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OSHA LISTENS MEETING:

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Department of Labor Auditorium

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200 Constitution Avenue, NW

12

Washington, D.C.

13

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14

Afternoon Session Part II

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1 DAVID MICHAELS: All right. So thank you all
2 for staying with us. I think this is -- sometimes -- I
3 apologize for running so long, but has been a
4 fascinating and important session, so I -- I certainly
5 haven't had trouble following and staying awake. So I'm
6 glad you're still with us and let's go to our next
7 panel. Panel number ten.

8 JOHN MASARICK: My name is John Masarick. I'm
9 with IEC, Independent Electrical Contractors. I'd like
10 to thank Dr. Michaels, and the panel for -- for inviting
11 us to participate in OSHA Listens.

12 IEC has a alliance with OSHA. Independent
13 Electrical Contractors is a national organization with
14 68 chapters with more than 3,800 members representing
15 100,000 workers. One of the main things that we do is
16 we train approximately 10,000 apprentices a year to
17 become electricians. More than 50 percent of our
18 members are small businesses, and when I say small
19 businesses, I mean less than ten employees, so they're
20 very small.

21 The work they do is residential, industrial,
22 commercial, municipal, hospitals, airports and schools,

1 so we work on a lot of different things. IEC members
2 are committed to health and safety of electrical workers
3 and the well-being of their electrical contracting
4 businesses and customers. For that reason, IEC has been
5 and continues to be an active participant with OSHA and
6 other organizations in continuing this effort to promote
7 safe products, procedures, and work practices that
8 govern our industry.

9 As a result of IEC's commitment to safety, we
10 helped develop the following regulations, so we're very
11 active in National Electrical Code, NFPA 70. We have --
12 we're on all 19 panels. We're also very active in
13 NFPA 70E, Electrical Safety in the Workplace. We have
14 two people that sit on that. We have five -- five seats
15 on the National Electrical Safety Code which deals with
16 utilities. And we're also very active in ANSI, the A10
17 committees.

18 IEC participates in the development of more
19 than a hundred ANSI standards with organizations such as
20 Underwriters Laboratory, National Electrical
21 Manufacturers Association, and also National Electrical
22 Contractors Association. These -- for the most part,

1 these are products or services in our industry.

2 So we're very active in -- in trying to work
3 with the regulations that govern our industry, and for
4 that reason we wanted to get in contact and work with
5 OSHA. One of the keys to the success of IEC's safety
6 program is our alliance with OSHA. We think -- we think
7 a lot of that.

8 Examples of the collaborative efforts between
9 us and OSHA include, we've created an electrical page.
10 We've created two pages -- one's an electrical page, an
11 electrical contractor's page. And together in the last
12 five months those two sites have had 29,000 visitors, so
13 we're very happy with that.

14 We've also worked with OSHA to create e-Tools.
15 We created e-Tools for ergonomic solutions for
16 electrical contractors. In the last five months that
17 site has also had about 4,000 visitors. We also worked
18 with OSHA to create electrical power generation
19 transmission distribution page.

20 In addition to that, other -- there's some
21 other alliance products. An example of that is our
22 jobsite safety handbook which was produced in

1 cooperation with OSHA. It's a little handbook, and it's
2 in both in English and Spanish. And what we've tried to
3 do is one section's in English, and the other side of
4 the page is in Spanish. So if you have a supervisor
5 that's trying to get the message across, he can open to
6 the English page, read it, point to the Spanish page,
7 and the worker can read that and can then try to follow
8 what the supervisor's trying to say. Oh, by the way, we
9 distributed 24,000 of these. And we're getting ready to
10 print another -- another 10,000. They've been very --
11 very good.

12 Also on IEC's website we have several products
13 and links to other products of other alliances, other
14 construction alliances. And in the past -- our counters
15 not working at the present time -- but in the past,
16 we've had over 20,000 visitors per year to -- to those
17 products.

18 Some of the other things that we've worked on
19 with OSHA's been the OSHA workshops, Design For Safety
20 and Fall Prevention. We've also participated in NAOSH
21 Week and National Drug Free Work Week. We're -- IEC is
22 a member of the OSHA Challenge program. Along with that

1 we also participate by sending comments to OSHA on
2 different regulations.

3 As a spokesperson representing more than 3,700
4 workers in our -- of all sectors of the industry in our
5 nation, we are confident that OSHA's alliance program
6 has been a useful tool in improving safe -- jobsite
7 safety for our contractor members and their employees.

8 We think that the two organizations working
9 together can reach more people than the organization --
10 OSHA by itself. We also think that working together,
11 OSHA knows the regulations. We know the industry, and
12 we think we can create an excellent product by the two
13 organizations working together. While I believe one
14 fatality is too many, I'd like to believe that the
15 IEC/OSHA alliance has in some small way been responsible
16 to declining the fatalities in construction for five of
17 the last six years.

18 Just on another subject, I would like to just
19 suggest maybe OSHA provide additional training. And one
20 of the things that I think is needed in the industry is
21 orientation for new workers, maybe if there were an
22 online site that workers could get to.

1 And one other thing that I think has been
2 mentioned before is if OSHA could simplify the OSHA
3 regulations. Our guys are very small contractors. I
4 think Rob Matuga showed the -- the book, the OSHA
5 regulations. If -- if one of our contractors is doing
6 work, and if he's installing a panel box, he needs to
7 come under -- under construction 1926. If he comes back
8 a couple of weeks later, and he's repairing that panel
9 box, he comes in under 1910. It's about the same size
10 regulation.

11 In addition to that, our guys have a book
12 that's just about as thick, the National Electrical
13 Code, that they have to deal with. So there's a lot of
14 work. If it's a small contractor, there's a lot of
15 things he has to keep up with. And anything we can do
16 to keep safety in front of them and make it simpler and
17 easier for them to follow the regulations, the better.
18 Thank you.

19 DAVIS LAYNE: Mr. Secretary, as President
20 Obama said very clearly during his remarks from the
21 economy in January the 28th of 2009, "What makes an idea
22 sound is not whether it's Democratic or Republican, but

1 whether it makes good economic sense for the workers and
2 companies." Good afternoon. My name is Davis Layne. I
3 am the Executive Director of the Voluntary Protection
4 Programs Participants Association. In this role in my
5 35 years with OSHA and retiring as Deputy Assistant
6 Secretary, I am here today to address what the agency
7 can do to enhance and encourage the efforts of
8 employers, workers, and unions to identify and address
9 workplace hazards.

10 Looking at it from the perspectives of the
11 agency, corporate America, as well as the over 900,000
12 workers impacted by VPP, I can testify that the merits
13 of OSHA's Voluntary Protection Programs, VPP, is the
14 answer to your questions. While enforcement only
15 addresses one of the objectives of the Occupational
16 Safety and Health Act, VPP was established on the
17 foundation of three of the thirteen mandates. These
18 requirements are directly related to the development of
19 cooperation between employer and employees to establish
20 a safe and healthful workplace.

21 Increasing OSHA's compliance staffing will
22 help have a positive impact on safety and health in this

1 country. But it cannot be the only tool. GAO issued a
2 report noting that since OSHA can only inspect a small
3 fraction of the nation's workplaces each year, voluntary
4 strategies may provide important opportunities to extend
5 the agency's influence. GAO concluded that OSHA's
6 voluntary compliance strategy shows promising results.

7 VPP is more than a recognition program. It
8 builds on the cooperation between management, labor, and
9 the government, and a joint effort to go above and
10 beyond OSHA's standards to protect workers from
11 unaddressed, inadequate -- inadequately addressed and
12 emerging hazards.

