr. BEALE. When you're dealing with Workers' Compensation data, the claims and the premiums are based on the whole distribution, including your aberrant people.

Therefore, you should use the mean, which includes them.

Mr. BARTLETT. I guess that would depend on the question you're asking. The question is, what is the situation in the typical company?

Dr. BEALE. No. The question you're asking is what is the total benefits.

Mr. BARTLETT. If that's the question you're asking, you'll want the mean.

Dr. BEALE. Yes.

Mr. BARTLETT. But if you're asking the question of what does the typical company look like, and what would the effect of a regulation be on that typical company, wouldn't you preferably use the median?

Dr. BEALE. Yes. If you were trying to set up a representative firm to study, for example, you would try to use something more like the median.

Mr. BARTLETT. I'm just trying to make the point——

Dr. BEALE. No, I agree with you completely.

Mr. BARTLETT. Which one you use, sometimes it depends on the context in which you ask the question.

One other observation. Because our manufacturing jobs have been racing overseas, and I think that OSHA's regulatory climate is at least partly the reason for that, since our manufacturing jobs are racing overseas and we're now moving to a service-based economy, aren't injury rates coming down no matter what we do, simply because the workplace has changed?

Dr. BEALE. Not necessarily.

Mr. BARTLETT. You mean it's as hazardous to sit in front of a computer as it is to sit in front of a stamping machine in a factory?

Dr. BEALE. You're talking about national rates, yes.

Mr. BARTLETT. Yes. When you're looking at whole states.

Dr. BEALE. That may be. But of course it also depends on what you're talking about as an injury. That's a more complex thing than you might suppose because if you're sitting in front of a computer, you might get some other types of injuries.

But, I mean, if you think of injury as cutting your finger off in a machine, yes.

Mr. BARTLETT. Some of those other injuries are more difficult to quantify. If your finger's gone, your finger's gone. If you've got a cut and 14 stitches, you've got 14 stitches.

If you've got a backache or your eyes hurt, or you have some pain in moving your thumb, those are very difficult things to quantify.

Dr. BEALE. Not necessarily. But the point is they are different and they don't fit the pattern, and that has to be dealt with rather carefully in one's thinking.

Mr. BARTLETT. The point that I was trying to make was that the workplace is changing because the average job is changing from manufacturing to service. We would expect the kind of injuries that most people see as injuries to be coming down.

That's the only point I was making.

Dr. BEALE. The traditional injury rate taken for the nation, yes. But in a given industry, no, not necessarily.

Mr. BARTLETT. It's not clear to me how these analyses were made, whether you're looking at, when you're looking at whole states, you're not looking at a specific injury. You're looking at the cross section.

Dr. BEALE. You're looking at the state rate.

Mr. BARTLETT. I would suspect that those injury rates would be coming down because we are changing the kind of jobs that people work at.

Dr. BEALE. Again, when you make a comparison between a particular state or for a particular state with a program, and compare it to the national average in this case, anything that brings the national average down makes your comparison more conservative.

Because if you still see your individual state dropping relative to the national average, then you know something's going on, if the national average is dropping rather than flat.

Mr. BARTLETT. That is true. It depends on which state you chose and where you got your averages. I am not sufficiently knowledgeable about the details of what you do. I come from a scientific background. I have a PhD. I did a lot of scientific work. I've got a hundred papers in the literature. So I can understand where you're coming from.

I just don't know enough about the details of the protocol to know whether your criticism of them is a justifiable criticism or not.

Dr. BEALE. The short answer is that unlike many hard sciences and medical research, economics works in a very dirty laboratory, where clinical trials are just not very possible unless you get really lucky with the data.

Mr. BARTLETT. And it's not a hard science. There's a lot of judgment involved which I gather is the reason——

Dr. BEALE. There's a lot of dealing with the confounding factors that are still there because you can't do clinical trials, yes.

Mr. BARTLETT. I understand.

So two people with the best of intentions could reach different conclusions?

Dr. BEALE. In some situations, yes, but not in the areas you're asking about.

Mr. BARTLETT. I was asking the question about the obvious disagreements which you and Mr. Singh have.

Dr. BEALE. I don't believe so, or I wouldn't be as forcible about it as I am. I think that they are things that are pretty fundamental.

I mean, when you draw conclusions from data, a conclusion of a particular pattern from data, where randomness would produce the same data, I think you have no basis for that conclusion, and that's basic scientific methodology in anybody's——

Mr. BARTLETT. Does your statistical analysis determine that?

Dr. BEALE. Yes. It's perfectly consistent with assumptions that are completely contrary to Mr. Singh's conclusions.

Mr. BARTLETT. It's not clear to me that that statement is true. I would just like to close——

Dr. BEALE. Read the part in detail.

Mr. BARTLETT. I will do that.

I'd like to close with one observation. It's an old, old saying which I think is part of the problem here, that he who frames the question determines the answer.

And I think that you may have been inadvertently framing different questions, so that you appear to be in more disagreement than you are in fact in.

Mr. Chairman, I thank you very much. I must go for a few moments, and I shall return shortly.

Chairman TALENT. I know Ms. Kelly has some questions.

I want to state for the record the initial regulatory flexibility analysis which we received begins by saying, "The Regulatory Flexibility Act, as amended in 1996, requires that an initial Regulatory Flexibility analysis contain the following elements." There are five stated.

The first is a description of the reasons why action by the Agency is being considered.

It goes on to state the other things they have to do in order to justify a rule under SBREFA.

Now, this is the ERFA and the only reference in the ERFA to what's happened in other states is what I read before, a reference to 25 states that have implemented mandatory safety and health program requirements.

And the finding that in those states, job-related injuries analysis went down 17.8 percent.

There's then some discussion of what's happened in states that haven't had programs to encourage voluntary implementation of safety and health programs.

And then OSHA's review of success stories.

That's the only statistical data in the ERFA that we were given. I do not think there's other data on the basis of which OSHA is now justifying the rule in part on the conclusion that the rule, when implemented, would reduce job-related injuries and illnesses by 20 to 40 percent. The only statistical data in the ERFA offered to justify that, regarding what's happened in other states, is what I've just indicated—unless I'm missing something. I'm trying to go through it here again. So if there's other data based on a smaller analysis of four states, we weren't given it.

Dr. BEALE. The point is also that there were other analyses used which are voluminous, I mean, in their number. There were dozens and dozens of other case studies and other things that were referenced; that were reviewed.

Chairman TALENT. That's the OSHA review of success stories about programs implemented by individual employers? Is that what you're referring to?

Dr. BEALE. That's one of them. That's the case studies.

Chairman TALENT. They don't refer to any case studies, I don't think.

Dr. BEALE. I would agree with you that that particular document is not well-written, but I would also make the comment, as a general proposition, that you never, in a published report, find the detail that went on in the analysis.

Chairman TALENT. Shouldn't the report have included some reference to the statistical analysis of the four states?

Dr. BEALE. I think it probably should have. It should have included more than is there.

Chairman TALENT. I'm kind of hot about this, but I'm going to say that I'm going to continue to presume that there's some good faith misunderstanding on my part or the Agency's part on who fouled that up.

Dr. BEALE. I would agree with that. It's just very unusual at this stage of the game to present a completely full blown analysis of the sort that you would in the final Reg Flex analysis, according to the original Reg Flex Act, or indeed economic analysis, or any aspect of the analysis.

The more preliminary you are, the sketchier it's likely to be. In the SBREFA process, in particular, where there is ample opportunity to discuss back and forth and figure things out and put your criticisms verbally so that you can figure out whether it's a justified criticism or just a misunderstanding, that's why I am really bothered by coming out with a document like this because I think that the misinformation sown by this, once you put this kind of stuff in writing, it gets a life of its own.

And I'm sure some of these numbers and conclusions are going to be quoted, and plague you and other people for a long time, and that's really what I mean by premature.

Putting this as a written report in as rough a stage as the whole process was, because it's chock full of errors.

Chairman TALENT. I think it's a pretty significant oversight since that's the statistical data on the basis of which they acted.

Dr. BEALE. Well, Mr. Chairman, let me suggest to you that I was once in an OSHA study where the statistical contractor brought the data in handcarts, and I don't think you would probably want to pour over even the 340 by 7 spreadsheet.

So there is an issue as to how much of it makes a written report, and there is a fact that things are sketchier the earlier in the process you are, because who wants to put the work into doing something really complete when you may turn around and change it all as a result of the SBREFA discussions.

Chairman TALENT. We have a vote coming up. I'm trying to hold the hearing open for Ms. Kelly.

Do you have any questions you want to get in?

[No response.]

Chairman TALENT. What I'll do is excuse this panel.

We have one more panel that I understand contains two lawyers. [Laughter.]

Chairman TALENT. So we'll go from the economists to the lawyers.

Dr. BEALE. Which may even be worse than two economists.

Mr. SINGH. Mr. Chairman, I would like to make a rebut a little bit here, if you'll give me a second, please?

Chairman TALENT. One more, Mr. Singh.

Mr. SINGH. I will make two comments here. One, that I will stand by any analysis that I have done in this report, and the analysis of programs by program states and non-program states and people in OSHA and outside are similar to what other people have done.

I don't apologize for that at all.

The incident rates in small firms are very low, and Mr. Beale refuses to address the summations there.

And as far as the Workmen's Compensation concerns, the mean versus median issue, we were incorrect in taking median. We have said that before. But what is there is that all of the benefits data is skewed by a large number of cases that are litigated and that ought to be excluded.

One last thing here is that regardless of what he says, I have never seen poorer analysis at any stage of the game from any federal agencies in my 20 years. I don't know how he can support that.

Chairman TALENT. I'll hold the record open and you both can submit additional comments in writing, if you want to.

Chairman TALENT. We'll recess for the vote.

[Recess.]

Chairman TALENT. Mr. Halprin, I hope you brought some extra work with you.

Mr. HALPRIN. I thoroughly enjoyed the session this morning, Mr. Chairman.

Chairman TALENT. You know, I don't care if anybody minds. We're going to go ahead with you, Mr. Halprin.

Mr. Larry Halprin is a partner at the Washington, D.C. law firm of Keller & Heckman, and also has an impressive bio, which I will not go into.

I do appreciate your patience.

Please go ahead, Mr. Halprin.

STATEMENT OF LAWRENCE P. HALPRIN, ESQUIRE, KELLER AND HECKMAN, LLP, 1001 G STREET, NORTHWEST, WASHINGTON, DC

Mr. HALPRIN. Thank you, Mr. Chairman.

I've a prepared presentation from the previous schedule hearing. I'd like to ask you to put that in the record. And I have a supplemental statement.

Before I jump into the statement, I'd like to address a few points that came up, not necessarily in any logical order, and I apologize for that in advance.

There was a discussion made by Mr. Beale as to OSHA's approach toward this entire rulemaking, and he noted this is a performance standard, it has a grandfather provision, and it explicitly exempts small business.

As you pointed out, a performance standard that takes away all the traffic laws and says, "drive safely," which means you decide your own speed limit, you decide whether to turn your lights on, it actually goes beyond that—the question is whether the car's going to have bumpers, whether the car's going to have lights, and we're talking about the whole ball of wax here—and then leaves it

totally to a compliance officer to decide whether that is enforceable is absurd.

So Mr. Beale is probably an outstanding statistician but I don't think he's ever been out in the real world of OSHA compliance.

Chairman TALENT. There used to be a two-attorneys problem. We know the old Anglo Saxon maxim of law is "what is not specifically prohibited is allowed." This kind of rule turns it around. It says, "what is not specifically allowed is prohibited, but we won't enforce it against everybody."

I don't think the Agency understands the negative impacts of that, and that's what you're getting at, Mr. Halprin.

Mr. HALPRIN. Definitely.

To make the points that came up, as far as cost, I attended several of the Small Business Panel telephone conferences, the comments——

To go back a step, OSHA estimated the cost of putting the basic program in place would be $2.3 billion, and then said the cost of future compliance would be another $2.6 to $4.4 billion.

In the Small Business telephone conferences, one of the first spokespersons said, "whoever put these numbers up is on another planet."

The final report from the panel, which was signed by OSHA, which understated the conclusions which were reached in an effort to gain consensus among its three agencies conceded that the cost estimates must be off by as much as a factor of ten, which is what the small business people said.

So if you take the $2.3 billion and you multiply it by ten to get $23 billion, and then you add the costs of controls, then you're in the number of $25 billion for the cost of compliance, and only $7 to $16 in benefits, and it suddenly swings way the other way.

So what we have here is this cop who's going to enforce the rule, which is totally unwritten, with the reasonable man test, I guess it's the reasonable inspector test, if there is such a person, and that inspector is going to enforce the law however they feel is appropriate.

Mr. Jeffress made the point that OSHA has the burden of proof. Yes, that's true, OSHA has the burden of proof, but OSHA also has the right to issue a citation without making that burden of proof.

So they issue a citation and, as you suggest, it costs thousands of dollars to defend against it. Most small businesses are going to pay the fine and move on.

As far as the grandfather clause, we've talked with OSHA numerous times about what a grandfather clause means. A practical grandfather clause has some numerical limit that you can measure—a lost work to injury and illness rate, and if you're below that rate, you're out.

That's the kind of thing that makes sense. To have a grandfather clause that says basically, "if you're in compliance with the standard, you're in compliance with the standard" is meaningless.

Chairman TALENT. A grandfather clause—and I didn't state it eloquently enough—makes something legal because it has existed for a while, which would otherwise be illegal. And what he's saying this makes it legal if it would otherwise be legal. [Laughter.]

I also could not get that through.

Mr. HALPRIN. Furthermore, if those programs are effective, there's no reason why it should be limited to people who already have an existing business. A new business that comes into line somewhere after this rule goes into effect should have the same opportunity to take advantage of whatever this grandfathering is, and the only way that works, as I said, is with some numerical cutoff.

The gist of this is the whole safety and health program rule is fine as a guideline but it is in no way appropriate for a government mandate.

As far as the SBREFA process, my view of it is that when OSHA is in favor of the process, it's when there's generally a level of cooperation and acceptance of what it's doing.

In the case of the safety and health program rule or ergonomics, I think the Agency has great distaste for the process and would like to think it never happened, particularly in the case of this rule.

There was a draft safety and health program rule. It was proposed, or shall I say issued, in November of '96. There was extensive discussions, stakeholder meetings and comments, and minutes from those.

It's not as if this thing just came out of the blue. And there should be some preliminary work with some preliminary numbers.

The current draft is not that much different from the draft that came out in '96. There's basically an ideological difference of views as to how to achieve safety, and it's not going to change.

The only thing that's going to change is, hopefully OSHA's going to start looking at the data.

Chairman TALENT. Mr. Halprin, there's nobody here but me. [Laughter.]

Explain to me, would you, speculate for me, if you will, what's the real draw behind this thing?

Mr. HALPRIN. I was afraid you were going to ask this.

Chairman TALENT. I was going to ask Mr. Jeffress this and I was going to be interested in his comments. We were on so long, I didn't want to keep him.

Why are they continuing to push this?

As far as I can tell, the interests that typically support aggressive OSHA action are not particularly interested in this rule.

It's not going to have—well, it could, depending on how they enforce it—it just seems to me to be going after people like my brother who nobody's really interested in, unless you want to go by and get a beer.

Where's the draw? Is it just ideological?

Mr. HALPRIN. I believe it's mostly that. There are a good number of people there who honestly believe that a government mandate will achieve what can only be accomplished by private sector incentives.

There are others who probably realize they are in the Department of Labor where labor has a great influence, and this is a political issue. There's no question about it.

Chairman TALENT. Let me just say with regard to that, and we don't have them here, I'd be happy to have somebody from the AFL/CIO testify, I'm sure they'd testify in support of the rule, but

I don't think this drive is coming from them. My sense is they are interested in other rules.

I guess I can't ask you to speculate on what you can't speculate on.

Go ahead, I'll let you testify.

Mr. HALPRIN. In my view, the three fundamental principles we have to keep in mind, when looking at this rule are:

First, the generally-held view that effective safety and health programs will significantly improve workplace safety does not mean that an OSHA-mandated program will have that effect. And in fact, there's substantial evidence to the contrary.

Second, regardless of the benefits which may be derived from a government mandate, that mandate is impermissible if it entrusts constitutional due process to the whims of a compliance officer, which is just what we're talking about.

And third, direct government intervention is inappropriate where there are alternative mechanisms which would do a better job in achieving the same objective.

So with that in mind, as we've discussed this morning, we believe there's no persuasive evidence that the rule will significantly improve workplace safety and health in the United States, and substantial evidence that it would not.

What is clear, by OSHA's own estimates, is it would cost employers billions of dollars each year for compliance costs.

Now the reason, and Mr. Beale scoffed at the legal issues, but as he described it, you need to establish a baseline before you know what something's going to cost, which means you have to know what is going to be required of an employer before you can, in any way, estimate what it's going to cost.

We won't know what's going to be required of the employer until this rule is adopted, so after the fact, OSHA's going to tell us what the rule means through the enforcement process, and then we'll know what it actually is going to cost.

I can give you an example of that, and why this is different.

The lock-out/tag-out procedure. OSHA put out a standard that required lock-out/tag-out procedures for equipment. The regulatory analysis costed out generic procedures for a facility. OSHA has attempted to enforce a specific procedure requirement which would have cost millions of dollars of additional man-hours per year.

We made that case to OMB recently. OMB said, OSHA, they're right, that's what your regulatory analysis says. So when OMB put out the paperwork approval for that rule, there was a condition that OSHA not enforce equipment specific procedures.

There is a situation where the rule was clear as to what was intended when it was written, and we could go back to OMB, or we could have gone to the courts to get relief.

The same thing happened with personal protective equipment. OSHA put together cost data in the regulatory analysis for five types of PPE, and then tried to establish a hazard assessment and employee training requirement for every type of PPE known to man.

We said you've only got regulatory data for five types, and they carved back the rule to those five types.

Now we're talking about a rule with no bounds whatsoever except what a court might ultimately permit. No idea what it would cost.

OSHA has said—let's say a VPP, the voluntary protection program, a star plant might be rated ten on a one-to-ten scale, and let's say OSHA's safety and health program rule is now costed out at a five.

What will happen, if it gets through, is it will be adopted based on those costs, and in the real world that five will start climbing up. OSHA will raise the bar, and before you know it, we will have a VPP-type enforcement program with every employer in this country. And we won't be able to do anything about it because we didn't have a clear regulatory analysis and a clear guideline in the first place as to what was intended by this rule.

So it's really a blank check that would be written to adopt a rule like this. We've got no idea what it would really mean.

Now, as far as the data supporting this rule, as you noted in a study that was done not only by a senior OSHA economist but by one of OSHA's former directors of regulatory analysis, OSHA cited the decline in workplace injury and illness rates in 25 states with mandatory programs.

The Agency said the rates declined on average 18 percent during the five years after the programs were implemented. Assuming mandatory programs reduced injury and illness rates by 18 percent, you would say, okay, there is something to them.

The problem is that is not what the study shows. In the study that was done by the senior OSHA economist and OSHA's former director of regulatory analysis, they tried to determine why workplace safety and health injury and illness rates fell substantially between 1992 and 1996.

They didn't look at the four states that OSHA was talking about; they looked at 45 states. Twenty-one had some type of safety and health program requirement; twenty-four did not.

Although they described it as not statistically significant, it did show that the states with the mandatory safety programs had higher average injury and illness rates and showed less improvement in the rates than the states without mandatory programs.

I think that's clear. It is consistent with the analysis by PPE and it shows that the Agency has not substantiated that there is any reason for this rule in the first place.

Now when you get beyond the practical issue, is the rule going to do any good and conclude no, then you look to the legal side of things, and say, okay, leaving aside the practical aspect that OSHA can't show it's going to do any good in the first place, and it's going to cost $20 billion a year, does OSHA have the legal authority to do this?

To that, we say no.

First, the application of this rule to the hazards covered by the general duty clause is, in effect, an amendment of the general duty clause. If you've got a violation of the general duty clause, the obligation is to abate the hazard.

If you've got a piece of machinery without a guard, you put the guard on. It does not mean you suddenly go and install manage-

ment commitment and employee involvement and training and education and evaluation and all those other things.

The Agency is actually, in our view, amending the general duty clause, and it does not have the authority to do that.

Then the next question is with respect to the other hazards. This rule doesn't address any new hazards. It's either the general duty clause hazards, or the hazards governed by other existing standards.

So in effect, what the agency is doing, instead of going back, is basically saying every one of the existing standards we have on the book is inadequate.

Only instead of going through the required rulemaking process and saying, there's a significant risk and this is how it'll be reduced and this is the best way to do it, and the most cost-effective way, it's simply saying this is a good idea so we're going to superimpose this rule and effectively amend every standard we have on the books.

Third, as you mentioned, there's such a denial of due process in these numerous provisions which say, do something "as often as necessary," and for the ones that don't say "as often as necessary," we know that's how it's going to be interpreted when the case actually comes before the review commission.

So it doesn't say, "as often as necessary" or "adequate," but you can be sure that is how OSHA is going to interpret every one of those provisions in that standard.

And if it says, "communicate with employees," and you communicate once every ten years, OSHA's going to obviously bring a citation and say, "that's not adequate."

So the whole program is laced with that kind of an approach.

Fourth, the rule would inject a meddling government bureaucracy into the financial and labor management relations of every employer in the United States. That's a role for which it's particularly ill-suited, and I'm talking about an Agency that takes 20 years to get out a rule on confined spaces, and then fails to comply with due process when it does.

An Agency that can't do better than that, in my mind, has no business trying to manage the labor management relations of every employer in the United States.

So we have got the potential for citations for inadequate management, inadequate employee opportunity for communication and involvement, and in the latest edition, OSHA would have the authority, under this rule, to cite employers for not taking disciplinary action against employees for violating safety rules.

You can imagine what that would mean.

I can see one of these inspectors, with the assistance of the Solicitor's Office, issuing a subpoena to employers for confidential personnel records to check through all these things to see what kind of communications there have been, and whether there's been any disciplinary action taken.

I just don't know how much more involved OSHA could get.

Chairman TALENT. And the smaller employers don't have to keep records.

Would you advise your smaller clients to keep records to be able to show that the they had these meetings, or not?

It might actually be an interesting question.

Mr. HALPRIN. I would find myself in a position where I'd say an employer over a certain size—I'm not sure what's going to be meant by "small"—would have to keep some records.

Chairman TALENT. Ten.

Mr. HALPRIN. Well, that's the proposal. Everything here is in flux, but it seems to me that he would end up keeping some records to document some kind of program, although not necessarily every element of this.

So the cost is going to go up substantially because, if you don't do that, like you said, you are going to have a compliance officer who comes in and says, "well, prove to me that you did it."

Chairman TALENT. You know what really happens with this, Mr. Halprin? There's three million small employers in the country who are in industries where they just don't have that many injuries or illnesses.

If they hear about this, and many of them won't, if they do hear about it, they're not going to have enough time. It's going to be too low on their list of priorities, and they'll try and do something that doesn't take very much time.

So they'll put out some notice or something, and then they'll just hope that's good enough. That's what my brother does.

I hate to keep bringing him up. I'll talk about my sister. That's what I'll do in the future, I'll talk about my sister. [Laughter.]

She's a pediatric psychologist, she has her own firm, her own practice. She'd be subject to this thing, so what is she going to do?

She has a little playroom for kids, and there are toys in there. So I guess that's a hazard because her secretary could step on them or something.

And what it means, of course it'll never happen, nobody will ever go in, but just again it's another set of laws that makes honest people into criminals.

I don't understand why we can't get them to recognize that.

Mr. HALPRIN. We're trying.

In the meantime, there are alternatives.

The Agency could put something out as a set of guidelines. I'll not deny they'll be criticized for avoiding the rulemaking process. That's something of their own doing because of the environment they've created, but nevertheless that's probably a better approach.

Put those guidelines in place for several years, have compliance officers talk about those guidelines when they start an inspection, and consider them in connection with the size of any penalties which might be issued, or whether a citation would be issued in the first place. After some reasonable period of time, and with the data that's available, I think a reasonable grandfathering-type approach, which would exclude 75 percent of industry from even being covered by a rule would go into place.

Then, if it really still makes sense to catch what we might call the employers who don't seem to be with the program yet, OSHA might try putting out some sort of rule different from the one that's been proposed in the sense that it would have to comply with the law.

Then that rule should have a clear partnership consultation option. So if an employer were in that program, they'd have a choice.

They could apply with the safety and health program rule, or they could opt for a true consultation partnership program. I don't mean a CCP but a program that would achieve far more than this program that OSHA is proposing now would ever achieve.

Chairman TALENT. I'm going to have to interrupt because I'm going to go vote on the recommittal of the tax cut. So, I'm going to go over and vote, and then come back and we'll finish this.

Mr. HALPRIN. As far as I'm concerned, I'm finished with my statement, and I'll be happy to wait for questions.

Chairman TALENT. Mr. Fellner, I'm sorry. If you'll just be patient a little while longer I'm going to vote and come back.

[Mr. Halprin's statement may be found in the appendix.]

[Recess.]

Chairman TALENT. Our next witness is Mr. Baruch Fellner, a partner in the Washington, D.C. Office of Gibson, Dunn & Crutcher.

STATEMENT OF BARUCH FELLNER, ESQUIRE, GIBSON, DUNN & CRUTCHER LAW FIRM, WASHINGTON, DC

Mr. FELLNER. Thank you, Chairman Talent.

It is a pleasure to be with you this afternoon. I have spent the last 15 years or so representing employer clients with Gibson, Dunn & Crutcher.

In my prior life, however, for close to 20 years, I was with various federal agencies including ten years as counsel for regional and appellate litigation with OSHA.

And therefore I think I bring to the deliberations of this Committee a kind of unique perspective, as it were, almost on both sides of the aisle, retaining a very deep-seated commitment to the purposes of OSHA but recognizing how far off the reservation the Agency has strayed, particularly with regard to this proposed standard.

Before turning to a synopsis, and the hour is late and we've heard almost all of these issues in triplicate, but before turning to a quick synopsis of my prepared remarks, I'd like to make two preliminary points, if I may.

One, there was a remarkable and illuminating colloquy between you, Chairman Talent, and Assistant Secretary Jeffress this morning.

And that colloquy reduces itself to one, brief principle. If I understood Assistant Secretary Jeffress, this new proposal either means everything to OSHA or absolutely nothing at all.

It either means that, as a result of the investigation, assessment and correction of hazards, which is at the forefront of the CSHP exercise, they will in effect cure every hazard that is in 29 CFR, so you don't need the books anymore; or it means that no citations will be issued under CSHP if an employer is in compliance with 29 CFR. In response to your questioning, Chairman Talent, Assistant Secretary Jeffress testified that if a compliance officer walks into a workplace, asks the employees whether or not they are being protected against specific workplace hazards, if he satisfies himself that the answer to that question is yes, there's lock-out/tag-out, there's hazcom, there's bloodborne pathogens, there's no double

jeopardy, there is no citation under CSHP. In other words, CSHP means absolutely nothing.

Under those circumstances, I don't think that that is a circle that even a bureaucrat can square.

Let me address myself to a question you posed to Mr. Halprin: What the drive is behind this standard. I think this is one of the most clever and diabolical exercises of the Agency in 30 years.

This standard, at least in its initial incarnations, was to have been motherhood and apple pie; indeed, we've heard much this morning about how many companies committed to safety and health in fact have safety and health programs.

It is almost de rigueur in a good workplace. And with good employers. There are a few who don't. But there are a variety of different safety and health programs, so OSHA figured that if they come up with a standard that simply encapsulated what otherwise employers have embraced over the years because it kind of makes good policy and good employee relations sense, then who is going to object to that kind of a standard? It is going to sail through, if I can mix my metaphors, like a knife through water or like a knife through butter.

Chairman TALENT. I am turning the light off on you, Mr. Fellner. This is quite enjoyable.

Mr. FELLNER. The diabolical aspect of this standard, I would suggest with respect, is the fact that I think even OSHA and its proponents recognize that there are certain ventures or adventures of the agency which might not succeed, the most important one of which is its exercise in ergonomics. It is an attempt to take junk science and foist billions of dollars of expenses for no benefits to employers in this country, and I think the agency in its heart of hearts recognized that that exercise is doomed. It is either doomed politically or I will assure this Committee we will make every effort possible to make it doomed in the courts.

And if you are OSHA, you have a contingency plan, and I am convinced that the comprehensive health and safety program standard that we are looking at today is the attempt on the part of the agency to enact a stealth ergonomics standard in case a direct ergonomics standard does not succeed. And how do they go about achieving that objective?

At bottom, this standard requires employers to systematically, and that is the operative term, to systematically examine their workplaces, to discover workplace hazards and to correct them. It is a very simple prescription in many respects. There are bells and whistles that we will get to in a minute, but that is, at rock bottom, what employers are required to do.

What is the basic indication that employers have to look towards and that compliance officers invariably look towards in order to determine whether you have got a problem in the workplace? You check your OSHA 200s. You check your records to see when injuries and illnesses are prevailing in your workplace.

Well, in many workplaces, because of the requirements of OSHA to record the aches and pains of life, there is no question but what ergonomic and musculoskeletal issues are being recorded with frequency because employers are self-respecting, because they are following the law, not the science, but the law in terms of doing what

OSHA is mandating, and as a result of that what is appearing in the lost workday incident statistics is a number of which is much larger than it ought to be and it is weighted towards ergonomics issues.

If an employer—should this regulation pass and be enacted and succeed in the courts, if an employer does not actively and systematically look at those kinds of issues, and correct them in the workplace through all of the ergonomic methodology which OSHA has required in its general duty clause citations—and those methods range from taking more work breaks to slowing down the conveyer systems to hiring more employees, the kinds of things that, of course, make no sense insofar as the science is concerned, but, nonetheless, if those are not systematically pursued by an employer—the employer will be cited under CSHP.

And this is a very simple citation. OSHA would not have the burden of proof of demonstrating a 5(a)(1) citation, a general duty clause citation, a recognized hazard. OSHA would not lose every case it has tried, from Pepperidge Farms to Dayton Tires, every case it has tried under 5(a)(1) in an attempt to establish ergonomics.

Indeed, OSHA would not have the burden of proving ergonomic science rejected by the administrative law judges of the Occupational Health and Safety Review Commission. OSHA marshaled the best science that it could under the Daubert test in the Supreme Court. The judges rejected OSHA's evidence, saying that science is junk science. Under CSHP, OSHA would not have that burden anymore. The only burden it has is to demonstrate there is a regulatory provision that requires a systematic analysis and a ridding of your workplace of discovered hazards; did you engage in that? And if you didn't engage in that systematic analysis, then you have violated that standard and you have got to abate by employing ergonomic measures.

[Mr. Fellner's statement may be found in the appendix.]

Chairman TALENT. Don't you have to show that the hazard was a hazard under the law, though? Aren't they back to the same—without a valid ergonomics standard, could they show that the employer failed to eradicate a hazard? Don't they have to have a standard to show that was a hazard?

Mr. FELLNER. The difference between recognized hazard and hazard is all the difference in the world. The threshold insofar as hazard is concerned may in all likelihood be met by numbers as long as you have got a lost workday incident rate that is higher than some imaginary bar which OSHA has established and which keeps floating. As we learned in the CCP litigation, a number which was 7, if you had an LWDI of 7, OSHA considered that to be a number which denominated the worst employers in the country.

Today, OSHA is implementing its SST program, which is kind of the son of CCP but without the, "voluntary aspects" which the court found obnoxious and inappropriate under the APA. What they have now done is they have pegged their SST inspections to 16. I mean, this is a wet finger in the air insofar as the assumptions and presumption that the agency is using.

But the point, in direct response to your question, Chairman Talent, is that when you take the numbers alone, at least from

OSHA's perspective, you can probably demonstrate a hazard simply by saying, mister employer, you have got all of these injuries in your workplace, now what are you doing to systematically eradicate them?

So I would suggest to you that this is—there is more here than meets the eye insofar as this innocent-looking CSHP exercise. I think it is much more than the bureaucrats have gotten a hold of the agency and have been pushing CSHP. It is much more, quite frankly. Not that the usual proponents of the agency, organized labor, is pushing CSHP, because I don't think that is in the forefront of their thinking. It is very subtle, and I commend the agency for its creativity, if I condemn them for the diabolical nature of their exercise.

Chairman TALENT. You know, one of the things that is sad about it all is that worker safety actually gets lost in this whole process. Some of you here are aware of the fact that I have cosponsored and pushed very hard in the House the companion bill to Senator Enzi's bill, the "SAFE Act," which I believe, by restructuring incentives for employers, would really encourage the majority of employers to attack vigorously, aggressively and effectively remaining hazards in the workplace and also then allow OSHA to concentrate on that layer of employers who really continue to be recklessly indifferent to this. And I think they are there. Mr. Bartlett and I may disagree on this. There may be some people who, for one reason or another, the fly-by-nights figure they can fool the workers comp insurance; and those are the kind of people that I want OSHA going after. But you have to have some means for screening those people out, separating the wheat from the chaff, if you will.

As I said in my opening statement, this is a step in the wrong direction, because it lumps all of those people—instead of trying to separate them out—it basically lumps in all the honest people and, in fact, primarily bothers them.

Assume for a second that you are one of these fly-by-night types and you don't care about worker safety. You just figure it will never catch up to you and there will never be a big accident. You are the kind of person and that is just how you live your life. You are going to cut the corners and figure it will never happen to you. So you probably have got serious hazards at the workplace right now—pools of acid out and things without guards and stuff everybody recognizes.

The problem with a rule like this is that it overdeters the honest people and is of no deterrent value whatsoever on that layer of people. Because they are not deterred by ongoing and serious violations of substantive hazards, they are certainly not going to be deterred by the fact that OSHA is requiring that they meet with their employees about safety. They laugh at that.

It is the honest people who do try and comply with the law who go home at night with a stomachache because they are afraid that somebody is going to come in and they may not be in compliance. Those are the ones that get this burden. It is topsy turvy, and I had seen the agency moving in the direction of less paperwork violations and voluntary compliance and I just think this moves in the opposite direction. So what you are saying is plausible, but I sure would be disappointed if this were true.

Mr. Halprin.

Mr. HALPRIN. I would like to add one more thing.

The potential with this rule is to significantly enhance the agency's penalty authority. They issue one—normally, you have got a rule that deals with lockout or confined spaces, you get a citation and fine for training under that standard, and that is it. Now you have one standard that covers everything, so every time there is a lack of training or there is a lack of management commitment, you keep getting the same citation in the same section, and the next time around it is repeated. So we are talking about compounding fines that will magnify substantially the agency's enforcement authority.

Chairman TALENT. If OSHA wanted to encourage safety and health programs, here is what they would do. They would identify employers or areas of industry where there is some special concern, and they would let it be known that, look, if you will go out and hire firms to establish real safety and health programs, firms that we certify are approved, so we know you are not going out and getting—our enforcement policy is going to be one of not leniency, but we are not going to inspect you as often. And when we go in we will take that into account and follow that up so employers get confidence that that will be the case. That will encourage people to go out and really work on their safety and health programs. That is the direction the SAFE Act is trying to move in.

And I hate the idea that the choice is between an OSHA that is constantly trying to establish a tyranny—that is what you have described—and no check on trying to. It shouldn't be all or nothing at all. You can have a regulatory apparatus that doesn't consistently abuse its power.

Mr. FELLNER. If I may, Chairman Talent, associate myself with the comment that you just made insofar as OSHA's overreaching. When I heard the testimony this morning, I turned to my colleague, Brian Morrison, who assisted me in my testimony, and I said to him, the sad part, as a person who used to work for OSHA, who was responsible for some of the initial enforcement policies of the agency dealing with very concrete hazards, not behavioral relationships between employers and employees that OSHA is attempting to regulate here, the kinds of touchy-feely stuff which God only knows whether it yields something in terms of a benefit but surely creates all of the difficulties in terms of enforcement that Mr. Halprin talks about. But the truth of the matter and the lament is that when an agency that was born with an extraordinarily important and good purpose attempts to overreach, which it is doing here, it is doing in ergonomics, and let me alert this Committee it will do in the recordkeeping standard when it issues at the end of this year, it is another bite at the ergonomic apple. When an agency overreaches in that fashion, it endangers its own existence.

And when I witnessed the bipartisan or the relatively bipartisan criticism of this standard this morning, it was remarkable. It must be to the credit of the Chairman having spoken so eloquently to his colleagues. But it is not often that we see an agency which galvanizes opinion and policy the way OSHA does lose or begin to lose its base. And that is truly a remarkable event today.

Chairman TALENT. Let me just say—and I, of course, cannot speak for my friends on either side of the aisle, much less on the minority side, but I will certainly say this, that the Ranking Member always brings an independent and probing approach to every one of the issues that comes before this Committee and she did so here. She and I had not discussed this, but certainly, on the staff level, this had happened. We disagree sometimes and maybe that could even be said often on issues like this.

But I do think, and I said in my opening statement, there are certain things that nobody on either side of the aisle wants. That is why SBREFA passed virtually unanimously. We do not want small businesspeople hurt for nothing. We want some payoff in terms of worker safety.

You know, as bad as what we referred to as this tyranny might be, if it actually did result in a 20 to 40 percent reduction in serious injuries and illnesses at the workplace, then you might say, well, if somebody is not losing an arm or not losing a life or going up on an electric pole and not getting killed, maybe we don't like doing it that way, but we are getting something.

But I don't think anybody has any confidence this is going to happen. I don't think anybody in the room would bet $50 of their own money that this would reduce these illnesses or injuries by 20 to 40 percent. It just wouldn't happen.

And so you go through all of this, violation of what everybody I think sees as the proper role of the law and all the practical burdens, and then yet another statement to the average small entrepreneur that the government basically just doesn't like you. And that is what these people believe, that the government just doesn't like them.

My parents' generation didn't believe that in the 1950s. They didn't view the Federal Government as an enemy. And it is just wrong that you do that to people. And then you get nothing.

And I don't know, we are a Committee that operates in a more bipartisan fashion than many do when Mr. LaFalce was the chairman, we often had agreement on our side of the aisle, and we try to continue. So on behalf of everybody I will thank you for your kind words but will assure you that the position that people like Ms. Velazquez and Mr. Pascrell and Ms. McCarthy take is never because I have talked to them.

Well, is there anything else either one of you want to offer?

Mr. FELLNER. If I may in a couple of minutes just kind of briefly highlight some of the issues that have not been touched on by Mr. Halprin, some of the more technical issues. And that is, number one, I think it is important to remember, as a result of the Chamber of Commerce litigation just concluded in the D.C. Circuit, which I had the pleasure of arguing before the D.C. Circuit, it is very, very clear that this exercise, this CSHP exercise, is going to be a standard rather than a regulation. And, as a standard, it is going to be a health and safety standard. OSHA is going to have the burden of demonstrating significant risk of material health impairment on the one hand, and it is going to have the burden of demonstrating a cost-benefit analysis, as that has been defined in the D.C. Circuit, on the other hand.

There is little doubt in my mind that OSHA will not be able, in any way, shape or form, to succeed in both of those hurdles in order to have this standard prevail in the courts.

Chairman TALENT. We are talking about this safety and health program.

Mr. FELLNER. That is correct.

Chairman TALENT. What about SBREFA? How will that impact?

Mr. FELLNER. Well, I think that, insofar as SBREFA is concerned, without getting into the economics which were discussed at great length, I think SBREFA is going to be a substantial Achilles heel insofar as this exercise is concerned. We have the view of the panel. I think OSHA—coming to grips with the economics as described in that is going to be very difficult and is going to provide yet another argument in the Court of Appeals. But I think the central challenge is going to be the basic hurdles that they have got.

Chairman TALENT. Substantive statutory authority?

Mr. FELLNER. As articulated in the benzene case, the lockout cases and the other steelworker cases in the D.C. Circuit, benzene in the Supreme Court, I think they are going to have a devil of a time in the courts; and this is one of those instances where the judiciary is going to serve an extraordinarily important purpose of keeping OSHA's feet to the fire because this is an inappropriate, arbitrary and capricious standard, just by definition at this stage, and I think the courts are going to see through that.

In addition to that, we have substantial due process issues insofar as definitional questions are concerned. You can drive a Mack truck through the words that are contained in the draft that has circulated, and that has essentially two problems.

One, as Justice Thurgood Marshall, no right-winger, put it, he said: "Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited so that he may act accordingly."

There is no way that what we have heard today gives that kind of information to a small businessman, to a larger businessman or, frankly, to the independent consultant who is going to charge an arm and a leg to either business in order to attempt to interpret what this standard means. And not only will employers not be able to know what this standard means, but, as you engaged Mr. Jeffress extensively this morning, his—I don't care how long he trains his compliance officers, they will, in good faith, adopt differing interpretations.

Chairman TALENT. Again, there is a lot of things I wanted to ask him. Do we as a matter of policy want OSHA to be spending its scarce training dollars on training these people about process? I want them to learn about actual hazards and actual industries that really affect people.

Mr. FELLNER. We want them to know where to look for the guards that are off the machines, the laniards that are not being attached. That is what we want our compliance to know—and, fortunately, you don't have to be a rocket scientist—and many of them are not rocket scientists—you don't have to be a rocket scientist to spot real safety problems and real health problems. And it is those

few employers who are committing those kinds of violations, it is their employees that we ought to be protecting, not the conjectural issues of aches and pains and trying to get into these very subtle issues of what is and what is not an injury. Let's go for the jugular rather than the capillary. And OSHA invariably goes for the capillary. And it is essential for us to redirect the agency, and I think this standard doesn't do it.

Chairman TALENT. I think one of the reasons for that, that is a tendency of bureaucracies, and it is for several reasons. One of them is a person who has got a jugular exposed, when you do finally get them or get on to them, it is a major effort to catch them and stop them. They will fight pretty hard, because there is a lot at stake. And you might lose.

On the other hand, a person with just a capillary you can go in and build a pretty good record of enforcement by just nicking all of these people. It is quick. It is not as much of a burden on your time. And so there is a tendency that pushes bureaucratic enforcement organizations in that direction unless the top level is constantly pushing back.

You know, it is the old story of the police officer going out, he has got to get his work done, he has to write so many—he takes whatever will get him the most tickets quickly. And if it is rolling a stop sign in a neighborhood, he doesn't care whether it is protecting any safety. It just makes it easier. It is a constant tendency.

I don't know that I accept your theory that they really are—that this is conscious. I would like to believe that it is more sort of the bureaucracy pushing that way. But you are more familiar with that.

Mr. FELLNER. I used to be part of that bureaucracy.

Very, very briefly, Chairman Talent, and we have indicated in our papers that we believe that employers have a Hobson's Choice between either violating the National Labor Relations Act on the one hand, Section 8(a)(2), or violating this regulation should it become law on the other hand because, under the Federal code, the NLRB decision which we describe at some length, the kinds of safety committees which would be at the heart of the CSHP program would clearly violate Section 8(a)(2) of the National Labor Relations Act.

None other than Senator Kennedy, when the Democrats were in control in 1990 or 1991, when he introduced a different kind of OSHA reform bill—as you will recall, his reform bill accommodated and recognized the change that would be necessary in the National Labor Relations Act in order to achieve by legislation what OSHA is attempting to achieve by regulation. He saw that. OSHA is blind to it.

And, with that, I would simply suggest that we have discussed the grandfather clause. It is nonexistent.

One of the issues which we touch on is the notion of criminal penalties, and we do believe that passage of this regulation opens the door for an argument that criminal, willful violations can be based incrementally or in part on a violation of this regulation subject to a much easier burden to prove, once again as in the ergonomics counterpart, than the kinds of intentional conduct

which is at the base of criminal willful and leads to so few criminal willful violations today.

With that, thank you very much for the privilege and the opportunity of appearing before the Committee today.

Chairman TALENT. I appreciate your indulgence and your patience. I thank both of you, and I will adjourn the hearing.

[Whereupon, at 3:21 p.m., the Committee was adjourned.]

OPENING STATEMENT
CHAIRMAN JIM TALENT
HOUSE COMMITTEE ON SMALL BUSINESS
HEARING ON OSHA'S DRAFT SAFETY & HEALTH PROGRAM STANDARD
JULY 22, 1999

Our hearing today will focus on the Occupational Safety and Health Administration's ("OSHA's") draft safety and health program rule. The current version of the draft rule was released in October 1998. OSHA plans to issue a proposed rule, based on the draft, later this year.

By OSHA's own estimation, the draft rule would require over 4 million American small businesses to adopt safety and health programs satisfying certain vague requirements such as "management leadership," "employee participation," "hazard identification and assessment," "hazard prevention and control," "information and training," and "evaluation of program effectiveness." OSHA claims that the rule is flexible, permitting employers to meet the requirements of the rule however see fit. Unfortunately, the rule is not flexible. It is vague. Flexibility and vagueness are not synonymous. IRS regulations are vague, but they are not flexible. As any small business entrepreneur will tell you, there are two substantial problems with forcing employers to either comply with vague requirements or risk civil and criminal penalties. First, a small business acting in good faith will have no way to know what specific steps it must take to demonstrate sufficient "management leadership" or "employee participation." Second, such vague terms provide OSHA inspectors with extraordinary discretion to target employers.

Importantly, a recent study authored **by a Senior Economist at OSHA** suggests that the draft rule would **not even** increase the safety of American workers. The study, published in the November 1998 Monthly Labor Review, indicates that mandatory safety and health programs like those required by OSHA under this rule are no more effective at reducing occupational injury and illness than voluntary safety and health programs. Indeed, in 1996, the median occupational injury and illness rate in states with mandatory safety and health programs was greater than that in states with voluntary programs or no programs at all. Moreover, the median reduction in injuries was greater in states with voluntary programs or no programs. This

finding is not surprising. BLS statistics show that over 75% of all businesses as well as 75% of businesses with 10 or fewer employees have **no** recorded occupational injuries and illnesses at all. Thus, occupational injury and illness is concentrated among a relatively few high-hazard industries. Many, if not most, of these employers already utilize safety and health programs in order to obtain lower insurance and worker's compensation premiums! In short, all this rule would do is burden the 75% of employers and small businesses who sustained no injuries or illnesses. The few high-hazard employers already have such programs.

On a related note, I am profoundly disappointed with the Regulatory Flexibility analysis published by OSHA in support of the safety and health program rule. OSHA flagrantly overestimated the likely benefits of the rule and underestimated the associated compliance costs. Both RegFlex and SBREFA afford valuable protections to small businesses. They require OSHA to provide small entities with estimates of the compliance burdens associated with the rule and thereafter solicit feedback as to how the underlying safety objectives might by effectively achieved at a lesser cost to small employers. When an agency makes spurious assumptions in cost/benefit data, small businesses lose the underlying protections of the statute. Unfortunately, that is exactly what OSHA did during the safety and health program rulemaking. An independent report commissioned by the SBA Office of Advocacy concluded that "OSHA's costs and benefits methodologies do not provide adequate information on their underlying assumptions; make faulty assumptions; and are fraught with inconsistencies, inaccuracies, and missing data." Here are just a few examples:

- OSHA assumes that the draft safety and health program rule will lead to a 20%-40% reduction in occupational injury and illness despite the fact that
    a) States imposing mandatory safety and health programs do not have lower occupational injury and illness rates than those without such a requirement; and
    b) 75% of affected businesses already have an occupational injury and illness rate of zero.

- OSHA includes the benefits **but not** the costs of "hazard control" in its estimates for the rule. According to the independent report commissioned by the SBA, "hazard control" is the most expensive variable associated with the rule, increasing compliance costs by **50%**, or over **$2 billion**

annually. It is simply disingenuous to include the benefits supposedly received from hazard mitigation but not the costs to small business of that mitigation.

I want to say in conclusion what is so frustrating to me personally about this proposed rule. It seems to me that, both in process and substance, this rule is a return to the old OSHA. None of us wants OSHA to concentrate on paperwork violations. None of us wants OSHA to proliferate vague new regulations that invite inspectors to be arbitrary. None of us wants OSHA to use its enforcement resources on honest small employers who simply want guidance in obeying the law. And none of us wants OSHA to hurt small business while accomplishing nothing. I'm afraid this proposed rule does exactly that, and I agree with the "primary recommendation" made in the independent report commissioned by the SBA Office of Advocacy: OSHA should not promulgate the draft safety and health program rule, but should rather augment outreach and consultation programs to help employers develop and implement effective safety and health programs on a voluntary basis.

Statement for the Record
Congressman Jim DeMint
July 22, 1999
OSHA's Safety and Health Program Rule

Mr. Chairman, first I want to thank you for holding this important hearing. I believe it is vitally important to the work of this committee that we exercise this oversight over actions by agencies of the federal government that will have a direct impact on our constituents, and on small business throughout the United States.

Being a small business owner myself until about seven months ago when I came to Congress, I have serious concerns about the impact these new federal regulations will have on small business. I have seen firsthand the difficulty of complying with the confusing web of federal, state, and local regulations, all while trying to stay in business and make a profit.

Many small businesses and business organizations already have health and safety standards which are working and are specifically crafted for maximum effectiveness for individual businesses and regions. According to a letter I received from the Association of General Contractors of America,

many of its members, *"currently do use written safety and health programs, developed specifically for their own company, its employees and unique circumstances."* The letter goes on, *"this heavy-handed, "Washington knows best" initiative is a step in the wrong direction and may actually undermine these existing voluntary plans."* I would like to submit a copy of this letter into the record.

I am deeply concerned that the OSHA rules are another case of Washington attempting to take away more of people's freedom with the promise of additional "security." This is a false promise. The SBA's Office of Advocacy has recommended that this rule not be promulgated and that OSHA instead rely on increased outreach and funding for its existing free consultation and existing voluntary programs. I am inclined to agree.

Mr. Chairman, thank you again for holding this hearing.

