Statement of the U.S. Chamber of Commerce

ON: **"SECRET RULE: IMPACT OF THE DEPARTMENT OF LABOR'S WORKER HEALTH RISK ASSESSMENT PROPOSAL"**

TO: **THE HOUSE SUBCOMMITTEE ON WORKFORCE PROTECTIONS OF THE COMMITTEE ON EDUCATION AND LABOR**

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THE UNITED STATES CHAMBER OF COMMERCE

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The Chamber's mission is to advance human progress through an economic, political and social system based on individual freedom, incentive, initiative, opportunity and responsibility.

The U.S. Chamber of Commerce is the world's largest business federation, representing more than three million businesses and organizations of every size, sector, and region.

More than 96 percent of the Chamber's members are small businesses with 100 or fewer employees, 70 percent of which have 10 or fewer employees. Yet, virtually all of the nation's largest companies are also active members. We are particularly cognizant of the problems of smaller businesses, as well as issues facing the business community at large.

Besides representing a cross-section of the American business community in terms of number of employees, the Chamber represents a wide management spectrum by type of business and location. Each major classification of American business— manufacturing, retailing, services, construction, wholesaling, and finance—is represented. Also, the Chamber has substantial membership in all 50 states.

The Chamber's international reach is substantial as well. It believes that global interdependence provides an opportunity, not a threat. In addition to the U.S. Chamber of Commerce's 96 American Chambers of Commerce abroad, an increasing number of members are engaged in the export and import of both goods and services and have ongoing investment activities. The Chamber favors strengthened international competitiveness and opposes artificial U.S. and foreign barriers to international business.

Positions on national issues are developed by a cross-section of Chamber members serving on committees, subcommittees, and task forces. More than 1,000 business people participate in this process.

Testimony of Randel K. Johnson,

Vice President of Labor, Immigration and Employee Benefits

U.S. Chamber of Commerce

Before the

House Committee on Education and Labor

Subcommittee on Workforce Protections

"Secret Rule: Impact of the Department of Labor's Worker Health Risk Assessment Proposal"

September 17, 2008

Madame Chairwoman, members of the committee, I am Randy Johnson, Vice President for Labor, Immigration and Employee Benefits at the U.S. Chamber of Commerce. Before coming to the Chamber, I was the Labor Policy Coordinator and Counsel for this committee when it was chaired by Representative Goodling from Pennsylvania. Prior to working for this committee, I was at the Department of Labor working in the Solicitor's Office on regulatory matters, including OSHA regulations such as benzene, formaldehyde, the Hazard Communication Standard, asbestos/non-asbestisform tremolite and the Personal Exposure Limit (PEL) project rulemaking. It was one of my personal disappointments that the PEL rulemaking was struck down by the courts. Based on my experience, what the Department of Labor has proposed for comment appears useful to all parties interested in OSHA and MSHA rulemakings, and is consistent with the principles of sound rulemakings as expressed during this and previous administrations.

An agency of the federal government shall only have the power to impose a requirement on a private citizen through a regulation, either an individual, or in the case of OSHA and MSHA an employer, where it has made a compelling and public case for the need for the regulation, and demonstrating that the best available science and data support such a regulation. While taken for granted in Washington, DC, the power to regulate is an awesome one, and often underappreciated by decision makers who rarely have to live under these regulations. Inherent in

these principles is that the public shall have the opportunity to examine and critically review the materials supporting the agency's intended action. OSHA's and MSHA's rulemaking processes as well as the broader Administrative Procedure Act are built on this foundation. The Department of Labor is proposing to ensure that, to the greatest degree possible, these principles of best data underlying a regulation and maximum transparency are achieved, and the U.S. Chamber unequivocally supports this proposal.

As a preliminary matter, I wish to emphasize what should be obvious in all regulations, but often goes unnoticed—which is that the burdens and costs of this proposal (along with its benefits) should be viewed in the context of the numerous and complex regulations businesses must already comply with. Currently, there are more than 100,000 regulations on the books with an estimated cost of over $1.11 trillion to the public. Thousands of pages of fine print of the Code of Federal Regulations, which are then interpreted by agency directives, and ultimately by the courts against the backdrop of numerous statutes, truly present a huge compliance burden to business which is daunting to any employer. State and local laws add to the confusion. Even the best intentioned employer and even those well staffed by lawyers can make good faith compliance errors which agencies and plaintiffs' lawyers will make much ado over, to say the least. OSHA regulations are but one small part of this gigantic puzzle and all the more reason they should be carefully justified before issuance.

