Attachment 1

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March 10, 2014

The Honorable David S. Michaels
Assistant Secretary of Labor for
Occupational Safety and Health
U.S. Department of Labor
Room N-2625
200 Constitution Avenue N.W.
Washington, D.C. 20210
c/o OSHA Docket Office
Docket No. OSHA-2013-0024

SUBMITTED ELECTRONICALLY: www.regulations.gov

Re: Occupational Safety and Health Administration Proposed Rule to Improve Tracking of Workplace Injuries and Illnesses, 78 Fed. Reg. 67,254 (Nov. 8, 2013), Docket Number OSHA-2013-0023

Dear Dr. Michaels:

The U.S. Chamber of Commerce (the "Chamber") is the world's largest business organization representing the interests of more than three million businesses of all sizes and in every market sector and region throughout the United States. Our members range from small businesses to large multinational corporations, and local chambers to leading industry associations.

The Chamber respectfully submits this comment on behalf of its members, many of whom will be directly affected by the Occupational Safety and Health Administration's ("OSHA") proposed rule to Improve Tracking of Workplace Injuries and Illness, 78 Fed. Reg. 67,254 (proposed Nov. 8, 2013) (the "Proposed Rule"). At the outset, we note that the title for this rulemaking proposal is misleading because it has nothing to do with "tracking injuries" but instead focuses on the electronic reporting and public dissemination of such reports.

As this comment demonstrates, this Proposed Rule is fatally flawed because it is hinged to no statutory authority, is arbitrary and capricious in light of OSHA's

inconsistent positions on confidentiality, and violates the constitutional mandates of the First and Fourth Amendments. Additionally, this Proposed Rule would cause significant harm to both employers and employees by publishing their private, confidential, and proprietary information. Finally, OSHA's cursory cost-benefit analysis has overstated the potential benefits of this Proposed Rule while underestimating the costs that it will impose. In sum, this rulemaking stands as an example of overreach by this administration. *See, e.g.*, *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013) (unconstitutional Executive recess appointments). Accordingly, the Chamber believes that this Proposed Rule must be withdrawn.

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BACKGROUND

A. Regulatory Background and Context.

In 2008, as part of its effort to shape the direction of the Obama administration's regulatory activities, the AFL-CIO asked President Obama's transition team to, among other things, "leverage the impact of their interventions through highly publicized enforcement initiatives and actions and expand access to information and data on employers' safety and health performance." Submission from the American Federation of Labor and Congress of Industrial Organizations to President-elect Barack Obama's Transition Team, Turn Around America: AFL-CIO Recommendations for the Obama Administration–Workplace Safety and Health at 2 (Dec. 11, 2008) (on file with the Obama-Biden Transition Project).[1]

Shortly after taking office, President Obama appointed Dr. David S. Michaels to serve as Assistant Secretary of Labor for Occupational Safety and Health. Upon being confirmed to this position, Dr. Michaels stated clearly and repeatedly that he planned to adopt the strategy advocated by the AFL-CIO, that he dubbed "regulation by shaming." *See, e.g.*, Greg Hellman, *New Approaches Needed for OSHA After 40 Years, Michaels Says in Letter*, 40 OSHR 657 (Aug. 12, 2010); Stephen Lee, *Michaels Gives Guidance on Rulemakings, Welcomes More Congressional Oversight*, 40 OSHR 1031 (Dec. 16, 2010).

On November 8, 2013, OSHA introduced one manifestation of this "regulation by shaming" strategy by issuing the Notice for this Proposed Rule. *See* Improve Tracking of Workplace Injuries and Illness, 78 Fed. Reg. 67,254 (proposed Nov. 8, 2013). Through this Proposed Rule, OSHA proposes that in addition to adopting several new burdensome reporting requirements, the information collected by OSHA would be made readily available to the public and special interest groups through a government-maintained internet database. *See id.* at 67,259. While OSHA offers several rationales for these changes, the real purpose of this Proposed Rule is clear: To provide special interest groups with information that can be misconstrued and distorted in a manner that does not reflect business's commitment to the safety of this nation's employees.

[1] *Available at* http://otrans.3cdn.net/fed3a90fdf0413d737_vcm6b1l9w.pdf.

B. OSHA Should Hold a Formal Hearing, and Perform a Review of this Proposed Rule under the Small Business Regulatory Enforcement Fairness Act.

Considering both the burdens that this Proposed Rule will impose on businesses and the far-reaching implications that the publication of confidential and proprietary information contained in injury and illness recordkeeping forms will have, the Chamber asks OSHA to hold formal hearings throughout the United States regarding this Proposed Rule in order to allow for thorough and coherent presentations by OSHA personnel, as well as cross-examination by the public. The informal public meeting did not allow the majority of this nation's employers—who are not located in Washington, D.C.—a meaningful opportunity to participate in the rulemaking process.

The Chamber also urges OSHA to convene a panel under the Small Business Regulatory Enforcement Fairness Act ("SBREFA") to review this Proposed Rule. A SBREFA review of this Proposed Rule is particularly appropriate because the vast majority of employers and establishments that will be affected by this Proposed Rule's electronic-only reporting requirements will be small businesses, many of which do not currently record injuries electronically. These same small businesses are also the ones that will be disproportionately affected by the publication of workplace injury and illness information. For example, in light of the small sample size feeding the statistics that OSHA will collect from small businesses, just one or two injuries could have a significant and disproportionate effect on how an employer's commitment to workplace safety is perceived. Further, given their relative lack of resources, small businesses will be less able—compared to their larger counterparts—to engage in the expensive process of reviewing purported injuries to determine whether they must be reported under OSHA's regulations.

The Chamber believes that these procedural measures will yield insights from numerous stakeholders that will better inform OSHA's priorities and policies and reinforce the concerns and objections presented in these comments.

DISCUSSION

A. OSHA Does Not Have the Requisite Statutory Authority to Promulgate this Proposed Rule.

A fundamental axiom of the regulatory process is that an agency must have statutory authority for any rule which it wishes to promulgate. *See Am. Library Ass'n v. FCC*, 406 F.3d 689, 708 (D.C. Cir. 2005) ("[F]ederal agencies[] literally [have] no power to act . . . unless and until Congress confers power upon

it."). When seeking to adopt a new regulation, an agency must unambiguously articulate the basis for its authority, and may rely only on the grounds that it has "clearly invoked." *See SEC v. Chenery Corp.*, 332 U.S. 194, 196–98 (1947). OSHA has stated that it has authority for this Proposed Rule under Sections 8(c)(1), (c)(2), (g)(2), and 24 of the Occupational Safety and Health Act ("OSH Act" or the "Act"). 78 Fed. Reg. at 67,255. None of these sections, however, provide OSHA with the statutory authority required to promulgate this Proposed Rule.

Each of the sections upon which OSHA relies states that the information that OSHA is empowered to collect is for the use of the Secretary of Labor and the Secretary of Health and Human Services. For instance, Section 8(c)(1) requires employers to maintain records, which they must make available to the Secretary of Labor and the Secretary of Health and Human Services. 29 U.S.C. § 657(c)(1). This section further provides that the Secretary of Labor is empowered to conduct periodic inspections and requires employers to inform their employees of their protections under the OSH Act. *Id.* Similarly, Section 8(c)(2) provides that the Secretary of Labor may adopt regulations that require employers to maintain records and make reports regarding deaths, injuries, and illnesses related to their workplace to the Secretary of Labor and the Secretary of Health and Human Services. *Id.* § 657(c)(2). Section 8(g)(2) states that the Secretary of Labor may prescribe rules it deems necessary to carry out *its responsibilities* under the Act. *Id.* § 657(g)(2). Finally, Section 24 provides, in relevant part, that the Secretary of Labor must maintain a program for the collection and analysis of statistics related to occupational safety and health. *Id.* § 673(a).

Conspicuously absent from these provisions is any mention, let alone express or implied authority, that OSHA may create an online database meant for the public dissemination of an employer's injury and illness records containing confidential and proprietary information. Had Congress envisioned or intended that the Secretary of Labor would have the authority to publish this information it surely would have so provided. But of course, it did not and has not. Nor has such authority been contemplated by the numerous bills to amend the OSH Act that have been proposed. *See, e.g.*, Protecting America's Workers Act of 2009, S. 1580 & H.R. 2067, 111th Cong. (2009). Instead, the statutory provisions upon which OSHA relies for its legal authority to proceed with this Proposed Rule are limited to the *government's* collection and analysis of raw data regarding workplace injuries and illnesses.

Perhaps nowhere is this more apparent than in Section 24, which states that "the Secretary, in consultation with the Secretary of Health and Human Services, shall develop and maintain an effective program of collection, compilation, and analysis of occupational safety and health statistics." 29 U.S.C.

§ 673(a). OSHA seeks to justify this Proposed Rule by asserting that publication of this information will improve workplace safety and health because "[p]ublic access to timely, establishment-specific injury and illness information will allow researchers to identify patterns of injuries or illnesses . . . ." 78 Fed. Reg. at 67,256. The ingenuity of OSHA's attempt to outsource its obligation under this section cannot be denied. Creativity, however, is no substitute for statutory authority. Section 24 plainly places the obligation to analyze the information and statistics the agency collects on the Secretary of Labor. Had Congress wanted this role to be performed by someone else, it would have said so. *See Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) ("Congress 'says in a statute what it means and means in a statute what it says . . . .'").