STATEMENT OF CHARLES N. JEFFRESS
ASSISTANT SECRETARY OF LABOR
FOR OCCUPATIONAL SAFETY AND HEALTH
before the
COMMITTEE ON SMALL BUSINESS
HOUSE OF REPRESENTATIVES

July 22, 1999

Mr. Chairman, Members of the Committee, thank you for inviting me to testify about OSHA's effort to promulgate a rule on safety and health programs. Safety and health programs are systematic, simple approaches to managing workplace safety and health. They are widely recognized as fruitful ways to reduce the number of job-related injuries and illnesses and the number of job-related fatalities. OSHA has worked extensively with stakeholders from industry, labor, safety and health organizations, State governments, trade associations, insurance companies and small businesses to develop a draft proposal, which would require employers to develop basic safety and health programs to improve worker protection.

The draft proposed rule reflects the experience and suggestions of many of these participants and would require that safety and health programs include five "core" elements: management leadership and employee participation; hazard identification and assessment; hazard prevention and control; training; and evaluation of the program's effectiveness. The elements are simple and straightforward. Reduced to their basic level, the elements require an employer to work credibly with its employees to find workplace hazards and fix them, and to ensure that workers, supervisors and managers can recognize a hazard when they see it. The rule creates no new obligations for employers to control hazards that they have not already been required to control under the General Duty Clause of the OSH Act or existing OSHA standards.

Safety and health programs work. In the words of Occidental Chemical's Vice President for Health, Safety and Responsible Care, Stephen Kemp, safety and health programs "not only help you improve safety, but [also help] in many other areas of your business. We firmly believe that good safety performance leads to higher productivity, better product quality and overall improved performance as a company." However, even with OSHA's growing emphasis on safety and health programs, widespread action at the State level, and strong insurance company encouragement, many employers either are not aware of the benefits of such programs or have not elected to establish their own programs voluntarily. Therefore, OSHA believes a safety and health program requirement is necessary to foster the implementation of these worthwhile approaches to worker protection.

OSHA's interest in workplace safety and health programs has grown steadily since the early 1980's, when the Agency first developed its Voluntary Protection Program (VPP) to recognize companies in the private sector with outstanding records in the area of worker safety and health. It became apparent that these worksites, which had achieved injury and illness rates markedly below those of other companies in their industries, were relying on safety and health programs to produce those results. At VPP worksites, which today routinely achieve injury and illness rates as much as 60 percent below those of other firms in their industry, safety and health programs--and thus the protection of the safety and health of the workforce--have become self-sustaining systems that are fully integrated into the day-to-day operations of the facility. At these worksites, worker safety and health, instead of being relegated to the sidelines or delegated to a single individual, is a fundamental part of the company's business, a value as central to success as producing goods and services or making a fair profit.

The evidence has continued to accumulate as OSHA's stakeholders from industry, labor, State governments, small businesses, trade associations, insurance companies and safety and health organizations have all gained experience with safety and health management systems. OSHA has applied what it learned about safety and health programs from VPP companies and our other stakeholders to smaller businesses, through the addition of the agency's Safety and Health Achievement Recognition Program (SHARP), which is directed at high hazard businesses with 250 or fewer employees.

In 1989, OSHA published its voluntary *Safety and Health Programs Management Guidelines* to help employers establish and maintain management systems to protect their workers. OSHA's guidelines and others like them have helped thousands of companies adopt systematic ongoing approaches to safety and health, which achieve injury and illness rates markedly below those of other companies in their industries, reduce their workers' compensation costs, improve employee morale, and increase worksite productivity. In fact, OSHA has found that programs implemented by individual employers reduce total job-related injuries and illnesses by an average of 45 percent and lost worktime injuries and illnesses by an average of 75 percent. For example, Mereen-Johnson Machine Co. worked with its 95 employees in Minneapolis, Minnesota to implement a program and achieve a lost workday injury rate 60 percent below the industry average. Applied Engineering, Inc., a manufacturer of specialties materials with 74 employees, located in Yankton, South Dakota, reduced its lost workday injury rate from 6.0 in 1993 to 0.0 in 1997, a success the company's president attributes to implementing a safety and health program.

Today, thirty-two states have some form of safety and health program provision, though few are as comprehensive as OSHA's draft proposed rule. Four States (Alaska, California, Hawaii and Washington) have mandated comprehensive programs that have core elements similar to those in OSHA's draft proposal, that cover businesses of all sizes within the State, and for which at least five years of data are available. In those four States, injury and illness rates fell by nearly 18 percent over the five years after implementation, in comparison with national rates over the same period. Several other States have studied the effectiveness of their own programs and found that average workers' compensation costs were reduced by as much as 20 percent per year, and that these benefits were even greater several years later when the program had matured. For example, Colorado evaluated a program that provides premium discounts to firms instituting safety and health programs. Over 50 percent of the more than 500 participants had fewer than 100 employees. Colorado's review found that in all of the five years after the program was established, lost work-time injury rates declined by at least 10 percent per year and the costs of workers' compensation claims declined by at least 20 percent per year. The State of North Dakota determined that participants in its program, which provided premium discounts to employers who implemented safety and health programs, reduced lost work-time injury claims by 42 percent over 4 years, with significant reductions occurring in each year of the program. The Texas Workers' Compensation Commission implemented requirements for safety and health programs for firms identified as "extra-hazardous." The program averaged 325 participants per year, and these employers reduced injuries and illnesses by an average of 61 percent in each year of the program's existence.

Experience with safety and health programs demonstrates that systematic, common sense efforts to protect workers have a direct impact on workplace injury and illness rates and on compliance with existing worker protections. However, more than 6 million reportable injuries and illnesses continue to occur each year. More than 6,000 job-related fatalities are reported to the Bureau of Labor Statistics (BLS) annually, with tens of thousands more job-related fatalities resulting from chronic occupational illnesses. The common sense advantages provided by safety and health programs will reduce these injuries, illnesses, fatalities and associated workers' compensation costs, bringing a clear new benefit to the many establishments that have yet to establish such programs.

SIMPLE SOLUTIONS

Safety and health programs are proven solutions to basic problems. The search for straight-forward, common sense approaches to worker protection has led many businesses to implement safety and health programs and motivated business associations to adopt their own model programs and recommend them to their members.

The National Federation of Independent Business's (NFIB) Ohio chapter has developed a comprehensive document entitled *Workplace Safety Program Guidelines*, which explains to NFIB members how to design and implement an effective safety program. The guidelines include the same elements that OSHA has identified as the keys to a successful program: leadership by top management; responsibility and accountability by managers, supervisors and employees; training in safety and health; identifying, reporting, investigating and controlling hazards; and involvement of employees According to the NFIB guidelines, "Serious accidents

or injuries can be very disruptive to any successful operation and to the lives of people involved. An important step that an employer can take to effectively prevent these losses is the development of an organized safety plan or accident prevention program."

The Synthetic Organic Chemical Manufacturers Association (SOCMA) has also developed *SOCMA's Model Safety and Health Program*, a document intended to help member companies, many of which are small, implement their own safety and health programs. Like the NFIB guidelines, SOCMA's model program calls for: management commitment and employee involvement; worksite analysis; hazard prevention and control; and safety and health training. The manual recommends that a company tailor its safety and health program to the company's site-specific needs and argues that "SOCMA member companies who incorporate this program into their operations will receive benefits by:

- reducing injuries, illnesses, accidents and property loss;
- saving time and resources by not having to develop a program from scratch;
- demonstrating management commitment to safety and health;
- giving employees an alternative means to address safety and health concerns before calling OSHA;
- avoiding a wall-to-wall OSHA inspection;
- assisting in conforming with the Responsible Care Employee Health and Safety Code."

Similar approaches are found in the safety and health programs advanced by other professional associations, trade associations and employers. The National Fire Protection Association, the American Society of Safety Engineers, the American Dental Association, the National Spa & Pool Institute, the BF Goodrich Specialty Chemicals division, the American Industrial Hygiene Association, and Argonaut Insurance Company have all developed model safety and health programs. OSHA has borrowed directly from these associations and employers in fashioning our draft safety and health programs rule. In fact, many companies have already

put such model programs to good use. For example, in 1994 the Ryder Company instituted a safety and health program modeled after programs advocated by the International Loss Control Institute, the National Safety Council, and OSHA's own 1989 *Safety and Health Program Guidelines*. Between 1994 and 1998, Ryder reduced lost time cases by 50 percent, lost workdays by 58 percent and its lost workday incidence rate by 42 percent.

Earlier this year, the National Association of Manufacturers, in testimony before the Senate Subcommittee on Employment, Safety and Training, echoed the sentiments of those who proclaim the value of safety and health programs. At the hearing, Robert Cornell from Mon Valley Petroleum in McKeesport, Pennsylvania, told the Subcommittee that, "Today, we have an effective safety program resulting in fewer injuries and reduced workers' compensation costs." Mr. Cornell's company used a comprehensive analysis of its safety and health violations and employee involvement proactively to address potential hazards. As a result, they reduced lost workdays from 70 between 1992 and 1994 to zero from 1995 through 1998. Mr. Cornell did not testify on behalf of OSHA's proposal. However, he illustrated quite effectively the value of instilling safety and health in the culture of his workplace.

Although the preceding examples generally involve companies that implemented programs voluntarily, the results for mandatory programs are equally impressive. Data from the four States with mandates covering most employers and OSHA's enforcement experience, which has emphasized safety and health programs, show overwhelmingly the effectiveness of this approach. The General Accounting Office, in 1992, concurred with earlier OSHA assessments of the value of comprehensive safety and health programs. GAO also said consideration should be given to requiring high risk employers to have safety and health programs "because the potential

number of lives saved or injuries and illnesses averted is high." OSHA believes that every employer, not just high risk employers, would benefit from a safety and health program.

At its heart, a safety and health program promotes the exercise of reasonable diligence in the workplace in order to protect workers. When Congress enacted and President Nixon signed the bipartisan OSH Act in 1970, they imposed on employers a general duty to provide employees with a workplace free of serious recognized hazards and a specific duty to adhere to rules promulgated by OSHA. Because State occupational safety and health and workers' compensation laws provided insufficient incentive to protect workers, the OSH Act, as some courts have held, required employers to exercise reasonable diligence in complying with these duties. Through its draft proposed rule, OSHA seeks to assure that employers exercise reasonable diligence in protecting their workers.

THE DRAFT PROPOSED RULE

OSHA's draft proposal is based on years of experience with successful safety and health programs. OSHA used that experience to identify the core elements that have proven necessary to implement effective safety and health program efforts. The required elements in OSHA's draft proposal mirror those found in model programs produced by the NFIB of Ohio, SOCMA, and many other associations, insurance companies and employers. As those on the front lines have found, the elements all support each other. This experience shows all five must be present to ensure success.

The Agency recognizes that many companies have already embraced the program approach to managing safety and health in their workplaces. Because the draft proposed rule

only includes those elements that OSHA believes are essential for program effectiveness, and because the rule is framed in broad and flexible performance language, OSHA believes that existing programs that are effective will already meet the proposal's requirements. To reassure those employers, OSHA has incorporated a grandfather clause into the draft proposed rule that would allow such programs to be "grandfathered in."

Program Elements

Management Leadership and Employee Involvement. A safety and health program will only work if management is fully committed to it and communicates that commitment to the entire organization. According to Michael Seitel from Norwalt Design, a 38-employee, New Jersey company that manufactures high-speed assembly machinery for the plastics industry, "One of the biggest things, I think, in regard to the safety and health program that a company needs is management commitment ... you're going to save money on your insurance and on workers not being out due to injury."

Employee involvement means actively engaging front-line employees, who are closest to workplace operations and have the highest stake in preventing job-related accidents, in developing, implementing and evaluating the safety and health program. In the words of Bill Harvey, Senior Vice President of Alliant (formerly Wisconsin Power & Light), "you must build a corporate culture that conditions employees to think of safety as their job, not someone else's job." According to the NFIB of Ohio's guidelines, "Many times employees who are most familiar with a job will be excellent sources of solutions to safety problems, just as they are for production or quality problems." Employee involvement spreads the responsibility for safety and

health and ensures that more eyes seek and identify problems and more perspectives are used to develop solutions. When OSHA held stakeholder meetings on the draft proposal in 1996, there was widespread agreement that employee participation is crucial to an effective safety and health program.

Hazard Identification and Assessment. Hazard identification and assessment means, among other things, that the employer reviews workplace safety and health information, inspects the workplace, identifies hazards, and prioritizes covered hazards for elimination or control. Front-line employees are empowered to avert injuries and accidents by identifying and bringing hazards to the attention of their supervisors. In essence, this element calls on employers to look for hazards, decide how serious they are, and prioritize their control or elimination.

Hazard Prevention and Control. Once hazards covered by OSHA standards and the general duty clause are identified and assessed, they must be controlled. Put simply, the element calls for a workplace to obey the law as it already exists--fix identified hazards in accordance with the relevant OSHA standards or the general duty clause. Hazard prevention and control provides the solutions to the safety and health problems discovered by the program's hazard identification and assessment activities. Unless hazards are prevented, controlled or eliminated, workers who are exposed to them will continue to be killed, hurt, or made ill.

Information and Training. Information and training ensure that both workers and management have the information, knowledge and skills to recognize identified hazards, understand what controls are in place to prevent exposures and their roles in preventing or minimizing exposures. People need to know hazards when they see them, so they can protect themselves and their co-workers.

Program Evaluation. Program evaluation simply tells an employer to assess how well its safety and health program works, to ensure that it protects workers. Where the employer identifies deficiencies, they should be corrected.

ISSUES RAISED BY SMALL BUSINESS

Since OSHA last testified before the Small Business Committee regarding this issue, a Small Business Advocacy Review Panel has reviewed the draft proposed rule, as required by the Small Business Regulatory Enforcement Fairness Act. The panel, which consisted of personnel from OSHA, SBA's Office of Advocacy and OMB's Office of Information and Regulatory Affairs, submitted its report to me on December 18, 1998. The panel report was based in part on the advice and recommendations provided by 18 small entity representatives (SERs).

The version analyzed by the SBREFA panel was different from the one OSHA described to you when last we testified before your Committee. At that hearing, members of the Committee raised a number of questions about the rule. Since that time, OSHA has continued to respond to suggestions made by members of this Committee, small businesses and other stakeholders. OSHA incorporated a number of changes into the draft proposed rule the agency ultimately provided to the SBREFA panel. For example, when OSHA testified before you two years ago, the draft called for employers to conduct hazard assessments at a frequency "appropriate to safety and health conditions at the workplace." The draft discussed by the SBREFA panel provided that such assessments should occur at least every 2 years or when changes in workplace conditions indicate that a new or increased hazard may be present. The agency also added the "grandfather clause" discussed earlier in my testimony to the version of the

draft proposal provided to the SBREFA panel. The grandfather clause responded to concerns raised by the Chairman and various small businesses that employers who already operate effective programs should not be required to change them.

OSHA has been clarifying the regulatory text wherever possible. In part because of the flexibility the rule provides, some small businesses questioned whether it incorporated sufficient guidance to help them comply without unnecessary difficulty. Several recommendations in the panel's report suggested that OSHA further clarify certain portions of the rule and its accompanying analyses. For example, the panel suggested that OSHA should clarify in its preamble how the Safety and Health Program rule interacts with other OSHA rules, with the existing requirements of the General Duty Clause, and with National Labor Relations Act requirements. The panel also recommended that OSHA "solicit comment on the possibility of providing guidance that contains all cross-references in the rule and explains such concepts as the General Duty Clause so that small firms can understand these issues without having to go to other sources."

OSHA is responding to the issues raised by SERs and the panel as it readies the proposal for publication in the *Federal Register*. In some cases, we will provide additional explanations in the preamble to the proposed rule and in the accompanying analyses. In other cases, we are clarifying language in the rule that some SERs thought to be too vague. For example, the draft provided to the SBREFA panel required training to be provided "as often as necessary to ensure that employees are adequately informed and trained." OSHA is considering a modification that would require training when the employer "has reason to believe" that employees lack the knowledge or understanding they need. With regard to evaluating program effectiveness, the

panel draft included language requiring an evaluation "as often as necessary to ensure program effectiveness." We likely will replace this requirement with language calling for a review "when the employer has reason to believe" that all or part of the program is ineffective. These changes both clarify that an employer need not guess when a reevaluation or new training should be conducted, but instead must exercise reasonable care. In addition, the Agency is further evaluating the accuracy and transparency of its cost estimates and plans to solicit comments and raise, in the preamble of any proposed rule, regulatory alternatives for consideration. The issues raised by SERs and the panel are important and OSHA is considering them all carefully.

In addition, when the final rule is published in a few years, OSHA will provide a variety of informational and outreach materials to simplify compliance. Materials will include checklists, model programs, decision logics and other materials to help employers determine how to comply and when they have met their obligations under the rule. For example, the agency is already developing a new "Expert Advisor" to provide computerized guidance to employers who are attempting to implement or improve safety and health programs. Last year, OSHA released its Hazard Awareness Advisor, which has received excellent reviews from small businesses and is referenced on the Home Page of the National Federation of Independent Business. In addition to this extensive array of informational materials, small businesses will continue to have available to them free consultation services through OSHA's 50 state consultation programs. OSHA will also provide intensive training to its compliance officers to ensure that their enforcement of the rule is consistent with OSHA's intent to provide maximum flexibility to employers.

Because OSHA has drafted a flexible rule rather than a one-size-fits all requirement, it has not specified every action a business must take to comply. Nor should it. However, the agency is committed to providing the most instructive materials possible to help small businesses comply with ease. As Bill Pritchard from MASCO, which has facilities ranging in size from 5 to 2,700 employees, points out, "The program must be performance oriented. Give companies the flexibility to allow them to develop the process which will work for each facility. Don't specify the process, specify the key elements... let companies decide the way to implement the elements." Many models similar to the one OSHA is proposing already exist and should prove invaluable as businesses develop their own programs. Clearly, the flexibility OSHA has built into its draft proposal is preferable to a one-size-fits-all approach.

A particular area of interest to small businesses where the rule will provide significant flexibility is documentation. The program for small businesses, for example, need not be written. And employers with fewer than 10 employees are exempt even from those minimal requirements. Although some small businesses have expressed skepticism, feeling they will need to maintain written records regardless of this exemption, that is emphatically not OSHA's intent. Small businesses will have many ways to demonstrate their compliance. For example, they can simply describe to a compliance officer the hazards that have been or are being identified and what has been or is being done to identify, assess and control them. They may also demonstrate their compliance using receipts, order forms and other documents developed or obtained in the normal course of business.

Some small business stakeholders have questioned whether the rule should be universally applicable. OSHA believes there is strong evidence to support such coverage. Many

stakeholders have expressed a similar point of view. For example, John Cheffer of the Travelers Insurance Company testified in 1995 before the National Advisory Committee on Occupational Safety and Health that, "We consider any proposed safety and health standard to be the centerpiece from which all other rules and standards flow, in effect, the ultimate safety and health guideline document for the Nation. If that view is accepted, by its very nature it must be generic, flexible and universally applicable." Another significant reason for applying the rule to establishments of all sizes is the risk currently posed to employees working in small businesses. Although small businesses with 10 or fewer employees account for only about 15 percent of employees, 30 percent of all work-related fatalities reported to the BLS in 1997 occurred in these very same workplaces. By comparison, businesses with 100 or more employees accounted for approximately 45 percent of employees, but experienced only 20 percent of all work-related fatalities in 1997. Based on these numbers, the risk of fatalities in businesses with 10 or fewer employees is 4 to 5 times higher than the risk in businesses with 100 or more employees. Although most stakeholders opposed exempting small businesses from coverage, they agreed with OSHA that every effort should be made to ease compliance burdens for small businesses. The compliance assistance materials that OSHA is now developing will address that need.

CONCLUSION

Safety and health programs already make a significant difference in the lives of many of our Nation's workers and in the financial bottom line of many businesses. But many businesses have yet to recognize their value. To fill this gap, OSHA is designing a rule that provides a general framework for employers to follow but leaves each individual employer free to add

workplace-specific procedures and to adopt management practices that suit the characteristics of that particular workplace. OSHA is committed to working with employers of all sizes, both during and after development of its rule, to ensure that the rule provides sufficient flexibility, OSHA's compliance guidance furnishes suitable information to meet the compliance needs of employers, and that workers are protected.

July 22, 1999

Testimony of
Jasbinder Singh, President,
Policy Planning & Evaluation, Inc.
before the

Committee on Small Business
U.S. House of Representatives

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Testimony of
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Honorable Chairman Talent and the Committee members, it is my privilege to be here today to present the summary of our report "Regulatory Analysis of OSHA's Safety and Health Program Rule". This report was prepared on behalf of the Small Business Administration, Office of Advocacy, to assist it during the SBREFA panel process. We reviewed the draft rule and accompanying documents to determine:

- whether benefits outweigh costs of the rule for certain categories of small businesses, and
- whether regulatory flexibility can be provided to small business without compromising the goals of the rule.

My company, Policy Planning & Evaluation, Inc. has prepared such independent reports on more than 15 other Federal rules over the last 4 years. In addition, we have prepared numerous economic analysis reports on behalf of several Federal agencies over the last 20 years.

Our report is very critical of the Preliminary Initial Regulatory Flexibility Analysis (PIRFA) developed by OSHA as justification for the Safety & Health Program Rule (the rule). In my view, OSHA did not make a good faith effort in analyzing the costs and benefits of the rule. As discussed below, OSHA has largely ignored the impacts of the rule on small businesses. Moreover, its depiction of the total costs and benefits is highly deficient. I believe OSHA's analysis does not exhibit "due diligence".

Impacts on Small Businesses

According to the Bureau of Labor Statistics (BLS), 75% of small businesses have no reported incidence of injuries and illnesses. OSHA has failed to consider this fact in crafting the rule. Lets consider the injury and illness rates in the generally accepted high hazard sector of the economy, the manufacturing sector, to illustrate this shortcoming. As shown in Table 1, the incidence rate of injuries and illnesses (with days away from work) is zero in 75% of businesses with less than 10 employees, 50% of businesses with 11-49 employees, and 25% of businesses with 50-249 employees. The yearly rate is less than 0.5 per 100 workers in other businesses in the first three quartiles. By comparison, the injury rate varies between 6 and 12 per 100 workers in the fourth quartile.

This data implies that a vast majority of small business firms will incur costs of the rule, but derive little or no benefit. Certainly firms with no injuries (the six categories given in

Tables 1) will receive no benefits. Firms with low incidence rates will receive marginal benefits while incurring the cost of the rule. Lets consider a 49 employee firm that experiences only one injury every five years. If it experiences a reduction of 20% in its injury rate, according to OSHA's estimates of benefits, it will save only $460 per year. This low level of savings can almost never overcome the costs of the rule, even if we disregard the controversies about OSHA's estimates of the costs and benefits of rule.

Thus, our analysis suggests that about 75% of the firms will be unduly burdened by the rule, yet OSHA suggested no regulatory alternative that would be less burdensome on small businesses.

1. Benefits of the Program Rule

OSHA has overestimated the benefits of the S&H program rule. The benefits of the program rule are directly proportional to the reduction of injuries and illnesses. OSHA assumes that the rule would reduce injuries by 20% to 40%. However, this assumption cannot be justified. About 25 states (called program states) have already promulgated rules similar to the Federal proposal and OSHA appears to have based its estimates solely on the reduction in injury and illness rates that occurred in such states. However, the correct method for finding the effect of the rule would be to compare the reductions in program states with reductions in states without similar rules (non-program states). The data for Minnesota illustrates why the injury and illness data should not be evaluated in isolation. As shown in Table 2, the injury rates actually went up in Minnesota after the promulgation of the rule. This does not mean that program rule will increase injury rates, but this does suggest that other factors are responsible for changes in injury and illness rates.

When we compare the injury and illness rates in program states with the rates in non-program states, we find that average injury rates decreased by about 17% after program states promulgated their rules; however, the rates also decreased in the non-program states in our sample by about 12% during the same period. This means that a set of factors other than or in addition to the rule affected the reduction in injuries in the entire nation. There are indications that changes in workers' compensation rules are responsible for the reductions in injuries in program and non-program states. OSHA did not consider the differences between the program and non-program states in making its assumptions.

OSHA also did not consider the fact that the benefits of similar rules in half the states have already been realized in making its 20%-40% reduction in injury rate assumption. The reductions in injuries and illnesses have already taken place in 25 program states. Few further reductions can be expected by implementing the draft Federal rule. This means the rates in the remaining 26 states will have to decrease by 40%-80% in order to achieve the assumed nation-wide reductions of 20%-40%. There is nothing in the state data that supports such large reductions.

OSHA has stated that in its VPP and SHARP programs, some firms have experienced significant reductions. However, OSHA has failed to present any data in its regulatory analysis report that suggests that the VPP program achieved a high degree of reductions, that the results of VPP program are applicable to the program rule, or that they can be replicated in low and high incidence rate firms.

Finally, OSHA's estimates of total benefits of the rule are based on the cost of an average worker compensation claim; however, the cost of the average claim is skewed by very large monetary settlements in litigated workers' compensation cases. It is not at all obvious to me that the draft rule will reduce the number of cases that will be litigated or that the compensation settlements will be lower after the promulgation of the rule. Therefore, the benefits based on the cost of an average claim are likely to be highly overestimated.

2. Costs of the Rule

Notwithstanding the problems with the benefits estimates, OSHA has not calculated the costs of the S&H program rule properly. For example, OSHA has made many unsubstantiated and apparently unreasonable assumptions including the following:

- The average cost to correct a medium to high priority hazard is only $437 dollars!
- The average time to establish management responsibility is 1.5 hours per establishment regardless of its size.
- It will take only 6 minutes of a manager's time, 6 minutes of a worker's time and 36 seconds of a clerk's time to prepare employee participation reports.
- It will take a manager only 15 minutes and a worker 90 seconds to identify and assess a hazard.
- It will take a manager only 2 minutes per hazard to prioritize and track hazards.
- It will take a manager only 2 hours to create a training program for low hazard firms, 4 hours for medium hazard firms, and 8 hours for a high hazard firms.
- It will take an employee 1 hour to get trained in all low hazard establishments, 2 hours in all medium hazard establishments, and 4 hours in high hazards establishments.

Given the breadth of rather unsubstantiated and apparently unreasonable assumptions, it would appear that OSHA has highly underestimated the costs of the rule.

Not only has OSHA underestimated the costs of the rule, it has also excluded the cost of the costliest program element -- hazard controls -- from the cost-benefit calculations. According to OSHA, the costs of equipment changes should be allocated to those OSHA standards which have been promulgated but with which compliance has not yet been achieved. This assumption would have been reasonable only if OSHA had excluded the

benefits of hazard controls from the benefits of the rule. It did not do so; therefore, its cost-benefit comparisons are incorrect. OSHA should either include both the benefits and the costs or exclude them both from the cost-benefit calculations of the rule. I do believe the rule will force companies to invest in capital equipment sooner than they otherwise would. OSHA should take this effect into account in calculating the costs and benefits of the rule.

Summary

In closing, I would like to reflect a bit on our criticism of OSHA's apparent lack of good faith effort to examine the effects of the rule and to provide regulatory flexibility to well deserving businesses. Based on my experience, I can state that OSHA is not alone in inaccurately assessing the impacts of their rules on small businesses. I believe most agencies focus on promulgating predetermined rules -- rules that are desired by particular constituencies. Agencies dislike any requirement that makes this task difficult. Their natural tendency is to find a way around any hurdle that comes their way. SBREFA is the first real hurdle that is not easy to get around, as OSHA has discovered. SBREFA is the first real hope that the concerns of small businesses can be taken into account during the regulatory process; however, the quality of the regulatory flexibility analyses prepared by Federal agencies must improve significantly in order to adequately address the concerns of small businesses before, during, and after the SBREFA process. Furthermore, the SBREFA process itself must continue to evolve and improve to accomplish the goal of developing cost effective regulations. I will be happy to answer any questions that you may have.

Table 1.

Estimated Rates of MSD Incidence With Days Away from Work By Quartile Distribution and Size Group for *Manufacturing* per 100 Workers (1996)

Establishment Size Group	Average	1st Quartile (25% of estab. With rate lower than	2nd Quartile (50% of estab. With rate lower than	3rd Quartile (75% of estab. With rate lower than	4th Quartile (estimate*) (All estab. with rate lower than
All Establishments**	**2.2**	0.0	0.0	0.0	8.8
1—10	**1.5**	0.00	0.00	0.00	6.00
11—49	**2.8**	0.00	0.00	0.4	10.80
50—249	**3.2**	0.00	0.2	0.5	12.1
250—999	**2.3**	0.1	0.2	0.3	8.6

Source: Bureau of Labor Statistics

* These means are accurate only for the manufacturing industry as a whole and for establishments with fewer than 10 employees. Means of the 4th quartile for other size categories are conservative and represent the minimum possible mean.

**The data in this row pertains to all establishments in the private industry including the manufacturing industry.

TABLE 2

Total Incidence Rates in States With and Without State Safety and Health Programs 1985 - 1996

Year	State Plan States[1]			Non-State Plan States			National Average
	MN	NC	WA[2]	FL	MT	OK	
1,985	7.6	7.4	9.4	8.8	8	9.5	7.9
1,986	7.3	7.2	9.8	8.8	8.25	8.1	7.9
1,987	7.8	8.1	10.6	8.5	9	8.3	8.3
1,988	8.1	8.2	11.1	8.4	9.2	8.7	8.6
1,989	8.3	8.2	11.3	8.3	8.6	8.7	8.6
1,990	8	8.1	11.6	8.2	9.5	8.9	8.8
1,991	**8.1**	7.8	11.1	7.8	8.7	9.3	8.4
1,992	8.6	8.2	11.8	8.2	9.7	9	8.9
1,993	8.6	**7.7**	11.2	8.2	9.2	9	8.5
1,994	8.6	7.5	10.3	8	9	8.8	8.4
1,995	8.4	6.8	10.5	8.1	10.1	8.3	8.1
1,996	8.3	6.5	10.3	6.9	8.9	7.8	7.4

1 Bold numbers indicate the year in which the State program became effective.

2 Washington's program became effective in 1973

TABLE 3

Different Types and Number of Injuries & Illnesses
Private Industry Only, 1996

Type of Injury/ Illness Case	Number of Cases
Total Cases	6,238,900
Cases with Lost Work Days	2,832,500
Cases with Days Away from Work	1,880,600
Cases without Lost Work Days	3,406,400

Source: Bureau of Labor Statistics

TESTIMONY OF

DR. HENRY B. R. BEALE

Before the

HOUSE COMMITTEE ON SMALL BUSINESS

HEARING ON

OSHA's SAFETY AND HEALTH PROGRAM RULEMAKING

July 22, 1999

INTRODUCTION

PERSONAL BACKGROUND

My name is Henry B. R. Beale. I am an economist with over 20 years experience conducting and reviewing regulatory impact analyses. My clients have included both OSHA and the SBA. I hold an M.A. and a Ph.D. in economics from the University of Chicago. I have taught benefit-cost analysis at the graduate level at Georgetown University and under contract to the Corps of Engineers.

OVERVIEW OF COMMENTS

I have reviewed the report by Policy Planning and Evaluation, Inc. on OSHA's proposed safety and health program rule. I find this report highly counter-productive to the whole SBREFA process. The SBREFA process should bring OSHA and industry together at a very early stage in the development of a regulation to share their ideas, concerns, and analytical "first cuts" on what a proposed rule will do. To be effective, the process should be open, collaborative, and collegial.

The PPE report intrudes into the SBREFA process like an attack dog in a Quaker meeting. Its tone is hostile; its analysis is abysmal; its perspective is purely partisan; and it is ready, at the drop of a footnote, to point the finger of blame. The implications and conclusions it draws are misguided, misleading, or mistaken. This is not helpful to the SBREFA process.

At a stage where one would want OSHA to share drafts and preliminary analyses while they are still malleable, the PPE report constantly complains about incomplete documentation and information -- as if complete and final results should have been set before them. At best, these criticisms are distinctly premature. The misrepresentations of OSHA's analysis are so pervasive that it is difficult to conclude that PPE tried very hard to understand what OSHA did and possible to conclude that they didn't want to understand. This is not helpful to the SBREFA process.

The PPE report completely ignores OSHA's efforts at regulatory flexibility alternatives. The report then advocates two regulatory alternatives of its own. In discussing one of these, the PPE report is so intent on tearing apart OSHA's analysis, that it does not seem to notice it has also demolished its own case for the alternative. In the other case, the PPE report essentially assumes its own conclusion and – forsaking all other hypotheses, as well as basic probability theory – spends most of its space inaccurately criticizing OSHA's analysis. This is not helpful to the SBREFA process.

In its discussion of OSHA's cost methodology, the PPE report bases its most of its criticisms on fundamental legal and conceptual errors about regulatory analysis of costs. The PPE report's most consequential criticism of OSHA's benefits methodology is based on a conceptual error in statistical methodology. Although one key issue is identified, for which more analysis is wanted, the PPE report resolves this issue purely by assumption. This is not helpful to the SBREFA process.

REGULATORY ALTERNATIVES

A considerable portion of the PPE report is spent flaying OSHA for failing to consider regulatory flexibility alternatives. The PPE report does not even acknowledge the regulatory flexibility alternatives that OSHA has included in the proposed rule. The PPE report then argues for two particular regulatory alternatives. Not only does the PPE report fail to build a case for these two alternatives, however, it completely misunderstands and misrepresents OSHA's analysis in the process of seeking to excoriate OSHA for not adopting these two alternatives.

OSHA REGULATORY FLEXIBILITY MEASURES

OSHA's proposed rule contains several regulatory flexibility measures, which include the following:

- The rule is a performance standard. It indicates the types of activities that make up a safety and health program, but it does not prescribe how to carry them out. This approach allows firms and establishments of different sizes, with different production processes, and with different types and levels of hazards to craft a plan that will best fit their own circumstances. The lack of specific prescription eliminates most of the potential for economies of scale in compliance and disproportionately large impacts on small entities.

- OSHA has grandfathered in existing plans to the extent that they meet the criteria of the proposed rule. Such grandfathering is a corollary of the non-prescriptive nature of the rule. It means that establishments -- including small ones -- that have attended to hazards and taken steps to get them under control will generally have relatively low costs -- and possibly no costs -- under the proposed rule.

- OSHA has explicitly exempted very small establishments (under ten employees) from recordkeeping requirements of the proposed rule. This explicit element of regulatory flexibility is designed to minimize burden on the smallest of establishments.

The PPE report completely ignores these regulatory flexibility measures. It does not acknowledge that OSHA included them in the rule. The PPE report does not list them under the regulatory alternatives that it considers. Except for passing reference to the grandfather clause, the PPE report does not mention them at all. This omission produces an entirely inappropriate insinuation that OSHA neglected regulatory alternatives and flexibility issues.

EXPANDED NON-REGULATORY GUIDANCE

One of the two regulatory alternatives advocated by the PPE report is to scrap the proposed rule entirely:

> The primary recommendation of this report is that OSHA not promulgate the proposed Safety and Health Program Rule and instead rely on increased outreach and funding for its existing free consultation and existing voluntary programs such as VPP and SHARP. This recommendation is mainly based on a lack of data demonstrating the effectiveness of state regulations mandating safety and health programs.

The purported finding of a "lack of data" in the PPE report is supported by a lengthy discussion that consists largely of errors, distortions, and ommissions from OSHA's analysis. The PPE report relies on the Initial Regulatory Flexibility Analysis, which is not particularly clear and lacks detail. The discussion in the actual economic analysis is much clearer and more detailed. Unfortunately, PPE did not get things straight before writing.

State Programs

The PPE report spends most of its discussion tearing apart OSHA's finding "that in the 25 states with acceptable safety and health programs, injury and illness rates 'were 17.8% lower five years after the implementation of rules requiring these programs.'" OSHA, in fact, limited its analysis to states that met two criteria:

- They had programs covering most employees in the state; and
- These programs had been in place for at lest five years.

OSHA derived the 17.8% figure from analysis of four states that met these criteria, not all 25 states with any sort of program.

In challenging the 17.8% reduction, the PPE report completely misconstrues OSHA's analysis. Rather than focusing on the states that OSHA actually used, the PPE report uses two comparisons:

- The PPE report looks at time series data on incidence rates for seven of the 25 states that were "selected randomly." Four of these seven states did not meet OSHA's screening critera, and for one state that did (Washington), the PPE data begin seven years after the state program was implemented. Even then, the reduction in incidence is clear for the two OSHA states (California and Hawaii) that are adequately represented (if one knows which they are), and it is also perceptable in two other states (Nebraska and North Carolina), for which only three years of post-program data are available.
- The PPE report then compares time series data for three "State Plan States" and three "Non-State Plan States." How these states were selected is not clear. The "State Plan

States" include Washington, beginning 12 years after the program was implemented; Minnesota, the only state in the previous table that showed an increase in incidence rates after a partial program was implemented; and North Carolina, which shows a 15.5% decrease in incidence rate but has only three years of data after the program was implemented. The text itself focuses entirely on two large one-year decreases in the "Non-State Plan States," which may well be random fluctuations.

This analysis is not a basis for concluding that "OSHA has presented no reliable data that would indicate that state safety and health programs have been successful in reducing injuries and illnesses." The PPE report has arrived at this conclusion only by misrepresenting what OSHA actually analyzed, omitting half of OSHA's cases, using anecdotal counter-examples, and introducing so much statistical noise in the form of states that did not meet OSHA's criteria that the strong support for OSHA's finding in the data that OSHA did use is pretty well obscured.

OSHA's Estimated Range of Incidence Reduction

OSHA estimates that the proposed rule will produce a reduction in the incidence rate of illness and injury of from 15% or 20% (depending on which OSHA source is used) to 40%. The PPE report states that "there is no evidence suggesting that the level of efficacy presumed by OSHA is at all possible. In fact, there is substantial evidence to the contrary." The PPE report then spends a couple of pages deriding the idea of projecting a 17.8% decrease into a 20% to 40% decrease.

The PPE report is simply wrong on this matter. It fails to recognize that OSHA based its range not so much on the state programs (which figure in the low end of the range) as on two other types of studies, including:

- Studies related to workers' compensation programs in four states, which consistently showed reductions in incidence rates of 10% to 20% per year, with cumulative reductions over time as high as 60%; and

- A review of over 50 case studies in the safety and health literature, that showed an average reduction of 45% in the overall incidence rate and an average reduction of 75% in the incidence rate of lost work-time injuries and illnesses.

In short, OSHA had very solid evidence in support of its estimated level of efficacy.

Voluntary Protection Program

Eventually, the PPE report turns to OSHA's use of the Voluntary Protection Program (VPP) as a source of evidence that incidence rates can fall. The PPE report argues strongly that the VPP relies on the commitment of employees and employers to workplace safety. The PPE report notes that "there may be reasons why most employers choose not to enlist in the Voluntary Protection Program," and goes on to note that only a miniscule percent of establishments participate in the VPP.

Indeed, the PPE report gets so caught up in arguing that the VPP cannot be replicated on a wide scale that the authors fail to note that they have succeeded in demolishing the argument in favor of relying on the VPP instead of promulgating the proposed rule.

Conclusion

The PPE report fails to document a lack of data showing that a safety and health program can be effective. Instead, it merely reveals ignorance and confusion about OSHA's analysis. Ultimately, the PPE report demonstrates the inadequacy of the regulatory alternative it set out to advocate.

EXEMPT SMALL BUSINESSES IN LOW-HAZARD INDUSTRIES

The other regulatory alternative advocated by the PPE report is a substantial exemption:

> The second regulatory option recommended by this report is the exemption of those small businesses in low-hazard industries. This recommendation is based on Bureau of Labor Statistics (BLS) data showing that 75% of all establishments in private industry have no measurable incidence rates of injuries and illnesses.

In supporting this regulatory alternative, the PPE report demonstrates an inadequate understanding of statistics, hazard prevention, and the purposes of the OSH Act itself.

Risk, Probability, and Statistics

The PPE report constructs a table, using BLS data, which shows that:

- 75% of all establishments have no measurable incidence rates of injuries and illnesses;
- 75% of very small establishments (10 or fewer employees) have no measurable incidence rates of injuries and illnesses; and
- 50% of fairly small establishments (11 to 49 employees) have no measurable incidence rates of injuries and illnesses.

From these data, the PPE report draws several inferences:

- Most small establishments are essentially risk free;
- Small businesses as a group pose little risk; and
- The risk that does occur in small establishments is accounted for by industries that have serious hazards.

The BLS data do not support any of these conclusions.

The problem with the PPE report's conclusions is that the patterns in the BLS data are nothing more than the workings out of elementary probability on groups of establishments that differ by size. These patterns of incidence rates occur even if one makes the assumptions -- directly contrary to the PPE conclusions -- that:

- The risk to workers is the same in all establishments, regardless of size; and
- Risk is randomly distributed.

Consider two groups of 1,000 workers, who all work under conditions with a six-percent risk of injury or illness. The expected number of incidents in each group is 60. One group of workers works in 10 establishments that have 100 employees each. The other group works in 250 4-employee establishments.

- In the 100-worker establishments, there is a probability of 0.2% that any given establishment will have no injuries or illnesses in a given year. There is only about a 2% probability that <u>any</u> of these ten establishments will experience no injuries or illnesses in a given year.
- In the 4-employee establishments, there is a probability of 78% that any given establishment will have no injuries. Thus the expected value of establishments that will have no reported industries is 195 of the 250 establishments employing those workers. The other 55 establishments collectively will report an expected value of 60 injuries -- an average incidence rate per worker of over 25%.

Put in even simpler terms, if there are 60 incidents among 250 establishments, at least 190 establishments will not experience an injury or illness in any given reporting year. For three quarters (188) of the establishments to have no incidents is not evidence that small establishments have lower risk, nor is it evidence about how the risk is distributed.

Workers and Establishments

The PPE report mistakenly focuses on the risk to establishments, rather than the risk to workers. The relationship between risk per worker and risk per establishment varies with the number of workers in an establishment. Risk per establishment does not represent risk per worker accurately. In the numerical example given above, the risk per worker was the same and was randomly distributed. The expected value of an incident for a small establishment was 0.22. Fractional injuries, however, do not occur in the real world. Thus most of the establishments reported no injuries or illnesses.

The OSH Act is concerned with the protection of workers, not control of establishments. Employee for employee, the workforce of small establishments is just as deserving of protection as the workforce of larger establishments. Although very few employees are found in any one very small establishment, collectively the number of workers in even the smallest size class of establishments is far too large to dismiss as *de minimus*, as is often appropriate for pollution or

other impacts of small entities under environmental regulation. It is not as easy to establish that exemption does not compromise the objectives of the OSH Act as it is for a good deal of environmental legislation.

Causes of Variability in Levels of Hazard

The reasons why some establishments are high-hazard and others are low-hazard is an issue that needs to be addressed. There are at least three obvious factors:

- The nature of the industry is a factor; some are inherently highly hazardous, while others are less so;
- The attention that management pays to hazard control is a factor; the more active the management is, the less will be the hazards; and
- Accidents are to some extent probabilistic and random -- at least in the sense that establishments with comparable risk will have different incidence rates in any given year.

The PPE report staunchly maintains that the inherent nature of the industry is the only relevant factor. In the section on regulatory alternatives, the PPE report is rather single-minded in denying that safety and health programs work very well, if at all, in most instances (particularly low-hazard industries). The PPE report also implicitly denies that randomness is a factor.

As noted above, the PPE report's failure to understand the randomness inherent in probabilistic risk led to serious misinterpretation of the BLS survey data. Consequently, the PPE report failed to demonstrate that a large number of establishments are actually essentially risk free. The PPE report sought to buttress the BLS results by a listing of unquestionably high-hazard industries, from which the report drew a curiously tautological inference: "Given that the manufacturing sector is the most hazardous industry sector in the country, there must also be an industry sector which is the least hazardous." None of this adds up to a demonstration that there are such things as industries in which risk is so low that it cannot be reduced or that can safely be ignored. Yet the PPE report adds nothing further except this assertion.

OSHA, contrary to PPE's assertion, does <u>not</u> deny that risk varies considerably among industries. OSHA, however, is also concerned about the variability of risk within industries. SIC industries may be reasonable gross indicators of risk (and OSHA treats them as such for purposes of estimating costs), but this does not make them an adequate basis for categorical exemptions. Even within four-digit SIC industries -- or individual establishments -- there can be enormous differences in production process and therefore in hazard levels. At the two-digit industry or the sector (i.e., manufacturing, services, etc.) level that the PPE report is discussing, SIC designations are far too aggregated to use as reliable indicators of hazards. Thus not only does the PPE report assume (rather than demonstrate) that intra-industry differences don't matter, it does so at a preposterously high level of industry aggregation.

In examining causes of intra-industry variability in hazard level, OSHA singles out the attention of management to hazard control -- particularly in the form of a safety and health program and/or its components. The importance of safety and health programs is both superficially plausible at a common-sense level and quite well documented by studies that OSHA cites. OSHA's finding that safety and health programs have an effect on hazards across a wide range of inherent risks is, of course, strong support for the proposed regulation.

The PPE report seeks to deal with this lack of demonstration with rhetoric. Essentially the PPE report resorts to deriding OSHA's suggestion that risk can be reduced in a low-hazard industry, even if a much higher level of risk in a far more hazardous industry cannot be reduced much. This is assertion, not demonstration.

The basic issue is what is likely to cause differences in hazard among establishments. The PPE report insists that the SIC code provides all the information one needs. OSHA's analysis, on the other hand, indicates that the attention that management pays to safety and health and the extent to which a safety and health program has been put in place is the key factor.

The PPE report fails to acknowledge the efficacy of safety and health programs (and in the discussion of the exemption alternative does not even consider the working hypothesis that they might work). As a result of admitting only one factor -- the industry -- as an explanation of the variability of hazards, the PPE report ends up assuming its own conclusion.

Conclusion

The PPE report summarizes the conclusion that it has reached largely by assumption as follows:

> The majority of all businesses in the country are small and the majority of these small businesses have little or no risk of workplace injury or illness. The minimal amount of risk found in small businesses is primarily limited to those establishments in medium-hazard, or high-hazard industries.

In fact, the PPE report has demonstrated nothing beyond the fact that the majority of all businesses in the country are small. The PPE report's recommendation that small businesses in a broad range of industries have little or no risk has a logically flawed foundation and is lacking in empirical support. If there is a valid case for this regulatory alternative, the PPE report has utterly failed to make it.

COST AND BENEFIT METHODOLOGIES

COST METHODOLOGY

The PPE report is quite critical of OSHA's cost methodology. Unfortunately, PPE does not seem to have taken the time and care to understand what OSHA has done, preferring to rely on rough analysis using highly aggregated average data. The PPE report then blames OSHA in rather disparaging terms for any discrepancies. To say the least, such an approach fails to make a positive contribution to the SBREFA process.

Replicability of OSHA Cost Estimates

The PPE report is quite critical of the untimeliness, lack of clarity, lack of documentation of assumptions, and general lack of replicability of OSHA's cost methodology. The PPE report then proceeds to make some cost calculations of its own, which produce very different numbers. These criticisms are unfortunate and misleading in several respects.

OSHA's cost analysis was highly detailed. It was done at the three-digit SIC industry level and involved seven size classes. The PPE report made no attempt to reproduce OSHA's analysis. Instead, the report used broad national averages, which were not remotely comparable. These averages inaccurately characterized OSHA's mix of high, medium, and low hazard firms; distorted the average size of affected firms; and failed to represent OSHA's training cost estimates – among other problems. It is, therefore, ludicrous and entirely unfair for PPE to conclude "unmistakably... that any inaccuracies in these estimates are due entirely to inconsistencies in the methodology, the lack of data in the methodology, and lack of specificity in the methodology."

The PPE report criticizes OSHA for providing too little too late in the way of information. Yet an agency such as OSHA is in a no-win situation. Had OSHA presented a complete analysis and a thoroughly documented methodology, the Agency would have been open to criticism for a *fait accompli* that left no room for meaningful input by the SBREFA Panel. Indeed, the SBREFA process is far better served by a preliminary analysis at the draft stage. The SBREFA process is harmed – not helped -- by a commentor who aggressively weighs in with criticisms without taking the time needed to work through the analysis with the Agency and understand the methodology.

Treatment of Costs of Hazard Control

The PPE report is highly critical of OSHA's treatment of the costs of hazard control and argues that OSHA greatly understated costs of the regulation:

> OSHA does not include the costs of Hazard Control as part of the costs of this rule even though it willingly attributes the benefits of Hazard Control to the proposed rule.

In making this criticism, PPE reveals a lack of understanding of the analysis that OSHA performed and of the basic concepts that underlie that analysis.

OSHA carefully distinguished between two concepts of cost, which are applicable to different purposes:

- For the purpose of assessing economic feasibility of the proposed rule, it is appropriate to consider only the costs that are directly attributable to the rule. The legally correct way to do this is to assume that the regulated entities are already in compliance with other regulations, and thus to excluded costs of coming into compliance in instances when they, in fact, are not already in compliance. Thus, for the purpose of assessing economic feasibility of a regulation, costs of hazard control required by other regulations are properly omitted, and OSHA did so.

- For the purpose of assessing the relationship between benefits and costs of a proposed rule, all costs that will result from the rule should be included, as well as all benefits. For this purpose, costs of Hazard Control should be included. OSHA did so, but PPE has failed to notice the inclusion because OSHA did not include hazard control costs explicitly alongside the direct costs of the proposed rule. Instead, OSHA deducted hazard control costs from the benefits of controlling the hazards, using net benefits, instead of gross benefits, of hazard control activities.

In analyzing benefits and costs, it does not necessarily matter at what stage costs are netted out. The PPE report was correct in arguing that hazard control costs should be included at some stage – which they were. The report erred, however, in insisting that they be included in the same manner as costs directly attributable to the proposed rule. The PPE report's conclusion that OSHA greatly understated costs is similarly erroneous.