13 Unlike enforcement, VPP is a safety and health
14 management system that addresses real problems in
15 realtime, leading the way for more current safety and
16 health program standards. For instance, VPP addresses
17 ergonomics as a recognized hazard in the workplace. As
18 a matter of fact, our latest publication is dedicated to
19 ergonomic hazards in the workplace, addressing that. It
20 also addresses OSHA's recordkeeping requirements as well
21 as focused on by the current national emphasis program.

22 And furthermore, acting as a force multiplier,

1 VPP frees up resources for OSHA as VPP site
2 representatives become ambassadors for safety and health
3 excellence, engaging in outreach and training so that
4 other sites can improve their safety and health programs
5 as well.

6 As a matter of fact, former Assistant
7 Secretary of Labor Jeffreys stated, "At VPP worksites,
8 workers' safety and health, instead of being regulated
9 to the sidelines or delegated to a single individual is
10 a fundamental part of a company's business. A value as
11 central to success as producing goods and services
12 making a fair profit."

13 VPP works. Our members tell us that.
14 Previous administrations tell us that. GAO reports tell
15 us that. Secretary Solis and Secretary Michaels have
16 publicly declared that they see the value of VPP.

17 Furthermore, in talking about the future of
18 OSHA and the need for more progressive dynamic
19 partnerships where industry takes the lead and helps
20 develop higher standards, what are we really talking
21 about is VPP. Vice President Al Gore stated, "VPP is
22 about working in a partnership with common goals,

1 instead of as adversaries to protect the safety and
2 health of our workers. It's about focusing a lot less
3 on red tape and a lot more on results. Voluntary
4 Protection Programs is the premiere example of a
5 partnership between government, management, and labor."

6 Many participants in the VPP program benefit
7 from the results of getting in to VPP. Employers,
8 employees, the government all benefit through lower
9 injury and illness rates, greater profits, employees
10 going home to their friends and families as whole and
11 healthy people at the end of the day.

12 Now, we can all agree with the fundamental
13 importance, Mr. Fairfax, of enforcement, but we know its
14 limitations. As a matter of fact, there are many sites
15 that are in VPP from the pulp and paper industry. And I
16 just want you to know that when you're out enforcing the
17 pulp and paper industry's standard, you'll be enforcing
18 a print -- a pressure vessel code that was written in
19 1965, a lighting standard that was written in 1965, and
20 a conveyer standard that was written in 1957.

21 Ms. Dougherty, you have your work cut out for you.

22 We -- we are puzzled though that taking away

1 funding from VPP to put -- to put into enforcement with
2 a \$10 million increase in enforcement it's not really a
3 question of scarce resources. It's a question of
4 priorities for the agency.

5 We believe that the Voluntary Protection
6 Programs require all three parties to get involved to
7 have its success. And VPP labor and management is
8 making the commitment. We're puzzled and -- by the fact
9 that the third member of that, the Occupational Safety
10 and Health Administration seems to be pulling away from
11 the partnership and not providing direct funding support
12 for DCC. And in the words of the President, does this
13 make good economic sense for workers and their
14 companies? Thank you.

15 DAVID MICHAELS: Okay. Thank you both. It's
16 a pleasure. For those of you who don't know, we
17 certainly have in front of us a great font of experience
18 and wisdom on -- on OSHA which allows me to ask my first
19 question, which really, I think, both of you -- John,
20 because you're deeply involved in the alliance, and
21 Davis, probably because you supervised the formation of
22 many of them.

1 I've looked at -- I've only been in OSHA a few
2 months, but I've looked at many of the alliances, and
3 some I think are -- look like they're great -- very
4 successful. And some look like they're paper exercises.
5 What's the best way to evaluate them to choose, you
6 know, which ones to promote and to move forward and
7 which ones to -- to let disappear?

8 JOHN MASARICK: I would certainly say the ones
9 that are more valuable are the ones that are creating
10 something. The ones that are creating documents or
11 tools that can be used by the industry. And if they're
12 willing to share their -- their expertise with OSHA and
13 with the rest of the safety organizations, then I think
14 they're worth keeping.

15 And they've also got to be able to disseminate
16 the information to their members, and I think those are
17 the values that -- that an alliance brings to the table.

18 DAVID MICHAELS: Davis, you got any thoughts
19 on that?

20 DAVIS LAYNE: Well, I -- yeah, I think -- my
21 experience is that -- is that whatever gets measured
22 gets done. And -- and --

1 DAVID MICHAELS: Okay. So we got to figure
2 out what we're going to measure. That's exactly right.

3 DAVIS LAYNE: Yeah, and I -- I -- so I -- I
4 think there absolutely has to be some element, some
5 measurement in this process. I -- I think that's the
6 key to the success. And you can look at it and -- and
7 see the results of it.

8 The struggling question that we've always had
9 is, you know, what is the measurement of success? But I
10 think that's a key to a successful program. In fact,
11 GAO, one of the criticisms that it had of the
12 cooperative programs was that OSHA had never really
13 measured it, you know, what is successful?

14 DAVID MICHAELS: Right.

15 DAVIS LAYNE: Of course, sometimes I sort of
16 scratch my head and say, okay. We got injury and
17 illness rates that are at least 50 percent below those
18 of Lock Industries. I mean, that's a pretty good
19 measure in itself.

20 DAVID MICHAELS: Yeah.

21 DAVIS LAYNE: Also then people say, well, you
22 know, the recordkeeping at VPP sites are -- maybe

1 they're not what they should -- some of that's
2 absolutely true, but that's certainly not true of the
3 majority of them.

4 DAVID MICHAELS: No, actually I would think
5 more likely you've got a selection bias for companies
6 that want to do the right thing or in there, and they're
7 being compared to companies that don't. But what about
8 other than injury and illness rates? I mean, you
9 suggest maybe the -- the materials that they create we
10 should look at. Are there --

11 DAVIS LAYNE: Right. The more people that you
12 can reach --

13 DAVID MICHAELS: Do you think alliances should
14 be required to provide material that can be used outside
15 their industry? Not -- not to use that expression but
16 should we ask that they be made available publicly, or
17 should they be limited to --

18 JOHN MASARICK: I think all the information
19 comes out of the alliances. It's my understanding that
20 it's public, becomes part of the --

21 DAVID MICHAELS: We just don't make it that
22 way, but we can. Yeah.

1 DAVIS LAYNE: Same thing with the VPP
2 programs. That's all -- all public information. I
3 mean, maybe what you do with, like, the VPP sites is
4 that you -- you look at where they were five years
5 before they made the commitment to get into the VPP
6 program and -- and see where it ends up after the VPP
7 program.

8 DAVID MICHAELS: Right. Okay. Any thoughts?

9 RICHARD FAIRFAX: Actually, a question for
10 both of you -- I mean, different questions, but away
11 from the alliances and VPP. Start with you, John. One
12 of the things we have trouble with or difficulty is
13 hiring compliance officers and people in the national
14 office qualified in electrical, which is obviously your
15 -- your area.

16 You know, if I were to call you up next week
17 and say, you know, I want you to put together a training
18 program for our compliance officers on electrical. Can
19 you give me a few things or ideas that what you think
20 from your experience that, you know, we're short on?

21 JOHN MASARICK: First of all, there's a
22 shortage -- well, there's -- with the economy right now

1 there's a lot of people that are looking for work.