To the extent that a risk assessment by OSHA or MSHA is not adequately supported by scientific data and results in a new regulation that imposes more burdens on employers without producing a commensurate improvement in worker protection, employers will be further disadvantaged and have that many fewer resources for creating new jobs and compensating employees. Indeed, much will be expended on attorney fees to determine, in good faith, if there even was an error, given the vagueness of many legal requirements.

Unfortunately, one of the major problems of government and its enforcement agencies is that its initiatives tend to be read in isolation and silos, rather than against this backdrop of the huge existing panoply of regulations. Who among us envies the small business person faced with these challenges? Who among us even dare open such a business and putting our assets on the line? We ask that you keep this entire picture in mind as you consider whether to support the Department of Labor's proposal to implement a consistent and transparent risk assessment process.

That being said, what constitutes the level of risk necessary for regulating by OSHA or MSHA is still an issue of debate. The Supreme Court in the "Benzene" decision in 1980 ruled that OSHA must establish that a significant health risk is presented, and that this risk can be lessened or eliminated through some change that can be imposed through regulation.[1] While the Supreme Court established the requirement for finding significant risk, it did not spell out how OSHA was to do so. The Court mused that a one in a billion chance of someone dying from cancer because of drinking chlorinated water would not be significant, but a one in a thousand risk of dying from inhalation of benzene would be significant. Although it may be tempting to mandate such a specific statistical threshold as identifying significant risk, the Chamber believes this would be unwise. The essence of risk assessment is flexibility, as risks need to be evaluated

[1] *Industrial Union Department v. American Petroleum Institute*, 448 U.S. 642 (1980).

in context. The National Research Council's report on OMB's Proposed Bulletin on Risk Assessment in criticizing OMB's proposal stated that "risk assessment is not a monolithic process or a single method. Different technical issues arise in the probability of exposure to a given dose of a chemical….Thus, one size does not fit all, nor can one set of technical guidance make sense for the heterogeneous risk assessments undertaken by federal agencies."[2]

A sound risk assessment is necessary for a good regulation, but getting a poorly supported risk assessment overturned in court is extremely difficult. Courts almost always defer to agencies with respect to their determinations, and in particular to OSHA risk assessments. This heightens the need for OSHA and MSHA to ensure that the science and data underpinning a regulation is adequate.

The principles for good risk assessments have been expressed by a variety of sources over several administrations. Among them, the Presidential/Congressional Commission on Risk Assessment and Risk Management, created under the Clean Air Act Amendments of 1990, concluded that OSHA has "relied upon a case-by-case approach for performing risk assessment and risk characterization."[3] The Department of Labor's proposal seeks to systematize this process, moving beyond the "case-by-case" approach cited by the Commission.

Another source for the principles of risk assessment is the Memorandum for Heads of Executive Departments and Agencies issued by OMB and the Office of Science and Technology Policy last September. The Department's proposal reflects the principles stated in that memo closely. The top principle is that agencies "should employ the best reasonably obtainable scientific information to assess risks to health, safety and the environment,"[4] which is the central thrust of the Department of Labor's proposal. The memo also makes clear that assumptions and uncertainties should be stated explicitly. This is also one of the provisions of the Department of Labor's proposed risk assessment regulation.

Furthermore, the proposal reflects the recommendations of the National Research Council in its review of OMB's proposed risk assessment bulletin. The NRC concluded that agencies "describe, develop, and coordinate their own technical risk assessment guidance,"[5] instead of OMB trying to institute a generic risk assessment process. The NRC stated that "long-established concepts and practices that have defined risk assessment as a process…involve hazard identification, hazard characterization or dose-response assessment, exposure assessment and risk characterization."[6] These terms are the exact requirements for a risk assessment in the proposed regulation under section 2.9(c)(4).