Treatment of Initial Costs

The PPE report is critical of OSHA's annualization of costs. Initial costs <u>are</u> substantially higher in the first year when they actually occur than the yearly equivalents when they are annualized over a number of years. Indeed, it is a fundamental fact of benefit-cost analysis that one-time initial costs are not directly comparable with annually recurring costs. For comparison, either the initial costs must be annualized or the annual costs must be discounted to the first year.

The PPE report, however, <u>does</u> directly compare initial costs with annual costs, claiming that is does so "in order to more accurately portray the costs of this rule." The report then concludes that the comparison "clearly shows that the initial cost of this rule is dramatically higher than that presented by OSHA." At best, it is unfairly misleading to describe an annualized cost as "the OSHA estimate" of the first-year cost; at worst, it is analytically incompetent.

The PPE report compounds this conceptual error with others. Almost all of the difference between initial cost and annual cost[1] comes from hazard control costs. Since the genuine issue concerning the size of the first-year costs – whether the capital costs can be financed – is one of economic feasibility, inclusion of hazard control costs at this juncture is inappropriate and

[1] $10.2 billion out of $10.9 billion.

misleading. Furthermore, the PPE report is not even arithmetically accurate in concluding that "Table 6 demonstrates that the first-year cost of this rule will be roughly seven times greater than the OSHA estimate."[2]

BENEFIT METHODOLOGY

The PPE report's critique of benefit methodology is no more helpful than of any part of the report. In its preliminary work, OSHA did apparently make some computational errors.[3] The possibility of such errors is one reason for peer and outside review. Such errors, however, do not justify the hostile tone of PPE's criticisms, which stridently blames OSHA for anything that PPE's analysts do not readily understand. Several specific issues also merit comment.

Use of Workers' Compensation Data

OSHA made extensive use of workers' compensation data. OSHA also performed a detailed analysis at the three-digit SIC level. OSHA's analysis, therefore, relied on detailed actual data and included a variety of specific adjustments.

The PPE report weighs in with broad-brush approach that uses national averages and truncated BLS data and then critically remarks that OSHA has not stated why they did not use thi approach. Using such a broad-brush approach as a check has its legitimate uses; suggesting that such an approach replace more detailed analysis does not have this legitimacy. The PPE report's certainty that OSHA -- not PPE -- must be wrong has no basis.

Statistical Interpretation

The most critical issue for the whole benefits analysis is PPE's choice of statistics used to interpret workers' compensation data. PPE argues for median values rather than mean values as the proper rendering of the concept of "average." The PPE report is seriously off the wall on this point, although there is an important issue buried in the report's comments.

Workers' Compensation data show a highly skewed distribution of injuries and illnesses. A relatively small number of injuries/illnesses are of very long duration and account for a large percentage of workers' compensation payouts. These are actual costs, and they are reflected in premiums paid. Workers' compensation is, among other things, catastrophic insurance, and the numbers reflect this. The data are hard data in the sense that, when payments are made, the costs are documented.

The survey data collected by BLS, on the other hand, are much thinner on the long distributional tail of catastrophic injuries and illnesses. Because of statistical significance issues with these data, the BLS does not publish mean values. The PPE report, however, suggests that the

[2] $15.76/$4.83 = 3.26, not 7.

[3] Personal conversation with the principal OSHA analyst, Bob Burt, whom I have worked with off and on for 15 years.

BLS presents only median data because the median it is a better measure of the "average." The report completely ignores the underlying survey sample problems that render problematic the statistical significance of BLS data on the skewed tail of the distribution.

For an insurance program, the mean is clearly the appropriate measure. Indeed, this is the only way to reflect catastrophic risk. The PPE report, however, insists on use of the median because, "in a skewed distribution, the best measure of central tendency (the average) is the median and not the mean." In risk analysis or an insurance context (which this is) such a statement is flat wrong, and it leads to anomalous and incorrect conclusions. If one used the median, for example, one would conclude that NASA's space program is quite safe, because the median number of astronauts injured or killed is zero per flight. It is this error in statistical methodology that leads the PPE report to conclude that OSHA's estimates of benefits are as much as ten times too high.

There is a more subtle issue, which the PPE report notes and then itself mishandles. The legitimate question is whether the injuries and illnesses prevented by a safety and health program can be expected to have the same skewed distribution as workers' compensation claims. This is an issue that OSHA apparently had not considered. If a safety and health program disproportionately reduces lesser injuries/illnesses, then OSHA indeed has overstated the benefits. If, on the other hand, a safety and health program disproportionately reduces catastrophic injuries/illnesses, then OSHA has actually understated the benefits. By using median values, the PPE report makes the former assumption – but it is every bit as much an assumption as OSHA's and thus is no basis from which to criticize OSHA's analysis. The reality is that this issue needs some more evidence, rather than competing assumptions.

CONCLUSIONS AND RECOMMENDATIONS

The PPE report adds nothing useful to the SBREFA process. It promotes trench warfare in a process where flexible give and take of discussion is the most productive approach. I would consider it an embarrassment to the SBA staff whose credibility as advocates for small business depends on a foundation of solid professional analysis. Although there are a few – very few – valid issues raised by the PPE report, supporters of SBREFA should shun this report lest they sabotage the process. At a minimum, it should be taken with a large quantity of salt; better still, it should be disregarded entirely.

OSHA'S SAFETY AND HEALTH PROGRAM RULEMAKING

HEARING BEFORE THE COMMITTEE
ON SMALL BUSINESS
OF THE U.S. HOUSE OF REPRESENTATIVES
106TH CONGRESS
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Mr. Chairman, we very much appreciate the opportunity to provide you and the other Members of the House Committee on Small Business with our oral and written testimony on the Occupational Safety and Health Administration's (OSHA) Safety and Health Program Rule (SHPR) initiative. We feel privileged to be involved with this hearing and support the Committee's efforts to ensure that OSHA pursues the goals of the Occupational Safety and Health Act in a manner which reflects an appropriate exercise of the authority delegated to the Agency by the Congress. In the rulemaking context, this means ensuring OSHA takes only those legally authorized actions which will substantially advance workplace safety in the most cost-effective manner possible without upsetting the structure or balance in the workplace environments which have been the engine of our nation's economic expansion.

We applaud the Chairman for taking on this important task and we look forward to working with you, the other Members of the Committee, and OSHA in the coming months. Before we proceed with our substantive comments, we would like to begin by providing you with a brief summary of our qualifications and experience in the field of workplace safety and health, and our familiarity with both large and small businesses.

I. BACKGROUND AND EXPERIENCE IN WORKPLACE HEALTH AND SAFETY

I am a partner located in the Washington, D.C. office of the law firm of Keller and Heckman, LLP and head the firm's OSHA-Labor practice group. In addition to my law degree, I have a B.S. in Chemical Engineering and an M.B.A. in Finance and Investments. While an undergraduate, I spent approximately seven months working a variety of jobs in an organized ceramic tile factory. During that time, I had a broad range of experience with numerous safety and health hazards and controls, most on a daily basis, including hazardous energy control, machine guarding, confined spaces, walking surfaces, working at heights, manual handling, unloading railroad hopper cars and box cars, noise control, dust control, heat exposure, repetitive motion, rotating shifts, and the use of hand, eye, head, face, foot and respiratory protection. I also had a variety of other summer and part-time jobs in the government, retail, and service sectors, involving both large and small employers.

As part of my legal practice with Keller and Heckman, I have visited and reviewed the safety and health practices and programs at over 50 industrial sites around the world, many on numerous occasions and frequently as part of an audit. I have drafted and/or reviewed numerous written safety and health programs and procedures, and provided extensive safety training. As for Keller and Heckman, LLP's unique experience in workplace health and safety, two of my partners are industrial hygienists and former safety and health managers with substantial experience in a broad range of industries. They have also visited numerous industrial sites, participated in numerous health and safety audits, drafted or reviewed numerous health and safety programs and procedures, and provided extensive safety and health training. We also have a former Virginia/OSHA Industrial Hygiene Compliance Officer on our staff whose previous position was as the environmental, health and safety manager for a medium-sized Texas manufacturer. Our OSHA practice deals with virtually every aspect of occupational safety and health law at the federal and state levels. We have assisted clients with a substantial number of OSHA enforcement actions and citation contests and have participated, on behalf of one or more clients, in virtually every major OSHA rulemaking since the Agency was created.

II. OVERALL ASSESSMENT OF OSHA'S DRAFT SAFETY AND HEALTH PROGRAM RULE

We have a deep commitment to workplace safety and health, recognize it to be one of this country's fundamental values, and believe OSHA has contributed a great deal to the advancement of worker health and safety in the United States. That being said, one must objectively evaluate the draft SHPR against the legal criteria governing OSHA's authority to issue standards and regulations, without being blinded by the highly meritorious goal of the initiative and the understandably emotional issues surrounding the advancement of workplace safety.

There are three fundamental principles which must constantly be kept in mind when evaluating this OSHA initiative:

First, the generally held view that an effective safety and health program can be expected to significantly improve workplace safety does not mean that an-OSHA mandated program will have that effect.

Second, regardless of the benefits which may be derived from a government mandate, that mandate is impermissible if it entrusts Constitutional Due Process to the whims of a compliance officer or otherwise exceeds the scope of the agency's delegated authority.

Third, direct government regulation should be minimized or avoided when there are alternative mechanisms for achieving the same objective.

Applying those principles, we have at least four fundamental objections to OSHA's draft SHPR:

1) First, while we do not believe the rule would significantly improve workplace safety and health in the United States, it would cost employers billions of dollars each year;

2) Second, as presently drafted and in the absence of a fundamental paring back of its scope and requirements, we believe the SHPR violates the fundamental Constitutional principles of Due Process because it fails to provide employers with adequate notice as to what is required or to place any meaningful limits on the discretion of compliance personnel;

3) Third, we believe OSHA lacks the legal authority under the OSH Act to issue the SHPR as a final rule-- whether as a standard or as a regulation--because:

a) we believe the recent D.C. Circuit decision in the CCP case makes it clear that, if OSHA has the legal authority to adopt the SHPR, it can do so only through the process for adopting standards and not regulations;
b) we believe the application of a SHP standard to the hazards covered by the General Duty Clause constitutes an invalid attempt to amend the General Duty Clause outside the legislative process; and
c) we believe the application of a SHP standard to all of the hazards covered by existing OSHA standards constitutes an unauthorized effort to amend those standards or otherwise regulate the covered hazards through a generic rulemaking contrary to the requirements of the OSH Act and the 11th Circuit decision in the 1989 PELs case which vacated OSHA's attempt to establish or amend approximately 400 permissible exposure limits through a generic rulemaking.

4) Fourth, the SHPR would inject a meddling government bureaucracy into the financial and labor-management decision-making process of every employer in the United States--a role for which it is particularly ill-suited.

For these reasons, which are more fully developed and explained in my written statement, we believe adoption of a rule substantially along the lines of the draft SHPR would be both illegal and clearly contrary to public policy.

To end this testimony on a positive note, there are practical alternatives which we believe are far more likely to achieve the desired result and on a far more cost-effective basis. It would begin with OSHA developing and issuing voluntary safety and health program guidelines supported by an extensive nation-wide outreach program. They would be appropriately discussed during the opening conference of every OSHA inspection and given significant weight in determining whether to reduce penalties for any citations based on the General Duty Clause or existing OSHA standards. After a reasonable period of time to gain experience with the guidelines, OSHA could chose to initiate a rulemaking to adopt a SHPR. The SHPR would apply only to those sites with lost workday injury and illness rates or some other quantifiable factor above an appropriately specified level which might be tied to the particular industrial sector of the employer, and only if they declined to pursue the consultation/partnership option. The rule would be written to give very employer subject to the rule a choice of complying with the SHPR or qualifying for an exemption from the rule by enrolling in either one of the OSHA-approved consultation programs or one of the OSHA partnership programs. If the resources of these alternatives are inadequate, they would have to be enhanced or supplemented with private consultants approved by OSHA, possibly using an approval process similar to the one described in the SAFE Act.

OSHA would be far more effective if it were to implement the principles of partnership which it regularly espouses on an expanded rather than a limited basis. The Agency needs to reach out to all of American business rather than limiting its partnership endeavors primarily to those who are already fully committed (e.g., VPP) and those whose backs are already against the wall.

When a committed employer **voluntarily** develops and implements a safety and health program, founded on cooperation, partnership, and mutuality between the employer and its employees, it can be one of the most effective means of achieving and maintaining a safe and healthy workplace. OSHA has the tools it needs to encourage this type of commitment. It should use those tools rather than clumsily attempting to coerce employers through another ineffective and counterproductive command and control regulatory mandate.

Mr. Chairman, we sincerely appreciate the opportunity to share with you and the other Members of the House Committee on Small Business our views regarding OSHA's draft SHPR and thank you for addressing this OSHA initiative which is so important to the business community. I ask that my entire statement be placed in the official record and would be happy to answer any questions which you or other Members of the Committee may have on this matter. Furthermore, if we could be of assistance with any issues which may be identified following this hearing, we would be pleased to provide you with further information.

III. THE TRADITIONAL COMMAND AND CONTROL APPROACH REPRESENTED BY THE DRAFT SHPR WILL NOT BE EFFECTIVE

A. OSHA Cannot Mandate Effective Management-Labor Collaboration

We believe experience demonstrates that every problem cannot be solved by another command and control government regulation. In the preamble to the final rule on confined spaces, OSHA stated:

> The Agency agrees that involvement by employees is vital to the creation of an effective permit space program and that such involvement **should be encouraged**. However, OSHA has determined that **it would be very difficult to mandate labor-management collaboration** in the development of the [confined spaces] permit program (emphasis added).

58 Fed. Reg. 4461, 4485, col. 2 (January 14, 1993). That statement is equally applicable to the implementation and ultimate success of any safety and health

program, whether comprehensive in scope or limited to a specific hazard or type of activity.

From both a philosophical and a practical standpoint, we have grave reservations about an OSHA initiative which would carve out the employer's role in a voluntary partnership endeavor and convert it to a regulatory mandate, especially when there is no provision for those willing to enter into a true partnership program to opt out of the mandatory program. In a partnership, tasks and activities are performed and coordinated by the employer in cooperation with the voluntary efforts of employees and a supportive government agency. The entire process is based on the willing and good faith participation of the parties. Employers set their sights on advancing workplace health and safety by meeting the spirit of principles and ideas which have been reduced to writing primarily for the purpose of providing and memorializing clear objectives and flexible guidelines on how to achieve them, not for purposes of regulatory compliance.

From both a practical and a legal standpoint, it is not possible to convert the language of OSHA's 1989 Guidelines into enforceable regulatory text without taking them out of the only context in which they can work. Employers, employees, and the third partner must be able to develop these programs though the identification and mutual pursuit of shared goals and objectives. It takes an enormous amount of time and effort to bring about the essential mutuality among people with diverse backgrounds, experiences, values, and attitudes. These objectives can only be achieved through a process in which people feel comfortable working together, sharing the inevitable ups and downs, and taking the bold risks to one's authority, status, and feelings needed to make it all work. These objectives cannot be achieved though the traditional command and control regulatory scheme.

In other words, successful implementation of a safety and health program cannot be achieved through the threat of citations issued by a compliance officer who, on average, may show up for the traditional adversarial inspection once every sixty or eighty years. This is particularly true when one recognizes that the compliance officer frequently has never worked in the private sector and, in any event, does not have the time to learn the business or understand the culture of the

site being inspected but sticks around just long enough to gather evidence.[1] Most compliance officers have limited experience with how to run an effective safety and health program, never having done it or even advised somebody else how to do so. The emphasis of their training is on identifying what is wrong and not in partnership efforts or consulting skills. OSHA's draft SHPR would give individuals with this orientation the authority to enforce amorphous language requiring an employer to "do as much as is necessary" within the virtually unlimited scope of the five "core elements" to ensure compliance with every requirement of the OSH Act. Clearly, this is a prescription for disaster. One simply cannot write a performance-based safety and health program rule with a scope as broad as the entire OSH Act which, on the one hand, provides employers with needed flexibility while, on the other hand, adequately describes and circumscribes the authority of the people who would enforce it. The draft "grandfather" clause is relatively meaningless and would leave the compliance officer with unfettered discretion, even over those employers with existing programs.

B. The SHPR Will Not Be Effective in Enhancing Workplace Safety and Health

The premises advanced by the Agency for this initiative are as follows: 1) "workers in all major industry sectors in the United States continue to experience an unacceptably high rare of occupational fatalities, injuries and illnesses"; 2) a substantial number of these deaths, injuries and illnesses are preventable; and 3) "a systematic approach to workplace safety and health can substantially reduce injuries, illnesses and fatalities." From both a legal and public policy standpoint, our threshold concern is the absence of well-documented, compelling, statistical studies necessary to support the Agency's determination that it would be appropriate to impose a comprehensive, one-size-fits-all safety and health program

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[1] We are familiar with several recent inspections where the compliance officer skipped the on-site closing conference and simply advised the facility of the citation(s) which would be issued by way of a brief follow-up telephone conversation. In some cases, compliance officers also fail to participate in the informal settlement conferences, leaving the employer to meet with a busy area director who generally has only a very limited knowledge of the case .

standard on all employers in all industries.[2] The Agency must demonstrate that the safety and health performances of employers with government-mandated programs such as those contemplated by the Agency's initiative are significantly better than those of employers without such programs and that it is the existence of the program, with all of the core elements identified by the Agency, which makes those programs significantly more effective. Instead, the Agency appears to be relying on anecdotal information, assumptions and unsupported assertions of a growing body of evidence of the effectiveness of such programs in significantly reducing fatalities, injuries, and illnesses. What is missing is convincing evidence from well-documented studies which validate this so far unsubstantiated premise.

OSHA has stated that the effectiveness of systematic safety and health programs is "evidenced by the experience of OSHA's Voluntary Protection Program (VPP) participants, who regularly achieve injury and illness rates averaging one-fifth to one-third those of competing firms in their industries." For at least two reasons, the VPP data does not support OSHA's SHPR initiative. First, even if these statistics are valid, and can be attributed entirely to the implementation of a voluntary safety and health program, it does not follow that

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[2] The Agency must obtain and then act in a manner consistent with the best available evidence. Section 6(b)(5) of the OSH Act provides that standards shall be promulgated "on the basis of the best available evidence." Section (6)(b)(5) goes on the state, in part, the following:

> Development of standards under this subsection shall be based upon research, demonstrations, experiments, and such other information as may be appropriate. In addition to the attainment of the highest degree of health and safety for the employee, other considerations shall be the latest available scientific data in the field, the feasibility of the standards, and experience gained under this and other health and safety laws.

Section 1(b)(7) of Executive Order 12866 provides, in principle, as follows:

> Each Agency shall base its decisions on the best reasonably obtainable scientific, technical, economic, and other information concerning the need for, and consequences of, the intended regulation.

The Agency has not yet met those threshold obligations and the evidence presented to date does not support adoption of the draft SHPR.

these results would be achieved by those implementing a government-mandated program.

Second, senior OSHA personnel have consistently stated that the SHPR would require only a basic program requiring nowhere near the high level of sophistication and substantial commitment of resources required of a VPP site. Therefore, the benefits which may be achieved by a VPP level program are irrelevant to this discussion.

OSHA has stated that in the approximately 25 states that have mandatory safety and health program requirements, "job-related injuries and illnesses were [on average] 17.8 percent lower five years after the implementation of rules requiring these programs,"[3] implying that these rules were the primary if not sole reason for these improvements. However, OSHA also noted that a number of states have programs to encourage employers to **voluntarily** implement safety and health programs, and found that those programs have resulted in a 10 to 20 percent reduction in workers compensation costs. Accepting OSHA's figures for purposes of discussion, this would suggest that voluntary programs are likely to be equally effective as mandatory programs.

OSHA's Initial Regulatory Flexibility Analysis as well as the data developed by OSHA to support issuance of the draft SHPR were evaluated by Policy Planning & Evaluation, Inc. (PP&E) under a contract with the U.S. Small Business Administration as part of the small business review required by the Small Business Regulatory Enforcement and Fairness Act[4]. After first identifying the numerous substantial and unjustified assumptions which would be required to

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[3] Initial Regulatory Flexibility Analysis, OSHA, pg. 2 (October 23, 1998).

[4] We wish to acknowledge the outstanding foresight demonstrated by Congress in establishing the small business review process for major OSHA rules under the Small Business Regulatory Enforcement and Fairness Act (SBREFA). That additional step has been, by far, the single most effective improvement in OSHA rulemaking in the Agency's 29 year existence. While not a complete cure, it brings structure, accountability, and lots if light (and some heat) to a process which has been operating largely in darkness for 29 years.

attribute the reported 17.8% reduction in injuries and illnesses solely to the state-mandated programs[5], PP&E concluded:

> OSHA has presented no reliable data that would indicate that state safety and health programs have been successful in reducing injuries and illnesses. This non-existent "success" should not provide the basis for mandating such programs at a federal level where they will not be as well targeted to state specific hazards and industry mixes, or as sensitive to employer and employee concerns.[6]

PP&E also concluded that "there is no evidence suggesting the [20 to 40%] level of efficacy presumed by OSHA [for its SHPR] is at all possible."

Particularly in light of the enormous commitment of resources which this initiative would require[7], we believe that it is totally inappropriate to proceed with a standard which the Agency has not yet justified and very well may not be able to

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[5] Most of the state mandates for safety programs were adopted as part of comprehensive workers' compensation reform legislation which included a number of other provisions designed to reduce injury and illness rates.

[6] Regulatory Analysis of OSHA's Safety and Health Rule, Policy Planning and Evaluation, Inc., pg. 12, (January 27, 1999).

[7] It is impossible to estimate the cost of the SHPR because it is impossible to cost out a "blank check." OSHA estimated an aggregate annual cost of approximately $2.3 billion per year to establish and operate the basic program and then an additional $2.6 to $4.4 billion per year to control the hazards identified by the program. This assessment was for a "basic program" described as far less burdensome than a VPP level program although, to the best of our knowledge, no one at OSHA has provided any meaningful explanation of the distinction between a basic program and a VPP program.

During the official November 12, 1998 SBREFA conference call between small entity representatives (SERs), OSHA, OMB's OIRA, and SBA's Office of Advocacy, government staff heard fairly universal support for one SER's comment that the people (presumably at OSHA) who developed the cost estimates for compliance with the draft SHPR "were on another planet" and had underestimated the program costs (of $2.3 billion) by a factor of approximately ten. The participants also made it clear that OSHA should not be annualizing the estimated compliance costs over ten years as if they were one-time start-up costs but should instead recognize that these would be fairly level ongoing annual costs for maintaining the required program.

justify. In the absence of convincing data, we are not prepared to accept the general premise that some form of government-mandated and enforced comprehensive one-size-fits-all safety and health program standard is reasonably necessary and appropriate, particularly one which would be applied to all employers in all of general industry and possibly all industries.

IV. AS WRITTEN, OSHA's DRAFT SHPR VIOLATES THE CONSTITUTIONAL PRINCIPLES OF DUE PROCESS

If the draft SHPR is evaluated objectively, we believe it is clear that the Agency does not have the constitutional authority to adopt such a rule. The requirements of OSHA's draft SHPR are written in language which is so vague and ambiguous that they fail to satisfy the Due Process requirements of the Fifth and Fourteenth Amendments to the United States Constitution. More specifically, they:

1) fail to provide employers (as well as employees and enforcement personnel) with adequate notice as to what is required and what is prohibited;[8] and

[8] Senior OSHA personnel previously indicated that the Agency planned to enforce the draft SHPR (if and when adopted) in accordance with the Agency's Program Evaluation Profile (PEP), most recently issued to employers who "volunteered" to participate in OSHA's infamous CCP. That raises several concerns. First, that document has not been developed through the rulemaking process. Second, senior agency personnel have given different statements as to what would be an acceptable or passing PEP score. Third, field trials of the PEP by OSHA compliance personnel have demonstrated that the criteria are highly subjective and yield results with unacceptable variation. In other words, the Agency has not been able to establish an acceptable level of accuracy and precision in defining an adequate safety and health program for purposes of penalty adjustments. We believe a significantly higher level of accuracy and precision is required for purposes of establishing an employer's obligations under an enforceable rule.

2) fail to place any meaningful limits on the discretion of OSHA compliance personnel to interpret those requirements in whatever way they deem appropriate with the benefit of 20/20 hindsight.[9]

If an ambiguously written, performance-based draft SHPR were to survive the expected legal challenges, it would eventually be converted into an extremely burdensome specification rule not through the rulemaking process but through "non-mandatory" supplemental materials, compliance instructions, an avalanche of OSHA interpretation letters, and a patchwork of Review Commission and court decisions.

Many of society's "ills" might be remedied by trampling upon the Constitution, but the price to freedom and democracy is far too great. Similarly, even if this OSHA proposal as currently conceived may offer some improvements in workplace safety, they would come only at an unacceptable loss of the freedoms and protections guaranteed by the Constitution.

The draft SHPR is structured around repeated use of provisions stating that employers must take some ambiguous action "as often as is necessary" to ensure compliance with the General Duty Clause and all OSHA standards. With the open-ended, performance-based language contained in the draft SHPR, employers would never have any certainty as to what would be required of them.

Once an inherently ambiguous performance-based standard has been adopted, OSHA compliance personnel are renowned for continuously "raising the bar" in determining what is required to achieve compliance. With a standard as amorphous as the draft SHPR, OSHA could interpret it to require virtually anything that a VPP Star site would do and the cited employer would be hard-pressed to prove that interpretation went beyond what was contemplated by the Agency in adopting the rule.

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[9] In the event of any incident, OSHA generally presumes the employer failed to comply with the law and could be expected to issue a citation alleging: inadequate management commitment, inadequate training, inadequate hazard identification and assessment, failure to hold personnel accountable, inadequate program evaluation, etc. Otherwise, in OSHA's view there would not have been an accident.

In other words, OSHA compliance personnel would be free to give the language of the rule virtually any interpretation as they see fit. It would be virtually impossible for a cited employer to successfully prove the interpretation was outside the scope of the rule because there would be no objective standard and OSHA is entitled to deference in interpreting its standards. OSHA's answer of "Trust us; this is the New OSHA" is not reassuring.[10] In reality, the amorphous nature of the draft SHPR creates the legitimate fear that American business will find itself the victim of a multibillion dollar bait and switch scheme if any SHPR is adopted.

The fundamental flaw of the approach of the draft SHPR is succinctly stated in the following excerpt from the Brief of *Amicus Curiae* United Parcel Service in Secretary of Labor v. Pepperidge Farm Inc., 17 BNA OSHC 1993 (D.C. Cir. 1997):

> An occupational safety and health standard must give an employer fair warning of the conduct it prohibits or requires, and it must provide a reasonably clear standard of culpability to circumscribe the discretion of the enforcing authority and its agents. Thus, it is fundamental that a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and

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[10] This concern seems particularly valid when: 1) OSHA has so far refused to include meaningful provisions describing how this rule would be enforced within the text of the rule; 2) field personnel continue to issue citations asserting that something was not done because it was not documented although no documentation was required — a critical point when one considers that the draft SHPR is loaded with requirements for which the Agency has repeatedly emphasized no documentation would be required; 3) field personnel continue to attempt to create new obligations under existing standards by giving them unfounded, novel interpretations; 4) the draft SHPR does not contain an access or use privilege which would prevent OSHA personnel from obtaining and using the employer's required internal workplace safety and health audit document as a road map to find violations and issue citations; and 5) despite 28 years of case law holding that OSHA must establish employer knowledge of a violation, the Agency recently filed a petition for certiorari with the U.S. Supreme Court asserting that the OSH Act does not require the Agency to establish employer knowledge, and that the lack of employer knowledge (as well as unanticipated employee misconduct) is always an affirmative defense to be raised by the employer. L.R. Willson & Sons v. OSHRC, 134 F.3d 1235 (4th Cir. 1998), cert. denied 142 L. Ed. 2d 238 (1998).

differ as to its application, violates the first essential of due process of law. Connally v. General Constr. Co., 269 U.S. 385, 390 (1926).[11]

The Occupational Safety and Health Review Commission and the courts have often found unconstitutional vagueness evidenced in, among other things, confusion among OSHA compliance officers and experts on the requirements of a health and safety standard.[12] As explained in the seminal case, an employer:

> should not be penalized for deviation from a standard the interpretation of which . . . cannot be agreed upon by those who are responsible for compelling compliance with it and with oversight of the procedures for its enforcement. L.R. Willson & Sons, Inc. v. Donovan, 685 F.2d 664, 672, 10 BNA OSHC 1881 (D.C. Cir. 1982).

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[11] *See also* the statement of Justice Thurgood Marshall in Grayned v. City of Rockford, 408 U.S. 104, 108-109, (1972):

> Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly . . . Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.

And see identical statements under the OSH Act in Diebold, Inc. v. Marshall, 585 F.2d 1327, 1335, 6 BNA OSHC 2002 (6th Cir. 1978) and Lloyd C. Lockrem, Inc. v. United States, 609 F.2d 940, 943, 7 BNA OSHC 1999 (9th Cir. 1979).

[12] *See* Georgia Pacific Corp. v. OSHRC, 25 F.3d 999, 1004, 16 BNA OSHC 1895 (llth Cir. 1994); Diamond Roofing Co. v. OSHRC, 528 F.2d 645, 649-650, 4 BNA OSHC 1001 (5th Cir. 1976); Kent Nowlin Constr. Co. v. OSHRC, 593 F.2d 368, 371, 7 BNA OSHC 1105 (10th Cir. 1979); Gates & Fox Co. v. OSHRC, 790 F.2d 154, 156, 12 BNA OSHC 1938, (D.C. Cir. 1986) (Scalia, J.).

> Finally, it must be remembered that we are not speaking of a rule whose sanctions would be limited to civil fines. Sooner or later, cases will come along in which OSHA can be expected to assert that an employer's alleged willful failure to comply with this rule resulted in a worker's death and provides the legal basis for a criminal prosecution under Section 17(e) of the OSH Act. Kent Nowlin Constr. Co. v. OSHRC, 593 F.2d 368, 371, 7 BNA OSHC 1105 (10th Cir. 1979).[13]

In sum, while we appreciate the Agency's effort in developing performance-oriented language, we believe many, if not most, of the draft proposed requirements are dangerously vague and ambiguous to the point of failing to satisfy Constitutional Due Process requirements. As written, they leave employers with far too much uncertainty as to what is required, and would provide far too much discretion to OSHA enforcement personnel in determining what is required and whether the employer is in compliance.

V. OSHA's DRAFT SHPR DOES NOT SATISFY THE APPLICABLE OSH ACT CRITERIA

A. The Draft SHPR Cannot be Issued As a Section 8 Regulation

Prior to April 19, 1999, OSHA planned to circumvent the rulemaking requirements applicable to occupational safety and health standards under Section 6(b) of the OSH Act by the simple expedient of relabeling this rule as a Section 8(c) "regulation" to be adopted under the Administrative Procedure Act (APA).[14]

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[13] *See also* the decision of the Eleventh Circuit holding a standard unconstitutionally vague when "Neither the Secretary nor the experts have been able to settle upon the standard's requirements." Georgia Pacific, 25 F.3d at 1005 *and see* Lloyd C. Lockrem, Inc., 609 F.2d at 943; Gates & Fox, 790 F.2d at 156.

[14] For years, OSHA has stated that the product of this initiative would be an occupational safety and health standard issued under Sections 3(8) and 6(b) of the OSH Act. OSHA's initial version of its draft SHPR was issued on November 15, 1996 and subsequently discussed at a December 11, 1996 stakeholders' meeting as an upcoming standard. On March 25, 1997, following up on the stakeholder's meeting, the American Iron and Steel Institute submitted a letter to OSHA which questioned OSHA's authority to issue such a standard, and challenged the propriety of many of the provisions in the working draft. OSHA subsequently

On April 9, 1999, we believe the U.S. Court of Appeals for the District of Columbia effectively foreclosed that strategy. The Court held that OSHA's "High Injury/Illness Rate Targeting and Cooperative Compliance Program" (The CCP Directive) was a Section 3(8) occupational safety and health standard rather than a Section 8 regulation because

> it effectively obligates employers, under penalty of certain inspection, to adopt a [Comprehensive Safety and Health Plan] CSHP, and thereby imposes on employers new safety standards more demanding than those required by the Act or by any pre-existing regulation implementing the Act.

Chamber of Commerce v. Department of Labor, No. 98-1036 (D.C. Cir. April 9, 1999). The primary factor in the Court's decision to classify the rule as a standard rather than a regulation was that the rule was not limited to uncovering violations but required the employer to implement new measures designed to correct specific dangers in the workplace.

The Court proceeded to strike down the CCP Directive as an illegal standard which had not been issued pursuant to the required rulemaking procedures. In other words the Court held that the CCP Directive was the type of rule which, **if it could be adopted at all**, could only be adopted as a standard.[15]

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announced that the rule would be issued as a regulation rather than a standard.

[15] We believe the majority was correct in concluding that the scope of a standard need not be limited to a single hazard. Some vertical standards address most of the hazards found in a particular industry. Even if the inquiry were limited to horizontal standards, to suggest that each existing OSHA standard is limited to a single type of hazard is to engage in unhelpful semantics. The General Requirements for Personal Protective Equipment, 29 CFR 1910.132, address a broad range of hazards as varied as burns, mechanical abrasion, chemical exposure, fire protection, and drowning. The Hazard Communication Standard addresses the multitude of hazards associated with harmful chemical exposures, including corrosivity, sensitization, toxicity, cancer, etc. The Lockout/Tagout Standard, 29 CFR 1910.147, addresses the broad range of hazards, including but limited to abrasions, lacerations, crushing, burns, engulfment and harmful chemical exposures associated with the uncontrolled release of energy from virtually any type of energy source--hydraulic, pneumatic, electro-mechanical, heat, chemical, gravity, spring, etc.

The only statement that can be made about the scope of OSHA's standards is that they have been defined by OSHA in a way which the Agency has deemed appropriate to provide a

Following the Court's line of reasoning, we believe OSHA's Draft SHPR must be characterized as a "standard" because it likewise would require employers, under threat of citation and penalty, "to adopt a [Comprehensive Safety and Health Plan] CSHP, and thereby impose on employers new safety standards more demanding than those required by the Act or by any pre-existing regulation implementing the Act."

OSHA subsequently expressed its disappointment with the Court's decision and announced that it was delaying and re-evaluating the SHPR rulemaking package that it had planned to forward to OMB for review the following week. Rather than expressing its disappointment with the Court's decision, we believe OSHA should have issued a sincere apology to the entire business community for its substantial violation of the fundamental principles of Due Process in implementing the CCP Directive. This is the second time in recent history that OSHA has issued a significant rule without rulemaking over industry objections only to have the reviewing court strike it down.[16] These and other OSHA

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logical and suitable vehicle for addressing the hazards of concern. The scope of existing standards appears to be defined more by the commonality of the control measures than the hazards. We are not aware of and do not believe there should be any legal limit on the number of hazards which can be addressed within a single section of Title 29 of the Code of Federal Regulations. The only requirement is that the Agency satisfy the applicable legal criteria for promulgating or amending a standard. Where the Agency fails to do that, as occurred in its attempt to establish or revise the permissible exposure limits (PELs) for hundreds of chemicals on a generic basis, the reviewing court can be expected to vacate the standard(s).

OSHA is responsible for defining the scope of a standard in a practical manner which will permit the Agency to carry its burden of satisfying the applicable statutory criteria. If the Agency chooses to take on the daunting task of writing a single standard addressing every hazard covered by the OSH Act, it may do so as long as it identifies each covered hazard and satisfies the applicable statutory criteria with respect to each covered hazard. If OSHA finds that burden to be insurmountable, the answer is not to avoid the burden by recharacterizing the rule as a regulation but to narrow the scope of the rule or turn to Congress for a broader delegation of authority.

[16] American Trucking Associations v. Reich, C. A. No. 96-552 (D.C. D.C., January 31, 1997) involved a challenge to OSHA's first mandatory annual data collection survey. The OSHA survey forms mailed to employers stated that "your participation ..is mandatory" and that "failure to ... file this report as required may result in ... citations and ... penalties..." The Courts opinion noted "those statements are false ... and OSHA admits it." The Court went on to hold:

initiatives give the appearance of an agency oriented toward consistently testing the limits of the law and the willingness of the business community to challenge invalid rulemaking. This situation appears to reflect an attitude of "the ends justify the means" and makes employers understandably loathe to support the amorphous SHPR.

B. The Draft SHPR Cannot be Issued as a Standard

From a legal standpoint, the Agency is authorized to develop occupational safety and health standards, pursuant to §§6(b) and 3(8) of the OSH Act, to address those identified hazards[17] which create a potential for death or serious bodily harm in the workplace. Generally, to sustain a standard on judicial review, OSHA must demonstrate the following:[18]

Salutory as its motives may be, OSHA has attempted to accomplish its data collection by a device that avoids the rulemaking process, thereby silencing any industry opposition and saving it the cost, delay and uncertainty associated with such proceedings. It also spares OSHA the same burdens entailed in using the information-gathering methods it is authorized to employ ... by shifting them all to employers. Because the agency's action was taken "without observance of procedure required by law," it violates the Administrative Procedure Act.

[17] OSHA has proposed to define the term "hazard" as follows: an object, condition, process or action at the workplace that poses a risk of death, illness or injury to an employee and is covered by another OSHA standard or by the General Duty Clause.

No one has suggested or credibly could suggest that the hazards to be addressed by the safety and health program standard would be the lack of a safety and health program, management leadership, employee involvement, etc. Those are not hazards; at best, they could be described as underlying causes for the failure to properly identify and control hazards.

[18] *See* Control of Hazardous Energy Sources, Supplemental Statement of Reasons, 58 *Fed. Reg.* 16612, 16614, cols. 2 and 3 (March 30, 1993), upheld in *International Union, UAW v. Occupational Safety and Health Administration, U.S. Department of Labor*, 37 F.3d 665 (D.C. Cir. 1994) (Lockout/Tagout II).

(1) current exposure levels to the identified hazard(s) pose a significant risk of harm;[19]

(2) the proposed requirements would significantly reduce the risk posed by that identified hazard(s);

(3) the proposed requirements are technically and economically feasible; and

(4) the proposed requirements are the most cost-effective approach for achieving the reduction in risk posed by the identifiable hazard(s).

OSHA's draft SHPR fails to identify the covered hazards or satisfy any of the other minimum legal requirements. Instead, it improperly attempts to describe the hazards on a generic basis by stating that the scope of the standard would be co-extensive with the scope of the OSH Act. In other words, it would apply to every hazard covered by either the General Duty Clause (Section 5(a)(1) of the OSH Act) or an existing OSHA standard. In effect, the draft SHPR would amend both the General Duty Clause and every occupational safety and health standard issued by the Agency.

To sustain a General Duty Clause violation, OSHA must establish: 1) a hazard; 2) which is recognized; 3) which is likely to cause serious physical harm; and 4) for which there is a feasible means of abatement. The General Duty Clause is properly interpreted to require implementation of either the specific abatement measure which OSHA demonstrates to be feasible or any effective alternative selected by the cited employer. Yet, under the draft SHPR, once OSHA establishes a General Duty Clause violation, all of the requirements of the SHPR, as they apply to that hazard, would be imposed on the employer without OSHA having to show they are necessary to abate the violation.

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[19] *Industrial Union Department, AFL-CIO v. Petroleum Institute*, 448 U.S. 607, 615 (1980) (vacating the benzene standard).

The draft proposal reflects a view that the General Duty Clause, even in combination with §17(k)[20] of the OSH Act, is inadequate and, therefore, must be amended to specifically impose the one-size-fits-all safety and health program on every employer with respect to every hazard covered by the General Duty Clause. While we respectfully disagree with the Agency's judgment on this point, it is clear that nowhere in the OSH Act or in any other statute does Congress attempt to delegate to the Secretary of Labor the authority to amend §§5(a)(1) or 17(k) of the OSH Act. Nor would such a delegation of authority be permitted by the Constitution of the United States which entrusts the legislative authority under our system of government to the Congress rather than the Executive Branch. Among other reasons for that proper limitation on the delegation of authority is the fact that the Department of Labor could not even begin to identify all of the hazards which are currently subject to the General Duty Clause much less those which may in the future become subject to the General Duty Clause as new information becomes available.

With respect to the hazards covered by existing §6 standards, OSHA is, in essence, attempting to make the following determinations on a generic basis: 1) that every single one of its existing standards is inadequate, (*i.e.*, that there is a remaining level of significant risk with respect to every single hazard covered by an OSHA standard); 2) that the requirements in the draft proposed one-size-fits-all safety and health program standard are reasonably necessary and appropriate to eliminate and/or control each of these hazards; and 3) therefore, that every one of those standards should be amended. However, rather than proposing to amend each of its standards, in accordance with the rulemaking process authorized by the OSH Act, the Agency is attempting, through generic rulemaking, to achieve that result.[21] In other words, with respect to widely varying hazards covered by a

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[20] Section 17(k) of the OSH Act already imposes an obligation on employers to use reasonable diligence in discovering and eliminating hazardous conditions which constitute serious violations of the OSH Act.

[21] In the recent amendment to its Permit-Required Confined Spaces (PRCS) Standard, the Agency added a broad "employee participation" provision, 29 CFR 1910.146(l), which reads as follows: "Employers shall consult with affected employees and their authorized representatives on the development and implementation of all aspects of the permit space program ....." Permit-Required Confined Spaces, Final Rule, 63 Fed. Reg. 66018, 66039 (Dec. 1, 1998). This action demonstrates the ability of the Agency to amend individual standards to

multitude of standards, the OSH Act requires the Agency to make a separate determination as to whether there is a continuing significant risk with respect to each of those hazards, and if so to determine what measures would be the most appropriate measures for eliminating or reducing that risk.[22] Instead of proceeding

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insert those aspects of the core elements of the draft SHPR which it deems appropriate.

We feel an obligation, however, to note our belief that the Agency failed to follow the applicable OSH Act requirements in issuing any of the amendments contained in that December 1, 1998 final rule. OSHA initiated that rulemaking as part of an agreement for settling the challenge to the initial PRCS Standard filed by the United Steelworkers of America in 1993. The 1993 PRCS Standard was not remanded to the Agency by the court. Nevertheless, rather than treating this as a new rulemaking requiring a new set of significant risk and feasibility determinations which would take the impact of the new PRCS Standard into account, OSHA determined (we believe erroneously) that this activity was properly treated as a continuation of the original rulemaking. 63 Fed. Reg. 66019, col. 2.

As previously noted, OSHA explicitly concluded in the preamble to the 1993 final rule that it was not appropriate to include a broad employee participation provision in the final rule and no such provision was included. (58 Fed. Reg. 4485, col. 2). Without providing notice that OSHA was considering adoption of a broad employee participation provision in either the November 28, 1994 Notice of Proposed Rulemaking or the August 2, 1995 Hearing Notice, the Agency adopted just such a provision on December 1, 1998. The Agency asserted that this provision was added in response to written comments and "further discussion" at the public hearing. 63 Fed. Reg. 66025, col. 2-3. We believe this explanation demonstrates the Agency's continued willingness to test the limits of Due Process, and clearly describes an approach which is outside the bounds of what the Agency has historically viewed as adequate public notice. Does the Agency sincerely believe that every business, large and small, can be fairly charged with the responsibility of reviewing and responding to every written comment and hearing transcript (from hearings in Washington, D.C. and possibly one or more other cities around the country) filed in the public rulemaking docket in Washington, D.C., assuming those transcripts are even available on a timely basis? In light of the foregoing, a persuasive argument can be made that OSHA did not advise the public that a broad employee participation provision was being considered, that 29 CFR 1910.146(l) was not a logical outgrowth of the rulemaking and, therefore, it was invalidly promulgated and is not enforceable.

[22] *AFL-CIO v. OSHA*, 965 F.2d 962 (11th Cir. 1992) (vacating 428 new permissible exposure limits for failure to satisfy the OSH Act criteria for promulgating OSHA standards). We believe the Hazard Communications Standard was the broadest generic standard adopted by the Agency pursuant to a §6(b) rulemaking. While it covered a large number of chemicals, it was limited to the hazards associated with overexposure to hazardous chemicals. Furthermore, the validity of that standard, as interpreted by OSHA, remains in doubt based on the significant risk issue. *See Durez Dir. Of Occidental Chemical Corp. v. OSHA*, 906 F.2d 1, 4-5 (D.C. Cir. 1990). In American Forest & Paper Association v. OSHA, Docket No. 94-1419, petitioners challenged,

in that fashion, the Agency suggests that it has the authority to conclude that there are many preventable deaths, injuries and illnesses and, therefore, a comprehensive approach which, in theory, would address all of them in a generic fashion, is the appropriate way to proceed. This is the same type of approach which OSHA followed and the 11th Circuit found invalid in the PELs rulemaking. We do not believe this approach is permitted by the OSH Act.[23]

VI. THE DRAFT SHPR IS CONTRARY TO PUBLIC POLICY

We applaud OSHA for using an expanded stakeholder process for this initiative. That being said, we are compelled to point out that the Agency does not satisfy either its public policy obligations or its legal obligations simply by emphasizing interaction with stakeholders in developing its draft SHPR and by participating in the SBREFA review process. We express this concern because a comparison of the draft SHPR and the November 15, 1996 draft "standard" indicates that the Agency simply discounted almost all of the industry criticisms and suggestions which called for changes in the fundamental approach and requirements of the draft SHPR. Furthermore, it is impossible to determine whether some of the potentially significant changes which were made reflect permanent and meaningful change or simply an effort to legally finesse the issue.

As we have explained, it is clear that OSHA has not demonstrated, and we doubt whether the Agency will be able to demonstrate, that the imposition of this

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among other things, the scope of the hazard assessment and employee training provisions of OSHA's revised Personal Protective Equipment (PPE) Standard — 29 C.F.R. § 1910.132(d) and (f). Those provisions purported to apply to all types of PPE although the regulatory analysis and other data in the record were limited to head, eye, face, hand and foot protection. In response to that challenge, OSHA issued a correction notice which added 29 C.F.R. § 1910.132(g) and limited the scope of the hazard assessment and training provisions to those five types of PPE.

[23] The OSH Act reform bills introduced by Representative William Ford and Senator Edward Kennedy in the 103rd Congress contain provisions which would have authorized and required OSHA to adopt a safety and health program standard. Those provisions, as well as the bills in general, were strenuously opposed by industry as highly counterproductive to achieving workplace safety. Regardless of OSHA's reinvention efforts, we remain opposed to rules which we believe are not only unnecessary but create an enormous potential for the exercise of counterproductive and abusive regulatory authority, and acrimonious labor relations.

comprehensive, one-size-fits-all rule on all employers in all covered industries would be necessary or appropriate for the advancement of workplace safety as required by Sections 3(8) and 6(b) of the OSH Act. In addition to failing to satisfy the applicable legal criteria, we believe many provisions of the draft SHPR are contrary to the goals of the OSH Act and public policy, and would have the following substantial and adverse consequences:

1) Convert the OSH Act into a strict liability statute through the pervasive use of provisions requiring an employer to take actions "as often as necessary" to comply with the OSH Act.[24]

2) Through this invalid attempt to amend the General Duty Clause, OSHA would, in effect, be issuing a back-door generic standard addressing:

   a) areas where there is no recognized scientific consensus on identification of the hazard and appropriate protective measures (e.g., ergonomics, workplace violence, and indoor air); and

   b) areas where the risk is not significantly different than that accepted by the public at large, the states have already addressed the hazards, and the remedies sought by OSHA are not likely to be effective (i.e., motor vehicle safety, etc.);

3) The requirements of the draft SHPR are unreasonably burdensome. One of the best examples of this fatal defect is the requirement in draft Section (f)(2) that would require employers to train each employee on the nature of the hazard and control measures for **every**

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[24] Consider the following: the required frequency of training would be "as often as necessary" to ensure adequate training; the required frequency of program evaluation would be "as often as necessary to ensure program effectiveness"; and the required frequency of hazard identification and assessment would be "as often as necessary to ensure compliance with the General Duty Clause and OSHA standards." The word necessary is unqualified and therefore absolute. This is a totally unrealistic, unjustified and unconscionable requirement for employer perfection.

hazard covered by the OSH Act to which the employee is exposed, unless the employer can demonstrate that the employee has already been adequately been trained. There is no allowance for an employer to rely on an employee's experience or common sense recognition of an obvious hazard or control measure. This approach flies in the face of the premises stated in Section 1(a) of Executive Order 12866, the principles of Section 1(b), and common sense;

4) The proposal professes to impose minimal paperwork burdens on employers when experience teaches that compliance officers have a pervasive institutional bias not to acknowledge/believe that employers have fulfilled their obligations unless compliance is documented. This circumvents the intent of both Section 603(B)(4) of the Regulatory Flexibility Act and the Paperwork Reduction Act.

5) The draft SHPR fails to recognize and provide a practical, statistically-based mechanism which would allow an employer with an effective safety and health program to qualify for an exemption from the rule, without subjecting an employer to the enormous potential for prosecutorial abuse associated with OSHA's enforcement of the rule;

6) Although partnership programs are likely to be far more effective in improving workplace safety and health, the draft SHPR fails to recognize and encourage the significant benefits available from partnership activities by providing an exemption to those employers who are in or would opt for a Voluntary Protection Plan, SHARP, state consultation, or some other program which OSHA found to be equivalent; and

7) The draft SHPR, adopting highly objectionable elements of the Ford-Kennedy OSHA Reform Bills of the 103rd Congress, would provide the Federal Government with an unjustified and counterproductive level of authority over the management and operation of virtually ever workplace in the United States. It would place government bureaucrats (OSHA) in the middle of private labor-management

relations, and arm OSHA with unchecked powers having the potential for enormous abuse of employers and damage to our economy.

