

CORPORATE AMERICA AND THE WAR ON DRUGS: THE IMPORTANCE OF DRUG TESTING

HEARING

BEFORE THE

SUBCOMMITTEE ON NATIONAL SECURITY,
INTERNATIONAL AFFAIRS, AND CRIMINAL JUSTICE
OF THE

COMMITTEE ON GOVERNMENT
REFORM AND OVERSIGHT
HOUSE OF REPRESENTATIVES

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CORPORATE AMERICA AND THE WAR ON DRUGS: THE IMPORTANCE OF DRUG TESTING

THURSDAY, JUNE 27, 1996

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON NATIONAL SECURITY, INTERNATIONAL
AFFAIRS, AND CRIMINAL JUSTICE,
COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT,
Washington, DC.

The subcommittee met, pursuant to notice, at 10:05 a.m., in room 2154, Rayburn House Office Building, Hon. William H. Zeff (chairman of the subcommittee) presiding.

Present: Representatives Zeff, Ehrlich, Souder, Wise, Cummings of Maryland, and Thurman.

Staff present: Robert B. Charles, staff director and chief counsel; Andrew Richardson and Sean Littlefield, professional staff members; Ianthe Saylor, clerk; and Cherri Branson and Dan Hernandez, minority professional staff members.

Mr. ZEFF. Good morning. The Subcommittee on National Security, International Affairs, and Criminal Justice will come to order.

This morning the subcommittee continues its investigation of the war on drugs in the United States. Today our focus is on the role of corporate America and the importance of drug testing in the workplace as a means of combating the rising drug epidemic.

Drug abuse too often ends in personal tragedy. Today we have seen a 200 percent increase in juvenile drug use over the past 3 years, an unprecedented rise. For those who don't recognize it, these kids are at risk, and they are also tomorrow's workforce. Moreover, the cost of drug abuse to our society is staggering. Beyond the estimated cost of drug-related violent crime, drug abuse in the workplace costs businesses in excess of \$100 billion annually. It decreases the competitiveness of our economy at a time when high productivity is vital if we are going to win in a global international market. In addition, co-workers of abusers are burdened through greater risk of injury on the job, and we are all affected in the form of higher taxes to pay for law enforcement, incarceration, Medicaid, treatment programs, as well as higher medical and insurance premiums.

Moreover, let's say it like it is. We have a compelling national interest in ending drug abuse. Drug testing offers companies, employers and employees a critical means for combating this epidemic. It is an important first step to help businesses move employees beyond detection and into treatment and future prevention through education. In short, the time is now for drug testing.

Today the subcommittee seeks the answers to central questions, including these: How effective is drug testing in the workplace? Is drug testing a violation of workers' rights? What procedures can be put into place to make drug testing as effective as possible while being only nominally intrusive? After an employee has tested positive for drugs, what is the next step for both the company and the employee?

We hope to hear the answers to these and other questions from our witnesses this morning, and we are quite grateful to have such distinguished panels before us.

With that, I would like to just say that we just came back from a breakfast that we had with Tom Constantine, the head of DEA. There are about 50 or 60 of us in the Congress that try to meet about once a month on an informal drug task force of committed and interested people, and our ranking member, Mrs. Thurman, is part of that group, with Charlie Rangel, myself and many others. We believe that we are making some progress. I talked to Clay Shaw this morning, and we would like to hear your testimony, but we also would like to introduce legislation. I don't know how far we will get, but maybe Members of Congress should be drug tested as well.

With that, I introduce our ranking minority member, my good friend from Florida, Mrs. Thurman.

Mrs. THURMAN. Thank you, Mr. Chairman. As you have stated this morning, we will be examining the role of corporate America in the fight against illegal drugs. This hearing is important because, as I have stated throughout the numerous hearings that this subcommittee has held on the drug problem, the solution, as I see it, must be a strong partnership between the Government and the private sector. One entity fighting alone will not solve the drug crisis facing our Nation.

General Barry McCaffery, the Director of the Office of National Drug Control Policy, has stated that 70 percent of the people that use illegal drugs in the United States are employed. This is a very disturbing figure. Not only do these employees who use illegal drugs present a threat to the financial well-being of the company, they may also be putting the personal safety and security of their co-workers and others in jeopardy.

According to a 1990 figure, drug abuse by members of the U.S. workforce costs companies, as the chairman has already stated, anywhere between \$50 to \$100 billion annually. That is too high a cost in human terms and to our economy. How do we fight drugs in the workplace? One method that will be discussed extensively this morning is drug testing of employees. A recent Gallup poll of workers discovered that 97 percent believe that workplace drug testing is warranted under certain circumstances, and another 85 percent agreed with the statement that urine testing may deter the use of illegal drugs.

It should be noted that this poll question was based on the premise that drug testing would be done for a reasonable cause. We all believe in public safety, so I look forward to today's testimony, which will discuss the benefits of drug testing and preventing drug abuse by American workers.

In addition, I also want to hear what our second panel has to say about the mechanics of drug testing. I want to know about the different types of drug testing that are available, the types of evaluation methodology, the costs involved and the process that drug testing labs go through to become certified.

These are all important questions to ensure the accuracy and confidentiality of an employee's drug test. Beyond the issue of drug testing, I also want to know what other programs, particularly prevention and treatment, that U.S. companies offer their employees. Drug testing alone will not solve the drug problem in today's workforce. While it is estimated that 90 percent of Fortune 100 companies have established some type of drug testing program, those workers must often depend on either employee assistance plans or their own health insurance to provide counseling and treatment for a substance abuse program. I expect the first panel will enlighten the subcommittee as to the other treatment programs, besides drug testing, that they provide to their employees.

As we have also heard throughout the hearings, one component alone will not solve the drug crisis facing our Nation. Prevention and treatment programs have just as important a place in the workplace as does drug testing.

Finally, what about our small businesses? Without the resources available to large companies, small businesses in this country are handicapped in their ability to conduct drug testing of employees or to offer prevention and treatment options. Let us not forget that 70 percent of the illegal drug users in the country are employed, and not all of those 70 percent work for large corporations.

In closing, Mr. Chairman, let me thank you for calling this hearing, and I welcome our witnesses. I look forward to learning more how the business world deals with the problems of drugs in the workplace.

I, too, join the chairman in thanking you all for taking time for being here today. We look forward to your testimony and our ability to have a question and answer.

Mr. ZELIFF. Thank you, Mrs. Thurman. In the interest of time, I would like to limit opening statements to just the chairman and the ranking member, if that would be all right.

I would also like to propose that any additional opening statements be placed in the record. Without objection, so ordered.

At this point I would like to welcome our first panel. Our first panel of witnesses will include Mark de Bernardo, the executive director of the Institute for a Drug-Free Workplace, who will give us an overview of the dangers of drugs in the workplace and discuss efforts to combat drug abuse. Mr. de Bernardo will also propose legislation that would standardize drug testing procedures.

Mr. C.R. Cummings, manager of labor relations and employment for Chevron; Mr. Joe Stevens, vice president of employee relations and corporate affairs of Brown & Root; and finally, Mr. Kevin Connors, director of safety and department of transportation compliance for WMX Technologies, Inc., representing corporate America in general as a group. All of you gentlemen will describe the importance and success that you all have been having in drug testing programs with your respective companies. We thank you for being here today. We recognize the sacrifice that you are making and the

time you are giving up. With that, if you would stand and raise your right hand and take the oath.

[Witnesses sworn.]

Mr. ZELIFF. Let the record show that the answer was in the affirmative.

What I would like to do, if you would, is condense your testimony, if you can, to 5 minutes, and then we will certainly have you submit all of your written testimony for the records.

You can proceed in any order you would like.

STATEMENTS OF MARK A. de BERNARDO, EXECUTIVE DIRECTOR, INSTITUTE FOR A DRUG-FREE WORKPLACE; C.R. CUMMINGS, MANAGER OF LABOR RELATIONS & EMPLOYMENT, CHEVRON; JOE M. STEVENS, JR., VICE PRESIDENT OF EMPLOYEE RELATIONS AND CORPORATE AFFAIRS, BROWN & ROOT; AND KEVIN W. CONNORS, DIRECTOR, SAFETY AND DEPARTMENT OF TRANSPORTATION COMPLIANCE, WMX TECHNOLOGIES, INC.

Mr. DE BERNARDO. Good morning, Chairman Zeliff, Ranking Minority Member Thurman, and members of the subcommittee. My name is Mark de Bernardo, and I have the privilege of serving as the executive director of the Institute for a Drug-Free Workplace (the "Institute") in Washington.

I am also an attorney and the managing partner of the Washington office of Littler, Mendelson, Fastiff, Tichy & Mathiason, which is the largest labor and employment law firm in the country.

I appreciate this opportunity to testify in support of responsible workplace drug testing and drug abuse prevention programs and to submit to this subcommittee a legislative proposal which is included in our testimony, which we believe to be both pro-employer and pro-employee, and which, more importantly, is pro-drug abuse prevention.

As background on the Institute, let me mention the Institute is 7 years old. We represent 7 of the 10 largest companies in the United States, nearly half of the Fortune 50, approximately 80 of the Fortune 200, and 120 members overall, including many trade associations and business organizations and community coalitions against drug abuse.

The Institute is a nonprofit corporation, and has been very active. We are the only witness, the only business witness, before the President's Commission on Model State Drug Laws. We are the only business witness in the previous Congress on H.R. 33, the Dingell-Bliley bill, and the sole and primary business witness in regulatory hearings more than 20 times at the State level. We have also published more than 30 publications, including one entitled "Lawyers' Guide to State and Federal Drug Testing Laws," which is very comprehensive, 320 pages, and deals with all of the case law and all of the State laws, including Workers' Comp laws and unemployment comp laws that affect workplace drug abuse prevention programs and drug testing.

Let me mention the State laws. I was talking to Mrs. Thurman prior to the hearing, one of the very best State laws is in Florida, and one I know you worked on when you were down there as well,

Florida Workers' Compensation Premium Reduction Act, which is one of the most effective and appropriate State laws in the Nation.

One of the reasons the Institute was created in the first place was because of the threat at the State level for anti-drug testing legislation, drug testing legislation that didn't appreciate the role of drug testing in a comprehensive employer program aimed at substance abuse prevention.

We feel that drug testing can be an effective tool. It is not a program in and of itself. It is not for all employers. But it may be for most employers, and it is certainly for most employers, who have identified a drug problem in their workplace, who strive to have drug-free workplaces, or, particularly for those employers who are in safety sensitive industries or have safety-sensitive positions within their company. In this regard, drug testing can be a very effective tool. We have seen that. There is a lot of debate in this country about whether or not we are winning the war on drugs. Let me say that by one statistic, 375,000 coke babies were born in the United States last year, 375,000 babies brought into this world, newborns, addicted to drugs. Anyone who says we are winning the war on drugs, I think that is the type of statistic that would counterbalance that.

Whether or not we as a Nation are winning the war on drugs, I don't know. I can tell you that I can probably argue the point both ways for an hour each. I think there is lots of statistics, I have seen them all. Certainly we have an enormous drug problem, including the employer community.

As Mrs. Thurman mentioned earlier, 70 percent of those who engage in illicit drug use is employed. What I know is that employers can win their war on drugs, individual employers can have effective programs, and drug testing can be a very effective component of that.

I know it because the people who represent that on this panel are good examples of corporations which have very responsible programs which have been effective. It has been my pleasure to work with many of the witnesses today, my pleasure to work with our next witness, who is the chairman of the Institute, Tim Cummings from Chevron, who has a very effective program.

But let me add that employers are meeting this challenge, are implementing programs, are recognizing the usefulness of drug testing, but at the same time there are discrepancies at the State level. There are seven States which have enacted laws, all in the mid-to-late eighties, which are restrictive, unduly restrictive of drug testing. One of the things we would like to see this subcommittee address is preemption of those State laws to assure that there is consistency and so that employers who are going to do drug testing do it the right way. I will talk about our legislative proposal in that regard.

Let me move on. In our prepared statement we discuss the nature of the drug abuse problem in America. We recognize the human tragedies and economic costs associated with drug and alcohol use, the necessary and legitimate role of employers in the war on drugs, and the need for fair and effective utilization of all available tools to deter, detect and treat the employee drug abuse prob-

lems which are so prevalent in our workplaces, endanger our workers, and plague our society.

In this regard there are a lot of statistics provided in our written statement. I commend those to your attention.

The next section of our statement talks about employer and employee rights. In that regard, I think it is important that the rights and responsibilities of employers and employees be recognized, be preserved. We certainly encourage employers to do it right or not at all in terms of both drug testing and drug abuse prevention programs.

But in this regard I want to make one mention of the fact that while there is a lot of discussion of employee rights, we think that there is not enough discussion of the rights of employees who are nondrug abusers to work in drug-free workplaces. I think it is extremely important when you look at this issue to understand that most employees are not drug abusers, most do not want to work side-by-side with drug abusers. The majority are parents, they are concerned about their kids' exposure to drugs now and in the future. The rights of nondrug abusing employees to be in productive, efficient and safe workplaces, I think is extremely important.

Let me mention briefly that we do have legislation that we have advanced, that we have included a copy of in our testimony. It is the Private Sector Drug-Free Workplace bill. It is a bill that in concept and substance has been endorsed by the President's Commission on Model State Drug Laws.

The President's commission issued this during the Clinton administration. A majority of the members on the commission were Democrats. This was a bipartisan effort. It is a bill that has been enacted in Arizona and in forms in Florida, Utah, and Georgia as well, but most resembling that endorsed by the President's commission in Arizona. It is effective legislation, revenue neutral. I will tell you the premise of the legislation. It is that if employers conduct drug testing the right way, if they follow a series of checks and balances and safeguards to assure they are doing it the right way, then they qualify for a benefit, and that benefit is they cannot be sued for acting in good faith on the results of that drug test. There is a quid pro quo. It fits into the tort reform concept.

As I mentioned, it is revenue neutral, self-policing, because employers would have the incentive to do it right. I think it is pro-employee. Of this seven-page bill, the first four and a half pages are the types of thing that any union member in the country would enthusiastically endorse. It is the right way to do drug testing, and we commend this to your attention.

In closing, let me thank this subcommittee for this opportunity to testify. I pledge the support of the Institute for a Drug-Free Workplace to your efforts. I would be happy to answer any questions which you may have.

[The prepared statement of Mr. de Bernardo follows:]

I. Statement of Interest

Good morning Chairman Zeliff, Ranking Minority Member Thurman, and Members of the Subcommittee on National Security, International Affairs and Criminal Justice. My name is Mark A. de Bernardo, and I have the privilege of serving as the Executive Director of the Institute for a Drug-Free Workplace (the "Institute").

I also am an attorney and serve as the Managing Partner of the Washington office of Littler, Mendelson, Fastiff, Tichy & Mathiason, the largest labor and employment law firm in the country with 22 offices and more than 250 lawyers, all of whom exclusively represent management on labor and employment issues, including the providing of counsel regarding workplace drug-abuse prevention policies and programs.

I appreciate this opportunity to testify in support of responsible workplace drug-testing and drug-abuse prevention programs, and to submit to this Subcommittee a legislative proposal which we believe to be both pre-employer and pro-employee, and which — more importantly — is pro-drug-abuse prevention.

II. Background on the Institute

The Institute for a Drug-Free Workplace is a non-profit coalition of major businesses and business organizations dedicated to preserving the interests of employers and employees in effective and responsible drug- and alcohol-abuse prevention programs. The Institute includes in its membership seven of the ten largest companies in the United States, nearly half of the "Fortune 50," approximately 80 of the "Fortune 200," and a wide range of chambers of commerce, trade associations, and community coalitions representing businesses of all sizes.

The Institute was the *only* business witness before the President's Commission on Model State Drug Laws; the *only* business witness in the previous Congress on H.R. 33, the Dingell-Billey drug-testing bill; and the sole or primary business witness at legislative and regulatory hearings more than 20 times at the state level.

Among the more than 30 Institute publications is the *Lawyers' Guide to State and Federal Drug-Testing Laws*, a comprehensive (more than 320 pages) overview and analysis of all state and federal case and statutory law relevant to private-sector workplace drug-testing and drug-abuse prevention programs.

Among other functions, the Institute disseminates information on substance-abuse prevention and treatment programs with the goal of having a constructive influence on government and corporate consideration of these issues. The Institute is uniquely situated to provide relevant and helpful information on the nature and dangers of employee drug and alcohol abuse, the effectiveness of workplace drug-testing and drug-abuse prevention programs, and the public policy and legislation that best serves the interests of employers and employees alike in promoting drug-free workplaces and a meaningful and effective response to the widespread and too often devastating effects of substance abuse.

III. Background on State Action on Drug Testing and Summary of the Institute's Position

The Institute was created in March 1989 in large part because of the proliferation of proposed state legislation and regulation that unduly restricted, or would have unduly restricted, employee drug testing and employers' ability to effectively address drug abuse.

Fortunately, that trend has been reversed. The majority of bills now being considered at the state level are favorable on drug testing, not unduly restrictive, and not one anti-drug-testing bill — federal, state, or local — has been enacted since 1989.

Also on the positive side, and of particular note to you, Representative Thurman, the Florida Workers' Compensation Premium Reduction Act is one of the most effective and appropriate state laws in the nation concerning workplace drug-abuse prevention.

In fact, after Florida and Utah took the lead, several other states — Arizona, Georgia, Louisiana, Mississippi, and Oklahoma in particular — also enacted legislation which effectively fosters an appropriate balance between employer and employee rights and responsibilities, and encourages responsible drug-free workplace programs.¹

¹ See *Lawyers' Guide to State and Federal Drug-Testing Laws*. Institute for a Drug-Free Workplace. Washington, DC. 1996. A copy of this publication has been submitted to the Subcommittee on National Security, International Affairs and Criminal Justice for inclusion in its resources and records.

This approach has been refined and improved, and was incorporated in the Model Drug-Free Private Sector Workplace Act of the President's Commission on Model State Drug Laws.² It is this approach which the Institute believes is *most* appropriate for *state* action, and for which the Institute and its members are *most* supportive. We now come before this Subcommittee to seek *federal* legislation consistent with this worthwhile approach to one of the nation's most critical problems, the national plague of drug and alcohol abuse.

In addition to state legislative action, state regulatory action in the '90s has either been supported by the employer community or considered neutral by the employer community — that is, consistent with the substance and philosophy of state legislative action, state regulatory agencies have *not* implemented regulations which have been unduly or inappropriately restrictive of workplace drug testing.

Nonetheless, there *are* seven states (Maine, Vermont, Rhode Island, Connecticut, Minnesota, Iowa, and Montana) which enacted unduly restrictive drug-testing laws in the '80s. We seek preemption of those laws and a better, more consistent, less partisan, and more effective legislative response to the tragedy of drug abuse as it affects our American workers.

² Drug-Free Families, Schools, and Workplaces. The President's Commission on Model State Drug Laws. The White House. December 1993. p. M-199. The President's Commission on Model State Drug Laws was comprised of 24 Commissioners, a majority of whom were Democrats. The Commissioners included state attorneys general, state legislators, police chiefs, treatment service providers, an urban mayor, a housing specialist, district attorneys, a state judge, and drug-abuse prevention specialists.

That approach is embodied in the Private-Sector Drug-Free Workplace Act, draft legislation which I will discuss today.

IV. Nature of the Drug-Abuse Problem

The Institute for a Drug-Free Workplace recognizes the human tragedies and economic costs associated with drug and alcohol abuse,³ the necessary and legitimate role of employers in the "war on drugs," and the need for fair and effective utilization of all available tools to deter, detect, and treat the employee drug-abuse problems which are so prevalent in our workplaces,⁴ endanger our workers,⁵ and plague our society.⁶ These problems pose an

³ The total economic cost of alcohol and drug abuse was estimated to be \$166 billion in 1990. Rice, Dorothy P. Unpublished data. 1990. Institute for Health and Aging. University of California at San Francisco. In *Substance Abuse: The Nation's Number One Health Problem*. The Robert Wood Johnson Foundation. Princeton, NJ. 1993.

⁴ See discussion of the magnitude of the drug problem as identified by employees regarding their own workplaces, Gallup National and 17 State Surveys of Employee Attitudes on Workplace Drug Abuse and Drug Testing, conducted for the Institute for a Drug-Free Workplace, the Gallup Organization, Princeton, New Jersey (1989-1995).

⁵ Drug-using employees are 3.6 times more likely to be involved in a workplace accident and are five times more likely to file a workers' compensation claim. Backer, Thomas E. *Strategic Planning for Workplace Drug Abuse Programs*. National Institute on Drug Abuse. 1987. p. 4.

Between 1975 and 1986, more than 50 train accidents were directly attributed to drug or alcohol abuse. The results of the accidents: 37 fatalities, 80 injuries, and more than \$34 million in property damage. "Battling the Enemy Within." *Time*. March 17, 1986. p. 52.

⁶ A strong correlation also has been demonstrated between violent acts and the abuse of drugs and alcohol. For example, the Center for Substance Abuse Prevention at the United States Department of Health and Human Services estimates that alcohol and other drugs are associated with 68 percent of manslaughter charges, 52 percent of rapes, and

enormous risk to public health and safety, and have substantial social and economic costs and consequences in every community and for virtually every person across the country (for example, higher taxes, higher crime rates, higher health-care costs, and higher insurance rates).⁷

In particular, the Institute recognizes the threat that drug abuse — cognizant that alcohol is a major drug of abuse — poses for employers and employees alike. Among other consequences, drug abuse decreases productivity and increases accidents, absenteeism, product

50 percent of spousal abuse cases. Although separate statistics are not maintained for drug-related occupational violence, it is reasonable to infer that a substantial percentage of violent conduct by drug-abusing employees is attributable to their substance abuse. The overall cost of family violence to employers has been estimated at between \$3 billion and \$5 billion annually. "When Employees Make Good on Bad Intentions." *EAP Association Exchange*. September 1993. p. 15.

⁷ More than one-half of all people arrested for major crimes — including homicide, theft, and assault — were using illicit drugs at the time of their arrest. U.S. Department of Justice. National Institute of Justice. 1991 Drug Use Forecasting Annual Report. Washington, DC: NCJ-136045. 1993. p. 21.

Drug-related hospital emergency-room visits increased eight percent from 1992 to 1993 to a total of 466,900. Estimates from the Drug Abuse Warning Network. U.S. Department of Health and Human Services. December 1994.

defects, medical and insurance costs, and employee theft.⁸ Clearly, employers and employees have a large stake and a legitimate role to play in the "war on drugs."

V. Employer and Employee Rights

For employees, the consequences of drug abuse can be tragic not only for abusers and their families, but also for co-workers and customers who are put in jeopardy by others' illicit use of drugs. Moreover, beyond the physical dangers, employees' jobs may be jeopardized if

⁸ The estimated losses in productivity in 1988 caused by drug and alcohol abuse were \$40.2 billion. Rice, Dorothy P. Unpublished data. Institute for Health and Aging. University of California at San Francisco. 1990. In *Substance Abuse: The Nation's Number One Health Problem*. The Robert Wood Johnson Foundation. Princeton, NJ. 1993.

In 1991, the reported cost of drug abuse to the business community was \$75 billion annually, or approximately \$640 per employed person based on 117 million U.S. workers. Tasco, Frank T., Chairman, Marsh & McLennan Companies, and Chairman, The President's Drug Advisory Council. Address delivered to President Bush and the President's Drug Advisory Council. Nov. 15, 1991.

The U.S. Postal Service would have saved \$52 million by 1989 had it screened out all drug-"positive" postal service applicants in 1987. Employees testing "positive" on their pre-employment drug tests were 77 percent more likely to be fired in their first three years of employment, and were absent from work 66 percent more often than those who tested "negative." Normand, Jacques, Stephen Salyard, and John J. Maloney. "An Evaluation of Pre-employment Drug Testing." *Journal of Applied Psychology*. Vol. 75, No. 6. 1990. pp. 629-639.

Employees testing "positive" on pre-employment drug tests at Utah Power & Light were five times more likely to be involved in a workplace accident than those who tested "negative." Crouch, Dennis J., Douglas O. Webb, Paul F. Buller, and Douglas E. Rollins. "A Critical Evaluation of the Utah Power and Light Company's Substance Abuse Management Program: Absenteeism, Accidents, and Costs." *Drugs in the Workplace: Research and Evaluation Data*. NIDA. 1989. pp. 169-193.

a company's profitability is undermined by the poor performance, mistakes, and accidents of drug abusers.

For employers, the consequences of drug abuse also can be highly detrimental. If American companies are to remain competitive in an increasingly global economy, they must strive to maintain a work force that is free from drug abuse.

In so doing, company drug-abuse prevention programs should be implemented in a fair, consistent, and equitable manner with due consideration of the rights, responsibilities, and privacy interests of all concerned parties.

Concerning employee rights, companies must maintain a commitment to all their employees, including the vast majority who are not — and will not — become drug abusers. Business's responsibility to protect its employees and their rights goes far beyond protecting the rights of those who choose to engage in illicit drug use. Employers not only have a right to expect a workplace free from drug abuse, they may well have a duty to ensure it.

VI. Drug Testing

The Institute recognizes that drug testing is not for all employers and all employment situations; that drug testing is not, in and of itself, a drug-abuse prevention program; and that — as mentioned earlier — drug testing should be done "right," or not at all.

"Right," in regards to drug testing, embodies a series of safeguards and procedures widely embraced by the scientific and medical communities — and formally endorsed by the Institute in its Policy Statement — as necessary and appropriate. These safeguards and procedures — and others — are specifically articulated in the "Private-Sector Drug-Free Workplace Act" (which the President's Commission endorsed and we commend to you today), and include: (1) acting in accordance with a written corporate policy; (2) performing confirmatory tests using a different chemical process to help assure accuracy before acting upon a "positive" drug screen; (3) ensuring chain-of-custody and proper documentation for test samples; (4) maintaining the confidentiality of test results as reasonably and appropriately as feasible; and (5) using certified laboratories with scientifically and medically accepted laboratory protocols and procedures to assure accuracy and fairness.

While recognizing the necessity of procedural and policy safeguards to drug testing, and the limitations of drug testing (*vis-a-vis* an overall, comprehensive drug-abuse prevention program), the Institute also fully recognizes that drug testing, *if done properly*: (1) can be a vital component of an effective drug-abuse prevention program; (2) is fair and accurate; (3) can have a strong deterrent effect on drug abuse; (4) is a legitimate and appropriate prerogative of employers; and (5) is ultimately in the best interests of *both* employees and employers.

VII. Magnitude of the Drug Abuse in the Workplace Problem

SmithKline Beecham announced on February 29, 1996 the results of its annual "index" of drug-testing results.⁹ They found a "positive" rate of 6.7 percent on more than 3.75 million drug tests of U.S. employees and job applicants. One-in-fourteen Americans, *knowing* they were subject to testing, *still* failed their drug tests. What does this say about the magnitude of the drug problem and the attitude of drug abusers in our country?

Roger Smith, the former Chairman of the Board of General Motors, said that drug abuse cost GM \$1 billion a year.¹⁰

One of the "baby Bells," a Fortune 50 telecommunications giant, said 40 percent of its health-care costs were attributable — directly or indirectly — to substance abuse.¹¹

American Airlines lost \$19 million because one employee, high on marijuana, failed to properly load a tape into its central reservations computer, causing eight hours of computer

⁹ SmithKline Beecham Press Release: "Drug Detection in Workplace in 1995 Declines for 8th Straight Year, SmithKline Data Shows." Collegeville, Pennsylvania. Feb. 29, 1996.

¹⁰ *Drug Abuse in the Workplace: An Employer's Guide for Prevention*. Second Edition. U.S. Chamber of Commerce. Washington, DC. 1990. p. 1.

¹¹ *What Every Employee Should Know About Drug Abuse*. Fifth Edition. Institute for a Drug-Free Workplace. Washington, DC. 1995. pp. 5-6.

down time (*no one* could get a reservation on American Airlines nationwide) and significant erasures.¹²

As these examples demonstrate, drug abuse is a major threat to the workplace, a threat which has enormous human and economic costs.

These examples — and many others like them — have gotten the attention of the employer community. They know drug abuse costs lives and money in the workplace. They are aware of the potential legal liabilities. They know they cannot afford to ignore the problem, and they want as much flexibility as appropriate to best address these problems effectively and cost-effectively

These concerns are all responsibly and appropriately addressed by the legislation which the Institute seeks to advance, legislation which embraces the language endorsed by the President's Commission on Model State Drug Laws, the *only* private-sector drug-testing bill endorsed by the Clinton Administration's Final Report of the Commission, a Commission for which a majority of the members were Democrats.¹³

Once again, on behalf of the Institute for a Drug-Free Workplace, I appreciate this opportunity to testify today, commend Chairman Zeff for his outstanding leadership on this

¹² See fn. 10, *supra*.

¹³ See fn. 2, *supra*.

issue, and respectfully urge your favorable consideration of our suggested legislation on workplace drug testing.

VIII. Advantages of the Private-Sector Drug-Free Workplace Act

The Institute strongly believes that the goals of achieving drug-free workplaces *and* ensuring accuracy and fairness in workplace drug-testing programs would both be effectively served by enactment of legislation embracing the concepts of the legislation endorsed by the President's Commission on Model State Drug Laws and the Institute, and enacted into law in 1994 in Arizona¹⁴ (and in a similar form earlier in Utah).¹⁵

This approach has major advantages. The Private-Sector Drug-Free Workplace Act would expressly permit private-sector employers to drug and alcohol test *any* of their employees and prospective employees, *provided* specific accuracy and fairness standards are met.

These standards include requirements of: (1) a written policy that is distributed to employees, (2) employer payment for the tests and, for employees, wages for the time in which the test is administered, (3) use of certified laboratories, (4) a second (or "confirmatory") test (using a different chemical process than the first test for drug tests) prior to any employer action,

¹⁴ Ariz. Rev. Stat. Ann. § 23-493 (1994).

¹⁵ Utah Code Ann. § 34-38-1 to -15 (1993).

(5) maintenance of confidentiality to preserve employees' privacy, and (6) safeguards in the collection, labeling, storage, and transportation of samples.