2 RICHARD FAIRFAX: Well, we have a lot of them.

3 JOHN MASARICK: And our chapters do a lot of
4 training.

5 RICHARD FAIRFAX: Yeah.

6 JOHN MASARICK: So I -- I think we could
7 certainly work with you to provide training for those
8 electrician -- for those inspectors that -- that want
9 some electrical training.

10 RICHARD FAIRFAX: I didn't mean to put you on
11 the spot.

12 JOHN MASARICK: 70E is an important one right
13 now --

14 RICHARD FAIRFAX: Right.

15 JOHN MASARICK: -- for our industry, and I
16 don't know if I mentioned it, but we created an art
17 blast PowerPoint. And I think we have averaged about
18 5,000 downloads on that a year. And it's very -- been
19 very popular.

20 I'd say maybe five or six years ago not many
21 people were talking about art blast, and -- and now a
22 lot of them are, and they're -- they're buying the

1 equipment. And they're each 70E, and so the industry
2 has changed in the last -- in the last five years.

3 RICHARD FAIRFAX: Okay.

4 DAVIS LAYNE: My answer, Mr. Fairfax, is --

5 RICHARD FAIRFAX: I have a different question.

6 DAVIS LAYNE: Well, it's (inaudible) to the
7 VPP International Conference for -- that is one of our
8 more popular --

9 RICHARD FAIRFAX: Popular. Of course. I'm
10 aware of it. All right. Davis, for you. You've been a
11 Compliance Officer, Regional Administrator, Deputy
12 Assistant Secretary, my boss, and now you're on the
13 other side working in, you know, the VPP Association.

14 DAVIS LAYNE: It's easier by the way.

15 RICHARD FAIRFAX: I'm sure it is. But -- but
16 you see both inside and outside, and kind of a similar
17 question is, you know, what -- a few couple steps or
18 whatever we could do for our compliance officers. I
19 mean, what do you think they need training in or
20 expertise in or -- you know we used to call it couth
21 training many, many years ago.

22 DAVIS LAYNE: Yeah. Mm-hmm. Mm-hmm. Well,

1 no, I don't -- I don't -- I really never -- I really
2 never supported the -- that training where we got couth.
3 But, you know, I think one thing that's come up that I
4 think is very, very important, and I was really
5 disappointed to hear the first panel's remarks this
6 morning about where they -- I mean, apparently there was
7 no contact with some of those people --

8 RICHARD FAIRFAX: Yeah.

9 DAVIS LAYNE: -- from the OSHA staff about
10 what was going on with the -- with the investigations
11 and what were going to be the results of the
12 investigation, whether any citations were going to be
13 issued. I -- I was truly disappointed there. And I --
14 I think that -- it -- it may -- and if you look at --
15 and I'm sure you'll go back and you'll look at these
16 individual cases.

17 RICHARD FAIRFAX: Yeah.

18 DAVIS LAYNE: And you'll see well, the -- the
19 person of contact who was a primary relative was
20 somebody else. I mean, we've run across that in the
21 past, but, really, I -- I think that's an area that is
22 very, very important for the -- for the OSHA staff, not

1 only in terms of it -- it being the compassionate thing
2 to do.

3 RICHARD FAIRFAX: Yeah.

4 DAVIS LAYNE: But also we found out over the
5 years that there was, a lot of times, valuable
6 information that the OSHA compliance officer could --

7 RICHARD FAIRFAX: Could do?

8 DAVIS LAYNE: -- could find as a result of
9 talking to those family members. I mean, it's hard. It
10 is really hard to go in there and talk to someone who's
11 lost a family member and talk about their death.

12 RICHARD FAIRFAX: Yeah.

13 DAVIS LAYNE: It's -- you know. But that --
14 that's an area that apparently has not -- has not jelled
15 for -- some reason.

16 RICHARD FAIRFAX: Yeah, I actually took a lot
17 of notes on that myself.

18 DAVIS LAYNE: Yeah.

19 RICHARD FAIRFAX: So okay. Thank you.

20 DOROTHY DOUGHERTY: John, Davis delicately
21 pointed out sort of a workload issue for me. In the
22 electrical arena we have one standard currently on our

1 (inaudible) agenda for Subpart V, and I was just curious
2 what would your list be if you could delicately tell me
3 like Davis did.

4 JOHN MASARICK: Well, I think OSHA is now on
5 the 2002 version of the National Electrical Code. Most
6 -- I think most jurisdictions are at least up to 2005.
7 We're getting ready to go in -- they've completed 2008.
8 I'm not sure most of the jurisdictions -- a lot of them
9 have -- have adopted that, and now we're working on
10 2011. So I would think bringing that up-to-date since
11 most of the industry is already -- is already doing it.

12 DOROTHY DOUGHERTY: Okay. And then, Davis,
13 how can a rule on injury and illness prevention
14 recognize existing affective programs?

15 DAVIS LAYNE: You mean, if OSHA comes out with
16 its own safety and health management rule or standard --

17 DOROTHY DOUGHERTY: Mm-hmm?

18 DAVIS LAYNE: -- how would it recognize maybe
19 some -- some of the ANSI standard or the ISO
20 recognitions?

21 DOROTHY DOUGHERTY: Mm-hmm?

22 DAVIS LAYNE: I really don't know that you

1 can, quite frankly. I -- I think it's very important
2 that OSHA move forward on establishing and promulgating
3 a safety and health management rule or standard. And I
4 believe that those employers that have embraced the VPP
5 process or the other consensus standards out there, I --
6 I think whatever you're able to come up with through the
7 rulemaking is going to be such a compromise that they're
8 -- they're going to be way ahead of what your
9 requirements are. I mean, I -- I often think about how
10 on earth is Mr. Fairfax going to enforce a -- a standard
11 like this, especially if it's some type of performance
12 standard.

13 So I -- I'm not really sure that there is a
14 way to (inaudible) this, and except for the fact that
15 those worksites that have already embraced safety and
16 health management systems will be ahead of whatever you
17 come up with and promulgate anyway.

18 And I think you got to have a safety and
19 health management program standard of rule before you
20 can go out and enforce one.

21 DAVID MICHAELS: Thank you both.

22 DEBORAH BERKOWITZ: All right. Thank you very

1 much. Good discussion. Our next panel is Bruce Lapham
2 and Scott Kolanz?

3 DAVID MICHAELS: No, Mark Kolans.

4 DEBORAH BERKOWITZ: I mean Mark Kolanz, and I
5 think Scott may not -- Scott -- okay. Scott missed his
6 plane, so --

7 DAVID MICHAELS: Okay. Yeah, what's -- let's
8 move this off here.

9 DEBORAH BERKOWITZ: And on deck is Pamela
10 Vossenas, John Morawetz and Dinkar Mokadam and somebody
11 else from the flight attendants. Just you're on -- you
12 know, stay around because you're next.

13 DAVID MICHAELS: In short order.

14 DEBORAH BERKOWITZ: Yeah. Go ahead. Thanks.

15 BRUCE LAPHAM: My name is Bruce Lapham, and
16 I'm the Director of Compliance Programs for Valcourt
17 Building Services. I, and my company, appreciate the
18 existence of this forum in which to express our thoughts
19 on issues that are vital to the safety of our workers,
20 as well as OSHA's ongoing efforts in raising the level
21 of safety in all markets for all trades.

22 My statements today will be directed towards

1 the need for requirements that buildings have an
2 anchorage system, as well as regulations associated with
3 the use of Rope Descent Devices, also referred to as
4 Descent Control Devices.