The lack of Congressional intent to give the Secretary of Labor the power to create an online database envisioned by this Proposed Rule is further evidenced by Congress's treatment of other similar databases. After a great deal of debate, in 2008, Congress passed the Consumer Product Safety Improvement Act of 2008 ("CPSIA").[2] The CPSIA expressly requires that the Consumer Product Safety Commission ("CPSC") create and maintain a publicly available online database of incidents related to the safety of consumer products. 15 U.S.C. § 2055a. This database is meant to provide consumers with information in an easily accessible fashion regarding "injuries caused by consumer products," 154 Cong. Rec. S7867, S7870 (daily ed., July 31, 2008) (statement of Sen. Carl Levin), so that customers may make informed decisions about the products they buy. Similarly, the database suggested by OSHA through this Proposed Rule is meant to make establishment-specific workplace safety information "easily accessible to customers and potential customers," thus allowing "members of the public to make more informed decisions about current and potential companies with which to do business." 78 Fed. Reg. at 67,256.

The contrast between the Congressional enactment of the CPSIA database and OSHA's regulatory sleight of hand could not be more stark. While Congress authorized the creation of the database under the CPSIA only after careful consideration and extensive debate, OSHA has sought to hide its database in a Proposed Rule that the agency claims simply "improves tracking" of workplace injuries and "does not add or change any employer's obligation to complete or retain injury or illness information." *Id.* at 67,254. At the time the CPSIA database was proposed, many within Congress opposed its creation, expressing concerns that "[i]naccurate information about a company's product on a government-endorsed website could irrevocably harm a company's reputation." 154 Cong. Rec. S7867, S7871 (daily ed., July 31, 2008) (statement of Sen. Jon

[2] 15 U.S.C. §§ 2051–2089.

Kyl). In response, the database provision of the CPSIA was enacted by Congress only after careful consideration, extensive debate, and the creation of robust procedural safeguards to prevent the dissemination of misleading information. *See* 15 U.S.C. § 2055a; *Doe v. Tenenbaum*, 900 F. Supp. 2d 572, 596–98 (S.D. Md. 2012). By contrast, Congress would not have silently granted OSHA the statutory authority to create an online database with a similar purpose, posing similar risks of false and misleading information as the CPSIA database, over which Congress debated so intensely, culminating in a robust statutory framework.

Indeed, other examples that highlight the contrast between OSHA's lack of statutory authority to promulgate a rule of this type and situations where Congress has given an agency that statutory power to create a public database are ubiquitous. For instance, in a recent Notice of Proposed Rulemaking, the Federal Motor Carrier Safety Administration ("FMCSA") issued a proposed rule outlining the creation of a database to track the drug and alcohol test results for all holders of a commercial driver's license. Commercial Driver's License Drug and Alcohol Clearinghouse, 79 Fed. Reg. 9703 (proposed Feb. 20, 2014). Unlike OSHA, which lacks the statutory authority to create a database of this type, the FMCSA was expressly authorized to do so. *See* Moving Ahead for Progress in the 21st Century Act, 49 U.S.C. § 31306a ("[T]he Secretary of Transportation shall establish, operate, and maintain a national clearinghouse for records relating to alcohol and controlled substances testing of commercial motor vehicle operators.").

For these reasons, OSHA lacks the required statutory authority to enact this Proposed Rule.

B. OSHA's Contradictory and Unexplained Positions on the Dissemination of Confidential Employer Information Render this Proposed Rule Arbitrary and Capricious.

An agency may not act in a manner that is "arbitrary" or "capricious." 5 U.S.C § 706(2)(A). Rather, when adopting new rules, it must engage in "reasoned decisionmaking." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 52 (1983). As courts have explained, this includes the requirement that "[a]n agency must treat similar cases in a similar manner unless it can provide a legitimate reason for failing to do so," *Indep. Petrol. Ass'n of Am. v. Babbitt*, 92 F.3d 1248, 1258 (D.C. Cir. 1996), and may not rely on inconsistent or contradictory reasoning, *Am. Tel. & Tel. Co. v. FCC*, 836 F.2d 1386, 1391 (D.C. Cir. 1988). OSHA's Proposed Rule plainly violates these principles.

On numerous occasions, OSHA has asserted that the very information that it now seeks to publish on the internet should not be made public because it includes confidential and proprietary business information. *See, e.g.*, *New York Times Co. v. U.S. Dep't of Labor*, 340 F. Supp. 2d 394 (S.D.N.Y. 2004); *OSHA Data/CIH, Inc. v. U.S. Dep't of Labor*, 220 F.3d 153 (3d Cir. 2000). Indeed, as recently as 2004, Miriam McD. Miller, OSHA's Co-Counsel for Administrative Law, stated in a sworn declaration that the information contained in what now constitutes OSHA's Forms 300, 300A, and 301 "is potentially confidential commercial information because it corresponds with business productivity." Decl. of Miriam McD. Miller ¶ 5, *New York Times Co. v. U.S. Dep't of Labor*, 340 F. Supp. 2d 394 (S.D.N.Y. 2004) (No. 03 Civ. 8334), ECF No. 16 (attached as Exhibit A).

In the *OSHA Data* case, OSHA rejected a Freedom of Information Act ("FOIA") request for the Lost Work Day Illness and Injury ("LWDII") rates of several businesses because the agency concluded that this information fell within FOIA's exemption for "trade secrets and commercial information." 220 F.3d at 162 (quoting 5 U.S.C. § 552(b)(4)). In support of this conclusion, OSHA argued before the Court of Appeals for the Third Circuit that it could not provide this information without first notifying the businesses that had submitted it because of "the possibility [that] substantial competitive harm" would result. *Id.* at 163. Agreeing with the Department of Labor, both the district court and the Third Circuit held that "the DOL had acted appropriately in concluding that it had 'reason to believe that disclosure of the information could reasonably be expected to cause substantial competitive harm.'" *Id.* at 167.

Similarly, in *New York Times Co.*, OSHA rejected the New York Times' FOIA request for the LWDII rates for 13,000 worksites that OSHA had identified as having an LWDII rate that was significantly above the national average. 340 F. Supp. 2d at 396–97. Once again, OSHA rejected this request on the grounds that it sought "commercial information" that could not be disclosed without first notifying employers so that they could have the opportunity to object. *Id.* at 397.

In support of this conclusion, OSHA again argued that "[r]elease of the LWDII rate it [sic] tantamount to release of confidential commercial information, specifically, the number of employee hours worked, because the number can be easily ascertained from the LWDII rate." *Id.* at 401; *see also* Dep't of Labor Mem. of Law at 1, *New York Times Co. v. U.S. Dep't of Labor*, 340 F. Supp. 2d 394 (S.D.N.Y. 2004) (No. 03 Civ. 8334), ECF No. 12 (attached as Exhibit B). ("[T]he number of employee hours worked (which many corporations, and OSHA, consider to be confidential commercial information), can be easily calculated from the LWDII rate."). This is because, as OSHA explained, the dissemination of this data, when combined with a workplace's total number of injuries and illnesses, which are posted at an employer's workplace for a limited

amount of time, could be easily deconstructed to reveal that establishment's total hours worked.[3] *New York Times Co.*, 430 F. Supp. 2d at 401; Miller Decl., Ex. A ¶¶ 4–5.

OSHA and the Chamber's position are, or at least were, the same: Total hours worked at individual establishments is confidential and proprietary information. *See New York Times Co.*, 340 F. Supp. 2d at 402. Indeed, in the *New York Times Co.* case, OSHA asserted that this number was not only confidential information, but had the capacity to "cause substantial competitive injury." *Id.* (citing Dep't of Labor Mem. of Law, Ex. B at 17). This is because, as OSHA itself argued, the total hours worked by a company's employees "corresponds with business productivity," Dep't of Labor Mem. of Law, Ex. B at 4, and could be used "to calculate a business['s] costs and profit margins," *id.* at 17 (citing *Westinghouse Elec. Corp. v. Schlesinger*, 392 F. Supp. 1264, 1249 (E.D. Va. 1976), *aff'd*, 542 F.2d 1190 (4th Cir. 1976)). The confidentiality problems relating to hours worked are only exacerbated in this Proposed Rule by OSHA's insistence on collecting and publishing this information on an establishment-by-establishment basis, *including the number of employees at each establishment.* Armed with total hours worked plus an establishment's employee count, a business' overall capacity and productivity can easily be determined.

The court in the *New York Times Co.* case ultimately found that OSHA could not withhold the LWDII rates. 340 F. Supp. 2d at 402. It did so, however, only after concluding that because the number of incidences of injury and illness—a necessary component to "reverse engineering" total hours worked—was posted at an employer's workplace in a location where it was likely to be viewed only by employees for just one month, it was thus not publicly available. *Id.* Thus, the much more detailed and revelatory information at issue in this Proposed Rule—perpetually available on a government database—was not before the court.

This Proposed Rule would make an establishment's incidences, hours worked and number of employees publicly available, thereby eliminating the need

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[3] The LWDII rate is calculated using the following formula:

LWDII = (N/EH) x 200,000

In this equation, N equals the number of incidents of injury or illness resulting in lost workdays, and EH equals the number of hours worked by all of the employer's employees. The result of the number of incidents divided by the total number of hours worked is multiplied by 200,000 to approximate a rate per hundred full-time employees. *New York Times Co.*, 340 F. Supp. 2d at 396. Once both a workplace's LWDII rate and number of incidences (N) are known, as OSHA itself explained, one "need only plug in [these numbers] to calculate the number of employee hours worked." Miller Decl., Ex. A ¶¶ 4–5.

for "reverse engineering." *See* 78 Fed. Reg. at 67,264 (the information to be submitted under this Proposed Rule includes "the number and nature of injuries or illnesses experienced by employees at particular establishments, and the data necessary to calculate injury/illness rates, i.e., the number of employees and hours worked at an establishment"). Moreover, OSHA has proposed this radical shift without even attempting to explain why it no longer believes its prior position and arguments to be true.