Although a detailed line-by-line analysis of the draft SHPR is beyond the scope of this statement, we would like to address a number of provisions that exemplify the unchecked powers OSHA would have if the draft SHPR were promulgated as currently written. Draft SHPR Section (c)(1)(ii)(B) would subject an employer to citation whenever OSHA determines the employer failed to provide any manager, supervisor, or employee with all of the authority, information, training, and resources needed to carry out his/her safety and health responsibilities. We can envision OSHA issuing subpoenas to employers for confidential financial, budgetary and purchasing records in its effort to determine whether an employer has complied with OSHA's subjective interpretation of this requirement.

Draft Section (c)(2) would subject an employer to citation if an employer failed to provide any employee with adequate "opportunities for participation in establishing, implementing, and evaluating the program." This is likely to lead to extensive employee interviews and second guessing of employers by OSHA inspectors.

Draft Section (c)(2)(iii) states that "the employer must not discourage employees from making reports . . . of injuries, illnesses, incidents or hazards". If adopted, that provision is expected to completely ban all of the widely used safety incentive programs tied to reducing the frequency or severity of workplace injuries or illnesses, even if they are effective in advancing workplace safety. We previously criticized that provision as poor public policy and noted that it would also appear to prohibit the employer from taking any form of disciplinary action which would discourage the reporting of injuries and illnesses. Apparently in response to that criticism, OSHA developed draft SHPR Section (c)(1)(ii)(A). That section explicitly requires employers "hold [managers, supervisors, and employees] accountable for carrying out those [safety and health] responsibilities" and subjects employers to citation for the failure to do so. In other words, after strenuously opposing legislation which would allow OSHA to cite employees for willful violations of the OSH Act, the Agency would now propose to cite employers for not taking disciplinary action against employees (at all levels). We can envision OSHA issuing a subpoena to employers for confidential personnel

records in its effort to determine whether an employer has complied with OSHA's subjective interpretation of this requirement. How much more involved could OSHA get in running the employer's business? The provisions mentioned above are an invitation to mischief and unwarranted intrusion by the government in private affairs.

VII. EFFECTIVE ALTERNATIVES TO THE DRAFT SHPR

It is not possible to create the atmosphere or foundation necessary for an effective safety and health program through regulatory mandates. OSHA can only help to bring about successful safety and health programs through incentives, outreach, education, and similar efforts. OSHA must refocus its resources into efforts which persuade the potential participants that the benefits of safety and health programs are substantial and that the path to achieving them is reasonably well marked and passable even for those whose safety and health efforts are in their infancy.

We believe the Agency must first make an all-out and meaningful effort to exhaust the non-regulatory alternatives. Clearly, OSHA does not satisfy its obligations in this area simply by publishing the January 26, 1989 Voluntary Safety and Health Program Management Guidelines (the 1989 Guidelines) in the Federal Register, a publication which certainly is not at the top of many "must read" lists, especially for small businesses. This effort should be designed and implemented in such a way that if the effort is not successful, the agency's efforts will have laid the groundwork for a creative hybrid regulatory approach and given employers a head start toward compliance.

A. Guidelines Based on a Modified Version of the Draft SHPR

OSHA should issue an appropriately modified version of the draft SHPR as a purely voluntary set of guidelines with extensive outreach and appropriate incentives to encourage employers to voluntarily implement safety and health programs. The Agency would make it clear that the document is voluntary and builds on the experience and knowledge gained since the 1989 Guidelines were issued. We recognize that some may object to this approach on the ground that the Agency is circumventing the rulemaking process. However, the Agency should forthrightly acknowledge that this concern is largely one of OSHA's own

making, demonstrate its good faith in moving forward, and be willing to "take the heat" in the interim period, while demonstrating that there is a "New OSHA" available to those who demonstrate a commitment to workplace safety and health.

Under this voluntary approach, OSHA would not in any way attempt to coerce employers into adopting a safety and health program as was the case with the Agency's Cooperative Compliance Program (CCP) Directive. In the event of an inspection, depending on the overall effectiveness of an employer's safety and health program, OSHA would offer a range of meaningful penalty reductions (far more meaningful than the current 25% and 15% penalty reductions), conduct focused/limited inspections for those sites with programs meeting certain minimums, make appropriate use of its discretion to issue "unclassified" citations, and give the employer community a reasonable amount of time to respond to this new initiative. The critical advantages of this approach are: 1) through their experience in applying the suggested incentives, the OSHA Compliance Corps, in working with employers and employees, would be able to develop and apply reasonable, appropriate, and uniform interpretations of the 1989 Guidelines; and 2) this nation-wide experience of OSHA working in a more cooperative and less adversarial environment with employers and employees would provide OSHA with a real opportunity to prove that the "New OSHA" is something more than political rhetoric by establishing a healthier level of trust, understanding, and credibility with the regulated community.

Based on what I heard and saw at the OSHA Partnership Conference in Washington, D.C. on November 13, 1998, I believe an outreach program containing the hands-on elements of that conference would be an excellent means of making employers and employees aware of the benefits of partnerships, cooperation, and the voluntary adoption of effective safety and health programs. It would also give those individuals an idea of where to begin and how to keep their programs moving forward toward very important goals over what is guaranteed to be a very challenging pathway.

B. Issuance of a SHPR With a Consultation Option

If, after reasonable time, regulatory intervention is shown to be necessary, the next step should be to create a creative hybrid approach. Employers with three-year average lost workday injury and illness rates or with experience modification rates below a certain level would be exempt from the rule.[25] All other employers, regardless of size, would be given the choice of participating in a true consultation program or complying with an appropriately written OSHA Safety and Health Program Rule. OSHA and Congress, with the political support of the business community, would ensure the availability of necessary consultation program funding. Whatever funding was required would, according to OSHA's analysis, be far less than the cost of not providing this funding, and far less than the price tag for the draft SHPR. While not purely voluntary, the consultation alternative, unlike the guaranteed wall-to-wall inspection of the Cooperative Compliance Program (CCP), would be far more akin to a true partnership program than to the traditional and ineffective command and control compliance program.

During the trial period for the non-regulatory approach, OSHA could work with Congress to obtain the funding needed to support the availability of the state consultation service on a nationwide basis to all employers, regardless of size. It would also give OSHA the additional time needed to rework the draft SHPR into a form which would comply with the U.S. Constitution and the rulemaking provisions of the Occupational Safety and Health Act (OSH Act) and the Administrative Procedure Act (APA).

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[25] While no system is perfect, OSHA should not demand a perfect standard as the only basis for granting exceptions. OSHA's upcoming adoption of an amendment to 29 C.F.R. § 1904 requiring the most senior person responsible for operations at a site to sign the OSHA 200 Log should adequately address any remaining concerns. If OSHA feels the need for closer scrutiny, it can require every employer asserting that it is exempt from the draft SHPR based on its LWDII rate to submit its OSHA 200 Log to the Agency. While that may sound like a lot of paper shuffling, the burden of photocopying and mailing something that, for most employers, already exists pales in comparison to what is likely to be required to comply with the draft SHPR.

C. Issuance of a Section 8 Regulation

For the reasons set forth above, we believe the goals of the OSH Act are best served by the approach described above. We recognize, however, that the Agency may choose to proceed by promptly initiating a rulemaking for the purpose of issuing a rule consisting of those limited components of the draft SHPR which could properly be described as a Section 8 regulation.

Section 8(c)(1) of the OSH Act authorizes OSHA to issue rules requiring that employers conduct, and apparently document, "periodic inspections" and requiring that employers, "through posting of notices or other appropriate means, keep their employees informed of their protections and obligations under this Act, including the provisions of applicable standards." We do not believe the latter provision can be relied upon to justify the universal training requirement found in Section f(1)(ii). However, the focus of our comments is on the potential use of the former provision regarding periodic inspections.

Given the ambiguity of the language and the legislative history, it is not clear that provision can be used to require documented audits. In that regard, however, we were pleased to note that the Hazard Assessment Section of the draft SHPR does not include the requirement that documentation of the hazard assessment and hazard control activities be made available for inspection and copying by employees, the employee's designated representative, or the Assistant Secretary of Labor. We strenuously opposed this provision of the 1996 draft proposal, recognizing that compliance personnel would automatically request these documents at the beginning of every inspection just as they now ask to review the OSHA Forms 200 and 101, the employer's lockout/tagout program, the employer's hazard communication program, etc.

As a matter of policy, we believe it is crucial that OSHA not ask for copies of internal compliance audits. Otherwise, the draft standard and its enforcement are likely to discourage employers from performing audits with the depth and thoroughness that might be appropriate.

We believe the availability of internal audit reports to employees and employee representatives would have similar adverse effects. First, it would enable employees with grudges or in the midst of labor relations disputes to harass

their employer by disclosing or threatening to disclose proprietary information to the media or OSHA out of context and in a fashion which might have a deleterious effect on the employer's business. Second, the availability of these documents to employees and employee representatives would likely encourage employers to perform less frequent and less effective audits, and to expend substantial additional resources involving legal counsel in the performance of audits and the preparation of audit reports.

We sincerely applaud the Agency for eliminating the requirement that employers make the hazard identification assessment documentation available to employees, employee representatives, and the Department of Labor. The spirit of this approach reflects a more appropriate balance between cooperation and enforcement. Finally, any rule should specify a record retention period no longer than necessary to correct any identified hazard.

VIII. CONCLUSION

In conclusion, we do not believe OSHA has met a number of the threshold requirements necessary to proceed with the Draft SHPR. More specifically, we believe the Agency has not demonstrated that the contemplated, comprehensive, one-size-fits-all safety and health program standard is reasonably necessary or appropriate to achieve and/or maintain safe and healthy working conditions at every place of employment in the United States. Furthermore, those employers who already have effective programs do not believe it is either fair or appropriate to be put to the burden of preparing for and participating in what could very well be an exhaustive and highly subjective compliance inspection simply to verify compliance with an unnecessary standard. For employers with effective programs, the preparation would involve assessing and modifying their programs not to improve safety but to improve their chances of satisfying the compliance officer's's subjective interpretation of what would be adequate under the standard. The "OSHA Reform Survey" released by the National Association of Manufacturers in December 1996, as well as recent episodes of overzealous compliance officers brought to the Agency's attention, demonstrate that OSHA's reinvention is far from complete and that our objections to the draft SHPR reflect real world experience.

Mr. Chairman, we sincerely appreciate the opportunity to share with you and the other Members of the House Committee on Small Business our views regarding OSHA's draft SHPR and thank you for addressing this OSHA initiative which is so important to the business community. I ask that my entire statement be placed in the official record and would be happy to answer any questions which you or other Members of the Committee may have on this matter. Furthermore, if we could be of assistance with any issues which may be identified following this hearing, we would be pleased to provide you with further information.

TESTIMONY OF
BARUCH A. FELLNER
June 17, 1999

Mr. Chairman and members of the Committee, I am Baruch A. Fellner. I am a partner in the Washington, DC office of Gibson, Dunn & Crutcher, LLP, where I specialize in employment law and issues arising under the Occupational Safety and Health Act of 1970 ("OSH Act"). Prior to joining Gibson, Dunn in 1986, I spent 18 years in several government agencies including eight years as Counsel for Regional and Appellate Litigation in the Occupational Safety and Health Administration ("OSHA"). My responsibilities involved shaping OSHA enforcement and litigation during the agency's first decade.

I appear today at the invitation of the Committee, to share both my views and those of the management-side labor clients I have represented in private practice. I thank the Committee for this opportunity to comment on the pending proposed adoption of a Comprehensive Safety and Health Program ("CSHP") requirement under the OSH Act.

On the first day of the 106th Congress, this Committee set an ambitious agenda for its work to aid American small businesses.[1] One of the chief items on that agenda was providing

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[1] *See* House Committee on Small Business Sets Aggressive Agenda for 106th Congress, Press Release, January 7, 1999.

relief to small businesses from a burdensome regulatory regime. It is my hope that my testimony today will aid in that worthy endeavor.

In short, I believe that the CSHP, if adopted, will be a mistake of epic proportions. As a threshold matter, any CSHP requirement must be adopted as a standard, not a regulation. Even then, however, the CSHP requirement would run afoul of the Due Process Clause of the Fifth Amendment to the Constitution, and the constitutional non-delegation doctrine. In addition, the CSHP would force employers to violate the National Labor Relations Act. From a practical perspective, the CSHP mistakenly requires a unitary prescription ill-suited to all American businesses. I also note briefly that it will impose significant paperwork burdens, that it defies any attempt to accurately estimate costs, and that its grandfather clause is inadequate. I further argue that it raises the specter of vastly broadened criminal liability under the OSH Act, and that it represents an attempt to back-door the failed ergonomics standard. From this litany of deficits, one fact emerges clearly: the CSHP proposal is fundamentally flawed.

I. Any CHSP Must Be Adopted As a Standard, Rather Than a Regulation

In *Chamber of Commerce of the United States v. Department of Labor*,[2] in which I was lead counsel, the United States Court of Appeals for the District of Columbia Circuit held that OSHA must propose a CSHP requirement as a standard. The Court of Appeals stated:

> In sum, we are forced by the jurisdictional structure and form of the OSH Act to characterize the Directive either as a "standard" or as a "regulation." Although neither moniker is entirely apt, we conclude that the Directive is a "standard" . . . because it effectively obligates employers, under penalty of certain inspection, to adopt a CSHP, and thereby imposes upon employers new safety standards more

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[2] ___ F.3d ___ (1999), 18 O.S.H. Cas. (BNA) 1673, 1999 WL 193386 (D.C. Cir. 1999).

> demanding than those required by the Act or by any pre-existing regulation implementing the Act.[3]

In so ruling, the Court of Appeals correctly assessed the state of the law. Any new efforts to implement the CSHP requirement could not evade this decision, as the fundamental nature of the CSHP as an obligation remains true. Because the CSHP's "basic function . . . is not a purely administrative effort designed to uncover violations of the Act," it is a standard.[4] Standards, under *Chamber of Commerce*, are remedial measures. As the *Chamber of Commerce* Court noted, "By its terms, it aims to foster safety policies more stringent than any required by the Act or by the regulations implementing the Act, including . . . voluntary standards, industry practices, and suppliers' safety standards."[5] OSHA, in attempting to characterize the CSHP as a regulation, seeks to force compliance with such stringent standards while evading the procedural requirements that the OSH Act demands.

II. The CSHP Improperly Advocates A Unitary Solution for All of American Business

This committee, I am certain, shares my belief that employers are responsible for providing a safe and healthy work environment and conducting effective occupational safety and health programs. Such programs are essential to good employee relations and constitute good business practice. Chairman Talent's Safety Advancement for Employees Act of 1999, H.R. 1427, rightly recognizes this and applies the appropriate regulatory model, in stark contrast to

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[3] 1999 WL 193386 at *4.

[4] 1999 WL 193386 at *2.

[5] 1999 WL 193386 at *5 (internal quotation marks omitted).

OSHA's CSHP. By advocating a "may" rule, as opposed to a "must" rule, the Chairman's bill empowers small businesses to take actions that are both good business and good policy.[6] It does this by freeing them from the threat of liability under the National Labor Relations Act[7] and by providing a mechanism to decrease the costs and increase the efficacy of compliance programs through the introduction of consultants.[8] Unlike OSHA's draft mandatory rule, Chairman Talent's bill is hortatory, and as a result does not force a unitary scheme, subject to inconsistent and subjective enforcement, on all of American business.

OSHA's federally mandated CSHP is too blunt a tool for the nation's diverse workforce. OSHA, in seeking to impose a CSHP on all employers, presumes that singular prescriptions can satisfy the needs of worker safety and health in all circumstances, a presumption small business owners throughout the nation know to be false.[9] As the Committee members are aware, small businesses in Missouri often face radically different challenges with respect to safety and health than those in New York. OSHA's current proposal advocates an ill-fitting "one-size-fits-all" proposal. It seems all-but impossible that the same standard can be used to force a CSHP for a family-owned bakery in California, a meat processing plant in Illinois and an electronics store in

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[6] *See* Safety Advancement for Employees Act of 1999, H.R. 1427 § 3.

[7] *See id.*, *see also infra* Part V. (discussing National Labor Relations Act).

[8] *See id.* at § 5.

[9] On might draw an analogy to the Clinton Administration's unsuccessful attempt to formulate a national health care program. Simply put, some matters are sufficiently individualized as to defy sweeping national solutions. Just as health care was one, so too is the CSHP.

Texas.[10] Compliance programs that are "appropriate to conditions in the workplace" in such disparate businesses will vary far too dramatically to be enforceable. The nature of occupational hazards, "the protective measures the employee must follow to prevent these hazards," and the control mechanisms for these hazards will vary significantly.[11] Now, businesses of disparate sizes will face dramatically heterogeneous cost-benefit balances under CSHP's, a fact that will likely put small business owners at a competitive disadvantage. For any compliance program to be effective, businesses must retain the flexibility and latitude to tailor such programs to the individual needs of the industry, location and workforce. By mandating specific actions, OSHA will inevitably force inefficiencies on much of American business. Instead, OSHA's laudable goals could be met by broad performance-based guidelines, which would avoid the myriad pitfalls of a poorly tailored national standard.

The CSHP is of a fundamentally different nature than OSHA standards have historically been. OSHA standards in the past have sought to regulate identifiable, quantifiable and correctable hazards with clear, administrable solutions.[12] In contrast, the CSHP seeks to regulate human behavior on a grand and undefined scale. This sea change in OSHA philosophy understandably strikes a chord of deep concern for American business. As one judge of the DC

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[10] Contrast this with other OSHA standards that are readily applicable to such businesses. *See, e.g.*, 29 C.F.R. 1910.94(c)(5)(*f*) (1999) ("Where ductwork passes through a combustible roof or wall, the roof or wall shall be protected at the point of penetration by open space or fire-resistant material between the duct and the wall.).

[11] *See* Draft Proposed Safety and Health Program Rule, Oct. 27, 1998 at §§ (f)(2)(i)-(iii).

[12] *See supra* note 10.

Court of Appeals remarked during the *Chamber of Commerce* oral argument, the CSHP "sounds like the product of a commissariat."

Undoubtedly, OSHA will argue that the CSHP is deliberately vague in order to allow flexibility. This ignores the reality of enforcement, however. Compliance officers will enforce the letter of the CSHP requirement. But just as beauty is in the eye of the beholder, non-compliance with undefinable terms, as I will show below, is in the eye of the compliance officer. As a result, cautious business owners will not feel free to tailor the CSHP in appropriate ways. They, too, will attempt to follow the letter of the rule. This means that the CSHP is at once too specific and prescriptive *and* too broad and vague. This, perhaps, is the best evidence that the problem the CSHP seeks to correct is not susceptible to rulemaking at all.

III. The CSHP Violates the Due Process Clause of the Fifth Amendment

Under any conceivable incarnation of the CSHP, the standard would violate the Due Process clause of the Fifth Amendment to the Constitution. The Supreme Court has long held that "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence and understanding must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."[13] The CSHP requirement utterly fails to do this, with such conclusory language as "Each employer must set up a safety and health program to manage workplace safety and health to reduce injuries, illnesses and fatalities by systematically achieving compliance with OSHA standards and the General Duty Clause. The

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[13] *See* Connally v. General Constr. Co., 269 U.S. 385, 391 (1925).

program must be appropriate to conditions in the workplace, such as the hazards to which employees are exposed and the number of employees there."[14] Such language, unaided by the putatively simple yet undeniably oversimplified "question and answer" format with which OSHA would promulgate the CSHP, inescapably will leave American small business to "guess at its meaning and differ as to its application." For instance, the rule requires employers to "achieve compliance" in a way that is "appropriate to conditions in the workplace." Given prior OSHA CSHP guidelines, the agency will expect compliance not only with existing regulations but also so-called "consensus body initiatives" and other emerging theories that have no support in science, logic or law. As Justice Thurgood Marshall stated, "Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly."[15] The CSHP does not begin to let one know what is prohibited. Vagueness and ambiguity is inherent in the venture, and no amount of craftsmanship in drafting can cure the CSHP from this failure. This vagueness appears in stark relief when the CSHP is contrasted with other OSHA regulations.

Courts have been particularly cognizant of the danger of vagueness in the context of the OSH Act, noting that "Any statute imposing general obligations, such as the general duty clause,

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[14] Draft Proposed Safety and Health Program Rule, 29 CFR 1900.1 (1998).

[15] Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972).

raises certain problems of fair notice."[16] This implicates the basic issue in CSHP's: employers will not know what the law requires. Coupled with the fact that the high burden of proof necessary in an action under the OSH Act's general duty clause would not apply to CSHP's, this vagueness could prove disastrous to American small business.

The general duty clause has avoided such vagueness problems because, as the Third Circuit held, "[t]he recognized hazard standard gives industrial employers fair notice of the conduct they must avoid."[17] For instance, failure to shore or brace trenches, or provide a safety belt or lifeline to an employee working high above the ground have been held to violate the general duty clause.[18] These are obvious, universally acknowledged hazards, thus limiting the scope of the general duty clause. No such limiting principle exists in the instant context.

The CSHP will not only be unconstitutionally vague with respect to business owners, its vagueness will also lead to unconstitutionally unrestrained discretion in enforcement. OSHA compliance officers will have no recourse but to enforce the letter of the CSHP. Given language such as "achieve compliance," this will mean that the fact of an injury is *ipso facto* evidence of a violation of the CSHP. The tort doctrine of *res ipsa loquitor* will be imported wholesale into

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[16] Donovan v. Royal Logging Co., 645 F.2d 822, 831 (9th Cir. 1981).

[17] Bethelehem Steel Corp. v. OSHRC, 607 F.2d 871, 875 (3d Cir. 1979).

[18] *See e.g.,* M.A. Swatek & Co. OSHRC Docket No. 33, 1971-1973 CCH OSHD ¶ 15672, 1 BNA OSHC 1191 (1973) (affirming citation for failure to shore trenches); Cormier Well Service, OSHRC Docket No. 8123, 1975-1976 CCH OSHD ¶ 20583, 4 BNA OSHC 1085 (1976) (affirming citation for failre to provide a safety belt or lifeline). *See generally,* Annotation, *What is "Recognized Hazard" Within Meaning of General Duty Clause of Occupational Safety and Health Act?*, 50 A.L.R. Fed. 741 (1980).

OSH Act law.[19] Even absent such a disastrous result, enforcement of the CSHP requirement will utterly lack consistency. A national force of compliance officers cannot possible agree upon what is "appropriate to the conditions in the workplace;" accordingly, business owners will not know how the standard will be enforced against them, and the threat of liability will drive up the costs of business, having a disproportionate affect on those very businesses whose interests this Committee seeks to protect. Justice Marshall's words are again appropriate here: "[I]f arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory enforcement."[20] In the leading case voiding OSHA action for vagueness, the Fifth Circuit cited not only the employer's lack of notice, but also the absence of "a reasonably clear standard of culpability to circumscribe the discretion of the enforcing authority and its agents."[21] The CSHP requirement will of necessity fail to provide a clear standard of culpability.

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[19] California's Injury and Illness Prevention Program requirement, Cal. Lab. Code § 6401.7 (1998), has become a catch-all citation. Compliance officers, when faced with a situation in which they cannot find a specific violation, have come to cite employers for deficient hazard assessment programs. Similarly, experience has taught that they finish most valid citations with a citation for a faulty program for good measure. This is certain to be the future of the CSHP requirement. It will become to OSHA compliance officers what mail fraud has become to federal prosecutors.

[20] *Grayned*, 408 U.S. at 108-09.

[21] Diamond Roofing Co. v. OSHRC, 528 F.2d 645, 649 (5th Cir. 1976). *See also* Dravo Corp. v. OSHRC, 613 F.2d 1227, 1232 (3d Cir. 1980) (stating "an occupational safety and health standard must give an employer fair warning of the conduct it prohibits or requires, and it must provide a reasonably clear standard of culpability to circumscribe the discretion of the

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Confusion among OSHA compliance officers alone is likely to doom the CSHP requirement. In a leading case, the Tenth Circuit stated that an employer:

> should not be penalized for deviation from a standard the interpretation of which . . . cannot be agreed upon by those who are responsible for compelling compliance with it and with oversight of the procedures for its enforcement.[22]

Given the purposes and goals of the CSHP, it seems impossible that any CSHP requirement language would evade this reality of disparate enforcement.

IV. The CSHP Requirement Would Violate the Constitutional Non-Delegation Doctrine

The constitutional doctrine of non-delegation bars the legislative branch from delegating authority to an administrative agency without providing an "intelligible principle" to guide the agency's use of that authority.[23] Regulations can fall afoul of this doctrine if the administrative agency construes its own organic statute in such a way as to vitiate an otherwise sufficient intelligible principle.

In *International Union, United Automobile, Aerospace & Agricultural Implement Workers of America v. OSHA,*[24] ("*Lockout/Tagout I*") the DC Circuit invalidated and remanded OSHA action on the grounds that OSHA's construction of the OSH Act, if accepted, would have

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enforcing authority and its agents.").

[22] Kent Nowlin Constr. Co. v. OSHRC, 593 F.2d 368, 371 (10th Cir. 1979).

[23] *See generally* Kenneth Culp Davis & Richard J. Pierce, Jr., I Administrative Law §2.6 (1994).

[24] 938 F.2d 1310 (DC Cir. 1991).

violated the non-delegation doctrine.[25] In the view of the court, OSHA had construed its power under the statute to mean that, once it found significant risk, it could "require precautions that take the industry to the verge of economic ruin . . . or to do nothing at all."[26] The CSHP rule appears poised to do exactly that.

The *Lockout/Tagout I* Court left unclear the extent to which OSHA's action violated the Constitution or merely manifested poor statutory construction. More recently, though, the DC Circuit made clear that it will adhere to the non-delegation principle hinted at in *Lockout/Tagout I*. In *American Trucking Associations v. EPA*,[27] the DC Circuit invalidated EPA standards, finding a similar absence of an intelligible principle, stating:

> Here it is as though Congress commanded EPA to select "big guys" and EPA announced that it would evaluate candidates based on height and weight, but revealed no cut-off point. The announcement, though sensible in what it does say, is fatally incomplete. The reasonable person responds "How tall? How heavy?"

This is, in fact, exactly what OSHA seeks to do by compelling employers, on the threat of draconian liability or none at all, to "systematically identify and assess hazards,"[28] or carry out inspections "as often . . . as necessary."[29] Under the CSHP, neither small business owners nor

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[25] *See Lockout/Tagout I*, 938 F.2d at 1313 ("we find that the interpretation offered by the Secretary is, in light of nondelegation principles, so broad as to be unreasonable.").

[26] *Lockout/Tagout I*, 938 F.2d at 1317.

[27] ___ F.3d ___, 1999 WL 300618, *2 (DC Cir. May 14, 1999).

[28] Draft Proposed Safety and Health Program Rule § (d)(1).

[29] Draft Proposed Safety and Health Program Rule § (d)(3)(ii). The *American Trucking Associations* Court stated: "[W]hat EPA lacks is any determinate criterion for drawing lines. It has failed to state intelligibly how much is too much." *American Trucking Associations*,

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the courts will know what OSHA will consider too tall, or too heavy - or, more specifically, how systematic, or how often.

V. OSHA's Proposed Standard Violates the National Labor Relations Act

Section (b)(2)(i) of the Draft Proposed Safety and Health Program Rule mandates "Management leadership and employee participation." Compliance with this section of the CSHP requirement will force employers to violate § 8(a)(2) of the National Labor Relations Act (NLRA), which proscribes employer domination of labor organizations.[30] In *EFCO Corp. and United Brotherhood of Carpenters and Joiners of America*,[31] the National Labor Relations Board (NLRB) considered a challenge to a "Safety Committee." EFCO established its Safety Committee and "broadly charged [it] with the duty of handling 'safety problems.'"[32] Committee members were to "set safety policies and find ways of enforcing them."[33] It addressed "such matters as safety awards and incentives . . . the wearing of safety shoes and glasses . . . the need to replace dirty and broken light fixtures, a lack of fans in certain areas of the facility, the repair

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1999 WL 300618 at *2. In stating "as often . . . as necessary," OSHA will repeat the EPA's mistake.

30 Section 8(a)(2) of the NLRB makes it unlawful for an employer to "dominate or interfere with the formation or administration of any labor organization." 29 U.S.C. 158(a)(2).

31 327 N.L.R.B. No. 71, 160 L.R.R.M. (BNA) 1049, 1998 WL 930967 (1998).

32 *EFCO*, 1998 WL 930967 at *3.

33 *EFCO*, 1998 WL 930967 at *4.

or replacement of a miter [sic] saw, the need for additional ventilation, meeting OSHA requirements . . . and the need to correct a number of safety hazards."[34]

The NLRB found that this committee constituted a "labor organization" that "dealt with" management under Section 2(5) of the NLRA because "the organization exists, at least in part, for the purposes of 'dealing with' the employer . . . [concerning] grievances, labor disputes, wages, rates of pay, hours of employment, *or conditions of work*."[35] The NLRB held:

> [EFCO] did not simply delegate safety inspection or reporting duties to the Safety Committee. Rather, the Committee's functions included reviewing safety rules and policies, developing safety incentive programs, and, most significantly, making proposals to management about such policies and programs, including proposals respecting employee compensation. In short, the Safety Committee was an integral part of a bilateral process falling under the rubric of Section 2(5) and involving employees and management with the purpose of affecting safety issues.[36]

The Board further held that EFCO "dominated" the Safety Committee simply because it created the committee, announced its formation, explained the goals and purposes of the committee to the employees, held the meetings at the workplace during working hours, determined the structure and function of the committee, selected the initial members and chose the subjects they were to address.[37]

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[34] *EFCO*, 1998 WL 930967 at *4. (internal footnotes omitted).

[35] *EFCO*, 1998 WL 930967 at *5 (emphasis added).

[36] *EFCO*, 1998 WL 930967 at *7 (internal citations omitted).

[37] *EFCO*, 1998 WL 930967 at *8. *See also* Electromation, Inc. v. National Labor Relations Board, 35 F.3d 1148 (7th Cir. 1994) (undertaking the same analysis and holding as the Board in *EFCO*).

After *EFCO*, employers would be faced with a Hobson's Choice under a CSHP. They must choose to violate one of the two operative statutes. Under the terms of the draft CSHP, it does not even appear that they could cede all control over the CSHP to the employees or their representatives in order to avoid *EFCO* and NLRA § 8(a)(2), because the CSHP requires "management leadership." The problem raised by NLRA § 8(a)(2) defies solution. Even if the safety committee were manned by union representatives, the employer would still "dominate" the "labor organization" by setting the agenda and goals for the safety committee.[38]

V. The CSHP Requirement Revives the Failed Ergonomics Standard

OSHA's over-arching concern for the last decade has been regulation of ergonomics. Just as the CSHP rule would be a blatant circumvention of the general duty clause, so it would constitute a stealth ergonomics standard. The CSHP regulates ergonomics in a subtle yet undeniable way, one that would likely prove catastrophic for American business. Section (d)(2) of the Draft Proposed Safety and Health Program Rule requires employers to "systematically assess hazards and assess compliance." Section (d)(3) requires that employers undertake this assessment initially, every two years, whenever there is a change in the workplace conditions, and (in keeping with the vague terms of the rule) "as often thereafter as necessary to ensure compliance with the General Duty Clause."[39] This will undoubtedly require employers to

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[38] This is, of course, a business necessity, as the employer must set the agenda for the committee, because it is the employer, and not the employees, who bears the risk of an OSHA citation.

[39] Draft Proposed Safety and Health Program Rule § (d)(3)(ii).

engage in a systematic assessment of hazards in response to recorded musculoskeletal aches and pains, despite the junk science on which ergonomics is based and which has been consistently rejected as inadmissible under governing Supreme Court law.[40] As a result, OSHA need not prove, as the Review Commission required in *Pepperidge Farm,* the efficacy of ergonomics regulation, but only that the employer did not approach the risk systematically. This is a far cry from the high burden imposed in the general duty clause. Employers will be forced to bear the burden of showing their reasonableness in failing to undertake a systematic analysis. The systematic inquiry the rule requires is, of course, the hallmark of the very ergonomic regulation of which the Congress has explicitly disapproved. The inquiry, moreover, is likely to prove extraordinarily expensive; employers must, under Section (d)(2), "evaluate new equipment, materials, and processes for hazards before they are introduced into the workplace." In addition to the disincentive this will place on efficient innovation and modernization, small businesses are likely to suffer greatly from this burden. When California solicited comments on a state ergonomics standard, estimates of the cost of the standard were staggering. One economist estimated that the direct costs of California's rule would reach *$8 billion* in eight years.[41] Once

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[40] *See generally* Eugene Scalia, Ergonomics: OSHA's Strange Campaign to Run American Business, National Legal Center For the Public Interest White Paper Vol. 6, No. 3 (August, 1994) (recounting the evidence against the existence of repetitive stress injuries, and against the causal connection to repetitive labor).

[41] *See* M. Cubed, Economic Analysis of the California Occupational Safety and Health Standards Board's Proposed Ergonomics Rule (February 1996). The paperwork burden of this rule is also likely to cost small businesses a great deal of money, and a disproportionate amount with respect to large businesses. *See* House Passes Two Small Business Bills, Press Release, Feb. 9, 1999 (quoting House Small Business Committee Chairman Jim Talent (R-

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again, because of economies of scale, these costs will have a disproportionate and crippling effect on small businesses. For many small businesses, purchase of new equipment is a major expenditure, often intended to allow the business to compete with larger firms. By adding to the costs of retooling, a CSHP would put small businesses at a distinct disadvantage.

OSHA should not be allowed to flout the will of Congress and impose enormous liability on small businesses through the adoption of the CSHP requirement. A "back door" solution to the perceived problem of ergonomics is unconscionable.

VI. The CSHP Requirement Raises a Host of Practical Problems

A. *Any Attempt To Quantify the Cost of the CSHP is Illusory*

Because so much turns on the vast and unbridled discretion that compliance officers would wield under the CSHP requirement, it is impossible for OSHA to estimate with any rational degree of certainty the costs of the CSHP. Its estimates heretofore have bordered on the absurdly optimistic. Small business owners know that the cost of preventing unseen and unknown hazards, as the CSHP requires, is likely to be astronomical.

B. *Employers Will Be Buried in Paperwork In An Attempt to Ensure Compliance*

Contrary to the express will of Congress, the CSHP is likely to generate massive amounts of paperwork for small businesses. Experience teaches that compliance officers will not believe that which is not documented; as a result, small business owners will be burdened by the need to document the numerous steps taken in an attempt to comply with the ill-defined CSHP standard.

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Mo.) as stating: "Paperwork burdens on small business are outrageous. It often costs small business twice what it would cost larger business to comply with the payroll tax paperwork

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C. *The CSHP's Grandfather Clause Is Hopelessly Inadequate*

Section (b)(3) of the Draft Proposed Rule purports to allow employers who have had a safety and health program before the effective date to continue with that program if they can "demonstrate the effectiveness of any provision of the employer's program that differs from the other requirements of this rule."[42] Given this language, the burden of proof, and the certainty of uneven enforcement, virtually no employer will be able to avail herself of this provision.

VII. OSHA's Enactment of the Draft Proposed Rule Would Violate the OSH Act

Because the Draft Proposed Safety and Health Program Rule effectively amends all other substantive OSHA standards, its enactment in one rulemaking would violate the OSH Act. The CSHP rule's imposition of liability for failure to "systematically comply" with all OSHA standards, means that in reality OSHA is amending all other standards to require systematic compliance.[43] This is impermissible under the OSH Act. In *AFL-CIO v. OSHA*, the Eleventh Circuit Court of Appeals struck down a similar rulemaking procedure. In that case, OSHA attempted to alter the standards for 428 toxic substances under the rubric of a comprehensive "Air Contaminants Standard."[44] The Eleventh Circuit, noting that the OSH Act requires that

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alone.").

[42] Draft Proposed Safety and Health Program Rule § (b)(3)(ii).

[43] Draft Proposed Safety and Health Program Rule §§ (b)(1) and (e)(1). To use an example from the regulation quoted in footnote 10, although an employer might have all ductwork in his establishment in compliance with OSHA standards, he might still be liable under the CSHP rule if he has simply not assured himself of compliance in a systematic way.

[44] *See AFL-CIO v. OSHA*, 965 F.2d 962, 968 (11th Cir. 1992).

standards must be "supported by substantial evidence in the record considered as a whole,"[45] held that in amending 428 standards at once, OSHA had failed to show substantial evidence for each standard.[46] Obviously, in this case, OSHA could not make such a showing with respect to every substantive standard effectively amended by the CSHP requirement. This is more than wooden formalism; it goes to the crux of the problem with the CSHP requirement. OSHA seeks to impose a regulatory burden on *all* of American business, with absolutely no consideration as to whether that burden is an appropriate one.

VIII. The Draft Proposed Rule Raises the Specter of Vastly Increased Criminal Liability Under the OSH Act

Section 17(e) of the OSH Act states:

> (e) Any employer who willfully violates any standard, rule or order promulgated pursuant to section 655 of this title, or of any regulations prescribed pursuant to this chapter, and that violation caused death to any employee, shall, upon conviction, be punished by a fine of not more than $10,000 or by imprisonment . . . . or by both.[47]

This section of the OSH Act has been, in the past, fairly limited in application due to the stringent standard for "willfulness," which the Seventh Circuit has defined as actual knowledge

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[45] *AFL-CIO*, 965 F.2d at 969-79 (quoting the OSH Act, 29 U.S.C. § 655(f)).

[46] *See AFL-CIO*, 965 F.2d at 972 ("OSHA may not, by using such multi-substance rulemaking, ignore the requirements of the OSH Act. Both the industry petitioners and the union argue that such disregard was in essence what occurred. Regretfully, we agree."). Such disregard is, in essence, what OSHA manifests in promulgating the CSHP requirement.

[47] 29 U.S.C.A. § 666(e) (1998). For corporations, the fine increases to $500,000 under 18 U.S.C. § 3571(c)(4) (1998).

of a danger, formed by knowledge of the essential facts (such as that ductwork is not protected) coupled with knowledge of the legal requirements (that ductwork must be protected).[48] The CSHP, however, calls future application of this doctrine into question. In those unfortunate instances in which a workplace hazard results in the death of an employee, the CSHP will add a new element to the legal analysis. To what extent will an employer be charged with knowledge when a CSHP that was "appropriate to the conditions in the workplace" would have led to the discovery of the hazard? Because CSHP's are so sweeping, the answer is miasmic at best. Similarly obscure is the issue of causation. Is it rational to say that a faulty CSHP caused the death of an employee? It is likely not, but it is just as likely that OSHA will urge such an interpretation on the courts. An even more complicated analysis would arise in a case in which the employer did not know that ductwork needed to be protected and did not know that ductwork in his small business was unprotected, but did know of the CSHP requirement, and knew that he did not have one. Under ascendant case law, this would seem to generate criminal liability.

Section 17(e) does not allow for criminal liability for violation of the general duty clause. Despite this, the CSHP will provide a way for OSHA to impose criminal liability under the general provisions of the CSHP. There is a vast delta between willful violations of a clear and administrable standard, and willful violations of a vague and incomprehensible one. Given the fact that OSHA has not stated that prosecutions under § 17(e) will not be predicated entirely on

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[48] *See* United States v. Ladish Malting Co., 135 F.3d 484, 490 (7th Cir. 1998) ("wilful [is] a synonym for knowing, and [we] equate knowledge with awareness of the essential facts and legal requirements.").

violations of the CSHP, the future may well bring what amounts to criminal liability under the CSHP akin to liability under the general duty clause, without the protection of the "recognized hazard" requirement.

The confusion that CSHP's will create in OSH Act criminal liability hearkens back to an earlier point. OSH Act jurisprudence is built upon a model in which OSHA promulgates standards to regulate identifiable hazards, not the vicissitudes of human behavior. Requiring CSHP's breaks that model, and the ensuing confusion over what the law requires will cause great harm to small businesses. For small business owners, the threat of huge criminal fines, jail time, and attorney's fees may drive them out of business.

IX. Conclusion

The CSHP is, in short, an ill-conceived foray by OSHA into the regulation of human behavior. In addition to the many legal problems discussed above, as a matter of economics the flaws of the requirement will be visited chiefly upon smaller businesses. This Committee, charged with considering the interests of these businesses, can and should play an important role in blocking any attempt to introduce a standard requiring CSHP's.

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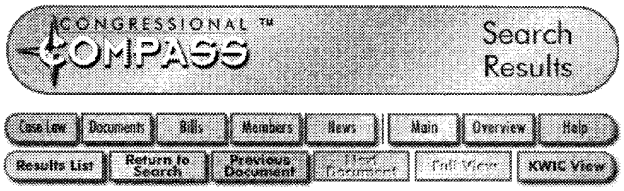

Document 6 of 6.

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March 4, 1999, Thursday

SECTION: CAPITOL HILL HEARING TESTIMONY

LENGTH: 3066 words

HEADLINE: TESTIMONY March 04, 1999 ROBERT J. **CORNELL SENATE** HEALTH, EDUCATION, LABOR & PENSIONS METHODS TO ENCOURAGE WORKER SAFETY

BODY:
TESTIMONY OF ROBERT J. **CORNELL** DIRECTOR, DEALER OPERATIONS AND ENVIRONMENTAL REGULATIONS of **MON** VALLEY PETROLEUM, INC. on behalf of THE NATIONAL ASSOCIATION OF MANUFACTURERS regarding "THE NEW SAFE ACT: USING THIRD PARTY CONSULTATIONS AND ENCOURAGING SAFETY PROGRAMS TO MAKE WORKERS SAFER before the SUBCOMMITTEE ON EMPLOYMENT, SAFETY AND TRAINING of the COMMITTEE ON HEALTH, EDUCATION, LABOR AND PENSIONS UNITED STATES SENATE March 4, 1999 Good morning. My name is Bob **Cornell** and I am director of dealer operations and environmental regulations, and also chairman of the Safety Committee, for **Mon** Valley Petroleum Inc., McKeesport, Pa. **Mon** Valley Petroleum is a small petroleum jobbership with 125 employees at eight locations throughout Western Pennsylvania. **Mon** Valley has been in the petroleum business for more than 70 years. Our employees include 10 truck drivers, 119 convenience store personnel and 17 other office and management personnel. Of our eight locations, seven are gas stations with convenience stores, and the eighth is our main office, which includes a truck garage and a warehouse facility. I am testifying today on behalf of the NAM's 14,000 member companies, approximately 10,000 of which are small manufacturers. Small manufacturers especially are sincerely appreciative of the attention that you, Mr. Chairman, and the members of this Committee, are paying to the issue of worker safety in this country. Early in 1994, the Commonwealth of Pennsylvania passed legislation enabling businesses in Pennsylvania to earn a 5- percent credit toward their workers' compensation premium by establishing a working safety committee. With the complete support of management, **Mon** Valley Petroleum took the first steps toward establishing such a committee. Our first meeting was held in July 1994 with five members from management and five from labor. During the remainder of 1994, we met monthly and tried to identify and address possible safety hazards. As a small company with no budget for a safety expert on staff, we lacked direction and an agenda. In early 1995, our workers' compensation insurance carrier reviewed **Mon** Valley Petroleum's policies and programs and offered some very general suggestions. After that meeting, I realized **Mon** Valley Petroleum needed to establish a very specific agenda for correcting all health and safety violations. The Safety Committee's original and primary goal was to follow the guidelines established by OSHA. We found, however, that the language was not reader friendly and was, in fact, impossible for a layperson to understand. I think for the small business person to understand and then try to comply with OSHA is very frustrating. Our mission statement indicates some very specific responsibilities in protecting our employees' and customers' health and safety. If I may, I would like to include our mission statement in my testimony. Mission Statement One of the primary responsibilities of the management of this corporation at all levels, at all locations is to take practical steps to safeguard employees and customers from accidental injury and hazard to health and well-being. This program is a shared responsibility between management and all employees. Everyone will work together to reach one common goal. In order to achieve this common goal, employees and management will provide cost- effective means to achieve safety and reduce risk of injury or accidents to both employees and customers by eliminating and/or identifying safety hazards and problems. Recognizing safety or health hazards, present or potential, and bringing them to the attention of management at any level for correction, shall be regarded as a contribution to the common goal. REMEMBER - Safety starts at home, in your travels, on the job. In order to comply with our mission statement, **Mon** Valley Petroleum realized we needed some expert guidance. We are aware that OSHA offers this guidance, but I was extremely apprehensive about asking OSHA for help, feeling that would open the door to extensive fines and penalties. Yes, I feared the statement, "Hello, I'm from the government and I'm here to help." In October 1995, I contacted Three Rivers Health and Safety, a small safety consulting firm located in Pittsburgh, Pa. for

a comprehensive safety audit. Our primary reason for bringing in a third-party safety professional was to ensure the safety of our employees as mandated by OSHA. We also needed a third party to assist the **Mon** Valley Safety Committee in establishing a priority list and an agenda for eliminating violations. We knew going in that it would be a comprehensive inspection, and that no stone would be left unturned. But that was our objective. Even though we had requested the inspection, we were not looking for a favorable report. We wanted an honest report. We wanted to know if we had any deficiencies and, if so, where they were. Our goal was to correct those deficiencies and, most importantly, to provide a safe workplace for our employees. The inspection of our facility by the third-party consultant was very thorough and was completed by a safety professional knowledgeable in all areas of safety and with all OSHA regulations. The inspection covered 1) required record keeping; 2) required training of employees to comply with specific OSHA regulations; 3) implementation and effectiveness of required OSHA programs; 4) machine guarding and 5) electrical regulations, just to name a few. The inspection of our facility resulted in an extensive report of no less than 20 pages. The report was written in terms that our non-expert Safety Committee would read and understand. When we received the inspection report, it showed us where we were in compliance with OSHA and where we were not. Using the information contained in the report, our Safety Committee followed through on the recommendations we could complete in- house. The total cost of this very professional and extensive audit on **Mon** Valley Petroleum was $3,300. Fines associated with violations found would have been many times that amount. Today, we have an effective safety program resulting in fewer injuries and reduced workers' compensation costs, due in part to Three Rivers Health and Safety and the dedication of **Mon** Valley Petroleum and its Safety Committee. Let me illustrate with some hard numbers. From 1992 through 1994, the number of workers' compensation claims at **Mon** Valley Petroleum was 19, and we had 70 lost workdays. Three Rivers Health and Safety did a comprehensive audit of **Mon** Valley Petroleum in late 1995. We began to address potential hazards immediately with its help. From 1995 through 1998, our workers' compensation claims held at 19 (medical claims only). Our lost workdays dropped to zero. Our last lost-time injury was in February 1994. We have not had one lost-time workday in that entire four-year period. In addition, because of this, we have reduced our workers' compensation premiums significantly. We've gone from paying more than $37,000 in 1994 to slightly less than $30,000 in 1999. This savings has allowed our small company to grow and, in fact, we opened our seventh convenience store in 1998 with 25 new employees. Hopefully, in the next millennium, we will be able to open even more stores and add more employees. Our Safety Committee continues to receive full encouragement and support from top managers. We now have 14 active members on our Safety Committee, six management and eight employees. The Western Pennsylvania Safety Council has recognized **Mon** Valley Petroleum over the past four years (1995-1998) for outstanding accident prevention. We have maintained a relationship with Three Rivers Health and Safety, using it on an as-needed basis. After the comprehensive safety audit, we hired them to establish a lockout/tagout inspection program and to conduct the required annual inspection. These third-party safety professionals have provided **Mon** Valley Petroleum excellent guidance and help. During the last required lockout/tagout inspection, the Three Rivers Health and Safety staff person noticed minor violations while just casually walking around our property. They were violations we were unaware of, but OSHA violations nevertheless. At our next Safety Committee meeting, they were discussed and within 60 days were corrected. OSHA publishes no pamphlet and offers no service that would have pointed out these problems to us. It was only through a third- party safety consultant that we could quickly find out what we needed to do to provide a safe workplace for our employees and be assured of complying with OSHA. I feel that the cost is an important factor, but to our small businesses there is a deeper and more important reason to focus on safety. Our company is very much like a family. In fact, we have many second-generation employees and one third-generation family. I, myself, am a second-generation employee. I have been to many graduation parties, weddings, baptisms and funerals for employees' family members because we know each other in a friendly way. The one phone call or visit I never want to make is the one to a family informing them that there has been an accident and their husband, wife, son or daughter has been injured or killed. **Mon** Valley Petroleum values its employees and we try to make every effort to maintain a safe and healthy working environment. Through our programs and policies and through our actions, our employees realize that we are trying to protect them. One very good way to encourage small companies especially to focus on their employees' safety is to provide incentives for them to use a third-party safety professional, who can provide needed direction and leadership.

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MON VALLEY PETROLEUM, INC.

July 19, 1999

The Honorable James Talent
Chairman
Committee on Small Business
U.S. House of Representatives
2361 Rayburn House Office Building
Washington, DC 20515

Attn: Max Reynolds

Dear Chairman Talent:

My name is Bob Cornell and I am director of dealer operations and environmental regulations and also Chairman of the Safety Committee for Mon Valley Petroleum Inc., McKeesport, PA. Mon Valley Petroleum is a small petroleum jobbership with 125 employees at eight locations throughout Western Pennsylvania. Mon Valley has been in the petroleum business for over 70 years. Our employees include ten truck drivers, 119 convenience store personnel and 17 other office and management personnel. Of our eight locations, seven are gas stations with convenience stores and the eighth is our main office which includes a truck garage and a warehouse facility.

Mr. Chairman, small manufacturers are sincerely appreciative of the attention that you and the members of this Committee are paying to the issue of worker safety in this country. As you may remember on January 29, 1998, I testified before your committee on the proactive steps Mon Valley has taken to ensure a safe and healthy workplace for its employees. Most recently, on March 4, 1999 I appeared before Senator Enzi's Subcommittee on Employment, Safety and Training to talk about the successes Mon Valley continues to experience with respect to the safety and health of our employees due in large part to our uniquely tailored safety program.