The proposal is also consistent with the Administration's and Department of Labor's guidelines on Information Quality, all of which stress the use of the best available data at the time of the rulemaking. Among the areas where the best available data is to be used is how long

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[2] 2007 NAS Report on the Proposed Risk Assessment Bulletin, Executive Summary, page 7.
[3] Presidential/Congressional Commission on Risk Assessment and Risk Management, *Framework for Environmental Health Risk Management*, 2 Final Report 133 (1997).
[4] OMB/OSTP Memorandum for the Heads of Executive Departments and Agencies, *Updated Principles for Risk Analysis (2007) M–07–24.*
[5] 2007 NAS Report on the Proposed Risk Assessment Bulletin, Executive Summary, page 7.
[6] *Id.* at 3.

an employee stays at a specific job. While the Department has retreated from the position taken in the draft proposal that was leaked, which explicitly moved away from the assumption that workers stay at their jobs for 45 years, the published proposal still makes clear that OSHA and MSHA are to use best available scientific data including industry-by-industry evidence describing working life exposures. Relying on a stale, inaccurate assumption when better, more current data is available simply makes no sense.

The proposed regulation also codifies the 1980 "benzene" decision by the Supreme Court, which established the principle that OSHA must find a "significant risk" that can be lessened or eliminated by a change in practices before promulgating any health standard. As mentioned above, the Supreme Court did not define "significant risk," leaving that up to OSHA. In this proposed regulation, DOL is establishing a consistent process by which OSHA and MSHA will describe how significant risk was determined for any given health standard.

Not only is this proposal well reasoned, necessary, and overdue, but the Department should be commended for its approach to implementing it. As this is only an internal policy guideline, it could have been implemented without seeking public comment through a notice of proposed rulemaking as they have done. If the Department had pursued that approach, the title of today's hearing might have been appropriate—this could have been seen as a "secret" rulemaking. As they have chosen to do this through a fully public procedure, soliciting comments and input as with any other regulation, calling this a secret regulation is unwarranted and suggests a desperate intent to find something wrong with the proposal.

What the Department has proposed is very simple—provide more information to the public and those interested in a specific health standard rulemaking, make sure that any assumptions and uncertainties are identified and explained, and give interested parties the opportunity to review and comment on the science and data upon which the agency is relying. These goals would be achieved through the use of mandatory Advanced Notice of Proposed Rulemakings (ANPRMs), except in the case of an emergency temporary standard. [7] Requiring ANPRMs and thus opening up OSHA's and MSHA's scientific and data support to public scrutiny is similar to the way that OSHA must disclose its support for a regulation during the Small Business Regulatory Enforcement Fairness Act (SBREFA) review panels that are required if a regulation is determined to have a significant economic impact on a substantial number of small entities. The SBREFA process has been criticized by organized labor as giving small businesses too much access to the rulemaking process. By requiring that OSHA and MSHA issue ANPRMs for health standards (not safety standards), the Department is giving the unions and all others not part of the SBREFA review process the same opportunity to review the science and data upon which the agencies are relying and comment on these materials at a time before the regulation has been drafted and all but formed. Commenting at that point in the process is essential, since once a regulation is drafted and proposed, getting OSHA or MSHA to significantly revise a regulation or withdraw it because of inadequate scientific support is all but impossible.

[7] Criteria and procedures for emergency temporary standards are found under section 6(c) of the OSH Act, and section 101 (b)(1) of the Mine Act.

The Department is also requiring that all relevant documents related to the rulemaking be posted in an easily accessed and well organized format at www.regulations.gov – the federal government's central internet rulemaking portal. This sounds so fundamental in this era of instant electronic access to an enormous array of authorities and data that specifying this would seem redundant or unnecessary. However, there are examples where OSHA did not make key materials available in a timely manner during major rulemakings. The most egregious of these was during the ergonomics rulemaking when key studies were not made available for review during the comment process, frustrating those who were trying to develop statements and questions in preparation for the administrative hearings held by OSHA.

The proposed regulation from the Department of Labor specifying how risk assessments for health standards are to be done and providing greater transparency and opportunity for public input is absolutely consistent with the principles of risk assessments, sound rulemaking, and above all, good government. The risk assessment drives the entire process of regulation from the go/no go decision to what level of protection and remedial action may be required. It is imperative the risk assessment be done using the best available and most current data. The Department's proposal establishes a process that will yield sound and credible risk assessments. I look forward to responding to your questions.