Indeed, the only hint of an explanation for this change that can be found in OSHA's Proposed Rule is the unsupported assertion that the Secretary has carefully considered the court's holding in *New York Times Co.* *See* 78 Fed. Reg. 67,263. And no effort is made to explain why OSHA apparently jettisoned the reasoning of the Third Circuit, and the extensive case law on which it was based, in favor of the conclusion of a district court. Moreover, when read closely, *New York Times Co.* does not support, much less justify, OSHA's 180 degree turn on this issue.

First, OSHA states that because some employers already disclose the number of employees working at an establishment and their illness and injury rates, businesses do not consider this information to be confidential. *Id.* ("Many employers already routinely disclose the number of employees at an establishment."). The court in *New York Times Co.* rejected the OSHA's identical flawed reasoning. *See* 340 F. Supp. 3d at 403. As the court correctly observed, one company's consent to disclosing proprietary information "cannot speak for all . . . employers." *Id.* What was true then remains true today. That some employers voluntarily disclose this information does not equate to a universal agreement among employers that this information is not confidential.

Second, OSHA asserts that the *New York Times Co.* case stands for the proposition that because employers are already required to post OSHA's Form 300A, which contains the establishment's hours worked and injury and illness rate, it cannot be considered confidential. 78 Fed. Reg. at 67,263. The court in *New York Times Co.* considered and rejected this line of reasoning as well. Indeed, the court observed that "[a]lthough employers are required to post information relating to incidents of lost workday injuries and illnesses, contrary to the DOL's argument, these postings are *not* 'public.'" 340 F. Supp. 3d at 401 (emphasis added).

This precise type of inconsistency, when coupled with the OSHA's failure to adequately explain its abrupt shifts in policy and reasoning, makes this Proposed Rule arbitrary, capricious, and vulnerable to a legal challenge. *See, e.g.*, *Babbitt*, 92 F.3d at 1258; *Am. Tel. & Tel. Co*, 836 F.2d at 1391; *Nat'l Ass'n of Broadcasters v. FCC*, 740 F.2d 1190, 1201 (D.C. Cir. 1984).

C. The Proposed Rule Would Violate the First Amendment.

The First Amendment protects both the right "to speak and the right *to refrain from speaking*." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (emphasis added). This Proposed Rule violates this principle by forcing employers to submit their confidential and proprietary information for publication on a publicly available governmental online database.

While OSHA's stated goal of using the information it collects from employers "to improve workplace safety and health," 78 Fed. Reg. at 67,254, is unobjectionable, "significant encroachments on First Amendment rights of the sort that compelled disclosure imposes cannot be justified by a mere showing of some legitimate governmental interest." *Buckley v. Valeo*, 424 U.S. 1, 64 (1976) (per curiam). Instead, where the government seeks to require companies to engage in the type of speech proposed here, the regulation must meet the higher standard of strict scrutiny: Meaning that it must be narrowly tailored to promote a compelling governmental interest. *See United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 819 (2000).

Once subjected to strict scrutiny,[4] the publication provision of this Proposed Rule must fail because it is not narrowly tailored towards accomplishing a compelling government interest. *See Playboy*, 529 U.S. at 819. Under the narrow tailoring prong of this analysis, the regulation must be *necessary* towards accomplishing the government's interest. *See, e.g.*, *Republican Party of Minn. v. White*, 536 U.S. 765, 775 (2002) ("[T]o show that the [requirement] is narrowly tailored, [the government] must demonstrate that it does not 'unnecessarily circumscrib[e] protected expression.'" (fourth alteration in original) (quoting *Brown v. Hartlage*, 456 U.S. 45, 54 (1982))).

The stated purpose of this Proposed Rule is to improve workplace safety and health. *See* 78 Fed. Reg. at 67,254. But this regulation, which would sweep millions of data bits in an arbitrary manner onto a government-approved database, hardly comports with the "narrow tailoring" requirement. Instead of advancing

[4] While some types of commercial speech have been afforded a lower level of scrutiny, the more restrictive standard applies here as the information at issue meets no definition of commercial speech. For instance, the speech that this Proposed Rule seeks to compel is readily distinguishable from the types of speech that courts have considered to be commercial, such as speech that involves commercial transactions, *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 562 (1980), speech that is meant to prevent consumers from being misled, *Zauderer v. Office of Disciplinary Counsel of the Sup. Ct. of Ohio*, 471 U.S. 626, 650-51 (1985), or speech "relating to the sale or purchase of securities," *SEC v. Wall Str. Publ'g Inst., Inc.*, 851 F.2d 365, 373 (D.C. Cir. 1988). Because the speech that this Proposed Rule seeks to compel is not commercial in nature, it must satisfy the higher standard of strict scrutiny.

OSHA's goal, publication of information under this Proposed Rule would actually undermine this interest. Maintenance of the database, including the processing and scrubbing of personal identifying information—for which OSHA has assumed responsibility—would substantially deplete OSHA's resources. Additionally, even if OSHA were able to maintain this database and analyze this information in an effective and timely manner, there is no evidence that publication of this information will have any effect on workplace safety. Rather, OSHA has conclusorily stated, absent any support, that publication will result in the reduction of workplace injury rates by making this information more readily available to the public. 78 Fed. Reg. at 67,254. OSHA points to no evidence that this is true. This Proposed Rule, therefore, cannot be said to be *necessary* to achieving any governmental interest. Instead, this Proposed Rule is at best tangentially related to workplace safety, and at worst, an imposition of enormous financial burdens on business all so that their confidential and proprietary information may be misused by the public and special interest groups.

The Supreme Court has also been clear that a regulation which infringes on an essential right will fail to be narrowly tailored if it is underinclusive. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993). A regulation is underinclusive where it requires some conduct that purportedly furthers a compelling interest while neglecting to require other conduct that is substantially similar. In essence, a regulation's underinclusivity substantially "diminish[es] the credibility of the government's rationale" for infringing upon the First Amendment's right to free speech. *City of Ladue v. Gilleo*, 512 U.S. 43, 52 (1994). This Proposed Rule is clearly underinclusive as OSHA's recording and reporting requirements, which at present relies on the Standard Industrial Classification ("SIC") system, exempts some industries from recordkeeping while requiring recording from others.

Moreover, the arbitrariness of these distinctions is highlighted by OSHA's recent proposed final rule, which is now being reviewed by the Office of Information and Regulatory Affairs ("OIRA"), regarding changing employer classifications from the SIC system to the North American Industry Classification System ("NAICS"). *See* Occupational Injury and Illness Recording and Reporting Requirements—NAICS Update and Reporting Revisions, 76 Fed. Reg. 36,414 (proposed June 22, 2011). Should this proposal become a final rule, roughly 200,000 companies that are not currently required to keep OSHA 300 logs would be forced to start, while approximately 120,000 employers that presently maintain logs will become exempt. In other words, whether an employer would be compelled to keep and submit information under this Proposed Rule, and accordingly whether they would be published on a government database, would be determined arbitrarily by how they are classified under the NAICS classification system. Just two examples will suffice to demonstrate the arbitrary and happenstance nature of which employers will be

required to report their workplace injury information to be published on OSHA's proposed database: Oil and gas pipeline companies will be exempt while museums will be required to report. Accordingly, it defies credulity to suggest that this Proposed Rule would comprehensively, and not underinclusively, advance the government's purported goal of reducing workplace injuries by publishing this injury and illness information.

For these reasons, this Proposed Rule violates the First Amendment. Accordingly, the Chamber believes that this Proposed Rule would fail legal challenge and should be withdrawn.

D. The Proposed Rule Would Violate the Fourth Amendment.

The Notice for this Proposed Rule cites several cases that OSHA asserts confirm that the requirement to report injury and illness records comports with the Fourth Amendment's prohibition against unreasonable searches and seizures. 78 Fed. Reg. at 67,255–56. In making this preemptive defense, however, OSHA has neglected to address the more pressing Fourth Amendment problem with this Proposed Rule: That OSHA's use of the information collected for enforcement purposes will fail to constitute a "neutral administrative scheme" and will thus violate the Supreme Court's holding in *Marshall v. Barlow's Inc.*, 436 U.S. 307 (1978).

In *Barlow's*, the Court explained that under the Fourth Amendment, OSHA may obtain a warrant to search a workplace based on either "specific evidence of an existing violation" or upon a "showing that specified businesses had been chosen . . . on the basis of a general administrative plan . . . derived from neutral sources." *Id.* at 320–21. Because, as this comment shows, the information gathered under this Proposed Rule will not provide OSHA with "specific evidence of an existing violation" at any particular workplace, *see* John Mendeloff & Seth A. Seabury, Inspection Targeting Issues for the California Department of Industrial Relations Division of Occupational Safety and Health, RAND CORPORATION 11 (Oct. 2013), OSHA's enforcement efforts based on this information must satisfy the "general administrative plan" standard, *see Barlow's*, 436 U.S. at 320–21.

However, the raw data collected under this Proposed Rule will fail to provide any defensible neutral predicate for enforcement decisions. Nor has OSHA asserted that any realistic prospect exists for the agency to distill, analyze, or synthesize this raw data into a meaningful comprehensive scheme for

inspections.[5] Thus, this Proposed Rule raises the very concerns of arbitrary searches and unbridled agency discretion that so worried the Court in *Barlow's*. *See id.* at 322–23; *see also Camara v. Mun. Ct.*, 387 U.S. 523, 528 (1967) ("The basic purpose of [the Fourth] Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by government officials."). Because OSHA will be unable to meaningfully analyze the millions of individual pieces of raw data that employers will be obligated to submit under this Proposed Rule, enforcement based on this information will amount to little more than the arbitrary and unconstitutional selection of establishments.

