TESTIMONY
OF
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Before The
Committee On Education And Labor
Subcommittee on Workforce Protections

United States House of Representatives

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Summary of Testimony

This testimony will concentrate on the legal and public-policy constraints that prevent immediate promulgation of occupational safety and health standards. Among those constraints are requirements for notice and comment as well as court review of OSHA standards; the complexities of science and statistics on which such standards are based; the OSH Act statutory framework requiring findings of significant risk and feasibility to support OSHA standards; the staggering costs of such regulations; and the practical impact on available resources of competing regulatory priorities.

CHAIRMAN WOOLSEY, Members of the Workforce Protections Subcommittee, My name is Baruch Fellner, an attorney with the law firm of Gibson, Dunn & Crutcher, LLP. I very much appreciate your invitation to participate in this important hearing dealing with the question "Have OSHA standards kept up with workplace hazards?" I appear this afternoon in my personal capacity as a citizen and not on behalf of any clients. Indeed, since OSHA's birth over 35 years ago, I have worked both sides, having shaped OSHA's enforcement policies and priorities during its first decade and questioned them thereafter. I therefore hope to bring a broad substantive and historical perspective to this Committee's deliberations.

To that end, I will reject the temptation of answering the question posed at today's hearing with a resounding "yes" – that OSHA has moved with all deliberate speed in responding to workplace hazards. That simple response is supported by the fact that American workplaces have become demonstrably safer as evidenced by the steady decline of recorded workplace injuries, illnesses and fatalities – all while the economy has grown and jobs have increased at enormous rates over the past 35 years. Notwithstanding the pace of regulations, OSHA must be doing something right.

Instead of such a facile response, however, allow me to draw upon my experiences as a government attorney trying to get standards promulgated and then defending them, as well as a management attorney challenging such standards and finally as one who facilitates the settlement of such standards challenges in a manner that promotes the interests of all parties. For example, I represented the electroplating industry in its challenge to OSHA's most recent hexavalent chromium standard. We resolved our challenge to OSHA's standard in a settlement signed by the industry, OSHA, Public Citizen and the United Steelworkers. This agreement was recognized as a win for all parties and the vindication of a process that functioned properly to protect American workers.

Despite some evidence that the OSHA regulatory process is working, I would be the first to acknowledge that like any other agency dealing with complex scientific, technological and economic issues, OSHA's task is enormously difficult and time consuming. And, I would respectfully submit, with good reason.

First, the OSHA statute, as interpreted by decades of case law, requires the agency to make detailed findings of significant risk of material impairment of employee health before it can pursue regulation of a workplace hazard. *See, e.g., Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst. ("Benzene")*, 448 U.S. 607, 639 (1980) (holding that Secretary can regulate only if a "significant risk of a material health impairment" exists (emphases added)). In addition, OSHA must gather credible evidence with respect to the technological and economic feasibility of its regulations, and it must do so industry by industry. *United Steelworkers v. Marshall,* 647 F2d 1189 (D.C. Cir. 1980). Finally, it must perform what amounts to a cost benefit analysis. These are not simple tasks and to do them in a cursory fashion is to invite court rejection of OSHA standards.

Second, OSHA's regulations are on the frontier of science. They rely on a variety of retrospective, cross-sectional, prospective and randomized controlled trial studies.

Epidemiological and biostatistical analyses do not make OSHA's job any easier. And often, intuition and anecdote that fuel public policy clash with evidence-based medicine. Therefore, in the context of such cutting edge science, OSHA's task of establishing permissible exposure limits is indeed a daunting one. *See Cellular Phone Taskforce v. FCC*, 205 F.3d 82, 90 (2d Cir. 2000). ("In the face of conflicting evidence at the frontiers of science, courts' deference to expert determinations should be at its greatest").

Third, nor can OSHA simply cut through all this complexity and recognize a few studies that seem to point in the direction of the most protective standard it can promulgate. Even if the agency could get away with such a truncated process, which it cannot as I will discuss in a moment, it is simply not good public policy to ignore the enormous costs of OSHA regulations. For example, by OSHA's own admission, the ergonomics regulation, rejected by Congress under the Congressional Review Act, would have cost American industry billions of dollars and made it the most expensive regulation in Department of Labor history, and some would suggest in the history of our Republic. In the context of a global economy and the outsourcing of American jobs, good public policy demands an appropriate balance between a standard setting process that keeps up with workplace hazards and one that does not jeopardize the existence of those workplaces.

Fourth, OSHA's regulatory actions are subject to the requirements of the Administrative Procedures Act ("APA"). 5 U.S.C. § 5 *et seq*. Since 1946, the APA and appellate review have been this nation's insurance policy against arbitrary and capricious agency action. The APA was passed during a period of expanding power for the federal government – and was the result of decades of careful deliberation on how to best provide Constitutional safeguards to govern agency action. The APA requires transparency in government through notice to stakeholders of proposed rulemaking, the opportunity for comment and informal hearings, the promulgation of final rules that deal with stakeholder concerns and the opportunity for appellate review. These activities take time, but in our democracy it is essential that all voices are heard and considered – particularly those that will be subjected to regulation – before difficult and controversial regulations are promulgated. That is the objective of the APA as reinforced by Section 6(b) of the OSH Act. That objective is more fundamental than any individual OSHA standard.[1]

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[1] **Without regard to formal administrative requirements, OSHA may enact an emergency temporary standard to take immediate effect upon publication in the Federal Register if it is determined that (a) employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards, and (b) that such emergency standard is necessary to protect employees from such danger. *See* 29 U.S.C. § 655(6)(c)(1) . This is a drastic measure intended only for the most dire and pressing of circumstances. *See, e.g., Public Citizen Health Research Group v. Auchter*, 702 F.2d 1150, 1155 (D.C. Cir. 1983) (noting that the power to enact emergency standards is "extraordinary," and "to be used only in limited situations . . . [in] response to exceptional circumstances.") (internal quotations and citations omitted).**

Fifth, and perhaps most importantly, the question before this Committee frames the fundamental issue of OSHA priorities: what are the workplace hazards du jour and should they galvanize OSHA's immediate attention? Can or should OSHA's priorities be micromanaged from outside the agency? In this regard, the ergonomics regulatory process is instructive. It is a classic example of the doctrine of unintended consequences. The massive amount of time and resources applied to the ergonomics regulation clearly delayed and prevented the promulgation of other OSHA standards that would have been responsive to workplace hazards.

Finally, the question of OSHA regulatory priorities is only part of a broader set of OSHA issues. What remains are more challenging, complex, and subtle issues about how to improve workplace safety—and let us be clear, this is the cause which unifies us all -- not the question of how many standards OSHA has issued, or even whether all employers comply with these standards. Some of those questions to which I would invite this Committee's attention are:

- **How best to get small businesses which rarely if ever have dedicated safety personnel to focus on safety in their workplaces, and assist them in navigating the complex minefield that OSHA's regulations have become.**

- **How should exposure levels be updated that seek control measures that would quickly over-burden employers and exacerbate the trend towards exporting jobs.**

- **Given that there will never be an OSHA inspector in every workplace, what is the best model to achieve employer compliance with OSHA regulations and good workplace safety practices?**

- **Is OSHA getting its "bang for its enforcement buck" by directing its inspectors to workplaces with the deadliest and most serious workplace hazards subject to regulations that are already on the books?**

I welcome this opportunity to address the important question of the pace of OSHA standard setting. I respectfully submit that while the process appears glacial and cumbersome, it strikes an appropriate balance among the complex scientific, economic and public policy considerations. I look forward to your further questions.

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