The bottom line on this legislation is: employers who follow drug-testing safeguards and exemplary procedures in their substance-abuse prevention programs would be immune from legal challenges for acting in "good faith" on the results of employee drug tests.

Seven Major Advantages of the Private-Sector Drug-Free Workplace Act

- **It is voluntary.** Employers could not argue that this legislation is a regulatory imposition, because they could simply choose not to use the accuracy and fairness safeguards articulated in this bill. Of course, they would not qualify for the benefit of this bill — a "shield" from legal claims based on their acting in "good faith" on the test results.
- **It is pro-employee.** Employees would benefit from increased employer responsibility in testing because testing inaccuracies would be far less likely to occur. Respect of employee rights in the process would be put at a premium. (Of course, by promoting workplace safety and health, this bill would achieve an even more significant employee benefit.)
- **It is revenue-neutral.** This bill would not cost taxpayers a dollar. Rather, it would create a private-sector incentive for action that is in both employers' and employees' interests. There is no need for government regulation and enforcement since the process is self-policing: an employer who does not comply simply would be subject to potential legal liability.
- **It would reduce litigation.** By limiting the causes of action and encouraging model programs with a proper balance of employer and employee interests, this bill would reduce litigation, legal fees, the backlog in the courts, and the unproductiveness of an increasingly litigious society. It therefore matches up very comfortably to Congress's recently expressed commitment to tort reform.
- **It represents the "carrot" approach for employers,** not the "stick" approach, by giving employers the incentive — if they are going to do drug or alcohol testing — to do it the *right* way.

- It would encourage a business focus on drug-abuse prevention. Of the "Fortune 200" corporations, 98 percent currently do drug testing of one or more classes of employees or job applicants.¹⁶ This bill would send a credible message to employers that their commitment to drug-free workplaces is necessary and appropriate.
- It would promote safety and health. By encouraging responsible programs, the bill would result in safer workplaces, fewer product defects, and less of a substance-abuse impact on motorists. Safety and health are the primary reasons why employers are addressing substance abuse, and this bill would help deter, detect, and treat substance-abuse problems, thereby helping to protect the safety and health of the public at large.

IX. Suggested Workplace Drug-Testing Bill

The language on drug testing which the Institute respectfully urges you and your colleagues in Congress to support is, as discussed, identical in concept and purpose and largely identical in substance to the language endorsed by the President's Commission on Model State Drug Laws.

In addition, this bill, again with only minor alterations (and again identical in concept and purpose), and with the strong support of the Institute, was enacted into law in 1994 in Arizona, with U.S. Congressman Matt Salmon (R-AZ), then the Arizona Senate Assistant Majority Leader, the chief sponsor.¹⁷

¹⁶ Corporate Membership Surveys. The Business Roundtable. New York, N.Y. December 1991.

¹⁷ See fn. 14, *supra*.

It is, without question, the *best* drug-testing law in America from the Institute's and the employer community's points of view.

The language of the President's Commission's bill and the Arizona law — slightly modified, updated, and expanded (to fit a federal context, for example), is incorporated into the "Private-Sector Drug-Free Workplace Act" listed below:

**PRIVATE-SECTOR
DRUG-FREE WORKPLACE ACT**

Section 1. Title — This Title shall be known and cited as the "**Private-Sector Drug-Free Workplace Act.**"

Section 2. Finding — Whereas drug and alcohol abuse by employees has been demonstrated to seriously compromise workplace safety and health, and to endanger the public at large and the environment, be it enacted that this Title shall become law.

Section 3. Definitions — As used in this Title:

- (A) "Alcohol" means ethanol, isopropanol, or methanol.
- (B) "Drugs" means any substance considered unlawful under the Controlled Substances Act (21 U.S.C. 812).
- (C) "Employer" means any person, firm, company, corporation, labor organization, employment agency or joint labor-management committee, including any public utility or transit district, which has one or more full-time employee(s) employed in the same business, or in or about the same establishment, under any contract of hire, express or implied, oral or written. "Employer" does not include, for purposes of this Act, the United States, the states, or other public-sector incorporated municipalities, counties, or districts, or any Native American tribe.
- (D) "Employee" means any person in the service of an employer, as defined in Subsection (C) of this Section.
- (E) "Good faith" means reasonable reliance on facts — or that which is held out to be factual — without the intent to deceive or be deceived and without reckless, malicious, or negligent disregard for the truth.

- (F) "Prospective employee" means any person who has made application to an employer, whether written or oral, to become an employee.
- (G) "Sample" means such sample of the human body capable of revealing the presence of alcohol or other drugs or their metabolites.

Section 4. Applicable conditions for a legal policy — It is lawful for an employer to test employees or prospective employees for the presence of drugs or alcohol, in accordance with the provisions of this Title, as a condition of continued employment or hiring. However, in order to qualify for a bar from being subjected to legal claims for acting in good faith on the results of a drug or alcohol test, employers must adhere to the accuracy and fairness safeguards included in subsequent Sections of this Title.

Section 5. Collection of samples — In order to test reliably for the presence of drugs or alcohol, an employer may require samples from its employees and prospective employees, and may require presentation of reliable individual identification from the person being tested to the person collecting the samples. Collection of the sample shall be in conformance with the requirements of this Title. The employer may designate the type of sample to be used for this testing.

Section 6. Scheduling of tests — Regarding the timing and costs of drug and/or alcohol tests, and in order for an employer to qualify for the benefits of this Title:

- (A) Any drug or alcohol testing by an employer of employees normally shall occur during, or immediately before or after, a regular work period. Such testing by an employer shall be deemed work time for the purposes of compensation and benefits for current employees.
- (B) An employer shall pay all actual costs for drug and/or alcohol testing required by the employer of employees and prospective employees.
- (C) In addition, an employer is required to provide transportation or to pay reasonable transportation costs to current employees if their required tests are conducted at a location other than the employee's normal work site(s).

Section 7. Testing procedures — All sample collection and testing of drugs and alcohol under this Title shall be performed in accordance with the following conditions:

- (A) The collection of samples shall be performed under reasonable and sanitary conditions.
- (B) Sample collections shall be documented, and these documentation procedures shall include:

- (1) Labeling of samples so as to reasonably preclude the possibility of misidentification of the person tested in relation to the test result provided and handling of samples in accordance with reasonable chain-of-custody and confidentiality procedures; and
 - (2) An opportunity for the employee or prospective employee to provide notification of any information which may be considered as relevant to the test, including identification of currently or recently used prescriptions or non-prescription drugs, or other relevant medical information. This may be accomplished by providing procedures for review by a qualified medical professional to verify a laboratory sample which tests "positive" in a confirmatory test.
- (C) Sample collection, storage, and transportation to the place of testing shall be performed so as reasonably to preclude the possibility of sample contamination, adulteration, or misidentification.
 - (D) Confirmatory drug testing shall be conducted at a laboratory: (1) certified by the U.S. Department of Health and Human Services's Substance Abuse and Mental Health Services Administration, or approved by the U.S. Department of Health and Human Services under the Clinical Laboratory Improvement Act, or (2) approved by the College of American Pathologists.
 - (E) Drug and alcohol testing shall include confirmation of any "positive" test results. For drug testing, confirmation will be by use of a different chemical process than was used by the employer in the initial drug screen. The second — or confirmatory — drug test shall be a chromatographic technique such as gas chromatography/mass spectrometry, or another comparably reliable analytical method. An employer may take adverse employment action — including job denial to a prospective employee — based only on a confirmed "positive" drug or alcohol test.

Section 8. Testing policy requirements

- (A) Testing or re-testing for the presence of drugs or alcohol by an employer shall be carried out within the terms of a written policy which has been distributed to every employee subject to testing, and is available for review by prospective employees.
- (B) In order to comply with the provisions of this Title, and to qualify for the legal benefits, employers must provide employees, when requested and/or as appropriate, with information as to the existence and availability of counseling, employee assistance, rehabilitation and/or other drug abuse treatment programs of which the employer is aware.

- (C) Within the terms of the written policy, an employer may require the collection and testing of samples for, among other legitimate drug abuse prevention and/or treatment purposes, the following:
- (1) Deterrence and/or detection of possible illicit drug use, possession, sale, conveyance, distribution, or manufacture of illegal drugs, intoxicants, or controlled substances in any amount or in any manner, on- or off-the-job, or the abuse of alcohol or prescription drugs;
 - (2) Investigation of possible individual employee impairment;
 - (3) Investigation of accidents in the workplace or incidents of workplace theft or other employee misconduct;
 - (4) Maintenance of safety for employees, customers, clients, or the public at large; or
 - (5) Maintenance of productivity, quality of products or services, or security of property or information.
- (D) The collection and testing of samples shall be conducted in accordance with this Act and need not be limited to circumstances where there are indications of individual, job-related impairment of an employee or prospective employee.
- (E) The employer's use and disposition of all drug or alcohol test results are subject to the limitations of this Title if the employer is to qualify for the legal benefits and protections available under this Title.
- (F) Nothing in this article shall be construed to encourage, discourage, restrict, limit, prohibit, or require on-site drug or alcohol testing.

Section 9. Disciplinary procedures — Upon receipt of a confirmed "positive" drug or alcohol test result which indicates a violation of the employer's written policy, or upon the refusal of an employee or prospective employee to provide a testing sample, an employer may use that test result or test refusal as a valid basis for disciplinary and/or rehabilitative actions, which may include, among other actions, the following:

- (1) A requirement that the employee enroll in an employer-provided or -approved rehabilitation, treatment, and/or counseling program, which may include additional drug and/or alcohol testing, participation in which may be a condition of continued employment, and the costs of which may or may not be covered by the employer's health plan or policies;
- (2) Suspension of the employee, with or without pay, for a designated period of time;
- (3) Termination of employment;
- (4) Refusal to hire a prospective employee; and/or
- (5) Other adverse employment action in conformance with the employer's written policy and procedures, including any relevant collective bargaining agreement provisions.

Section 10. Sensitive Employees' Job Removal — If the confirmatory drug- or alcohol-test of an employee is "positive," and that employee is in a sensitive position wherein an accident could cause loss of human life, serious bodily injury, or significant property or environmental damage, his or her employer may permanently remove the employee from the sensitive position and transfer or reassign the employee to an available non-sensitive position with comparable pay and benefits, or may take other action, including termination or other adverse employment action, consistent with the employer's policy for drug- or alcohol-test "positives" for employees in sensitive positions, provided there are not applicable contractual provisions that expressly prohibit such action.

This Title shall preempt any Federal law, rule, regulation, order, or standard that applies to the continued employment or reemployment in a sensitive position of a recovering drug addict, chronic drug abuser, or alcoholic, or to the reinstatement or rehiring of any employee in a sensitive position for whom an employer has administered a drug or alcohol test consistent with this Act that has produced a confirmed "positive" drug- or alcohol-test result.

Section 11. Employer protection from litigation — No cause of action is or shall be established for any person against an employer who has established a policy and initiated a testing program in accordance with this Title, for any of the following:

- (A) Actions in good faith based on the results of a "positive" drug or alcohol test, or the refusal of an employee or job applicant to submit to a drug test;
- (B) Failure to test for drugs or alcohol, or failure to test for a specific drug or other controlled substance;
- (C) Failure to test for, or if tested for, failure to detect, any specific drug or other substance, any medical condition, or any mental, emotional, or psychological disorder or condition; or
- (D) Termination or suspension of any substance abuse prevention or testing program or policy.

Section 12. Causes of action based on test results

- (A) No cause of action is or shall be established for any person against an employer who has established a program of drug or alcohol testing in accordance with this Act, unless the employer's action was based on a "false positive" test result, and the employer knew or clearly should have known that the result was in error, and ignored the true test result because of reckless, malicious, or negligent disregard for the truth and/or the willful intent to deceive or be deceived.
- (B) In any claim, including a claim under this Title, where it is alleged that an employer's action was based on a "false positive" test result:

- (1) There is a rebuttable presumption that the test result was valid if the employer complied with the provisions of this Title; and
 - (2) The employer is not liable for monetary damages if its reliance on a "false positive" test result was reasonable and in good faith.
- (C) There is no employer liability for any action taken related to a "false negative" drug or alcohol test.

Section 13. Limits to defamation causes of action — No cause of action for defamation of character, libel, slander, or damage to reputation is or shall be established for any person against an employer who has established a program of drug or alcohol testing in accordance with this Title, unless:

- (A) The results of that test were disclosed to a person other than the employer, an authorized employee, agent, or representative of the employer, the tested employee, or the tested prospective employee, or the authorized agent or representative of the employee; *and*
- (B) The information disclosed was a "false positive" test result; *and*
- (C) The "false positive" test result was disclosed with negligence; *and*
- (D) All elements of an action for defamation of character, libel, slander, or damage to reputation as established by the relevant state's statute or common law, are satisfied.

Section 14. No employer requirement to implement a policy or testing — No cause of action arises in favor of any person against an employer based upon the failure of the employer to establish a program or policy on substance abuse prevention, or to implement drug or alcohol testing.

Section 15. Confidentiality of results — All communications received by an employer relevant to employee or prospective employee drug or alcohol test results and received through the employer's drug testing program are confidential communications and may not be used or received in evidence, obtained in discovery, or disclosed in any public or private proceeding, except in a proceeding related to an action taken by an employer under this Title.

X. **The Need to Provide for Job Removal for Substance-Abusing Employees in Safety-Sensitive Positions**

Section 10 of the Private-Sector Drug-Free Workplace Act¹⁸ is not in earlier versions of this bill, but does address a current concern which is critically important.

This provision would permit employers to permanently remove from the most highly safety-sensitive positions those employees (or deny employment to those job applicants) who test "positive" for drugs or alcohol, provided it is consistent with the employer's established policy and not contrary to contractual obligations (such as collective bargaining agreement provisions).

Individual assessments of fitness — as required under current law¹⁹ — should not be required to disqualify a recovering alcoholic or drug addict from employment or continued employment in designated safety-sensitive positions. Alcoholism and drug addiction are not distinguishable from other disabilities — such as diabetes and epilepsy — that have been viewed as disqualifying (even in the absence of individual assessments) in such very limited, specific, and highly safety-sensitive types of employment.

In the interests of enhanced employee safety and health, employers should be able to lawfully bar recovering alcoholics and drug addicts from certain positions *all* of the time. Some

¹⁸ See Section 10 of Section IX, at 19, *supra*.

¹⁹ Americans with Disabilities Act, 42 U.S.C. § 1212(d).

positions pose such inherent dangers that the risk of catastrophic accident and potential harm to life and property demands elimination of any known danger, even risks that cannot be quantified precisely.

Even if employers cannot terminate recovering alcoholics and drug addicts who occupy designated safety-sensitive positions, it is *not* discriminatory to offer such employees alternative positions with the same pay, seniority status, and benefits in order to minimize the risks to the employee, his or her co-workers, the public, the environment, and the company's interests at large. Corporate policies against placing recovering alcoholics and drug addicts in safety-sensitive positions are consistent with business necessity and the safe performance requirements of the job.

Both the courts and regulatory agencies historically have accepted the proposition that certain medical conditions are inherently disqualifying for positions with a high safety component because these conditions can have a severe impact on an individual's conduct and job performance without prior warning.²⁰ The reasons for this disqualification are obvious: some positions involve such a high element of safety responsibility that lives literally hang in the balance. Individuals with a history of serious medical conditions that may — without warning — impair performance, pose an unacceptable risk to life and property when such individuals

²⁰ See, e.g., *Chiari v. City of League City*, 920 F.2d 311 (5th Cir. 1991) (public employer lawfully terminated individual with Parkinson's disease from construction inspector job); *Mahoney v. Ortiz*, 645 F. Supp. 22 (S.D.N.Y. 1986) (court upheld disqualification of police officer candidates who had previously suffered shoulder dislocations, even though probability of recurrence was only 10-15 percent).

occupy certain positions. While the timing of such a threatening recurrence typically cannot be predicted, the seriousness of the potential harm justifies the exclusion of these individuals from appropriately designated employment positions.

Historically, the courts have accepted this treatment for medical conditions such as diabetes and epilepsy, which long have been viewed as posing unacceptable risks for highly safety-sensitive positions. Categorical exclusions of individuals with these conditions have been utilized by various Federal, state, and local agencies in both their employment of government workers (such as FBI agents), and in their regulation of fields of commerce (*e.g.*, those engaged in public or commercial transportation).

Recovering alcoholics and drug addicts pose dangers similar to those posed by persons with diabetes or epilepsy whose conditions do not appear to be currently active. Those who have previously experienced problems of alcoholism and drug abuse pose an unacceptable risk of relapse or recurrence — with potentially catastrophic consequences — that many corporations do not desire to assume and many others simply are not *capable* of assuming. Any dictate to the contrary — through the interpretation of disability discrimination laws — would unnecessarily and inappropriately impose substantial safety and health risks on employees and the public at large, and would pose equally unnecessary and inappropriate dangers to property and the environment.

It is clear that rehabilitation programs — even the most responsible programs — are *not* universally successful or permanent in altering addictive and abusive behaviors. While it would be wonderful to conclude that individuals who enter — and complete in good faith — treatment programs can be presumed "cured," now and forever, that is obviously *not* the case. The likelihood of a recovering alcoholic's relapse is significant.²¹ There are many other well-documented, substantial studies of relapse among alcoholics and drug addicts who seek to end their damaging and destructive behavior, but are unable to maintain their sobriety. For example, one recent publication on alcohol recidivism reported that approximately 90 percent of alcoholics are likely to experience at least one relapse over the four-year period following treatment.²² Another study reported that approximately 55 percent of people with chemical dependency are prone to relapse at some time during their recovery.²³

²¹ In 1988, six operating administrations of the DoT adopted sweeping regulations on substance-abuse prevention in commercial transportation operations, including mandatory drug-testing requirements. *See, e.g.*, Federal Highway Administration policy statement accompanying original drug-testing rules, 53 Fed. Reg. 47,135 (1988). The strong public policy behind these DoT regulations was definitely underscored by the U.S. Congress in its enactment by wide vote margins in both the Senate and the House of Representatives of the Omnibus Transportation Employee Testing Act of 1991, 49 U.S.C. app. § 2717, which mandated random and other types of drug *and alcohol* testing for employees in safety-sensitive, transportation-related jobs regulated by DoT's operating administrations. These legislative mandates have become new requirements for regulated transportation carriers and industry workers. *See* 59 Fed. Reg. 7302 (1994) (final agency rules limiting alcohol use by transportation workers and mandating alcohol testing).

²² J.M. Polich, et al., *Stability and Change in Drinking Patterns, The Course of Alcoholism: Four Years After Treatment*, 159-200 (1981).

²³ M. Dusoe, *supra*. *See also*, D. Ellis & J. McClure, *In-patient Treatment of Alcohol Problems — Predicting and Preventing Relapse*, *Alcohol & Alcoholism J.*, 449 (1992) (34 percent of males and 55 percent of females had relapsed six months after completing alcohol treatment program; after one year, rates were 47 percent and 61 percent, respectively); P.J. Frawley & J.W. Smith, *One-year Follow-up after Multimodal Inpatient Treatment for Cocaine*

In addition to the sizable percentages of recovering alcoholics and drug addicts who experience relapses, there are no clear indicators that universally signal an oncoming relapse. While constant, comprehensive assessments of an individual's mental and physical state — if they were feasible — might produce some information regarding an individual's difficulties in "remaining clean," such mechanisms do not exist. The suggestion that even close observation and monitoring ensure that individuals with addiction histories and proclivities will relapse is not borne out by real-world experience.

These studies also reveal that there is no fixed time period which signals a total "cure" and obviates the need for future concern of relapse. Any combination of pressures, stress, or problems — many of which likely will be entirely unknown to the employer — can lead to a

and Methamphetamine Dependencies, J. Substance Abuse Treatment 271 (1992) (47 percent relapse rate one year after treatment for cocaine dependence); J.W. Smith & P.J. Frawley, *Treatment Outcome of 600 Chemically Dependent Patients Treated in a Multimodal Inpatient Program Including Aversion Therapy and Pentothal Interviews*, J. Substance Abuse Treatment 359 (1993) (35 percent relapse rate in 12 months after treatment of chemically-dependent patients, 40 percent relapse rate after 14 months, and only 13 percent relapse rate of airline pilots completing treatment program); K.M. Carroll & B. J. Rounsaville, *A Comparative Trial of Psychotherapies for Ambulatory Cocaine Abusers: Relapse Prevention and Interpersonal Psychotherapy*,⁶ Am. J. of Drug & Alcohol Abuse 29 (1991) (compared results of one cocaine recovery program with a 67 percent success rate and another program with a 38 percent success rate); Milton R. Ayala, *Mean-Work Hours of Substance Abusing Employees*, 10 Alcoholism Treatment Q. 203 (1993) (analyzed the record of union employees after completing rehabilitation program and showed that 55 percent relapsed within one month and 79 percent relapsed within one year). The Institute's membership survey in 1992 offers equally damaging percentages — even following company rehabilitation programs. Despite the fact that these programs were carefully designed to provide the optimal rehabilitation techniques available for employees, were well-funded, and were conducted by those companies who are among the most committed in the country on this issue, the relapse rates were as high as 80 percent for some members and virtually never lower than 30 percent. Institute for a Drug-Free Workplace, *Institute Member Surveys* (1992).

relapse that terminates an extended period of sobriety. Simply presuming that an individual who goes six months, one year, two years, or five years is forever cured of addiction problems is arbitrary. Such periods of abstinence are not reliable indicators that employees with past addiction problems are "risk free" in terms of recurrence.

In addition, supposed "warning signs" of a relapse provide inadequate protection to employers, co-workers, and the public with respect to individuals who perform highly hazardous activities. The Institute is a strong proponent of the key role of supervisory training in the implementation of a substance-abuse prevention program. Supervisors should be familiar with corporate policies, acquainted with treatment and assistance alternatives, and prepared to respond to situations in which employees appear to be "under the influence" of drugs or alcohol at work — or in violation of the company's drug- or alcohol-prevention policy in some other regard. At the same time, it is quite clear that such training efforts do not create medical or treatment and assessment "experts." Reliance on the perceptions and assessment capabilities of lay supervisors provides an inadequate means of assurance for a vast quantity of high-risk positions.

Furthermore, such oversight "options" are entirely meaningless for positions that are not supervised, or where "rank-and-file" tasks are performed in transit or at remote work locations. Apart from the potential loss of life and human suffering that might be avoided, corporations have millions — or, in some cases, billions — of dollars potentially at risk in a single catastrophic incident or error.

For all these reasons, Congress should not permit government agencies to compel employer reliance on the limited oversight effect of supervision, observation, random testing, or some other combination of these procedures where a high-risk job is involved *because no procedure or combination of procedures would be fail-proof.*

Scientists may not be able to precisely quantify the likelihood that an individual with a prior alcoholism or drug addiction problem will suffer a relapse. That fact does not mean that these risks and concerns are not valid or substantial. To the contrary, the fact that the precise means to identify, quantify, and limit risk *do not* exist make the need for the application of company policies that call for permanent removal — in limited circumstances — compelling, appropriate, and necessary. This need would be favorably addressed by the language of our proposal.

The Institute strongly believes that Section 10 of our recommended legislation, which would permit "sensitive-employees' job removal," is necessary and appropriate, would promote workplace safety and health consistent with the overall goals of the Private-Sector Drug-Free Workplace Act (*and* the overall goals of virtually *all* employer drug-abuse prevention programs), is both pro-employer and — ultimately — pro-employee, and is highly appropriate for enactment as part of our proposed bill *or* as stand-alone legislation.

XI. Conclusion

The Institute for a Drug-Free Workplace respectfully urges the Subcommittee on National Security, International Affairs and Criminal Justice to consider and enact the Private-Sector Drug-Free Workplace Act, as suggested in this testimony, endorsed by the Institute, supported by the employer community, and largely embodied in concept, purpose, and substance by the President's Commission on Model State Drug Laws.

On behalf of the Institute, I sincerely thank and commend Chairman Zeliff, Representative Thurman, and the Members of this Subcommittee for this opportunity to testify in support of responsible workplace drug-testing programs and to advance what we — and many, many others — consider to be model legislation in the workplace drug-abuse prevention area.

I would be pleased to answer any questions on workplace drug testing, our suggested legislation, current law, and/or workplace substance-abuse prevention which you may have now, or during your future considerations in regard to drug-testing issues and legislation.

Mr. ZELIFF. Thank you very much.

Mr. Cummings.

Mr. CUMMINGS. Good morning, Mr. Chairman, Mrs. Thurman, other members of the subcommittee.

My name is Tim Cummings, and it is my pleasure to be here this morning representing Chevron and also in my role as chairman of the Institute. I manage the labor relations and employment compliance function for Chevron, and in that regard deal with a wide range of workplace policy issues, including those common to all of Chevron's operating locations. Among the most important of these is the company's approach to workplace substance abuse issues.

We are fully committed to promoting a drug-free work environment for all employees. We are dedicated to not only protecting employee safety, health and well-being, but also the safety, health and well-being of the many customers and suppliers who come in contact with our workplaces or use our products and services.

Chevron is also committed to protecting company, public, and personal property and the environment, and we recognize the importance of an effective substance abuse prevention program in that regard.

As I mentioned, I have been involved both internally at Chevron and externally through the Institute in these efforts, and I am pleased to serve as the Institute's current chairman.

We appreciate the opportunity today to describe the manner in which Chevron has worked toward achieving drug-free workplace goals in our work environment. I would also like to express our support in Chevron for the efforts of this subcommittee and the chairman in continuing to focus needed attention on this compelling public policy issue. While the concentration of some political leaders, the news media, and some segments of the public has wandered in recent years, you continue to recognize the need for continuing national efforts in this critical area, a priority with which we emphatically agree and support. Today's youth are tomorrow's employees, and it is important for all of us to keep that in mind.

Next, I would like to summarize briefly my comments from the written statement regarding Chevron's substance abuse prevention program. Our program has evolved as a result of periodic review of our policies, analysis of data, both inside and outside of our company, and our ongoing commitment to continuous improvement of our processes in the health and safety arena as well as other parts of business.

Chevron has taken what we believe to be a comprehensive approach to substance abuse in the workplace. The fundamental components of our program are education, identification, and rehabilitation. Over the past few years, we have seen the number of drug and alcohol cases in our company decline steadily, along with the number of workplace accidents and the amount of money that the company expends on worker compensation costs.

We believe that our efforts to achieve a workplace free from the effects of drug and alcohol abuse have played a significant role in improving worker safety, as evidenced by, among other indicators, the improvement in our safety statistic in recent years. However, we also recognize that the threats which employee substance abuse pose overall to American workplaces are enormous, and that Chev-

ron's concern and commitment must remain steady. Data recently released by the Department of Health and Human Services identifies 7 percent of the working population as being users of illicit substances and, as Mrs. Thurman mentioned, 70 percent of the users are active employees in the American workplace. While we are very proud of our employees, we know they are not immune from the problems of the rest of the population.

Our concern is made even more compelling perhaps by the fact that 60 percent of our U.S. based workers, approximately 17,000 employees, are engaged in safety sensitive jobs. Due to the substantial numbers of Chevron employees who work in these roles, we have strongly embraced a commitment to continuous improvement in this area, as in the other components of our safety and health program. This dedication also reflects our desire to achieve a high performance organization in all components of our operations.

From our perspective, the best approach requires implementation of a fair and equitable policy which attempts to balance in all respects our business needs with our concerns for employees and the communities within which we work and live. My prepared testimony discusses in great detail this balanced approach in the roles of education, identification and rehabilitation, but I want to take just a moment and touch briefly on the third of these roles, rehabilitation and the success of our Chevron Employee Assistance Program, our EAP.

Our EAP evaluates and refers employees to the appropriate treatment provider, meets with employees and their supervisors prior to returning the employee to the work site, provides regular supportive counseling and coordinates a rigorous program of weekly followup testing during the first year and frequent retesting in subsequent years to ensure employees remain drug and alcohol free when returned to their prior positions.

I am proud to point out we modified our mental health and substance abuse benefit plan in 1989 to provide a strong incentive for self-referral to our EAP. Over 50 percent of the employees who are in our EAP program are there as a result of self-referral. We believe that self-referral is a critical component of an overall effective program. Under our EAP, some of the details are provided in the written testimony.

Before an employee returns to work in a safety sensitive position, we require a return to work agreement between the employee assistance program administrators and the employee. This agreement obligates the employee to meet with the EAP counselor for regular followup, continue with outpatient treatment, participate in the community of individuals supporting individual recoveries, such as Alcoholics Anonymous, maintain 100 percent abstinence from alcohol and illicit drugs, submit to frequent screenings, and agree to EAP's reporting to management if there is a failure to comply with the agreement.

We have had excellent success. Two-thirds of the employees who have participated in the program for drug abuse and three quarters of the employees who have participated for alcohol abuse are still Chevron employees, productive, contributing members of our workforce.

We continually also seek to revise our policy to make sure that the policies and programs we have fully support a drug-free workplace. We just completed a year's study that has led to some recommendations that will be implemented in the next few months, and they are detailed somewhat in the written testimony.

One other thing I would like to mention briefly is that a number of our Chevron locations have unions representing our employees, and the bottom line of the relationship with the collective bargaining agents for our employees across the country has been that with appropriate education and appropriate investment of time to discuss issues thoroughly, there has been excellent cooperation and support from the unions that represent Chevron employees across the country.

In the beginning, in the late eighties when we moved to drug testing as a component of our overall program, there were a number of questions, not only from collective bargaining agents, but from all of our employees. We took the time to answer those in a way that satisfied the needs of the workforce and led to, as I said, excellent cooperation from the unions that represent Chevron employees. I think there may be some partnership opportunities for other employers who perhaps have not pursued that to the fullest yet.

In conclusion, I would just like to say we support the legislative initiatives that Mr. de Bernardo has referred to. We support this subcommittee's efforts to continue to move forward. We believe that such testing efforts and the component of testing carried out in good faith should not form the basis for tort, negligence, wrongful discharge, defamation, or other legal actions, and we would welcome any supportive legislation that would help with that issue.

As I previously noted, we appreciate the opportunity to discuss our substance abuse program with you today, with particular emphasis on the EAP. I recognize I am over on time.