This is, of course, a far cry from OSHA's existing neutral administrative schemes, such as OSHA's Site-Specific Targeting program, which is based on the analysis of an entire year's worth of data to identify whole industries and specific factors that substantially enhance the average LWDII and Days Away Restricted Transferred ("DART") rates, that, therefore, warrant closer inspection. *See* OSHA Notice 14-01 Site-Specific Targeting 2014 at 13 (Feb. 2, 2014).[6] Unlike these programs, which courts have upheld under the Fourth Amendment, *see In re Trinity Indus., Inc.*, 876 F.2d 1485, 1490 n.3 (11th Cir. 1989) (collecting cases), targeted inspections based on the piecemeal information derived from individual reported injuries will fall well short of the Fourth Amendment's requirements. Rather, under this Proposed Rule, OSHA will be able to target any employer that submits a reportable injury or illness for any reason the agency chooses, or for no reason at all, under the unlimited discretion it has sought to grant itself to "identify workplaces where workers are at greatest risk." *See* 78 Fed. Reg. at 67,256.

Further, this Proposed Rule conflates enforcement based on a complaint and those inspections conducted pursuant to a neutral administrative plan. The targeting of an employer based on its reported injuries or illnesses alone would in essence turn each individual reported injury into a self-implicating complaint. Even more troubling, it would do so while failing to simultaneously import any of the procedural requirements and safeguards imposed on complaint inspections. *See, e.g., Donovan v. Sarasota Concrete Co.*, 693 F.2d 1061, 1068 (11th Cir.

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[5] OSHA proposes that this Proposed Rule will replace its current OSHA Data Initiative ("ODI"). However, the amount of raw information that would be collected under this Proposed Rule is substantially larger than the data collected under ODI. Without a realistic prospect of obtaining the considerable resources to meaningfully analyze this amount of data, much less any suggestion in this proposal of an analytical framework for synthesizing this raw data, enforcement actions driven by this Proposed Rule would violate the Fourth Amendment. Additionally, the Chamber notes that it does not concede that the ODI program does not itself suffer from these same Fourth Amendment infirmities.

[6] *Available at* https://www.osha.gov/OshDoc/Directive_pdf/CPL_02-14-01.pdf.

1982) (internal footnote omitted) ("Because of this increased danger of abuse of discretion and intrusiveness . . . a complaint inspection must bear an appropriate relationship to the violation alleged in the complaint."); *Burkart Randall Div. of Textron, Inc. v. Marshall*, 625 F.2d 1313, 1323 (7th Cir. 1980) ("[I]nspection warrants issued in response to specific employee complaints must be limited in scope, if possible, to the subject matter of the complaints."). Through this Proposed Rule, OSHA has sought to free itself from these requirements and limitations, and by extension the Fourth Amendment, by creating a scheme—untethered to neutral criteria or limiting principles—which would allow it to unconstitutionally target specific employers and establishments guided only by its own arbitrary discretion.

This is precisely the type of unbridled discretion and arbitrary invasions that the Supreme Court has routinely held the Fourth Amendment to prohibit. *See Barlow's*, 436 U.S. at 322–23; *Camara*, 387 U.S. at 528. Accordingly, the Chamber believes that any efforts at enforcement by OSHA based on the information collected under this Proposed Rule could well be subject to successful legal challenge.

E. The Proposed Rule's Classification of Establishments Based on Number of Employees Per Year is Ambiguous and Will Lead to Absurd Results.

This Proposed Rule states that any establishment that is required to maintain records under Section 1904 must submit annual electronic reports to OSHA if it "had 20 or more employees (including full-time, part-time, temporary, and seasonal workers) at any time during the previous calendar year . . . ." 78 Fed. Reg. at 67,282. The Notice uses the same language to articulate the threshold number of employees needed to trigger the proposed requirement for quarterly electronic reporting for larger companies. *Id.* at 67,281. This construction is likely to cause both confusion and lead to absurd results. It would be inappropriate for OSHA to proceed with finalizing this Proposed Rule without first addressing these issues. Nor would it be sufficient for the agency to attempt to define the parameters of these employer categories through changes made in a final regulation; the very essence of "notice and comment" rulemaking demands the opportunity for the regulated community to comment on this crucial definitional framework.

Based on OSHA's Notice, it is unclear whether this Proposed Rule would require an employer to report who, over the course of a year only employed 15 full-time employees at any one time, but due to employee turnover, had a total of 23 distinct individual employees. For these employers, compliance with this Proposed Rule would be, in essence, a guessing game as to OSHA's intended

meaning, where one option could expose them to potential liability for failing to properly report while the other to the potentially unnecessary costs of reporting where they were not required to.

As it is currently stated, this Proposed Rule is open to an interpretation that would lead to absurd consequences. It is inconceivable that OSHA would have intended to subject small employers who never have more than 20 employers at any one time to the onerous and expensive reporting requirements that this Proposed Rule would impose. Doing so would provide absolutely no benefit to the agency while saddling these businesses with an immense hardship.

Relatedly, it is also unclear under this Proposed Rule who will be responsible for recording and reporting workplace injuries and illnesses for employees that work for several employers throughout the year. For instance, if an employee works for Company A for two weeks, and then Company B for the remainder of the year, but experiences a purported repetitive motion injury while working for Company A that is attributable to his or her work with Company B, OSHA's geographical presumption theory of recordkeeping would require Company A to record and report this injury. Company A would be saddled with the stigma of this publicly reported injury even though the purported cumulative trauma should be attributable to Company B. Based on what OSHA's Proposed Rule, this possibility exists. Such reporting would not only be unfair in terms of both reputation and costs, but would be useless both to the government and the public. While OSHA would factor this injury into its enforcement scheme, thus targeting a company with no real connection to the injury, the public may shun this employer, assuming—based on their lack of context—that the injury is fully attributable to the establishment that reported it. Under these circumstances, the data reflected on the contemplated database will truly be, as the Seventh Circuit observed, "garbage in, garbage out." *Caterpillar Logistics Servs., Inc. v. Solis*, 674 F.3d 705, 710 (7th Cir. 2012).

Finally, OSHA has not addressed how this Proposed Rule will affect the numerous practical intricacies of recordkeeping with regard to employees supplied by temporary employment agencies. OSHA insists that this Proposed Rule will have no impact on recordkeeping requirements under Section 1904. *See* 78 Fed. Reg. at 67,254. Nothing could be further from the truth. For instance, under this Proposed Rule, it is unclear who will be responsible for recording and reporting injuries: The agency supplying temporary employees, who may retain contractual responsibilities for medical and workers' compensation burdens arising from workplace injuries, or the host employer, who may control or share with the temporary employment agency authority over the employees' daily activities. Further, this confusion will be compounded by the effect of the bifurcated responsibilities between temporary employment agencies and host employers with respect to which entity must include the temporary employee for

purposes of hours worked and recorded injuries for the calculation of injury and illness rates.

If OSHA proceeds with this Proposed Rule, OSHA must provide unambiguous explanations and scenarios both in order to dispel this confusion and avoid the inevitable absurd results that would occur absent corrections. Accordingly, OSHA should withdraw this Proposed Rule and, if it chooses, submit a new proposal that addresses these issues so that interested parties may have the opportunity to meaningfully comment on OSHA's proposed changes.

F. Publication of this Information Will Violate the Privacy of Employees.

The information that OSHA seeks to make publicly accessible through an online database will be easily traceable to individual employees, violating their legitimate privacy interests. OSHA has stated that it intends to make all or portions of the information collected on its Form 300, Form 300A, and Form 301 available to the public under this Proposed Rule. Specifically, the Proposed Rule states that all of the information contained on Form 300A may be made publicly available, while the employees' names and other personally identifiable information would need to be removed from its Form 300, and as many as nine categories contained on its Form 301 would have to be withheld. *See* 78 Fed. Reg. at 67,259–60.

The broad range of information that OSHA has stated will be made publicly accessible under this Proposed Rule includes:

- the injured employee's job title (Form 300, item B);
- the date of the injury or illness (Form 300, item C; Form 301, item 11);
- the time when the employee began his or her shift (Form 301, item 12);
- the time of the injury or illness causing event (Form 301, item 13);
- where the injury causing event occurred (Form 300, item E);
- a description of the injury or illness causing event (Form 301, item 15);
- a description of the injury, including what body parts were affected (Form 300, item F; Form 301, item 16);
- the employee's job activities, including what tools and equipment he or she was using when the injury or illness occurred (Form 301, item 14);

- the result of the injury in terms of missed work and job restrictions (Form 300, items G–L); and
- the type of injury or illness, identifying specifically whether it was an injury, skin disorder, respiratory condition, poisoning, hearing loss, or other illness (Form 300, item M).

This wealth of information will make it disturbingly easy to link reports of injuries and illnesses posted by OSHA on the database to specific individuals. This problem will only be exacerbated by OSHA's insistence that this information be reported and published on an establishment-by-establishment basis. It is easy to imagine a member of the general public, especially in smaller communities, observing someone with an injury and then being able to go to OSHA's database to match the date of the injury, the location and type of injury, and the relative severity of the injury, thus revealing a wealth of specifics.

This, of course, accounts only for the information that OSHA *intends* to make available to the public, and says nothing of the private employee information that OSHA will inevitably publish by mistake. The forms that OSHA plans to use to gather the data that it will publish call for employers to write in a great deal of information in response to open-ended questions that often call for the inclusion of private identifying information. For instance, item E on OSHA's Form 300 asks for the employer to "[d]escribe [the] injury or illness, parts of body affected, and objects/substances that directly injured or made person ill." Similarly, item 14 on OSHA's Form 301 asks the employer to state "[w]hat . . . the employee [was] doing just before the incident occurred?" and directs the employer to "[b]e specific." Item 15 broadly asks "[w]hat happened?" before giving examples such as "ladder slipped on wet floor, worker fell 20 feet" and "[w]orker was sprayed with chlorine when gasket broke during replacement." Nowhere on these forms does OSHA instruct employers not to include private or identifying employee information in their responses.