5 Valcourt building services provides window
6 washing, caulking, tuck pointing, facade cleaning,
7 sealing and restoration services and repairs. Our
8 company has eight offices that service buildings in ten
9 states on the east coast. Our Florida-based restoration
10 company contracts services and repairs in California and
11 other states as well.

12 Throughout our eight offices we have
13 approximately 500 workers who engage in doing high-rise
14 maintenance and restoration work. With many of our
15 workers employing Rope Descent Devices, we likely have
16 as much interest in having clear regulations regarding
17 this piece of equipment as any other company.

18 In 1991 there was a public hearing held by
19 OSHA that included commenting on the regulation of Rope
20 Descent Devices and whether or not they should be banned
21 for use by our industry. The principals of Valcourt
22 building services along with other founding members of

1 the IWCA, the International Window Cleaning Association,
2 spend many hundreds of hours coordinating comments for
3 this hearing. The result of this hearing was that the
4 equipment was not banned, and OSHA sent out an
5 eight-point letter providing expectations of companies
6 employing this equipment.

7 The understanding at the time was that OSHA
8 would eventually officially regulate this piece of
9 equipment. To this day, the one and a half page,
10 eight-point memo is the only official suggestions for
11 use of this equipment.

12 Nationally, approximately 70 percent of all
13 high-rise window cleanings is performed utilizing Rope
14 Descent Devices. This means that every day thousands of
15 workers use a piece of equipment that only has
16 suggestions for its use. In contrast, swing stage
17 equipment, the second most common equipment utilized in
18 high rise window cleaning has both CFR 1910.66 and
19 1910.28 to regulate its use. The lack of clear-cut
20 regulation of Rope Descent Devices as with any piece of
21 of unregulated but widespread equipment, there can be
22 rampant misuse.

1 Additionally, the question of whether building
2 owners should be required to have tie-off points on the
3 roofs that are adequate for this piece of equipment and
4 allows us to utilize a separate tie-off point for our
5 backup safety systems is still debatable. Valcourt
6 strongly believes that there should be clear regulation
7 of the use of this equipment and clear expectations
8 written regarding the need for assurances to be
9 exchanged between the window washing contractors and the
10 building owners.

11 Valcourt and other members of the IWCA have
12 worked to provide guidelines for the use of Rope Descent
13 Devices. An ANSI standard, the ANSIIWCA I-14.1 Window
14 Cleaning Standard is the first and only indepth
15 guideline for the use of the most prevalent piece of
16 equipment in high-rise window cleaning. We would like
17 OSHA's help in providing more clear-cut regulation
18 beyond this voluntary standard.

19 It is our understanding that a proposed rule
20 on Walking and Working Surfaces and Personal Fall
21 Protection (Subparts D & I) is being reviewed by OMB and
22 may be published in the Federal Register in the near

1 future. We would like to urge OSHA, in the interest of
2 greater workplace safety and public safety, to rule on
3 Walking and Working Surfaces and Personal Fall
4 Protection. Again, we appreciate the time we were given
5 to voice our concern and thank you for the opportunity.

6 MARK KOLANZ: My name is Mark Kolanz. I am
7 the Vice President of Environmental Health and Safety
8 for Brush Wellman Incorporated. Brush commends OSHA for
9 providing this opportunity for stakeholders to help OSHA
10 address the key issues facing the agency.

11 My purpose here today is to encourage OSHA to
12 help business owners understand how to put a Health and
13 Safety Management System into action, and for OSHA to
14 apply its resources to develop innovative computer
15 training tools to more effectively educate both workers
16 and business owners.

17 Speaking at a small business roundtable
18 meeting about six weeks ago, Dr. Michaels extolled the
19 benefits of a comprehensive Health and Safety Management
20 System. He said such programs are needed not just to
21 comply with regulations, but as part of a broader
22 process to incorporate worker health and safety into

1 daily business operations with a goal of continuous
2 improvement.

3 Brush Wellman has had an active occupational
4 health and safety programs going back decades. We are a
5 medium-sized company that manufactures metals with all
6 the risks inherent to those processes. We handle molten
7 metal and corrosive chemicals. We push, pull, lift,
8 compress, atomize, and pulverize metals. During its 75
9 years in business, Brush Wellman has unfortunately
10 experienced occupational disease, explosions, burns,
11 amputations, and a few fatalities.

12 Over the years we worked hard to better
13 protect workers by implementing a typical accident
14 prevention program. What our company and its workers
15 experienced, however, was a safety performance that was
16 just okay with the occasional very good year as an
17 exception versus the rule.

18 What we determined was missing from our
19 efforts was engagement by all workers, including
20 executive management, floor managers, and our hourly
21 employees. Therefore, in 1999 our Chief Executive
22 Officer and his executive management team agreed to

1 adopt and lead a Health and Safety Management System
2 program.

3 We found the move toward an affective Health
4 and Safety Management System requires real perseverance
5 on the part of the Chief Executive Officer and the
6 executive management team. Our Health and Safety
7 Management System was first viewed by workers and
8 management as a "flavor of the month" program. It took
9 a good year and several training sessions, as well as
10 some very personal communications from the leadership
11 for the message to sink in that the program is for real
12 and here to stay.

13 The CEO and executive management reinforced
14 this priority by their routine visits to the work areas.
15 I cannot emphasize enough the importance of executive
16 management visibility in the plants and their personal
17 interest in the well-being of all workers.

18 Since 2000 the executive team kept working the
19 program which has resulted in the continuous improvement
20 that Dr. Michaels identified as a key element to a
21 successful program. To illustrate the value of
22 management commitment, employee involvement, and a

1 target of zero injuries, in 2000 we had 111 OSHA
2 recordable injuries. That number has dropped to 11 in
3 2009, a ten-fold improvement.

4 In 2000 we had 131 lost-time injuries. In
5 2009 we had eight lost-time injuries, a 16-fold
6 improvement. The estimated total cost for worker's
7 compensation lost-time and medical in the year 2000 was
8 \$8 million. Our costs in 2009 is estimated to be
9 580,000.

10 Putting in place an effective and sustainable
11 health and safety culture takes a lot of work and highly
12 visible commitment by a company's leadership. However,
13 it is abundantly clear that the effort is worth it.
14 OSHA should Foster the implementation of Health and
15 Safety Management Systems and support their
16 implementation through outreach programs, training
17 initiatives, and partnership arrangements.

18 For the past 12 years, Brush Wellman has
19 partnered with NIOSH in a formal research collaboration.
20 This cooperative research represents one of the best
21 examples of research-to-practice in occupational health.
22 We strongly encourage OSHA and NIOSH to develop

1 partnerships with industry and employee representatives
2 to work together towards addressing systemic workplace
3 health and safety issues.

4 Aided by its work with NIOSH, Brush Wellman
5 developed a first of its kind, innovative computer-based
6 inter active e-learning tool allowing -- allowing
7 employees and employers to develop a customized
8 beryllium safety plan. Our e-learning tool has won over
9 a dozen national and international awards for its
10 innovative use of computer training technology.

11 We believe OSHA's use of these new
12 technologies could offer a history-changing improvement
13 in teaching employers and workers how to work safely.
14 To see for yourself, I have some copies that have been
15 on the back -- the entrance table earlier, and I have a
16 few more that I could hand out at the end here. You
17 could also go to a website called
18 www.berylliumsafety.com for an active web version. This
19 is exactly the same thing.