There is one other thing I do want to mention. You can put it under the umbrella of community outreach and leadership. We believe education is a very, very important component. I mentioned today's youth is tomorrow's employee. Chevron, in 1995 on a pilot basis in California, and we decided to expand it to all locations where we have employees around the country in 1996, in partnership with Californians for a Drug-Free Youth, Partnership for Drug-Free California, and Partnership with a Drug-Free America, initiated, in conjunction with Red Ribbon Week in October, an Adopt-a-Classroom program. In the State of California, 1,000 Chevron employees adopted classrooms and, in conjunction with teachers and local school administrators, had materials available. We reproduced many of the video spots that the Partnership for a Drug-Free America uses on TV. The feedback we got from each and every teacher and administrator, was very, very positive. As a result of that, as I said, we are planning on expanding that program this year.

It is not just good community relations. For us, it is tomorrow's employee that is currently in the school system. While the focus here is testing, I think the rehabilitation piece for Chevron has helped our success significantly, and I think the overall interface

in the community is very, very important on a long-term basis to help combat the problems you have identified here today.

Thank you.

[The prepared statement of Mr. Cummings follows:]

TESTIMONY

on

WORKPLACE SUBSTANCE-ABUSE PREVENTION PROGRAMS

before the

SUBCOMMITTEE ON NATIONAL SECURITY,
INTERNATIONAL AFFAIRS AND CRIMINAL JUSTICE

of the

COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT

of the

U.S. HOUSE OF REPRESENTATIVES

on behalf of

CHEVRON CORPORATION

presented by

C. R. CUMMINGS
MANAGER OF LABOR RELATIONS & EMPLOYMENT COMPLIANCE

June 27, 1996

I. **STATEMENT OF INTEREST & SUMMARY OF POSITION**

Good morning, Mr. Chairman and Members of the Subcommittee. My name is Tim Cummings, and it is my pleasure to be here today representing Chevron Corporation.

I am employed in Chevron's corporate headquarters, and serve as its Manager of Labor Relations & Employment Compliance. In that capacity, I regularly deal with a wide range of

workplace policy issues, including those that are common to all of Chevron's operations. Among the most important of these policy questions is the Company's approach to workplace substance-abuse issues. Chevron is fully committed to promoting a drug-free working environment for *all* of its employees. We are dedicated to not only protecting their safety, health, and well-being, but also the safety, health, and well-being of the many customers and suppliers who come in contact with our workplaces, or use our products and services. Chevron also is committed to protecting company, public, and personal property, and the environment, and it recognizes the importance of an effective substance-abuse prevention program to achieving that goal.

I have been involved in efforts to address these specific concerns on a pro-active basis, both within Chevron and — in conjunction with other concerned employers — through the Institute for a Drug-Free Workplace, for which I am pleased to currently serve as Chairman. The Institute is a non-profit coalition of businesses and business organizations focused on effective and responsible drug-abuse prevention programs. Through our involvement with and support of the Institute, we attempt to assist other employers and their employees in the development of corporate drug-abuse prevention and treatment programs. The Institute also effectively attempts to positively influence the national, state, and local consideration of drug-abuse prevention issues.

We appreciate this opportunity to testify today to describe the manner in which Chevron has worked toward achieving these goals within our work environments. We also wish to

express our support for the efforts of this Subcommittee and its Chairman in continuing to focus needed attention on this compelling public policy issue. While the concentration of less resolute political leaders, the news media, and some segments of the public has wandered in recent years, you continue to recognize the need for our continuing national efforts in this critical area, a priority which we emphatically support.

II. CHEVRON'S PROGRAM

Chevron's program has evolved as a result of periodic review of our policies, analysis of data both inside and outside our Company, and our ongoing commitment to continuous improvement of our processes in the health and safety arenas as well as other parts of our business.

At Chevron, we have taken a comprehensive approach to the issue of substance abuse in the workplace. The fundamental components of our program are education, identification, and rehabilitation. Over the past few years, we have seen the number of drug and alcohol cases in our Company steadily decline, along with the number of workplace accidents and the amount of money the Company expends on workers' compensation costs. We believe that our efforts to achieve a workplace free from the effects of drug and alcohol abuse have played a significant role in improving worker safety, as evidenced by, among other indicia, the improvement of our safety statistics.

However, we recognize that the threats which employee substance abuse pose overall to American workplaces are enormous, and that Chevron's concern and commitment must remain steadfast. Data recently released by the Department of Health and Human Services identifies 7% of the working population as being users of illicit substances, and other studies indicate that another 7-10% of the working population abuses alcohol. Studies done by utility companies (such as Utah Power & Light) and studies of U.S. Postal Service employees dramatically show that workers who abuse drugs and alcohol are far more likely to cause on-the-job accidents which injure themselves and their colleagues, as well as having other adverse human and economic consequences. While we are very proud of our employees, we know that they are not immune from the problems of the rest of the population.

Chevron's concern is made compelling by the fact that 60% of our Company's employees — approximately 17,000 workers — are engaged in safety-sensitive jobs. In our view, it is appropriate to classify jobs as "safety-sensitive" if the individuals in those positions, if impaired, could:

- 1) Adversely affect the environment through contamination of air, water, soil, flora, or fauna;
- 2) Have the ability to jeopardize the community through property damage or imperil members of the public; or

3) Create hazards or dangers to themselves, to other employees of the Company, or to contract personnel.

Due to the substantial numbers of Chevron employees who work in these roles, we have strongly embraced a commitment to continuous improvement in this area, as in the other components of our safety and health program. This dedication also reflects our desire to achieve a high-performance organization in all components of our operations.

To refine our efforts in the area of workplace substance-abuse prevention, we periodically have considered a number of questions: How well are our programs working, according to our own data and that of companies within and outside of the petroleum industry? Does our policy reduce risk to the public, the environment, and the Company? Does our guidance to employees enunciate a clear, broadly applicable policy? Does it effectively balance cost with risk reduction? Does it promote the early identification and treatment of drug and alcohol problems? Does it help rehabilitate employees who suffer from substance abuse?

From Chevron's perspective, the best approach requires implementation of a fair and equitable policy which attempts to balance, in all respects, our business needs with our concern for our employees and the communities in which we live and work. Chevron's efforts, as stated earlier, have three principal components: 1) employee education about drug and alcohol issues *and* the availability of confidential, Company-paid treatment through our Employee Assistance Program (EAP); 2) identification through supervisory training to recognize both the overt and

covert signs of substance abuse, and the use of pre-employment, random, for-cause and post-incident drug and alcohol testing; 3) rehabilitation through our EAP, which provides assistance for a wide range of personal problems and is staffed by qualified professionals in the area of substance-abuse treatment.

The EAP evaluates and refers employees to the appropriate treatment provider, meets with employees and their supervisors prior to returning the employee to work, provides regular supportive counseling, and coordinates a rigorous program of weekly follow-up testing during the first year, and frequent retesting in subsequent years, to ensure that employees remain drug- and alcohol-free when returned to their prior positions.

In addition to these critical elements, I am proud to point out that Chevron modified its Mental Health and Substance Abuse benefit plan in 1989 to provide a very strong incentive for employees to self-refer to our EAP. Under this plan, the Company pays 100% of the first \$5,000 of treatment costs and 80% of additional costs up to a lifetime maximum of \$25,000. This program helps illustrate Chevron's commitment to both substance-abuse prevention and to our employees, and has proven highly successful.

Role of Education — In 1991, Chevron conducted a series of interviews and focus groups with employees, supervisors, and senior management to design a state-of-the-art educational program directed towards the goal of a workplace free from the effects of drug and alcohol abuse. The result of these efforts was a set of training videotapes and instructional

materials for employees and supervisors which has been utilized on a Company-wide basis. A very compelling part of this training package is a videotape with testimony from employees who agreed to waive their confidentiality in order to tell their own stories of substance abuse and recovery, and thereby inspire their co-workers to seek help sooner, rather than later.

Role of Identification — In addition to educating and encouraging our supervisors to recognize the indicia of employee substance abuse, Chevron is a strong supporter of drug and alcohol testing as a means of identifying and deterring employee use of illicit substances and abuse of alcohol. Our policy language and testing procedures are strongly supported by management and employees seeking to keep our workplaces free from the effects of substance abuse. Applicants who seek employment with our Company must submit to a drug test administered prior to the onset of employment. A "positive" result at this stage will lead to the denial of the pending employment application. Similarly, employees who are selected for drug or alcohol testing under *any* component of our policy understand that a "positive" test result can ultimately be a cause for termination. If the employee is retained, then referral to, and full compliance with and cooperation in, the EAP is compulsory.

Chevron performs more than 20,000 employee and job-applicant drug tests each year, more than half of which are random tests. We believe that this process, while not only extensive but also expensive, is a very worthwhile expenditure, despite the fact that in 1995 only 1% of our pre-employment, random, for-cause, post-accident, and other drug tests were "positive." Based upon our studies of the prevalence of drug abuse among our employees and pre-hires done

a decade ago, and our knowledge of the magnitude of the drug problem in our society, we are confident that the drug-screening process — and particularly the random-testing component — have a tremendous deterrent effect on employee substance abuse. Chevron employees know what is expected of them, that we strive to maintain drug-free workplaces, that they are subject to random drug testing, and that their illicit use of drugs subjects them to adverse employment action. *That* is deterrence and, frankly, our experiences demonstrate consistently that it works.

Role of Rehabilitation — While drug and alcohol testing are important components of our overall policy, we have found that it is Chevron's multi-faceted approach to workplace substance-abuse issues that is most effective. Chevron's policies permit and *encourage* employees who have a problem with drugs or alcohol to self-identify. As a result, more than half of the drug and alcohol problems treated through our EAP come from self-referrals by employees. Less than one-quarter — 21% — are referred to the EAP because of violations of Company policy. We believe that restrictions on opportunities for rehabilitation for individuals in certain safety-sensitive jobs would significantly reduce the chances that employees with substance-abuse problems would seek assistance. In our judgment, that result would be detrimental to the Company's efforts to maintain safe and healthy working conditions, and to protect the organization from potentially catastrophic liability — and any liability — as a consequence of drug- or alcohol-linked accidents or errors.

Before we return an employee to a safety-sensitive position following treatment for a drug or alcohol problem, we require the employee to agree to a return-to-work agreement. This

agreement: 1) obligates the employee to meet with the EAP counselor for regular follow-up sessions; 2) continue with outpatient treatment (commonly known as "aftercare"); 3) participate in a community of individuals supporting each other's recovery (such as Alcoholics Anonymous); 4) maintain 100% abstinence from alcohol and illicit drugs; 5) submit to frequent screening for the use of alcohol and drugs, and 6) agree to the EAP's reporting to management if they fail to comply with the contract. Non-compliance results in disciplinary action which almost invariably means termination.

We believe, on the basis of our own statistics prior to and following the implementation of this program, that an intensive and highly structured follow-up is critical to the effectiveness of the rehabilitation process. Looking back at our program results since 1990, we are very proud of our success in retaining as productive employees two-thirds of the employees who entered the EAP abusing drugs and three-fourths of employees who entered with alcohol problems. These percentages, incidentally, reflect employees who were not terminated and did not resign at a point in time two years subsequent to being treated and returning to work.

Chevron has analyzed its rehabilitation program in terms of safety and in terms of cost-effectiveness. A study of more than 600 employees who have undergone rehabilitation since 1990 shows that the on-the-job and off-the-job accident rates of these employees are statistically equivalent to the normal employee population. We also have looked at the cost of rehabilitation, compared "before" and "after" measures of job performance, and the cost of replacing employees who otherwise might be terminated as a result of receiving treatment outside of an

EAP follow-up structure. National studies have shown that treatment for an employed population, without structured EAP follow-up, has a success rate of about 35%. Our analysis indicates that we save nearly \$10 for every \$1 we spend on employee rehabilitation, and this calculation does not take into account the cost of accidents which were prevented.

III. PROCESS IMPROVEMENT

Recently, Chevron completed a year-long study of the best practices of rehabilitation in industries having large numbers of safety-sensitive jobs. Our analysis team concluded that much of what we, as a Company, were currently doing should not be changed, but that there were ways in which our program could be improved. The committee made the following recommendations, which were endorsed by senior management and will be implemented shortly.

Key Role of Consistency — As with many aspects of the employment relationship, a critical principle for administering an equitable and appropriate policy is consistency in application and enforcement. Apart from compelling legal concerns under discrimination laws or the challenges to management actions that can arise in a number of settings, we are motivated to ensure that our substance-abuse policies are enforced consistently out of a sense of fundamental fairness.

The Company does not benefit if employees at one work site are treated one way under a critically important policy, while their counterparts at another facility or another area of the

same operation are treated more leniently *or* more harshly. This is, of course, a very difficult goal to achieve in an organization with vast numbers of locations, many supervisory officials, and a number of different collective bargaining units. Yet, the goal of consistency is one which we believe can improve the overall effectiveness of corporate policy in this area, and a target toward which we continue to work.

Highly Safety-Sensitive Jobs — Our experience in balancing the various interests which converge in this area recently has led us to refine our approach to certain jobs. We are in the process of establishing a new job category for "highly safety-sensitive jobs." These positions involve additional criteria beyond those previously considered for safety-sensitive workers. This classification would extend to individuals who work alone (*i.e.*, without supervision), and in positions in which there is the potential for a significant event with major safety, financial, or environmental consequences. While a relatively small *percentage* of our Company's employees fall into this category, we have a sizable *number* of job slots, including pilots and aircraft mechanics, truck drivers carrying hazardous or toxic materials, and ship masters and chief engineers, which will be affected. We have devised additional safeguards with respect to the individuals occupying these positions in order to protect against the risks of having an active drug or alcohol abuser in any one of these critical roles. These safeguards include:

- 1) An annual check of publicly available driving records for citations related to driving under the influence or while intoxicated, and a requirement that employees self-report such citations;

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- 2) Only one opportunity for rehabilitation after a person self-refers, and
- 3) Employee Assistance Program follow-up, including frequent testing and counseling for the remainder of the employee's tenure in a highly safety-sensitive job.

We believe that these steps are necessary in light of our obligations to protect life, health, the environment, and the property of those with whom our employees come in contact. This prudent approach is both necessary and rational, and we feel confident that it represents the best option for accommodating the various interests which we face.

Post-Incident Testing — In light of our firm commitment to rehabilitation efforts, it also is important to emphasize one critical component of our drug- and alcohol-testing efforts: post-rehabilitation testing for employees in safety-sensitive jobs. In our experience, follow-up testing is an absolutely necessary safeguard, and an important component of any company's risk-management efforts.

In line with the practices of other petroleum companies, we utilize an extended period for post-rehabilitation testing (for periods of up to five years after a second rehabilitation experience). Similarly, we expect to be even *more* systematic in our efforts to test employees after specific incidents occur which suggest the possibility of drug or alcohol involvement at work. These practices are necessary both because they can (and, unfortunately, sometimes do)

serve as a tool to identify employees in key jobs who have continuing problems, and because they have an ongoing deterrent effect for many employees who otherwise might prove susceptible to the temptations that drugs or alcohol provide to some individuals.

Lowering Marijuana Identification Threshold — Based on available studies and industry practices, Chevron has determined that the Company should lower the cutoff level for marijuana "positives" from 50 nanograms per milliliter to 20 nanograms per milliliter on initial drug-screening tests. This conclusion was reached after reviewing clinical evidence both within our Company and in research studies. We have been aware for quite some time that certain employees may intentionally or unintentionally evade detection in our screening process by consuming large quantities of water and diluting the specimens which they provide. Interviews with employees who have gone through the rehabilitation process have confirmed that this technique of avoiding a "positive" test is common knowledge within the community of illicit drug users.

Current research has determined that refinements in testing technology have made immunoassay identification far more accurate. One benefit of this enhancement in testing sophistication is that the possibility of a random drug test being "positive" as a result of passive exposure to ambient marijuana smoke is virtually nil. Another reason for Chevron's change to a 20 nanogram screen threshold is Chevron's experience when the Company lowered its marijuana cutoff level from 100 to 50 nanograms for drug screens in 1993. That threshold change increased the number of "positive" tests by 45%.

These same technical refinements, paradoxically, also have reduced the length of time during which genuine marijuana usage can be detected. While earlier testing methodology may have detected marijuana at the 50 nanogram level a week after usage, laboratory studies show that using today's testing technology, even a high dose of marijuana will not produce a "positive" test after two days.

IV. UNION INVOLVEMENT

Due to the scope of Chevron's unionized operations, our experience in this area may be informative for other employers. Chevron has a number of collective bargaining relationships with labor organizations that represent various groups of our employees. While generalizations are difficult, it is fair to say that our unions' cooperation with Chevron has been good concerning work on the development and refinement of policies.

Unions have obligations to represent their members, which can pose challenges to those organizations due to conflicting sentiments within each bargaining unit. Certainly many of Chevron's union-represented employees feel as strongly as supervisory and corporate staff regarding the need for strenuous efforts in this area. Some other employees may feel differently about testing issues or other specific components of policy, and there have been circumstances in which Chevron has differed with union representatives over policy terms and their application.

When Chevron commenced the drug-testing programs some years ago, some union representatives — like some individual employees — raised many questions about the testing process and drug-testing methodologies. Recognizing that such inquiries were motivated by good faith efforts to better understand a new technical process, Chevron expended substantial time, efforts, and resources to increase their understanding. For example, in some cases, appropriate union representatives visited the drug-testing laboratory in North Carolina which we contract with to become better acquainted with the manner in which specimen handling, chain-of-custody issues, and the specific testing technologies were to be utilized for employee drug screens, and on other matters. That effort and dialogue was extremely important in developing the necessary understanding and acceptance (in most cases) of Chevron's new testing program, its technology, and its reliability.

While the embrace of drug testing was not universal in all of our collective bargaining relationships, applicable bargaining obligations regarding our substance-abuse policies have been satisfied, and programs implemented with a minimum of difficulty. Some individual grievances or challenges arise from time-to-time, and they are aired in the arbitration context or some other forum. However, it is accurate to conclude that such differences have not proven to be insurmountable or overly burdensome. We suggest to other employers of union-represented workers that many labor organizations see the need and benefit for cooperation in implementing effective mechanisms to deal directly with these issues, and effective partnership is possible in many settings.

V. CONCLUSION

Chevron is supportive of legislative and regulatory initiatives that would encourage and reward *appropriate* employer practices in this area. In our view, good employer practices include the use of proper collection and chain-of-custody procedures, utilization of appropriate tests and certified laboratories, use of medical professionals in the analysis of test results, and other accepted employee protections. When such practices are followed, employers *should* retain the ability to: 1) require employee submission to tests; 2) utilize the results of tests for *determining violations of company policy*, and 3) *administer appropriate disciplinary measures* in accordance with its previously communicated policy. Such testing efforts, carried out in good faith, should not form the basis for tort, negligence, wrongful discharge, defamation, or other legal actions, and initiatives at the federal level to provide that legal shield to employers who act responsibly and in good faith would be most welcome. We encourage legislation and regulatory initiatives consistent with, and supportive of, these employer practices.

As previously noted, we very much appreciate the opportunity to discuss our substance-abuse program and its very tangible human and economic benefits. We strongly support this Subcommittee's efforts to emphasize the key leadership role that employers — and particularly our major corporations — can play in educating other businesses, employees, and the public that substance abuse is a threat that must be eradicated from each and every work site across America. While ultimate achievement of that goal may not be within our immediate grasp, employers who devote the time, effort, and resources to develop a comprehensive substance-

abuse prevention program can achieve results that are beneficial to both the corporation and to the communities in which they operate.

Thank you very much for your consideration of Chevron's views. I would be happy to respond to any questions that members of the Subcommittee may have concerning our programs and experiences in this area.

Mr. ZELIFF. Thank you, Mr. Cummings.

Mr. Stevens.

Mr. STEVENS. Good morning. My name is Joe Stevens, and I am the vice president of employee relations and corporate affairs for Brown & Root, an international engineering and construction company with operations throughout the United States and much of the world. Brown & Root is one of the largest construction companies in the world, with nearly 45,000 employees, and considers itself the leader in its industry in the level of commitment, innovation and success achieved in the substance abuse prevention program.

I have been with Brown & Root for 34 years, including 10 years as an attorney in their legal department, and as vice president of employee relations and corporate affairs, I am a senior corporate official with a number of departments reporting directly to me.

Among those departments is Safety, and included in Safety is Brown & Root's longstanding and comprehensive substance abuse prevention program. Make no mistake about it, Brown & Root considers drug and alcohol abuse prevention to be a top company priority, to be first and foremost a safety and health issue. In our industry we believe it has to be.

Brown & Root administers more than 50,000 drug tests each year, a number that we don't believe any other company in the world can match. The vast majority of those drug tests are done onsite in our own facilities. As a measure of the extent of this program, Brown & Root spends more than \$1 million a year in just the reagent alone. The facilities are state-of-the-art and staffed by highly trained and certified professionals.

We believe in doing drug testing the right way or not at all. Ultimately, we strongly believe in the value of drug testing and comprehensive drug abuse prevention programs and in the very legitimate and necessary interests of employers in striving to achieve and maintain drug-free workplaces.

Brown & Root was a pioneer in broad-based drug testing, having implemented its drug testing program in 1985. It remains a leader, continually seeking to refine and improve our program and its effectiveness.

I have no doubt whatsoever that Brown & Root's drug abuse and alcohol policy program have not only produced very substantial economic savings to our company, but have also saved lives and prevented injuries. These efforts have significantly contributed to our safety record, which is consistently at or among the very best in our industry.

In short, drug testing works. On-site drug testing is a vital component of what works for Brown & Root and for many other companies with time sensitive hiring needs in safety sensitive positions.

Sections II and III of our written statement discuss Brown & Root's drug abuse and alcohol policy and the nuts and bolts of our onsite drug testing programs. But for the sake of time, let me merely point out one fact from this portion of our written statement, that in 10 years since we began this program, that pre-employment drug testing, the positive rate for our applicants has decreased from 30 percent, which was found in a pilot study we did

in 1985, to less than 5 percent in 1995. This is progress, and in my opinion this is real success.

Next, I would like to comment briefly on our company's particular need for a quick turnaround of drug test results. Waiting 2 or 3 days for the laboratory results for drug screens, the overwhelming majority of which are negative, 95 percent of Brown & Root's is negative, is not a vital option for our company. I will say here that if it is positive, they are sent out for confirmation by certified laboratories outside of our facilities.

We are often called in for emergency situations to do cleanup and reconstruction, after a national disaster, for example, or an oil or chemical fire or spill. We just simply cannot wait 24 or 48 or 72 hours to clear workers and at the same time we cannot afford to put even one drug abuser on the job site.

Allow me to briefly touch on just three of the advantages of onsite drug testing overall, which are discussed in much greater detail in our prepared statement.

First, as I mentioned, it is a necessity. For some safety and time sensitive positions such as most of those within Brown & Root, employers cannot wait 2 or 3 days for the results. They simply cannot afford to put anybody on the job, even for a day, with a major industrial accident a genuine possibility if that employee is impaired.

Working America's drug problem is enormous. It was mentioned in the opening statement that 74 percent of those Americans who engage in illicit drug use are in fact employed. That represents 11 percent of the total workforce. This workplace drug abuse problem is throughout, and employers who are in safety sensitive industries and need their employees immediately, they cannot gamble to put this person to work without having some onsite testing.

The necessity of onsite drug testing can be critical, not just to the construction industry, but to the petroleum, shipping, mining, chemical, utility industries as well. For employees at remote workplaces and with little or no supervision, onsite drug testing can also be useful and necessary.

Second, the cost involved in sending all samples out for drug testing at a certified lab is very expensive. We can save time and administrative costs, we can save many of the costs that are necessary to keep up with all of those things, like chain of custody and things of that nature, if we do not have to send them all to the laboratory. We need to save that time. Time is money, and employees benefit significantly from onsite testing.

Third, of course, is safety. As addressed earlier, putting employees on the job, even for a short period of time while you await drug test results, can result in tragedy. Many industries simply cannot afford any breach of safety due to having drug or alcohol abusers on the job. One glance at any major harbor with significant shipping, petroleum facilities, port facilities, illustrates the need for no margin of error on employee fitness for duty.

Our Nation faces an enormous drug problem. Brown & Root recognizes that and the risk which substance abusing employees pose to our company and to our industry, to our employees, to our other contractors, subcontractors, vendors and clients, and, of course the public at large. We feel we have every incentive to create and maintain drug-free work sites and a completely drug-free

workforce, and we are always striving for just that goal. Whether it is obtainable or whether we can ultimately achieve it, I really don't know, but I do know we have made some great progress since we put our program in place and we will never stop trying.

One highly useful tool to Brown & Root is again the onsite drug testing. No one does it more, and I don't believe anybody does it better.

One other point, we find that unfortunately nine States have passed laws where they do not permit onsite drug testing. We find that this goes against what is necessary in the industry, it is an industry practice, and increasingly common and useful for screening purposes. I feel that Federal legislation, which you will be addressing, should specifically permit onsite drug testing and should specifically pre-empt those nine States with restrictive laws. It is necessary and highly appropriate.

On behalf of Brown & Root, I want to thank the committee for the opportunity to share some of our successes and come before you. I will be happy to answer any questions that you have regarding our program or any of the other issues that you might have interest in, either today or later as you go through this process.

[The prepared statement of Mr. Stevens follows:]

TESTIMONY

on

WORKPLACE SUBSTANCE-ABUSE PREVENTION PROGRAMS

and in support of

ON-SITE DRUG TESTING

before the

SUBCOMMITTEE ON NATIONAL SECURITY,
INTERNATIONAL AFFAIRS AND CRIMINAL JUSTICE

of the

COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT

of the

U.S. HOUSE OF REPRESENTATIVES

by

JOE M. STEVENS, JR.
VICE PRESIDENT OF EMPLOYEE RELATIONS AND CORPORATE AFFAIRS
BROWN & ROOT

June 27, 1996

I. Statement of Interest and Summary of Position

Good morning, Chairman Zeff and Members of the Subcommittee on National Security, International Affairs and Criminal Justice. My name is Joe M. Stevens, Jr., and I am the Vice President of Employee Relations and Corporate Affairs for Brown & Root, an international construction company with operations throughout much of the United States and the world.

Brown & Root is one of the largest construction companies in the world with nearly 45,000 employees, and considers itself a leader in its industry not only as a major construction contractor, but also as the leader in its industry in the level of commitment, innovation, and success achieved in its substance-abuse prevention program.

I have been with Brown & Root for 34 years, including ten years as an attorney in its Legal Department. As Vice President of Employee Relations and Corporate Affairs, I am a senior corporate official with a number of departments and divisions reporting directly to me. Among those departments is Safety, and included in Safety is Brown & Root's long-standing and comprehensive substance-abuse prevention program.

Make no mistake about this — Brown & Root considers drug- and alcohol-abuse prevention to be a top Company priority and to be, first and foremost, a safety and health issue. In our industry, it *has* to be.

We appreciate this opportunity to discuss Brown & Root's program and policies, and to demonstrate to the Subcommittee our level of commitment.

Brown & Root administers more than 50,000 drug tests *each* year — a number no other company in the world can match, and the vast majority of those drug tests are done on-site and in our own facilities.

As a measure of the extent of this program, Brown & Root spends more than \$1 million a year on reagent alone (the reagent which is used in drug testing). Our facilities are state-of-the-art, and are staffed by highly trained and certified professionals.

We believe in doing drug testing the "right way," or not at all. Ultimately, we strongly believe in the value of drug testing and comprehensive drug-abuse prevention programs, and in the very legitimate and necessary interests of employers in striving to achieve and maintain drug-free workplaces.

Brown & Root was a "pioneer" in broad-based drug testing, having implemented its drug-testing program in 1985, and remains a leader, continually seeking to refine and improve our program and its effectiveness.

I have no doubt whatsoever that Brown & Root's Drugs of Abuse and Alcohol Policy and program have not only produced very substantial economic savings to the Company, but also have saved lives and prevented injuries. These efforts have significantly contributed to our safety record, which is consistently at or among the very best in our industry.

In short, drug testing works, and *on-site* drug testing is a vital component of what works for Brown & Root and for many other companies with time-sensitive hiring needs in safety-sensitive positions.

Brown & Root appreciates this opportunity to testify in support of responsible workplace drug-testing and drug-abuse prevention programs, on-site drug testing, and any appropriate legislation under consideration which would preserve and enhance the employer community's ability to perform effective drug testing, *including on-site drug testing*, in its efforts to create drug-free working environments for all Americans.

I also want to commend you, Chairman Zeliff, for your leadership in addressing drug-abuse prevention and drug-trafficking prevention, and for recognizing the appropriateness and

necessity of workplace drug testing and the valuable and vital role employers play in our nation's "war on drugs."

II. Brown & Root's Drugs of Abuse and Alcohol Policy

Brown & Root was one of the first companies, in *any* industry, to take comprehensive action to prevent substance abuse among its employees. Brown & Root first implemented a pilot study of pre-employment drug testing in 1985, and was shocked to find that 30 percent of those job applicants already extended a conditional offer of employment tested "positive" for the illicit presence of drugs.

Now, after more than a decade of pre-employment testing, Brown & Root has a nationwide pre-employment test "positive" rate of less than 5 percent, despite being in an industry that has been estimated to have one of the highest reported rates of employee substance abuse.¹

Since the implementation of our program, our reportable accident rate has plummeted, and we are confident that the effectiveness of our Drugs of Abuse and Alcohol Policy and program have been a major factor in that improvement.

¹ The United States Department of Health & Human Services' Annual Household Survey on Drug Abuse reports that 17.3 percent of construction employees, including supervisors, admit to past-year illicit drug use. Survey officials believe that the survey, which is dependent on self-reporting, underestimates the actual prevalence of illicit drug use. U.S. Department of Health & Human Services, "Drug Use Among U.S. Workers: Prevalence and Trends by Occupation and Industry Categories," April, 1996.

Brown & Root has nearly 30,000 employees in the United States and approximately 45,000 worldwide. Of those U.S. employees subject to our drug-testing policy, fully two-thirds, or 20,000, are classified as "safety-sensitive."

Brown & Root's Drugs of Abuse and Alcohol Policy ("the policy") includes a one-page document which all employees are required to sign at the time of their employment.