Let me provide you with some background. When the Commonwealth of Pennsylvania passed legislation in 1994 enabling businesses in Pennsylvania to earn a 5 percent credit toward their workers' compensation premium by establishing a working safety committee, Mon Valley Petroleum took the first steps toward establishing such a committee with the complete support of management. Our first meeting was held in July 1994 with five members from management and five from labor. During the remainder of 1994 we met monthly and tried to identify and address possible safety hazards specific to our industry and our facilities.

In early 1995 our workers' compensation insurance carrier reviewed Mon Valley Petroleum's policies and programs and offered some very general suggestions. After that meeting I realized Mon Valley Petroleum needed to be proactive and establish a very specific agenda for correcting all health and safety violations in our facilities. Our safety program includes the following underlying principles:

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> It is considered to be one of the primary responsibilities of the management of this corporation at all levels, at all locations to take practical steps to safeguard employees and customers from accidental injury and hazard to health and well-being. This program is developed to be a shared responsibility between management and all employees. Everyone will work together to reach one common goal. In order to achieve this common goal, employees and management will provide cost-effective means to achieve safety and reduce risk of injury or accidents to both employees and customers by eliminating and/or identifying safety hazards and problems. Recognition of safety or health hazards, present or potential and bringing it to the attention of management at any level for attention and correction shall be regarded as a contribution to the common goal.

As a supplement to our safety program, in October 1995, Mon Valley hired a safety professional knowledgeable in all areas of safety and with all OSHA regulations to conduct a comprehensive safety audit of our facilities. Our primary reason for bringing in a safety professional was to ensure the safety of our employees as mandated by OSHA. The inspection covered 1) required recordkeeping; 2) required training of employees to comply with specific OSHA regulations; 3) implementation and effectiveness of required OSHA programs; 4) machine guarding and 5) electrical regulations just to name a few.

The total cost of this professional and extensive audit to Mon Valley Petroleum was $3,300. Fines associated with violations found would have been many times that amount. Today we have a uniquely tailored and effective safety program resulting in fewer injuries and reduced workers' compensation cost due to the proactive steps and dedication of Mon Valley Petroleum and its Safety Committee. In fact, since implementing our safety program, Mon Valley's lost workdays have dropped significantly and lower workers' compensation premiums have allowed the company to invest in a new facility and to hire 25 more employees. We have had one lost time injury since February 1994.

Our Safety Committee continues to receive full encouragement and support from top management. We now have fourteen members on our Safety Committee, six management and eight employees. The Western Pennsylvania Safety Council has recognized Mon Valley Petroleum over the past four years (1995-1998) for outstanding accident prevention.

Mr. Chairman, I feel that the cost is an important factor, but to our small business, there is a deeper and more important reason to focus on safety. Our company is very much like family. In fact, we have many second-generation employees and one third-generation family. I myself am a second-generation employee. I have been to many graduation parties, weddings, baptisms and funerals for employees' family members because we have family-like bonds. The one phone call or visit I never want to make is the one to a family informing them that there has been an accident and their husband, wife, son or daughter has been seriously injured or killed.

Mon Valley Petroleum values its employees and we try to make every effort to maintain a safe and healthy working environment. Through our uniquely tailored safety programs and policies and through our actions, our employees realize that we are trying to protect them. I do not believe for a minute that OSHA's plan to impose a "one-size-fits-all" safety and health program regulation that directly conflicts with the specific needs and existing safety program of Mon Valley Petroleum will improve health and safety in our facilities. Rather, such a regulation would intrude into the management of our business by imposing a federally mandated structure for managing our safety and health program and compromising the initiatives Mon Valley has taken to tailor its management techniques to meet the specific safety needs of its employees. OSHA can help businesses like Mon Valley Petroleum achieve safer workplaces by strengthening existing programs and enhancing its outreach on non-regulatory approaches.

Sincerely,

Robert J. Cornell
Director Dealer Operations and
Environmental Regulations
Chairman of Safety Committee

SUMMARY OF THE PRELIMINARY ESTIMATES OF IMPACTS, COSTS, AND BENEFITS OF THE RULE AS A WHOLE

Source: OSHA
(Provided by OSHA to SBREFA Panel 10/98)

DRAFT

SUMMARY OF IMPORTANT POINTS IN THE ECONOMIC ANALYSIS

Total Number of Affected Establishments: 5.9 million

Total Number of Small Businesses (Using SBA Definitions): 3.95 million

Total Number of Small Businesses Employing Fewer than 20 Employees: 3.93 million

Overall Program Costs for All Covered Employers: $2.326 Billion per Year

Overall Program Costs for All Covered Employers by Provision of the Rule:

Management Commitment and Employee Involvement:	$402 million per year
Hazard Identification and Assessment:	$379 million per year
Employee Training:	$1.012 million per year
Program Evaluation and Program Updates:	$422 million per year
Multi-Employer Worksites:	$111 million per year

Average Program-Related Cost per Affected Facility: $495 per year

Average Program-Related Cost per Small Business (SBA definition): $391 per year

Average Program-Related Costs per Small Business with Fewer than 20 Employees: $262 per year

Costs as Percentage of Profits for a Typical Small Business (Using SBA Definitions): 1.36%

Costs as Percentage of Profits for a Very Small Business with Fewer than 20 Employees: 1.81%

Only 6% of all small business with fewer than 20 employees are in industries where the average program-related costs exceed 5 percent of profits.

Reduction in Number of Injuries and Illnesses Expected as a Result of the Rule: 580,000 to 1.3 million per year

Direct Cost Savings (Out-of-Pocket Expenses to Employers, Employees, Insurance Companies and Others Affected by an Injury or Illness) Associated with Reductions in Injuries and Illnesses: $7.3 to $16.5 billion per year

Reduction in Fatalities Expected as a Result of the Rule: 416 to 918 fatalities per year

Costs of Controlling Hazards Found as A Result of The Program Required by This Rule: $2.6 to $4.4 billion per year; Costs per typical facility: $440 to $745 per year

INITIAL REGULATORY FLEXIBILITY ANALYSIS

INITIAL REGULATORY FLEXIBILITY ANALYSIS

The Regulatory Flexibility Act, as amended in 1996, requires that an Initial Regulatory Flexibility Analysis contain the following elements:

1) a description of the reasons why action by the Agency is being considered;
2) a succinct statement of the objectives of, and legal basis for, the proposed rule;
3) a description of and, where feasible, an estimate of the number of small entities to which the proposed rule will apply;
4) a description of the projected reporting, record keeping and other compliance requirements of the proposed rule, including an estimate of the classes of small entities that will be subject to the requirements and the type of professional skills necessary for preparation of the report or record; and
5) an identification, to the extent practicable, of all relevant Federal rules that may duplicate, overlap or conflict with the proposed rule.

In addition, a regulatory flexibility analysis must contain a description of any significant alternatives to the proposed rule that accomplish the stated objectives of applicable statutes (in this case the OSH Act and Regulatory Flexibility Act) and that minimize any significant economic impact of the proposed rule on small entities.[1]

Reasons for the Proposed Rule

OSHA has a substantial body of evidence pointing to the effectiveness of safety and health programs in reducing occupational deaths, injuries, and illnesses. The Agency has encouraged employers availing themselves of the Consultation Program, OSHA's free consultation service for small employers in high hazard industries, to implement these programs.

[1]The Regulatory Flexibility Act states that a Regulatory Flexibility Analysis need not contain all of the above elements in toto if these elements are presented elsewhere in the documentation and analysis of the rule. The Regulatory Flexibility Analysis should, however, summarize where these elements can be found elsewhere in the rulemaking record.

and has seen dramatic results even in the smallest of these firms. Further, OSHA's well-known Voluntary Protection Programs (VPP), which recognize companies with exemplary safety and health records, also require participants to implement comprehensive safety and health programs. VPP companies routinely achieve injury and illness rates up to 60 percent below those of other firms in their industries. Companies participating in OSHA's Maine 200 Program and in the many other Cooperative Compliance Programs the Agency has implemented in the last 5 years, who also are required to implement safety and health programs, have seen dramatic reductions in injury and illness rates. Lastly, OSHA's enforcement efforts, which have emphasized these programs during inspections at establishments of all sizes and in many different industries in recent years, point overwhelmingly to the effectiveness of the programmatic approach to the management of safety and health in the workplace.

The experience of states and the insurance industry also support safety and health programs as the single most effective tool available to employers to protect their workers and reduce their accident-related costs. Currently, 25 states have implemented mandatory safety and health program requirements either through their state occupational safety or health agencies or workers' compensation systems. OSHA studies of the impacts of these programs show that, for programs covering most firms in the state, job-related injuries and illnesses were 17.8 percent lower five years after the implementation of rules requiring these programs than they were before issuance of the rules. A number of states have programs to encourage the voluntary implementation of safety and health programs among employers. Several states have studied the effectiveness of these programs and found that they reduce workers' compensation costs by 10 to 20 percent per year. The private sector has also played a significant role in encouraging employers to implement safety and health programs. For example, numerous insurance companies provide premium reductions or other incentives for employers who adopt these programs. Many non-governmental safety and standards organizations as well as trade and professional associations encourage and, in many cases, provide assistance to employers to implement safety and health programs. Finally, an OSHA review of "success stories" about

programs implemented by individual employers shows that these program commonly reduce injuries and illnesses by an average of 45 percent and reduce lost worktime injuries and illnesses by 75%.

Legal Basis and Objectives of the Proposed Rule

OSHA's authority to issue this safety and health program rule derives from sections 2(b), 3(8), 6(b), 8(c), 8(g), and 17(k) of the OSH Act. The ultimate purpose of this rule is to reduce injuries, illnesses, and fatalities by ensuring compliance with existing OSHA standards and the General Duty Clause of the Act. The rule will achieve this purpose by requiring safety an health programs to ensure that employers systematically identify and assess workplace hazards so that they can comply with existing OSHA standards and the General Duty Clause of the OSH Act ("Each employer shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm").

The proposed rule would not require employers to eliminate or control hazards they have not previously been required to control. That duty already exists under specific OSHA standards and the General Duty Clause of the Act. What this rule will do is help employers to systematically identify hazards that need to addressed through compliance with those standards and the General Duty Clause.

The Act authorizes the Agency to issue two types of rules: standards and regulations. Preliminarily, OSHA has concluded that this safety and health program rule is a section 8 regulation, rather than a Section 6(b) standard. Standards are normally addressed to specific risks, and require the hazard to be controlled to the extent feasible. This rule is addressed to compliance with existing standards and the General Duty Clause, which require the control of many different kinds of hazards. Further, as a regulation, the rule need not require employers to control hazards to the extent feasible, thus permitting greater regulatory flexibility than if the rule were issued as a standard.

Despite the widespread recognition of the effectiveness of safety and health programs,

and the various mandatory state program requirements and Federal, state, and private sector initiatives intended to encourage the voluntary implementation or safety and health programs by employers, the majority of employers have not to date implemented these programs. As a result, the number of occupational fatalities, injuries, and illnesses remains unacceptably high.

Description of the Number of Small Entities

The proposed rule would cover 4.16 million establishments operated by 3.93 million small entities, as defined by SBA. About 72.7 percent of the total number of affected establishments are operated by small entities. The proposed rule covers 4.08 million establishments operated by 3.93 million very small entities, defined for analytical purposes as entities employing fewer than 20 workers. Almost 71.3 percent of the affected establishments are operated by very small firms.

Description of Proposed Reporting, Recordkeeping and Other Compliance Requirements

Proposed Compliance Requirements

Because the proposed regulation applies to all employers in the general industry and maritime sectors, OSHA has developed a performance oriented rule. The proposed rule would require that employers: establish responsibilities for managing safety and health at the workplace; provide employees with opportunities for participation in establishing, implementing, and evaluating the workplace safety and health program; undertake the systematic identification and assessment of workplace hazards to which an employee is reasonably likely to be exposed; provide for the systematic control of hazards; ensure that each employee covered by the rule is provided with information and training about the workplace safety and health program; evaluate the workplace safety and health program to ensure that it is effective and appropriate to workplace conditions; and ensure that appropriate information about hazards, controls, safety and health rules, and emergency procedures is provided to all employers at multi-employer workplaces. (These proposed requirements are also discussed in greater detail in the Preamble and in the Cost Chapter of the Preliminary Economic Analysis.)

Each of these requirements is described in the proposed rule in a plain language, question

and answer format. Each of the basic requirements is applicable to all kinds of employers. Each provision is written broadly to allow employers flexibility in its application so that the compliance can differ in small and large firms, and in low and high hazard firms. In order to ensure that this flexible performance oriented approach is maintained in the actual enforcement of the rule, OSHA has developed an enforcement policy designed to assure that penalties under this rule are limited to systematic failures to identify and control significant hazards. Penalties will not be given for situations in which the employer has failed to carry out purely procedural requirements, but has nevertheless successfully controlled hazards. OSHA's proposed enforcement policy will be published at the time the rule is proposed as part of the Preamble to the rule or as a separate document.

Recordkeeping Requirements

The proposed regulation has only one recordkeeping requirement. Under the rule, employers would be required to document the results of the hazard identification and assessment process and the employer's plan for controlling covered hazards. Employers with fewer than 10 employees would be exempt from this requirement, but other small entities would need to fulfil it. This is the only formal documentation requirement in the rule.

There are other requirements involving information transfer that would result in burdens under the Paperwork Reduction Act. These include the following requirements:

- Employers must develop a way for employees to promptly report job-related fatalities, injuries, illnesses, incidents, hazards, and make recommendations about appropriate ways to control those hazards;
- Employers must revise their programs in a timely manner as necessary to correct any significant deficiencies revealed by the program evaluation; and
- Host employers must provide information about hazards, controls, health and safety rules, and emergency procedures to all other employers (contract employers) at the workplace.

In estimating the cost of creating and maintaining records of the results of hazard

identification and assessment activities. OSHA used the average national wage rate of clerical personnel adjusted to account for fringe benefits. All recordkeeping requirements included in the proposed rule could be performed by existing staff in any of the covered industries. A detailed description of the proposed recordkeeping requirements appears in the Introduction and the Cost chapters of this analysis.

Burdens Imposed by the Regulatory Requirements

OSHA examines the costs imposed by the rule's requirements in greater detail in the Cost chapter of the economic analysis. In stakeholder meetings with small entities, OSHA presented preliminary estimates of the burdens imposed by the regulatory draft in circulation at that time. Small entity stakeholders raised several concerns with respect to OSHA's estimates of the potential burdens and costs of the rule. First, many employers expressed concern that the initial burden estimates presented in those meetings were too low. Specifically, some stakeholders with programs thought the burden estimates were low compared to their own experience in setting up programs. OSHA believes that most of those making this objection had programs much more extensive than those that would be required by the proposed regulation. OSHA also believes that some stakeholders attributed to the program rule the costs of controlling hazards that should rightly be attributed to existing standards and existing General Duty Clause requirements. OSHA has included in this economic analysis estimates of the costs of such controls for informational purposes, so that employers can compare these costs of compliance with existing safety and health requirements and the resulting benefits in terms of reductions in injuries, illnesses, and fatalities with their own experience.

Some small entity stakeholders felt that OSHA's burden estimates failed to recognize the difficulties and educational effort required of employers who previously had put little effort into safety and health. OSHA believes that improved outreach efforts, and the long phase-in period for compliance with the rule, will aid employers inexperienced in safety and health to comply with the rule with minimum burdens. Finally, some stakeholders expressed concern that OSHA had not adequately considered the problems of multi-employer workplaces. OSHA's cost

estimates now include estimates for costs of this program element, and recognize that most small firms will incur such costs when they use temporary agencies or subcontractors.

Federal and State Rules That May Duplicate, Overlap or Conflict with the Proposed Rule

There are no existing Federal regulations requiring safety and health programs for employers in the General Industry or Maritime sectors. OSHA published voluntary guidelines, the Safety and Health Program Management Guidelines, in 1989 to assist employers voluntarily to establish and maintain worker protection programs. As a result of OSHA consultation programs alone, thousands of small employers have established programs based on these guidelines. Small employers who have already established effective programs using these guidelines will be able to make use of the "grandfather clause" in the proposed regulation to continue using the programs they have already established.

Twelve State-Plan States have some form of safety and health program requirement. These regulatory requirements will be allowed to continue if they are judged by OSHA to be at least as effective as the Federal regulation. OSHA estimates that most employers who have established programs as a result of requirements in State-Plan States will find that their States will be able to maintain their programs unchanged because their State requirements are at least as effective as the Federal OSHA regulation. In addition, 13 states that are not State-Plan States require safety and health programs for at least some employers. These requirements would be pre-empted by the Federal regulation to the extent that they are safety and health regulations. To the extent that employers have established programs that include all of the program elements of the Federal regulation, these employers could also make use of the "grandfather clause" in the proposed regulation. Even employers whose programs do not include all of the required program elements would find the costs of implementing the proposed OSHA regulation much reduced as compared with the case for employers who have no program at all.

Some small entity stakeholders raised the issue of whether there might be a conflict between the proposed safety and health program regulation and existing OSHA program standards aimed at specific problems, such as the programs required by the process safety

management standard or the hazard communications standard. OSHA sees no conflict between these standards and the proposed safety and health program regulation. The safety and health program regulation provides an overall framework for finding hazards. Once a hazard is identified, compliance with specific standards is the appropriate means of controlling the hazard (assuming it is hazard covered by an existing OSHA standard). The proposed safety and health program regulation is designed to work with rather than displace or conflict with, programs required by existing OSHA standards.

Alternatives to the Proposed Regulation

Regulatory Flexibility Elements Already Incorporated into the Proposed Regulation

OSHA's proposed regulation has incorporated a variety of regulatory flexibility features. First, the proposed regulation is performance oriented and designed to provide all firms with flexibility in how to meet the regulation's core requirements. For example, the core requirement for employee participation states only that employers must provide employees with opportunities to participate in establishing, implementing, and evaluating workplace safety and health programs. Employers have great flexibility in how to establish such systems. Some employers may use formal mechanisms, such as employee complaint boxes and joint employee management committees. Other may find it more effective simply to designate a person who can receive employee reports and hold lunchbox meetings. The choice is up to the employer.

In addition to these general flexibility features, OSHA's proposed regulation has been tailored to recognize the special problems potentially faced by very small employers (those with fewer than 10 employees) in complying with the a new regulation. Although these employers are not exempt from any provision of the rule, the requirements for these employers have been reduced in some instances. For example, the proposed regulation requires employers to establish the responsibilities of managers, supervisors, and employees for managing safety and health at the workplace. Very small employers may choose to carry out these responsibilities themselves without any formal delegation. OSHA has also tailored the proposed rule to very small employers by exempting them from the documentation requirements under the hazard

identification and assessment provision of the proposed rule.

In addition to these reduced compliance requirements, OSHA has also provided very small employers with compliance deadlines that are twice as long as the deadlines for larger employers. For example, very small employers have 18 months to implement the information and training requirements of the proposed rule while larger employers have 9 months.

OSHA will respond to the need expressed by many small business stakeholders for guidance and outreach by providing extensive outreach materials when the rule is published in final form. For example, OSHA may develop a checklist for hazard identification and assessment. OSHA solicits comments on the best ways to focus its outreach efforts and the best means for providing compliance assistance to small entities.

Continuing to Rely Only on Existing OSHA Programs and Policies

Some small entity stakeholders urged OSHA to continue to rely on outreach efforts to encourage employers to adopt safety and health program voluntarily, i.e., to continue to urge employers to voluntarily adopt the Agency's Safety and Health Program Management Guidelines, rather than issuing a regulation. OSHA has made the voluntary adoption of safety and health programs a cornerstone of many of its efforts for years. For example, OSHA's Consultation and Voluntary Protection Programs encourage or require employers to adopt and maintain safety and health programs. The voluntary development of safety and health programs is the centerpiece of its Consultation Program; any firm asking for comprehensive assistance will be provided free assistance in developing its own safety and health program. All VPP participants must have such programs in place to qualify for the program. OSHA has developed incentives for employers to adopt safety and health programs in the form of reduced penalties and in the Maine 200 and other statewide cooperative compliance programs. Despite these efforts, only one-third of establishments surveyed by OSHA reported having a safety and health program, and some of those establishments claiming to have safety and health programs provided no safety and health training of any kind to their employees. Of the establishments reporting that they had safety and health programs, almost half have these programs as a result of State safety

and health program requirements, rather than as a result of the voluntary adoption of such programs. Although the Agency's efforts to encourage the voluntary adoption of safety and health programs, which represents the most sustained and resource-intensive outreach effort OSHA has ever undertaken, has resulted in thousands of employers and hundreds of thousands of employees receiving the benefits of safety and health programs, the majority of employers still have not adopted such programs. At this stage, the additional incentive provided by a regulation is needed if a majority of employers are to adopt safety and health programs. OSHA will continue, and indeed plans to intensify, its outreach efforts in this area. OSHA is not abandoning outreach, or choosing only to rely on this rule, but is instead adding a rule to all of its other efforts to encourage employers to adopt safety and health programs. The Safety and Health Program rule thus supplements the Agency's other efforts--its voluntary guidelines, its VPP and Consultation Programs, its Cooperative Compliance Programs, its penalty policy, its technical assistance and outreach program, its training activities--and brings to bear the only major tool at the Agency's command that has not to date been employed in the effort to encourage employers to adopt these life-saving programs.

Some small entity stakeholders argued that because safety and health programs are cost effective, there should be no need for regulation. Although OSHA agrees that safety and health programs can be cost effective for most small businesses, OSHA does not agree that cost effectiveness represents a sufficient motive for small businesses to implement safety and health programs. There are two major reasons for this.

First, many of the benefits of safety and health programs do not accrue directly to smaller employers. Research has shown (see the Benefits section of the economic analysis) that workers' compensation costs do not, on the average, cover all income losses to injured workers, and do not cover pain and suffering, or certain types of long-term chronic illnesses. In addition, smaller employers typically are experience-rated, so that they do not directly pay a significant share of the costs of workers' compensation claim. This is particularly true of smaller firms with fewer hazards. OMB's guidelines for implementing EO 12866 ask OSHA to develop regulations that

maximize net benefits to all parties, and not just to employers. When a substantial portion of all benefits go to parties other than employers, employers cannot be counted on to implement safety and health programs to the extent that such programs are cost beneficial.

Second, small businesses typically take the very understandable approach of not fixing what isn't perceived to be broken. Because injuries and illnesses are relatively rare events in small firms, and are paid for in part by workers' compensation insurance, many small employers, especially in lower hazard industries, find it easy to neglect safety and health. This does not mean that safety and health programs are not cost effective. Aggregate statistics show that small firms have significant numbers of injuries, and studies show that these injuries can be reduced by safety and health programs. However, because accidents are rare events for an individual small employer, the need for safety and health programs may not come to the attention of busy small business employers as often as is the case for larger employers. As a result, cost effective safety and health programs are less likely to be adopted by employers with few employees. This is unfortunate because, as many sates have recognized, safety and health programs are one of the best ways to lower worker compensation costs for small business over the long run.

Coverage of Very Small Businesses

Very small businesses (i.e., those with fewer than ten employees) constitute 73% of all workplaces but employ only 15% of the workforce. Some small business stakeholders argued that, because small workplaces do not devote resources to safety and health, or because OSHA rarely visits these workplaces, they should not be covered by this regulation. However, data and studies generally indicate that employees in small businesses face risks at least as high as employees in larger businesses. For example, those elements that characterize a safe and healthful workplace, like employee training, exposure monitoring and safety and health programs, are less likely to be present in small compared to larger businesses (Seligman, "Compliance with OSHA Record-keeping Requirements," Am. J. Public Health 78:1218 (1988)). OSHA surveys show that, although a majority of establishments with more than 100 employees have safety and health programs, only a small minority of smaller establishments

have safety and health programs.

Fatality data indicate that employees of small firms are at greater risk than those of larger employers. Although the reliability and validity of occupational safety and health statistical data are often questioned, most professionals would agree that occupational fatality data are more reliable than occupational injury and illness data, principally because fatalities are such serious events that they are more likely than injuries to be reported. OSHA's analysis of the limited amount of work-related fatality data for which employer size-class data are available shows the following: although accounting only for 15% of the total workforce, businesses with fewer than 10 employees accounted for approximately 33% of occupational fatalities in 1994. And, with only 25% of the total workforce, businesses with fewer than 20 employees accounted for 44% of all occupational fatalities (Mendeloff, "Using OSHA Accident Investigations to Study Patterns in Work Fatalities." J. Occup. Med, 32: 1117, 1119 (1990). These data strongly suggest that small businesses are disproportionately hazardous places to work, posing a risk of job-related death to their employees that is significantly greater than the risk posed to workers in larger establishments.

The occupational injury and illness data reported by employers to the BLS in connection with its Annual Survey of Occupational Injuries and Illnesses, however, show lower rates of injuries and illnesses for firms in the smallest size classes than for those in larger classes. Although conclusive proof of underreporting is lacking, many safety and health professionals believe that injuries and illnesses are substantially under-reported by small employers. In an effort to understand why smaller firms might have lower injury and illness incidence rates, the authors of one study found that: 1) occupational fatality rates were highest in the smallest (fewer than 50 employees) businesses; 2) the smallest businesses were least likely to have occupational health services available; and 3) lost workday injuries in several major industry categories are highest (i.e., the injuries are most severe) in the smallest facilities. These authors concluded :

> It is difficult to imagine a set of workplace conditions in small establishments that would lead simultaneously to lower injury rates, higher fatality rates, and equal, or greater,

> injury severity measured by missed worktime, especially since these establishments were less likely to provide injury prevention and safety services (Oleinick et al., 1995).

After considering a number of explanations that might explain this apparent incongruity, these authors rejected them all, except one--underreporting:

> With the rejection of alternative explanations, there is a strong likelihood of underreporting as the explanation, and we estimate that the annual [BLS] survey substantially undercounts injuries in small establishments (Oleinick et al., "Establishment Size and Risk of Occupational Injury," Am. J. Ind. Med., 28(1): 2-3 (1995))

NIOSH reached an essentially identical position: "recent literature comparing Annual Survey data and workers compensation data questions the validity of the estimated rates for small employers obtained through the BLS Annual Survey " (NIOSH comments on OSHA's Proposed Recordkeeping Rule, June 28, 1996, Docket ....., Exh.15-407, p. 2). Thus the apparent discrepancy between the rate of fatalities in the smallest firms and the rates of injuries and illnesses reported for those same firms is likely to be explained not by a true difference in these relative outcomes but by underreporting of injuries and illnesses.

The argument that employees of small businesses are in fact at greater risk from workplace hazards than employees of larger businesses (and that BLS data for small firms do indeed seriously understate injury and illness rates) is further confirmed by a computer analysis of more than 500,000 federal and state safety-inspection records from 1988 through 1992, which was conducted by the Wall Street Journal (Feb. 3, 1994). During the period studied, there were 1.97 deaths per 1,000 workers at workplaces with fewer than 20 employees, compared with just 0.004 deaths per 1,000 workers at workplaces with more than 2,500 workers. Thus, an employee's risk of death was approximately 500 times higher at the smallest as compared with the largest businesses. Similarly, while one in six of all employees at small businesses worked in an area cited for a serious safety violation, only one in 600 did so at large businesses. This means that employees in small businesses are 100 times more likely to be exposed to a serious hazard than those in the largest businesses (Wall Street Journal, February 1994).

In summary, the available data indicate that employees of small businesses have risks at least as great as those of larger businesses. Small business fatality rates are higher, their use of hazard prevention measures is less extensive, and they have more hazards per employee. The only contrary data, the somewhat lower rate of injuries and illnesses reported by BLS for the smallest size classes of employers, are likely to be the result of underreporting.

OSHA examined the costs and benefits of the rule if firms with fewer than 20 employees were exempted. In examining both costs and benefits, OSHA assumed that smaller firms had the same injury, illness and fatality rates as the average for their industries as a whole. As explained above, however, it is likely that small firms, in general, have higher rates than is the case for their industries as a whole. A rule exempting firms with fewer than 20 employees would have **costs of $991 million per year** (as compared with costs of $2.434 billion dollars per year if all firms are included). The costs of hazard control, and the benefits of the rule, both depend on the effectiveness of the rule in reducing injuries and illnesses. OSHA has estimated a range of effectiveness for this purpose. The low end of the range is a 20% reduction in injuries and illness for firms that do not now have safety and health programs, and the high end of the range is a 40% reduction in injuries and illnesses for such firms. Table 1 shows the annual reductions in injuries and illnesses, direct cost savings, and annual reductions in deaths estimated to result from implementation of a rule exempting firms with fewer than 20 employees from coverage.

Table 1. Benefits and Associated Costs of Hazard Control for an Alternative That Would Exempt Firms with Fewer than 20 Employees

Assumed Effectiveness Rate (% Reduction in Injuries, Illnesses and Fatalities)	Annual Reduction in Number of Illnesses and Injuries	Annual Direct Cost Savings Associated with Annual Reduction in Injuries and Illnesses (Dollars per year)	Annual Reduction in Number of Fatalities	Costs of Controlling the Hazards That Would Have Caused These Injuries, Illnesses and Fatalities (Dollars per year)
20% Reduction	391,000	$4,957,000,000	230	$1,863,000,000
30% Reduction	621,000	$7,874,000,000	365	$2,508,000,000
40% Reduction	882,000	$11,178,000,000	514	$3,205,000,000

For informational purposes, OSHA also examined the costs of the rule and the benefits associated with it for firms with fewer than 20 employees, i.e., the costs and benefits these smaller employers would experience from being included in the scope of the rule. Firms with fewer than 20 employees have annualized program-related **costs of $1.434 billion per year**. Table 2 shows the benefits of the rule, and the associated costs of controlling the hazards that account for these benefits, for these firms. As can be seen from the table, the direct cost savings alone, which do not include any monetary value for pain and suffering and do not attach a value to human life, exceed the costs of the rule for small businesses, even if the costs of controlling hazards that firms are already required to control ($700 to $1,173 million per year) are included in the cost estimates.

Table 2. Benefits and Associated Costs of Hazard Control for the Proposed Safety and Health Program Rule for Firms with Fewer than 20 Employees

Assumed Effectiveness Rate (% Reduction in Injuries, Illnesses and Fatalities)	Annual Reduction in Number of Illnesses and Injuries	Annual Direct Cost Savings Associated with Annual Reduction in Injuries and Illnesses (Dollars per year)	Annual Reduction in Number of Fatalities	Costs of Controlling the Hazards That Would Have Caused These Injuries, Illnesses and Fatalities (Dollars per year)
20% Reduction	189,000	$2,396,000,000	186	$700,000,000
30% Reduction	298,000	$3,778,000,000	289	$951,000,000
40% Reduction	418,000	$5,298,000,000	404	$1,173,000,000

In addition to these risk-based reasons for including even the smallest establishments in the scope of this rule, there are legal and public policy reasons for doing so. First, exempting small businesses from the regulation would deprive their employees of equal protection under the law, and neither the Act nor good public policy suggests that these employees should receive less protection than their counterparts in larger businesses. Nothing in the OSH Act or the Regulatory Flexibility Act suggests that employees working in small businesses, any more than employees in larger businesses, should be exposed to significant risks of death when such risks can feasiblely be reduced. This concept of equal protection is firmly embedded in OSHA's statutory mandate. Section 6(b)(5), for example, calls on OSHA to set health standards that assure that "no employee" will suffer material impairment of health or functional capacity. In analogous situations, courts have held that, if the means exist to further reduce a significant health risk to certain workers and it is feasible to do so, then the Agency must either act to protect those workers or explain its reasons for failing to do so (Building and Construction

Trades Dept, AFL-CIO v. Brock, ... (D.C.Cir 1988); and see Public Citizen Health Research Group v. Tyson, 796 F.2d 1479, 1505 (D.C.Cir. 1986)).

Second, with its limited resources, OSHA has had difficulty effectively reaching the millions of very small businesses across the country. Thus, encouraging and ultimately requiring small businesses to establish workplace safety and health programs, which will, over time, assist employers to change workplace culture to make the protection of workers a basic part of good management, is the best way for OSHA to ensure that employees in small business are appropriately protected. This is one of the strategies that OSHA needs to implement to devolve more frontline responsibility for workplace safety and health onto employers and to provide education, compliance assistance, and incentives to help them effectively exercise their responsibility. To the extent that these workplace programs are successfully implemented, employers are more likely to identify and control significant workplace hazards and to implement proactive, rather than merely reactive, policies to protect workers from such hazards. Where OSHA has implemented this strategy, as, for example, in its Consultation program, there has been substantial improvement in workplace safety and health.

Third, the vast majority of stakeholders who participated in OSHA's stakeholder meetings supported the principle of universal coverage, which helps to create a level playing field for all employers in an industry, assures that subcontractors will have safety and health programs that can work with those of their host employers, and assures that the regulation will have its maximum impact in reducing worker compensation costs .

Fourth, according to OSHA's Preliminary Economic Analysis (see Section VII of this preamble), this proposed regulation is economically and technologically feasible for even the smallest employers in general industry and the maritime industries and will not have a significant impact on most small businesses, with only a few exceptions. There is, therefore, no justification under the OSH Act or the Regulatory Flexibility Act to exempt small employers from this rule or to allow them to provide substantially less protection to their employees.

Most stakeholders, including those larger employers who oppose exempting small businesses from coverage by the rule, agreed with OSHA that every effort should be made to ease the compliance burden on small employers. OSHA has done this by writing the proposed rule in plain language and in an easily understood question-and-answer form and by eliminating from the proposed rule any recordkeeping requirement for small employers. In addition, OSHA is providing small employers with twice as much time as larger employers to come into compliance with every requirement of the rule.

Coverage of All Low-Hazard Businesses

Some small entity stakeholders, including small entity stakeholders who believe a safety and health program regulation is appropriate for high-hazard small businesses, stated that OSHA should exempt all businesses in low-hazard industries from the scope of the rule. This alternative is attractive in theory, because it appears to exempt only those employers whose workers are not at risk of serious harm and whose costs of implementing a workplace safety and health program would therefore presumably be high relative to the program's benefits. Exempting workplaces in low-hazard industries would also allow OSHA to focus its resources on employees in workplaces in high-hazard industries, who are most in need of protection.

OSHA is still considering this approach and solicits comments on the approach, however, OSHA hasconcerns with such an approach. First, OSHA has found that establishments in low hazard industries pose significant job-related risks to their workers. For example, finance, real estate, and insurance, an industry division consisting largely of office employees, and which has the lowest injury rate of any industry division, still has an injury rate of 2.4% annually. This means that a typical employee in these office environments has a 66 percent chance of incurring at least one serious occupational injury over a 45 year working life. Thus there is significant risk in these workplaces. Further, this risk can be reduced with safety and health programs, which are generally much less expensive to implement in offices than they are in higher risk establishments.

The data relied on to identify industries as low hazard do so at least in part by seriously

underestimating the number of chronic occupational illnesses caused by exposure to health hazards that do not create immediate, acute health effects. BLS has recognized this serious flaw, which affects large business as well as small business injury and illness statistics, in its industry-by-industry illness data:

> Some conditions (e.g., long-term, latent illnesses caused by exposure to carcinogens) often are difficult to relate to the workplace and are not adequately recognized and reported. These long-term latent illnesses are believed to be understated in the survey's illness measures. The overwhelming majority of the reported new illnesses are those which are easier to directly relate to workplace activity (e.g., contact dermatitis or carpal tunnel syndrome. **[BLS]**

Reliance on such data, therefore, would in many cases exempt workplaces that appear to be relatively safe only because longer-term health risks have not been accounted for. In addition, because OSHA has regulated health hazards much less extensively than safety hazards, this approach would leave workers exposed to health hazards in these workplaces even more poorly protected.

Third, the Standard Industrial Classification ("SIC") system, which is the current industry-by-industry classification system that BLS uses to identify the various industries in its Annual Survey of Occupational Injuries and Illnesses, is not appropriately designed for these purposes. SICs were established for the systematic gathering of economic data, not for identifying or assessing safety and health risks. As a result, SICs do not take safety and health issues into account in delineating industries. With this in mind, the court said, in the Lockout/Tagout decision, that there was "no reason" why OSHA should be concerned with the SIC data for purposes of distinguishing high-risk from low-risk workplaces, because these data are "essentially irrelevant to its [OSHA's] task." (37 F.3d at 670). Moreover, SIC designations reflect only the primary work activity at a workplace, not secondary or other work activities, which may expose employees to quite different hazards and levels of risk. Thus, SIC classifications cannot account for high-hazard workplaces in low-hazard SICs or low-hazard workplaces in high-hazard SICs. This approach, therefore, will always be either under-inclusive

or over-inclusive, depending on the particular case. Consequently, SIC classifications are only crude indicators of differences in inter-industry risk.

Fourth, recent demographic changes, technological developments, and shifts in production have changed the traditional pattern of low- vs. high-hazard industries. A number of industries that were previously considered low hazard, such as office work and retail sales, now have fatality rates that rival or exceed those of many manufacturing industries, a sector traditionally considered high hazard. For example, some retail trade industries (SICs 54 and 55) and SIC 75 (auto repair services) had higher fatality rates than manufacturing in 1997 (BLS CFOI data, 1998).

Finally, reliance on BLS industry data to exempt industries from the scope of this regulation would lead to an administrative burden for employers, employees, and the Agency, because the hazard ranking of industries often changes from year to year. BLS data on repeated trauma disorders, for example, indicate that the highest risk industries changed every year between 1987 and 1993. Such shifts in hazard ranking would mean that industries and employers might be exempt from complying with the regulation one year and be included in the following year, creating uncertainty and administrative difficulties for employers and OSHA alike.

OSHA examined the costs and benefits of a regulatory alternative that would exempt firms in low hazard industries, defined as the one-third of all covered industries with annual injury and illness rates of less than 4.7 per 100 full time equivalent (FTE) workers. In examining both costs and benefits, OSHA assumed that smaller firms had the same injury, illness and fatality rates as the average for their industries as a whole, although, as discussed above, smaller firms are likely to have higher rates. OSHA's analysis estimated that the costs of a regulatory alternative that would exempt firms in low hazard industries would be **$1.959 billion per year.** Table 3 shows the benefits and associated hazard control costs of such an alternative.

Table 3. Benefits and Associated Costs of Hazard Control for An Alternative to the Proposed Safety and Health Program Rule Exempting Firms in Low Hazard Industries

Assumed Effectiveness Rate (% Reduction in Injuries, Illnesses and Fatalities)	Annual Reduction in Number of Illnesses and Injuries	Annual Direct Cost Savings Associated with Annual Reduction in Injuries and Illnesses (Dollars per year)	Annual Reduction in Number of Fatalities	Costs of Controlling the Hazards That Would Have Caused These Injuries, Illnesses and Fatalities (Dollars per year)
20% Reduction	505,000	$6,402,000,000	340	$2,359,000,000
30% Reduction	801,000	$10,156,000,000	531	$3,207,000,000
40% Reduction	1,135,000	$14,385,000,000	747	$4,097,000,000

For informational purposes, OSHA also examined the costs and benefits of the rule for firms in low hazard industries, as defined above. Firms in low hazard industries have annualized costs of $475 million per year for the rule. The costs of hazard control, and the benefits of the rule, both depend on the effectiveness of the rule in reducing injuries and illnesses. Table 4 shows the benefits of the rule, and the associated costs of controlling the hazards that account for these benefits, for these firms. As can be seen from the table, the direct cost savings alone, which do not include any monetary value for pain and suffering and do not attach a value to human life, exceed the costs of the rule for small businesses, even if the costs of controlling hazards that firms are already required to control ($204 to $281 million per year) are included in the cost estimates.

Table 4. Benefits and Associated Costs of Hazard Control for the Proposed Safety and Health Program Rule for Firms in Low Hazard Industries

Assumed Effectiveness Rate (% Reduction in Injuries, Illnesses and Fatalities)	Annual Reduction in Number of Illnesses and Injuries	Annual Direct Cost Savings Associated with Annual Reduction in Injuries and Illnesses (Dollars per year)	Annual Reduction in Number of Fatalities	**Costs of Controlling the Hazards That Would Have Caused These Injuries, Illnesses and Fatalities (Dollars per year)**
20% Reduction	75,000	$951,000,000	76	$204,000,000
30% Reduction	118,000	$1,496,000,000	123	$251,000,000
40% Reduction	165,000	$2,091,000,000	171	$281,000,000

A slightly different alternative that some stakeholders have urged OSHA to adopt would exempt establishments in SIC codes that have less than the national average rate of injuries. This approach, however, raises several problems. First, it is workable only for relatively large establishments. Only large establishments (at least 500 or more employees) have enough employees for an injury rate in any given year to have any real statistical meaning. For smaller firms, as workers' compensation underwriters recognize, the annual injury rate is not useful or meaningful for predictive purposes. Thus most small businesses would not be able to take advantage of such an approach. Even for large establishments, a below-average injury rate may indicate only that the firm has fewer hazardous activities that other firms in its SIC code. For example, one plumbing equipment establishment may have a lower injury rate not because it has a good safety and health program, but simply because it employs a large sales staff, who have lower injury rates than production workers, in the same establishment. Workers' compensation underwriters recognize this problem and require much more information on such things as each

worker's occupational classification before attempting to assess a firm's overall safety performance or its level of risk. OSHA does not believe that a below-average injury rate, by itself, even in large establishments should be taken as evidence of low risk or a strong safety and health program.

Based on this reasoning, OSHA has rejected this alternative. The Agency preliminarily concludes that exempting the so-called low-hazard industries or firms with below average injury rates would not provide employees in the establishments in these industries with the protections required by the Act.

Coverage of Small Businesses in Low Hazard Industries.

Some small business stakeholders urged OSHA to consider exempting small businesses in low hazard industries from the coverage by the rule. OSHA is considering this option and solicit comments on the option. OSHA has several concerns with this option. First, small businesses do not involve lower risk than larger businesses whether they are in low hazard industries or not. Second, low hazard industries still have workplaces that pose significant risk to their employees and that significant risk can be reduced through the use of safety and health programs. Finally, small businesses in low hazard industries have relatively low compliance costs. Small firms in low hazard industries not only do not have economic or technological feasibility problems, they also have no significant impacts based on the results of the screening analysis for small and very small entities. Thus employees in these firms are exposed to significant risk, their employers will not experience significant economic impacts, and these firms can reduce these risks in a feasible way, i.e., through the implementation of safety and health programs.

OSHA examined the costs and benefits of a regulatory alternative that would exempt firms with fewer than 20 employees in low hazard industries, defined as the one-third of all covered industries with injury and illness rates of less than 4.7 per 100 full time equivalent workers. In examining both costs and benefits, OSHA assumed that smaller firms had the same injury, illness and fatality rates as the average for their industries as a whole, although, as

discussed above, these firms are likely to have higher rates. A rule exempting small firms in low hazard industries would have **annualized costs of $2.036 billion per year** for the rule. The costs of hazard control, and the benefits of the rule, both depend on the effectiveness of the rule in reducing injuries and illnesses. OSHA has estimated a range of effectiveness for this purpose. The low end of the range is a 20% reduction in injuries and illness for firms that do not now have safety and health programs, and the high end of the range is a 40% reduction in injuries and illnesses for such firms. Table 5 shows the annual reductions in injuries and illnesses, direct cost savings, and annual reductions in deaths estimated to result from implementation of a rule exempting low hazard firms with fewer than 20 employees from coverage.

Table 5. Benefits and Associated Costs of Hazard Control for an Alternative to the Proposed Safety and Health Program Rule Exempting Firms with Less than 20 Employees in Low Hazard Industries

Assumed Effectiveness Rate (% Reduction in Injuries, Illnesses and Fatalities)	Annual Reduction in Number of Illnesses and Injuries	Annual Direct Cost Savings Associated with Annual Reduction in Injuries and Illnesses (Dollars per year)	Annual Reduction in Number of Fatalities	Costs of Controlling the Hazards That Would Have Caused These Injuries, Illnesses and Fatalities (Dollars per year)
20% Reduction	532,000	$6,745,000,000	374	$2,474,000,000
30% Reduction	846,000	$10,726,000,000	581	$3,347,000,000
40% Reduction	1,198,000	$15,183,000,000	747	$4,244,000,000

To clarify the effect of including small firms in low hazard industries, OSHA examined the costs and benefits of the rule for firms with fewer than 20 employees in low hazard industries, defined as the one-third of all covered industries with injury and illness rates of less

than 4.7 per 100 workers. Smaller firms in low hazard industries have **annualized costs of $398 million per year** for the rule. Table 6 shows the benefits of the rule, and the associated costs of controlling hazards that account for these benefits, for these firms. As can be seen from the table, the direct cost savings alone, which do not include any monetary value for pain and suffering and do not attach a value to human life, exceed the costs of the rule for small businesses, even if the costs of controlling hazards that firms are already required to control ($88 to $133 million per year) are included in the cost estimates.

Table 6. Benefits and Associated Costs of Hazard Control for the Proposed Safety and Health Program Rule for Firms with Less than 20 Employees in Low Hazard Industries

Assumed Effectiveness Rate (% Reduction in Injuries, Illnesses and Fatalities)	Annual Reduction in Number of Illnesses and Injuries	Annual Direct Cost Savings Associated with Annual Reduction in Injuries and Illnesses (Dollars per year)	Annual Reduction in Number of Fatalities	Costs of Controlling the Hazards That Would Have Caused These Injuries, Illnesses and Fatalities (Dollars per year)
20% Reduction	48,000	$609,000,000	42	$88,000,000
30% Reduction	73,000	$926,000,000	73	$112,000,000
40% Reduction	102,000	$1,293,000,000	123	$133,000,000

DRAFT PROPOSED SAFETY AND HEALTH PROGRAM RULE

29 CFR 1900.1

Docket No. S&H-0027

What is the purpose of this rule? The purpose of this rule is to reduce the number of job-related fatalities, illnesses, and injuries. The rule will accomplish this by requiring employers to establish a workplace safety and health program to ensure compliance with OSHA standards and the General Duty Clause of the Act (Section 5(a)(1)).

(a) Scope.

(a)(1) Who is covered by this rule? All employers covered by the Act, except employers engaged in construction and agriculture, are covered by this rule.

(a)(2) To what hazards does this rule apply? This rule applies to hazards covered by the General Duty Clause and by OSHA standards.

(b) Basic obligation.

(b)(1) What are the employer's basic obligations under the rule? Each employer must set up a safety and health program to manage workplace safety and health to reduce injuries, illnesses and fatalities by systematically achieving compliance with OSHA standards and the General Duty Clause. The program must be appropriate to conditions in the workplace, such as the hazards to which employees are exposed and the number of employees there.

(b)(2) What core elements must the program have? The program must have the following core elements:

(i) Management leadership and employee participation;

(ii) Hazard identification and assessment;

(iii) Hazard prevention and control;

(iv) Information and training; and

(v) Evaluation of program effectiveness.

(b)(3) Does the rule have a grandfather clause? Yes. Employers who have implemented a safety and health program before the effective date of this rule may continue to implement that program if:

(i) The program satisfies the basic obligation for each core element; and

(ii) The employer can demonstrate the effectiveness of any provision of the employer's program that differs from the other requirements included under the core elements of this rule.

(c) Management leadership and employee participation.

(c)(1) Management leadership.

(c)(1)(i) What is the employer's basic obligation? The employer must demonstrate management leadership of the safety and health program.

(c)(1)(ii) What must an employer do to demonstrate management leadership of the program? An

employer must:

(A) Establish the program responsibilities of managers, supervisors, and employees for safety and health in the workplace and hold them accountable for carrying out those responsibilities;

(B) Provide managers, supervisors, and employees with the authority, access to relevant information, training, and resources they need to carry out their safety and health responsibilities; and

(C) Identify at least one manager, supervisor, or employee to receive and respond to reports about workplace safety and health conditions and, where appropriate, to initiate corrective action.

(c)(2) Employee participation.

(c)(2)(i) What is the employer's basic obligation? The employer must provide employees with opportunities for participation in establishing, implementing, and evaluating the program.

(c)(2)(ii) What must the employer do to ensure that employees have opportunities for participation? The employer must:

(A) Regularly communicate with employees about workplace safety and health matters;

(B) Provide employees with access to information relevant to the program;

(C) Provide ways for employees to become involved in hazard identification and assessment, prioritizing hazards, training, and program evaluation;

(D) Establish a way for employees to report job-related fatalities, injuries, illnesses, incidents, and hazards promptly and to make recommendations about appropriate ways to control those hazards; and

(E) Provide prompt responses to such reports and recommendations.

(c)(2)(iii) What must the employer do to safeguard employee participation in the program? The employer must not discourage employees from making reports and recommendations about fatalities, injuries, illnesses, incidents, or hazards in the workplace, or from otherwise participating in the workplace safety and health program.

> **Note:** In carrying out this paragraph (c)(2), the employer must comply with the National Labor Relations Act.

(d) Hazard identification and assessment.

(d)(1) What is the employer's basic obligation? The employer must systematically identify and assess hazards to which employees are exposed and assess compliance with the General Duty Clause and OSHA standards.

(d)(2) What must the employer do to systematically identify and assess hazards and assess compliance? The employer must:

(i) Conduct inspections of the workplace;

(ii) Review safety and health information;

(iii) Evaluate new equipment, materials, and processes for hazards before they are introduced into the workplace; and

(iv) Assess the severity of identified hazards and rank those that cannot be corrected immediately according to their severity.

> **Note:** Some OSHA standards impose additional, more specific requirements for hazard identification and assessment. This rule does not displace those requirements.

(d)(3) How often must the employer carry out the hazard identification and assessment process? The employer must carry it out:

(i) Initially;

(ii) As often thereafter as necessary to ensure compliance with the General Duty Clause and OSHA standards and at least every two years; and

(iii) When safety and health information or a change in workplace conditions indicates that a new or increased hazard may be present.

(d)(4) **When must the employer investigate safety and health events in the workplace?** The employer must investigate each work-related death, serious injury or illness, or incident (near-miss) having the potential to cause death or serious physical harm.