OSHA has recognized that even with the heightened scrutiny that employers will devote to completing these forms whose contents would be made public, a good deal of private and identifying information is still likely to be included in employers' submissions. At the public meeting regarding this Proposed Rule, OSHA stated that it would assume responsibility for ensuring that private information is not inadvertently made available. Jan. 9, 2014, Tr. 77:14-78:13 ("It'll be OSHA's responsibility to make sure that the information that we make public does not include anything that is prohibited by the Privacy Act or the FOIA or there's also elements within the recordkeeping rule itself that prohibits making certain elements public. So that responsibility will fall on OSHA.") (statement of David Schmidt, Director, OSHA Office of Statistical Analysis). At the same time, however, OSHA has admitted that despite the massive undertaking of scrubbing an estimated 900,000 incident reports every year, *id.* at 83:11-21, to

make sure that no private employee information is publicly disseminated, the agency has no plan for how it will do so, *id.* at 79:5-8 ("The technical aspects of how to do it, we haven't – you know, we're looking for that information within this proposal for post comments."); *see also id.* at 79:12-17 ("Well, you know, I'm not – well, I'm saying we're not going to do it. I'm saying that we've thought it through, you know, but we're also looking for comments from the public in order to implement when this becomes final.").

Moreover, OSHA has admitted that regardless of the plan it develops, ensuring that personal information is not published will be no easy task. As David Schmidt, the Director of OSHA's Office of Statistical Analysis, stated at the public meeting, while "[i]t's very easy to eliminate the name field[,] . . . [h]owever, when you collect narrative information, anything and everything is in those narratives . . . ." Jan. 9. Tr. 89:14-17. As a result, before OSHA will be able to publish any information collected under this Proposed Rule, it will have to first devote an enormous amount of resources in employee hours to carefully review the information provided regarding every reported injury, each of which may contain several narratives, to ensure that OSHA does not publish any details that could identify the injured employee. There is no conceivable way that OSHA will be able to adequately do this.

Finally, OSHA has attempted to claim this rulemaking is an extension of President Obama's Open Government Initiative. This is another example of OSHA mischaracterizing this rulemaking and misleading the public about its value and intent. The Open Government Directive issued on December 8, 2009, directs agencies to put information about their operations and decisions online and available to the public. The Initiative and Directive focus on government actions and transparency, not on private employers or making private employers' data publicly available. The objective of the Open Government initiative is to provide "the public with information about what the Government is doing," not to provide the public with private information of private employers.

Given these serious concerns, the Chamber urges OSHA to withdraw this Proposed Rule or, in the alternative, delay proceeding until it has more adequately considered these issues and given interested parties an opportunity to comment on such a nettlesome issue. At the very least, OSHA should indicate what funds and full-time equivalents will be devoted to ensuring that private employee information is not published.

G. OSHA Has Failed to Explain How it Will Provide for the Amendment or Removal of False and Inaccurate Information After Publication.

The Chamber is deeply concerned that OSHA has proposed to create the database envisioned by this Proposed Rule without first considering how, or even if, it will be able to update the data to ensure its accuracy. *See* 78 Fed. Reg. at 67,271 ("Should the electronic data submission system be designed to include updates?");[7] Jan. 9. Tr. 85:1-9 ("Very tricky issue and it's an issue that we directly ask questions to the public to submit to us through their comments, because, you know, from a technological point of view, allowing employers, if they submit data to us and then they want to update that data, we have to – you know, from an IT perspective, it's much more complicated . . . "). Employers will need to update the information contained on their OSHA Forms 300, 300A, and 301 for any number of reasons. For instance, after initially reporting an injury or illness as being workplace-related, a workers' compensation commission or court may determine that in fact the injury or illness lacked sufficient connection to the work environment, meaning that it should not have been reported. *See, e.g.*, *Caterpillar Logistics*, 674 F.3d at 707.

Further, OSHA acknowledges in its Notice for this Proposed Rule that the present recordkeeping rules require that employers update their OSHA Form 300 for five years. *See* 78 Fed. Reg. at 67,271. Those updates will affect the forms described above which in turn would affect the accuracy of database entries. Thus, it is not a question of *whether* employers will need to update this information, but rather a question of *how* they will do so.

Accordingly, the Chamber urges OSHA to withdraw this rulemaking. *First*, any suggestion that OSHA will be able to keep up with this insurmountable task of maintaining an immediately accessible, accurate database is not credible. *Second*, if OSHA insists on pressing forward with a rule of this type, it must start over and reintroduce a proposed rule with an adequate system for updating submitted data that stakeholders may meaningfully consider and comment on.

H. Publication of Injury and Illness Information Has the Potential to Create Serious Security and Safety Problems by Disclosing the Location of Dangerous Materials or Controlled Substances.

[7] The mere posing of this question indicates that OSHA entertained a negative response, thereby proceeding with a rule that would create a publicly accessible database containing inaccurate and misleading information.

A company's LWDII rate and personal employee identifying information are not the only information that will be published under this Proposed Rule that could cause substantial harm. Publication of injury and illness information in certain circumstances, including the location of the injury and the materials responsible for causing the injury, may inadvertently publicize where an employer keeps dangerous materials or controlled substances, making them vulnerable to theft or other criminal activity.

Take for example a company that uses a dangerous but valuable chemical in certain aspects of its business, but confines its use to specific properties, the locations of which are kept confidential for safety reasons. Under this Proposed Rule, if one of this company's employees is injured while using this chemical, the company would be required to submit a report for publication detailing both the chemical involved, *see* Form 301, item 14, and the location of the accident, *see* Form 300, item E. Such publication would allow anyone with internet access to determine the chemical and its location.

For this reason, OSHA should reconsider and withdraw this Proposed Rule. Alternatively, if OSHA chooses to proceed in finalizing this Proposed Rule despite this issue, the Chamber urges OSHA to include in its final rule a reasonable exception to publication for reportable injuries—implemented at the employer's, not OSHA's discretion—that could endanger a company's employees and the public, or lead to criminal activity.

I. The Proposed Rule's Cursory Cost-Benefit Analysis Dramatically Underestimates its Costs While Overstating its Benefits.

OSHA has an existing obligation to perform a basic cost-benefit analysis of all proposed regulations. Executive Orders 12,866 and 13,563. In performing this analysis, OSHA, like all agencies, may not "inconsistently and opportunistically frame[] the costs and benefits of the rule; fail[] adequately to quantify the certain costs or to explain why those costs could not be quantified; neglect[] to support its predictive judgments; [or] contradict[] itself . . . ." *Business Roundtable v. SEC*, 647 F.3d 1144, 1148–49 (D.C. Cir. 2011).

Many of these errors are apparent in OSHA's cursory cost-benefit analysis for this Proposed Rule. OSHA has estimated that this Proposed Rule will have an economic impact of only $11.9 million per year. 78 Fed. Reg. at 67,256 and 67,271. Conversely, it makes no attempt to estimate or quantify the purported economic benefits of this Proposed Rule; instead, it conclusorily asserts that these benefits will "significantly exceed the annual costs." *Id.* at 67,256. OSHA has entirely failed to explain how electronic quarterly reporting or the creation of a public database that will publish the private and confidential information of

employers and employees will provide any increase in workplace safety. For the following reasons, OSHA's cost-benefit analysis is deeply flawed.

First, the stated anticipated costs of this Proposed Rule are significantly underestimated because OSHA has neglected to include the increased costs that will result from companies more closely scrutinizing whether an injury or illness is recordable and hence reportable. Under the present recordkeeping and reporting scheme, when an employee complains that he or she has suffered an apparent injury or illness resulting in lost time, light duty restrictions, transfer, or medical treatment, the employer's default decision is to record the incident. Since there is no penalty for doing so, employers make the economically rational decision to rarely question the recordability of a purported injury or illness.

This Proposed Rule would initiate a paradigm shift in this process. Faced with the prospect that every recorded injury and illness will be published on a publicly accessible government database, which the public may misinterpret and the media, unions, and special interest groups may misconstrue, employers will be much more painstaking in the recordkeeping process and will likely change their default position to looking for a legally supportable reason not to record an injury or complaint.

Employers must record an injury or illness that is work-related, new, and not otherwise exempted. *See* 29 C.F.R. § 1904.4(a); *see also id.* § 1904.4(d)(2) (providing a flow chart for determining whether an injury or illness must be recorded). The costs of employers carefully analyzing whether a purported injury or illness meets these criteria far exceed OSHA's underestimations. This is particularly true of two of these criteria: Whether the employee has actually suffered an injury or illness, and whether that injury or illness is work-related. With regard to the latter prong, OSHA's regulation directs employers that an injury is to be considered work-related if "the work environment either caused or contributed to the resulting condition or significantly aggravated a pre-existing injury or illness" and does not fall within one of nine listed exceptions. *Id.* §§ 1904.5(a) and (b)(i)-(ix).

While the complexity of this analysis is self-evident, the Seventh Circuit's recent decisions in *Caterpillar Logistics, Inc. v. Solis*, 674 F.3d 705 (7th Cir. 2012) [hereinafter *Solis*] and *Caterpillar Logistics, Inc. v. Perez*, 737 F.3d 1117 (7th Cir. 2013) [hereinafter *Perez*], illustrate the time and resources that employers will be forced to expend in making these recordability decisions. These cases arose when one of Caterpillar's employees complained of pain in her right elbow. *Solis*, 674 F.3d at 707. The employee was seen by one of Caterpillar's staff physicians, who placed the employee on leave. *Id.* Three weeks later, Caterpillar's physician diagnosed the employee with epicondylitis—an inflammation of the tendons surrounding the elbow more commonly known as

"tennis elbow." *Id.* Having been satisfied that one of its employees had suffered an injury or illness, Caterpillar set out to determine whether it was work-related and, therefore, reportable. Caterpillar's physician concluded that the employee's work had not caused or contributed to her injury. *Id.* Additionally, Caterpillar convened a five-person panel of specialists, who agreed that the injury was not work-related. *Id.* Nevertheless, the Department of Labor disagreed with this assessment and cited Caterpillar for failing to log a reportable injury. *Id.*

At an initial hearing before an administrative law judge, Caterpillar presented several experts who supported its conclusion through testimony on epidemiological research, the likelihood that the work involved could lead to such an injury, and Caterpillar's experience with injuries. *Perez*, 737 F.3d at 1118. Conversely, Caterpillar was forced to defend against the Secretary of Labor's expert, a Clinical Professor of Medicine, who testified that the activities involved could have caused the injuries. *Id.* at 1118–19. Despite the fact that the Secretary of Labor's only expert provided testimony that the Seventh Circuit later described as "un-scientific and anti-intellectual," *id.*, at the conclusion of the four-day hearing, the administrative law judge upheld the penalty against Caterpillar. *Solis*, 674 F.3d at 707–08.