20 In closing, we support and encourage OSHA to
21 help companies adopt HSMS systems. As Dr. Michaels
22 stated, OSHA can't do it alone. Industry, labor, and

1 OSHA will need to work together to make it happen. It
2 is our hope that other companies with Health and Safety
3 Management Systems success stories will join us in
4 working with OSHA to develop its plan.

5 Thank you again for this opportunity to share
6 the health and safety experiences of our company.

7 DAVID MICHAELS: Great. Thank you both very
8 much. I think we'll let Rich take the first question
9 this time and then --

10 RICHARD FAIRFAX: Sure. I just have a
11 question for -- for both of you. I'll start with you,
12 Mark. I'm little bit familiar with your Safety and
13 Health Management System there that you have at Brush
14 Wellman, but I was just wondering -- it sort of pertains
15 to beryllium, but it's sort of about contaminant
16 exposures in general.

17 I mean, as you know, and it's been brought up
18 several times during the day that our permissible
19 exposure limits are, you know, terribly out of -- out of
20 date. Under your Safety and Health Management System at
21 your facilities, you know, when you run into an air
22 contaminant where you -- your data, your information

1 shows that the PEL is not protective, you know. And
2 we're developing rulemaking on beryllium, so obviously
3 ours is in that -- that category. How -- how do you
4 handle it under your -- your program? How do you
5 evaluate? What do you do?

6 MARK KOLANZ: As far as how do we manage the
7 exposure?

8 RICHARD FAIRFAX: Yeah, manage the exposure.
9 Yes.

10 MARK KOLANZ: Well, we -- well, we have set a
11 regular -- a recommended exposure guideline for
12 beryllium that's currently ten-fold under the OSHA PEL.
13 And we've communicated that out. It's also communicated
14 as part of that interactive guide that we supply to
15 people.

16 But we -- our approach to utilizing that
17 number is -- we -- we view it as a limit. A lot of
18 people look at numbers as averages, and -- and we take a
19 very strict look at the data that goes into evaluating
20 worker exposure. And if we don't have -- we typically
21 use a 95th confidence --

22 RICHARD FAIRFAX: Mm-hmm.

1 MARK KOLANZ: -- what's called 9595, a 95th
2 percentile with 95 percentile confidence limits around
3 it to say if people are not -- if we can't control to .2
4 to that level of statistical confidence, then we
5 incorporate personal protective equipment --

6 RICHARD FAIRFAX: Okay.

7 MARK KOLANZ: -- to help manage those
8 exposures. And unfortunately, that puts a lot of people
9 in respirators in our facilities, but we kind of adopt
10 it as part of the Health and Safety Management System,
11 kind of a seatbelt mentality. If we don't know the
12 answer, we're going to protect first until we get it
13 figured out.

14 RICHARD FAIRFAX: All right. Okay. That's
15 good. Thank you. Bruce, you mentioned something that
16 comes up in my area quite a bit where -- where there's
17 roofing work, tuck pointing, window washing, whatever,
18 and especially an old building, particularly in
19 residential homes without points to tie off.

20 BRUCE LAPHAM: Sure.

21 RICHARD FAIRFAX: So what -- what do you --
22 what do you see people doing out there to when -- there

1 aren't tie-off points. There aren't places to secure,
2 but you've got to get up there. And whether it's
3 cleaning the windows or working on the side of the
4 building or doing roofing work or whatever?

5 BRUCE LAPHAM: It's been my experience --
6 obviously, there's a -- there's a -- to a certain
7 extent, unfortunately, it has to do with the company.

8 RICHARD FAIRFAX: Yeah.

9 BRUCE LAPHAM: There's -- I would say that --
10 I started in window cleaning, so I'll speak for that.
11 Window cleaning is definitely a can-do industry. If
12 there is a -- if -- historically speaking, if a -- if a
13 -- say, a building owner wanted to have their window
14 cleaning done. They were contracted. The window
15 cleaners will come, and they'll figure out how to do it.
16 They'll find a way.

17 Our industry's come a long ways, but what
18 we're asking for is a little bit of help in that area.

19 RICHARD FAIRFAX: Sure.

20 BRUCE LAPHAM: Obviously, with more regulation
21 for what it is that we do, and then also something we
22 can point to to show the building owners, that will help

1 a lot in what you're talking about.

2 RICHARD FAIRFAX: Okay. Thank you.

3 DOROTHY DOUGHERTY: Mine is for you, Mark,
4 first. It's a pretty general question on safety and
5 health programs or injury and illness prevention. Do
6 you think that OSHA should consider a rulemaking that
7 requires a program to correct violations of OSHA
8 standards, or one that requires a process that fosters
9 safety and health in the control of hazards?

10 MARK KOLANZ: Well, I think you have a process
11 for compliance, and the -- the thing that I see as a
12 potential downfall with Health and Safety Management
13 Systems is when too much dependency is placed on the
14 Health and Safety Management System, and people stop
15 looking at what's going on at the facility.

16 And we've seen some of that happen in our own
17 facilities where we start looking at the paper too much.
18 Do you have this program in place? Do you have that
19 program in place? Oh, yes, we do. Here it is. I can
20 hand it to you. I can show you. I can answer every
21 question you have when you come in. But I walk out on
22 to the factory and I go, what's going on here? The

1 physical safety can go downhill.

2 You have to be looking at -- you have to -- I
3 mean, we've been using self-audits, and -- and
4 professional audits on top of that program. Because it
5 -- it has to be a fine mix of that. And I know there
6 are a lot of companies who started out early in the
7 early years of Health and Safety Management Systems and
8 thought that was the panacea of solving the program. We
9 don't have to worry about, you know, basic compliance
10 anymore. Not one of them has given up now traditional
11 compliance checks as part of their program. You need
12 both. And you need both to be successful.

13 DOROTHY DOUGHERTY: Mm-hmm. Thank you. For
14 you, Bruce. First I'd like to thank you for having your
15 company make an arrangement for a site visit for members
16 of my staff, developing the Walking and Working Surfaces
17 rulemaking because it was very helpful. And I'm trying
18 to make a plug here. It's -- these are hard for us to
19 get, but they are so valuable as we go forward with our
20 rulemaking.

21 So it's a little bit of a -- somewhat of a
22 question, I guess, but what made you decide to sort of

1 open your doors, you know, to OSHA to come in? And was
2 it a good experience for you? For my boss, you can tell
3 him, you know? But just if you could share maybe some
4 of your thoughts about that.

5 BRUCE LAPHAM: Sure. Absolutely. Yeah. I
6 would say that we -- not only is it something that we
7 gladly did, but I think we got a lot out of it. It's
8 not often that somebody -- speaking as myself, I'm a
9 director of compliance programs for a window cleaning
10 company. We're -- we're not huge, okay? And it was an
11 opportunity for us to talk to OSHA directly, which is --
12 along with this is something that we really appreciate.

13 As -- you know, I think that if you're in
14 safety, again, it's not really just that, you know, your
15 company is committed. It's -- you have to be committed
16 to the industry, too. And I think that what my company
17 decided to do was it would help push things along. It
18 would help, you know -- it would help OSHA in their
19 efforts towards getting this regulation done, it's worth
20 it. It's definitely worth it.

21 DOROTHY DOUGHERTY: So thank you, and I hope
22 everyone in the audience heard that. So -- and I hope

1 you continue to participate in our rulemaking. Thank
2 you.