(d)(5) **What records of safety and health program activities must the employer keep?** The employer must keep records of the hazards identified and their assessment and the actions the employer has taken or plans to take to control those hazards.

> **Exemption:** Employers with fewer than 10 employees are exempt from the recordkeeping requirements of this rule.

(e) Hazard prevention and control.

(e)(1) **What is the employer's basic obligation?** The employer's basic obligation is to systematically comply with the hazard prevention and control requirements of the General Duty Clause and OSHA standards.

(e)(2) **If it is not possible for the employer to comply immediately, what must the employer do?** The employer must develop a plan for coming into compliance as promptly as possible, which includes setting priorities and deadlines and tracking progress in controlling hazards.

> **Note:** Any hazard identified by the employer's hazard identification and assessment process that is covered by an OSHA standard or the General Duty Clause must be controlled as required by that standard or that clause, as appropriate.

(f) Information and training.

(f)(1) **What is the employer's basic obligation?** The employer must ensure that:

(i) Each employee is provided with information and training in the safety and health program; and

(ii) Each employee exposed to a hazard is provided with information and training in that hazard.

> **Note:** Some OSHA standards impose additional, more specific requirements for information and training. This rule does not displace those requirements.

(f)(2) **What information and training must the employer provide to exposed employees?** The employer must provide information and training in the following subjects:

(i) The nature of the hazards to which the employee is exposed and how to recognize them;

(ii) What is being done to control these hazards;

(iii) What protective measures the employee must follow to prevent or minimize exposure to these hazards; and

(iv) The provisions of applicable standards.

(f)(3) **When must the employer provide the information and training required by this rule?**
(f)(3)(i) The employer must provide initial information and training as follows:

(A) For current employees, before the compliance date specified in paragraph (i) for this paragraph (f); and

(B) For new employees, before initial assignment to a job involving exposure to a hazard.

Note: The employer is not required to provide initial information and training in any subject in paragraph (f)(2) for which the employer can demonstrate that the employee has already been adequately trained.

(f)(3)(ii) The employer must provide periodic information and training:

(A) As often as necessary to ensure that employees are adequately informed and trained; and

(B) When safety and health information or a change in workplace conditions indicates that a new or increased hazard exists.

(f)(4) **What training must the employer provide to employees who have program responsibilities?** The employer must provide all employees who have program responsibilities with the information and training necessary for them to carry out their safety and health responsibilities.

(g) Evaluation of program effectiveness.

(g)(1) **What is the employer's basic obligation?** The employer's basic obligation is to evaluate the safety and health program to ensure that it is effective and appropriate to workplace conditions.

(g)(2) **How often must the employer evaluate the effectiveness of the program?** The employer must evaluate the effectiveness of the program:

(i) As often as necessary to ensure program effectiveness;

(ii) At least once within the 12 months following the final compliance date specified in paragraph (i); and

(iv) Thereafter at least once every two years.

(g)(3) **When is the employer required to revise the program?** The employer must revise the program in a timely manner to correct deficiencies identified by the program evaluation.

(h) Multi-employer workplaces.

(h)(1) **What are the host employer's responsibilities?** The host employer's responsibilities are to:

(i) Provide information about hazards, controls, safety and health rules, and emergency procedures to all employers at the workplace; and

(ii) Ensure that safety and health responsibilities are assigned as appropriate to other employers at the workplace.

(h)(2) **What are the responsibilities of the contract employer?** The responsibilities of a contract employer are to:

(i) Ensure that the host employer is aware of the hazards associated with the contract employer's work and what the contract employer is doing to address them; and

(ii) Advise the host employer of any previously unidentified hazards that the contract employer identifies at the workplace.

(i) Dates.

(i)(1) **What is the effective date for this rule?** The effective date for this rule is [insert date 90 days from the date of publication in the Federal Register].

(i)(2) **When must the employer be in compliance with the requirements of this rule?**

(i)(2)(i) Employers with fewer than 10 employees must comply with the requirements of paragraphs (c), (f), and (h) by [insert date 18 months after the effective date], and with paragraphs (d), (e), and (g) by [insert date 36 months after the effective date].

(i)(2)(ii) Employers with 10 employees or more must comply with the requirements in paragraphs (c),

(f), and (h) by [insert date 9 months after the effective date], and with paragraphs (d), (e), and (g) by [insert date 18 months after the effective date].

(j) Definitions.

Control means to reduce exposure to hazards in accordance with the General Duty Clause or OSHA standards, including providing appropriate supplemental and/or interim protection, as necessary, to exposed employees. Prevention and elimination are the best forms of control.

Contract employer is an employer who performs work for a host employer at the host employer's workplace. A contract employer does not include an employer who provides incidental services that do not influence the workplace safety and health program, whose employees are only incidentally exposed to hazards at the host employer's workplace (e.g., food and drink services, delivery services, or other supply services).

Employee means all persons who are considered employees under the OSH Act, including temporary, seasonal, and "leased" employees.

Employer means all persons who are considered employers under the OSH Act.

Exposure (exposed) means that an employee in the course of employment is reasonably likely to be subjected to a hazard.

General Duty Clause means the General Duty Clause of the OSH Act, Section 5(a)(1), which states that "[e]ach employer...shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees."

Host employer means an employer who controls conditions at a multi-employer worksite.

Multi-employer worksite means a workplace where there is a host employer and at least one contract employer.

Program means procedures, methods, processes, and practices that are part of the management system at the workplace.

Safety and health information means the establishment's fatality, injury, and illness experience, OSHA 200 logs, workers' compensation claims, nurses' logs, the results of any medical screening/surveillance, employee safety and health complaints and reports, environmental and biological exposure data, information from prior workplace safety and health inspections, Materials Safety Data Sheets (MSDSs), the results of employee symptom surveys, safety manuals and health and safety warnings provided to the employer by equipment manufacturers and chemical suppliers, information about occupational safety and health provided to the employer by trade associations or professional safety or health organizations, and the results of prior accident and incident investigations at the workplace.

Severity means the likelihood of employee exposure, the seriousness of harm associated with the exposure, and the number of exposed employees.

DEC 18 1998

Ex. 1
SHP-027

JAN 4 1999

Mr. Charles N. Jeffress
Assistant Secretary for Occupational Safety and Health
Occupational Safety and Health Administration
Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C., 20210

Dear Mr. Jeffress:

Enclosed for your consideration is the Report of the Small Business Advocacy Review Panel convened for OSHA's draft proposed rule on safety and health programs.

The Panel was convened on October 20, 1998, by OSHA's Small Business Advocacy Chairperson, Marthe Kent, under Section 609(b) of the Regulatory Flexibility Act, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA). In addition to the Chairperson, the Panel consisted of Don Arbuckle, Acting Administrator of the Office of Management and Budget's Office of Information and Regulatory Affairs; Jere W. Glover, Chief Counsel for Advocacy of the Small Business Administration; Joseph Woodward, Associate Solicitor for Occupational Safety and Health; and Robert Burt, the senior OSHA economist for this rule.

Sincerely,

Marthe B. Kent
Panel Chair

Jere W. Glover
Chief Counsel,
Office of Advocacy,
SBA

Don Arbuckle
Acting Administrator,
Office of Information
and Regulatory Affairs,
OMB

Joseph Woodward
Associate Solicitor
for Occupational
Safety and Health,
DOL

Robert E. Burt,
Senior Economist
OSHA

Report of the Small Business Advocacy Review Panel on the Draft Safety and Health Program Rule

1. INTRODUCTION

This report has been developed by the Small Business Advocacy Review Panel consisting of representatives of the Occupational Safety and Health Administration, the Office of Advocacy of the Small Business Administration, and the Office of Information and Regulatory Affairs of the Office of Management and Budget, for the proposed Safety and Health Program rule that OSHA is currently developing. On October 20, 1998, OSHA's Small Business Advocacy Panel Chair convened this panel under section 609(b) of the Regulatory Flexibility Act (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA). Section 609(b) requires the convening of a review panel prior to the publication of any Initial Regulatory Flexibility Analysis that an agency may be required to prepare under the RFA. In addition to the chair, Marthe Kent, the panel consists of the Associate Solicitor for Occupational Safety and Health, Joseph Woodward; the senior OSHA economist for this rule, Robert Burt; the Acting Administrator of the Office of Information and Regulatory Affairs within the Office of Management and Budget, Don Arbuckle; and the Chief Counsel for Advocacy of the Small Business Administration, Jere Glover.

This report provides background information on the proposed rule being developed and the types of small entities that would be subject to the proposed rule, describes the Panel's efforts to obtain the advice and recommendations of representatives of those small entities, summarizes the comments that have been received to date from these representatives, and presents the findings and recommendations of the Panel. The complete written comments of the small entity representatives are attached as Appendix A of this report.

Section 609(b) of the RFA directs the review panel to report on the comments of small entity representatives and make findings about issues related to certain elements of the Initial Regulatory Flexibility Analysis (IRFA), as outlined in Section 603 of the RFA:

- a description of and, where feasible, an estimate of the number of small entities to which the proposed rule will apply;
- a description of the projected reporting, record keeping and other compliance requirements of the proposed rule, including an estimate of the classes of small entities that will be subject to the requirements and the type of professional skills necessary for preparation of the report or record;
- an identification, to the extent practicable, of all relevant Federal rules that may duplicate,

overlap or conflict with the proposed rule; and

- a description of any significant alternatives to the proposed rule that accomplish the stated objectives of applicable statutes (in this case the OSH Act) and that minimize any significant economic impact of the proposed rule on small entities.

This Panel Report will be provided to the Assistant Secretary for OSHA, and OSHA must include this report in the rulemaking record. OSHA may also, as appropriate, modify the proposed rule, the Initial Regulatory Flexibility Analysis, or the decision as to whether an Initial Regulatory Flexibility Analysis is needed, based on the Panel's recommendations.

It is important to note that the Panel's findings and discussions are based on the information about the safety and health program rule available at the time this report was drafted. OSHA is continuing to conduct analyses relevant to the proposed rule, and additional information may be developed or obtained during the remainder of the rule development process. The Panel makes its report while development of the proposed rule is still underway, and its report should be considered in that light. At the same time, the report provides the Panel and OSHA with an opportunity to identify and explore potential ways of shaping the proposed rule to minimize the burden of the rule on small entities while achieving the rule's statutory purposes (i.e., protection of the safety and health of workers on the job). Any options the Panel identifies for reducing the rule's regulatory impact on small entities may require further analysis and/or data collection to ensure that the options are practicable, enforceable, and consistent with the Occupational Safety and Health Act.

Table 1 provides, for background purposes, OSHA's summary of its reasons for developing the draft safety and health program rule.

OSHA's interest in workplace safety and health programs has grown steadily since the early 1980's, when the Agency first developed its Voluntary Protection Program (VPP) to recognize companies in the private sector with outstanding records in the area of worker safety and health. It became apparent to OSHA that many of these worksites, which had achieved injury and illness rates markedly below those of other companies in their industries, were relying on safety and health programs to produce these results. At these worksites, safety and health programs--and thus the identification and control of the safety and health hazards at the workplace--had become self-sustaining systems that were fully integrated into the day-to-day operations of the facility. At these worksites, responsibility for worker safety and health, instead of being relegated to the sidelines or delegated to a single individual, was a fundamental part of the way the company did business, and the safety and health of workers was a value as central to success as producing goods and services or making a fair profit.

OSHA found that its enforcement experience pointed in the same direction: where companies had adopted a systematic, on-going approach to safety and health, the company was able to achieve and sustain an outstanding injury and illness record. These businesses had also been able to reduce their workers' compensation costs, improve employee morale, and increase worksite productivity.

Based on this evidence, OSHA issued the Safety and Health Program Management Guidelines in 1989 (54 FR 3908). These guidelines reflected the best management practices of successful companies, and were intended to help business owners and managers, as well as their employees, implement these programs. The Guidelines were well received, widely followed, and and have been reported to OSHA as being highly effective in helping companies develop safety and health programs of high quality.

OSHA's Consultation Program, which is designed to assist small companies in high-hazard industries to protect the safety and health of their workers, also emphasized the importance of safety and health programs. Thousands of small businesses in all sectors have benefitted from developing such programs with the assistance of OSHA consultants, at no charge to the participating company. Some of these firms have gone on to become SHARP participants. SHARP is a program that provides recognition to small employers with outstanding safety and health programs.

By 1994, 18 of the States also had adopted legislation or issued regulations requiring employers operating businesses in the State (or, in some cases, employers in certain industries or of a certain size) to implement these programs. In still other States, the workers' compensation system requires or encourages covered employers to have such programs. All in all, 32 states have some kind of mandatory or voluntary safety and health program provision. However, only 5 states have requirements that result in safety and health programs for most employers in the state.

Based on employer response to a 1993 survey, OSHA estimates that, at the present time, approximately 30 percent of establishments in the United States have at least a basic safety and health program in place; many of these programs have been set up voluntarily by employers who are proactive about protecting their workers.

Even with OSHA's growing emphasis on safety and health programs, widespread action at the State level, and strong insurance company encouragement, however, many employers have not elected to establish such programs voluntarily. OSHA believes that, should a safety and health program regulation be promulgated, it may fill this gap. In many cases, OSHA believes that employers who have not implemented safety and health programs are simply not aware of the benefits they are likely to reap from doing so; these employers would be helped by compliance assistance materials and other forms of outreach that OSHA plans to disseminate, which may accompany the final rule. In other cases, employers have simply not yet taken the first steps, despite their intentions to do so; OSHA believes that the rulemaking may lead employers to follow through on these intentions.

In developing its draft proposed regulation, OSHA has relied on its substantial experience with safety and health programs and those of the states, private firms, trade associations, and insurance companies during the 1980s and 1990s. OSHA believes that those experiences clearly show that: 1) various entities have required, implemented, or endorsed safety and health programs as an effective way to reduce occupational injuries, illnesses and fatalities; 2) those programs achieve that objective; 3) OSHA's proposal is consistent with these other efforts; and 4) the proposal is also firmly grounded in the OSH Act and in other OSHA policies and experiences. OSHA believes the main lesson to be learned from these experiences is that employers with effective, well-managed safety and health programs achieve a higher level of compliance with OSHA standards and the General Duty Clause and have substantially lower injury, illness and fatality rates and lower workers' compensation costs than is the case for employers without such programs. A safety and health regulation could generalize this experience to all employers and employees in covered workplaces.

2. OSHA's OVERVIEW OF THE PROPOSED SAFETY AND HEALTH PROGRAM RULE

To ensure that the proposed regulation could be applied to all employers and workplaces in the general industry and maritime sectors. OSHA has developed a performance-oriented rule. The proposed rule would require that employers:

- establish responsibilities for managing safety and health at the workplace;
- provide employees with opportunities for participation in establishing, implementing, and evaluating the workplace safety and health program;
- undertake the systematic identification and assessment of workplace hazards covered under the OSH Act and to which an employee is reasonably likely to be exposed;

- provide for the systematic control of those hazards;
- ensure that each employee covered by the rule is provided with information and training about the workplace safety and health program and about the serious hazards to which the employee is exposed;
- evaluate the workplace safety and health program to ensure that it is effective and appropriate to workplace conditions; and
- ensure that appropriate information about hazards, controls, safety and health rules, and emergency procedures is provided to all employers at multi-employer workplaces.

Each of these requirements is described in the proposed rule in a plain language, question and answer format. Each of the basic requirements is applicable to all kinds of employers. Each provision is written broadly to allow employers flexibility in its application so that compliance can differ in small and large firms, in technologically simple and complex environments, and in low and high hazard firms. To ensure that this flexible, performance-oriented approach is maintained in the actual enforcement of the rule, OSHA has developed a draft enforcement policy designed to assure that penalties under this rule are limited to cases where employers systematically fail to identify and control significant hazards. In this context, a systematic failure means that employees are exposed to a pattern of serious hazards that are inadequately controlled or are not controlled. Penalties will not be issued in situations in which the employer has failed to carry out purely procedural requirements but has nevertheless successfully controlled the hazards in the workplace. OSHA generally will not use this safety and health program rule to penalize employers twice for the same offense. OSHA will only penalize the employer for a failure to comply with an underlying requirement in a particular standard or for failure to comply with the General Duty Clause unless the employer has also systematically failed to identify and control significant hazards, in which case penalties may ne issues under this regulation as well.

3. APPLICABLE SMALL ENTITY DEFINITION

To define small entities, OSHA used, to the extent possible, the Small Business Administration (SBA) industry-specific criteria published in 13 CFR Section 121. Because these definitions apply to 4-digit SIC code industries and OSHA did not conduct its analysis at this level of detail, and because some industry classifications use small business definitions requiring data not readily available from general data sources (such as kilowatt hours of electricity produced), OSHA instead used the definitions of small entities for industry divisions, except in cases where there was no division definition; in such cases, OSHA used the industry (2-digit SIC code) definition of small entity.

4. INDUSTRIES THAT MAY BE SUBJECT TO THE PROPOSED REGULATION

The proposed rule would apply to all employers in general industry, shipyard employment, marine terminals, and longshoring operations. In terms of standard industrial classification codes, this means that the standard would apply to certain small entities in SICs 07, agricultural services; 08, forestry; 09, fisheries; 14, oil and gas well drilling, and SICs 20 to 99, with the exception of some operations in SIC 45, railroads, and SIC 44, water transportation (other than longshoring and marine terminals). The proposed rule would also apply to small public entities in State-plan states; approximately 50% of all state and local employees work in State-plan states and would be covered by the proposed rule.

The proposed rule would cover 4.16 million establishments operated by 3.93 million entities defined as small by the SBA. About 72.7 percent of the total number of affected establishments are operated by small entities. The proposed rule covers 4.08 million establishments operated by 3.93 million very small entities, defined for analytical purposes as entities employing fewer than 20 workers. About 71.3 percent of the affected establishments are operated by these very small firms. Entities meeting the SBA small business criteria have 32 million employees and account for 32.24% of all employees within the scope of this rule. Very small entities (i.e., entities with fewer than 20 employees) have 16 million employees and account for 16.52% of all employees within the scope of the rule.

5. SUMMARY OF OSHA's SMALL ENTITY OUTREACH

General Outreach

Even before SBREFA's enactment, the Panel notes that OSHA had conducted extensive outreach about this rule to employer and employee organizations, including organizations that represent small employers, in the affected industries. In October of 1995, OSHA held the first series of stakeholder meetings to discuss preliminary ideas for a safety and health program rule and the significant issues raised by such a rule. This first session was a two-day meeting with more than 50 participants. (Notes summarizing the stakeholder meetings, and a transcript of the first series of meetings, are available in the docket for this rulemaking (Docket S-027).) As a result of the input received at this meeting and the interest expressed by stakeholders, OSHA decided to hold additional meetings at regular intervals during the development of the regulation to assure that all interested persons had an opportunity to participate in the development of the safety and health program rule. For example, during November and December of 1995, OSHA staff met with representatives from organizations such as the National Plumbing, Heating, and Cooling Contractors Association; the Synthetic Organic Chemical Manufacturers Association; the National Association of Manufacturers; the U.S. Chamber of Commerce; the American Petroleum Institute; the Chemical Manufacturers Association; Organization Resources Counselors; the American Farming Association; the American Trucking Association; and the

Industrial Safety Equipment Association. These meetings were informal two-way discussions of the issues and often involved the sharing of information on best practices.

On May 6, 1996, OSHA sent stakeholders a summary of the provisions then under consideration for a program rule for general industry to serve as a focus for discussions at upcoming stakeholders' meetings. By this time, approximately 200 stakeholders had expressed an interest in participating in the development of the rule. In response to this interest, OSHA held four half-day stakeholder meetings on June 5-6, 1996. These meetings provided invaluable input to the Agency in formulating the requirements of the rule and minimizing its impacts on small businesses.

On November 15, 1996, OSHA sent a draft of the regulatory text of the proposed safety and health program rule to stakeholders in preparation for discussions at additional stakeholder meetings. Again, because so many stakeholders expressed interest in participating in the development of the proposal, OSHA scheduled six half-day stakeholder meetings for December 10-12, 1996. At these meetings, OSHA discussed its responses to ideas generated during the earlier stakeholder meetings and described its thinking on the provisions of the rule. Again, the discussion advanced the development of the proposal substantially.

The Panel is keenly aware of the potential impact that a safety and health program regulation may have on small businesses; many small businesses and organizations representing small businesses attended the stakeholder meetings, and staff from the Office of Advocacy of the Small Business Administration were also present at several of the stakeholder meetings. To ensure that small businesses throughout the country had an opportunity to be heard and to tell OSHA about their experiences, OSHA joined with the Small Business Administration to sponsor regional meetings with small business employers in Atlanta, GA, Philadelphia, PA, Columbus, OH, and Portland, OR. These meetings, held in the Summer of 1997, gathered input on the special problems of small businesses and their successes with safety and health programs in anticipation of the formal convening of the panel. Each meeting was attended by 15-25 small business owners, representatives, and trade association representatives. The Panel understands that these meetings were particularly useful to OSHA because the Agency was able to gain insights about small business at the grass roots level. The input also helped OSHA advance the rulemaking to the point where the Panel could commence. Summaries of these stakeholder meetings will be entered into the docket.

In December of 1997, the Massachusetts Coalition on Occupational Safety and Health arranged a meeting to enable OSHA to meet with small business employees to discuss the need for a safety and health program rule and hear about their experiences on the front line. Hearing from workers from small firms provided a unique perspective on the methods used by small business employers to identify hazards as well as the pressures often faced by small business and their employees.

The stakeholder meetings featured many frank and open exchanges of opinion, and written summaries have been entered into the docket for most of these meetings. For example, some stakeholders expressed support for a rule, while others opposed a regulatory approach. Similarly, some stakeholders favored the inclusion of all small business within the scope of the rule, while others felt that some exemption of small businesses would be appropriate. Two critical issues at these stakeholder meetings on which there was wide agreement were the importance of a consistent and reasonable enforcement policy and of good outreach programs.

The SBREFA Panel

On October 20, 1998, the OSHA SBREFA Panel chair convened the Panel for this rulemaking. The Panel provided small entity representatives with initial drafts of the rule, a summary of the rule, the Initial Regulatory Flexibility Analysis, a summary of the benefits and costs of the rule as it affected firms in the small entity representative's industry, OSHA's draft enforcement policy for the rule, and a list of issues of interest to panel members. The Panel held teleconferences with the SERs on November 12th and 13th, in which most of the small entity representatives participated and which allowed for interactive discussion. After these teleconferences, the Panel received the written comments of small entity representatives; these comments, and the Panel's responses to them, form the principal basis for the Panel's report.

6. SMALL ENTITY REPRESENTATIVES

In consultation with the Office of Advocacy of the Small Business Administration, OSHA invited 18 small entity representatives (SERs) to participate in the panel process. Table 1 shows the names, affiliations, and industries of the SERs that chose to participate in the process, and indicates whether a particular SER submitted written comments. At least 5 of the SERS were participants in either OSHA's VPP or SHARP programs.

Table 1. Small Entity Representatives Participating in the Panel Process

Name(s)	Affiliation	Industry (SIC Number in parentheses)	Written Comments Provided
Nancy Klim	D&E Industries, Inc.	Steel Foundries (SIC 3325)	No
Scott Rankin	Vulcan Spring And Manufacturing Co.	Reconstituted Wood Products (SIC 2493)	Yes
Clyde Stryker	Spirit Communications	Computer Systems (SIC 5045)	No
Sam Brooks	S. Brooks and Associates	Temporary Services (SIC 7363)	Yes
Andy Hathaway	Jones Stevedoring	Stevedoring (SIC 4491)	No
Laurie Anderson, Kenneth Schmidt	Anchor Manufacturing	Printing Equipment Cleaners (SIC 2893)	Yes
Steve Watkins	Boda Manufacturing	Power Generators (SIC 3621)	Yes
Steve Hays	G.H. Stenner Company, Inc.	Chemical Control Pumps (SIC 3589)	No
Frank Copple	T&G Industrial Equipment Inc.	Wholesale Paint Spraybooths, Conveyors, Dryers and Ovens (SIC 5084)	Yes
Mark Leguillon	Shinco Silicones Inc.	Chemicals (SIC 28)	Yes
Brian Landon	Landon's Carwash, Laundry, and Paint Touch Up	Carwash and Other Services (SICs 72 and 75)	Yes
Jim Balmain	Smith's Bakery	Retail Bakery (SIC	Yes
Katherine Gekker	The Huffman Press	Printing (SIC 27)	Yes

Mike Fagel	Aurora Packing Company	Food Products (SIC 20)	No
Ron Lyons	Stewart Brothers Paint Company	Paints (SIC 2851)	Yes
Peter Myer	Sequins International	Sequins (SIC 23)	No
Kevin Adkins	City of Goldsboro	Municipality	No

7. Summary of SER Input

This summary reflects both the oral comments expressed by the SERs in two teleconferences and the written views submitted by them to the Panel. The complete text of the written comments has been provided as Appendix A to this document, and will be submitted to the docket as part of this report.

Costs and Impacts

Total Costs

Almost all of the SERs felt that the costs of compliance projected by OSHA were underestimated. Several stated that OSHA's costs might well be underestimated by a factor of ten to twenty. Some SERs provided estimates of the man-hours or costs the proposed rule would require to implement in their firms. Mr. Lyons estimated that program setup would require 72 to 96 hours to comply with the core elements of the rule and $18,000 to $20,000 to pay for hazard control. Mr. Watkins estimated that his firm had spent 300 man-hours developing and implementing its existing safety and health plan and had incurred hazard control costs of approximately $5,000. Mr. Watkins estimated that the annualized costs for a 6- to 10-person firm in his industry would be approximately $1,350 per year. Mr. Watkins felt that OSHA's estimate of 1 to 3 hazards discovered in the first year was in line with his firm's experience, but that the hazards had been much more expensive to control than OSHA estimated. Mr. Copple estimated that the program would cost around $1,000 to set up for a firm with fewer than 10 persons. Mr. Leguillion estimated that his firm's program had required 180 hours to establish and $1,000 for hazard control.

Several SERs believe that the costs for certain specific elements, in particular, were underestimated (see discussion below). Some SERs with fewer than ten employees also felt that OSHA had failed to recognize the costs of recordkeeping for facilities such as theirs. These SERs felt that, even though the draft does not specifically require a written program, they would need to have a written program to demonstrate compliance during an inspection. Some SERs also emphasized that training costs had been underestimated because all of the training required by existing OSHA requirements would far exceed OSHA's training cost estimates. Mr. Brooks

stated that OSHA had failed to account for lost labor when it estimated training costs.

Training

Many SERs were particularly concerned with training costs. One SER has found that " it is the training that takes time, effort, and costs." Another pointed out that his program required 55 hours of employee training per employee per year, and felt that small firms would not have the resources for this kind of effort. Mr. Landon noted that the many hats worn by employees in very small businesses would mean that a lot of training would be required per employee. Mr. Brooks, an SER in the temporary employment business, emphasized the special training problems of temporary employees, who would need to work in many different work sites.

Special Costs for Small Businesses

Some SERs also believe that OSHA has not adequately considered that almost all of the work in setting up the program would need to be performed by the manager of a small firm, whose time has a special value because the manager would be unable to work on the fundamental business of the small firm while he or she was setting up the program. Some SERs felt that OSHA had generally not appropriately accounted for the opportunity costs of employees' (as well as the manager's) time. Some SERs questioned whether OSHA's belief that clerical time would be used to carry out some program-related activities was accurate, and expressed concern that, in small businesses, the manager's time would be needed instead.

Cost of Outside Assistance

Many SERs felt that small businesses would need consultants in order to implement their programs and that OSHA had not fully accounted for such costs. For example, Mr. Lyons felt that a consultant costing $4,000 to $5,000 would be necessary to help a firm like his set up this program. Mr. Balmain estimated the necessary consulting costs at approximately $3,000. Another SER reported using a program that cost $2,500 and provided the buyer with two workplace inspections and 6 employee seminars per year. This SER found this program particularly useful because the training was industry specific. On the other hand, Mr. Copple didn't think that his firm would need outside consultants to achieve compliance with the rule. All of the SERs whose programs had been established with the aid of OSHA or state consultation programs felt that this assisstance had been essential in setting up their programs. Most SERs felt that some form of outside assistance would be necessary, but hoped that OSHA, industry associations, or states could provide the necessary assistance.

Cost Pass-Through

In addition to feeling that costs were higher than OSHA had estimated, many SERs felt that they would be unlikely to be able to pass on their costs to consumers. One SER pointed out that prices rise and fall, and stated that a rise in price would simply result in a loss of business. Another SER said it is the big guy and not the little guy that can absorb costs. In the view of most SERs, competition with larger businesses and the overall competitive framework of their industries would prevent pass-through from happening.

Benefits as an Offset to Costs

Some SERs pointed out, however, that the benefits from the program would serve to offset the costs. Mr. Watkins stated that his program had not only improved safety and health but also had resulted in improvements in productivity and operations. One SER argued that costs should not be a concern where employee safety is at stake.

Benefits and Effectiveness of the Rule

Some SERs stated that the benefits of the rule would be low for smaller firms. Mr. Landon pointed out that, based on BLS data, businesses with fewer than ten employees in industries other than agriculture and construction had injury rates of 1.9 per 100 fulltime workers, as compared to 7.5 per 100 fulltime workers for private industry overall. Mr. Landon also pointed out that very small businesses have employers who work alongside their employees, share the same tasks, and have strong personal relationships with their employees that contribute to health and safety. Ms. Gekker also pointed out that, as a small business manager, she walks the floor of her company every day. She also stated that none of the four serious accidents that had occurred in her business would have been prevented by this rule. Mr. Brooks felt that he had seen no measurable results from his existing safety and health program. Mr. Landon, as well as several other SERs, argued that the rule would accomplish little because most small businesses lack the training to identify and mitigate hazards. Only education, consultation, and outreach could in fact affect small businesses, in the opinion of these SERs. Ms. Gekker felt that there was no serious safety and health problem to be addressed in many small businesses. On the other hand, some SERs reported that they had achieved significant benefits from their own safety and health programs. One SER reported cutting his accident and illness rate by 79% as a result of his program. Another SER reported increasing his firm's productivity by 63% and having gone for two years without an accident.

Litigation and Labor/Management Relations

Mr. Balmain was concerned that OSHA had omitted the costs of, and problems potentially resulting from, litigation, liability and labor/management issues. Mr. Balmain argued that the draft rule would be used by plaintiffs to establish a "standard of care" and would be used by unions and employees to "harass, threaten, sue, organize, and/or extort cash from employers." Mr. Balmain was also concerned that employees might cite the rule and the absence of adequate training in "wrongful discharge" and other suits against their employers.

Number of Small Entities

In response to a request for comment on this topic, Ms. Gekker stated that there were 54,000 companies classified as commercial printing establishments and that approximately 80% of these employ 20 or fewer employees. No other SER commented on this topic.

Description of Projected Requirements and the Expertise Required to Meet Them

Clarity of the Rule

Many SERs found the rule clear. However, even some of those who found the rule clear were concerned that the rule's performance language was "open to many interpretations" (Mr. Lyons). Other SERs were concerned about the language of the rule, however. For example, Mr. Landon found the language of the rule "vague" and the implications for enforcement "troubling and scary." Mr. Balmain referred to the rule as being full of "weasel words" and gave as examples of unclear provisions the requirement to demonstrate the effectiveness of existing programs and the requirement to "systematically identify and assess hazards." Mr. Balmain concluded that the rule could not be clarified to eliminate misunderstandings: "even if the final rule...went on for a hundred pages, there still would be ambiguities on every page." Another SER asked how the term "near miss" was to be defined. Some SERs argued that cross-references to other rules and laws are confusing for small employers, and that the rule itself should provide explanations rather than cross-references to National Labor Relations Board (NLRB) requirements, the General Duty Clause, and other OSHA standards. Many SERs felt that the General Duty Clause was a key to understanding the requirements of the rule but felt that most small businesses would have no idea what the General Duty Clause required. Some SERs were unclear on the relationship between the requirements of the safety and health program and other OSHA requirements, particularly the requirements of other program rules such as bloodborne pathogens and hazard communication.

Need for Special Expertise

Almost all SERs felt that outside expertise would be necessary to achieve compliance, but some felt the program could be implemented without outside assistance. Ms. Gekker stated that " most small business owners have neither the background or the skill to develop a comprehensive safety and health plan." She supported this point by recalling the difficulties and assistance she had needed to implement an OSHA-required hazard communication program. All SERs that imlemented their program with the assistance of OSHA's (free) consultation service or its equivalent felt that such assistance would be essential to any small business trying to implement the rule.

Value of Recordkeeping Exemption

Some SERs also felt that the recordkeeping exemption would serve no useful purpose because small entities with fewer than ten employees would feel the need to keep records for compliance purposes anyway.

Clerical Time

Some SERs questioned whether OSHA's belief that clerical time would be used to carry out some program-related activities was accurate, and expressed concern that the manager's time would be needed instead.

Duplicative and Overlapping Rules

Some SERs wondered how this rule might overlap with existing OSHA program requirements, such as the bloodborne pathogens rule. Mr. Balmain argued that everything important in the rule was already required by the General Duty Clause and therefore the rule was unnecessary. Mr. Balmain also questioned how employee participation would interact with NLRB requirements and how industry associations could provide adequate support without being subject to the Sherman Anti-Trust Act. One SER felt that health and safety was already adequately covered by the overlapping combination of State OSHA rules, EPA rules, local fire department rules, and the county's hazardous materials program. One SER felt that there would be an overlap between the rule and state workers' compensation rules.

Regulatory Alternatives

Nonregulatory Approaches Preferred

Many, if not most, SERs felt that a rule would neither be a useful nor necessary way of implementing safety and health programs. Several SERs pointed out that OSHA's limited enforcement resources would be inadequate to enforce the rule in small businesses. SERs suggested a variety of nonregulatory approaches. Many SERs who had made use of OSHA's consultation services had high praise for that program. They urged that OSHA publicize and expand this program as an alternative to issuing a safety and health program rule. Some SERs urged OSHA to make more use of industry associations and the resources of these associations. For example, Mr. Rankin urged a general shift to consultation through the use of enforcement officers to provide consultation, with no fines for violations that the employer corrects within a reasonable time, and increased cooperation between industry association consultation services and OSHA consultation services.

Testing the Rule on a Subpopulation

Mr. Balmain suggested that the rule should first be tested on a sample population of employers to see if it performs as OSHA says it will. If it does, he suggested that OSHA then promulgate it more widely. In discussion, the possibility of trying the rule in a single industry sector as a pilot project was also suggested.

Exemptions to Coverage of the Rule

If it is decided to issue a rule, SERs suggested a variety of exemptions to the rule's coverage. Mr. Landon believes that firms with fewer than 10 employees have lower injury rates and higher costs and should therefore be exempted from the rule on these grounds. Mr. Balmain urged OSHA to consider exempting either all firms in low hazard industries or all small businesses in low hazard industries. Some SERs suggested an exemption for firms that were participants in the VPP or SHARP programs. Ms. Gekker pointed out that the nature of the hazards in an industry may change over time. In her industry, commercial printing, work has

shifted from mechanical to computer methods, and even the remaining heavy press equipment is safer because it is computer controlled. Other SERs suggested establishment-specific approaches to exemption. For example, Mr. Schmidt suggested that firms with outstanding records should be exempted from the rule. Mr. Schmidt felt that outstanding firms already have a culture in place which emphasizes safety and health. On the other hand, Mr. Lyons argued that firms with good records should not be exempted from the rule because "safety and health are a day to day function of all business and should remain that way."

Mr. Copple recommended that the recordkeeping exemptions for firms with fewer than 10 persons should apply only to firms that both had fewer than 10 employees and were in low hazard industries.

Alternatives with Respect to Enforcement

Some SERs also offered suggestions with respect to the Agency's enforcement policy. Mr. Copple and Mr. Leguillon suggested that there should be no penalties if the employer corrected the problem within some time limit. Mr. Copple suggested that the rule be enforced entirely at the State level. Mr. Copple felt that the enforcement policy would be less confusing if it simply stated "what...the result [would be] if an employer does not comply." Some SERs felt the enforcement policy should be part of the rule. Many SERs felt that OSHA must carefully train its compliance officers in its new approach and new enforcement policy. Some SERs remain concerned about the possibility of "double jeopardy," i.e., that the rule will result in two penalties for the same violation.

Importance of Outreach

Most SERs felt that a rule could only work in association with a strong outreach effort, with industry-specific and even firm-specific aid on how to implement the program. Several SERs felt that training videos and/or online help were an essential part of any outreach effort.

8. Panel Discussions and Recommendations

Costs and Impacts

Underestimation of Costs

The Panel is concerned that many SERs felt that OSHA had underestimated costs. Some suggested that costs had been underestimated by a factor of ten to twenty or more. The Panel finds that OSHA appears to have underestimated the costs of the rule. The Panel recommends that OSHA review its cost estimates in light of these comments, with specific attention to those comments that offered alternative cost and hour estimates or explanations of why they believed the costs to be underestimated. This review, with a presentation of the estimates provided by the SERs, should be included as part of a revised IRFA. If OSHA concludes that the costs were not significantly underestimated, OSHA should consider alternative approaches to presenting the

costs so that they can be more readily understood by small businesses; or should explain the rule more clearly so that small businesses will not misunderstand the intended requirements.

Need for Clarity and Transparency

The Panel recognizes that many assumptions underlie OSHA's cost and benefits estimates, including the amount of time needed to implement the rule's requirements; the need for, and cost and availability of, consultants; when and how entities will incur regulatory costs; and whether presenting the costs as national or firm-specific costs best conveys the necessary information to the public. The Panel notes that the small entity representatives had difficulty using the average annualized cost estimates for a firm in their size-class and industry that OSHA developed and presented to them.

In the interest of transparency and full disclosure, the Panel recommends that OSHA clearly present, in the preamble to any proposed rule, information on the key assumptions and estimates underlying the estimated program-related costs, hazard control costs, and benefits associated with the rule. OSHA should also present, for both the program-related and hazard control costs and the benefits of the rule, information on the time stream over which these benefits and costs would be incurred, highlight initial costs, and seek comment on the reasonableness of these estimates and assumptions in the context of individual firms. In addition, OSHA should present several firm-specific examples showing the time stream of costs for the hazard control and program-related costs. The Panel recommends that the Preliminary Economic Analysis contain a description of the methodology and the assumptions used to develop OSHA's estimates.

Costs for Entities Already in Compliance

The Panel noted that the economic analysis does not ascribe any costs to an entity with a health and safety program now in place. Comments received during the panel process suggest that some small entities may seek legal assistance to evaluate whether their existing programs meet the federal mandate. The Panel recommends that OSHA add to its cost analysis the cost of evaluating compliance by entities with existing health and safety programs, and seek comment on the need for legal assistance and the cost of such assistance when conducting such an evaluation.

Treatment of Hazard Control Costs

The Panel recognizes that all of the benefits associated with the proposed rule arise from illness, injury, and fatality reductions resulting from hazard control steps taken as a result of a health and safety inspection program, i. e., the hazard identification activities that would be required by the rule. To the degree that benefits arise from the rule, so too do hazard control costs. The Panel recommends that descriptions of the rule's effects present both the costs of compliance for the health and safety program *and* the costs of hazard control. The Panel also recommends that presentations of the national benefits and costs clearly include the hazard control costs as part of the full effects of the rule.

Effectiveness of State Program Rules

The Panel notes the OSHA bases its benefits analysis in part on its estimates of the success of State programs that contain requirements similar to those in the proposed rule in reducing the incidence of job-related illness and injuries. The Panel recommends that OSHA include more details of this analysis to justify this preliminary conclusion in the face of other evidence that seems contradictory. For example, Washington state has enforced comprehensive health and safety regulations for two decades, but over the past decade, the rate of injuries and illnesses reported in that state remains between 20 and 40 percent higher than the national average. Similarly, over the past decade, Minnesota's incidence rates fell below the national average, but in the two years after implementation of the state's health and safety regulations, the state's rates have exceeded the national average. The Panel also notes that illness and injury incidence rates vary from year to year and that a similar pattern of year-to-year variations arises in states with health and safety programs and in states without them. The Panel recommends that OSHA more clearly display the basis for its preliminary conclusion that state health and safety programs are effective in reducing job-related injuries and illnesses.

Need for Outside Consulting Services

The Panel recommends that OSHA consider whether the Agency's analysis has underestimated the need for help from outside consultants and that OSHA examine the necessity for, cost, and availability of consultant services.

Need for Recordkeeping

The Panel recommends that OSHA consider the possibility that even firms not required to keep records will nevertheless keep such records as a result of this regulation.

Cost Pass-Through

The Panel recommends that OSHA reconsider the extent to which small firms can pass along any price increases to consumers or would suffer feasibility problems if such costs could not be passed along.

Injury and Illness Rates in Small Entities

The Panel noted that BLS studies and data indicate that injury and illnesses rates in small entities (with 1 to 10 employees) are only 40 percent of the national average, a finding that holds for private industry as a whole and for each of the seven major industrial sectors. These data suggest potential cost-efficiencies associated with targeting regulatory proposals at large employers and reduced requirements at small employers. Other studies suggest different conclusions.

Because information on injuries stands at the heart of OSHA's analysis of regulatory alternatives, the Panel recommends that OSHA display the information it has or can obtain that compares injury and illness rates and death rates by entity size, and that OSHA present other empirical data it may have collected in a manner that clearly establishes any potential underreporting of injuries and illnesses by small entities. The Panel recognizes that the current

OSHA estimates differ from the BLS data and therefore that the use of these estimates must be strongly supported by relevant data.

Litigation and Employee/Employer Relations

One SER expressed concern that OSHA had not considered the possibility of increased litigation and employee/employer relations problems. OSHA's experience suggests that increased employee participation, such as the draft rule would provide, decreases labor management problems because a two-way communication channel is in place. OSHA also does not believe that the rule will increase litigation; in fact, by reducing the number of unidentified hazards and non-compliances, it should reduce litigation. However, the Panel recognizes that the issue of increased litigation risk, including employers' perception of such risk, deserves further review and recommends that OSHA describe the issue in the preamble and solicit comment on it.

Number of Small Entities

The Panel recommends that OSHA solicit comment on whether OSHA's approach may have caused the Agency to incorrectly estimate impacts on small entities in those cases where the SBA small entity definition differs from that of the industry division.

Description of Proposed Requirements

As noted above, the Panel recommends that OSHA consider the extent to which outside consultants will be necessary for small firms to comply with the rule.

The Panel also recommends that OSHA evaluate, and clearly state as part of the IRFA, the levels of expertise needed for compliance with each requirement, and the possible role of clerical personnel in carrying out the activities required by the rule. The IRFA's discussion of the role of clerical personnel should consider the situation of very small businesses that may not have any clerical personnel.

The Panel also recommends that OSHA consider suggestions and solicit comment on the possibility of providing guidance that contains all cross-references in the rule and explains such concepts as the General Duty Clause so that small firms can understand these issues without having to go to other sources. The Panel also recommends that the proposed regulatory document provide a plain language description of the General Duty Clause and that the preamble provide further explanation and solicit comment on the rule's description of that clause.

The Panel recommends that OSHA solicit comment on whether there should be a checklist for the key provisions of the hazard identification requirement, the content of that checklist, and whether that checklist should be included in the regulatory document.

The Panel finds that outreach will be critical to the success of any regulatory or

nonregulatory alternatives. The Panel recommends that OSHA further consider the forms of outreach that will be necessary and that OSHA solicit comment on the most useful types of outreach and guidance. The Panel recommends that the compliance guides include example programs and be as specific as possible. OSHA should specifically solicit comment on the need for industry-specific guidance.

The Panel finds that there is concern about OSHA's enforcement policy for the rule and agrees that this is a legitimate concern. The Panel recommends that OSHA clearly explain its draft enforcement policy in its regulatory document and solicit comment on the content of the enforcement policy and its possible inclusion in the regulatory document.

Duplicative and Overlapping Rules

The Panel recommends that OSHA clarify in its preamble the answers to the questions raised by some SERs concerning overlap with other OSHA rules, with the existing requirements of the General Duty Clause, and with NLRB requirements.

Regulatory Alternatives

The Panel recommends that OSHA analyze and solicit comment on the following alternative approaches, giving special attention and consideration to alternative 4, Targeted regulation based on industry risk data.

1. Non-regulatory guidance

This alternative would expand federal assistance programs but leave regulation to the States.

2. A phased approach to the regulation

This regulatory alternative would have OSHA implement its safety and health program requirements for certain industries. Only after evaluation of the requirements for successful program implementation, including the specific requirements needed to deal with the special challenge to small entities, would OSHA extend the program to other industries.

3. Exempt all small firms

Reflecting comments that small entities have lower BLS-reported injury rates than large employers and that small entities may incur disproportionate costs to implement the program, this alternative would regulate large employers, placing small employers into a guidance program.

4. Targeted regulation based on industry risk data

Reflecting comments and data showing that workplace risks vary substantially, depending on the industry involved, this alternative would regulate those industries with high risks, based on reports of injuries, illnesses and deaths. OSHA would identify high risk industries by arraying injury, illness, and fatality statistics along with affected worker populations and industries and would limit application of the regulation to those industries. This information would be included in the full Preliminary Economic Analysis. Other industries would continue to be regulated under existing OSHA standards, the General Duty Clause, and any applicable State safety and health program requirements.

5. Targeted regulation based on firm-specific risk data

This alternative would exempt firms that have low injury rates. One way of doing this would be to exempt small firms in low-hazard industries. Another would be to set a threshold rate and exempt any firms with recordable rates lower than the threshold. Another variant on this approach would be to exempt firms based on their individual records or achievements. For example, firms in the SHARP or VPP programs might be exempted from the rule.

Occupational injury and illness rates, 1992–96: why they fell

A decline in occupational injury and illness rates in the early to mid-1990s is attributable to legislative reforms motivated by increases in workers' compensation payments and a growing awareness of workplace hazards by unions, employers, and the insurance industry

Hugh Conway
and
Jens Svenson

Between 1992 and 1996, the rate of reported occupational injuries and illnesses per 100 full-time workers declined from 8.9 to 7.4. Following passage of the Occupational Safety and Health Act in the early 1970s, the rate had declined from 11.0 in 1973 to 7.6 in 1983. Thereafter, the rate increased for the most part, reaching 8.9 in 1992. Then, beginning in 1993 and every year following, it fell. (See table 1.) Because the occupational injury and illness rate is such an important measure of employee well-being, the causes of the latter decline are of considerable interest. This article identifies the factors that have contributed to the rate decline and assesses their importance regarding future changes in the rate. Of particular interest is whether the decline will continue, flatten, or reverse itself and conform to a cyclical pattern.

The recent decrease is especially dramatic in light of the expected pattern of increased injuries and illnesses during economic expansions. The temporary drop in the rates in the early 1980s has been attributed to the concurrent effects of the recession. For example, Peter Dorman concludes that

> there is clearly a "cyclical" component to safety: it rises during periods of economic hardship, and falls during periods of growth. This may be due either to the speedup in the pace of work when orders pile up (this is implicit in Okun's law, according to which fluctuations in output exceed fluctuations in employment), or to the influx of new, inexperienced workers when hiring expands.[1]

In addition, the "records inspection" policy of the Occupational Safety and Health Administration (OSHA) from 1982 to 1986 (forgoing further investigation if an employer's records indicated safe workplace conditions) has been suspected of having been an incentive to underreport violations during that period; the policy was subsequently changed in the face of high-profile, large-penalty cases for recordkeeping violations.

The disaggregation of data by State reveals significant differences among States in the degree of the recent decline. Notably, the data indicate that the reductions in the national statistics cannot be attributed primarily to reductions in States with above-average rates. In fact, no significant correlation was found between the injury and illness rates in 1994 and the reductions achieved from 1994 to 1996. (See chart 1.)

Table 2 shows total and lost-workday injury and illness incidence rates by industry sector for 1992, 1994, and 1996, with the percent change in rates for 1992–96 and 1994–96. Viewed in this detail, the data reveal that on a national basis, many industry sectors have achieved reductions in injury and illness rates of 20 percent to 30 percent or more in recent years.

Several explanations have been given for the decline: the well-known shift in employment out of traditionally highly hazardous manufacturing

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industry jobs and into relatively less hazardous service industry employment; an increase in underreporting of workplace injuries and illnesses; a growing emphasis on cost control among employers and insurers in response to rising worker compensation costs; increased efforts on the part of employers and unions to identify and eliminate workplace hazards; and more effective OSHA enforcement and consultation activities.

The analysis that follows identifies recent reforms in workers' compensation programs at the State level and industry initiatives in implementing workplace safety and health programs as being primarily responsible for the rate reduction. The various reforms and initiatives were triggered by sharp increases in workers' compensation costs over the previous decade. Efforts to identify the nature of these costs and to reduce them resulted in many diverse approaches and changes, including an increased emphasis on risk reduction.

Employment shift from high-hazard industries

One possible explanation for the decline in occupational injury and illness rates is that there has been a decline in employment in traditionally high-hazard industries, accompanied by growth in low-hazard industries. For example, in the high-hazard manufacturing industry, a long-term decline in employment continued into the 1990s. Manufacturing employment declined by more than 600,000 between 1990 and 1996 (from 19,076,000 to 18,457,000). (The reference year 1990 was selected rather than 1992 in order to avoid the business cycle effect of the 1992 recession.) In contrast, employment in the relatively low-hazard service industries continued to show strong long-term growth, increasing from 27,934,000 in 1990 to 34,377,000 in 1996.