In addition, Brown & Root maintains a comprehensive training program for supervisors. Supervisor training is performed Company-wide and includes: (1) training on the effects of illicit drugs and symptoms of drug abuse, (2) a detailed Company policy review and explanation of Brown & Root's commitment to a drug-free workplace, (3) an explanation of the policies and procedures used in drug and alcohol testing, (4) special training emphasis on supervisors' responsibility to respond to employee problems that may be drug- and/or alcohol-related, and (5) Brown & Root's drug, alcohol, and contraband search procedure.

The policy itself prohibits any and all employees from the:

(1) use or possession of prohibited drugs, including inhalants, and unauthorized alcoholic beverages, (2) an employee's being under the influence of these drugs or beverages, (3) measurable presence of these drugs or alcohol in an employee's body determined by urine, blood, or other accepted testing procedures, (4) tampering with a specimen or the use of a substance or device designed to falsify drug-test results. Prohibited drugs include, among others, marijuana, hashish, cocaine, and hallucinogens and depressants, stimulants, and medication not prescribed for current personal treatment by a licensed physician.

The Company also has reserved the right to conduct unannounced searches of Company work locations, including vehicles, and to search those entering Company work sites. Prohibited drugs or paraphernalia, alcoholic beverages, and any unauthorized property or equipment may be taken into custody and may be turned over to law enforcement.

Currently, Brown & Root conducts the following types of drug testing: (1) pre-employment — after a conditional offer of employment is rendered; (2) post-accident — for employees involved in accidents or near accidents, whether or not job-related when on Company property, client property, or in a Company vehicle; (3) random — for all employees working in jobs categorized as "safety-sensitive" who are then randomly selected from a computer-generated list for testing; and (4) required testing — for compliance with government or client contractual requirements exceeding or otherwise deviating from Brown & Root's policy.

Brown & Root's pre-employment testing is extensive because of the nature and structure of the construction work performed by the Company. An employee hired to perform a job at a particular site is employed to work at that site only. When the project is complete, or when an employee is no longer needed at a particular site, his or her employment is terminated. If that individual later applies for employment at another construction site operated by Brown & Root, and that individual is offered employment at that site, and that applicant has not been tested in 90 days, another pre-employment test is performed before putting that individual to work at that site.

As a result, it would not be uncommon for a construction worker in a particular craft specialty to work for Brown & Root, for example, 30 weeks in one year on five different projects on five different job assignments at five different locations, and with corresponding multiple pre-employment drug tests. Employees who fail a drug or alcohol test are terminated immediately. However, they are referred to the company's Employee Assistance Program (EAP) for evaluation, referral, and follow-up. Employees who successfully complete an EAP-supervised rehabilitation program (or participate for 30 days and continue in the program)

become eligible for immediate rehire. The costs of the EAP most often are covered by the Company's health benefit plans, plans which involve a significant number of employee options at inception of coverage.

Employees rehired after successfully completing rehabilitation are placed in a separate random drug-testing pool administered through the EAP. These individuals are tested very intensively when they first begin work, tapering off over an 18-month period. Rehabilitated employees also are subject to testing through the regular company drug-testing procedures mentioned above.

Brown & Root is very pleased with the success of its EAP. Of those who elect to enter the program, nearly 80 percent do so because they have tested "positive" on a drug test. Nearly three percent are supervisor-referred, and the remaining 18 percent self-refer, a number we consider to be proof that our EAP is well-known by, and communicated to, employees and is highly regarded and credible.

Of those who enter the program, roughly 37 percent complete the program and become eligible for rehire. Unfortunately, nearly two-thirds fail to complete rehabilitation or test "positive" a second time during the rehabilitation process. Fortunately, *after* rehabilitation is complete, fewer than ten percent of the individuals subsequently suffer a relapse and are dismissed.

III. How Drug Tests Are Conducted at Brown & Root

As mentioned earlier, Brown & Root conducts as many as 50,000 drug tests a year, and the vast majority of those tests are performed by Company personnel on-site, either at our

corporate office complex in Houston, or in the field at our major work sites which are geographically widespread and diverse. Less than 3,000 of those tests are "positive" for the illicit presence of drugs each year.

When a job applicant or employee is selected for a drug test, he or she is asked to report directly to the designated collection site. Once having arrived at the site, the employee or job applicant has up to two hours to provide a valid specimen.

Chain-of-custody forms are completed in the presence of the employee. Employees are asked to remove their coats and hats, to remove noticeably bulky items from their pockets, and to leave items that they are carrying — such as bags or purses — outside of the area in which they are to provide a test sample. The information provided on the chain-of-custody form is then re-verified, and the employee and the collector sign the chain-of-custody form.

If the sample is to be forwarded to a laboratory, the specimen is then packaged, in the presence of the employee, in an overnight shipping envelope. If an on-site test is to be performed, the specimen is tested immediately while the employee or job applicant waits. This process is performed using a sophisticated and highly accurate medical testing device from the Syva Corporation which is capable of testing more than a dozen specimens at a time, and which generally takes less than 30 minutes to complete.

If the results of the Syva test are "negative," the urine sample is discarded and the employee returns to work or, in the case of a job applicant, reports to work. If the results are "positive," the sample is forwarded to a laboratory certified by the U.S. Department of Health and Human Services for testing in the same manner described above for a confirmation test, and the employee is not permitted to work until the results of the confirmatory test are received.

If the confirmation test is "negative," the employee is reimbursed for the time he or she was suspended from work. Employees with confirmed "positive" tests are terminated and referred to the EAP for follow-up and possible re-employment.

The benefits of the Syva on-site testing system are substantial for a construction company such as ours because we often need to put people to work immediately, and for the vast majority of our employees and job applicants, the test establishes that they are drug-free. These individuals can begin work immediately after screening "negative" on a drug test.

Conversely, and at least as importantly, the on-site screen allows us to identify presumptive drug users, and to hold them off a construction job at least until a confirmation screen is obtained, thus reducing the likelihood of a workplace accident and the attendant liability.

IV. Brown & Root's Position on On-Site Drug Testing

On-site drug testing is increasingly common and useful for purposes of performing the initial drug screening of job applicants and employees — particularly in time-sensitive situations and for safety-sensitive positions. For example, on-site drug testing is very common not only in the construction industry, but in the shipping and petrochemical industries as well. As a practical matter, the use of on-site drug testing for such positions as employees at high-rise construction projects not only makes sense, it could easily be defended as critically important.

Of the 39 states in which Brown & Root currently has construction projects, many are, quite naturally, in the areas of greatest economic growth, business expansion, and level of construction.

Often these projects are on tight deadlines, or stages of the construction project are on interdependent timetables and scheduling.

Understand too that Brown & Root is one of the very few companies *globally* that can take on *any* construction project, no matter how massive, remote, or difficult the terrain and climate. We have built dams, bridges, airports, highways, shipyards, docks, and industrial complexes all over the world.

The nature of our construction projects — whether domestic or international — is characterized by a dynamic work force which constantly changes and includes numerous contractors, subcontractors, and vendors, and for which impairment of a single employee could result in an accident which would have tragic consequences.

Therefore, it is our strong conviction that the right of employers to utilize on-site drug testing *for drug-screen purposes* for job applicants *and* employees should be explicit in the law, uncompromised, and encouraged by our national policies, and to *not* do so would compromise the safety and health of employees and the public, and could create situations with potential significant harm to the environment as well.

Unfortunately, while 41 states do *not* restrict on-site testing, and in those states on-site drug testing rightfully remains a viable option for employers, such as Brown & Root, in their efforts to combat employee substance abuse, nine states *have* restricted on-site testing.

Some of these state actions may have been inadvertent — an indirect restriction on on-site drug testing by requiring the use of certified laboratories for *all* drug tests, including drug screens, for example.

However, as explained earlier, waiting two or three days for laboratory test results for drug *screens* — the overwhelming majority of which test "negative" (95 percent for Brown & Root) — is *not* a viable option for our Company. We often are called in for emergency situations — clean-up or reconstruction after a natural disaster, for example, or after an oil or chemical fire or spill. We cannot wait for 24, 48, or 72 hours to clear workers and — at the same time — we cannot afford to put even *one* drug abuser on the job.

Use of certified laboratories for "positive" drug-test confirmations *is* appropriate and Brown & Root does this universally.

However, for drug screens — especially in our position and in our industry — on-site drug testing is necessary, highly appropriate, and indispensable.

As discussed earlier, we do drug testing "right." Our commitment is reflected in the professional staffing, facilities, state-of-the-art equipment, and resources we commit on an on-going basis to our drug-testing and drug-abuse prevention programs — costing literally millions of dollars *each* year.

Obviously, we are proud of our program, and I would like to extend a standing invitation to you Chairman Zeliff, to you Representative Thurman, and to all the Members of this Subcommittee to visit our Houston headquarters and to experience our level of commitment first-hand on this issue. I promise you that you would be most welcome.

As to the issue of state restrictions, Brown & Root respectfully requests that the Members of this Subcommittee, and the U.S. Congress, recognize the appropriateness and necessity of workplace on-site drug testing by pursuing legislation which would preempt those nine state laws

which are restrictive, and thus would more broadly preserve on-site drug testing as an effective employer tool for the detection and deterrence of drug abuse.

V. **Advantages of On-Site Drug Testing Overall**

On-site drug testing is increasingly common and important to the employer community at large. Among its advantages overall are:

- (1) **Necessity** — For some safety- and time-sensitive positions, such as *most* of those at Brown & Root, employers cannot wait two-to-three days for a laboratory drug-test result. They simply cannot afford to put *any* employee on the job — even for a day — with a major industrial accident a genuine possibility if that employee is impaired. Working America's drug problem is enormous: 74 percent of those Americans who engage in illicit drug use are employed, and this represents 11 percent of the total work force, according to the U.S. Department of Health and Human Services. This workplace drug-abuse prevalence precludes those employers, who are in safety-sensitive industries and who need employees immediately, from "gambling" that these employees are drug-free until they can know for sure from a laboratory. The necessity of on-site drug testing can be critical, not just to the construction industry, but to the petroleum, shipping, mining, chemical, and utility industries as well. For employees at remote work locations or with little or no direct supervision, on-site drug testing also can be useful and necessary;

- (2) **Cost-Effectiveness** — On-site drug testing can be extremely cost-effective: saving employers time and money, and saving their employees and job applicants time. As mentioned earlier, the majority — sometimes the overwhelming majority — of individuals tested will test "negative" and no laboratory screen or confirmation costs will be incurred. It thus can take less managerial and administrative time; less employee time; less collection, shipping, and storage time and costs; and less overall intrusiveness into workplace operations to do on-site drug testing — particularly for job-applicant screens which overall are more numerous than employee tests — than to submit *all* urine specimens to laboratories for testing. Time *is* money. Many employers, beyond producing a *safer* short-term work force (until drug-test results are available), benefit significantly *financially* from on-site testing;
- (3) **Safety** — As addressed earlier, putting employees on the job — even for a short period of time — while you await laboratory drug-test results, can result in tragedy. Again, some industries beyond construction — shipping, petrochemical, public *and private* law enforcement and security, and public utilities — cannot afford *any* breach of safety due to having drug or alcohol abusers on the job. One glance at any major harbor with its significant shipping, port facilities, and petroleum storage facilities illustrates the need for *no* margin of error on employee fitness-for-duty;

- (4) **Business Development** — With more and more employers embracing on-site drug testing, and with more and more employers committed to drug testing overall (98 percent of the Fortune 200 according to the Business Roundtable), domestic business expansion and development could well be hindered by inflexibility and undue restrictions on drug testing. Currently, nine states restrict on-site drug testing, and this number *could* grow. Clearly, this is a factor in some employers' decision-making on work site location and expansion. In fact, 41 percent of the Institute for a Drug-Free Workplace's members said in a recent survey that a state's drug-testing laws were a significant factor in its business location decisions. While Brown & Root, frankly, generally goes to wherever the construction projects are, it has minimal or no operations in those states with restrictions on on-site drug testing (only 21 of our nearly 30,000 U.S. employees are in these nine states), and it has tempered interest in going there. Other companies committed to on-site drug-testing programs could easily decide to relocate their operations out-of-country. The bottom line is that many employers who are committed to drug-free workplaces and to on-site drug testing have options in a global economy and may exercise those options if the legal and political climate on such issues is or becomes unfavorable; and
- (5) **Employee Benefits** — Most employees are not drug abusers. Most do not want to work side-by-side with drug abusers. A majority of employees are parents, concerned about their children's exposure to drugs — now or in the future.

Given employees' attitudes, particularly as demonstrated by the 19 Gallup surveys conducted for the Institute for a Drug-Free Workplace, any reasonable measure to ensure completely drug-free workplaces — even in the day or two or three immediately after job applicants' hire or while awaiting employees' laboratory drug-test results — are appropriate and would and should be considered beneficial to employees.

An additional point about on-site drug testing is in order. Confidentiality regarding drug-test results, as appropriate, can and routinely is maintained. Likewise, sample security can and routinely is maintained. There are standard, reasonable, and effective protocols for on-site drug testing.

The science of drug testing — laboratory *and* on-site — has advanced significantly in recent years, and given the other legal protections in place both federally and at the state level, confidentiality and security concerns need only be *de minimis*.

In summary, the U.S. Congress should act to set a universal *federal* standard on drug testing which would expand to all 50 states and enhance employers' ability to implement on-site drug testing of job applicants and employees, an increasingly common and effective means of workplace drug-abuse deterrence and detection.

VI. The Working Public's Expectations for Drug-Free Construction Workers

Employees' attitudes about workplace drug testing and corporate drug-abuse prevention programs are highly relevant, particularly as they relate to construction workers.

The Gallup Organization, as I mentioned earlier, has conducted 19 surveys of employees' attitudes on drug testing and related issues over the last six years for the Institute for a Drug-Free Workplace.

One of the questions posed to employees in those surveys was: "For each of the following categories of individuals, please tell me if you think it would be a good idea or a bad idea if they were required to take periodic drug-screening tests?".

One of the "categories of individuals" was "construction workers," and in *every* survey, the overwhelming majority of the working public's responses were in support of drug testing of construction workers.

In the national Gallup survey, for example, employees said by a margin of 81 percent to 16 percent that periodic testing of construction workers was "a good idea."

In the Gallup survey of Texas workers — Texas has the largest single concentration of Brown & Root employees of any state — the survey results were even stronger: 87 percent of employed Texans thought periodic drug testing of construction workers was a "good idea"; only 11 percent called it a "bad idea."

The bottom line is that there is an *expectation* on the part of working Americans for construction employees — such as Brown & Root's — *not* to be impaired by illicit drug use.

Brown & Root recognizes this public expectation, agrees with it, and strives diligently to meet it.

VII. Conclusion

Our nation faces an enormous drug problem. Brown & Root recognizes that, and the risks which substance-abusing employees pose to our Company, our employees, our contractors, subcontractors, and vendors, our clients, and the public at large. We feel we have every incentive to create and maintain drug-free work sites and a *completely* drug-free work force, and we are determinedly striving for just that goal. Whether it is obtainable, and whether we can ultimately achieve it, I do not know... but I do know that we will try and that we will never stop trying.

One highly useful tool in Brown and Root's efforts is on-site drug testing. No one does it more; no one does it better.

Unfortunately, nine states are effectively at odds with the laws in the overwhelming majority of states nationwide on this issue, and are prohibitive of an industry practice which is increasingly common, useful, and appropriate for screening purposes, and essential for many safety-sensitive positions and/or time-sensitive workplace situations such as ours. That is why federal legislation which would specifically permit on-site drug testing, and which would just as specifically preempt those nine states with restrictive laws, is necessary and highly appropriate.

On behalf of Brown & Root, I sincerely thank Chairman Zeliff, Ranking Minority Member Thurman, and the Members of the Subcommittee on National Security, International Affairs and Criminal Justice for this opportunity to testify in support of responsible workplace drug-testing and drug-abuse prevention programs, on-site drug testing, and legislation that would promote, encourage, and reward such appropriate employer practices.

I would be pleased to answer any questions regarding Brown & Root's program and policies, or on on-site drug testing in particular and workplace drug-testing in general, which you may have at this time or during your future deliberations in regard to these subjects.

Mr. ZELIFF. Thank you, Mr. Stevens.

Mr. Connors.

Mr. CONNORS. Good morning, sir. My name is Kevin Connors. I am employed by WMX Technologies out of Oak Brook, IL, as the company's director of safety and DOT compliance. I have been serving them in that capacity since 1983.

One of my duties for Waste Management is to administer our company's drug and alcohol awareness and testing program. WMX Technologies, I slipped the name already, but we are probably better known as Waste Management, Wheelabrator Technologies, Inc., and Rust International, which are our operating companies in WMX.

We employ about 75,000 people worldwide in WMX. Here in the United States we are operating about 18,000 commercial motor vehicles, most of them are basically garbage trucks, and employing, of course, an appropriate number of people to operate that equipment.

We, like Mr. Stevens said, recognized a decade ago the importance of preventing substance abuse and use in the workplace. For all of the reasons that you stated in your opening comments, Mr. Zeliff, which I will not repeat, but the financial costs of having an employee on drugs and the safety hazard that that provides to the people around him, is just intolerable for our company.

We also believe that our customers, shareholders, and the employees deserve to work and have our vehicles operated by people that are professional and not subject to the substance abuse that is going on.

So about a decade ago, 1986, we began drug testing programs and drug awareness programs in our company. It was about 7 years prior to the time that the Department of Transportation mandated it for the types of equipment that we are operating.

Our program initially included and still includes 4 important functions. First of all, it is an awareness program, coaching our employees in the dangers of drug abuse, how to avoid them, and, second, a program where our employees could come forward and we will provide treatment for them, paid for by our company, and hopefully stick with them on the whole program so they can go through a successful rehabilitation.

The third part of our program is anybody that comes to work for our company does go through a pre-employment drug test. We feel that that is probably our first line of defense to keep drug users from our workforce.

Then, fourth, we have a random testing program where all of our truck drivers and most of our safety sensitive employees are subject to periodically having their name drawn out of a hat, so-to-speak, and submit to a drug test.

Over the past 10 years, we have found that the pre-employment testing is a very effective tool in keeping illegal substance users out of our workplace. In the past 3 years we conducted over 33,000 pre-employment drug tests, and a little over 1,200 of those, or 3.6 percent, were positive. Those individuals were not hired by our company.

So in the past 3 years, I guess there has been about 3,000 illegal drug users we have prevented from coming to work for WMX Technologies.

The random program, in the last 3 years we have conducted 21,000 tests of our employees, and about 2.8 percent of those tests fail, indicating the person is a substance abuser. We have had about 589 people that we detected were drug users that did get into the workforce.

We also have post-accident testing and what we call reasonable cause testing. If a supervisor has some firm reason to believe a person is using a substance, then they would be required to take a test.

Through this 10 years, we have always been continually looking for better ways to do this. We have made a lot of success early on with strengthening our program.

I was interested in what Mr. Stevens said about the onsite testing. These drug users find a way to beat your system, and it is a game where we seem to have to chase them continuously to find out how they are trying to beat the system and then we patch up that leak.

In 1991, we began a pilot program to evaluate the technology of testing a person's hair for drug use as opposed to testing urine. We found over 1991 through today that by testing a person's hair, we are getting better results. In some years we had 5 times the number of positive tests. In other years it has been 2 or 3 times. I think in 1996 we are getting 9.9, or basically 10 percent positive results by testing hair, while we are only getting 4 percent positive results through the urine test.

The problem that concerns us is that the urine test is the only test that is prescribed by the Department of Transportation and the Department of Health and Human Services. They do not accept this hair testing technology.

We stopped our pilot program in 1992 and hired some independent medical people to do our own evaluation, because we didn't want to subject our employees to some technology that was not valid. Based upon what their results of that study was, we went right back to it, and we are very, very pleased with the results we are seeing. It is a better tool to keep drugs out of our workforce.

In 1995, we did 2,354 parallel tests where we tested the individual's urine and hair, and the urine test yielded 98 positive tests, but the hair test yielded 232. So there is over 100 additional positive tests that we were able to keep those people out of our company.

We have been in contact with the Department of Transportation and the Department of Health and Human Services, trying to get them to adopt hair testing technology. Basically, we are hitting a very unresponsive wall as far as any regulatory changes that would allow it.

If we had gone through our entire 10 years and done hair testing instead of urine, we would have removed well over 5,000 additional drug users from the workforce. But that would have cost us over \$50 million in additional costs, because we have to do the urine and then the hair is an additional expense for us. It is worth it, but it is almost a wasted expense, if you will.

We would like to see this committee and the Congress initiate legislation that would require the Department of Health and Human Services to take up the hair testing question and say is this good technology or not. Of course, we believe it is. And then to continue on to the Department of Transportation and say allow this as an alternative for those companies that choose to use this technology.

One other part of the hair testing that to me is very important, because I spend a lot of mornings at 5 a.m., talking to our truck drivers. These men and women do feel submitting a urine sample is an embarrassing thing, or at least an invasion on their privacy. They are much more willing, or at least cooperative, with the hair testing technology. It is just a little less painful for them as the donor to go along with that. So we would encourage you to look at this area. I remain available to work with you and the agencies and to answer any questions you might have, sir.

[The prepared statement of Mr. Connors follows:]

Testimony Presented Before;

The Congress of the United States,
House of Representatives,
Committee on Government Reform and Oversight,
Subcommittee on National Security, International Affairs, and Criminal Justice

Presented by;

Kevin W. Connors,
Director, Safety and DOT Compliance
WMX Technologies, Inc.
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June 27, 1996

Ladies and Gentlemen, Members of Congress, my name is Kevin Connors. I am employed by WMX Technologies, Inc. in Oak Brook, IL as the Director of Safety and Department of Transportation Compliance. I have served WMX in the Safety and Compliance area since 1983. One of my duties at WMX is to manage and direct our alcohol and drug awareness and testing program.

WMX Technologies is the largest Environmental Services Company in the United States, providing a broad range of environmental services to our customers, our host communities and the general public. Our services are delivered by our family of operating companies; Waste Management, Inc., Wheelabrator Technologies, Inc., Rust International, Inc., and Waste Management International, Inc. We employ over 75,000 people world wide.

In the United States, we currently operate over 18,000 Commercial Motor Vehicles and employ a comparable number of drivers to operate this equipment. The safety of our employees and the citizens of the communities we serve is of utmost importance to WMX.

We have long recognized that people influenced by alcohol or drugs are not acceptable as drivers of our vehicles or to work in any safety sensitive position for our company. WMX Technologies instituted measures to eliminate drugs from our workplace in 1986, 7 years before the U.S. Department of Transportation mandated testing for intrastate drivers. Our program includes urine analysis for drug usage which is required by the regulations of the Department of Transportation. Further, we extended the testing program to all of our employees that work in safety sensitive functions. These added tests are not required by law, but we chose to conduct them because we believe that controlling drug use in the workplace is our responsibility as a good corporate citizen.

WMX began these programs because our people deserve to work in a company free from drug use, our customers deserve to receive professional service from employees that are not under the influence of alcohol or drugs, and our shareholders expect WMX to be a leader in the area of safety and compliance. Published studies indicate that employees that use or abuse these substances are costly to the employer. These added costs are apparent in increased absenteeism, high turnover, excessive medical costs, preventable accidents and injuries, and poor job performance.

Our WMX program includes four important functions.

First, we have a strong Alcohol and Drug abuse awareness program to educate our employees and their families of the dangers of substance abuse.

Second, any employee may come forward voluntarily and confidentially to receive treatment for Alcohol or Drug dependency.

Third, all employees receive a pre-employment drug screen. This keeps drug dependent individuals out of our work force.

Fourth, we have instituted random and post-accident alcohol and drug testing programs designed to remove any employee that tests positive for alcohol or drugs from a safety sensitive function.

Our experience over these past 10 years has shown results. We have learned that;

Pre-Employment drug testing can be an effective tool in keeping those that chose to use illegal substances out of our workplace. Since 1993, we conducted over 33,000 pre-employment drug tests. Over 1,200 (3.64%) of these tests results were positive. The percentage of positive tests has increased each year. Since beginning pre-employment testing, we have kept over 3,000 illegal substance users from entering our work force.

Random Alcohol and Drug testing deters an employee from using these substances. We conducted over 21,000 random drug tests of our employees since 1993. Our results yielded 589 (2.8 %) confirmed positive tests. This program, removed nearly 1,200 employees from safety sensitive work duties due to their substance use since WMX began the program.

Post-accident and reasonable cause testing have also been an integral part of our program.

WMX continually seeks advanced technology to allow us to accomplish our activities faster, better, and in a more cost effective manner. Our substance abuse program is no exception to this rule.

In 1991, we began piloting a program to evaluate hair testing technology as an alternative to urine testing. Hair testing is an alternative to the urine testing that is currently the only testing technology allowed by the Department of Transportation and the Department of Health and Human Services. This pilot program was conducted with our testing provider, Psychemedics Corporation of Boston, MA. We conducted parallel sampling of both the urine and the hair of applicants. The purpose of the pilot was to evaluate the effectiveness of hair testing in detecting the presence of illegal substances and to compare the cost of hair testing to urine testing.

Our results were overwhelmingly conclusive. Testing of hair identified substantially more drug users than the urine tests. The following chart summarizes these results.

Year	Hair % Positive	Urine % Positive
1991	11.9%	3.14%
1992	No Tests Conducted *	2.77%
1993	16.7%	2.82%
1994	14.0%	3.53%
1995	9.9%	4.19%
1996	10.2%	5.02%

* Tests were not conducted while independent analytical evaluation of hair testing technology was being conducted.

In 1995 this pilot program collected 2354 samples of hair and urine from applicants for employment. The urine tests for these individuals yielded 98 positive tests (4.19 %), while the hair tests yielded 232 positive tests (9.9 %). In 1996, we have seen similar results, with the positive rate for hair testing increasing to 10.2 %. Clearly, we are able to detect drug use in employment applicants at over twice the rate through the use of hair testing instead of urine testing. We further discovered that donors prefer the non-invasive and less embarrassing nature of hair testing over the collection of a urine sample. The cost of hair sample collection and testing is equivalent to or slightly lower than urine testing. Hair testing for drug use has been proven to be more effective than urine at detecting drug users. It has also been proven to be cost effective and more acceptable to the donor. Independent research conducted for WMX has concurred with published research and court decisions on the quality and reliability of hair testing.

Currently, the U.S. Department of Transportation and the Department of Health and Human Services, Substance Abuse and Mental Health Services Administration, do not recognize hair testing as an acceptable test to be in compliance with their regulatory requirements. Repeated efforts to open dialogue with these agencies regarding this issue have failed to produce results. A company that wishes to enjoy the safety and economic benefits of identifying additional substance abusers in the workplace through hair must be willing to pay for a hair testing program in addition to the required urine testing which

produces less than the desired results. This additional cost would have been over \$55 million if WMX had conducted both hair and urine tests for each drug screen since 1991. We believe, however that an additional 5,000 drug users would have been eliminated from our work place.

WMX will continue to conduct hair testing as part of our substance abuse program. In 1996, we are expanding this technology throughout those areas of our business where employees are not governed by the Department of Transportation or the Department of Health and Human Services thus not being subject to the regulations which limit the testing technology to urine. We believe Congress should pass legislation that will require the Department of Health and Human Services to quickly research hair testing technology and incorporate it into their regulations as an acceptable alternative for the detection of substance use. Legislation should also require the Department of Transportation to adopt hair testing as an available alternative technology within their drug testing regulations for those employees required to be tested.

On behalf of WMX Technologies, Inc. I thank you for the opportunity to present our findings on this topic. I also thank you for your attention to our comments. We remain available to assist your efforts in bringing this technology into the current regulations of the Department of Health and Human Services, the Department of Transportation, and any other federal drug testing programs.

Mr. ZELIFF. Mr. Connors, thank you. Let me ask you, if you would, describe what a hair test involves?

Mr. CONNORS. Well, a trained person snips, and for me it is quite a commitment, but about 60 hairs from the top of your head, about an inch and a half long.

Mr. ZELIFF. Did you say six?

Mr. CONNORS. Sixty. It is not a noticeable patch of hair. It is a very small amount. Those go through, and I am not a technical person so I will not try to be, but those go through a testing program in the laboratory, including gas chromatography/mass spectrometer analysis as a confirmation test, and the rulings are reviewed by a medical doctor, a medical review officer.

Mr. ZELIFF. What is the probability that there is any chance of mistake or error?

Mr. CONNORS. The research that we contracted with said there is no chance of error on a false positive. You may get a false negative. That is protective to our employees. The chance of error on the hair test is less than the urine. The technical people should give you the facts on that, sir.

Mr. ZELIFF. Mr. de Bernardo, tell us a little bit about some of the safety sensitive companies, such as airlines. I know that there is a lot of hue and cry about protecting individual rights. But as I get on a plane and fly as much as we do, I think it is important that those people that fly, and particularly fly or use a train or use public transportation, have a good feeling of credibility that people are not on drugs. Maybe you could just describe, if you would, what we know, and just give me a general idea. Are we in a very safe situation, 100 percent, or do we have problems?

Mr. DE BERNARDO. Unfortunately, the tragedy of substance abuse really knows no boundaries. It doesn't matter how educated or affluent or how senior a position or safety sensitive a position a person has. From the top management to the most junior employee, you can have a substance abuse problem.

Of course, employers and the employer community have to recognize this. This is true, of course, in the transportation industry where, as you point out, there is virtually no margin of error. Every one of us that takes a plane, if there is one airline pilot who has a substance abuse problem, that is one too many if they have to pilot or co-pilot, or a key mechanic or a person working in an airline or in another transportation-related, safety-related job is impaired.

There currently are 400 airline pilots who have undergone treatment in the United States. One of the things that we have addressed in our proposed legislation is this notion of whether or not there are some jobs that are so safety sensitive, hyper safety sensitive, or highly safety sensitive, that it should be permissible to remove on a permanent basis people with a history of substance abuse or people who have tested positive for alcohol or drug abuse from those jobs.