3 DAVID MICHAELS: Thank you. And I have a
4 question for Mark which, you know, I'm quite familiar --
5 I think your really terrific Health and Safety
6 Management System they use within Brush and the
7 materials you've produced for your customers. But the
8 product stewardship question is one I've often thought
9 about and think about also for the chemical industry.
10 You make a product that you really understand and do a
11 great job controlling in your facilities. And then
12 purchasers (inaudible). So how do you compel them --
13 going beyond encouraging them. How -- how do you insure
14 that it's used safely down the line?

15 MARK KOLANZ: Well, we have been doing product
16 stewardship for a long time --

17 DAVID MICHAELS: Right. That's --

18 MARK KOLANZ: -- starting in 1949, so we've
19 put warning labels on --

20 DAVID MICHAELS: I -- I worked for one of your
21 customers for a number of years.

22 MARK KOLANZ: That's right. So we've done a

1 lot of communications via literature, and we have a --
2 we -- we approach from a lot of levels nowadays, and
3 this interactive guide is just the latest approach. If
4 you go onto our website there are dozens of document --
5 or a hundred -- over a hundred documents on there of
6 different types of tools and pieces of information as to
7 how to work safely with very specific kinds of
8 applications.

9 We do outreaches with customers, and with some
10 customer bases, it's a little harder on the alloy side
11 of the business because it's much larger. But on the
12 beryllium metal side of the business where, you know,
13 it's -- it's 30 major users of the material, we actually
14 bring them in once a year. And there's always a health
15 and safety component to the presentation, sometimes
16 anywhere from a couple hours to we've had them for all
17 day long to review things.

18 We have hotlines where anybody can call in any
19 time, and we've actually have documentation of customer
20 services via phone and visits going back to 1957. So we
21 -- we do it a lot. We have a full-time director of
22 product stewardship. I still get involved with a lot of

1 those things. And we continue to try to create tools
2 that make it easier.

3 One of the things we have been doing recently
4 is doing the actual research at customer -- downstream
5 customer locations beyond our direct customers, the
6 users beyond them, in determining exposures and how to
7 -- see what formulas we can come up with for control
8 methodologies that can be used across the board. We've
9 been doing it in the plastics industry, the recycling
10 industry, stamping. Primarily in the alloy side where
11 there's much greater depth of -- of downstream users.

12 DAVID MICHAELS: Great. Thank you both very
13 much. That was very helpful.

14 DEBORAH BERKOWITZ: Very helpful. Okay.

15 DAVID MICHAELS: Okay.

16 DEBORAH BERKOWITZ: Next panel. Pamela
17 Vossen, John Morawetz, and Dinkar Mokadam?

18 DAVID MICHAELS: Mokadam.

19 DEBORAH BERKOWITZ: Mokadam. And there's
20 somebody else also on that panel -- right. Chris
21 Witkowski also. And then the last panel's on deck
22 somewhere out there. Rick Inclima, Jason Zuckerman,

1 Richard Renner, and Tim Sharp. Right -- nobody's in the
2 hall. That's right.

3 DAVID MICHAELS: Okay.

4 UNKNOWN SPEAKER: We're just taking things up,
5 and John is going to go forward.

6 UNKNOWN SPEAKER: (Inaudible).

7 JOHN MORAWETZ: For the cameras. Posterity.
8 Okay. My name is John Morawetz, and I work for the
9 International Chemical Workers Council, which primarily
10 represents workers in bulk chemical production
11 facilities.

12 As we continue to improve the safety of our
13 nation's work forces, we welcome these forums to focus
14 on key issues, move the discussion forward, and assist
15 the agency in taking clear and decisive action.

16 As many others have testified, and I didn't
17 know whether they would today, we believe that a
18 comprehensive health and safety program standard would
19 significantly improve our workplaces and help to answer
20 OSHA's Federal Register questions, 1, 2, 4, and 6. It's
21 not a panacea, but we think it's a very basic first
22 step.

1 The first question was how to encourage
2 employers, workers and unions to identify and address
3 workplace hazards. I think clearly all discussions
4 about a program standard that involves workers and
5 management will do that, and should focus on the widest
6 range of hazards in as many industries as possible and
7 require plans to address them. It's something that I
8 think everybody in this room probably already does. The
9 problem is the people who not only are not in this room,
10 but probably never even heard about this hearing.

11 A key question is how to approach the variety
12 of hazards, each with its unique set of challenges. And
13 we believe from our experience, and many unions do, that
14 broad and generic standards such as, for example, house
15 communication and access to records that apply to many
16 workplaces, give workers powerful tools on our excellent
17 models.

18 You have an opportunity to promulgate a
19 standard that puts the structure in place to begin to
20 accomplish these tasks. Steps that many of our
21 companies currently have in place, but regrettably, many
22 do not or they have it in place, but it's in a file

1 cabinet. It's not implemented all too often. We could
2 just try to encourage these steps without the force of
3 regulation, but many will just pay lip service.

4 Workers know what the reality is on their jobs,
5 and this standard must give them and their unions the
6 right for meaningful involvement to improve their
7 workplaces.

8 The second question is on emerging and
9 unaddressed issues. For our members, exposure to new
10 chemicals is a major emerging issue, continually. As
11 each new substance is put into production, they are
12 exposed.

13 Now, there will always be a need to devote
14 OSHA's resources to particular hazards such as silica,
15 diacetyl flavorings, ergonomics. We also need to figure
16 out how to broadly look at all workplaces and duplicate
17 what the best companies are doing. Mandating that
18 facilities with their work force have a plan to identify
19 and address their own problems will likely find many
20 emergent problems and force these significant new
21 hazards to be addressed. It's the kind of broad
22 standard that can best minimize the time to identify

1 them and formulate control plans, as many here have sort
2 of testified, the length of time it takes to get a
3 standard on particular hazards through.

4 Although this is beyond, as I well know,
5 OSHA's jurisdiction, I think other federal agencies need
6 to mandate stronger requirements for substances to be
7 tested before they hit the market, which by definition
8 is well before workers are exposed when they possibly
9 are getting sick, and years before chronic effects can
10 be documented.

11 Question 4 asks for specific actions to
12 enhance the voice of workers int the workplace,
13 particularly workers who are hard to reach, do not have
14 ready access to information, or are afraid to exercise
15 their rights. Most importantly, workers must know that
16 OSHA will enforce the standards and vigorously defend
17 workers who file OSHA complaints against discrimination
18 and retaliation. Without strong enforcement, even the
19 best of standards is only a law on the books with no
20 practical meaning.

21 In addition, a strong program standard that
22 mandates workers' roles in identifying their remediating

1 hazards gives them a stronger voice and then the ability
2 to be involved in a wide range of activities. Mandating
3 their involvement would not only bring valuable
4 information to the discussion, it will make them less
5 fearful for speaking up.

6 I should say that I've been involved in
7 activity beyond the scope of OSHA recently, and it was
8 very interesting. They had all this discussion,
9 background checks, anti-terrorism stuff. And industry
10 people said, we welcome your views. Why don't you come
11 to our conference? Went up the chain of command, and
12 they basically said there's no way they want labor
13 there. And this is for a professional person. I'm
14 trying to rationally talk about discussion. You can
15 imagine the fear on the job that is all too often.

16 Lastly, question 6 is about the rulemaking
17 process. And asks if there are policies and procedures
18 that will decrease the time to issue final standards.
19 We support these efforts, and I would suggest an
20 additional approach. If our goal is more broadly how to
21 implement needed protections, then in addition to
22 promulgating specific standards, which is an important

1 task, we should have a standard that generically
2 mandates structures to identified site-specific hazards
3 even without a hazard-specific standard.