On Caterpillar's first appeal of this decision, the Seventh Circuit vacated the administrative law judge's decision, holding that it had failed to adequately take into account all of the evidence—especially the statistical and epidemiological evidence—presented. *Solis*, 674 F.3d at 708–10. On remand, the administrative law judge again disregarded Caterpillar's substantial evidence and expert testimony. *Perez*, 737 F.3d at 1119–20. It took another appeal to the Seventh Circuit before the evidence was properly considered. Vacating the citation, the Honorable Frank Easterbook, writing for the panel, stated that the Department of Labor's administrative law judge had not only failed—for a second time—to properly consider the statistical evidence, but adopted a "minority view within the medical profession," and had engaged in "circular" reasoning that defied reasonableness. *Id.*

As the Seventh Circuit observed, this careful analysis of purported injuries and OSHA recordkeeping, which will become the norm rather than the exception with this Proposed Rule, comes at a great cost to employers. *See Solis*, 674 F.3d at 710. In all, it took "[a]n elaborate board of inquiry . . . [,] followed by the Department's investigation, a four-day trial, an opinion by an ALJ, submissions to the Commission, and then briefs and arguments in a court of appeals" before a conclusion on work-relatedness could be definitively reached. *Id.*

Not every recordation decision will result in this Dickensian saga, but given the stakes of a searchable government database of workplace injuries and attendant data, these decisions will no longer be done automatically.

Inexplicably, OSHA has ignored this reality and has concluded that performing this analysis will only cost larger and smaller establishments an average of $183 and $9 a year, respectively. This defies credulity. Evaluating just one purported injury per year will send the costs of complying with this Proposed Rule soaring past these projections. Simply determining whether a complaining employee has suffered an injury may require the opinions of one or more physicians. On top of this, the employer must determine whether an injury is work related. This is far from a simple task. In fact, as the *Caterpillar* cases illustrate, not even the Occupational Safety and Health Review Commission's administrative law judges have proven capable of performing this analysis reliably. *See Perez*, 737 F.3d at 1119–20; *Solis*, 674 F.3d at 709–10. Ignoring the extensive legal analysis and expert opinions in medicine, statistics, and epidemiology that may be required, OSHA's estimated costs barely scratch the surface of the resources that this Proposed Rule will require.

This is especially true when one considers that, based on the Bureau of Labor Statistics' most recent statistics, as many as 34% of all purported nonfatal workplace injuries and illnesses are musculoskeletal disorders—or as they are colloquially called, ergonomic injuries. Bureau of Labor Statistics, Nonfatal Occupational Injuries and Illness Requiring Days Away From Work, 2012 (Nov. 26, 2013). These types of purported injuries are particularly difficult to diagnose as they often do not present objective signs or symptoms. *See, e.g.*, *Rodden v. Jefferson Pilot Fin. Ins. Co.*, 591 F. Supp. 2d 1113, 1121 (N.D. Cal. 2008) (noting that the plaintiff's own experts stated that "in cases of repetitive strain injury it is common for there to be a paucity of what you might call 'hard' objective findings"); *Hoskins v. Meiser*, CV 09-09-S-EJL, 2010 WL 2557695, at *6 (D. Idaho June 21, 2010) ("[T]he record reflects that diagnosis . . . is quite difficult. Dr. Fields notes that RSD is really an ill-defined and poorly understood syndrome that may redevelop after a fracture or 'minor musculoskeletal injury.'").

Whether these types of purported ergonomic injuries bear any relation to the workplace is even more difficult to determine. These often nebulous aches and pains are experienced by large swaths of the adult population and often arise from any number of non-work-related activities, conditions, and factors. *See, e.g.*, *Perez*, 737 F.3d at 1119–20 (finding that the Secretary of Labor had failed to adequately rebut the employer's evidence that there was no relation between the employee's complaint of injury and her work activities); *Maske v. Astrue*, No. 10 C 7401, 2012 WL 1988442, at *3 (N.D. Ill. May 31, 2012) (noting that the physician who examined the plaintiff "stated that it was difficult for him to apportion how much of her disability is related to a work-related injury and how much of it is related to her degenerative disc disease and arthritis in her neck and lumbar spine"). Recognizing the unreliability of the diagnosis of these types of

injuries and the extreme burden that their regulation places on employers, Congress has expressly rejected the regulation of ergonomic injuries.[8]

Second, OSHA has disregarded the increased costs that will result from requiring employers, both large and small, to submit their injury and illness information electronically. Rather, OSHA has sought both to conflate electronic recordkeeping with electronic submission and to gloss over this difference by wrongly asserting that "[t]he electronic submission of information to OSHA would be a relatively simple and quick matter." 78 Fed. Reg. at 67,272. OSHA is mistaken.[9]

To begin, while some larger employers may already electronically record injury and illness data, many, if not most, of this country's small businesses do not. The effect of this Proposed Rule, therefore, will have a significant and disproportionate impact on small businesses that will have to adopt electronic recording. While OSHA estimates that the recordkeeping and submission aspects of this Proposed Rule will only cost $11,892,889 per year, *id.* at 67,276, the Chamber's analysis indicates that the real cost will be much higher. This is because OSHA has completely ignored at least three major cost elements that will affect employers.

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[8] Following Congress's vote invalidating OSHA's proposed ergonomic regulations under the Congressional Review Act, President George W. Bush stated that:

> Today I have signed into law S.J. Res. 6, a measure that repeals an unduly burdensome and overly broad regulation dealing with ergonomics. . . . There needs to be a balance between and an understanding of the costs and benefits associated with Federal regulations. In this instance, though, in exchange for uncertain benefits, the ergonomics rule would have cost both large and small employers billions of dollars and presented employers with overwhelming compliance challenges.

Statement of the President, George W. Bush (Mar. 20, 2001), *available at* http://georgewbush-whitehouse.archives.gov/news/releases/2001/03/20010321.html. To the extent this Proposed Rule is an attempt indirectly to focus public attention on anecdotal evidence of an "ergonomic epidemic," it will benefit from the synergies created by OSHA's musculoskeletal disorder ("MSD") column rulemaking, *see* Occupational Injury and Illness Recording and Reporting Requirements, 75 Fed. Reg. 4,728 (proposed Jan. 29, 2010), if that rulemaking is finalized. That rulemaking was previously blocked by an appropriations rider in the 2012 omnibus appropriations bill that reflected Congressional concern, *see* Consolidated Appropriations Act of 2012, H.R. 2055, 112th Cong. at 279 (2012), but which was not continued in the 2014 omnibus appropriations package.

[9] Of course, OSHA's suggestion that the electronic submission and publication of this information will be inexpensive, simple, and seamless is belied by the government's other attempts to create easily accessible online interfaces. *See, e.g.*, Michael D. Shear & Robert Pear, *Obama Admits Web Site Flaws on Health Law*, N.Y. TIMES, Oct. 22, 2013, at A1.

For instance, all employers, whether ultimately affected by the proposed rule or not, will need to expend time (and its monetary equivalent) to ascertain whether the rule applies to them. If it does, employers will then need to spend additional time to further investigate its requirements to determine which reporting elements apply. This is only exacerbated by the fact that this analysis will have to be done on an establishment-by-establishment basis. There are over 5.7 million private sector firms operating over 7.4 million separate establishments with employees in the United States.[10] If each firm on average spent just one hour to review the rule's compliance requirements, the initial year cost would be over $342 million.[11]

For those companies that do fall within the coverage of this Proposed Rule, they will be required to expend additional costs, in both time and resources, to comply with the electronic submission requirement. The majority of employers will find it necessary to change existing records systems and procedures in order to compile and submit information according to the format and periodicity of this Proposed Rule's reporting requirement.

The costs associated with this include the implementation of costly new or re-programmed of information systems. The adoption of new information systems, especially for multi-establishment enterprises, is expensive and time-consuming. In addition to the firm's own staff labor, these efforts often involve the services of specialized contractors. While OSHA has baldly asserted that this cost will be *de minimis*, the Chamber's analysis presents a very different picture. If each of the 38,094 large (250 or more employees) establishments, which OSHA estimated would be covered by the quarterly electronic reporting requirement, expend on average only $5,000 to retool information systems and software, the initial year cost would be over $190 million.[12] Additionally, if each of the 440,863 establishments (20 to 249 employees and in designated industries), which will be covered by the annual electronic reporting requirement, expended on average only $1,000 to retool information systems and software (equivalent to

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[10] According to 2010 Census data published by the U.S. Small Business Administration, Office of Advocacy, *available at* http://www.sba.gov/advocacy/849/12162.

[11] Based on 2013 average compensation of private sector managers and administrations published by the Bureau of Labor Statistics, *available at* http://data.bls.gov/pdq/SurveyOutputServlet;jsessionid=0DF07E8613C6773556F440C2C8EE3F1F.tc_instance5.