We think the answer is yes. When you balance the rights of the public, of the co-workers, and of, frankly, the individuals themselves, the potential harm they can cause. The National Highway Traffic Safety Association tells us a majority of the fatal, over-the-road vehicle accidents in the United States are substance abuse re-

lated. We know that every one of those drivers killed in the accidents, that caused the accident that was fatal, thought that they could handle a 3,000 pound car driving 55 miles per hour. They thought they were not impaired.

That is the same mentality we face in the workplace with people operating machinery or forklifts, working in the petrochemical or construction industries. There are some jobs that we recognize—for example, the Nuclear Regulatory Commission says that is right, anybody with a history of substance abuse is not going to be allowed, ever, to work in certain jobs at nuclear power facilities.

We feel that that philosophy is appropriate for certain positions in certainly petrochemical and construction, which are two examples of industries where there are some jobs that are so highly safety sensitive that employers should not be compelled to put known substance abusers back to work in those jobs.

Mr. ZELIFF. At what point—maybe I will give this to Mr. Stevens. You feel pretty proud of your record. At what point does it become ineffective? How many times do you deal with an employee? You send them to treatment, you pay for their treatment. Is there a point where you give up on an employee and he then becomes fired, and then where does he go from there?

Mr. STEVENS. In our employee assistance program, people are required to give continuous testing after they have been put into the program. It is up to that individual to do what is necessary to clean himself up. If in fact he does not do that, then he no longer works for us.

Mr. ZELIFF. So you have a one chance for treatment. Then you maintain that zero tolerance from that point on. At some point the employee has to be responsible for their own lives.

Mr. STEVENS. That is right.

Mr. ZELIFF. Mr. Cummings, would you comment?

Mr. CUMMINGS. Yes, I would be glad to, Mr. Chairman. At Chevron we do not have as firm a one rehabilitation approach. We rely very heavily, as I mentioned, on self-referral. In some situations, it is possible that a second rehabilitation can occur and employment can continue.

We recognize at the same time that that does not necessarily constitute the right answer for all employers. But in Chevron's case, apart from the highly safety sensitive category that Mr. de Bernardo referred to a minute ago, we do have the opportunity for more than one rehabilitation in some situations.

Mr. ZELIFF. Yes, sir?

Mr. STEVENS. May I add to that, that most of our referrals come from the testing process, where the people have been found positive on a screen that we have taken, either after an accident or near miss, and we then send them to the employee assistance program and put them into a program. That is when it becomes necessary for that group to take care of their own needs. We do provide the doctors and help and medical assistance in order for them to do that.

Mr. DE BERNARDO. If I can add too, Mr. Chairman, the Institute is a very strong component of an employee assistance program, rehabilitation and treatment. The best shot that any individual, drug abusing individual will have to go straight is in the corporate pro-

gram. At the same time, we are very strong proponents of EAP, and most members have this treatment and we encourage them to do so. You have to have a policy that has teeth in it, and it can't be the annual retreat to the Betty Ford Clinic. You have to draw a line in the sand and say hey, look, your job is on the line. If you choose to engage in illicit drug use, you are not going to work for our corporation anymore. It is that type of incentive we feel the employers have the most effective weapon in the war on drugs. That is the paycheck. Because if you and I believe that our jobs are contingent on our being drug-free, it creates a very powerful incentive to get or stay off drugs.

Mr. ZELIFF. I would ask you one quick question. How do feel if everybody that got a Federal paycheck had to be drug tested?

Mr. DE BERNARDO. I think it is a great idea.

Mr. ZELIFF. Thank you.

Mrs. Thurman.

Mrs. THURMAN. Mr. Chairman, Mr. Wise is going to have to leave in a minute. I would like to go ahead and have him recognized, and then—

Mr. WISE. I will ask one question and yield the balance of my time to Mrs. Thurman. To Mr. Connors, I guess, this hair testing technique, programs. You mentioned it in your statement and I missed it. Has this been applied in the criminal system and what weight has been given to it in a prosecution?

Mr. CONNORS. Over the last 7 or so years, the courts in a number of different cases have allowed hair testing, and in fact have used hair testing to confirm or dispute the results of a urine drug test. So it is very widely used throughout the United States in a number of different industries. It is simply not in the Department of Transportation, Health and Human Services area. It is used in the prison systems and criminal justice system.

Mr. WISE. I yield the balance of my time to the gentlewoman from Florida.

Mrs. THURMAN. Maybe just a followup on that, because I think one of the concerns, and I don't know much about this, so in the next panel we will get an opportunity to maybe hear a little more about the hair part of it. But that is a lasting effect for maybe a year or more. If somebody in fact had been through treatment and/or had already followed through, then there could be some residue left that would be used against somebody?

Mr. CONNORS. That is my understanding, ma'am. The portion of hair they take when doing the test for us will detect about 90 days worth of drug usage. It will also give you a chronology of how long ago you used the drugs and what kind of drugs you used. So it has a lot more value to us, particularly in rehabilitation, because the urine test, some drugs, 3 or 4 days, that is all you are going to detect. It is recent history.

Mrs. THURMAN. Hopefully we will hear more and all learn something here today.

Mr. de Bernardo, I am interested in the legislation. As we talked earlier, there are some things I think all States are doing, and I understand your pre-exemption. One of the concerns I do have is that there are a lot of issues that would be related to the employer and not as much for the employee. Yet I am listening to the testi-

mony here today, and everyone I have heard from seems to have for the most part a very good employer-employee relationship, but also a commitment to being a partnership within a drug-free workplace between the employee and employer.

I am a little concerned, though, that we do not abuse that or that we do not get rid of that incentive for employers to work with their employees.

Is there anything that we could do in this legislation to tighten that area down that you see, or any of the colleagues that are here today?

Mr. DE BERNARDO. I think it is an excellent point. In fact, that is the premise of the legislation that we bring before you today, that it is, as I mentioned earlier, pro-employee. At the same time it is pro-employer. This was again endorsed by the President's Commission on State Laws. A majority of the members of the commission were Democrats. It is the only private sector drug testing bill endorsed by the President's Commission. In fact, the premise of this legislation is pro-employee in that it encourages employers to do it the right way.

What you have is what we know. You are right, the members of this panel are very responsible employers with good programs and successful stories. Those are the types of employers that you are going to have come to Washington and testify before a subcommittee like this.

But what we want to do and what we train employers to do and encourage employers to do at the Institute is to act in the most responsible fashion. What this legislation takes is the consensus of what is the most responsible way to address substance abuse in corporate programs, and it says for you as an employer, if you will follow these guidelines, if you will take these steps, and they are very extensive, comprehensive, and frankly more expensive steps, if you do it the right way, the way the very best companies do, then you qualify for a benefit. That benefit, again, is that you can't be sued for acting in good faith on the drug test results.

It is a voluntary bill. Employers can choose to abide by it or choose to go the other way. They don't get the benefit of the shield from potential legal liability. But I think this carrot approach, telling employers, do it the right way, do it the best way, and you will qualify for a benefit, a benefit incidentally that costs the taxpayer and the government nothing, I think that is really a very positive approach.

Mrs. THURMAN. Mr. Cummings, in your testimony that was presented to us, there was a very interesting number in there that you didn't get a chance to talk about, but actually I was impressed. I wish I could get a return on my dollar, for every dollar spent I would get a \$10 return. That had to do with the idea that when you didn't have to train somebody to come in and take that job, but you actually by putting them through a program, it was a 10 to 1 return. That didn't include any accidents or any other costs that might be associated?

Mr. CUMMINGS. That is correct, Mrs. Thurman. The analysis we went through was based on nonstructured EAP assisted rehabilitation efforts receiving about a 35 percent success rate. Ours, depending on whether you are looking at drugs or alcohol, somewhere

between 66 and 75 percent. And factoring in those numbers, plus things like retraining, training of new employees, if we were to hire a new employee, when we added all that up and tried to put a number on it, we figured every dollar we spend has probably saved us \$10.

Mrs. THURMAN. Let me ask a question to all of you very quickly. In your testimony, each one of you handled rehabilitation a little differently. What I am curious to know is, is this an optional part of their insurance? I think, Mr. Stevens, in your testimony there are some covered, but not all, or they can take it as an optional part of their employee's benefits.

Could you give the panel some idea what the cost is for that treatment in dollars so that we would have that? I know Mr. Cummings, as are all of us, is concerned about how we work this over into the small business. I am interested in these numbers.

Mr. STEVENS. I think the written testimony talked about the benefits that we have, the benefits that individuals that go to work for us can choose, various levels of coverage. If they select medical, and they want to be able to participate in our medical plan, that would in fact be covered. If they are not covered, however, our employee assistance programs work with other agencies within the local community to try to give the individuals the help they need so they can continue to be an employee of our company.

Mrs. THURMAN. But the cost, if the chairman doesn't mind if I can just do this followup, but what would then be the cost as to either the employee or the employer, which might have a direct issue as far as how far an employee could go or not go into treatment?

Mr. STEVENS. I don't have any information on that that I can share with you now.

Mrs. THURMAN. Do any of the others?

Mr. CUMMINGS. I might be able to help with that a little bit. In our case our mental health substance abuse coverage at Chevron is where the first dollar of our company contribution to health care coverage goes. So all of our employees essentially are members of that coverage. The cost of that on a premium basis is about \$30 a month out of a total overall health care support in probably the \$300 to \$400 range, depending on the overall coverage you have.

The cost of a residential 28-day program can vary, depending on what part of the country you are in, but generally we find they range somewhere between \$5,000, and it can go to \$10,000, and sometimes even more, depending on where you are.

We have had one or two cases in our company, not with employees, but with dependents of employees, where the \$25,000 lifetime maximum that we have in our mental health substance abuse coverage, we are starting to bump up against that ceiling. So we are taking a look at whether that is the right number or not.

Mrs. THURMAN. We have had that same problem here in Congress on a bill we have been talking about.

Mr. Chairman, thank you for your indulgence.

Mr. SOUDER [presiding]. The chairman of the subcommittee had to leave for a few minutes, so I am going to Chair in the interim. I want to take my questioning period now.

Mr. de Bernardo, I just wanted to clarify for the record, I think you said there were seven States, and Mr. Stevens referred to nine.

Mr. DE BERNARDO. That is right. There are seven States that have enacted what we consider to be anti-drug testing laws, four States in new England and three States in what I call the Northern Plains, Montana, Minnesota, Iowa, and then as well Maine, Vermont, Rhode Island and Connecticut. In addition, there are two States that have taken regulatory action, not legislative action, that have been restrictive of onsite testing. That would bring the total to nine. Those are Oregon and Maryland.

Mr. SOUDER. One thing that would be helpful also, just as a footnote if you have not—Senator Ashcroft in the careers bill, the replacement for JPDA, has a drug testing provision we have accepted in conference. That may be killed this year because Senator Kennedy said he will filibuster it. If you can talk to him and see how we might mesh some of what you had here, because some of this is going on in the Government program which sets a national model. It happened in Transportation some years ago.

Mr. DE BERNARDO. Thank you for that suggestion.

Mr. SOUDER. Mr. Cummings, in one of the more celebrated cases, not your company, the Exxon Valdez carrier, there appears to have been alcohol abuse on the part of the pilot, shipmaster, or whatever he is called.

In these States where you can't do drug testing, are companies like yours not held liable if the employee commits some sort of terrible liability action while they are abusing a drug? In other words, are you in effect being held accountable for an action you are not allowed to correct?

Mr. CUMMINGS. Fortunately, we have never been a party to the litigation of that issue, but it would be—

Mr. SOUDER. There could be other safety concerns at your facilities, where you have storage facilities or other types of facilities. Are you held liable for the actions if you are not allowed to test?

Mr. CUMMINGS. It is inconceivable to me how we would not be held accountable for the behaviors of members of our workforce that had an impact. If we were not able to test for whatever reason, not able to have that as one of the tools available to us, then I think from an overall effectiveness perspective, our management of the drug and alcohol substance abuse issue, which we really see as a risk management issue, would be significantly impaired.

Mr. SOUDER. Mr. Stevens.

Mr. STEVENS. In our written testimony we made reference to the selection process that people go through or companies go through in determining where they are going to build and create new businesses. That is one of the things that they do look at, to see whether or not they can control that sort of situation with respect to the local laws.

Mr. SOUDER. Because conceivably, to address the question of State pre-emption, we could write into legislation that no State has to follow this law, but then they don't have the right for any actions in that State against the companies, if the companies don't have a right to defend themselves to prevent the action, in which case that would be a potential balance, probably pretty controversial, but nevertheless interesting.

Also, Mr. Cummings, you have—on the question of highly sensitive positions, which certainly the accident in a tanker in Alaska caused millions of dollars in cleanup costs and many environmental concerns around the world, when you bring somebody back after they have gone through rehab, do you put them back in a highly sensitive position, or do they go to another place while you make sure they are rehabbed? You have a high percentage of rehab, but one failure is pretty catastrophic. Mr. Stevens had a pretty high rate of failure coming back from rehab. If it is a highly sensitive position, do you differentiate from other positions? You said they get one more chance. Do you give everybody at least one chance, even in that kind of position?

Mr. CUMMINGS. In the highly safety sensitive position, which we are just in the process of identifying in our company and we expect that shipmasters would fit that category, rehabilitation has been an option that has been available up to this point and will continue to be an option. One of the things we do in the post-residential rehabilitation phase is put that individual back into the normal work routine of being a ship captain through some sort of shore-based assignment for an extended period, sometimes 3 to 4 months, so that the additional support systems that are available following the residential treatment would be a little more available to him or her than it would be if he or she were back at sea.

Mr. SOUDER. I had one other kind of informational question from you. In your report you said that Chevron has 20,000 job applicant drug tests, which more than half are random. You have a percentage given on, I think, the employment. What percentages are random, for cause, post-accident, of those that were positive? If you don't have that in front of you, maybe you could supply it in written form. I would be interested in that breakout.

Mr. CUMMINGS. Actually I do have it, sir. On the pre-employment tests, our percentage is a little better than 3 percent positives. On our random testing program, it was 0.56 percent. It is extremely low there. On our "other" category, which would include things like post-rehabilitation followup testing, EAP followup testing, that number is about 0.9 percent. So it is a 1 percent overall. The high side for Chevron is in the pre-employment testing.

Mr. SOUDER. If I can ask a yes or no for the three business people, do you test management as well as other employees?

Mr. CUMMINGS. Yes.

Mr. STEVENS. Yes.

Mr. CONNORS. Yes.

Mr. SOUDER. Thank you.

Mr. Cummings.

Mr. CUMMINGS OF MARYLAND. Thank you all for being here. This is an issue that I dealt with in the Maryland legislature as head of Workman's Compensation. It is a very, very sensitive and a very difficult issue.

Mr. de Bernardo, why do you think that there is so much fear and concern with regard to abusing this whole thing of drug testing? That seemed to be a real major issue in Maryland. Why do you think that is? It is a balancing act. I agree with you, you have got to look at safety. I think we all agree that safety is very, very important in saving lives and preventing accidents.

But with the public's concern about drugs, and I don't think the public is aware that 70 percent of drug users do work every day, and maybe that is part of the problem, but why do you think there is so much fear with regard to drug testing?

Mr. DE BERNARDO. I think there is legitimate concerns on the part of employees and all parties. It a new technology. In 1983, it was only 3 percent of the Fortune 200 companies who were doing drug testing of one or more classes of job applicants or companies, 6 companies out of the top 200 in the United States. By 1991, it was 98 percent. So it had gone from 6 companies to 196 companies. That is a revolutionary number by industry standards. It was a lot to digest. There were a lot of unknowns. Frankly, it was a lot of misinformation and disinformation.

I think some of the parties involved in this, some of the groups that are pro-legalization or some of the groups that perhaps had other causes, not all of the dialog on drug testing and drug abuse prevention has been that useful. I think there was a lot of concern that employers were testing employees for other purposes.

Frankly, some employers, of course, are less responsible than they should be. Some are irresponsible. Those aren't the types of employers that the Institute represents. It is not the type of employers that are represented today at the subcommittee hearing. Certainly it is not the type of employer that would qualify for the benefits of the legislation that we are advancing.

One of the premises, again, of our legislation is to try to encourage employers and give them a carrot to do it the most responsible way. What has evolved, Mr. Cummings, I think over time, there are two important points. No. 1, the science of drug testing has improved dramatically. What was around in 1983 or 1987, no comparison to what you have today.

What we will hear on the second panel today are further innovations and further developments that are very promising or in some cases are already here and contribute very much to the overall efforts of the employer community, and in employees' interests to have a drug-free workplace.

The Institute has done 19 Gallup surveys. These are Gallup surveys of employee attitudes on drug testing and drug abuse in the workplace. We did a national survey in the United States and Canada, and 17 State surveys. All 19 surveys, what we found was the same results, again and again and again, and that is that employees recognize that it is a very significant problem, recognize that employers should play a role in prevention of that problem, and support drug testing.

Drug testing is not going to be the highlight of anybody's day. Providing a urine sample, it was mentioned a little earlier by Mr. Connors, is somewhat undignified, somewhat invasive. I think that is right. I think it is appropriate. I think there is fear. What was going to happen if I was taking cold medicine, or the poppy seed bagels, all the unknowns, the information out there that creates fear on the part of employees.

But what employers need to do is do it the right way, and explain they are doing it the right way, use the appropriate methodology, and follow the safeguards, and communicate that to employees. I think that alleviates those types of fears.

Mr. CUMMINGS OF MARYLAND. Mr. Cummings, I would guess that your statistics with regard to pre-employment test regulations would probably be a little higher. What we found in Maryland is a lot of times people will come, fill out the application, and once they discover that they have to take a drug test they say I don't want the job. I have heard that from many, many employers.

Before people come to you, do they know that you are going to do a drug test? In other words, before they fill out the application? Is that a part of your statistics?

Mr. CUMMINGS. It is well-known in the various communities where we do business that a drug test is a pre-employment condition of employment. Frankly, the number that I cited is a little bit higher than it has been in past years for us because we have just begun testing in the service station area of our business. If you look just within the manufacturing facilities, our refineries and chemical plants, as an example, the number of pre-employment positives there is significantly lower than the 3 percent. And it is for the very reason you mentioned. It is well-known in the community that Chevron is a company that strives for a drug-free workplace, is proud of a drug-free workforce and pre-employment tests and, once an employee, continues a comprehensive testing program.

Mr. CUMMINGS OF MARYLAND. Someone needs to answer this one. I am still not satisfied with regard to small business. Small business is a major, major employer in this country. I can see how a large company can do this. When you have a small company that may have 6 or 7 employees, every employee is essential. I am just wondering, how does your legislation affect the small company?

Mr. DE BERNARDO. One of the major reasons why a small business would not do drug testing and would not have a comprehensive drug abuse prevention program is fear they are going to be sued, potential legal liability. If they are provided with a shield to that potential legal liability, they are more likely to go forward. That certainly has been the experience in Arizona, where it is my understanding from State regulators there, there are a great number of small businesses that have now adopted programs consistent with what is in the bill.

Second, the bill itself spells out what an appropriate program is. I think that is an advantage to small businesses as well, because they have guidelines for how to proceed.

Third, I think we have seen this with some of our members, and, Mr. Souder, Indiana is a good example where the Chamber of Commerce has a consortium approach. In order to better permit small businesses the cost savings and the lack of administrative hassle, they will go forward with picking an employee assistance program, a medical review officer, a drug testing company or laboratory, and make those available to members of a local chamber or bigger State chamber or trade association so that they can take a consortium approach, which can be very cost effective and time saving as well.

Mr. ZELIFF [presiding]. Mrs. Thurman.

Mrs. THURMAN. I got somebody else's time. That is why you get to have me again here.

One of the things that we have been tracking and we have had some hearings about over the last couple of months is the use of

illegal drugs and some of those drug numbers that are going up, whether it be marijuana or cocaine use or whatever.

Can you tell us in the testing that you have done what you have seen? Because some of this sounds like there is an awful lot of alcohol abuse from what I am hearing a little bit of, but I may not be listening as well as I should.

Can you tell me what the percentage of this is actually illegal drugs, or what is being considered as alcohol abuse?

Mr. CONNORS. Last year we conducted thousands of alcohol breath analysis tests during the workday, and had a very low fraction of a percent positive for alcohol. Alcohol abuse can be a problem in the workplace, if you are abusing it in the evenings, productivity and so forth. But our people are basically not using alcohol during the workday.

Over the years now we have seen an increase in our positive rates every year. In the urine testing it would seem the drug of choice would appear to be marijuana, with cocaine second. In the hair testing, the hair testing is picking up cocaine for a longer period of time, where the urine testing is losing that drug identity after a few days.

So it is a very inconsistent number, and we need more experience to see where the trend might be. But it would appear to me at least that the drug use is on the increase. We need to redouble our efforts to prevent that.

Mr. STEVENS. We do test everybody if they are involved in an accident or a near miss around an accident. The numbers there is 1.4 percent positive year-to-date on the illegal drug use. It is almost nonexistent on alcohol around those accidents.

Mrs. THURMAN. So it is mostly illegal substances.

Mr. CUMMINGS. In our case in 1995, a little better than 50 percent of all the positives we had in Chevron was marijuana. I do not have the specific number on alcohol. I can get that for you. But I can say it is relatively low. We do a lot of breathalyzer tests because of our DOT program.

Mrs. THURMAN. If I remember correctly in your testimony, you have also lowered your standard, or actually raised your standard on marijuana testing. Do you think that has anything to do with your 50 percent higher?

Mr. CUMMINGS. In 1993, we lowered the screen from 100 nanograms to 50. That increased positives by about 45 percent. So that has been a factor. We also think the increase is partly attributable to increased usage.

Mrs. THURMAN. It could be a combination.

Mr. CUMMINGS. For example, in the Adopt-a-Classroom program, some of the dialog there was a surprising increase in the use in the schools.

Mrs. THURMAN. In doing any of your backup on this, and with your programs that the people are involved with, do you think the drug use is a choice of entertainment? Is this related to stress, problems at home? Are we seeing any trends in that? I am just kind of curious to know why people would turn to that. I don't know. Maybe you don't either.

Mr. CUMMINGS. I can talk to some of our EAP folks to see if something has come out of that. I do not have an answer for you here.

Mr. ZELIFF. I just wondered if it was work related, if there were things happening in the workplace, or if it was something from home. That helps us in determining policy too in society, changes as to what might be taking place in people's lives that have a situation dealing with this.

Mr. DE BERNARDO. I think it is all of the above plus more. During the recession in the beginning of the nineties, we saw an increase in drug abuse in an age group of the mid-thirties to early forties, managers with more stress, they had layoffs, you had consolidation. Frankly, that abuse was particularly concentrated in misuse of legal drugs, so illicit use of amphetamines, barbiturates, people taking uppers or downers because of the stress of work or because they had to do more work, and certainly that is a problem. There is a correlation.

Overall, the number of factors on why people engage in illicit drug use are myriad. I will say this, public education is extremely important. Leadership here in Washington is extremely important. What we have seen in recent years is less of a focus on this issue, and there is no question that that has made the job of employers and those employees that are committed to this much tougher, because the perception of the dangers of drug abuse has lessened. And all of these Government surveys, we have seen the change in the nineties which is disturbing and alarming. After steady decrease in drug use and attitudes on drug use from the late seventies to the early nineties, it is starting to reverse.

Mrs. THURMAN. One very last question and you can add to this, but in putting together your drug policy for your company, I have noticed in some of the testimony that in fact—I don't know why I keep picking on you, Mr. Cummings, but actually I guess there are some improvements you are getting ready to do or you have been working on, and it actually talks about kind of endorsed by senior management.

From all of your perspectives, how much do you think your employees have participated in putting this together as to the policies within your company from a standpoint of knowing they are going to come to work with you, but also so that you have a successful rate when you are actually providing opportunities for employees in drug use, in going through programs?

Mr. CUMMINGS. In our company, the initial development of the education process had significant rank and file employee involvement. One of the reasons we think we have such a high acceptance of self-referrals in our process right now is the education process, which included a number of video presentations and some live presentations by employees who had abused various illegal substances, had gone through rehabilitation, and offered themselves up, some anonymously, some otherwise, as role models to talk about throughout our company.

So there was significant employee involvement. The things that we are moving to now has had some, although somewhat less employee involvement than the initial phase.

Mr. STEVENS. I just wanted to add, I believe there is clear evidence to show that a good drug policy within an employee-employer relationship is very positive, because we did do that pilot study back in 1985, and those were people that we had actually hired and sent to work. It was a 29.9 percent positive rate. Since that time, the people in the community do know that we will do drug testing, and our numbers are around 4 percent or below on all types of testing that we do. That is a number that we have not been able to get below, so I feel like even if people know you have a testing process, there is still about a 4 percent population problem out there that we have that we have to continue to work on.

Mr. CONNORS. Our employees are continually, or at least on an annual basis, have had an opportunity to sit down and provide comments about how the program is running and how they feel it could be improved, changed, or whatever. They often share with us what our reputation as a company is for being fairly tough in our drug program, and most of them appreciate that, the nondrug users at least.

Mrs. THURMAN. Thank you, Mr. Chairman.

Mr. ZELIFF. Thank you, Mrs. Thurman. Now to the vice chair of the subcommittee, a guy that has done a great job on this issue, Mr. Ehrlich of Maryland.

Mr. EHRLICH. Thank you, Mr. Chairman. You are the one that is doing the job. I congratulate you, as usual, for keeping this in the forefront.

As all of you know, there are a lot of us here in Congress that take this issue seriously, not just in the traditional sense that a lot of folks in Congress are running for Congress and talking about drugs. We have had some very good debates with respect to how serious in this country we are of getting ahold of what many of us view is our No. 1 problem in this country today, period, by far.

I will have a couple wide ranging observations, which I would like comments from anybody who feels so compelled.

The issue of guidelines in the workplace that control off-employment behavior, obviously, is of great interest to civil libertarians; i.e., what business is it of my employer if I smoke a little dope when I am home at night. It doesn't affect my business. It is not the Government's business nor my employer's.

Would any of you care to comment on that thought process, which is certainly out there?

Mr. DE BERNARDO. Yes. This is constantly brought up in debates. We have many debates. Some union people are very, very cooperative on the issue of drug testing. Some of them are not. Some civil libertarians are opposed to drug testing. They say, what business is it of yours what I do in the privacy of my own home on a Saturday night?

Mr. EHRLICH. Which is not an unsubstantial argument.

Mr. DE BERNARDO. It is a specious argument of—the point of the matter is, first of all, there is no constitutionally or other legally protected right to engage in illegal behavior in your own home. A majority of the over-the-road vehicle fatalities are caused by impaired drivers, those who think they are in control and can drive a car at high speeds.

The person least qualified to tell us whether they are able to perform is the drug abuser him or herself. Those are the same people operating machinery or performing hazardous jobs within the workplace. You also have the gateway effect; people using drugs at home sometimes are unable to stop using drugs at work. No one sets out to be an addict, no one sets out to be an alcoholic. It is very naive. Addiction is something people think they can control. Even when they are addicts, they are in denial. No, I don't have an addiction. What may start off as drug use at home on a Saturday night oftentimes turns into drug use during break or during lunch or before work or after work.

Mr. EHRLICH. Comment, if you would, on the observation that even recreational use, which stays at that level for an extended period of time, has negative impacts, long-term, obviously, with respect to skills brought to the workplace. Is that a part of it?

Mr. DE BERNARDO. There is a study released by the National Institute on Drug Abuse that said those employees with illicit drug use are 3.6 times more likely to be injured or injure another person in an accident on the job, but 5 times more likely to be injured in an accident outside the job, which is going to affect performance or attendance on the job.

If I report to work with a broken arm or leg, it may impair my performance on the job. Outside of the workplace accidents that are caused by drug impairment or alcohol impairment are significant in terms of the impact, in terms of attendance and performance and medical costs, health care costs.

Bell South found that 40 percent of its health care costs were attributable to substance abuse. We have a lot of talk in Washington and up here on Capitol Hill on containing health care costs, a lot of efforts by the employer community on containing health care costs. Here is a Fortune 50 company, 40 percent of their health care costs attributable to substance abuse.

Mr. EHRLICH. Something the chairman talks about a lot, which all of us know, health care is a good example. One of the major issues in this country today is prison construction, privatization with respect to locking people away. We have a tremendously high percentage of our population now in prison. The chief of police in Baltimore City was here yesterday, and I asked him of your crimes, how many are drug-related in Baltimore City? He said about 75 percent.

Look at the long-term cost to the taxpayer. Your argument is the best rejoinder to the civil libertarian argument.

Mr. CONNORS. In 1995, our rate of positive tests that were conducted following an accident were twice what the rate was just for randomly selected people, indicating that, of course, we can't tell on a drug test whether the drug had currently been used or prior. But we still see double the percentage positive tests post-accident that we do random.

Mr. EHRLICH. That is interesting. Obviously, the timeliness here is an issue, being the devil's advocate for a second. It is tough to quantify.

Mr. CONNORS. We don't know if the drug was used last night or prior to the accident.

Mr. EHRLICH. So your numbers pretty well answer that argument.

Mr. CUMMINGS. Our numbers in a post-accident or post-incident setting are higher. I do have to point out, however, we do not have a lot of incidents, so I can't say there is a tremendous amount of data behind that.

Mr. STEVENS. Ours are not. Ours are somewhat lower. But we have a lot of turnover. All of our people are hired for project jobs. They stay there for the entire period of the project, and if they are rehired for another project, we retest them again if they have been off the payroll for a minimum of 90 days. So we have a lot of pre-employment testing. That is about 4.4 for this year so far. Injury accidents is 1.4, and noninjury accidents, where the people are not hurt but they do have some type of an accident, is 3.8. It is a significant impact on people that are impaired on the accidents we have.

Mr. EHRLICH. It is really job performance, which is the bottom line here.

I see my time is up. Thank you, Mr. Chairman.

Mr. STEVENS. If I may, one other thing, since we have started doing this our costs, our claims, our accidents, the injuries, the deaths, everything, have gone down significantly over the period of time.

Mr. EHRLICH. That is the nexus argument which I think needs to be made in a very learned way in order to rebut some of the legitimate constitutional concerns some people might have. Thank you very much.

Mr. ZELIFF. Mr. de Bernardo, you mentioned small business. I am a small businessman. Somehow a lot of small business people get through the cracks on this. You apparently have some knowledge on where it has worked well, working with an association like Chambers of Commerce. You might just comment, are we just starting that process, or do we have some pretty good success stories to tell?