4 But simply, a program standard covers many
5 hazards on the shop floor. At the same time OSHA's
6 limited standard setting resource and compliance
7 assistance are used for the most significant hazards.

8 To answer a question also that Secretary
9 Michaels asked earlier, should OSHA get the plans? I
10 say, yes, for a couple of reasons. One as we heard from
11 Brush Wellman, they have a good plan. They're doing a
12 good job. And very easily OSHA can learn from that,
13 take the best elements of it and share them and be part
14 of the compliance assistance.

15 Number two, complaints. A local office gets a
16 complaint. They pull the health and safety plan the
17 company has. They compare it. They're armed when they
18 go in to know what the company has said they're going to
19 do. And just random inspections. Again, you can just
20 pull the plan and see what they say.

21 There is no magical solution that's going to
22 erase all the hazards, but we think this is an important

1 step that is long overdue, and the labor movement stands
2 united and ready to assist you in these efforts. Thanks
3 again, for this opportunity.

4 PAMELA VOSSENAS: I thought you were going to
5 ask him questions. My apologies.

6 To the Assistant Secretary of Labor for OSHA,
7 David Michaels, thank you for the opportunity to testify
8 today. I am Pamela Vossenias, United Here's health and
9 safety specialist. We are responding broadly to the
10 first four questions, and we are going to highlight our
11 submitted comments.

12 United Here represents workers in the U.S. and
13 Canada in hospitality, gaming, food service,
14 manufacturing, texttile, laundry, and airport
15 industries. Most are employed in the service sector.
16 Our diverse membership includes immigrant workers and
17 high percentages of African American, Latino, and Asian
18 Americans. The majority of our members are women.

19 First, it is long overdue for OSHA to
20 recognize the serious hazards that exist in the services
21 industry. Today we highlight concerns about worksites
22 under NAICS Code 72, accommodations in food services.

1 From hotels to casinos, from cafeterias to airline
2 catering kitchens, repetitive motion injuries, acute
3 trauma and injuries due to speed up abound, along with
4 exposures to mold, cleaning agents, and extreme
5 temperatures.

6 One example is airline catering workers who
7 prepare and transport food to planes. From server areas
8 of catering employees at LSG, Sky Chefs, and Gate
9 Gourmet, many complain of not having enough time to do
10 their job, to rushing so much that they get hurt or
11 strain themselves, and having to skip steps or task of
12 the job.

13 As you know, some hazards for food service
14 workers can also impact food safety for the public.
15 OSHA needs to pay attention to these two airline
16 catering giants. OSHA must take an industry-wide
17 approach to protecting service sector workers, applying
18 models successful in other industries, and accessing BLS
19 and NIOSH resources.

20 Second, while it is unacceptable for my worker
21 to be maimed, made sick, or killed on the job, it is
22 outrageous for disparities to exist by race, ethnicity,

1 gender, and employer. The American Journal of
2 Industrial Medicine's recently released issue on this
3 topic includes the study by four leading academic
4 centers and Unite Here, using OSHA 300 logs from the
5 five leading U.S. hotel companies.

6 There are approximately 3,000 injuries over
7 55,000 worker years of exposure from 2003 to -- to 2005.
8 The study findings are disturbing. Hispanic female
9 housekeepers had the highest injury rate of 10.6, nearly
10 double that of white female housekeepers. Hyatt, known
11 as Company 2 in the study, had the highest injury rate
12 for housekeepers of 10.4, almost twice that of the
13 referent company.

14 This is a staggering difference between hotel
15 companies and the injuries rates for housekeepers in the
16 hotels sampled. And just to clarify, Company 1, 2, and
17 5, each had 12 hotels included in the sample, and
18 Company 5 -- Company 3 had five, and Company 4 had nine
19 included.

20 The third disturbing finding is that
21 housekeepers overall was the most dangerous job with an
22 injury rate of 7.9. That was 50 percent higher than the

1 rate for all other hotel jobs. Unite Here calls on OSHA
2 to partner with hotel employers, NIOSH, and Unite Here
3 to investigate the causes of such disparities, to
4 investigate why housekeeping is such a dangerous job,
5 and to identify remedies.

6 OSHA also needs to revisit its site-specific
7 targeting and identify hotels for what they are, "high
8 hazard" worksites. And to identify the hospitality
9 industry for what it is, a "high hazard" industry.

10 Unite Here believes that the injury rates
11 reported here today rival the rates of worksites in
12 OSHA's primary and secondary list for inspection.

13 Programs such as Hyatt's Refresh Program must
14 cease to exist. Celia Alvarez, a 19-year room attendant
15 who worked at the non-union Long Beach Hyatt Regency
16 before becoming permanently injured explains: "I
17 believe the Refresh Program damages the body much
18 faster. Cleaning between 25 and 30 rooms a day demands
19 working fast, and this is how I hurt my body."

20 OSHA must call stakeholder hearings to hear
21 from housekeepers about their working conditions and
22 input about remedies, including possible new standards.

1 Possibly a rest and recovery standard or a safe cleaning
2 standard. How much time do I have left?

3 DEBORAH BERKOWITZ: When the light turns red,
4 you have 30 seconds.

5 PAMELA VOSSENAS: Oh. Okay. Unite Here
6 applauds OSHA and NIOSH for convening the upcoming
7 National Action Summit for Latino Worker Health and
8 Safety, and we request OSHA to include the hotel
9 industry as a target high-risk industry for Latino
10 workers. And that hotel housekeepers be included as
11 part of the worker panels of the summit.

12 Extreme work practices must end, such as
13 Hyatt's instructions to housekeepers to on hands and
14 knees using a sponge, wash the entire bathroom floor.
15 Long-handed scrub brushes, dusters, and mops must become
16 industry standards. So must fitted sheets. Thank you.

17 DEBORAH BERKOWITZ: Thank you.

18 DINKAR MOKADAM: Okay. Thank you. My name is
19 Dinkar Mokadam. I am with the Air Safety Health and
20 Security Department of the Association of Flight
21 Attendants, CWA. With me today is the director of our
22 department, Chris Witkowski.

1 AFA is the world's largest flight attendant
2 union with more than 50,000 members at 22 airlines.
3 Thank you, Dr. Michaels, and OSHA for affording AFA this
4 unique opportunity to speak for our members about
5 occupational safety and health regulations for flight
6 attendants. Please note that these remarks summarize
7 more extensive written comments which are submitted to
8 the meeting docket.

9 Every day flight attendants are exposed to
10 occupational hazards that include turbulence, broken
11 overhead bins, toxic chemicals, communicable diseases
12 and more. Bureau of Labor statistics data show that
13 flight attendants suffer occupational injuries and
14 illnesses at rates far in excess of those experienced by
15 workers in nearly all other sectors of private industry.

16 As an example, in calendar year 2008, workers
17 in the scheduled past year transportation industry
18 suffered 9.6 recordable injury/illness cases per 100
19 workers. To put this into perspective, the coal mining
20 industry rate was only 4.4 cases per 100 workers, less
21 than half.

22 We believe that an important factor

1 contributing to these unreasonably high injury/illness
2 rates is a 35-year-old claim of exclusive jurisdiction
3 over the aircraft cabin by the federal aviation
4 administration.

5 Let me share one example of how this FAA claim
6 affects flight attendants. In January, 2009, flight
7 attendant Joan, not her real name, was standing next to
8 the closed passenger boarding door in the aircraft cabin
9 during ground deicing operations.