[12] These estimates are based on experiences reported by companies surveyed in various contexts where human resources information systems needed to be modified to conform to new reporting requirements. These numbers reflect the lowest end of such costs reported. OSHA would be well served to conduct direct surveys of employers to develop specific data related to the cost of compliance with this Proposed Rule.

about 16 hours of professional labor), the initial year cost would be over $440 million.

OSHA has sought to gloss over these issues by claiming that none of these costs will be incurred because some companies already *record* this information electronically. *See id.* at 67,272 ("In many cases, especially for large establishments, OSHA data are already kept electronically . . . . In those cases, the establishment would be able to submit its electronic information, in the format in which it is kept, to OSHA without having to transfer it into OSHA's online format."); *see also id.* at 67,260 ("[A]n OSHA requirement for electronic submission of information from injury and illness records will not be a burden for most large employers, because large employers already keep their records electronically.").

To say, however, that electronic *recordkeeping* and electronic *submission* of this data are the same is plainly false. While a company may choose under the current recordkeeping regime to record workplace injuries and illnesses electronically, the requirement that they submit this data electronically will introduce a host of additional costs and difficulties. Mainly, as with many attempts to integrate software or databases, there are likely to be significant difficulties ensuring the compatibility of the various different types of software utilized by employers and OSHA's electronic submission system. Alternatively, if employers are not able to submit this information to OSHA in the format created by the software they use, they will be required to devote substantial resources in terms of work-hours to re-entering this information into a program and format that OSHA can accept.

Finally, in order to comply with this Proposed Rule, establishment and corporate managers charged with these new reporting duties will need to be trained to comply with the reporting formats, schedules and procedures. Initially, at least one manager per establishment will need training, and in some cases more will need training to cover multiple shifts, absences, and internal review needs. For the 38,094 larger and 440,863 smaller establishments—478,957 in total—covered by the Proposed Rule, the initial year cost of training these managers would total nearly $150 million.[13] Significant training costs would continue in future years due to employee turnover.

These three cost elements that OSHA failed to consider indicate a likely initial year compliance burden in excess of $1.1 billion. Turnover of management staff, entry of new firms, opening of new establishments, and growth of existing

[13] This is a conservative estimate based on just one hour of training plus the average costs for commercial occupational safety training materials.

establishments triggering reporting requirements will result in continuing annual training, familiarization and information systems costs as well. Had OSHA properly considered these omitted cost elements, as well as the incidental "Caterpillar" costs of determining recordability of injuries, the proposed rule would have been seen as economically significant (e.g., the annual cost for the initial year will far exceed $100 million), and OSHA would have been obligated under Executive Orders 12866 and 13563 to submit a full cost benefit analysis to the Office of Management and Budget and the Office of Information and Regulatory Affairs. Statutory requirements under the Unfunded Mandates Reform Act[14] and Congressional Review Act[15] would have also been triggered. OSHA's failure to fully and accurately estimate the economically significant cost of the proposed rule is a procedural error that has denied the proposal the degree of internal policy review that was intended by the cited statutes and Executive Orders. Further, OSHA's unbelievable underestimation of this Proposed Rule's costs renders it unsustainable.

Not only does OSHA underestimate the costs associated with compliance with this proposed regulation, OSHA has not quantified the benefits of this rule. This failure, however, has not stopped OSHA from concluding that the annual benefits will "significantly exceed the annual costs." 78 Fed. Reg. at 67,256. More importantly, all the unquantified assumed benefits are based on mere speculation. There are no scientific analyses, data, reports, or studies to support any of the putative benefits. The closest OSHA comes to supporting its benefits assessment is a flawed analysis that relies on the value of a fatality avoided to establish a monetary component. OSHA posits, without explanation, that "if the proposed rule leads to either 1.5 fewer fatalities or .025% fewer injuries per year, the rule's benefits will be equal to or greater than the costs." *Id.* at 67,277. The Chamber certainly supports fewer workplace fatalities and injuries, but OSHA does not explain *how* this regulation will lead to that result. The analysis that is required to estimate the amorphous and unsupportable alleged benefits from the collection and publication of raw data regarding individual injuries is not the same as the benefit quantification of reducing injuries and fatalities directly related to the lowering of a permissible exposure limit. *See, e.g.*, Asbestos Exposure Limit, 70 Fed. Reg. 43,950, 43,979 (proposed July 29, 2005) (providing an example of where estimating a regulation's benefits in terms of reduced fatalities is applicable and appropriate). OSHA's claim that this rule will lead to reduced fatalities is further undermined by the fact that employers are already required to report fatalities and this rule would have no impact on that requirement. *See* 78 Fed. Reg. at 67,277.

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[14] 2 U.S.C. §§ 1501–1571 (1995).

[15] 5 U.S.C. §§ 801–808 (1996).

J. This Proposed Rule Will Not Achieve its Stated Purposes.

OSHA suggests that this Proposed Rule will improve workplace safety and health by providing information to "employers, employees, employee representatives, the government, and researchers [who] will be better able to identify and abate workplace hazards." *Id.* at 67,254. As laudable as this goal is, neither the reporting nor publication of raw, disjointed data collecting disparate injury/illness data will promote this objective.

OSHA claims that the electronic submission of the information contained in its Forms 300, 300A, and 301 will allow it to "use its resources more effectively by enabling OSHA to identify the workplaces where workers are at greatest risk . . . and to target its compliance assistance and enforcement efforts accordingly."[16] *Id.* at 67,256. To make use of this information, however, a significant amount of resources will be needed to process and analyze this data. This Proposed Rule will not allow OSHA to accomplish its goal or be any more effective for the simple reason that it does not have the resources necessary to perform this initial analysis.

OSHA's lack of resources, especially with regard to data collection and analysis, is well chronicled. In 2004, OSHA stated that it could not fulfill a FOIA request that sought the injury and illness rates of just 13,000 employers because doing so would be "too burdensome for the DOL to undertake." *New York Times Co.*, 340 F. Supp. 2d at 399. Indeed, OSHA argued, this limited analysis would require "approximately 30,290 staff hours, or approximately 15 work-years . . . ." *Id.*

[16] OSHA's Notice also boasts that this Proposed Rule will allow for the publication of confidential information "without having to work under the restrictions imposed by BLS for the use of confidential data." 78 Fed. Reg. at 67,276. Why OSHA believes it is liberated from the very confidentiality requirements applicable to its sister agency–BLS is incomprehensible. Pursuant to the Confidential Information Protection and Statistical Efficiency Act of 2002 ("CIPSEA"), Pub. L. 107-347, 107th Cong., the collection and dissemination of data submitted to the Bureau of Labor Statistics are subject to strict confidentiality requirements. Specifically, the CIPSEA provides that the data collected may not be disclosed to any unauthorized person *for any non-statistical purpose*, and that violation of this restriction is punishable by up to five years' imprisonment. Accordingly, Congress has made its concerns about the use of this type of information for non-statistical purposes clear. Despite these concerns, however, OSHA apparently believes that the publication of this information for irrefutably non-statistical purposes can be defended.

Despite a budget that is effectively lower than its budget was in 2004,[17] through this Proposed Rule, OSHA has committed itself to an undertaking the magnitude of which dwarfs comparable OSHA programs. Indeed, while processing just the LWDII rates for 13,000 employers was unfeasible for OSHA just ten years ago, the agency now claims that it has sufficient resources to collect, process, scrub of personal identifying information, and publish a far greater amount of raw data on an estimated 900,000 injuries from approximately 38,000 establishments each year. *See* Jan. 9, 2014, Tr. 83:11-21 (statement of David Schmidt, OSHA Office of Statistical Analysis). Further, OSHA apparently has resources left over to do something analytical and enforcement-oriented with this information. Simply to state this proposition is to recognize its incredulity.

OSHA's inability to manage information was highlighted in the Department of Labor Office of Inspector General's report on OSHA's Voluntary Protection Program ("VPP"). Voluntary Protection Program: Controls Are Not Sufficient to Ensure Only Worksites With Exemplary Safety and Health Systems Remain in the Program 1 (Dec. 16, 2013) [hereinafter "OIG Report"]. Under the VPP, participant employers that comply with the program's requirements are exempt from OSHA programmed inspections. While the amount of information that OSHA must review and analyze under the VPP is significantly smaller than what would be required under this Proposed Rule, the Inspector General found that OSHA had failed to adequately manage this program. *See id*. at 2 ("OSHA did not have controls in place to sufficiently select, reevaluate, and monitor VPP participants to ensure that their worksites maintained exemplary status."). To the contrary, when pressed by the Inspector General, *OSHA could not even identify how many workplaces were participating in the program* or how many applications were currently pending approval. *Id.* ("OSHA did not have an accurate count for how many worksites were in the program ([estimating] 1,746 to 1,851) or how many applications were awaiting approval (20 to 232).").

Because of OSHA's failure to adequately collect, maintain, and evaluate this information, the Office of the Inspector General found that "approximately 13 percent of VPP participants had injury and illness rates above industry averages or had been cited for violations of safety and health standards." *Id.* Nor had OSHA "reevaluated another 11 percent of VPP participants timely enough to ensure that they maintained exemplary systems" and "[s]ome reevaluations had still not been

[17] In 2004, OSHA's inflation-adjusted budget was the equivalent of approximately $566 million today. *See* FY 2012, Congressional Budget Justification, Occupational Safety and Health Administration, at 14, *available at* http://www.dol.gov/dol/budget/2012/PDF/CBJ-2012-V2-11.pdf (last visited Feb. 20, 2014). Conversely, OSHA's budget for the current year is just $552 million the equivalent of roughly $14.3 million less than ten years ago. *See* Occupational Safety and Health Administration, Commonly Used Statistics, *available at* https://www.osha.gov/oshstats/commonstats.html (last visited Feb. 20, 2014).

performed a year past their due dates." *Id.* If OSHA cannot evaluate the information collected from so few exemplary establishments under this current program, or act in a meaningful way upon it, it is difficult to see how OSHA would be able to make effective use of the flood of information it would collect under this Proposed Rule. The Chamber urges OSHA to focus its resources on improving its current programs, including the VPP, rather than undertaking a massive new program which the agency is clearly incapable of effectuating.