Mr. DE BERNARDO. Very good success stories, but spotty. Frankly, let me give the example of Chambers of Commerce. A lot of chambers are very good and a lot are not so good. It is very much a function of the people who are involved, the same as companies. Where you have good leadership and you have a lot of commitment and you have a driving force of some key members on this issue, typically what will happen is bigger companies will be involved in terms of sharing their expertise and providing help, helping out in seminars, helping with education, and being a driving force behind it.

So there is probably, I don't know, 40 to 45 of these consortium approaches, which I think are very effective, and it probably covers maybe 20 percent of the landscape.

Mr. ZELIFF. Do you work with groups like NIFB, survival business folks, the national chambers? Are you working actively with them?

Mr. DE BERNARDO. Not so much with NIFB, although certainly we would welcome that opportunity. We work with a number of State chambers, a number of local chambers, and again a lot of community coalitions as well. The Institute has published, in fact,

what we call the Employer Guide Series, a series of 4 booklets the size of a business envelope, 16 pages, on different elements. It is really a how-to and bare bones and simple and meant for the layman. Those have been distributed by a lot of organizations.

Mr. ZELIFF. We talk about education and we are getting to a wrap-up stage here kind of, but when we talk about education, we need to somehow get it down to the local community level. We need to do drug testing and education for our individual employees, small business employees. And then in the end we have to recognize that the real issue is families. How do we get communities and businesses and everybody to connect into a small community area and take responsibility for the community, not just their own house, not just their own business, but go beyond that and reach out?

Three or four weeks ago, I taught a classroom in Manchester, NH, in a program called GREAT, which is an extension of the DARE Program. It involves, in terms of dispute resolution, violence in schools and this kind of thing, with very young people. So many of the kids just came back out and said, "Look, we don't talk to our families, our families don't talk to us." The only people we reach out to are peer groups, and we reach out to gangs, and we get into a situation with statistics that you are aware of. Less than 11 percent of the families out there talk to their kids about drugs.

So we have a real major challenge. I know the military, for example, particularly in the Marines and others, have a zero tolerance policy. It sure has worked and has cleaned up the military since the eighties.

It seems like you all have very positive policies. We in Congress need to do the technology, whether it be to move from drug testing to the hair testing. We will commit to you we will look into that.

You talked about leadership in Washington. I am very concerned about the lack of leadership in Washington. I think we need to do that. We are going to establish a drug testing program for Members of Congress. Of course, it is going to be voluntary. I would love to see a situation where every person who gets a government paycheck gets drug tested on a random basis. I think that makes sense. We need to do education there. We are fighting appropriation bills on both sides of the aisle, in cooperation here to fund the Nation's drug war. We have problems on both sides of the aisle of those that are committed to it, those that are not.

Each of you in a minute as we close here—I also mention one other thing, I visited with Dr. Brown, the former drug czar, at a woman's prison in Framingham, MA, where we talked to people whose lives have been destroyed. We can go on and on and on.

What single one or two things, I will give each of you a chance, what do you think that we can do to win the war on drugs? If John F. Kennedy, in 1960, can say that we are going to put a man on the Moon and we can do that, we certainly can win the war on drugs. What one or two things would you recommend? Maybe just start working right down the line, that we need to do, address.

Mr. DE BERNARDO. Two things. One is, you touched on it, I touched on it, more leadership in Washington. It is very disturbing that the surveys from the Department of Health and Human Services show that young people now, their perception of the dangers

of drug abuse, of the addictiveness of cocaine or marijuana, as to whether or not drugs are harmful, is decreasing and decreasing substantially.

Tim Cummings is right, this is our future workforce. These are people coming to our workplaces. This is our future leadership. What has happened is we have what is a large knowledge vacuum in the nineties, where this issue is not hot in the media nor politically, and we don't have the political leadership, with some very few excellent exceptions, such as yourself, Mr. Zelif, but we don't have the type of leadership we had in the past. It makes employers' jobs in terms of selling their programs and the dangers of drug abuse and the need to do drug testing much, much tougher. Because it is not just perception of young people, it is perception of employees and managers. Gee, the drug issue, you know, it is going by the wayside. We need much more of a presence on the issue.

The second thing I think is, frankly several of the drug czars have mentioned this to me, they feel that the greatest success stories are in the military, which you mentioned, and in the employer community in terms of drug abuse prevention. I mentioned in my remarks that I know that employers can win their war on drugs because I have seen it literally hundreds of times, effective corporate programs.

I think the second thing that we can do or you can do here on Capitol Hill is to embrace the types of concepts and the legislation that we have forwarded, because again that is the carrot approach, and that will get more employers involved, more employers active, and most importantly, more employers doing it the right way.

Mr. ZELIFF. Mr. Cummings.

Mr. CUMMINGS. I would support the two things Mr. de Bernardo mentioned. I think the only other thing I would add, Mr. Chairman, is, and maybe it comes under the umbrella of leadership from Washington, when the individual Members are back in their home districts, anything they can do there to continue to help educate and applaud the successes that exist.

I hate to keep going back to the Adopt-a-Classroom program in Chevron last year, but the reaction in the communities from the teachers and students, very young people in particular, most of whom were seeing some of the cartoon Partnership for Drug-Free America ads for the first time, and they didn't get them from the partnership, they got them because Chevron underwrote the cost of reproducing those ads in video form, there was such hunger in the schools for that kind of information and such a positive response from the young people there, that I think when those things get singled out and applauded, it tends to reinforce the large employer community's commitment to turn its employees loose in their communities to perform those kinds of services.

So I think a few success stories highlighted when you are back in your home districts would also help that.

Mr. ZELIFF. PSAs, role models, schools.

Mr. CUMMINGS. Yes.

Mr. ZELIFF. Thank you. Mr. Stevens.

Mr. STEVENS. I think we have to concentrate on the demand side. I don't think we will ever win the war on drugs if we just look at the supply side with law enforcement and whatever else you can

throw at that. All that has been said here this morning shows if you put certain restrictions on employment, whether people can work or not, you can have great successes.

In the construction industry, we have had some great successes because the owners that we work for, the people that ask us to bid on their projects, have included in their contracts, in their requests for proposals, information about our safety program, our drug program, what are we doing about it, and that is part of the evaluation that they make when they decide who is going to win that job. We have made great strides in the construction industry, and the numbers continue to go down and safety continues to improve. The drug and substance abuse programs are a big part of that. So we have got to work on the demand side.

Mr. ZELIFF. Great. I certainly agree. Mr. Connors.

Mr. CONNORS. I would like to answer your question, sir, the way the men and women that drive our garbage trucks tell me, which is that they don't mind taking a drug test, but they don't think it is right that a person needs to take a drug test to work, when people not working and perhaps living off of various programs are not required to do the same. That is a very strong feeling universally throughout the country with our people.

Mr. ZELIFF. I think you just hit a nice nerve. I want to make sure I understand what you said. Everybody that gets an entitlement from the Federal Government or program would have to be drug tested?

Mr. CONNORS. If we are doing drug testing at one of my divisions this morning, that is what they would be saying as they were waiting in the room: I have to give a sample to work; what about the people not working?

Mr. ZELIFF. You have an excellent operation up in New Hampshire, so I am glad to hear they are saying that. Maybe that is a good place for us to start as we move forward.

Thank you all very much. I just think that the key thing here is that we need to have a balance between education, prevention, treatment, interdiction, source country programs. This committee has been in South America, we have been with the Coast Guard, at Customs along the borders, we have been in our cities. Mark Souder, for example, just had a hearing last Monday, I believe, in Fort Wayne, IN. Denny Hastert had one in Chicago. We have been in Puerto Rico. All of it, somehow, just meeting with Tom Constantine this morning, and I will leave his comment with you as we wrap up: It is a time bomb, ticking away, getting ready to go off. We better wake up as a country because it is the most serious issue we face.

I would like to thank you, Mr. de Bernardo, Mr. Cummings, Mr. Stevens, Mr. Connors, thank you for your time and your commitment to this effort. We appreciate your being here. I am sure that we will continue to progress, thanks to your efforts and many others.

Mr. EHRLICH [presiding]. I would like to recognize our second panel, which are representatives from companies that deal in testing techniques: Neil Fortner, vice president and director, Laboratory Operations, PharmChem Laboratories, Inc.; Raymond Kubacki, president and chief executive officer of Psychomedics

Corp.; and John Lankford, sir, welcome, national program manager of Biosite Diagnostics, Inc.

These gentleman will discuss current and future drug testing methods and their effectiveness. I appreciate your being here today. It is our practice on the subcommittee to swear you in. If you would please stand.

[Witnesses sworn.]

Mr. EHRlich. Let the record reflect all the witnesses answered in the affirmative. I don't know who would like to begin.

STATEMENTS OF NEIL FORTNER, VICE PRESIDENT AND DIRECTOR, LABORATORY OPERATIONS, PHARMCHEM LABORATORIES, INC.; RAYMOND C. KUBACKI, JR., PRESIDENT AND CHIEF EXECUTIVE OFFICER, PSYCHEMEDICS CORP.; AND JOHN LANKFORD, NATIONAL PROGRAM MANAGER, BIOSITE DIAGNOSTICS, INC.

Mr. KUBACKI. Thank you. Good morning, I might say almost afternoon, to all the members of the subcommittee. My name is Raymond C. Kubacki. I am president and chief executive officer of Psychemedics Corp. Since 1987, our sole business is testing hair specimens for evidence of drug use. I welcome the opportunity to testify on the essential contribution workplace drug testing is making to the national fight against drug abuse.

Again as mentioned, the key to winning the war against drug abuse in my opinion also is demand reduction, and one of the keys to demand reduction is deterrence. The workplace is an excellent place to do drug testing. As has been mentioned many times now, over 70 percent of the drug abusers in the United States are employed. Also interestingly, 44 percent of drug abusers sell to fellow workers. Drug abusers will think long and hard when their job is at stake.

I think one of the key points here is if we are ever going to make significant inroads and win the war against drug abuse, we need to use the full range of proven technologies. Since each drug testing technology is optimally suited for uniquely different applications, they are complementary, as you will see. Providing employers with the choice of the best technologies for the best applications is critical.

Hair testing is a proven technology in wide use and is already making a very major contribution. It should be made available to all employers. Importantly, it should be available for testing safety sensitive employees under mandatory Federal guidelines.

Our company alone has over 600 corporate clients nationwide, from a wide variety and cross-section of U.S. business, including banking, mining, manufacturing, retail, service and lodging and casino. Our clients include Fortune 500 companies, Federal Reserve banks, law enforcement agencies, and the criminal justice system. The rapid acceptance of hair testing in the marketplace has been mirrored by its acceptance by the courts. Hair analysis is not an emerging technology. It has arrived.

I would like to give you a quick illustration of how drugs get into the hair, if I may. What this is, is an enlarged hair follicle. Basically what happens is drugs are ingested and get into our bloodstream. Our bloodstream nourishes developing hair follicles. Trace

amounts of the drugs then are entrapped in the center of the hair and stay there permanently. Our hair grows out about half an inch a month, and they stay in that position. So we basically have a little ticker tape, if you will. They are in there forever.

So hair grows about a half inch a month. In our standard test we are looking at the inch and a half closest to the scalp, which would be 90 days worth. It can go back further, but we don't want to discriminate between long hair-short hair. That is it basically. As I said, the drug residues cannot be washed out or bleached out. They are in the center of the hair. They can be detected for extended periods.

Now, the reason hair analysis technology has gained such rapid and wide acceptance is because it offers some very unique advantages for employers. It also offers some very significant benefits and safeguards for employees.

Looking at the unique advantages for employers, I will go through those quickly. One, it provides a wider window of detection. We are looking at drug use for the past 90 days versus other methods where you are looking at 2 to 3 days for most drugs. Cocaine gets excreted generally within 24 hours. Second, it is very difficult to evade this test. The drug residues are in there permanently. You can't just abstain for 3 days and go ahead and take the test.

It also provides some very significant information, quantitative and historical information, which has very important ramifications when it comes to treatment programs, the type you would have someone take.

Fourth, it is cost effective. When you look at a drug abuser, the government estimates a drug abuser costs an employer on average \$7,000 to \$10,000 annually, and you look at the superior detection rates, the economics are compelling in favor of hair.

Equally important are the significant benefits, but also safeguards for employees. One is an obvious one. It is significantly less demeaning and embarrassing providing a hair sample than with other technologies.

Second, hair testing provides the employee with a safety net. This is very important. It provides an unparalleled opportunity to verify test results through testing a completely new sample at a later time. In urinalysis, for example, the 2 to 3-day detection period for drug use generally expires before the employee learns of an alleged positive result. If a challenge is raised to the propriety of the test or the result reported, it is simply too late to take a second sample, as it would prove irrelevant to the question of drug use at the time the initial test was taken.

The third point, and this is a very important one also, is for the first time we have a test that can be used equally effectively as a qualifier. Many people tend to look at drug testing as a disqualifier. We have a test now which can be used as a qualifier. It provides the opportunity to individuals with a history of drug use to definitively demonstrate they have refrained from drug use for an extended period of time, at least 90 days. A negative hair test provides individuals with an effective and reliable means to establish they are drug-free and can remain in the workforce.

The fourth significant advantage for employees, and for all really, is that hair testing offers, because of the superior detection rate, a very significant and powerful up front deterrent. That is critical. This is critical to controlling drug abuse at its most effective time, and that is before it even starts.

Let me give you a real world example of hair testing's superior detection rate: Steelcase Corp. of Grand Rapids, MI. There are numerous studies done like this. They gave 774 people both hair and urine tests at the exact same time. The positive rate with urinalysis was 2.7 percent. The positive rate with hair was 18 percent. The difference when you look by drug, cocaine was 16 to 1, hair versus urinalysis. Back to the questions Mrs. Thurman asked before about the types of drugs.

To all members of the committee, I would like to say while the technology has certainly advanced, private industries, the courts and many other parts of government have adopted hair testing, the Federal guidelines have remained narrowly drawn and are a drag on the full implementation of modern, proven drug testing capabilities. The Federal drug testing guidelines first written in 1988 do not include hair testing for determining drug use. In fact, the guidelines have not advanced beyond urine testing for drugs. It is clear to us and others that the guidelines are obsolete. We would really appreciate any efforts that this committee and Congress could do to require HHS to provide hair testing technology in its guidelines. If we are ever to make significant inroads and win the war against drug abuse, we need to make all the proven tools and technologies that we have available to all employers and others.

Thank you very much for allowing us to come before this committee.

[The prepared statement of Mr. Kubacki follows:]

BACKGROUND & SUMMARY

Good morning, Chairman Zeff and Members of the Subcommittee. My name is Raymond C. Kubacki, Jr. I am President and CEO of Psychomedics Corporation and have been for the last 5 years. I welcome and appreciate this opportunity to testify today on the essential contribution workplace drug testing can make to the national fight against drug abuse.

By way of brief introduction, Psychomedics is a publicly-held company listed on the American Stock Exchange. It is the nation's leading drug testing company using hair for the detection of drug abuse. Headquartered in Cambridge, Massachusetts, with a laboratory in Culver City, California, since 1987, our sole business has been providing this service and technology to employers and others. The Company currently provides hair testing services to more than 600 corporations across the United States which rely on Psychomedics' hair analysis technology for their job applicant and employee drug screening. In addition to our corporate accounts, the Company also works with more than 80 research and medical accounts.

We are very appreciative of the Chairman's and the Subcommittee's dedication to the critical national problem of illicit drug use and its workplace impact. We recognize your contribution to maintaining a public focus on, and to advancing, an issue which critically needs such focus and attention.

We are particularly pleased to appear before this Subcommittee today as part of its focus on workplace drug testing programs and technology. Drug testing is an important tool in our national efforts to limit the use of illicit drugs and to identify those who need help. This panel's recognition of these values is most welcome.

Regarding the role of hair analysis in workplace drug testing, I would like to make the following key points:

- 1) The full range of proven tools and technologies should be made available to employers in order to eliminate the costs and burden of drug abuse in the workplace and to safeguard the rights of employees.

Hair analysis and urinalysis are complementary. Each drug testing technology is optimally suited for uniquely different applications. For example, in cases where one wants to determine if someone is on drugs at the present time (following an accident), urinalysis, with its short window of detection, (2 - 3 days), is the best technology for that application. However, ways of beating the urine test are widely known and include abstention for 2 - 3 days prior to the test. Therefore, in cases where the drug test is a scheduled test (such as pre-employment) hair analysis, with its wider window of detection (90 days), is the most effective technology for this application, since the test cannot be beaten by tampering or short-term abstention.

Limiting the method of testing solely to urinalysis limits the effectiveness of any drug program by allowing drug abusers the opportunity to beat the system and does not provide effective up-front deterrent. Unfortunately, as will be addressed later, this is precisely what the current Federal Guidelines do. In addition, such limitation also does not provide the necessary protection for those being tested. For example, urinalysis is susceptible to false positives from the simple consumption of poppy seeds. Hair analysis is not.

- 2) Hair analysis is a proven technology.

While I appreciate that part of this hearing is devoted to "emerging technologies" in drug testing, I must point out that hair testing is *not* an "emerging technology" - it is one which has fully "arrived." Hair testing has been validated by

extensive research, is in very wide and successful use, and is seen as uniquely beneficial by a wide range of entities, ranging from law enforcement to major corporations to public-sector employers.

Hair testing for drugs of abuse is not a new technology - numerous clients have been using it for years and are committed to it. Hair analysis is not even a different technology, it uses the same analytical chemistry screening as urinalysis and blood analysis. All positives are confirmed by a separate and independent gas chromatography/mass spectrometry (GC/MS) confirmatory test, which is generally recognized in the scientific and legal community as the "gold standard" for drug testing regardless of the specimen used.

Broad acceptance of hair testing in industry, the courts and law enforcement agencies is also supported by a large body of peer reviewed scientific literature. Over 300 articles have been published on hair analysis worldwide, as well over 50 field studies and numerous scientific studies done by independent investigators who have used our hair testing method.

Our testimony will describe the technology that has been embraced by large and small employers alike, and discuss the unique characteristics of hair testing that are attractive benefits to those who seek to stem the use of illicit drugs by workers and throughout society.

Briefly stated, hair testing possesses a number of major advantages and benefits over many other forms of drug testing technology, including a longer detection period for drug use, non-intrusive means of sample collection, and an easy means of verifying disputed test results through collection of a second sample that can be analyzed to confirm prior findings.

These and other features of hair testing have made it a very effective tool for

major employers - such as Steelcase, EDS, Toyota Motor Manufacturing, Magma Copper, The Sports Authority, WMX Technologies, and the New York City Police Department - who wish to establish a drug-free workplace environment.

In summary, hair testing for illicit drug use is not an "emerging technology" - it has emerged, it is widely accepted and used, and it is a prominent and growing tool in our national effort to eradicate drug use and its devastating effects.

3) Hair analysis is in wide use nationwide in the workplace and other areas and has been recognized by the court system.

Along with the above, our Company alone has over 600 corporate clients nationwide from a wide variety and cross section of U.S. business such as banking, mining, manufacturing, retail, service and lodging/casino. Our clients also include Federal Reserve banks, law enforcement agencies and the criminal justice system. In addition, over 80 research and medical studies have employed this method, addressing such critical issues as drug abuse and the spread of AIDS, crack cocaine babies and mothers, the homeless, and drug abuse in prisons. Other studies on the criminal justice system have been published by the National Institute of Justice.

The rapid acceptance of hair testing in the marketplace has been mirrored by the consistent affirmation and recognition by the courts and other legal authorities.

Over the last 14 years, both state and federal courts have admitted hair analysis and have determined that hair analysis is an accurate and reliable method of detecting individual illegal drug use. In the majority of cases, judicial notice was taken of the abundance of scientific literature authored by forensic experts acknowledging the validity of hair analysis.

In the most recent employment case, Nevada Employment Security

Department et. al. v. Cynthia Holmes 914 P.2d 611 (Nev. 1996), the Nevada Supreme Court held the following with regard to a drug abusing employee:

"We acknowledge that there are, arguably, no certainties in science. See Daubert v. Merrell Dow Pharmaceuticals, Inc. _____ U.S. _____ 113 S.Ct. 2786, 2795 (1993). Nonetheless, we conclude that RIA (hair) testing especially when coupled with a confirmatory GC/MS test, is now an accepted and reliable scientific methodology for detecting illicit drug use."

In another appellate level case where a corrections officer sought to utilize a negative hair test to refute a positive urinalysis,

Bass v. Florida Department of Law Enforcement, Criminal Justice Standards and Training Commission 627 So. 2d 1321 (Fla. Dist. Ct. of Appeals 1993) the court held that the hair test should be admitted and that,

"The radioimmunoassay analysis of human hair to determine cocaine use is generally accepted in the scientific community."

Numerous administrative hearings have resulted in formal determinations that hair testing for drugs of abuse done properly is an effective, valid method of drug testing.

The validity of hair analysis was reviewed by a Federal District Court as early as 1990. United States V. Medina 749 F.Supp. 59 (E.D.N.Y. 1990). In Medina, the court ordered a hair test to determine if a probationer, in a parole revocation hearing, had violated his parole by utilizing drugs in the preceding months. In revoking parole, after a positive hair test, Judge Jack Weinstein found,

"Extensive scientific writings on RIAH hair analysis establishes both its reliability

and its acceptance in the field of forensic toxicology when used to determine cocaine use" and that, ". . . radioimmunoassay is an effective and accurate method of detecting the presence of various compounds including narcotics."

Hair analysis has been recognized and admitted in criminal cases, child custody cases, military Court Martials, and in fact, is being used by a number of court systems. In 1994, our Company was presented with the Outstanding Program of the Year award by the Quincy, Massachusetts District Court System. The District Attorney of New Orleans also utilizes our hair testing method in their Diversionary Program.

4) Background on hair testing technology.

The presence of drugs in hair is based on a simple scientific fact: drugs which are ingested circulate in a person's bloodstream which, in turn, provides nourishment to developing hair follicles. Trace amounts of the drugs become entrapped in the core of the hair shaft, in amounts that are roughly proportional to what is ingested. These traces remain in the hair as it grows out over a period of time (roughly at the rate of one half-inch per month). These drug residues cannot be washed or flushed out, and can be detected for very extended periods of time - a major advantage for detection and deterrence purposes.

Our Company's technology was pioneered in 1987 after 10 years of research funded, in part, through federal and private agencies such as the Veterans Administration, the U.S. Navy, the National Institute of Justice, and the American Society for Industrial Security.

That research established that drugs deposited in the hair can be measured by radioimmunoassay procedures and highly sensitive gas chromatography/mass spectrometry. The effectiveness of hair analysis for drugs of abuse has been

documented in several hundred scientific publications around the world.

In 1987, Psychemedics created the world's first laboratory to offer a cost-effective method for testing hair rather than body fluids for the detection of drugs of abuse. Our technology not only detects *if* drugs of abuse have been used, it also provides information on the quantity and historic patterns of individual drug use - information not available through other forms of drug testing technology. Our test detects drugs of abuse used in the 90 days preceding the date the specimen is taken. This contrasts dramatically with the very limited window of information available through urinalysis testing, which gauges use only during the prior 2 - 3 days.

5) Hair analysis offers employers a number of important advantages.

Hundreds of employers across the United States have concluded that hair testing technology is exceedingly beneficial in making drug-free workplace programs more effective in comparison to other methodologies. This is true for several decisive reasons:

a) Wider window of detection:

While urine tests mainly determine if drugs have been used in the past 2 - 3 days, hair provides a 90 day history of information.

b) Resistance to evasion:

Hair analysis cannot be evaded as in urinalysis where drug users can substitute clean samples, tamper with specimens, or merely abstain for 3 days and pass the test. Drug residues remain permanently embedded in the hair.

c) Quantitative and historical information:

Because hair records drug use chronologically and in amounts proportional to those consumed, the pattern and approximate quantity of drug abuse is also provided. This information is extremely useful in tailoring Employee Assistance Plans and individual treatment programs.

d) Cost effectiveness:

Government studies reveal that each drug abuser costs an employer \$7,000 - \$10,000 annually. Superior detection rates, plus the ability to screen less frequently, provide significant cost savings and make hair testing an effective and efficient method of drug testing.

6) Hair analysis provides important safeguards for employees.

Hair testing technology also offers several major benefits and safeguards to employees including:

a) Non-intrusive sample collection:

Providing a hair sample is less demeaning and embarrassing since a cosmetically undetectable snip of hair is easily collected under close supervision without the embarrassment of providing a urine sample. Certainly there is significantly less impact on individual rights and privacy concerns than with other methodologies.

b) Safety net testing:

Hair testing provides an unparalleled opportunity to verify test results through the testing of a second sample at a later time. In urine testing, the 2 - 3 day detection period for drug use generally expires before the employee learns of an alleged "positive" result. If a challenge is raised to the propriety

of testing or the result reported, it is simply too late to take a second sample, as it would prove irrelevant to the question of use at the time of the first test. By contrast, hair testing provides a "safety net" in that any individual who sincerely believes and/or strongly asserts that a "positive" result was inaccurate can merely submit to a second test which still will provide accurate results three days later, three weeks later, and up to three *months* later. The ability to analyze a completely new sample or segment samples into different time periods, virtually eliminates concerns of sample mix-ups, laboratory error, spiked drinks or inadvertent exposure common with other methodologies.

c) Use of hair analysis by employees as a qualifier:

Hair testing also provides the opportunity to individuals with a history of drug use to definitively demonstrate that they have refrained from drug use for an extended time. Often, treatment professionals, employers, and co-workers remain legitimately concerned or suspicious that those who undergo treatment for substance abuse may experience relapse and evade detection. Even the most successful rehabilitation programs for hard-core users have recidivism rates of at least one-third.

By contrast, those individuals seeking rehabilitation may be less likely to cheat if they are subject to hair testing (because of the substantially increased likelihood of detection), and are more likely to be able to demonstrate their rehabilitation success. A "negative" hair test would provide such individuals with an effective and reliable means to establish that they have remained drug-free.

d) Upfront deterrent:

The superior detection rate of hair testing provides a very significant upfront deterrent to those who may be tempted to experiment with drugs. This

is critical to control drug abuse at the most effective time - before it starts.

7) Hair analysis is a powerful technology with a superior detection rate and up-front deterrent impact.

In over 50 field trials, hair analysis has also proven to provide a superior detection rate when compared with urinalysis.

In side-by-side comparison studies where people were given both the hair and urine test, hair analysis has demonstrated a superior detection rate - generally 5 - 10 times greater than urinalysis.

Corporate clients have also performed some of their own studies. Steelcase Corporation of Grand Rapids, Michigan gave both urine and hair tests to over 774 people. The positive results with urine was 2.7%, while with hair it was 18%. Hair analysis identified a positive rate for cocaine alone of 8.4% vs. 0.5% positive by urine (16 to 1). Side-by-side studies by other clients as well as the Cleveland Task Force on Violent Crime and the National Institute of Justice have produced similar results. (see attached).

ADMINISTRATION POLICY FAILURES

It is highly encouraging that our technology is increasingly used in the private workplace, that it has been endorsed by extensive research and is accepted by the courts and in our judicial system across the country. However, like many advanced technologies, we are encountering resistance not only from our competitors, where one might expect it, but also from the government.

The Department of Health and Human Services (HHS) is responsible for developing the drug testing Guidelines that govern the Department of

Transportation's (DOT) mandatory drug testing program for safety-related transportation jobs such as airline pilot, air traffic controller, truck driver, etc. These Guidelines are the responsibility of the Substance Abuse and Mental Health Services Administration (SAMHSA) within HHS.

Congress first directed SAMHSA to use the best available technology in developing drug testing Guidelines in 1987 in the Supplemental Appropriations Act, Public Law 100-71, July 11, 1987. Further, under the Omnibus Transportation Employee Testing Act of 1991, Congress directed the Department of Transportation to establish comprehensive standards "which require the use of the best available technology for ensuring full reliability and accuracy of controlled substances." However, the only Guidelines for drug testing ever developed by SAMHSA are for urine testing originally published in 1988.

Rather than working to facilitate advanced technologies, SAMHSA is engaged in an inappropriate, full-fledged battle against hair testing, faxing unsolicited negative materials to journalists and actively opposing the use of the technology. As illustrated by the recent overwhelming support and unanimous passage of the hair testing component of Florida's Drug Free Workplace Act, when presented with all the facts, the legislators were not persuaded by SAMHSA's arguments.

In our view, SAMHSA bases its opposition on outdated, flawed and statistically invalid studies and ignores the major, more recent, highly positive studies published. Further, SAMHSA consistently seeks to hold hair testing to higher standards than those imposed on urine testing. SAMHSA, in short, is unreasonably and inexplicably biased.

There is urgent evidence of HHS' bias in favor of urine testing in their recent proposal to raise urine opiate cut-off levels for the purpose of heroin detection because 87% of urine opiate positive are overturned by medical review officers due to

the deficiencies of urine testing in detecting heroin and its metabolite. Hair testing has no such limitations, as the heroin metabolite is extremely stable and can be detected by hair analysis months after usage.

By HHS' own estimate, this proposed change will result in 85 percent of the previously confirmed positives now going undetected. These heroin users that would have been detected will now continue to fly planes, drive trucks and trains and work in nuclear power plants.

Heroin use as close in time to the night before a urine test will not be positive. This is hardly a deterrent. HHS has simply refused to acknowledge that urine testing is a poor method to detect heroin and the proposed changes, incredibly, make it worse.

Representative Gerald Solomon wrote to SAMHSA Administrator Nelba Chavez on March 4, saying:

"In the face of the evidence, it is clear your department, in refusing to expand the Guidelines to include advanced technologies, and detection rates for people in safety-related jobs, is not performing its duties in the best interest of the American public."

It is clear to us and to others that the Guidelines are obsolescent. HHS is taking active measures to discourage rather than facilitate the use of advanced technologies such as hair testing in the war against illegal drug use. We would appreciate any efforts by you, Mr. Chairman, and this Subcommittee to require HHS to fairly evaluate hair testing technology and to address the bureaucratic inertia that has produced drug testing Guidelines for only a single technology in the last eight years.