Table 1. Occupational injury and illness rates per 100 full-time workers, 1973–96

Year	Total	Lost-workday rate
1973	11.0	3.4
1974	10.4	3.5
1975	9.1	3.3
1976	9.2	3.5
1977	9.3	3.8
1978	9.4	4.1
1979	9.5	4.3
1980	8.7	4.0
1981	8.3	3.8
1982	7.7	3.5
1983	7.6	3.4
1984	8.0	3.7
1985	7.9	3.6
1986	7.9	3.6
1987	8.3	3.8
1988	8.6	4.0
1989	8.6	4.0
1990	8.8	4.1
1991	8.4	3.9
1992	8.9	3.9
1993	8.5	3.8
1994	8.4	3.8
1995	8.1	3.6
1996	7.4	3.4

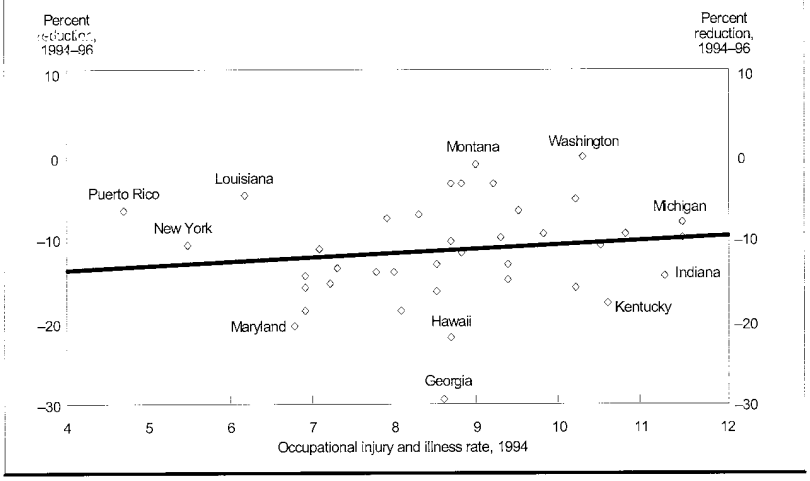
SOURCE: Bureau of Labor Statistics.

But the employment shift explanation for the decline appears problematic, for a number of reasons. First, when attention is focused on disaggregated industry employment details, it becomes clear that not all high-hazard industries in fact experienced a decline in employment during the period in question. In high-hazard construction, for instance, employment increased by 280,000 (from 5,120,000 to 5,400,000) between 1990 and 1996. Indeed, in a 1992 annual report, the Bureau of Labor Statistics identified and compiled a list of 36 detailed (that is, at the four-digit SIC level) manufacturing industries with the highest rates of nonfatal occupational injuries and illnesses.[2] Data from this list were matched against employment data on 20 of these high-incidence industries from the BLS State Current Employment Statistics program. (No employment data on the remaining 16 industries were found in the program.) The results of analyses carried out on these 20 industries are presented in table 3.

Employment in the 20 high-hazard industries increased from 1,813,200 to 2,009,500 over the period 1990–96. (Employment in these industries dipped to 1,805,900 during the 1992 recession.) Thus, the supposition that there has been an employment shift out of traditionally high-hazard industry sectors is not supported by these data. Further, while declines in occupational injury and illness rates were found in 18 of the 20 industries listed (the greatest reductions were in primary aluminum, –32.0 percent, and meatpacking plants, –31.8 percent), there were no concomitant declines in employment that might help to explain the reduction in the injury and illness rates found in manufacturing in recent years. The second reason the employment shift explanation fails is that the assumption that the decline in injury and illness rates is related to employment *growth* in low-hazard service industry occupations also appears suspect. Employment growth in many service sector jobs has led to an increase in attention on them and to a better appreciation of the hazards inherent in the jobs being created. At the three-digit level of industry detail, 10 service industry sectors had injury and illness rates equal to (job training and related services) or exceeding (hotels and motels, miscellaneous equipment rental and leasing, miscellaneous repair shops, commercial sports, miscellaneous amusement and recreational services, nursing and personal care facilities, hospitals, home health care services, and residential care) the total private-industry average rate of 7.4 percent.[3]

As an alternative explanation of why high-hazard industries are reducing their injury and illness rates, it has been

Chart 1. Occupational injury and illness rates, 1994, versus percent reduction, 1994–96, 38 States and Puerto Rico



suggested that automating high-hazard jobs may play a role. After automation of these jobs, the jobs that remain are inherently less dangerous, it is said, and thus the rates decline. To test this hypothesis, the share of production worker employment as a percent of total industry employment was analyzed using available BLS data. If the share were found to be declining, a case could be made for an employment shift out of high-hazard occupations and into clerical or supervisory jobs. The data, however, did not support the hypothesis: the production worker share of employment had increased in the majority of high-hazard industries between 1990 and 1996 (on average, from 78.6 percent to 80.5 percent).

In sum, the explanation that the recent decline in occupational injury and illness rates has been caused by an employment shift out of high-hazard industries and into low-hazard industries is not supported by the data.

Underreporting of injuries and illnesses

Companies, often unintentionally, perpetuate a variety of policies and management practices that may lead to poor recordkeeping. Among such practices and policies identified to date are the following:[4]

- Sheer neglect for the records, no training for the recordkeeper, no emphasis on maintaining records properly, downgrading recordkeeping to a collateral duty of a clerical or support staff person.
- Poor communications between different departments within the company, with the record keeper kept uninformed of injuries and illnesses, even when employees have reported them to their supervisors.
- Management bonuses and opportunities for promotion tied negatively to injury and illness rates.
- Employee group awards or bonuses if no injuries are reported by anyone in the group.
- Employees denied overtime or promotion opportunities for reporting an injury or for staying away from work.
- Subjection of employees who report injuries or illnesses to overly aggressive and personal accident investigations, including investigations of employees' personal lifestyles (for example, drug testing).

These disincentives to report occupational injuries and illnesses are difficult to address because they often reflect psychological factors and attitudes among people in the organization. Anything in the work environment that makes an employee uncomfortable with reporting an injury or illness to the company, or that makes the company unwilling or reluctant to record cases of injury or illness, could be seen as a disincentive. The result is that company injuries and illnesses will be chronically underreported.

Table 2. Total and lost-workday injury and illness rates, by industry, 1992, 1994, 1996, and percent change, 1992–96 and 1994–96

SIC code	Industry	Average employment, 1996 (thousands)	Total injury and illness rate					Lost-workday injury and illness rate				
			1992	1994	1996	Percent change		1992	1994	1996	Percent change	
						1992–96	1994–96				1992–96	1994–96
	Private sector	98,772.9	8.9	8.4	7.4	–16.9	–11.9	3.9	3.8	3.4	–12.8	–10.5
	Agriculture, forestry, fishing	1,717.4	11.6	10.0	8.7	–25.0	–13.0	5.4	4.7	3.9	–27.8	–17.0
	Mining	578.3	7.3	6.3	5.4	–26.0	–14.3	4.1	3.9	3.2	–22.0	–17.9
	Construction	5,359.7	13.1	11.8	9.9	–24.4	–16.1	5.8	5.5	4.5	–22.4	–18.2
15	General building contractors	1,256.1	12.2	10.9	9.0	–26.2	–17.4	5.4	5.1	4.0	–25.9	–21.6
16	Heavy construction, except building	770.7	12.1	10.2	9.0	–25.6	–11.8	5.4	5.0	4.3	–20.4	–14.0
17	Special trade contractors	3,332.9	13.8	12.5	10.4	–24.6	–16.8	6.1	5.8	4.8	–21.3	–17.2
	Manufacturing	18,460.5	12.5	12.2	10.6	–15.2	–13.1	5.4	5.5	4.9	–9.3	–10.9
	Durable goods manufacturing	10,774.4	13.4	13.5	11.6	–13.4	–14.1	5.5	5.7	5.1	–7.3	–10.5
	Nondurable goods manufacturing	7,686.0	11.3	10.5	9.2	–18.6	–12.4	5.3	5.1	4.6	–13.2	–9.8
20	Food and kindred products	1,690.0	18.8	17.1	15.0	–20.2	–12.3	9.5	9.2	8.0	–15.8	–13.0
21	Tobacco products	40.6	6.0	5.3	6.7	11.7	26.4	2.4	2.4	2.8	16.7	16.7
22	Textile mill products	627.6	9.9	8.7	7.8	–21.2	–10.3	4.2	4.0	3.6	–14.3	–10.0
23	Apparel and other textile products	866.1	9.5	8.9	7.4	–22.1	–16.9	4.0	3.9	3.3	–17.5	–15.4
24	Lumber and wood products	777.9	16.3	15.7	14.2	–12.9	–9.6	7.6	7.7	6.8	–10.5	–11.7
25	Furniture and fixtures	503.6	14.8	15.0	12.2	–17.6	–18.7	6.6	7.0	5.4	–18.2	–22.9
26	Paper and allied products	681.9	11.0	9.6	7.9	–28.2	–17.7	5.0	4.5	3.8	–24.0	–15.6
27	Printing and publishing	1,533.1	7.3	6.7	6.0	–17.8	–10.4	3.2	3.0	2.8	–12.5	–6.7
28	Chemicals and allied products	1,029.8	6.0	5.7	4.8	–20.0	–15.8	2.8	2.8	2.4	–14.3	–14.3
29	Petroleum and coal products	141.3	5.9	4.7	4.6	–22.0	–2.1	2.8	2.3	2.5	–10.7	8.7
30	Rubber and miscellaneous plastics products	979.9	14.5	14.0	12.3	–15.2	–12.1	6.8	6.7	6.3	–7.4	–6.0
31	Leather and leather products	95.7	12.1	12.0	10.7	–11.6	–10.8	5.4	5.3	4.5	–16.7	–15.1
32	Stone, clay, and glass products	544.1	13.6	13.2	12.4	–8.8	–6.1	6.1	6.5	6.0	–1.6	–7.7
33	Primary metal industries	709.6	17.5	16.8	15.0	–14.3	–10.7	7.1	7.2	6.8	–4.2	–5.6
34	Fabricated metal products	1,447.1	16.8	16.4	14.4	–14.3	–12.2	6.6	6.7	6.2	–6.1	–7.5
35	Industrial machinery and equipment	2,108.4	11.1	11.6	9.9	–10.8	–14.7	4.2	4.4	4.0	–4.8	–9.1
36	Electronic and other electrical equipment	1,655.4	8.4	8.3	6.8	–19.0	–18.1	3.6	3.6	3.1	–13.9	–13.9
37	Transportation equipment	1,785.2	18.7	19.6	16.3	–12.8	–16.8	7.1	7.8	7.0	–1.4	–10.3
38	Instruments and related products	853.3	5.9	5.9	5.1	–13.6	–13.6	2.7	2.7	2.3	–14.8	–14.8
39	Miscellaneous manufacturing industries	389.9	10.7	9.9	9.5	–11.2	–4.0	5.0	4.5	4.4	–12.0	–2.2
	Transportation and utilities	5,989.0	9.1	9.3	8.7	–4.4	–6.5	5.1	5.5	5.1	.0	–7.3
40	Railroad transportation	–	6.6	5.1	3.5	–47.0	–31.4	5.1	3.8	–2.7	–47.1	–28.9
41	Local and interurban passenger transit	416.3	11.0	9.6	10.3	–6.4	7.3	5.9	5.1	5.4	–8.5	5.9
42	Trucking and warehousing	1,622.7	13.4	14.8	10.4	–22.4	–29.7	7.9	9.2	5.9	–25.3	–35.9
43	U.S. Postal Service	–	–	–	–	–	–	–	–	–	–	–
	Water transportation	176.5	11.5	9.5	9.8	–14.8	3.2	5.5	5.1	5.2	–5.5	2.0
45	Transportation by air	1,119.2	13.8	13.3	17.9	29.7	34.6	7.6	8.0	11.8	55.3	47.5
46	Pipelines, except natural gas	14.5	3.1	2.4	2.0	–35.5	–16.7	1.6	1.4	.8	–50.0	–42.9
47	Transportation services	414.7	3.9	4.2	3.5	–10.3	–16.7	2.2	2.2	1.6	–27.3	–27.3
48	Communications	1,345.2	3.4	3.3	3.5	2.9	6.1	1.8	1.7	1.9	5.6	11.8
49	Electric, gas, and sanitary services	878.9	7.6	7.3	6.9	–9.2	–5.5	3.6	3.5	3.6	.0	2.9
	Wholesale and retail trade	28,027.1	8.4	7.9	6.8	–19.0	–13.9	3.5	3.4	2.9	–17.1	–14.7
	Wholesale trade	6,471.7	7.6	7.7	6.6	–13.2	–14.3	3.6	3.8	3.4	–5.6	–10.5
50	Durable goods wholesale trade	3,802.9	6.8	7.0	6.2	–8.8	–11.4	3.0	3.2	3.0	.0	–6.3
51	Nondurable goods wholesale trade	2,668.8	8.6	8.7	7.3	–15.1	–16.1	4.6	4.6	4.0	–13.0	–13.0
	Retail trade	21,555.3	8.7	–	6.9	–20.7	–	3.4	–	2.8	–17.6	–

In 1987, the Bureau of Labor Statistics conducted a pilot project to test the feasibility of a case-by-case comparison of OSHA employer injury and illness records with medical records, workers' compensation reports, and other related workplace records. The project involved visits by OSHA compliance officers to 200 randomly selected manufacturing establishments with more than 10 employees. Half of the establishments were in Massachusetts and half in Missouri. While this pilot project was not designed to provide statistical results for the Nation, the 200 sites that were visited did afford records of about 4,000 injury and illness cases reported in 1986.

The pilot survey uncovered evidence of both underreporting and overreporting. While virtually all overreporting involved cases with no lost work time, underreported cases were split between those with and without lost work time.[5] The project found that total injuries and illnesses were underrecorded by about 10 percent. (Two establishments were responsible for most of the undercount.) Lost-workday injury and illness cases were underrecorded by about 25 percent in the establishments visited.[6]

Table 2. Continued—Total and lost-workday injury and illness rates, by industry, 1992, 1994, 1996, and percent change, 1992–96 and 1994–96

SIC code	Industry	Average employment, 1996 (thousands)	Total injury and illness rate					Lost-workday injury and illness rate				
			1992	1994	1996	Percent change 1992–96	Percent change 1994–96	1992	1994	1996	Percent change 1992–96	Percent change 1994–96
52	Building materials and garden supplies	883.9	11.1	10.3	9.6	–13.5	–6.8	5.0	4.9	4.5	–10.0	–8.2
53	General merchandise stores	2,679.0	10.4	10.8	9.7	–6.7	–10.2	4.8	5.4	4.8	0.0	–11.1
54	Food stores	3,425.6	11.9	10.5	9.4	–21.0	–10.5	4.8	4.4	3.9	–18.8	–11.4
55	Auto dealers and service stations	2,261.0	8.0	7.4	6.8	–15.0	–8.1	2.9	2.8	2.5	–13.8	–10.7
56	Apparel and accessory stores	1,113.3	4.3	4.1	3.7	–14.0	–9.8	1.6	1.6	1.5	–6.3	–6.3
57	Furniture and home-furnishings stores	967.8	5.8	5.7	4.7	–19.0	–17.5	2.6	2.8	2.2	–15.4	–21.4
58	Eating and drinking places	7,516.7	9.1	7.7	6.2	–31.9	–19.5	3.1	2.6	1.9	–38.7	–26.9
59	Miscellaneous retail trade	2,708.0	5.0	4.5	4.1	–18.0	–8.9	2.1	2.0	1.9	–9.5	–5.0
	Finance, insurance, and real estate	6,746.2	2.9	2.7	2.4	–17.2	–11.1	1.2	1.1	.9	–25.0	–18.2
60	Depository institutions	2,014.9	2.1	2.1	1.8	–14.3	–14.3	.8	.8	.6	–25.0	–25.0
61	Nondepository institutions	512.2	1.0	1.5	1.1	10.0	–26.7	.4	.6	.4	.0	–33.3
62	Security and commodity brokers	551.5	.7	.7	.6	–14.3	–14.3	.3	.3	.2	–33.3	–33.3
63	Insurance carriers	1,376.9	–	2.6	2.1	–	–19.2	–	.9	.7	–	–22.2
64	Insurance agents, brokers, and services	707.0	1.4	1.4	1.4	.0	.0	.5	.5	.4	–20.0	–20.0
65	Real estate	1,372.0	6.8	5.7	5.4	–20.6	–5.3	3.1	2.7	2.4	–22.6	–11.1
67	Holding and other investment offices	211.7	2.7	1.9	2.8	3.7	47.4	1.3	.8	1.3	.0	62.5
	Services	31,894.7	7.1	6.5	6.0	–15.5	–7.7	3.0	2.8	2.6	–13.3	–7.1
70	Hotels and other lodging places	1,699.0	11.2	10.1	9.0	–19.6	–10.9	4.9	4.7	4.5	–8.2	–4.3
72	Personal services	1,181.5	5.1	4.1	3.8	–25.5	–7.3	2.3	1.9	1.8	–21.7	–5.3
73	Business services	7,336.3	5.4	4.9	3.9	–27.8	–20.4	2.6	2.4	1.7	–34.6	–29.2
75	Auto repair, services, and parking	1,081.0	7.8	6.9	5.9	–24.4	–14.5	3.3	2.9	2.5	–24.2	–13.8
76	Miscellaneous repair services	374.2	8.7	7.7	6.3	–27.6	–18.2	3.9	3.6	3.0	–23.1	–16.7
78	Motion pictures	–	–	3.0	–	–	–	–	1.0	–	–	–
79	Amusement and recreation services	1,524.8	10.1	9.0	9.5	–5.9	5.6	4.4	3.8	4.4	.0	15.8
80	Health services	9,439.2	10.2	9.4	9.1	–10.8	–3.2	4.1	3.9	3.7	–9.8	–5.1
81	Legal services	930.3	1.2	1.1	1.1	–8.3	.0	.5	.4	.4	–20.0	.0
82	Educational services	1,472.8	5.6	4.2	3.4	–39.3	–19.0	1.6	1.5	1.3	–18.8	–13.3
83	Social services	2,347.3	8.0	7.5	7.2	–10.0	–4.0	3.4	3.4	3.1	–8.8	–8.8
84	Museums, botanical gardens, and zoos	–	7.8	7.1	–	–	–	3.2	2.9	–	–	–
86	Membership organizations	975.4	–	–	3.5	–	–	–	–	1.3	–	–
87	Engineering and management services	2,865.5	2.4	2.6	2.0	–16.7	–23.1	1.0	1.1	.8	–20.0	–27.3
88	Private households	–	–	–	–	–	–	–	–	–	–	–
89	Services, not elsewhere classified	–	2.7	–	–	–	–	1.0	–	–	–	–

NOTE: Dash indicates data not available or (for percent change) calculation could not be made.
SOURCE: Bureau of Labor Statistics.

Table 3. Total injury and illness rates, 1992 and 1996, and total employment and production workers in high-hazard industries, 1990 and 1996

SIC code	Industry	Total injury and illness rate		Percent change, 1992–96	1990		1996	
		1992	1996		Total employment (thousands)	Production workers (percent of total employment)	Total employment (thousands)	Production workers (percent of total employment)
	Total	[1]26.8	[1]21.3	−17.8	1813.2	78.6	2009.5	80.5
2011	Meatpacking plants	44.4	30.3	−31.8	139.5	84.4	138.3	83.6
3731	Ship building and repairing	37.8	27.4	−27.5	129.5	72.8	98.2	73.1
3711	Motor vehicles and car bodies	32.3	26.1	−19.2	310.8	72.3	354.3	76.8
3321	Gray and ductile iron foundries	31.6	25.8	−18.4	81.8	81.3	80.3	82.8
3465	Automotive stampings	29.2	23.2	−20.5	99.7	83.2	118.3	83.8
3715	Truck trailers	25.0	19.4	−22.4	27.4	78.1	31.6	79.7
3325	Steel foundries, n.e.c. [2]	24.4	26.4	8.2	28.0	77.9	25.8	81.4
2015	Poultry slaughtering and processing	23.2	17.8	−23.3	194.1	90.2	233.1	89.1
2451	Mobile homes	23.0	26.2	13.9	43.4	80.6	64.4	83.9
3633	Household laundry equipment	22.6	16.7	−26.1	21.0	79.5	15.9	81.8
3713	Truck and bus bodies	22.3	21.0	−5.8	41.2	77.9	38.3	80.4
3462	Iron and steel forgings	21.1	19.4	−8.1	31.9	76.5	30.6	76.5
2013	Sausages and other prepared meats	21.0	16.3	−22.4	84.6	74.6	93.2	77.7
3792	Travel trailers and campers	20.5	19.7	−3.9	18.0	77.2	22.2	84.2
3322	Malleable iron foundries	20.3	16.7	−17.7	8.7	74.7	4.1	78.0
3365	Aluminum foundries	20.1	17.1	−14.9	23.7	78.9	24.9	82.3
3334	Primary aluminum	20.0	13.6	−32.0	25.5	76.1	22.5	79.6
3441	Fabricated structural metal	19.5	16.7	−14.4	77.0	71.7	76.5	73.5
3317	Steel pipes and tubes	19.2	13.9	−27.6	24.7	74.5	27.1	75.3
3714	Motor vehicle parts and accessories	19.2	16.9	−12.0	402.7	78.9	509.9	80.2

[1]Weighted average.
[2]n.e.c. = not elsewhere classified.
SOURCES: *Occupational Injuries and Illnesses: Counts, Rates, and Characteristics, 1992*, Bulletin 2455 (Bureau of Labor Statistics, April 1995), p. 5; *Employment and Earnings*, March 1991, table B-2; March 1997, table B-12.

In 1996, as part of a major OSHA data collection initiative, about 80,000 establishments were asked to submit information on injuries and illnesses reported that year, together with the number of workers employed and the hours they worked. A follow-on data-quality audit program was designed to check the accuracy of the data submitted to the Agency, as well as overall injury and illness recordkeeping practices. This audit, directed by the Office of Management and Budget, was designed with the following aims in mind:

- Comparing the information submitted to OSHA with the employers' 1996 OSHA form 200, "Log and Summary of Injuries and Illnesses," and with the employers' records of employment and hours worked.
- Identifying recordable injury and illness cases and determining whether the establishment recorded them properly, underrecorded them, or overrecorded them.
- Interviewing the establishment's recordkeeper about the OSHA recordkeeping requirements and the establishment's recordkeeping practices.

In 1997, OSHA contracted with Eastern Research Group, Inc., of Lexington, Massachusetts, to conduct the follow-on pilot study of data collection quality and verification of employer injury and illness records. The eventual study design encompassed a statistical sample of more than 250 establishments nationwide. The sample frame included establishments with more than 60 employees and excluded establishments in the construction industry. OSHA compliance officers were part of each site visit team. The completion of more than 250 audits in 1998 produced results that were markedly similar to the 1987 pilot test results. While underreporting of recordable cases remained a persistent problem, there was no apparent increase in the size of the problem over the 10-year period between the studies.[7] Preliminary results of the audit included the following:

- Total injury and illness cases were underreported by 11 percent (10 percent in 1986).
- Lost-workday cases were underreported by 22 to 23 percent (25 percent in 1986).

In addition, no data were identified that would support the hypothesis of a sudden and dramatic increase in underreporting in the period studied. Decreases in rates were observed across many industries and States, but the degree of the reductions varied widely. Also, the greatest reductions were *not* concentrated in States or industries with higher initial rates.

Consequently, the findings of the audit and the characteristics of the injury and illness data suggest that the recent decline in occupational injury and illness rates is not *due to an increase in underreporting.*

Workers' compensation reforms

Market forces for change. By 1992, social welfare expenditures on workers' compensation claims had reached $45.7 billion, more than twice the $22.3 billion spent in 1985. Within the insurance industry and among a growing number of employers, concern with rising premium rates was increasing. Workers' compensation premium levels among States were being compared. States with high premium levels believed that they were losing jobs as industry moved out of State.[8] Action took the form of changes in State workers' compensation legislation, including increased penalties for fraudulent claims, limitations on benefits paid, medical and case management initiatives, improved efficiency in the structure and administration of the insurance market, the introduction of large-deductible insurance options for employers, and requirements or incentives for the implementation of safety and health programs.

The level of workers' compensation costs reached in the early 1990s spurred cost control efforts and created profitable business opportunities for reducing costs; the discovery and scope of such opportunities fundamentally altered approaches to safety and health. Previously, safety and health issues were often relegated to a minor management concern; the extent of effort devoted to safety and health protection could be measured by the limited resources devoted to that function. Injury rates, and especially medical and other costs resulting from an injury, were considered largely uncontrollable. Significantly elevated insurance costs increased both the urgency and profitability of cost reduction efforts. In turn, the pursuit of such efforts resulted in new realizations regarding the nature of the costs involved and new opportunities for improvements. Workplace accidents are gradually evolving from a budget item to a commitment to change the way work is carried out.

While many reforms in State workers' compensation law have focused on program cost reduction first and accident prevention second, changes in perspective and attitude appear to have led to a greater commitment to reduce risk, as opposed to viewing safety as a cost add-on. Reforms have affected hazard assessment, training, claims management, rehabilitation and return-to-work programs, safety incentives for employees, and entrepreneurial opportunities by specialist consultants. In the next section, reforms that focus on hazard reduction (workplace safety and health programs and medical cost deductibles) are presented first, followed by reforms designed to reduce the number of claims filed (programs designed to detect and more effectively prosecute insurance fraud) and then reforms aimed at cost reduction (return-to-work and program administration reforms).

State workers' compensation legislative reforms

1. Workplace safety and health programs. At a minimum, typical components of workplace safety and health programs would include hazard identification and control and safety and health training. Recent reforms in many State workers' compensation programs have made such programs mandatory, either for all employers or for targeted employers with high injury and illness rates. Voluntary programs have also been encouraged through statutory language. These workers' compensation legislative reforms have supplemented comparable programs mandated under State occupational safety and health authority. (Generally, the two kinds of programs do not overlap; that is, mandatory safety and health programs are not usually found simultaneously under a State's occupational safety and health program and its workers' compensation program. Exceptions are California, Minnesota, and North Carolina.) In addition, many employers in States that have not introduced such programs through legislation are voluntarily adopting and implementing safety and health programs in an effort to reduce workplace hazards and the related costs of accidents.

The unique influence and effect of these programs in reducing occupational injury and illness rates is the subject of debate. According to the Insurance Industry Institute,

> while it is difficult to separate the impact of safety measures from other factors that could cause claims to decline, results for Texas and Oregon, two [S]tates in the vanguard of the accident prevention movement, suggest that reforms have had a significant impact. Accident rate per 100 private sector employees dropped 11.4 percent in three years in Texas, from 8.0 in 1990 to 7.1 in 1993. In Oregon the recordable accident rate per 100 employees in the private sector has fallen from 11.1 in 1988 to 8.7 in 1994, a reduction of 21.6 percent.[9]

Significantly, mandatory legislation to implement safety and health programs affects less than 1 percent of employers in Texas. (In Oregon, an estimated 20 percent to 25 percent of all business establishments and 80 percent of employees are affected by mandatory State occupational safety and health program requirements.) The recorded change in occupational injury and illness rates in Texas appears broadly based and not limited only to firms affected by legislation.

Between 1990 and 1996, the incidence of lost-workday cases nationwide declined 20 percent, from 4.1 to 3.4 cases per 100 full-time workers.[10] Table 4 presents occupational injury and illness rate changes derived from BLS data for 38 States and Puerto Rico and from data on insurance lost-time claims provided to OSHA by the National Council on Compensation Insurance and covering 36 States and the District of Columbia. The correlation between changes in the Council's State data on lost-time claims counts and changes in the BLS State data on lost-workday injury and illness rates for 1994–96 was statistically significant at the 0.05 level, with a Pearson correlation coefficient of 0.458. The two data sets permitted a statistical construction of injury and illness rates for seven States and the District of Columbia.[11] However, no data are

available for five States: North Dakota, Ohio, Pennsylvania, West Virginia, and Wyoming. Also shown in table 4 are data from the National Council on Compensation Insurance on the "frequency per constant worker," a standardized measure of risk used in the insurance industry.

In table 4, the State data are banked to show States with mandatory safety and health programs and those without statutory requirements. Table 5 presents the mean and median injury and illness rates for 1996 and recent rate declines among four categories of State occupational safety and health programs: statutory under workers' compensation, statutory under the State Occupational Safety and Health Administration or under some other State statute, voluntary under workers' compensation, and no comprehensive safety and health program requirements.

All States experienced declines in injury and illness rates, and no statistically significant differences were found among the four groups of States. Nevertheless, the observed variations in 1996 rate levels and relative rate declines among the four invite commentary. Given the higher average rates among States with mandatory programs, these States may have opted for that approach because of their more serious accident records. Post-1996 legislative changes in workers' compensation laws in New York, endorsing mandatory safety and health programs for employers with poor safety records, indicate that this approach retains its appeal.[12]

But it takes time for safety and health programs to have an effect. Four States with voluntary programs implemented prior to 1992—Alabama, Colorado, Oklahoma, and Oregon (Oklahoma and Oregon also have mandatory programs affecting some employers)—continued to have total injury and illness rates above the national average in 1996. Relatively greater rate declines in States with voluntary occupational safety and health programs may be explained by those States' experimentation with more inventive, site-specific safety and health program reforms. Firms in States with such voluntary programs appear to be responding to market forces, especially cost containment of workers' compensation.

2. Medical care costs. Medical care cost reforms have been introduced that strongly encourage employers to assign a higher priority to safety. About one-quarter of the States allow a rate credit or discount (schedule rating) for high-quality safety programs. In some States, safety committees are required in workplaces with poor claims histories.

In a majority of States, optional medical deductibles are now included in workers' compensation insurance policies. Legislative changes in recent years have raised allowable deductible limits. The perception has grown that deductibles encourage greater safety consciousness among employers who must pay the deductible amount.[13] According to the Insurance Industry Institute, many States now allow insurers to use State-set fee schedules, to review treatment plans, and to "permit or mandate the use of managed care, an approach used by health care insurers but until recently not always encouraged, and sometimes prohibited, under workers' compensation laws."[14]

Lower medical costs through managed care and reductions in medical care expenses have been documented in several States, including New Jersey,[15] New York, and Florida. Under the new Florida law, approved managed care plans must show evidence that they utilize case management techniques and have procedures for aggressive medical care coordination that encourage a prompt return to work.[16]

3. Insurance fraud. Since 1992, more than half the States have passed laws that make it easier to detect and prosecute insurance fraud. Past perpetrators have included medical care providers, workers who filed claims for non-work-related injuries, and employers who submitted false figures for their payroll and misrepresented the tasks workers were performing in order to reduce their workers' compensation premium. In 1995, there were 100 convictions for workers' compensation fraud in California. In New York, reforms to reduce fraud included creating a new workers' compensation inspector general with broad investigative powers and making workers' compensation fraud a felony punishable by jail time.

4. Return to work. Several States passed return-to-work reforms to promote injured workers' reentry into the workforce, thus reducing the time required for them to receive lost-income benefits. Laws in this category target both employees (for refusing appropriate work) and employers (for refusing to take injured workers back). Surveys of employers suggest that early return-to-work programs are among the most effective cost-containment initiatives.

One company, RTW, Inc., specializes in managing return-to-work programs for other companies through job modification and accommodation. Since its start in 1992, this company has produced a 45-percent average annual return on equity and was among the 15 best performing small companies listed in *Forbes*. Special attention to managing claims and getting people back to work has saved employers an average of 50 percent on workers' compensation insurance.[17]

The increasing adoption of return-to-work programs and other types of case management techniques are reflected in BLS occupational injury and illness statistics. The proportion of lost-workday injuries and illnesses that involved days away from work dropped from 76.9 percent in 1992 to 64.7 percent in 1996. (The lost-workday rate also includes those on restricted duty or reassignment following a workplace accident with no time spent away from work.) Reductions in the rates of injuries and illnesses involving days away from work have been more dramatic than reductions in total injury and illness

Table 4. Injury and illness rates, 1994–96, and workers' compensation claims, 1992, 1994, and 1996, by jurisdiction and safety and health program requirement category

Jurisdiction	Nonfarm employment (thousands)	OSHA inspections (Federal and State)			Inspections per 10,000 employees, FY1996	Bureau of Labor Statistics					
						1994 injury and illness rate		1996 injury and illness rate		Percent change, 1994–96	
		FY1992	FY1996	Percent change		Total	Lost-workday rate	Total	Lost-workday rate	Total	Lost-workday rate
With mandatory safety and health programs under workers' compensation											
Arkansas [1]	1,089.0	798	567	–28.9	5.2	9.4	4.3	8.2	3.5	–12.8	–18.6
California [2]	12,888.3	15,480	10,669	–30.9	8.3	8.1	4.0	6.6	3.4	–18.5	–15.0
Connecticut [3]	1,592.5	1,605	1,066	–33.6	6.7	8.5	4.1	7.4	3.6	–12.9	–12.2
Louisiana [4]	1,824.2	1,044	735	–29.6	4.0	6.2	2.9	5.9	2.8	–4.8	–3.4
Maine [5]	541.0	660	389	–41.1	7.2	10.5	5.6	9.4	4.8	–10.5	–14.3
Minnesota [6]	2,441.6	3,248	2,345	–27.8	9.6	8.7	3.8	8.4	3.7	–3.4	–2.6
Montana [7]	360.8	391	351	–10.2	9.7	9.0	3.2	8.9	3.3	–1.1	3.1
Nebraska [8]	839.2	295	141	–52.2	1.7	10.2	4.3	9.7	3.8	–4.9	–11.6
New Hampshire [9]	565.9	425	302	–28.9	5.3						
North Carolina [10]	3,599.5	2,156	4,313	100.0	12.0	7.8	3.5	6.7	3.0	–14.1	–14.3
Oklahoma [11]	1,368.6	1,102	744	–32.5	5.4	8.8	4.1	7.8	4.1	–11.4	.0
Pennsylvania [12]	5,345.0	3,197	2,508	–21.6	4.7						
Tennessee [13]	2,542.1	2,795	2,711	–3.0	10.7	9.4	4.3	8.0	3.8	–14.9	–11.6
Texas [14]	8,319.0	5,698	2,981	–47.7	3.6	7.1	3.5	6.3	3.1	–11.3	–11.4
Utah [15]	965.3	705	1,184	67.9	12.3	9.5	3.8	8.9	3.3	–6.3	–13.2
West Virginia [16]	700.7	546	481	–11.9	6.9	–	–	–	–	–	–
With mandatory safety and health programs under State OSHA or other State statute [17]											
Alaska [18]	262.9	1,215	408	–66.4	15.5	8.8	4.3	8.5	4.1	–3.4	–4.7
Florida [19]	6,237.6	2,433	1,399	–42.5	2.2	8.0	3.3	6.9	3.2	–13.8	–3.0
Hawaii [20]	529.2	1,802	910	–49.5	17.2	8.7	4.9	6.8	3.6	–21.8	–26.5
Michigan [21]	4,369.8	12,036	7,914	–34.2	18.1	11.5	5.2	10.6	4.9	–7.8	–5.8
Nevada [22]	859.3	2,160	1,262	–41.6	14.7	9.3	4.2	8.4	3.4	–9.7	–19.0
Oregon [23]	1,491.7	6,241	5,693	–8.8	38.2	8.7	4.2	7.8	3.8	–10.3	–9.5
Washington [24]	2,434.9	8,452	7,705	–8.8	31.6	10.3	4.2	10.3	3.9	.0	–7.1
With voluntary safety and health programs under workers' compensation [25]											
Alabama	1,831.0	1,342	548	–59.2	3.0	9.2	4.1	8.9	4.0	–3.3	–2.4
Colorado	1,913.2	1,263	1,023	–19.0	5.3	–	–	–	–	–	–
Kansas	1,242.4	518	197	–62.0	1.6	9.8	4.2	8.9	4.0	–9.2	–4.8
Massachusetts	3,064.7	2,223	1,582	–28.8	5.2	7.2	3.5	6.1	3.1	–15.3	–11.4
Missouri	2,579.5	1,854	515	–72.2	2.0	10.2	4.1	8.6	3.6	–15.7	–12.2
New Mexico	696.4	553	688	24.4	9.9	7.9	3.4	7.3	3.2	–7.6	–5.9
North Dakota	310.3	299	169	–43.5	5.4	–	–	–	–	–	–
Ohio	5,316.5	3,430	1,952	–43.1	3.7	–	–	–	–	–	–
Rhode Island	444.2	461	206	–54.9	4.7	8.5	4.1	7.1	3.6	–16.5	–12.2
South Carolina	1,678.6	2,800	1,815	–35.2	10.8	6.9	2.9	5.9	2.5	–14.5	–13.8
Without comprehensive safety and health program requirements											
Arizona	1,926.3	2,547	1,342	–47.3	7.0	8.3	3.6	7.7	3.3	–7.2	–8.3
Delaware	379.3	160	183	14.4	4.8	6.9	3.4	5.6	2.5	–18.8	–26.5
Georgia	3,546.4	1,761	779	–55.8	2.2	8.6	3.8	6.1	2.7	–29.1	–28.9
Idaho	497.7	491	221	–55.0	4.4	–	–	–	–	–	–
Illinois	5,694.9	3,017	1,764	–41.5	3.1	–	–	–	–	–	–

Table 4. Continued—Injury and illness rates, 1994–96, and workers' compensation claims, 1992, 1994, and 1996, by jurisdiction and safety and health program requirement category

Jurisdiction	Nonfarm employment (thousands)	OSHA Inspections (Federal and State)			Inspections per 10,000 employees, FY1996	Bureau of Labor Statistics					
						1994 injury and illness rate		1996 injury and illness rate		Percent change, 1994–96	
		FY1992	FY1996	Percent change		Total	Lost-workday rate	Total	Lost-workday rate	Total	Lost-workday rate
Indiana	2,826.9	4,762	3,208	–32.6	11.3	11.3	4.9	9.7	4.2	–14.2	–14.3
Iowa	1,383.6	948	648	–31.6	4.7	10.8	4.8	9.8	4.4	–9.3	–8.3
Kentucky	1,679.6	1,503	1,400	–6.9	8.3	10.6	5.0	8.7	4.1	–17.9	–18.0
Maryland	2,215.7	2,222	1,795	–19.2	8.1	6.8	3.4	5.4	2.6	–20.6	–23.5
Mississippi	1,094.8	742	469	–36.8	4.3	–	–	–	–	–	–
New Jersey	3,660.8	3,180	1,397	–56.1	3.8	6.9	3.2	5.8	2.6	–15.9	–18.8
New York	7,952.0	9,730	5,641	–42.0	7.1	5.5	2.8	4.9	2.4	–10.9	–14.3
South Dakota	350.2	175	87	–50.3	2.5	–	–	–	–	–	–
Vermont	276.2	646	529	–18.1	19.2	–	–	–	–	–	–
Virginia	3,159.3	2,579	2,222	–13.8	7.0	7.3	3.3	6.3	2.8	–13.7	–15.2
Wisconsin	2,620.8	1,935	829	–57.2	3.2	11.5	5.1	10.4	4.6	–9.6	–9.8
Wyoming	222.7	744	359	–51.7	16.1	–	–	–	–	–	–
Puerto Rico	–	1,450	1,604	10.6	–	4.7	3.9	4.4	3.5	–6.4	–10.3
District of Columbia	619.7	328	261	–20.4	4.2	–	–	–	–	–	–

Jurisdiction	National Council on Compensation Insurance									
	1992		1994		1996		Percent change, 1992–96		Percent change, 1994–96	
	Lost-time claims (number)	Frequency per constant worker	Lost-time claims (number)	Frequency per constant worker	Lost-time claims (number)	Frequency per constant worker	Lost-time claims	Frequency per constant worker	Lost-time claims	Frequency per constant worker
With mandatory safety and health programs under workers' compensation										
Arkansas[1]	11,584	67.3	7,922	61.4	6,171	47.6	–46.7	–29.3	–22.1	–22.5
California[2]	–	–	–	–	–	–	–	–	–	–
Connecticut[3]	22,464	48.8	16,315	44.2	14,291	36.8	–36.4	–24.6	–12.4	–16.7
Louisiana[4]	6,440	42.9	5,631	30.8	5,738	29.7	–10.9	–30.8	1.9	–3.6
Maine[5]	9,581	35.5	7,688	32.8	6,523	33.4	–31.9	–5.9	–15.2	1.8
Minnesota[6]	–	–	–	–	–	–	–	–	–	–
Montana[7]	1,024	27.3	1,454	28.5	1,882	23.8	83.8	–12.8	29.4	–16.5
Nebraska[8]	8,949	61.6	7,571	60.3	6,405	51.1	–28.4	–17.0	–15.4	–15.3
New Hampshire[9]	7,963	47.9	6,110	40.0	5,200	36.3	–34.7	–24.2	–14.9	–9.3
North Carolina[10]	25,027	40.8	14,403	42.1	11,712	33.4	–53.2	–18.1	–18.7	–20.7
Oklahoma[11]	9,751	43.8	7,705	42.3	7,879	39.8	–19.2	–9.1	2.3	–5.9
Pennsylvania[12]										
Tennessee[13]	23,818	41.2	16,496	39.1	11,157	30.7	–53.2	–25.5	–32.4	–21.5
Texas[14]										
Utah[15]	5,064	63.3	3,848	49.2	3,953	43.4	–21.9	–31.4	2.7	–11.8
West Virginia[16]	–	–	–	–	–	–	–	–	–	–
With mandatory safety and health programs under State OSHA or other State statute[17]										
Alaska[18]										
Florida[19]	5,793	35.4	5,381	29.5	4,141	24.7	–28.5	–30.2	–23.0	–16.3
Hawaii[20]	20,759	26.1	9,973	21.7	11,465	21.4	–44.8	–18.0	15.0	–1.4
Michigan[21]	16,373	71.1	14,527	58.0	6,552	38.7	–60.0	–45.6	–54.9	–33.3
Nevada[22]	38,155	38.6	31,596	36.4	26,737	31.5	–29.9	–18.4	–15.4	–13.5
Oregon[23]	–	–	–	–	–	–	–	–	–	–
Washington[24]	27,473	59.1	28,000	53.7	24,841	45.2	–9.6	–23.5	–11.3	–15.8
	–	–	–	–	–	–	–	–	–	–

Table 4. Continued—Injury and illness rates, 1994–96, and workers' compensation claims, 1992, 1994, and 1996, by jurisdiction and safety and health program requirement category

Jurisdiction	National Council on Compensation Insurance									
	1992		1994		1996		Percent change, 1992–96		Percent change, 1994–96	
	Lost-time claims (number)	Frequency per constant worker	Lost-time claims (number)	Frequency per constant worker	Lost-time claims (number)	Frequency per constant worker	Lost-time claims	Frequency per constant worker	Lost-time claims	Frequency per constant worker
With voluntary safety and health programs under workers' compensation[25]										
Alabama	14,809	48.3	6,773	39.0	4,261	43.1	–71.2	–10.8	–37.1	10.5
Colorado	22,506	44.9	20,378	37.9	17,234	33.8	–23.4	–24.7	–15.4	–10.8
Kansas	4,006	64.4	10,405	64.7	8,491	54.8	–39.4	–14.9	–18.4	–15.3
Massachusetts	–	–	–	–	–	–	–	–	–	–
Missouri	41,472	61.9	27,728	58.3	15,546	40.4	–62.5	–34.7	–43.9	–30.7
New Mexico	6,432	30.5	3,829	21.7	4,468	23.3	–30.5	–23.6	16.7	7.4
North Dakota	–	–	–	–	–	–	–	–	–	–
Ohio	–	–	–	–	–	–	–	–	–	–
Rhode Island	4,816	31.3	3,319	29.9	4,285	34.3	–11.0	9.6	29.1	14.7
South Carolina	12,576	65.5	9,561	65.8	8,857	52.6	–29.6	–19.7	–7.4	–20.1
Without comprehensive safety and health program requirements										
Arizona	10,681	32.1	11,118	30.9	9,331	24.7	–12.6	–23.1	–16.1	–20.1
Delaware	–	–	–	–	–	–	–	–	–	–
Georgia	24,525	45.2	13,633	42.2	11,470	33.3	–53.2	–26.3	–15.9	–21.1
Idaho	8,234	36.7	8,684	36.7	6,904	28.9	–16.2	–21.3	–20.5	–21.3
Illinois	66,086	35.6	57,283	33.8	47,163	28.5	–28.6	–19.9	–17.7	–15.7
Indiana	29,112	49.7	25,755	46.4	22,161	40.7	–23.9	–18.1	–14.0	–12.3
Iowa	20,668	61.4	17,272	60.5	14,819	50.8	–28.3	–17.3	–14.2	–16.0
Kentucky	14,000	66.3	10,070	68.3	5,504	42.9	–60.7	–35.3	–45.3	–37.2
Maryland	17,964	57.0	14,343	57.4	12,902	45.7	–28.2	–19.8	–10.0	–20.4
Mississippi	8,823	60.0	4,974	58.2	4,385	45.8	–50.3	–23.7	–11.8	–21.3
New Jersey	–	–	–	–	–	–	–	–	–	–
New York	–	–	–	–	–	–	–	–	–	–
South Dakota	3,827	49.0	3,204	50.2	2,778	40.2	–27.4	–18.0	–13.3	–19.9
Vermont	4,503	55.1	3,865	58.2	3,199	45.4	–29.0	–17.6	–17.2	–22.0
Virginia	20,116	44.2	15,805	42.8	12,321	31.7	–38.8	–28.3	–22.0	–26.1
Wisconsin	65,388	57.4	58,550	47.4	47,615	41.9	–27.2	–27.0	–18.8	–11.6
Wyoming	–	–	–	–	–	–	–	–	–	–
Puerto Rico	–	–	–	–	–	–	–	–	–	–
District of Columbia	2,810	33.1	2,254	34.5	1,689	28.1	–39.9	–15.1	–25.1	–18.6

NOTE: Dash indicates data not available.

[1]Employers with above-average injury and illness rate.

[2]Employers with above-average injury and illness rate; programs also implemented by State OSHA.

[3]Employers with above-average injury and illness rate.

[4]Employers with more than 15 employees; 15 percent of establishments, more than 75 percent of employees.

[5]Employers with injury and illness rate at least twice the average.

[6]Employers with more than 25 employees; programs also implemented without size limitation through State OSHA.

[7]Employers with more than 5 employees; 35 percent of establishments, 85 percent of employees.

[8]All employers.

[9]Employers with more than 10 employees; 20 percent of establishments, 80 percent of employees.

[10]Employers with injury and illness rates 1.5 times the average; programs also implemented through State OSHA.

[11]Employers with injury and illness rates 1.25 times the average; voluntary program coexists.

[12]Self-insured employers; voluntary program coexists.

[13]Employers with above-average injury and illness rate.

[14]Employers with "extrahazardous" workplaces; affects less than 1 percent of establishments.

[15]Employers with above-average injury and illness rate.

[16]Employers with above-average injury and illness rate.

[17]Excluding California, Minnesota, and North Carolina, which have mandatory programs under workers' compensation.

[18]All employers.

[19]Employers with more than 10 employees and employers with high rates; 20 percent of establishments, 80 percent of employees (limited State enforcement).

[20]All employers.

[21]Construction industry only.

[22]Employers with more than 10 employees; 25 percent of establishments, 85 percent of employees.

[23]Employers with more than 10 employees and employers with high rates; 20 percent of establishments, 80 percent of employees.

[24]All employers.

[25]Excludes Oklahoma and Pennsylvania, which also have mandatory programs under workers' compensation, and Oregon, which also has a mandatory program under a State OSHA.

rates. Between 1994 and 1996, the national days-away-from-work rate dropped by more than 21 percent, to 2.2, the lowest rate ever recorded. Table 6 presents the rates and the degrees of reduction for 38 States and Puerto Rico.

5. Program administration. In many States, reforms have addressed the amount of time and resources used to resolve disputes over benefits. Mechanisms to facilitate settlement, such as mandatory arbitration or mediation, are now being encouraged. They result in cost savings by getting the injured worker back to the workplace faster and reducing attorneys' fees.

Improvements in the administration of workers' compensation systems have been recorded in Hawaii with the creation of a special unit in the State labor department to improve the administration of claims filed.[18] In New York, legislative reform mandates the reduction of excessive paperwork in the claims process.

The introduction of cost-reducing incentives and reforms (competition and accountability, for example) has affected the administration of the insurance market. In Hawaii, a nonprofit insurance corporation to cover small businesses facing high premiums has been established. Administrative improvements have reduced the size of the residual market. In Massachusetts, following legislative reforms, the assigned risk pool for workers' compensation insurance, as a percentage of total market premiums, dropped from 66 percent in 1992 to 20 percent in 1996.[19] In 1995, Virginia's assigned risk market represented 24.3 percent of the total market. By 1996, the share had fallen to 15.7 percent, a 35-percent reduction; the number of employers in the assigned risk market decreased by 9 percent.[20]

Effects of reforms. Relying on data from the National Council on Compensation Insurance, the Insurance Industry Institute has documented the fact that States which passed comprehensive workers' reforms have experienced significant reductions in their premium rates in recent years. For example, employers in Montana experienced a rate drop of 14.6 percent in 1996, following legislative changes enacted in 1993 and 1995 that targeted fraud, workplace safety, and managed health care. In a number of States, after a period of chronically high and escalating rates in the 1980s, a succession of rate cuts followed workers' compensation reforms in the 1990s. Continuing declines were experienced in 1996 in Maine (a 10.9-percent reduction), Kansas (11.5 percent), Massachusetts (12.2 percent), Minnesota (24 percent), Michigan (15.7 percent), North Carolina (15.3 percent), and Illinois (13 percent).

In Oregon, following the implementation of a 1990 law promoting workplace safety programs, tightening compensation requirements, and revamping disputed settlement procedures, the State has experienced a rate reduction each year since 1991. In Mississippi, an antifraud emphasis, an increased attention to workplace safety, and reforms affecting the assigned risk pool led to rate declines that were expected to save $25.5 million during 1996–97. And in California, it was estimated that legislative changes in the State's workers' compensation program which took place in 1993 would result in a premium savings of almost $2 billion by 1995. Deregulation affecting the rates charged by the State's more than 300 insurers was also credited with contributing to savings.