Even if OSHA had the resources to effectively manage the collection, maintenance, analysis, and publication of this information, it would not lead to the targeting of workplaces that are most likely to have violations. This is because information about an establishment's incidences of workplace injuries and illnesses does not accurately or reliably correlate with an establishment that is hazardous or that has failed to take OSHA-compliant steps to prevent injuries. A recent study by the RAND Corporation, which was commissioned by the California Department of Industrial Relations and the California Commission on Health and Safety and Workers' Compensation, underscores the irrelevance of injury rates, much less descriptions of disparate injuries, to the identification of unsafe workplaces. In this study, which examined the effectiveness of several different workplace safety inspection models—programmed, complaint, and accident—RAND found that no research supports the preconception that the goal of reducing workplace injuries and illnesses can be most effectively reached by focusing on workplaces with the highest number of incidents of injuries or illnesses. Mendeloff & Seabury, at 2. Nor is it true that workplaces with the highest number of incidences of injury and illness are also the most likely to be in violation of workplace safety regulations. To the contrary, as this report found, "there appears to be little relationship between the injury rate and the likelihood of violations at inspected establishments." *Id.* at 11.

As RAND makes clear, instead of providing a source of information for accurately and reliably evaluating an employer's workplace safety efforts and compliance with safety and health regulations, this proposed database will provide raw data subject to so many caveats, complexities, and assumptions as to be meaningless.

At the heart of the problem is the fact that injury and illness recordkeeping is an inherently complex process that in many instances is unavoidably subjective. Indeed, with hundreds of pages of Frequently Asked Questions ("FAQs") and guidelines, it is unlikely that over the course of a year, any two individuals assessing and recording purported workplace-related injuries would arrive at the same conclusions regarding the same circumstances. Indeed, as the Court of Appeals for the Seventh Circuit recently observed, there are serious questions about the effectiveness of using the number of injuries reported under Section 1904 as a basis for setting OSHA's enforcement priorities:

> At oral argument, counsel for the Secretary suggested that the injury log's function is to help the Department determine which occupations are hazardous, so that it can concentrate enforcement resources on them and propose regulatory changes that may reduce risks to employees. These purposes can be served, however, only if the log contains *all* injuries. Then the Department can compare rates of injury in a given job with the background rate in the general population; the difference can be attributed to workplace hazards. If, however, employers log injuries only after first deciding that each is work-related, the log becomes less useful as an exploratory or investigatory tool. Given the work-relatedness requirement in § 1904.4(a), the log does not show actual risks; it shows whether the employer *believes* that there is a connection between the working environment and the injuries. The Secretary can get no more information out than the employer puts in: GIGO (garbage in, garbage out).

Solis, 674 F.3d at 710.

The shortcomings of this information as a means of targeting workplaces for enforcement purposes will only be exacerbated by the adoption of this Proposed Rule. As is addressed elsewhere and above, the publication aspect of this Proposed Rule will result in a paradigm shift with regard to determining whether an injury must be reported that will only further diminish the usefulness of this information.

Further, under 29 C.F.R. § 1904, employers are required to report a wide variety of injuries and illnesses that have nothing to do with their compliance with OSHA standards or the overall safety of their workplace. And the potential that employers will be forced to report these non-workplace-safety-related injuries is only magnified by the "geographic presumption" imposed by Section 1904. For instance, an opinion letter issued by OSHA explained that under the "geographic presumption," "[a]n injury is presumed to be work-related if it results from an event occurring in the work environment," including "injury or illness that results from activities that occur at work but that are not directly productive, such as horseplay." *See* OSHA Opinion Letter (Feb. 9, 2009).[18] The bottom line is that OSHA 300s and their related documents are not accurate barometers of safe workplaces or effective health and safety programs.

[18] *Available at* https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=interpretations&p_id=27406.

Nor does OSHA's Proposed Rule account for factors that influence recordkeeping, but have nothing to do with workplace safety. For example, the 50 state workers' compensation programs, as well as disparate federal programs for certain industries, such as the Federal Employer Liability Act[19] and the Longshoreman and Harbor Workers Compensation Act,[20] to name a few, profoundly influence the kinds and numbers of injuries that are also recorded in OSHA's Form 300s. The reporting of certain kinds of injuries, particularly MSDs, is substantially influenced by whether they are compensated and if so at what levels under these workers' compensation standards. The number of injuries and illnesses reported to OSHA and in turn published under this Proposed Rule will also be significantly impacted by the presence of collective bargaining agreements at certain workplaces. For example, the availability of light-duty work is often governed by collective bargaining. Accordingly, in unionized establishments, it may be more likely that an employee will be forced to miss days of work, as opposed to benefitting from lighter work activities not available to him. As a result, establishments with collective-bargaining agreements containing these types of restricted light-duty assignment provisions will generate a pattern of more serious injuries resulting in missed days of work compared to establishments that do not have these agreements for precisely the same kind of injuries. Two employers with the same kinds of injuries will be viewed by OSHA and the public as differently culpable based only on the availability of a light-duty program.

Further, this type of data, which does not reflect different workplace parameters, will disproportionately have an adverse impact on small businesses. Given their relatively low number of total hours worked, when calculating the LWDII rates for smaller companies, just one or two reported injuries will drastically skew the rates that OSHA has invited the public to use to judge which businesses are safe and which are not. This issue is only compounded by the fact that it is precisely these smaller companies that lack the resources and legal advice relative to their larger counterparts necessary to adequately analyze injuries to determine whether they must be reported. As a result, it is likely that smaller businesses will make more inaccurate decisions leading to under- and over-reporting of workplace injuries.

While this Proposed Rule will not accomplish its stated goals,[21] it will provide fodder for misinterpretation and misuse by the public and special interest

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[19] 45 U.S.C. §§ 51–60 (1939).

[20] 33 U.S.C. §§ 901–950 (1984).

[21] This Proposed Rule will instead undermine OSHA's stated objectives by, in all likelihood, *reducing* injury and illness recordation. As discussed above, the publication of all reported injuries will force employers to more carefully scrutinize every event and purported injury to

groups. The net result of this Proposed Rule, therefore, will not be the improvement of workplace safety, but rather the unjustified shaming of employers based on information that is not indicative of their commitment to their employees' safety or compliance with OSHA's regulations. To its credit, the agency does not hide the ignominious purpose of this Proposal—an invitation to employees and the public to make economic decisions that will greatly impact this country's businesses based on the misguided notion that workplace injuries and illnesses indicate an employer's wrongdoing worthy of avoidance and ostracism. *See* 78 Fed. Reg. at 67,256 ("Public access to this information will encourage employers to maintain and improve workplace safety/health in order to support their reputations as good places to work and/or do business with."); *id.* ("Public access to this information will allow current employees to compare their workplaces to the best workplaces for safety and health and will allow potential employees to make more informed decisions about potential places of employment."); *id.* ("Public access to this information will allow members of the public to make more informed decisions about current and potential companies with which to do business.").[22]

Perhaps the best argument against proceeding with this Proposal was acknowledged by the Assistant Secretary himself. In response to the Department of Labor's Office of the Inspector General's report on OSHA's VPP program, Dr. Michaels stated that "OSHA takes issue with OIG's presumption that simply having average injury and illness rates above industry rates, whether for two or three years" indicates that the employer's "programs are not fully protective." OIG Report, App. D at 2. Rather, "OSHA does not believe that every participant that exceeds the industry average is necessarily failing to fully protect its workers." *Id.* Moreover, Dr. Michaels argued, "injury and illness rates are lagging indicators that provide only a partial impression of an overall program." *Id.* Clearly, if injury rates are not correlative with effective safety programs, *a*

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determine whether a pathoanatomic injury has, in fact, occurred, and if so, whether it is workplace-related. In close cases, this process will result in fewer recorded injuries. This Proposed Rule will force employers to more carefully execute their recordkeeping responsibilities in order to avoid the ramifications of published misinformation. Thus, perversely, at least from OSHA's perspective, this Proposed Rule will likely reduce the overall number of reported injuries and thus the utility of the very records the agency requests.

[22] The stated purposes of this Proposed Rule adopt the rationale behind the suspension and debarment procedures for government contractors contained in the Federal Acquisition Regulation ("FAR"). *See* 48 C.F.R. §§ 2909.406 & 2909.407. Unlike suspension and debarment, under this regulation, OSHA's attempt to encourage the public to make economic decisions based on workplace injury and illness information is neither authorized nor subject to the standards and procedures required by the FAR. OSHA's attempt to circumvent the limitations of the FAR and the safeguards it provides should give further serious pause about the legality of the Proposed Rule.

fortiori, the raw data on which such rates are based cannot legitimately provide evidence that such programs are ineffective. The stark inconsistency between Dr. Michaels' proper defense of the VPP programs and OSHA's regulatory initiative not only makes this Proposed Rule arbitrary and capricious, *see, e.g.*, *Babbitt*, 92 F.3d at 1258, but seriously calls into question the very foundational assumptions upon which this Proposed Rule is based.

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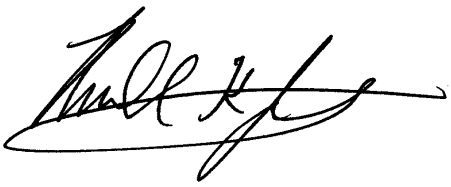
For the foregoing reasons, we respectfully submit that OSHA reconsider and withdraw this Proposed Rule.

Sincerely,



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