Workplace Drug Testing Legislation

Finally, I would like to address the issue of legislation to facilitate workplace drug testing. Psychomedics Corporation is prepared to support any appropriate legislative or regulatory effort that facilitates workplace drug testing as long as such legislation does not, in any manner, exclude or inhibit accepted or emerging technology.

Our concern is that efforts may be made by our competitors to influence the legislative process with the aim of locking in their current markets by inhibiting or even prohibiting the use of competing technologies. This might be accomplished by including language that references an employer's use of a drug test "consistent with the Guidelines of the Department of Health and Human Services" or "regulations of the Department of Transportation". Since urine is the only technology contained in the outdated Guidelines, this would have the affect of excluding hair and other technologies. The result would be the exact opposite of what is intended, restriction of employers options to a "one size fits all" federal government straight-jacket.

Again, we would like to work with corporations and our competitors to support legislation that will advance drug testing in the workplace and to provide employers maximum, appropriate flexibility to devise a drug testing regime that is tailored to their specific workplace needs and the best interests of employers and employees alike. We hope you on the Subcommittee and in Congress will remain vigilant against initiatives that seek to abuse the legislative and regulatory process to gain competitive advantage.

CONCLUSION

Both hair testing and urinalysis are, indeed, complementary, and both should be made available. Hair analysis has a proven superior detection rate and, therefore,

provides a greater deterrence for drug use. For this compelling reason, it should be specifically included as an available tool in the Federal Guidelines which include super safety sensitive positions.

The detection of drugs of abuse through hair testing is a methodology that has been firmly established, and its acceptance has become widespread. It makes unique contributions to employer efforts to prevent drug abuse and, of course, in other settings as well where the intensive monitoring of drug use patterns is necessary or advisable.

As you know, drug abuse continues to be a very serious, pervasive, and entrenched problem in the U.S. today, despite expenditures of hundreds of millions of dollars over the last 10 - 15 years. The key to winning the war against drug abuse is demand reduction. The deterrent impact, as well as accurate identification, is critical. If you look at the major issues facing us today -- crime, the spread of AIDS, increased health care costs, the new strain of T.B., the homeless, etc. -- the common thread to all of these is drug abuse.

The workplace is an excellent place to do drug screening. Over 70% of the drug abusers in the United States are employed and 44% of drug abusers sell to fellow workers. Drug abusers will stop and think long and hard when their job is at stake.

If we are ever to make significant in-roads and win the war against drug abuse, we need to make the best proven technologies available. Providing employers with the choice of the best technologies for the best application is a critical step. Hair testing is a proven technology in wide use that can make a major contribution and should be made available to employers participating in drug-free workplace programs, as well as others.

We believe there are very compelling reasons to expand the Federal Guidelines to include hair analysis. The drug problem is too critical to not use all the proven weapons available. Hair analysis benefits all.

We very much appreciate the opportunity to appear before the Subcommittee on National Security, International Affairs and Criminal Justice this morning to share our experiences and our successes with a drug testing methodology that is being embraced by an increasing number of employers, and which poses great promise for many others.

Psychemedics supports legislative and regulatory efforts that would expand and enhance existing Guidelines for drug-free workplace programs to include hair testing and other proven technologies that can assist in combating the major challenge facing our Country: illicit drug abuse and trafficking.

Once again, I commend the far-sighted efforts of this Subcommittee and its Chairman, and I pledge our cooperation in your efforts toward our mutual - and critically important - goal of drug abuse prevention.

STEELCASE CORPORATION

RESULTS FROM URINE VS. RIAH® COMPARISON (Sample Size = 774)

	<u>Percentage Positive</u>	
	<u>URINE</u>	<u>HAIR</u>
COCAINE	0.5%	8.4%
MARIJUANA	0.5%	3.5%
<u>OTHER DRUGS</u>	<u>1.7%</u>	<u>6.1%</u>
<u>OVERALL POSITIVE</u>	<u>2.7%</u>	<u>18.0%</u>

SUMMARY

Steelcase administered both urine and Psychemedics' hair analysis tests to 774 applicants in order to provide an effective side-by-side comparison. Hair and urine samples were collected on the same day from each individual. Steelcase has provided the results of this comparison to Psychemedics with their permission to reproduce them.

1. For all drugs tested, **Psychemedics was substantially more effective** in identifying drug use, yielding an **18.0%** positive rate in comparison to a rate of **2.7%** for urine.
2. Because of the rapid excretion of cocaine in urine, Psychemedics was overwhelmingly more effective than urinalysis in identifying cocaine users. **Sixteen times as many cocaine users were accurately identified** using Psychemedics' patented technology.

CONCLUSIONS

If Steelcase were to rely on urinalysis to screen applicants, **for every 100 employees hired, approximately 15 would be drug users.**

The National Institute of Health estimates that **each drug abuser costs an employer approximately \$7,000 annually.** Therefore, a company like Steelcase would save **\$105,000 per year for every 100 employees hired by pre-screening applicants with Psychemedics' hair analysis test.**

**NATIONAL INSTITUTE OF JUSTICE
FIELD STUDY**

National Institute of Justice (NIJ) In an investigation of drug use in over 200 parolees and probationers, the RIAH® hair analysis test proved significantly more effective than urine testing in detecting cocaine, PCP and opiate users. Hair, urine and self-reported drug use information was collected at intake and at three-month intervals during a one-year sampling period. Positive results of urinalysis and hair analysis (using one month-long section) at intake are presented below.

Subjects Positive By Urine And Hair At Intake

	<u>URINE</u>	<u>HAIR</u>	<u>INCREASE IN DETECTION WITH HAIR (%)</u>
<u>COCAINE</u>	17	88	420%
<u>PCP</u>	3	11	270%
<u>OPIATES</u>	10	28	180%

These data show the advantage of using the RIAH hair analysis test as an assessment tool when subjects are admitted to a program. The chart below presents the hair / urine comparison during the one-year surveillance period. Subjects were monitored by random urine collection (as many as eight samples per month) and a hair specimen taken every three months.

Subjects Positive By Urine And Hair: One Year Surveillance

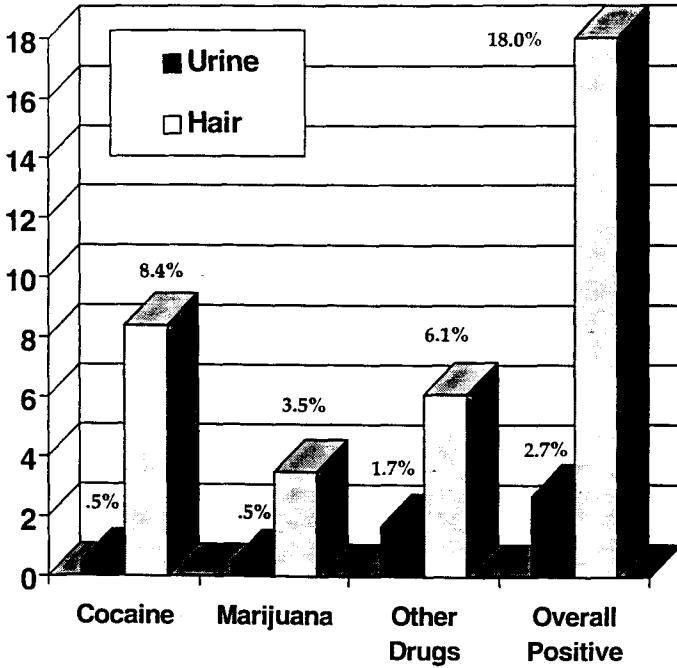
	<u>URINE</u>	<u>HAIR</u>	<u>INCREASE IN DETECTION WITH HAIR (%)</u>
<u>COCAINE</u>	6	32	430%
<u>PCP</u>	1	6	500%
<u>OPIATES</u>	10	15	50%

These data show that even frequent, random urine testing was less reliable than the RIAH hair analysis test for detecting cocaine, PCP and opiate use.

Additional analyses were conducted to determine the patterns of drug use during the three months prior to intake. The RIAH hair analysis test data were used to identify chronic abusers whose addiction put them at risk for the commission of additional crimes. In cases where the RIAH hair analysis test data were negative for the three months prior to intake, intensive supervision and inclusion in the comprehensive urine testing program appeared unwarranted. This information could be used to significantly reduce costs and increase productivity.

These analyses demonstrate that in all phases, the drug testing program used by the criminal justice system could be significantly streamlined and more cost effective by using the RIAH hair analysis test rather than urine testing.

STEELCASE CORPORATION: A GRAPHICAL REPRESENTATION OF POSITIVE RATE RESULTS



Mr. EHRLICH. Thank you. Mr. Lankford, you make this product. Would you indulge me? I need to leave in about 5 minutes. I will return later. I want to hear you comment on this in the context of your opening statement before I leave, if you don't mind.

Mr. LANKFORD. I will be glad to. First of all, good morning.

Mr. EHRLICH. I think all Members have this?

Mr. LANKFORD. Does everyone have one of the devices? First of all, I would like to say thanks to the members of the subcommittee. It is an honor for me to be here today representing Biosite Diagnostics.

The testing system you have in your hand and each of the members of the subcommittee have is called Triage. What I am going to talk about here today is a new program called the Express Test Network. We are employing that particular system, the Triage system, to provide immediate 1-hour negative drug screen results to employers across the country in the hands of medical facilities, including hospitals, occupational health clinics, notably through the hands of Columbia/HCA Corp., which is the largest health care provider in the country. Any employer of any size, and it has been noted several times today that the small employer is as important as the large employer in this situation, any size employer can access immediate information on its employees using that test.

Specifically, how does the test work? An employee comes into a clinic setting or a hospital setting and is able to provide a routine urine specimen, just like they would if the sample was going to be sent off directly to the reference laboratory. The chain of custody and collection process is identical to anything else done with urine testing.

What happens differently is after the initial aliquot of sample is sealed and initialed by the employee, the chain of custody form signed that it is in fact their sample, they are free to leave the clinic at that point. An initial portion of that specimen is used to run the Triage system. That will indicate through a visual ID whether there is positive response on drugs, multiple drugs, seven in the case of the system you are looking at.

Mr. EHRLICH. Could you run through the drugs it measures for? PCP—

Mr. LANKFORD. PCP, cocaine, amphetamine, THC, opiates, barbiturates, I may have left out benzophenones, that panel of seven. We make two systems. One is the seven, one is the five-test panel, which mirrors the DOT's SAMHSA five drugs that they specify for testing.

But within the hands of the clinics and in the hands of employers, we have onsite testing done with employers across the country again using that same system.

Mr. EHRLICH. I know I am messing up your presentation, but LSD?

Mr. LANKFORD. LSD, a good question. We at this point—there are several questions there as to whether the testing matrix there is appropriate. The biggest question we have I think to the employer community is as to how significant of a problem is that. There has been a lot of speculation as to the prevalence of LSD out there today. We have really not been able to gather any significant data yet as to the indication of interest. There is very much the

ability to do it within that device, and we have already done some initial testing on it. But that is how it works.

To give you more history on it, the product has been in use in hospitals across the country for the past 5½ years. It is the largest methodology used today in drug testing in the hospital community.

So it is very well-substantiated. The studies were done at the University of Virginia, the University of Texas, the University of California-Sacramento, Johns Hopkins, and so on. The prevalence of data out there supporting the technology is strong.

I will mention some more about the Express Test program now if that fits into your timeframe.

[The prepared statement of Mr. Lankford follows:]

STATEMENT

on

WORKPLACE SUBSTANCE-ABUSE PROGRAMS

before the

SUBCOMMITTEE ON NATIONAL SECURITY,
INTERNATIONAL AFFAIRS AND CRIMINAL JUSTICE, OF THE
COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT

of the

U.S. HOUSE OF REPRESENTATIVES

by

JOHN LANKFORD
BIOSITE DIAGNOSTICS, INC.

June 27, 1996

I. BACKGROUND ON BIOSITE & SUMMARY OF OUR TESTIMONY

Good morning, Chairman Zeliff, Ranking Minority Member Thurman, and Members of this Subcommittee. My name is John Lankford, and I am honored to be here today representing Biosite Diagnostics.

Biosite recognizes the magnitude of our country's drug-abuse problem (the United States has 6 percent of the world's population, but consumes 60 percent of the world's illicit drugs), and also recognizes the critical role that the business community plays in addressing this problem.

Employers should address drug abuse, strive to have a completely drug-free work force, and implement fair and effective drug-testing programs where necessary or appropriate.

In this regard, Biosite seeks to address specific employer needs in drug testing.

At the same time, we recognize the importance of political leadership in Washington on the workplace drug-abuse prevention issue, and commend this Subcommittee, and you, Mr. Chairman, for your leadership in this regard. We need legislators and regulators, like you, who will recognize the role of employers and the importance of drug testing, and who will fashion an appropriate legislative response to the issues.

In regard to my Company, Biosite Diagnostics is based in San Diego, California, was founded in 1988, and is dedicated to product innovation for unmet needs in point-of-care substance-abuse testing. Biosite Diagnostics develops, manufactures, and markets a new generation of self-contained Immediate Response Diagnostics products whose results can be visually interpreted.

Biosite's primary product, Triage™, is a single testing device that detects the seven most commonly abused drugs, interpreting results with a simple "on/off" visual verification method. When combined with the Company's unique, self-contained testing device, the technology allows for the rapid, simultaneous detection of multiple substances which may indicate drug abuse.

As to my role at Biosite, I am employed at Biosite's corporate headquarters, and serve as the National Program Manager for an innovative solution we have developed for quick, accurate off-site drug testing — the Express Test Network. I am in charge of overseeing contract negotiations with Express Test providers, managing Regional Express Test Coordinators, and directing and developing the implementation and use of Express Test nationwide.

Prior to coming to Biosite, I was Senior Product Manager for Hematology Systems at Abbott Laboratories when it became one of the top product areas in Abbott's overall growth over

the past four years. At Abbott I also acted as Southeastern Regional Product Manager for all of Abbott's blood bank products. In that capacity I negotiated agreements and managed blood supply safety programs with the Red Cross and all other regional blood bank systems.

I am here today not only to express Biosite's support for the efforts of this Subcommittee, and to pledge our support for the legislative positions of the Institute for a Drug-Free Workplace, but also to tell you about an exciting, new innovation in the area of off-site drug-testing — the Express Test Network.

II. THE EXPRESS TEST PROGRAM

As more and more employers realize the effectiveness of drug testing in maintaining the safety and productivity of their employees, demand has risen for fast, accurate methods to perform drug tests. The focus among employers has shifted from "Does drug testing work?" to "What is the best way to drug test?". The "best way" entails no compromise on reliability and protection of the rights of the individual, while achieving the same deterrence and detection value in a methodology that saves time and money.

Although some employers have been successful in administering and performing drug testing on-site with immediate results, this is far from the norm. Most employers send their samples off-site for processing. Even those that do on-site testing in many cases have found their facilities inadequate to efficiently handle an entire drug-testing program.

The Express Test Network is a response to employers' needs for rapid off-site drug-test sampling and processing. Biosite introduced the Express Test Network in early 1996 to give employers a fast, accurate, accessible alternative for off-site drug testing. The Express Test

Network links more than 150 medical facilities across the nation to provide one-hour "negative" drug-test results to employers in a hospital or independent clinic setting. When Biosite recently entered into a partnership with Columbia/HCA to offer Express Test service through all of its managed care facilities, Biosite ensured that the number of facilities offering Express Test will more than double in the next few months.

To access the Express Test program, an employer notifies Biosite that they want Express Test service on all or some subset of their employees. Biosite then provides names of hospitals and clinics in the employer's area which are part of the Express Test Network. The employer chooses a member hospital or clinic, notifies that clinic, and sends the employees to that hospital or clinic to give a sample.

When the employee comes into the clinic and gives a sample, he or she does so in exactly the same manner as they would were the test being sent to an outside laboratory. The clinic begins a standard chain-of-custody process that involves splitting the original sample and signing a chain-of-custody form, as well as initialing a sealed aliquot of the original sample. Once this is accomplished the employee is free to go and the Biosite Triage™ system is used to screen the sample.

If the results are "negative," the employer is notified of the results within an hour. If the results are "positive," they are sent on to a reference laboratory for further analysis by gas chromatography/mass spectrometry. Because Express Test reports only *negative* results, there is no danger of reporting a "false positive." Thus, with Express Test an employer can determine within one hour if an employee should be back on the job, or wait for a more detailed result.

The advantages of the Express Test Network are clear. Express Test offers:

- *Speed* — one-hour "negative" results are the fastest available;
- *Accuracy* — Using Biosite's patented ASCEND™ Multi-immunoassay process, one-hour drug tests are as accurate as conventional reference laboratory results;
- *Accessibility* — With hundreds of hospitals and clinics nationwide, employers of all sizes can access Express Test from almost anywhere;
- *Cost-savings* — Express Test allows employers to get more hours out of their work force (by reducing the work time spent by employees in the testing process, reducing the managerial and administrative time spent on implementing the testing process, and reducing the need for co-worker overtime or temporary help while employees are being tested or awaiting test results); and
- *Professionalism* — Sampled in a clinic or hospital setting, Express Test better maintains privacy, and projects more credibility, confidence, and professionalism to employees concerning the entire drug-testing process.

As stated earlier, the first and foremost advantage of the Express Test Network is *speed*. Until now, a 24- to 48-hour wait was mandatory for drug-testing laboratories to transport, test, and report drug-test results. Typically, a courier from the drug-testing lab completes one pick-up per day at each of its customers. The samples are sent overnight to a processing lab, tested

for "positive" or "negative" results, and reported to the employer the following day if the result is "negative."

This waiting period not only frustrates employers who immediately need labor on the job (such as employers in construction, shipping, and agribusiness), but it puts employees involved in workplace incidents and accidents in the difficult and potentially embarrassing position of waiting one-to-two days for test results.

The Express Test Network cuts this waiting period down to only one hour. Instead of waiting for days for results — while supervisors and co-workers speculate on drug-use possibilities — the individual can be back on the job site within an hour. This is a tremendous plus not only for productivity, but for employee morale. Unions also have commented that one-hour testing relieves their scheduling problems, improves morale, and instills in members the trust that their co-members are working drug-free.

Prior to Express Test, in tight labor markets such as Georgia and Tennessee, employers had little choice but to put employees to work pending drug-test results. This not only created potentially hazardous situations, but created distrust among employees for co-workers with a history or suspected history of drug abuse. With Express Test, employees know *before* they start work that their co-workers are drug-free. Safety concerns are paramount in many employment situations, and the ability to ensure that workers are drug-free before they start employment can be critically important and even life-saving.

The Express Test Network has been particularly useful in the construction and petrochemical industries, which are capital-intensive, safety-sensitive industries, often have high numbers of subcontractors *and* employee or contractor turnover, and often have employees

without a high degree of supervision. With Express Test, these employers can have drug screens at 6:00 a.m., and their employees where they are supposed to be — on the job — by 7:00 a.m.

The *accuracy* of the Triage™ system — together with Express Test — is also a major factor leading employers to use this system. As I noted earlier, the Express Test Network uses the Biosite Triage™ testing system. The Triage™ system has been the subject of numerous successful studies reported in the *Journal of Analytical Toxicology*. Virginia Medical College, Maryland Medical Labs, the University of California at Sacramento, the University of Texas, and Johns Hopkins University all have approved Triage™ through extensive testing and research. Moreover, each and every one of the more than 2,500 hospitals and clinics nationwide which use Triage™ have approved it as an effective, accurate indicator of illicit drug use.

The Triage™ Panel for Drugs of Abuse is a monoclonal antibody-based system used for the detection of up to seven different drugs within ten minutes using a urine sample. The system has built-in quality control indicators that insure proper testing procedures were followed and that the reagent system is working correctly.

The technology is called ASCEND™ Multi-immunoassay, and is comparable to the EMIT technology used by reference laboratories which produce 24-to-48 hour "negative" results. The thresholds (or cutoffs) are standardized to those established by the Substance Abuse and Mental Health Services Administration. The patented ASCEND™ Multi-immunoassay test provides a direct signal and an abrupt "on/off" color that makes visual interpretation easy and eliminates costly external calibration.

In short, Triage's™ simple testing method not only decreases the chances of a "false positive," but provides employers with the assurance that their drug test is as accurate as possible. Furthermore, as with any other "positive" results, Express Test "positives" are sent to a laboratory for verification by gas chromatography/mass spectrometry. Thus, an employer can be certain that results attained through Express Test are every bit as accurate as those attained through other testing methodologies.

The Triage™ system was approved by the Food and Drug Administration in September 1991 and is currently in use in 55 percent of the nation's hospitals. This widespread acceptance makes Triage™ not only unique, but accepted as an accurate, safe predictor of drug-test results.

Major employers such as U.S. Steel, Holland-America Cruise Lines, and Westpoint Stevens use the Triage™ system on-site to maintain the maximum level of employee safety with the minimum level of infringement on productivity and employee rights. Numerous other employers, such as All-American Homes, ALCOA, and the Kroger Corporation use Triage™ with Express Test for quick, accurate, and effective off-site drug testing.

One other important aspect of the Express Test Network is *cost*. The Express Test Network is built upon the premise that employee time is precious. Express Test saves the minimum wage employer approximately \$112.50 every time the service is used. Employers using Express Test save not only by having employees on the job more often (i.e., with less down time), but also by not paying wages to additional "fill-in" employees or overtime pay to co-workers to cover for employees waiting for drug-test results.

Moreover, as mentioned earlier, there also is less managerial and administrative staff time spent administering the drug-testing program or dealing with less numerous and/or less conveniently located laboratories.

Furthermore, employers of all sizes struck by short-term employee absences can turn to Express Test to bring in drug-free replacements within an hour. We have found this is valuable not only to big corporations, but to small employers who are impacted more severely by the loss of a single employee. Employers using Express Test also do not have to maintain their own laboratories or create sampling procedures. All of these factors mean real savings to employers, less disruption and distraction for employees, and, ultimately, lower costs to consumers.

Finally, employers have frequently reported that employees and unions appreciate the *professionalism* that the Express Test Network conveys. Employees recognize when an employer is using the latest, most technologically advanced tools to make sure that the workplace is safe for everyone. Sampled in a clinic or hospital setting, the one-hour Express Test prevents the potential embarrassment of giving a sample at work. Many hospitals, including Columbia/HCA, have included drug testing in their general regimen of employee fitness, giving the employee an opportunity to report other medical problems at the drug-testing site. Quick and professional, Express Test takes the inconvenience out of drug testing while preserving the accuracy and fundamental value.

III. Conclusion

When the Subcommittee looks for advances in the area of drug testing, the Express Test Network — the one-hour, accurate drug-testing method — must be recognized as among the

most significant developments in recent years. Less time-consuming and as accurate as other drug-testing methods, Triage™ — with the Express Test Network — brings drug testing to more workplaces at a lower cost than ever before.

Biosite is proud of the advances it has made toward promoting a drug-free working environment for *all* employees. Biosite, as a member of the Institute for a Drug-Free Workplace, supports initiatives which focus efforts on making the workplace a safer, more drug-free environment.

In that regard, I would like to express Biosite's strong support for the Institute's legislative proposals, and encourage the Subcommittee to push further for responsible employer efforts to create a drug-free workplace. Working together, with the support of enlightened legislators such as yourselves, we are making steady advances toward providing fast, accurate means of drug testing for a safer, more productive workplace.

I appreciate this opportunity to describe the Express Test Network to you today. Biosite strongly supports this Subcommittee's efforts in educating businesses, employees, and the public at large that substance abuse is a threat to the safety of working men and women nationwide, and in implementing national laws and policies that will assist employers in their role in the "war on drugs." We are using our best efforts in the fight against drug abuse and appreciate your support.

I would be happy to answer any questions which the Members of the Subcommittee may have.

Mr. EHRlich. Actually, if you would forego that for now.

Mr. Fortner, I would like to get your brief opening statement. I know the folks are going to have questions. Mrs. Thurman has many questions, I know, concerning costs and other things that I have as well. We usually think alike.

Mr. FORTNER. Thank you, Mr. Chairman. Members of the subcommittee, as you introduced me before, I am Neil Fortner, vice president of laboratory operations with PharmChem in Menlo Park, CA. I am here today to talk about a new technology in your interest of time that PharmChem has available and is currently in use throughout the United States. It represents a departure from the standard urine testing programs, although PharmChem certainly has over 2,000 clients across the country conducting urine tests. We have conducted over 20 million tests since our formation. We did 3.2 million last year in our corporate headquarters laboratories. But the product, in terms of new technology development, was developed in conjunction with a company in southern California and 3M corporation, and it is called the PharmChek™ sweat patch. It is literally a Band-aid device, which I will hold before you, that can be worn by an individual on an upper arm, for instance, for anywhere from 24 hours to 30 days. I have personally worn these for that time period.

The concept behind this, and this is a device that has been approved by FDA for five classes of drugs, what we normally call the NIDA 5, is that an individual produces sweat, and it is one of the primary mechanisms by which the body cools itself, and we call this insensible sweat. So a person perspires in the absence of any physical activity.

That sweat is actually deposited on this device. This is a device that can be worn and carried out in normal activities. It allows one-way diffusion of vapor, of water. You can swim, shower while you are wearing it. The features of the device is that you cannot remove it without demonstrating tamper evidence. So once it is applied, the person cannot take it off. But they can carry on their normal activities in the absence of that.

It has proven in our studies to be a highly effective mechanism, not only in terms of detection of drugs much superior to the urine testing, but it is also certainly less invasive than the collection of urine and provides a constant monitoring mechanism, which is also a very strong deterrent effect across there.

The sweat that is collected on here at the time that the individual then would maybe report back for pre-employment or conduct, the patch is then removed, sent to a laboratory for analysis. It literally takes the patch, suspends it back in a solution, and then tests that solution for the presence of these illicit drugs.

There are currently, as I said, five drugs approved. This is also under development before FDA right now for alcohol and some other drugs. One of the drugs we did develop and have FDA approval on is phencyclidine or PCP. It is in the same class of hallucinogens such as LSD. We do know that LSD, along with PCP, will come through the body into the patch.

The one disadvantage we currently have under the FDA process and studies conducted by Dr. Ed Cohen, its chief researcher at the United Addiction Research Center in Baltimore, MD, is that FDA

will not permit administration of Class I drugs such as LSD or PCP to volunteers. But in other cases we have received FDA approval for administration and collection and analysis of that.

The other advantage that the sweat patch has as opposed to urine testing is that urine testing can be easily beat simply through hydration, consumption of large amounts of fluids. The patch has the ability to detect not only the major metabolites, but also the parent drug that an individual takes. One of the exciting promises that Dr. Cohen discovered was that following administration of heroin to volunteers, you can actually detect the presence of heroin in the patch proper.

This patch, we have been working with Dr. Donna Bush, the chief of the drug testing program for the NIDA program, SAMHSA. I am an inspector for that program. We have been working with Dr. Bush for applications in workplace testing. This has been extensively used in the Michigan Department of Corrections. We saw a fourfold increase in the detection of drugs using the patch compared to urine testing, and these were paired sample collections.

As we go forward, this is also now being used by the U.S. Federal Court system. So we have 11 sites across the country in which this is in the pilot stages. It is also being used in other agencies, such as Florida Department of Corrections.

[The prepared statement of Mr. Fortner follows:]

TESTIMONY ON
WORKPLACE SUBSTANCE ABUSE PREVENTION EFFORTS
before the
SUBCOMMITTEE ON NATIONAL SECURITY,
INTERNATIONAL AFFAIRS, AND CRIMINAL JUSTICE
of the
COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT,
UNITED STATES HOUSE OF REPRESENTATIVES

PHARMCHEM LABORATORIES, INC.

Introduction and Overview

Good morning, Mr. Chairman, and members of the Subcommittee. My name is Neil Fortner, and I am Vice President and Director of Laboratory Operations for PharmChem Laboratories, Inc. in Menlo Park, California. I also serve as Scientific Director and oversee the laboratory operations of PharmChem's U.S.-based laboratories. I hold a B.S. and an M.S. in BioChemistry and am presently completing my Ph.D. in Neurochemistry. Over the course of my career, I have published many scientific papers in the area of forensic toxicology and have provided testimony in more than 300 cases involving drug testing in all types of courts. In addition, I am a member of several scientific associations, including the American Academy of Forensic Sciences, the Society of Forensic Toxicologists, the American Board of Forensic Examiners, and the American Association of Clinical Chemists. I am certified

as an inspector for the National Laboratory Certification Program directed by the U.S. Department of Health and Human Services' Substance Abuse and Mental Health Services Administration, as well as the College of American Pathologists' Forensic Urine Drug Testing Program. I also serve on the Board of Directors for the Institute for a Drug-Free Workplace, through which PharmChem supports corporate workplace substance abuse prevention efforts.

In that regard, I would like to express PharmChem's strong support for any legislative effort which you and this Subcommittee may take that would greatly endorse and encourage responsible employer efforts to eliminate substance abuse from the workplace.

Today, I would like to discuss an exciting new development in the area of substance abuse testing which has great potential for application in the workplace. PharmChem has developed, in conjunction with Sudormed, Inc., a new product called the PharmChek™ sweat patch which is capable of detecting drugs of abuse excreted in sweat. Initial studies have shown that this product is not only highly effective at detecting drug abuse, but it also can be used in a manner which is significantly less invasive than the more commonly used urine testing. The PharmChek™ sweat patch can be applied to a person's upper arm for a period of days during which time it collects drugs that are excreted along with the body's natural loss of moisture from the skin. This device has received approval from the Food and Drug Administration of the U.S. Department of Agriculture for detection of five drugs of abuse, and approval is pending for use of the patch to detect additional commonly abused drugs.

The PharmChek™ sweat patch has performed well in several scientific studies and we are optimistic that it will prove to be a popular and effective tool for workplace substance abuse detection and deterrence as well.

Thank you for providing PharmChem Laboratories this opportunity to present testimony to the Subcommittee. Mr. Chairman, I commend you for taking such an active role in the area of drug abuse prevention, and I am pleased to have the opportunity to describe our efforts in this area at this hearing.

About PharmChem Laboratories, Inc.