Finally, the Insurance Industry Institute, again citing data from the National Council on Compensation Insurance, reported that claim costs between 1980 and 1990 increased 11 percent each year, on average, compared with an average annual increase of less than 2 percent for the 1991–95 period. The Institute identified successful employer efforts to prevent accidents as a reason for the decline.[21]

The broad decline in occupational injury and illness rates between 1992 and 1996 was a phenomenon that affected virtually all States for which data exist. Among 37 jurisdictions (36 States and the District of Columbia) for which the National Council on Compensation Insurance maintains data, 36 recorded reductions in the number of lost-work-time claims filed between 1992 and 1996 (the lone exception was Mon-

Table 5. Mean and median injury and illness rates, 1996, and percent change in rates, by State safety and health program requirement category, 1994–96

Safety and health program requirement category	Mean injury and illness rate, weighted by employment, 1996	Mean percent change in injury and illness rate, weighted by employment, 1994–96	Median injury and illness rate, 1996	Median percent change in injury and illness rate, 1994–96
States with mandatory safety and health programs under workers' compensation	7.0	–13.2	8.0	–11.3
States with mandatory safety and health programs under State OSHA[1]	8.6	–9.6	8.4	–9.7
States with voluntary safety and health programs under workers' compensation[2]	7.5	–12.3	7.3	–14.5
States without comprehensive safety and health program requirements	6.8	–14.9	6.2	–14.0

[1]Excluding California, Minnesota, and North Carolina, which are included in the first category.

[2]Excluding Oklahoma and Pennsylvania, which are included in the first category, and Oregon, which is included in the second.

tana); and 33 jurisdictions posted reductions in the value of claims paid. (See table 7.) All 39 jurisdictions (38 States plus Puerto Rico) for which the Bureau of Labor Statistics has publishable data had declines in either total rates, lost-workday rates, or both between 1994 and 1996. The impact of mandatory, as opposed to voluntary, State occupational safety and health program requirements was not significantly correlated with the rate declines. (See table 5.) Occupational safety and health programs were being implemented by establishments in all States for a variety of motives, not the least of which was cost containment.

During the period 1992–96, the average value of lost-worktime claims rose in 34 of the 37 jurisdictions for which the National Council on Compensation Insurance has data. (See table 7.) (In three States—Maine, New Mexico, and Rhode Island—the average value of claims paid declined.) This statistic reflects the impact of higher deductible amounts for medical costs under workers' compensation programs, which have resulted in a sharp drop in the number of minor lost-time claims recorded by insurance companies. Eliminating many minor cost claims has greatly reduced the number of claims in the National Council's reporting system, while simultaneously increasing the average cost of those claims which remain. The deductible amount, however, does not absolve an employer from recording an incident on OSHA reports collected by the Bureau of Labor Statistics. Increases in deductibles have contributed to a rise in the rate of lost-workday cases involving restricted work activity only. The rate for such restricted workday cases rose from 0.7 case per 100 workers in 1990 to 1.1 cases in 1996.[22]

Accordingly, the various reform initiatives brought about by State workers' compensation legislation, including the implementation of safety and health programs and reforms having to with medical care costs, insurance fraud, and administrative procedures, are seen as causal factors in explaining the decline in the occupational injury and illness rate in the 1990s. Accident cost containment is held to be the primary motive behind a nationwide industry adoption of safety and health programs (mandatory and voluntary, as well as statutory and nonstatutory) that contributed to injury and illness rate reductions during this period.

Table 6. Rates of injuries and illnesses involving days away from work in 38 States and Puerto Rico, 1994 and 1996

Jurisdiction	1994	1996	Percent change
United States	2.8	2.2	–21.4
Alabama	3.0	2.5	–16.7
Alaska	3.8	3.6	–5.3
Arizona	2.8	2.0	–28.6
Arkansas	2.7	2.1	–22.2
California	2.7	2.1	–22.2
Connecticut	2.9	2.5	–13.8
Delaware	2.3	1.9	–17.4
Florida	2.5	2.0	–20.0
Georgia	2.5	1.7	–32.0
Hawaii	4.6	3.3	–28.3
Indiana	3.4	2.6	–23.5
Iowa	3.1	2.4	–22.6
Kansas	2.7	2.2	–18.5
Kentucky	3.7	2.4	–35.1
Louisiana	2.2	2.1	–4.5
Maine	3.3	2.5	–24.2
Maryland	2.8	2.1	–25.0
Massachusetts	2.5	2.3	–8.0
Michigan	3.0	2.4	–20.0
Minnesota	2.4	2.2	–8.3
Missouri	2.8	2.1	–25.0
Montana	2.8	2.7	–3.6
Nebraska	3.0	2.4	–20.0
Nevada	3.3	2.3	–30.3
New Jersey	2.9	2.1	–27.6
New Mexico	2.7	2.3	–14.8
New York	2.6	2.2	–15.4
North Carolina	2.4	1.9	–20.8
Oklahoma	3.3	3.0	–9.1
Oregon	3.0	2.6	–13.3
Puerto Rico	3.9	3.5	–10.3
Rhode Island	3.1	2.7	–12.9
South Carolina	2.1	1.6	–23.8
Tennessee	3.0	2.4	–20.0
Texas	2.4	2.0	–16.7
Utah	2.7	2.2	–18.5
Virginia	2.5	1.9	–24.0
Washington	3.5	3.1	–11.4
Wisconsin	3.7	3.0	–18.9

SOURCE: Bureau of Labor Statistics.

Industry recognition of hazards

In addition to legislative and administrative changes in State workers' compensation programs, industry interest in greater risk management, reduction in the number of accidents, and prevention of injuries in the workplace increased during the period under review. According to research carried out by the insurance industry, there was an upsurge of interest in process redesign, safety training, the enforcement of safety rules, and improved housekeeping: "Taking Massachusetts as an example, the Boston-based Workers Compensation Research Institute estimates that in that [S]tate about half of the cost reductions stemmed from legislative and administrative improvements, and as much as 30 percent was due to the actions of employers and insurers, independent of reform measures."[23] Within the insurance industry, Chubb Insurance Company published a guide for developing and maintaining a safety program for businesses.[24]

During the 1990s, Internet accessibility and advertising have facilitated the promotion of workplace safety and health programs. The National Council on Compensation Insurance, Inc., has taken a leadership role in this campaign. Headquartered in Boca Raton, Florida, the Council is the Nation's largest corporation providing information about workers' com-

pensation and health care. The company provides database products, software, publications, and consultation services to State funding agencies, self-insureds, independent bureaus, agents, regulatory authorities, legislatures, and more than 700 other insurance companies. Industry outreach and educational campaigns typically feature the financial benefits to be gained by reducing work-related accidents and injuries.

The National Council's message has received dramatically increased attention through Internet advertising. A recent search using the Internet search engine "Webcrawler" and the keywords "OSHA inspections" produced a listing of almost 5,000 sites, a large proportion of which were consulting firms offering employers their services to conduct onsite safety inspections designed to identify and eliminate workplace hazards. Apparently, the advance in information technology in the 1990s has facilitated the promotion of safety and health reform in U.S. workplaces and has contributed to the decline in injury and illness rates.

The results of a survey conducted in June 1995 by the Insurance Research Council, Inc., in cooperation with the National Federation of Independent Business Education Foundation, provides documentation showing that there has been an increase in awareness of the problem of workplace injuries and illnesses among medium-sized and small businesses.[25] This survey of about 3,200 owners of such businesses found that 45 percent of the firms that were sampled considered workplace safety a significant problem or one of the most serious problems facing management. Most business owners sampled (73 percent) believed that their employees had a strong or somewhat strong commitment to workplace safety.

The sampled firms averaged more than five different actions taken to increase workplace safety in the 5 years preced-

Table 7. Number and value of workers' compensation claims paid in 36 States and the District of Columbia, 1992, 1994, and 1996

[Value in millions of dollars]

Jurisdiction	1992		1994		1996		Percent change, 1992–96		Percent change, 1994–96		Average value of claims paid		
	Number	Value	Number	Value	Number	Value	Number	Value	Number	Value	1992	1994	1996
Alabama	14,809	$241.2	6,773	$128.9	4,261	$99.9	–71.2	–58.6	–37.1	–22.5	$16,288	$19,034	$23,434
Alaska	5,793	111.8	5,381	103.1	4,141	97.1	–28.5	–13.2	–23.0	–5.8	19,299	19,157	23,444
Arizona	10,681	189.8	11,118	192.8	9,331	190.5	–12.6	.4	–16.1	–1.2	17,769	17,339	20,418
Arkansas	11,584	142.5	7,922	97.3	6,171	84.9	–46.7	–40.5	–22.1	–12.8	12,305	12,287	13,754
Colorado	22,506	494.1	20,378	505.0	17,234	491.7	–23.4	–.5	–15.4	–2.6	21,954	24,782	28,531
Connecticut	22,464	350.1	16,315	300.4	14,291	234.3	–36.4	–33.1	–12.4	–22.0	15,586	18,409	16,397
District of Columbia	2,810	64.5	2,254	57.5	1,689	43.8	–39.9	–32.0	–25.1	–23.8	22,945	25,512	25,960
Florida	20,759	670.5	9,973	396.4	11,465	487.8	–44.8	–27.3	15.0	23.1	32,300	39,746	42,544
Georgia	24,525	511.6	13,633	315.1	11,470	271.1	–53.2	–47.0	–15.9	–14.0	20,861	23,112	23,635
Hawaii	16,373	305.8	14,527	246.1	6,552	127.0	–60.0	–58.5	–54.9	–48.4	18,675	16,940	19,388
Idaho	8,234	113.6	8,684	125.2	6,904	119.3	–16.2	5.0	–20.5	–4.7	13,795	14,415	17,275
Illinois	66,086	1,095.4	57,283	983.9	47,163	902.3	–28.6	–17.6	–17.7	–8.3	16,576	17,176	19,132
Indiana	29,112	314.4	25,755	308.8	22,161	289.6	–23.9	–7.9	–14.0	–6.2	10,800	11,990	13,066
Iowa	20,668	191.6	17,272	180.9	14,819	178.6	–28.3	–6.8	–14.2	–1.3	9,269	10,473	12,050
Kansas	14,006	169.8	10,405	147.5	8,491	135.2	–39.4	–20.4	–18.4	–8.4	12,125	14,178	15,918
Kentucky	14,000	206.4	10,070	165.0	5,504	101.4	–60.7	–50.9	–45.3	–38.5	14,741	16,384	18,421
Louisiana	6,440	181.1	5,631	174.1	5,738	146.9	–10.9	–18.9	1.9	–15.6	28,116	30,911	25,601
Maine	9,581	149.2	7,688	106.5	6,523	91.3	–31.9	–38.8	–15.2	–14.3	15,575	13,847	13,994
Maryland	17,964	290.0	14,343	264.2	12,902	253.5	–28.2	–12.6	–10.0	–4.0	16,141	18,419	19,648
Michigan	38,155	701.1	31,596	640.2	26,737	630.6	–29.9	–10.1	–15.4	–1.5	18,376	20,263	23,587
Mississippi	8,823	127.8	4,974	84.9	4,385	83.1	–50.3	–35.0	–11.8	–2.1	14,488	17,076	18,953
Missouri	41,472	468.2	27,728	368.6	15,546	262.5	–62.5	–43.9	–43.9	–28.8	11,289	13,292	16,886
Montana	1,024	22.0	1,454	31.9	1,882	55.3	83.8	151.4	29.4	73.2	21,469	21,948	29,366
Nebraska	8,949	125.5	7,571	115.1	6,405	111.2	–28.4	–11.4	–15.4	–3.4	14,019	15,200	17,363
New Hampshire	7,963	125.6	6,110	117.2	5,200	105.7	–34.7	–15.9	–14.9	–9.8	15,779	19,179	20,329
New Mexico	6,432	105.6	3,829	66.5	4,468	59.5	–30.5	–43.6	16.7	–10.4	16,425	17,365	13,328
North Carolina	25,027	458.2	14,403	286.9	11,712	266.2	–53.2	–41.9	–18.7	–7.2	18,310	19,922	22,725
Oklahoma	9,751	180.6	7,705	153.0	7,879	220.8	–19.2	22.3	2.3	44.3	18,521	19,858	28,023
Oregon	27,473	447.6	28,000	473.2	24,841	434.3	–9.6	–3.0	–11.3	–8.2	16,293	16,902	17,484
Rhode Island	4,816	84.1	3,319	54.2	4,285	59.9	–11.0	–28.7	29.1	10.6	17,456	16,331	13,986
South Carolina	12,576	172.8	9,561	141.6	8,857	139.9	–29.6	–19.0	–7.4	–1.2	13,742	14,808	15,800
South Dakota	3,827	55.6	3,204	53.1	2,778	54.4	–27.4	–2.1	–13.3	2.4	14,524	16,588	19,597
Tennessee	23,818	411.9	16,496	317.2	11,157	225.2	–53.2	–45.3	–32.4	–29.0	17,295	19,228	20,181
Utah	5,064	59.1	3,848	44.7	3,953	57.0	–21.9	–3.5	2.7	27.7	11,668	11,605	14,431
Vermont	4,503	72.4	3,865	63.8	3,199	56.1	–29.0	–22.5	–17.2	–12.1	16,075	16,514	17,529
Virginia	20,116	429.6	15,805	367.1	12,321	339.9	–38.8	–20.9	–22.0	–7.4	21,354	23,227	27,586
Wisconsin	65,386	576.8	56,550	576.2	47,615	560.3	–27.2	–2.9	–15.8	–2.7	8,821	10,189	11,768

SOURCE: National Council on Compensation Insurance.

ing the survey. The six most common actions, each undertaken by a majority of the firms, were as follows:

- provided personal safety equipment
- provided safety-related training
- installed safety controls or other devices on equipment
- conducted an indepth inspection for hazards
- adopted written safety rules
- purchased safer equipment.

The business owners identified providing safety-related training, providing protective equipment, and having a safety committee (one of the less common actions adopted) as the most effective actions taken to increase workplace safety.

According to respondents of the survey, the cost of workers' compensation insurance and the "right thing to do" were the two most important motivations for taking action to increase safety. Also important were long-term profitability, complying with Federal and State safety regulations, having had too many accidents, and employee morale. Anomalously, the survey found that a large proportion of small-business owners were not aware of the impact of workers' compensation experience ratings on their insurance costs. Had they been, the survey might have documented an even stronger embrace of safety reforms and programmatic initiatives.

Hazard identification and reform efforts have been high on the agendas of several industrial and building trades unions. The most active unions seeking reform include the United Automobile Workers; Steelworkers; Oil, Chemical, and Atomic Workers; Service Workers; State, County and Municipal Workers; Textile and Amalgamated Clothing Workers; Rubber Workers; United Food and Commercial Workers; United Paper Workers International; International Association of Machinists; Teamsters; Office and Professional Employees International; and Building Trades Unions, especially the Laborers International, International Brotherhood of Electrical Workers, International Union of Operating Engineers, Sheet Metal Workers International Association, and International Brotherhood of Painters and Allied Trades.

Unions have pursued their objective of safer workplaces through lobbying efforts in Washington, DC, or at the bargaining table. In a recent survey of major collective bargaining agreements, clauses requiring local-level labor-management safety and health committees were found in 29.4 percent of all contracts reviewed, a figure that was up from 26.5 percent 20 years earlier.[26]

Results of hazard assessments conducted as part of a comprehensive safety and health program, together with complementary activities of unions and insurance companies, have drawn attention to hazards that historically have not been the focus of traditional safety standards. OSHA standards such as those addressing machine guarding, electrical safety, fire prevention, equipment design, and flammable and pressurized materials continue to be important in the prevention of injuries. However, partly due to the general acceptance and widespread adoption of these standards, a growing proportion of injuries and illnesses currently occurring, such as those associated with lifting, repetitive stress, trips and slips, and violence, are not specifically addressed by the standards. Site-specific comprehensive safety and health programs, together with further information and compliance assistance support activities, may be better suited to developing solutions to some types of hazards.

A growing awareness of workplace hazards among all affected parties, including unions, employers, and the insurance industry, apparently has translated into a will to take corrective action to address and reduce hazards. The effort to promote that awareness was facilitated by emerging Internet information technology. Combined with the will to change and a greater accessibility to expert guidance and recommendations for appropriate corrective workplace changes, this awareness has contributed to the recent reduction in workplace injury and illness rates.

OSHA measures to increase compliance

The level of OSHA field inspection activity has changed significantly over the past 10 years. While the number of compliance officers has remained relatively constant during the period, the number of inspections of establishments has declined, and compliance assistance services have increased. The shift in emphasis from inspections to compliance assistance began in the mid-1990s as a result of "reinvention" initiatives and congressional language attached to OSHA's appropriations. (See tables 8 and 9.)

Federal OSHA enforcement. In 1995, OSHA conducted 29,113 Federal inspections, compared with 42,377 in 1994, a 31-percent drop. The decline came about primarily from a change in focus in the construction sector that resulted in 9,703 fewer inspections. In part, the change was in response to critical congressional oversight and review.[27] During this period, consultation funds for States rose again to more than 10 percent

Table 8. Compliance assistance, fiscal years 1994–98

[Funding in thousands of dollars]

Fiscal year	Federal funding	Authorized staff	State funding	Total
1994	$12,992	93	$30,982	$43,974
1995	13,410	91	31,564	44,974
1996	34,822	266	32,479	67,301
1997	37,351	285	34,477	71,828
1998	43,927	285	35,373	79,300

Table 9. OSHA inspections and authorized compliance officers, fiscal years 1988–97

Fiscal year	Federal inspections			State plan 18(b) inspections	
	Total	Construction	Officers authorized	Total	Construction
1988	58,549	31,051	1,245	57,601	28,357
1989	54,679	28,837	1,277	57,481	26,240
1990	45,511	24,279	1,268	75,652	35,391
1991	42,113	22,336	1,290	82,484	36,200
1992	42,431	22,563	1,264	71,786	30,308
1993	39,536	20,298	1,220	62,199	24,585
1994	42,377	22,704	1,226	60,600	24,464
1995	29,113	13,001	1,234	60,573	23,926
1996	24,024	11,399	1,169	57,199	23,279
1997	34,264	18,280	1,235	56,623	22,582

of the OSHA annual budget, regaining their pre-1989 percentage share. (See table 10.)

In addition to the increasing contribution to funding for State consultation programs, Federal money for compliance assistance to States reached $35.4 million in fiscal year 1998, up from $31.0 million budgeted in fiscal year 1994. Direct Federal funding for compliance assistance increased substantially after fiscal year 1994 in response to the Presidential directive to "reward results, not red tape." In OSHA's case, that directive was implemented via programs such as the Voluntary Protection Program, focused inspections, waived penalties for "quick fix" violations, and reductions in penalties for "good faith" employer efforts. The programs represented an Agency effort to extend worker protection beyond the minimum required by OSHA standards. Employers were given a choice of partnership or traditional enforcement and were encouraged to implement comprehensive safety and health programs.

Three categories of Voluntary Protection Program were designed, to (1) recognize the outstanding achievement of those who had successfully incorporated comprehensive safety and health programs into total management systems, (2) motivate others to achieve excellent safety and health results in the same way, and (3) establish a relationship among employers, employees, and OSHA based on cooperation rather than coercion. In 1995, more than 200 sites participated in Federal and State Voluntary Protection Programs.

Participating sites do not have a schedule of inspections. Instead, highly qualified volunteers from the safety and health field conduct site inspections for OSHA. (Any employee complaints, serious accidents, or significant chemical releases that occur are handled according to routine enforcement procedures.) OSHA data indicate that firms which participate in the Voluntary Protection Program experience lost-workday rates that are generally 60 percent to 80 percent below industry averages.[28]

Beginning in 1994, OSHA began to experiment with a number of other reforms that affected compliance and inspection activity in the field. That year, under a focused-inspections program, OSHA encouraged employers in the construction industry to implement comprehensive safety and health programs. Where OSHA compliance officers found an effective program on-site, the Agency conducted an abbreviated inspection limited to the top four hazards that kill workers in the construction industry: falls from heights, electrocution, crushing (suffered, for example, during a cave-in of a trench), and being struck by material or equipment. Conversely, where a safety and health program did not exist or was ineffective, OSHA conducted a complete site inspection. The "choose your OSHA inspection" strategy received a positive reaction from construction industry employers and labor unions.

OSHA expanded its focused-inspections program in 1995 to target industry hazards outside of construction. Industries were chosen on the basis of their accident and illness rates and other historical data. OSHA worked with the targeted industries both to identify the most serious hazards in those industries, in order to focus attention upon them during inspections, and to encourage the industries to adopt effective safety and health programs. Effective programs were identified by reductions in accident rates.

Also in 1994–95, as part of its "reinvention" effort, OSHA began to recognize employers who demonstrated a high level of effective self-enforcement of safety and health requirements. For these employers, OSHA offered penalty reductions of up to 100 percent for violations. While the Agency's traditional policies already allowed reductions in penalties, the new program explicitly related such reductions to effective safety and health program reforms.

If OSHA determined, during the course of a workplace inspection, that an employer had implemented a superior safety and health program, it granted substantial reductions in the penalties that would otherwise be assessed for any violations found. Penalties were eliminated entirely for violations that did not involve significant safety or health threats to workers,

Table 10. OSHA budget and State consultation funding, fiscal years 1988–98

[In thousands of dollars]

Fiscal year	Budget	Consultation	Percent of budget accounted for by consultation
1988	$235,474	$23,995	10.2
1989	247,746	24,181	9.8
1990	267,147	24,891	9.3
1991	285,190	25,354	8.9
1992	296,540	26,597	9.0
1993	288,251	28,541	9.9
1994	296,428	30,982	10.5
1995	311,660	31,564	10.1
1996	303,810	32,479	10.7
1997	324,955	34,477	10.6
1998	336,480	35,373	10.5

Table 11. Changes in injury and illness rates, 1994–96, lost-time claims, 1992–96, and inspections, 1992–96 and 1994–96, by State, ranked by 1996 total injury and illness rate

State	Nonfarm employment (thousands)	Bureau of Labor Statistics: 1996 injury and illness rate		Bureau of Labor Statistics: Percent change, 1994–96		National Council on Compensation Insurance: Percent change in lost-time claims, 1992–96	Federal and State OSHA inspections					Inspections per 10,000 employees, FY1996
		Total	Lost-workday rate	Total	Lost-workday rate		FY1992	FY1994	FY1996	Percent change 1992–96	Percent change 1994–96	
New York	7,952.0	4.9	2.4	–10.9	–14.3	–	9,730	7,970	5,641	–42.0	–29.2	7.1
Maryland	2,215.7	5.4	2.6	–20.6	–23.5	–10.0	2,222	1,960	1,795	–19.2	–8.4	8.1
Delaware	379.3	5.6	2.5	–18.8	–26.5	–	160	122	183	14.4	50.0	4.8
New Jersey	3,660.8	5.8	2.6	–15.9	–18.8	–	3,180	2,594	1,397	–56.1	–46.1	3.8
South Carolina	1,678.6	5.9	2.5	–14.5	–13.8	–7.4	2,800	2,265	1,815	–35.2	–19.9	10.8
Louisiana	1,824.2	5.9	2.8	–4.8	–3.4	1.9	1,044	955	735	–29.6	–23.0	4.0
Georgia	3,546.4	6.1	2.7	–29.1	–28.9	–15.8	1,761	1,726	779	–55.8	–54.9	2.2
Massachusetts	3,064.7	6.1	3.1	–15.3	–11.4	–	2,223	2,198	1,582	–28.8	–28.0	5.2
Texas	8,319.0	6.3	3.1	–11.3	–11.4	–	5,698	6,144	2,981	–47.7	–51.5	3.6
Virginia	3,159.3	6.3	2.8	–13.7	–15.2	–22.0	2,579	3,324	2,222	–13.8	–33.2	7.0
California	12,888.3	6.6	3.4	–18.5	–15.0	–	15,480	12,645	10,689	–30.9	–15.5	8.3
North Carolina	3,599.5	6.7	3.0	–14.1	–14.3	–18.7	2,156	3,795	4,313	100.0	13.6	12.0
Hawaii	529.2	6.8	3.6	–21.8	–26.5	–54.9	1,802	755	910	–49.5	20.5	17.2
Florida	6,237.6	6.9	3.2	–13.8	–3.0	15.0	2,433	2,681	1,399	–42.5	–47.8	2.2
Rhode Island	444.2	7.1	3.6	–16.5	–12.2	29.1	461	467	208	–54.9	–55.5	4.7
New Mexico	696.4	7.3	3.2	–7.6	–5.9	16.7	553	833	688	24.4	–17.4	9.9
Connecticut	1,592.5	7.4	3.6	–12.9	–12.2	–12.4	1,605	1,380	1,066	–33.6	–22.8	6.7
Arizona	1,926.3	7.7	3.3	–7.2	–8.3	–16.1	2,547	2,436	1,342	–47.3	–44.9	7.0
Oklahoma	1,368.6	7.8	4.1	–11.4	.0	2.3	1,102	953	744	–32.5	–21.9	5.4
Oregon	1,491.7	7.8	3.8	–10.3	–9.5	–11.3	6,241	5,562	5,693	–8.8	2.4	38.2
Tennessee	2,542.1	8.0	3.8	–14.9	–11.6	–32.4	2,795	2,832	2,711	–3.0	–4.3	10.7
Arkansas	1,089.0	8.2	3.5	–12.8	–18.6	–22.1	798	846	567	–28.9	–33.0	5.2
Minnesota	2,441.6	8.4	3.7	–3.4	–2.6	–	–3,248	2,902	2,345	–27.8	–19.2	9.6
Nevada	859.3	8.4	3.4	–9.7	–19.0	–	2,160	1,505	1,262	–41.6	–16.1	14.7
Alaska	262.9	8.5	4.1	–3.4	–4.7	–23.0	1,215	714	408	–66.4	–42.9	15.5
Missouri	2,579.5	8.6	3.6	–15.7	–12.2	–43.9	1,854	1,667	515	–72.2	–69.1	2.0
Kentucky	1,679.6	8.7	4.1	–17.9	–18.0	–45.3	1,503	1,382	1,400	–6.9	1.3	8.3
Montana	360.8	8.9	3.3	–1.1	3.1	29.4	391	405	351	–10.2	–13.3	9.7
Utah	965.3	8.9	3.3	–6.3	–13.2	2.7	705	1,140	1,184	67.9	3.9	12.3
Kansas	1,242.4	8.9	4.0	–9.2	–4.8	–18.4	518	892	197	–62.0	–77.9	1.6
Alabama	1,831.0	8.9	4.0	–3.3	–2.4	–37.1	1,342	1,207	548	–59.2	–54.6	3.0
Maine	541.0	9.4	4.8	–10.5	–14.3	–15.2	660	583	389	–41.1	–33.3	7.2
Nebraska	839.2	9.7	3.8	–4.9	–11.6	–15.4	295	357	141	–52.2	–60.5	1.7
Indiana	2,826.9	9.7	4.2	–14.2	–14.3	–14.0	4,762	3,442	3,208	–32.6	–6.8	11.3
Iowa	1,383.6	9.8	4.4	–9.3	–8.3	–14.2	948	785	648	–31.6	–17.5	4.7
Washington	2,434.9	10.3	3.9	.0	–7.1	–	8,452	5,790	7,705	–8.8	33.1	31.6
Wisconsin	2,620.8	10.4	4.6	–9.6	–9.8	–15.8	1,935	2,006	829	–57.2	–58.7	3.2
Michigan	4,369.8	10.6	4.9	–7.8	–5.8	–15.4	12,036	8,408	7,914	–34.2	–5.9	18.1
New Hampshire	565.9	–	–	–	–	–14.9	425	426	302	–28.9	–29.1	5.3
South Dakota	350.2	–	–	–	–	–13.3	175	120	87	–50.3	–27.5	2.5
Mississippi	1,094.8	–	–	–	–	–11.8	742	872	469	–36.8	–46.2	4.3
Pennsylvania	5,345.0	–	–	–	–	–	3,197	3,542	2,508	–21.6	–29.2	4.7
Illinois	5,694.9	–	–	–	–	–17.7	3,017	2,974	1,764	–41.5	–40.7	3.1
Colorado	1,913.2	–	–	–	–	–15.4	1,263	956	1,023	–19.0	7.0	5.3
Vermont	276.2	–	–	–	–	–17.2	646	765	529	–18.1	–30.8	19.2
Idaho	497.7	–	–	–	–	–20.5	491	415	221	–55.0	–46.7	4.4
Wyoming	222.7	–	–	–	–	–	744	386	359	–51.7	–7.0	16.1
North Dakota	310.3	–	–	–	–	–	299	245	169	–43.5	–31.0	5.4
Ohio	5,316.5	–	–	–	–	–	3,430	3,369	1,952	–43.1	–42.1	3.7
West Virginia	700.7	–	–	–	–	–	546	784	481	–11.9	–38.6	6.9

NOTE: Dash indicates data not available or (for percent change) calculation could not be made.

SOURCE: Bureau of Labor Statistics, National Council on Compensation Insurance, and Occupational Safety and Health Administration.

and citations were not issued for any such violations that were corrected during the course of the inspection. For employers who had less effective programs in place, but who were making good-faith efforts to comply with OSHA regulations, the Agency introduced a sliding scale of incentives.

Recognized elements of an effective safety and health program included a commitment to the program by management, meaningful employee involvement in the development and implementation of the program, training for workers and supervisors, diligent efforts to identify potential hazards in the workplace, and effective measures to prevent or control such hazards. The program had to be effective in practice and not just on paper. As evidence of the program's effectiveness, OSHA expected to find that the workplace had a verifiable low injury and illness rate, that the workplace had not been cited in the past 3 years for the gravest types of violations (willful, repeat, failure-to-abate, and high-gravity, serious violations), that there was documentation of an ongoing program to identify hazards, and that those hazards which were identified were corrected in a timely fashion.

The decline in the number of Federal field inspections reflected a major refocusing of OSHA's efforts to reduce workplace accidents. The extent to which the decline in injury and illness rates was influenced by this change in direction is difficult to quantify. As noted above, the audit of 1996 OSHA safety and health records found no increase in the extent of underreporting of accidents and illnesses over the 1986 level. If a significant increase in underreporting had been found, the decline in the number of inspections could have been viewed as a contributing factor to poor recordkeeping, and the rate decline might have been dismissed as illusory.

In sum, the increase in OSHA consultation and compliance assistance services during the period the occupational injury and illness rates declined, in combination with the focused inspections, indicates that the compliance assistance approach has been effective. But the unique influence of voluntary workplace safety and health programs on reducing injury and illness rates is very difficult to measure, given the concurrent activity in worker compensation reform. Nevertheless, a case can be made that the compliance assistance approach and the more selective compliance inspection approach introduced by OSHA during the 1994–96 period did contribute positively to the reduction in accident rates.

State OSHA enforcement. Inspection activity among the 23 State OSHA agencies during the 1994–96 period was similar to the Federal pattern, declining from 71,786 inspections in fiscal year 1992 to 57,199 in fiscal year 1996. Following the Federal OSHA example, States cut back substantially on construction inspections, which fell from 30,308 in fiscal year 1992 to 23,279 in fiscal year 1996. Table 11 shows the number of inspections by State, ranked by the 1996 total injury and illness rate.

Between fiscal years 1992 and 1996, the number of safety and health inspections declined in all States except Delaware (where the number increased from 160 inspections in 1992 to 183 in 1996), North Carolina (from 2,156 to 4,313), New Mexico (from 553 to 688), and Utah (from 705 to 1,184). Inspections in Puerto Rico also increased, from 1,450 in 1992 to 1,604 in 1996. By the latter year, the number of inspections in Puerto Rico exceeded the cumulative number of inspections conducted that same year in eight States: South Dakota (87), Nebraska (141), North Dakota (169), Delaware (183), Kansas (197), Rhode Island (208), Idaho (221), and New Hampshire (302). In 1996, only two States had inspection rates that exceeded 30 per 10,000 employees: Oregon (38.2) and Washington (31.6). No other State reached a rate of 20. (See table 11.)

The redirection in effort from compliance inspections with traditional regulatory enforcement to compliance assistance and consultation was clearly reflected in the general decline in the number of State inspections over the period 1992–96. The decline was not accompanied by an increase in occupational injury and illness rates. Instead, rates declined largely in response to legislative changes in State workers' compensation programs and the implementation of workplace safety and health programs, which the redirection of Federal and State OSHA efforts helped to promote.

OSHA reform efforts during this period (made, in part, in response to criticisms from the Congress and encouragement from the White House) affected the Agency's inspection strategy and resulted in a renewed emphasis on outreach, partnering, and working cooperatively with employers to address workplace hazards. The change in approach complemented market influences affecting industry, namely, escalating costs for workers' compensation programs and the dawning realization that corrective action was needed to reduce workplace accidents. The OSHA reforms reinforced and supported industry initiatives and contributed to the decline in occupational injury and illness rates. □

Footnotes

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[1] Peter Dorman, *Markets and Mortality* (Cambridge, U.K., Cambridge University Press, 1996), p. 15.

[2] *Occupational Injuries and Illnesses: Counts, Rates, and Characteristics, 1992*, Bulletin 2455 (Bureau of Labor Statistics, April 1995).

[3] Compare Joseph R. Meisenheimer II, "The services industry in the 'good' versus 'bad' jobs debate," *Monthly Labor Review*, February 1998, pp. 22–47.

[4] Memorandum from Jim Maddux, Office of Statistics, Occupational Safety and Health Administration, Apr. 1, 1998.

[5] William M. Eisenberg and Helen McDonald, "Evaluating workplace injury and illness records; testing a procedure," *Monthly Labor Review*, April 1988, pp. 58–60; see especially p. 59.

[6] *Norwood Plans BLS Action to Improve Occupational Safety and Health Data*, News Release USDL-87-444 (Bureau of Labor Statistics, Oct. 16, 1987).

[7] Interview with David Schmidt, Office of Statistics, Occupational Safety and Health Administration, May 28, 1998.

[8] Commonwealth of Pennsylvania, "Workers' Compensation Reform: The Bottom Line Is Jobs," on the Internet at **http://www.state.pa.us/PA_Exec/Governor/wcleg3.html** (visited Aug. 15, 1996).

[9] Insurance Industry Institute, "Workers Compensation," May 1998; an updated version is on the Internet at **http://www.iii.org/media/issues/workers.html.**

[10] *Lost-Worktime Injuries and Illnesses: Characteristics and Resulting Time Away from Work, 1996*, News Release USDL 98-157 (Bureau of Labor Statistics, Apr. 23, 1998).

[11] Results of this analysis may be obtained from the authors.

[12] State Insurance Fund, New York, Mar. 17, 1998. Workers' compensation rates were reduced an average of 26.2 percent from 1996 to 1997 as a result of legislative reforms passed in 1996. Changes included requirements for employers with poor safety records (an experience rating above 1.2) to adopt safety programs or face tough new sanctions, the creation of a new Workers' Compensation Inspector General with broad investigative powers, making workers' compensation fraud a felony punishable by time in jail, expanded use of managed care to treat workplace injuries, and the reduction of excessive paperwork in the claims process.

[13] Insurance Industry Institute, "Workers Compensation."

[14] *Ibid.*

[15] News release, Office of Governor, Trenton, New Jersey, Oct. 16, 1997. Workers' compensation insurance premiums will be reduced for the third consecutive year; beginning January 1998, rates will be reduced by an average of 9.3 percent. Contributing factors to the reductions that were cited in the news release were stepped-up workplace safety efforts by employers to reduce the number and severity of work-related injuries and a decline in the cost of providing medical services by insurers through the use of quality managed care. The 9.3-percent reduction for 1998 follows reductions of 11.2 percent in 1997 and 3.6 percent in 1996.

[16] Announcement by National Council on Compensation Insurance, Inc., Feb. 19, 1997.

[17] Nina Munk, "Can't lift boxes? Then sweep the floors," *Forbes*, Nov. 4, 1996, on the Internet at **http//www.forbes.com/forbes/110496/5811167a.htm**.

[18] *Honolulu Star-Bulletin*, Honolulu, Hawaii, Oct. 3, 1997. Workers' compensation rates were reduced by 10.5 percent beginning Nov. 1, 1997; this figure follows a reduction of 27 percent last year. Legislative reforms since 1995 credited with the reductions are the formation of a nonprofit insurance corporation to cover small businesses facing high premiums, the creation of the aformentioned special unit in the State labor department, and the creation of incentives for employers who set up prevention programs.

[19] Massachusetts Department of Industrial Accidents, Feb. 13, 1998. Workers' compensation legislative reforms were enacted in 1991, and costs are expected to drop even further as the reforms continue to work. Rates charged to employers for workers' compensation insurance will decrease by 21.1 percent in 1998, the fourth year in a row with a reduction and the largest reduction yet. The number of claims filed has been reduced from more than 40,000 to 22,000.

[20] National Council on Compensation Insurance, Inc., July 1, 1997, announcement of changes in Virginia workers' compensation.

[21] Insurance Industry Institute, "Workers Compensation."

[22] *Workplace Injuries and Illnesses in 1996*, News Release USDL 97-453 (Bureau of Labor Statistics, Dec. 17, 1997), p. 3.

[23] Insurance Industry Institute, "Workers Compensation."

[24] "Small Business Best Practices for Workplace Safety," in *The Rewards of Managing Risk: A Guide for Entrepreneurs and Managers* (Warren, NJ, Chubb Group, 1997), also on the Internet at **http://www.chubb.com.businesses/entguide.html**.

[25] Insurance Research Council, in cooperation with the National Federation of Independent Business Education Foundation, *Motivating Safety in the Workplace*, survey carried out June 1995; available from the Insurance Research Council, Inc., 211 S. Wheaton Ave., Suite 410, Wheaton, IL 60187.

[26] George R. Gray, Donald W. Myers, and Phyllis S. Myers, "Collective bargaining agreements: safety and health provisions," *Monthly Labor Review*, May 1998, pp. 13–35.

[27] *OSHA Potential to Reform Regulatory Enforcement Efforts*, GAO/T-HEHS-96-42 (General Accounting Office, Oct. 17, 1995).

[28] *OSHA Inspections*, revised edition, OSHA 2098 (Occupational Safety and Health Administration, 1996), p. 14.

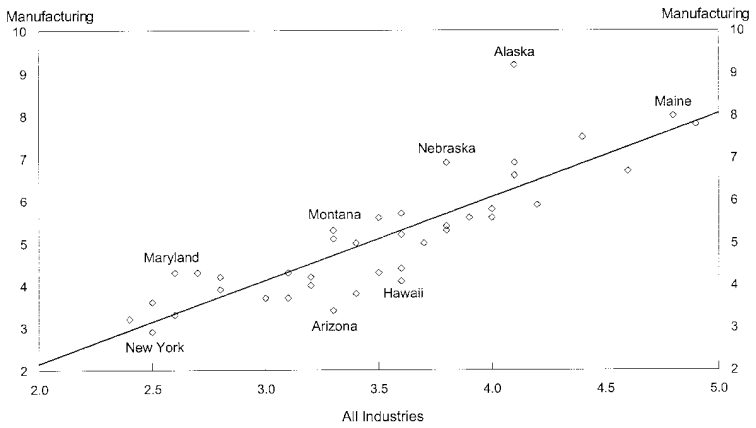
APPENDIX: Data analysis

In addition to relying on data from the BLS annual publication *Occupational Injuries and Illnesses: Counts, Rates, and Characteristics*, the analysis in this article was based on previously unpublished data from the following sources:

- Bureau of Labor Statistics, occupational injury and illness rates, by industry, for 38 States and Puerto Rico, 1994–96.
- Office of Statistics, U.S. Occupational Safety and Health Administration, four-digit level of industrial detail, occupational injury and illness rates, 1989–96.
- Office of Statistics, OSHA, preliminary results from the Eastern Research Group/OSHA compliance audits of 1996 recorded injury and illness cases in 250 establishments.
- National Council on Compensation Insurance, lost-time claim counts, average cost per claim, and frequency per constant worker, for 36 States and the District of Columbia, 1992–96.
- OSHA, Integrated Management Information System Internet file, total establishment inspections, by State, for fiscal years 1992 and 1996.

BLS State-level data were reviewed to determine the importance of industry rate changes on data at that level. Chart A-1 compares the relationships between lost-workday injury and illness rates in manufacturing and construction with the all-industry rate, by State, for 1996. In general, the match was closer for manufacturing than for construction. A comparison of the percent reductions in the manufacturing and construction rates between 1994 and 1996 reveals that neither industry division consistently followed State all-industry rate changes, although the changes were similar in scope and direction for the industry divisions. (See chart A-2.)

Chart A-1. Lost-workday injury and illness rates, all industries versus manufacturing and construction, 1996, 38 States and Puerto Rico



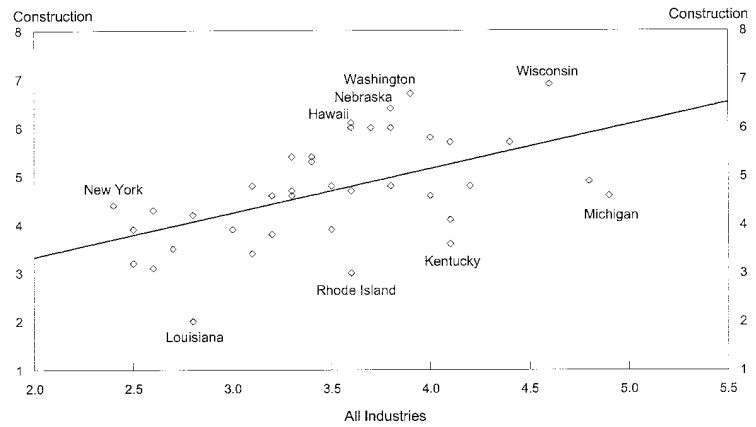
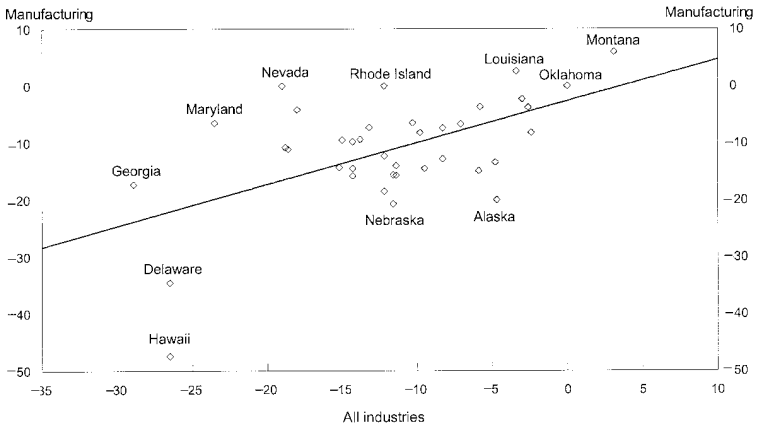


Chart A-2. Percent reduction in lost-workday injury and illness rates, all industries versus manufacturing and construction, 1994–96, 38 States and Puerto Rico



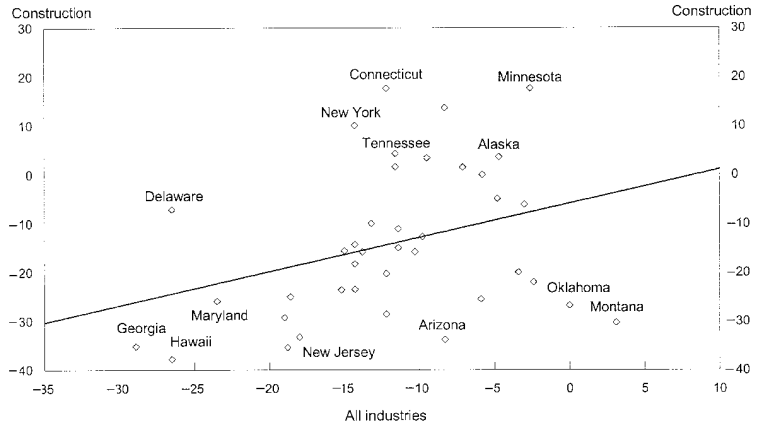


Chart A-3. Lost-workday injury and illness rates, all industries, 1994, and percent reduction, 1994–96, 38 States and Puerto Rico

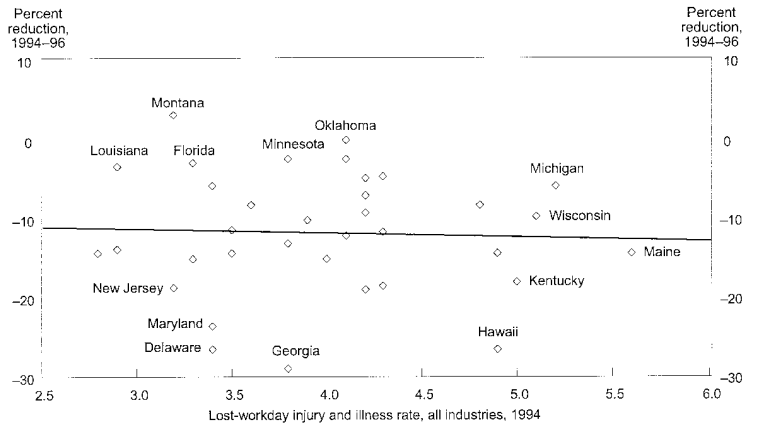


Chart A-4. Percent change in lost-time claims rate and in frequency per constant worker, 1992–96, 36 States and District of Columbia

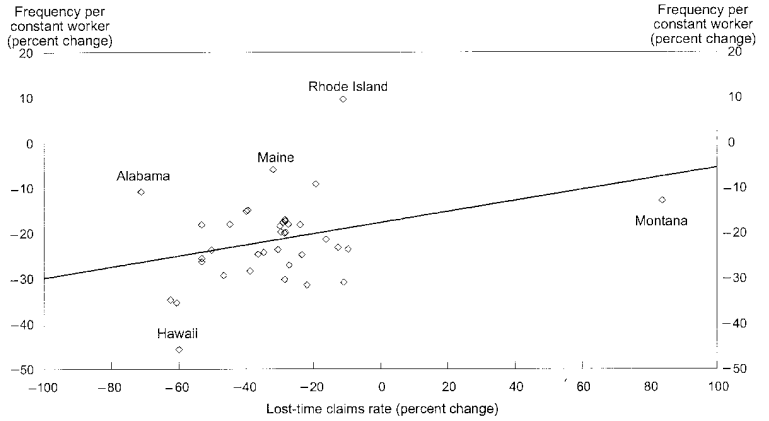
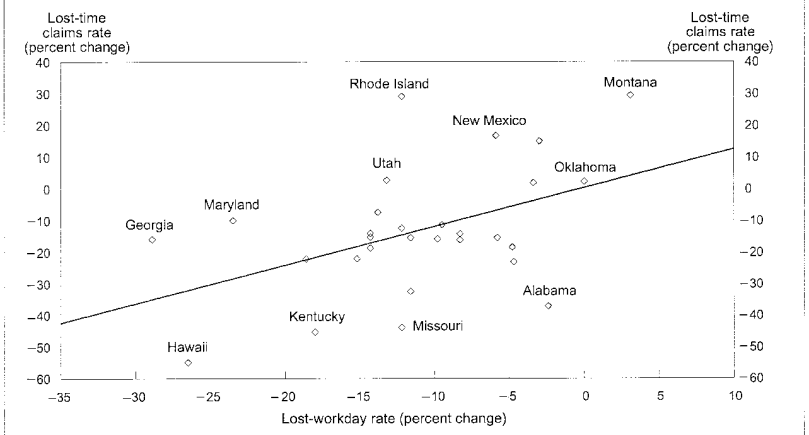


Chart A-5. Percent change in BLS lost-workday rate and in National Council on Compensation Insurance lost-time claims rate, 1994–96, 29 States



An interesting finding was the absence of a relationship between the 1994–96 State rate declines and the level of States' 1994 lost-workday injury and illness rates. The presumption that States with higher rates were likely to experience greater rate reductions than States with lower rates was not borne out by the analysis: rate reductions of 10 percent to 20 percent were as likely to have been registered in a State with a low injury and illness rate as in a State with a high rate. (See chart A-3.)

In comparing the internal consistency between lost-time claims count data and data on the frequency per constant worker, both data sets from the National Council on Compensation Insurance (see chart A-4), the relationship was generally seen to be consistent and reflected the sharp drop in National Council claims after 1992. A comparison of BLS lost-workday injury and illness rate changes from 1994 to 1996 tracked reasonably well with the percent change in the lost-time claims from the Council over the same years. (See chart A-5.) Given the large decline in those claims and the increase in popularity of higher medical deductibles, a close fit between the two rate changes was not expected. The relationship was found to be statistically significant at the 0.05 level with a Pearson correlation coefficient of 0.458.

The significant reduction in the number of lost-time claims reflected in the National Council State data, together with the increase in the average value of claims paid (see table 7), made it appear that minor lost-workday injuries and illnesses were decreasing and that the remaining cases were more serious and of longer duration and higher cost. BLS data for 1992 and 1996, however, did not support this inference. Median days away from work decreased between those years, from 6 to 5, for occupational injuries and illnesses involving days away from work.[1] The proportion of cases of short duration (under 3 days) increased from 28.6 percent to 29.8 percent; the reverse was found (a decrease from 26.1 percent to 24.7 percent) for cases involving 21 days or more away from work. Apparently, the BLS data indicate that not only is the incidence of lost-workday injuries and illnesses declining, but the severity of the remaining cases is also declining. This statistic should be closely monitored in subsequent BLS annual reports.

Footnote to the appendix

[1] *Lost-Worktime Injuries and Illnesses: Characteristics and Resulting Time Away from Work, 1996*, News Release USDL 98-157 (Bureau of Labor Statistics, Apr. 23, 1998), table 10.