PharmChem Laboratories, Inc., was founded in 1971 specifically in response to a need for a facility that could detect and deter the use of illegal drugs and alcohol. Since that time, PharmChem has analyzed more than 20 million urine samples for drugs of abuse, 3.2 million in the last year alone. Today, PharmChem Laboratories has 350 employees and operates three fully licensed and certified laboratories: one in Menlo Park, California; one in Fort Worth, Texas; and one, operating under the name MedScreen, in London. We serve more than 1500 customers in all 50 states and several foreign countries. Among our customers are the federal Departments of the Interior, State, and Energy, as well as more than 40 other federal government departments or bureaus. PharmChem performs tests for most drugs of abuse, including cocaine, marijuana, methamphetamines, heroin, PCP, and alcohol, almost exclusively through urinalysis.

In addition, PharmChem prides itself on its customized, integrated customer services which are designed to support customers in developing and maintaining cost-effective drug testing programs.

PharmChem has pioneered many of the most important innovations in forensic drug testing. In the 1970s, PharmChem was the first laboratory to apply strict chain-of-custody procedures to criminal justice and drug treatment testing. In the 1980s, PharmChem applied those procedures to workplace drug testing and developed the detailed testing procedures that were validated by the U.S. Supreme Court in its landmark decision National Treasury Employees Union v. Von Raab, 489 U.S. 656, 109 S. Ct. 1384, 103 L. Ed. 2d 685 (1989). In 1988, those procedures were incorporated into the regulations adopted by the U.S. Department of Health and Human Services for all federal workplace drug testing.

Today, PharmChem has developed the PharmChek™ sweat patch drug detection system, a new way to detect the use of illegal drugs and alcohol in a manner which substantially extends the detection period over urine testing, is less invasive of employee privacy than urine testing, and is more cost-effective.

Design and Operation of the PharmChek™ Sweat Patch

Researchers discovered some time ago that drugs a person ingests are later excreted in that person's sweat. By capturing sweat over a period of time, therefore, scientists can learn whether an individual recently has ingested an illicit drug or alcohol. PharmChem, in conjunction with Sudormed, Inc., a medical device company,

has developed a practical way to capture sweat for testing. Known as the PharmChek™ sweat patch, this device works by collecting non-volatile components of sweat, including drugs of abuse.

The patch looks like a two-inch by three-inch bandage, and consists of an adhesive plastic film that holds an absorbent pad in place against the skin. The patch is manufactured by 3M and uses technology and adhesives similar to their widely used wound dressings.

The adhesive portion of the patch is a semi-permeable barrier that allows oxygen, carbon dioxide, and water vapor to pass through so that the skin underneath can breathe normally. Larger molecules (such as drugs) are trapped in the absorbent pad portion of the patch. The patch is carefully designed so that contaminants from the environment cannot penetrate the adhesive barrier from the outside, and so the patch can be worn during most normal activities (including bathing and swimming, for example).

The patch collects two distinct types of sweat. "Sensible perspiration" is the active, controlled loss of sweat from specific glands in the skin, which typically occurs when a person is physically active. "Insensible perspiration" is the passive, uncontrolled loss of sweat which occurs whether or not a person is physically active. Because people typically produce 300 - 700 milliliters of insensible sweat each day, from all over the body, the absorbent pad in the patch can be expected to trap the analytes from at least 2 milliliters of sweat per week. Any sensible perspiration only adds to the amount of sweat collected.

The patch can be worn on the upper outer arm, or on the lower midriff. It should be worn for a minimum of 24 hours to insure that a adequate amount of sweat is collected, but may be worn for a period of up to two weeks. The skin where the patch is to be worn is cleaned with an alcohol wipe prior to application. Studies of the patch in use indicate that the adhesive used in PharmChek™ is very well tolerated; it is very uncommon for individuals to have any skin sensitivity to the patch.

The patch is tamper-evident if applied correctly, and each patch is imprinted with a unique number to aid in chain-of-custody and identification. After the patch is removed, the absorbent pad is removed from the patch and sent to PharmChem Laboratories to be tested for drugs of abuse. Clinical studies have shown that drugs and drug metabolites on the pad are stable for days at room temperature and months in the freezer, thus obviating the need for highly specialized and expensive packaging or shipping.

Once the pad is received at PharmChem, any drugs present are washed from it into an extraction solvent (liquid). The liquid is then tested by immunoassays similar to those used in testing urine samples. The liquid is tested for five specific drugs: cocaine, opiates, amphetamines, PCP, and marijuana. Positive immunoassay results are confirmed by gas chromatography/mass spectrometry (GC/MS), as are urine tests.

Because the sweat patch is capable of detecting drug use over the entire period of time during which it is worn, it is expected to prove particularly useful for detection and deterrence when used in a rehabilitation setting, as it should prove a disincentive toward drug use during the period in which it is worn.

Improvement Over Urine Testing for Drugs of Abuse

The PharmChek™ sweat patch provides several distinct advantages over urine testing:

- * **First and foremost, the collection process generally is perceived to be less invasive than collection of urine samples.**
- * **Second, the sweat patch retains any drug used just before its wear period until the patch is removed, usually one week. Urine testing is capable of detecting drug use for a shorter period of time, roughly 12-to-72 hours after the last use of the drug. Therefore, the sweat patch is more likely to identify drug users than even intensive urine testing.**
- * **Third, the molecules of the actual "parent" drug, as well as the drug's metabolites, can be collected and identified in sweat. Urine tests, by contrast, typically detect only a drug's metabolites. The detection of the parent drug is particularly useful in distinguishing between the use of heroin and the use of other products containing opiates which may be legally prescribed.**
- * **Fourth and finally, while individuals can attempt to beat urine testing by consuming large amounts of fluid in an attempt to "flush" their systems, sweat is not susceptible to such adulteration efforts and therefore may be more accurate in that there will be fewer "false negative" tests.**

The sweat patch is easy to apply and remove, and typically does not raise the same privacy concerns that many individuals consider offensive in urine testing.

For example, in studies of sweat patches used on individuals' upper arms, there was no effort to ensure that same-sex laboratory personnel applied or removed the patch, and no reported complaints regarding having members of the opposite sex perform these procedures.

As mentioned earlier, urine testing typically can detect only drug use which has occurred within the 12-to-72 hours previous to specimen collection. In contrast, a sweat patch worn for up to a week is capable of detecting drugs of abuse used during that entire time period. Therefore, the "window" of detection is considerably longer for the sweat patch than is the window for urine testing. This translates into an improved opportunity for detection.

In a study of the patch conducted in a prison setting (the Michigan Department of Corrections study, which I discuss in greater detail later in this testimony), the patch was 39% more effective at detecting drug use than was urine testing, even though the urine testing was conducted roughly three times as often as was sweat patch testing.

Because of the longer detection period available with the sweat patch, testing for illicit drug use with the sweat patch also may carry a greater deterrent value than urine testing provides. While it is possible that so-called "casual" drug users will be able to discontinue the use of illicit drugs during the time the patch is being worn, such a deterrent effect is to be desired and is one of the primary benefits of corporate substance abuse testing programs at any rate.

Drugs of abuse secreted through sweat often appear as molecules of the original or "parent" drug rather than, or in addition to, molecules of the parent drug's metabolite. By contrast again, urine testing generally is limited to detecting metabolites of drugs.

This fact is particularly significant with regard to testing for heroin use. In urine, heroin typically is detected by the presence of morphine, a metabolite. Also present in urine, for a very few hours, is a chemical known as 6-AM, or 6-acetylmorphine, which is unique to heroin. It is very difficult to "trap" 6-AM in a urine test so as to be absolutely sure that the drug consumed was heroin, rather than another, possibly legal, opiate derivative. When the PharmChek™ patch is used, heroin molecules themselves are trapped, as well as 6-AM, eliminating the possibility that codeine, poppy seeds, or other opiate molecules are responsible for the positive test. Therefore, the PharmChek™ sweat patch is likely to be considerably more accurate and economical in identifying heroin abusers than is urine testing. This is particularly significant because heroin use is, unfortunately, on the increase, and use is projected to continue to increase in the near future.

Pilot Program: Michigan Department of Corrections

In December 1994 PharmChem conducted an extensive study of the efficacy of the PharmChek™ sweat patch in conjunction with the Michigan Department of Corrections' criminal justice program. The project sought to compare the positive rates of sweat patches and urine specimens, determine the durability of the patch in

use, determine the ease of patch application and removal, and determine the acceptance of the patch by both prisoners and corrections staff. The results of the study were extremely encouraging.

The PharmChek™ patches were applied to the study participants for either seven or 14 days. After removal, the pads inside the patches were shipped to PharmChem for analysis. Once the pad had been flushed with fluid and screened for the presence of drugs, initial positive results were confirmed.

Intensive urine testing was conducted concurrent with the sweat patch testing, each individual submitting a sample approximately once every three days. The cutoff levels used to determine positive results using urine samples were those approved by the Substance Abuse and Mental Health Services Administration for federal workplace programs. Cutoff levels for drugs found in sweat were considerably lower because of the limited amount of fluid available for testing. Urine samples collected two days before the application of the sweat patch, during patch wear, and two days after the patch was removed were correlated to the patch's results for analysis.

The results of the study were instructive: the patch testing detected 39 percent more drug users than did urine testing, even when the data was not adjusted for the fact that almost three times the number of urine specimens were collected than patches. Overall, 140 patches from 95 subjects were screened and confirmed positive for drug use, representing a nine percent positive rate. By contrast, only 104 urine specimens from 69 subjects were confirmed positive, representing a 6.5 percent positive rate.

The patch detected more than four times as many cocaine users as did urine testing. A total of 5.8 percent of the subjects tested with the patch were positive for cocaine, while 1.4 percent of the subjects tested by urine were positive for cocaine.

While the patch detected about the same number of opiate users as urine testing, the patch test provided confirmation of heroin use by more than 60 percent of the positive subjects.

Two patches were positive for amphetamines; no urine specimens were positive for amphetamines.

Finally, while patch testing was three times less effective in detecting marijuana use in the program, the test technology for THC (the psychoactive ingredient in marijuana) detection has since been significantly modified to compensate based on analysis of the data.

The study also indicated that the patches may be worn effectively. In 85 percent of the cases in which wear data was reported on the chain-of-custody form, the patch was worn without discomfort or detachment. However, in some high-security facilities prisoners were more likely to refuse to wear the patches, and they had a greater incidence of the patch "falling off" than those prisoners who were participating in a work-release program.

Additional Studies and Supporting Research

As noted earlier, the Food and Drug Administration of the United States Department of Agriculture has now approved the sweat patch for purposes of testing

for cocaine, opiates (including heroin), amphetamines (including methamphetamines), PCP (phencyclidine), and THC (marijuana).

The PharmChek™ sweat patch drug test also has been studied in a number of different clinical settings. For example, comparative studies of urine testing versus sweat patch testing were initiated at the United States Probation Office and the United States Pretrial Service Office, Central District of California, and at the California State Department of Corrections, Parole, and Community Services Division.

In addition, a number of researchers have performed their own experiments using the sweat patch. For example, Dr. Edward J. Cone, Chief of the Chemistry and Drug Metabolism Section at the Addiction Research Center of the National Institute on Drug Abuse, and his colleagues have performed extensive research on the ability of the sweat patch to detect heroin and cocaine, and their metabolites. They determined that concentrations of cocaine in sweat rise in apparent relation to the size of the administered dose. They also found that heroin is excreted in sweat, as is 6-acetylmorphine, the metabolite specific to heroin. Dr. Cone concluded that testing individuals for illicit drugs with sweat patches worn continually for a week could provide effective coverage for detection of any abuse of illicit drugs.

In addition, scholarly articles on the potential of the PharmChek™ sweat patch have been published by researchers Marcelline Burns of the Southern California Research Institute and Randall C. Baselt of the Chemical Toxicology Institute regarding the effectiveness of sweat patch testing for detecting cocaine use; by Vina Speihler of Speihler & Associates and John Fay of STC Diagnostics, and their colleagues,

regarding the use of immunoassay procedures to detect drugs of abuse in sweat; and by Pascal Kintz, Antoine Tracqui, Carole Jamey, and Patrice Mangin of the Institute de Medecine Legal in Strasbourg, France, who have published the results of a study finding that codeine and phenobarbital (a barbiturate) use can be detected accurately using the PharmChek™ sweat patch.

Ongoing Research

A number of other drug-detection programs have begun pilot studies to evaluate the utility of the PharmChek technology in their environment. A notable example is the *Federal Corrections and Supervision Division of the United States Courts*. This agency is responsible for pre- and post-trial supervision of arrestees in the federal justice system, and has been conducting pilot studies in 11 different judicial districts across the country. Based upon demonstrated utility, the technique will be made available to all districts for pilot evaluation.

Conclusion

PharmChem appreciates this opportunity to testify before the Subcommittee on National Security, International Affairs, and Criminal Justice regarding its ongoing efforts to assist in the detection and deterrence of illicit drug use, and in particular regarding its latest scientific and technical success, the PharmChek™ sweat patch. We are confident that the sweat patch will prove to be a useful tool, particularly for employers who seek to eliminate substance abuse through detection, deterrence, and rehabilitation.

We commend you, Mr. Chairman, for your attention to this critical issue and support your efforts to ensure that the employer community continues its highly commendable efforts to create incentives for employees to get and stay off drugs, and we would be happy to assist the Subcommittee in any appropriate manner in its consideration of legislation affecting workplace substance abuse prevention programs, emerging technologies for detection of substance abuse, and employers' legitimate and necessary role in addressing drug abuse prevention.

Mr. EHRLICH. Thank you, sir. At this point I would ask unanimous consent that your formal opening statements be submitted as part of the record. Without objection, so ordered.

At this point, I am going to turn the hearing over to Mr. Souder from Indiana, my friend and colleague, and recognize Mrs. Thurman for questions.

Mrs. THURMAN. Thank you. First of all, let me say I am impressed. So often we get so much information here in Congress, and we get a lot of good up-to-date information, and technology certainly has come a long way from what I think we remember in the early eighties when many of these programs first started. But I remember the debate during the eighties, somewhat of the concern of the accuracy of some of the tests, that some people might have been either taking some other, whether over-the-counter or prescription, drugs that may have the same positive results that you might be testing for.

In any one of these products or tests, what is the accuracy now? Have we come further? Are there still those concerns out there? I really would like to hear from all three of you. So take your choice.

Mr. KUBACKI. I will start by talking about hair analysis. Accuracy is an absolutely critical variable, as you point out, and 99 percent is not good enough in this situation because of what we are dealing with. We have our own internal quality assurance of course, but we also have an outside agency that has been submitting samples to us for the last 5 years under a customer's name. So when they come in they are double blind samples. We have been 100 percent in avoiding false positives. That is the real key.

Second, I might add also with the hair test, if I may, that in the instance, again, whenever you are dealing with a human endeavor, there is always the possibility of human error. One of the things I mentioned before with hair testing is that you have the ability to go back a week or two later and test basically the same time period, which ability you don't have with urinalysis, because the 3 days will have lapsed on someone. That safety net testing offers a very, very effective safety net, literally, which is why we call it that.

Mr. LANKFORD. I will answer it for two things, first of all for our product and then the Express Test Network program. For the product, we use a technology that is called ASCEND Multi-immunoassay, which is based on monoclonal antibodies, without getting too deep into it. It really goes specifically after the drugs you are looking for without cross-reacting with some of the over-the-counter things you are talking about, but realizing in any drug testing method that the 3 of us here represent there is the opportunity for false positives and false negatives. What we do through the Express Test program and using Triage, if a result is negative on Triage, the employee is put to work immediately. If the result is positive, it is forwarded to the reference laboratory for gas chromatography confirmation, which has been the only legally accepted method for verifying positive results through the judicial system for employees. So that is how we guarantee that you don't have the false positive issues.

Mr. FORTNER. Let me respond to your question first by giving you some background of PharmChem so you can see where we have

developed on this. Back in the seventies, PharmChem Laboratories was the first lab to develop extensive chain of custody bar code procedures for testing individuals. In the eighties, PharmChem applied those procedures to workplace testing. We were the laboratory that provided the detailed procedures and practices validated by the U.S. Supreme Court in a landmark decision in *National Treasury Employees Union v. Von Raab*. This was the approach in immunoassay screening, followed by a positive confirmation using gas chromatography/mass spectrometry, or the GCMS. In 1978, those procedures were incorporated into the regulations by the Department of Health and Human Services.

Now, in response to your question, in the accuracy of this particular application, those are the same procedures that are used in testing sweat, extensive bar code, immunoassay screen, automatic confirmation using gas chromatography/mass spectrometry that were used in the establishment of the Federal testing program as it currently exists today.

I don't know that as a scientist I could come before you and say that things are always going to be 100 percent, but they are certainly at a 99.99999. And the clinical studies and the paired urine studies have shown this to be far superior in terms of accuracy and detection of drugs than the urine testing methodologies currently out there in use today.

Mrs. THURMAN. In the questions that we asked before, there was a concern about cost, because of the differences within the size of companies, particularly as it relates to some of the small businesses, where many of our folks are employed. You probably all know what each one costs, but I don't, so would you please tell me?

Mr. KUBACKI. Yes. Hair analysis would cost roughly around \$50 per test. It would go down with volume.

Mr. LANKFORD. For our system, about \$20 to \$25 for the actual Triage programs. The Express Test program, where the clinic is administering it, usually around \$30 to \$35.

Mr. FORTNER. The combined test, first of all, urine testing, those are generally in the range of \$25 to \$40. The patch technology is in that same range, if not a little bit lower than that, because it gives you the advantage of if you have individuals that are in constant monitoring mechanisms where you want to test them frequently, let's say you have somebody that is in a highly safety sensitive position, referred to as an extreme safety sensitive position, and you want to test them several times a week, the advantage is that a patch could be worn for a constant period of 7 days, 14 days, and very effectively replace 2 to 3 urine tests. It could become a more cost effective mechanism to address very specific areas.

Mrs. THURMAN. The red light is on. Thank you.

Mr. SOUDER [presiding]. Thank you. Mr. Kubacki, one of the things, I wonder if maybe the increase in hair testing is why we see so many people with shaved heads, not to mention some at less.

Mr. KUBACKI. You can use body hair.

Mr. SOUDER. That was going to be a serious question with that. What do you do with those who have shaved their heads or are bald?

Mr. KUBACKI. You would use body hair. You talk about under arm, on the arm, on the chest, so that usually eliminates that.

Mr. SOUDER. Similar accuracy?

Mr. KUBACKI. Yes. Absolutely. The exact same test.

Mr. SOUDER. On hair testing, does the accuracy decline the farther out from when the drug was used from the date they are being tested? You said you can go back and tell for several weeks back. Does the accuracy decline as you go backward?

Mr. KUBACKI. Yes, you could tell—for example, if we had a foot long length of hair that somebody submitted, that would really be 12 inches, a couple years worth.

Mr. SOUDER. You could tell the hippies from back in the sixties?

Mr. KUBACKI. Which is why we only use 90 days, by the way. But to our knowledge, there have been some studies that to our knowledge it does not really diminish over time, as a matter of fact, nor even over a long period of time. We did some hair follicles from the Victorian poet John Keats, who had been dead 165 years, and found traces of opiates in his system 2 months prior to his death. This is not to portray Mr. Keats as a drug abuser, but it is in there forever. It stays in there forever, 165 years later.

Mr. SOUDER. What are the primary objections and why do you feel that the HHS is being so aggressive in not allowing hair testing?

Mr. KUBACKI. It is a question that we ask ourselves every day, that with the preponderance of evidence, both in the scientific community, in the courts at the Federal and State level, why would they continue to drag their feet on this issue? I really don't know. But I can tell you obviously I am frustrated as a person involved directly in this enterprise, in this area. But I am also outraged as a citizen.

Mr. SOUDER. Mr. Lankford and Mr. Fortner, one of the concerns is that HHS has changed or proposed changing the cutoff for opiates in urine testing for heroin. I don't know that it affects the sweat testing as much. But how much of a concern is that in your ability to track heroin?

Mr. LANKFORD. That is a very good question, and it is a question we felt bore putting to our customer base, and that is what we did in the last 3 months. Some of that data is still coming in. On the initial data that has come through, employers as a whole are averse to some of those recommendations due to the fact that they feel like they will lose some of the effectiveness of their program with that threshold being changed on that particular assay.

So we are at this point waiting to see. But one of the questions that we want to do was to really find out what our employers want, and then go from there with our plans.

Mr. SOUDER. Do they have any rationale, other than the lawsuits?

Mr. LANKFORD. As far as the employers?

Mr. SOUDER. HHS, in changing this guideline, is it based on anything other than lawsuits? People are actually winning the lawsuits? Is there some inaccuracy in the testing or is it just to try to avoid the litigation?

Mr. LANKFORD. A variety of things. Part of it was as a result of the medical officers and the number of reviews they do on specimens that turn out to be maybe different from what they thought

initially. A lot of it appears to be economic issues involved in doing the testing.

Mr. SOUDER. Do you have any additional things?

Mr. FORTNER. As it happens, PharmChem is one of the two labs in the country that are certified by Department of Defense. We actually test military personnel. In addition, it was PharmChem's data in conjunction with the Department of Defense that HHS looked at in terms of reviewing opiate positives. Several years ago we conducted some rather extensive studies of all opiates that were positive across the country, looking for the presence of codeine, morphine and the major urinary metabolite of heroin. We actually presented this data at some of the national meetings.

The reasons for raising the opiate levels are certainly some economics in terms of costs of medical review officers to review positives, laboratories to test and confirm low level opiates. Currently the level is at 300. The major impetus was to eliminate a lot of the opiate positives that were allegedly due to codeine and/or poppy seed ingestion. Certainly depending upon what portion of the world that comes from, you can get levels up to 2,000 nanograms of morphine from poppy seed ingestion. The Department of Defense is currently using a screen of 2,000 confirming for codeine at 2,000 and morphine at 4,000 to eliminate that issue. When someone truly uses heroin, you get much higher levels.

The danger, as you suggested, Mr. Chairman, is that you will miss a number of people that come under that window. Certainly that gets addressed in the patch, because it is a cumulative process. That is why in the urine testing we submitted recommendations to HHS that if you are really concerned about heroin use, because of the medical review officers overturning codeine positives, what you really should be testing for is just the heroin metabolite and not going through the additional cost of looking for codeine and morphine levels.

Mr. SOUDER. As a final question, Mr. Kubacki can start this and if either of the other two have a comment on it, one of the growing problems is methamphetamine. As we do more interdiction, we will see more. We have a big increase in Indiana, we heard that on Monday, as well as Illinois. How accurate are your tests in being able to pick up the differences? Methamphetamine has products similar to Sudafed in them. How much in hair testing can you pick up that differentiation? Is that a danger in either of the other kinds of tests, that some legal drugs can be tested as illegal drugs, and how accurate will be the methamphetamine test?

Mr. KUBACKI. Well, certainly ours is 100 percent in methamphetamine, because keep in mind we are looking for the metabolite and not just the drug, so that is very critical. I might also add we have also seen in the results of the testing we do an increase in methamphetamine just in general to confirm what you learned the other day.

Mr. LANKFORD. Similarly, the antibodies we use are targeted to the metabolites. Therefore, we pick up methamphetamine at the same level as amphetamine. It has been recognized throughout that this product has had some extreme advantages in methamphetamine detection. We see the same trends, too.

Mr. FORTNER. I certainly concur. Being from California, I can say that methamphetamine use, not just in California, but the entire western United States is rampant. It is the predominant drug in many States. The patch and our programs actually detected methamphetamine use in several cases where the urines were negative. Because it is the same technology that we submitted in the U.S. Supreme Court decision and under HHS, it is 100 percent.

Mr. SOUDER. Do you have any more questions?

Mrs. THURMAN. I am interested in this area because I think this is an important area, because it is really getting to where people feel their lives are being invaded, and they do, not from the fact of illegal drugs, but something that—maybe some crisis that has happened in their life and they are under a doctor's care that their employer doesn't know about, and probably doesn't need to know about, quite honestly, as long as their job performance is all right.

I am a little concerned about that. I would like to hear your response on how do we make sure if somebody, for example, is on Prozac or some other form, but not just that it might show up in the test, but when you do the analysis, what of that information is given to its employer?

Mr. KUBACKI. Mrs. Thurman, may I address that? That is a very, very critical and important concern. Our test, just speaking for ours alone, specifically goes in and says is there cocaine, yes or no? Is there marijuana, yes or no? As opposed to saying what is all in this basket of things, this hair, that someone is pregnant and they are taking a heart medication, et cetera.

So, No. 1, it is just very specific. Of course, we know of different cross-reactions and all that, the process we use allows for that.

Second is that the results as they are sent back to the employer will just have in this case what are called the NIDA 5 drugs, which we have mentioned before, and it will just say positive or negative, and of course give a quantification. But there is no room to say, by the way, this person also has heart medication or something else like that. So it is very specific to those specific five drugs. Those are the only ones looked at and the only ones reported.

Mr. LANKFORD. Three things to that. No. 1, along with what you are saying, that is part of the Express Test program that made it so successful. Any time the testing is being administered, it is being administered in a medical facility by physicians or nursing staff. You get the element of professionalism there that helps in that regard.

The second thing is that we do again target just the drugs and the metabolites that you are detecting within that panel that you have in your hands.

We have actually tested over 700 different compounds for cross-reactivity, such as Prozac and some other things, to show there is no cross reactivity there that would cause those problems.

Last, again, the way the procedure is handled, it is a two-tier process. The initial screen, if it is negative, the employee gets those results reported back. If it is positive, it goes on for gas chromatography confirmation and it goes through the process of reporting back to the companies.

Mr. FORTNER. A very similar approach. Bear in mind the Federal guidelines incorporate this individual called the medical review of-

ficer, and they are the individual charged with the final reporting of a positive to the employer. So the medical review officer gets what we call a chemical positive from a testing laboratory. They do an investigation. If the individual shows a legitimate prescription for codeine or any of the other drugs that may be tested, the medical review officer overrides the laboratory chemical positive and sends a negative back to the employer. So the employer never knows that the individual tested positive for codeine, even though they had a legitimate prescription. That is a very integral part of the Federal workplace program.

Mrs. THURMAN. Since that has been instituted, have there been any times where there has been a problem with that, that any of you know of?

Mr. FORTNER. Well, in subsequent arbitrations that I have been involved in, there become issues of whether the employee produced a legitimate prescription for the drug. It is carried to a further extent. Different States and certain cities that we do some very large ones—

Mrs. THURMAN. Can I interrupt? That would be through the medical examiner and the participant?

Mr. FORTNER. Yes, ma'am, not the employer. Literally they interpret it as do you have a prescription for this drug. If you use your spouse's prescription, they consider that as illegal use of a controlled substance.

Mrs. THURMAN. So if I had codeine around my house or an ache in my shoulder or something and wanted to go to sleep one night, and took something like that that was prescribed, I could be—

Mr. FORTNER. You could potentially be in violation of your company's drug testing policy, not so much that you used it, because most of the medical review officers certainly look at the prescriptions and it will say "use as needed," depending on what it is prescribed for. If it happens to be your spouse's medication, you could take a different direction, because that becomes an area of use of a controlled substance without a legitimate prescription.

Mrs. THURMAN. Any others that you know of? Did he kind of summarize what your experience has been?

Mr. KUBACKI. No, nothing to add to that.

Mrs. THURMAN. What if it is your own prescription and it is out-of-date?

Mr. FORTNER. Certainly I have had those come across in arbitrations and hearings. Generally the courts or arbitrators have decided in favor of the individual. It was a legitimate prescription at one time, depending on how the arbitrator and the court looks at it in terms of legitimate use. Often these prescriptions say "use as needed." Even though they have an expiration date on them, in reality it means you are just not going to get as much benefit from the medication because it may not be stable and decompose.

Mrs. THURMAN. Thank you very much. I appreciate your help today.

Mr. SOUDER. Are those protections legally required or can an employer change what he is asking for? In other words, Mr. Kubacki said you have certain categories you respond to. What if the employer asked are there any other substances?

Mr. KUBACKI. First of all, we would not respond at all because we have no idea. By the way, we don't get names, we only get numbers. So we have not a clue as to who the person is. Second, as I said, ours are so specific to those specific drugs and metabolites that we couldn't respond.

Mr. SOUDER. An employer couldn't ask, "test for Prozac?"

Mr. KUBACKI. We don't. We do the basic five. That is all we do at this point.

Mr. SOUDER. I thank you all very much for being here. It is very useful. As we go through all the different angles and get into probably more prevention and treatment over time, this may trigger other things as well. I very much appreciate your coming.

One more question.

Mrs. THURMAN. It raised an issue I think that is really important here. You three have testified before this committee that you do the five, and that is all you test for. Because this goes back to the issue of whether it is certified, who certifies it and those kinds of things. Are there occasions where an employer would go outside of the three of you to some other laboratory that would be able to ascertain that information?

Mr. FORTNER. In terms of testing somebody for Prozac?

Mrs. THURMAN. For drug testing.

Mr. FORTNER. By and large the vast amount of testing done in the United States is modeled after the SAMHSA Program, so it is the NIDA 5. There is certainly testing done outside the NIDA 5. Clients test for 7 drugs, or 10 drugs, including prescription drugs like methadone, barbiturates, or Darvon.

Interestingly, one of the points is that ADA has come out with a interpretation that strictly prohibits, No. 1, individuals listing all medications that you are taking for fear that that may be used against them without support of a positive drug test.

Mrs. THURMAN. But we do need to be careful with that at any time we are putting legislation together and in a test, that we make it very clear as to what we are testing for, so that even outside of the three of you, or the three products, that we need to be very sensitive to that issue?

Mr. KUBACKI. Yes.

Mr. FORTNER. Sure.

Mr. LANKFORD. Absolutely.

Mr. SOUDER. We thank you very much for coming. If you want to submit any additional testimony or supplemental answers to questions, we will leave the hearing record open for at least 3 days, maybe up to 2 weeks, depending on the type of materials. We also want to thank the Institute for a Drug-Free Workplace for helping us with this, in talking through the legislation, and we may have additional hearings later on to further explore some of these issues.

With that, the committee stands adjourned.

[Whereupon, at 12:40 p.m., the subcommittee was adjourned.]