10 The deicing crew accidentally sprayed the
11 doors, and glycol-based fluid power poured in through
12 the door seal soaking her head and shoulders. Joan was
13 not trained to deal with this situation. Unsure what to
14 do, she kept working.

15 By the time she got home, Joan had a severe
16 headache, nausea, first degree burns on her neck and
17 shoulders and swollen eyelids. About seven hours after
18 the exposure, she ended up in an emergency room. The
19 next day her AFA union representative reported the event
20 to the FAA.

21 Two months after the event when it appeared no
22 action had been taken, Joan called the FAA's safety

1 hotline. In response, a cursory investigation found no
2 evidence of a violation and recommended no enforcement
3 action. Now, more than 13 months after the incident,
4 Joan still is not well enough to work.

5 If flight attendants were protected by OSHA,
6 Joan would have had the right to refuse her assigned
7 duties following a harmful chemical exposure, the right
8 to be provided the deicing fluid material and safety
9 data sheet that she could have taken to the ER, and the
10 right to report the incident to OSHA, a federal agency
11 with the experience, knowledge, and statutory mandate to
12 conduct a prompt investigation and identify and
13 remediate the hazardous workplace conditions that caused
14 her debilitating health condition. Under FAA
15 jurisdiction, Joan had none of these rights.

16 So why does the FAA rather than OSHA have
17 jurisdiction over the Occupational Safety and Health of
18 flight attendants in the airplane cabin? Well, in 1975
19 the FAA published a notice in the Federal Register
20 asserting complete and exclusive jurisdiction over crew
21 member health and safety on aircraft in operation.

22 In this notice, the FAA claimed that it --

1 that its safety regulatory responsibilities, and I
2 quote, "Directly and completely encompass the safety and
3 health aspects of the work environment of aircraft crew
4 members," end quote. But the reality is that nearly all
5 FAA safety regulations are intended to insure safe
6 takeoffs and landings rather than occupational safety
7 and health.

8 So 15 years later, following this notice, in
9 1990, FAA regulatory inaction led FAA to file a petition
10 for rulemaking. The petition asked the agency to adopt
11 selected OSHA regulations and apply them to crew
12 members. Nearly seven years later, the FAA responded to
13 the position with a one-page letter -- this was seven
14 years later -- that said AFA's issues may have merit but
15 do not address an immediate safety concern.

16 The rejection of the AFA petition stiffened
17 the resolve of flight attendants. Finally, in
18 August 2000, the FAA and OSHA entered into an historic
19 Memorandum of Understanding, and I think many of you
20 might be familiar with that. And I quote, "To enhance
21 safety and health in the aviation industry."

22 In this MOU, FAA and OSHA agreed to establish

1 a joint team to identify whether the OSHA acts
2 requirements could be applied to the working conditions
3 of employees on aircraft in operation. In
4 December 2000, the first report of the joint team
5 concluded that five of OSHA's existing standards -- and
6 these are recordkeeping, sanitation haz com,
7 anti-discrimination, and access to employee exposure
8 medical records -- could be implemented for all
9 employees in the aviation industry. Unfortunately, ten
10 years later, that 2000 MOU has not been implemented.

11 In closing, flight attendants are grateful
12 that OSHA has provided this forum and is willing to
13 listen to their concerns. But after 35 years of FAA
14 exclusive jurisdiction, flight attendants are hopeful
15 and expectant that OSHA will go beyond simply listening.

16 So today we thank you for listening, and in
17 the weeks and months ahead we look forward to working
18 with OSHA, FAA and all affected stakeholders to make
19 real the promise of the August 2000 MOU, and once and
20 for all insure that strong comprehensive regulations are
21 enacted to protect the safety and health of flight
22 attendants working on board aircraft in operation. I

1 thank you.

2 DAVID MICHAELS: Thank you very much. Rich,
3 you want to start off --

4 RICHARD FAIRFAX: Yeah, a couple questions.
5 I'll start with you, Dinkar. It was nice talking to you
6 the other day. For the sake of that, I mean, I'm well
7 aware of the -- the issues. We've been dealing with
8 each other for many years.

9 But if -- if that 1975 Federal Register notice
10 was rescinded, at that point OSHA would take over
11 jurisdiction. How -- how do you see -- like we get a
12 worker complaint and -- from a flight attendant, and
13 they're complaining about, you know, certain flights,
14 say, from San Francisco to Washington D.C. I mean, how
15 does -- how does your group look at this? You know,
16 would we board the plane? Do the inspection or -- I'm
17 just -- that's one of the things we've been struggling
18 with is how do we do that?

19 DINKAR MOKADAM: Well, first of all, simply --
20 simply taking the report is a giant stride. And being
21 able to follow up in a timely manner would be very
22 helpful whether you would have to actually board the

1 plane or whether you could base it on a interview of the
2 people involved. Whether -- you know, there are --
3 there are times when planes are not flighting, obviously
4 --

5 RICHARD FAIRFAX: Right.

6 DINKAR MOKADAM: -- when -- when it would be
7 possible to take a look. I refer back to this deicing
8 incident. It would be possible to send out an inspector
9 to actually look at that door seal during downtime, say,
10 less than two months after when -- when maybe, you know,
11 the airlines had time to remediate the situation, and
12 the inspector comes and looks at it, and says, well,
13 hey, there's no problem here. Don't understand how it
14 could have happened.

15 You know, I think the timeliness -- I think
16 part of the issue is that the FAA has just -- does not
17 see it in their mandate to focus on Occupational Safety
18 and Health. I mean, I'm trying -- I'm trying very hard
19 to be cognizant of their limitations. They -- they --
20 it's just not in their statute, really.

21 Aviation safety is their mandate, and we feel
22 strongly that that is -- that should be their mandate.

1 It's what they -- it's what they do. It's -- it's what
2 the statute tells them to do. And Occupational Safety
3 and Health is not something that they really focus on.
4 They do look at medical concerns for flight deck crew,
5 for cockpit crew, and that's -- that's good. And they
6 have a very strong program for that. But in terms of
7 the Occupational Safety and Health in the cabin, it's
8 woeful, frankly. And -- and I think many of us
9 understand that.

10 If we look at the ergonomic design, for
11 example, of overhead bins, where is the occupational
12 safety and health component of that? Who is writing
13 rules for overhead bins?

14 RICHARD FAIRFAX: Yeah.

15 DINKAR MOKADAM: Obviously, no one.

16 RICHARD FAIRFAX: Yeah.

17 DINKAR MOKADAM: I mean, as safety and health
18 experts, can anybody -- can anybody look at that
19 situation and say, this is -- this is okay?

20 DAVID MICHAELS: But, I guess, our problem is
21 there's this sort of -- this sort of intersection
22 between flight safety and worker safety. And, you know,

1 I've been on flights in which they said we're -- we're
2 grounding the flight because one closet door doesn't
3 close, and, therefore, the plane will be imbalanced.

4 And I think it will be quite a challenge for
5 us to -- to come up with worker safety issues that don't
6 interfere with the flight safety as well. I think
7 that's something that -- sounds like the people who are
8 involved with it now are not concerned with half of the
9 equation.

10 DINKAR MOKADAM: Yeah, like the -- the
11 Memorandum of Understanding actually addresses that. I
12 don't know if you're aware of that, but, yes. I mean,
13 the FAA, according to the MOU would have the ability to
14 work with OSHA to ensure that flight safety is
15 paramount.

16 CHRIS WITKOWSKI: If I can interject, the MOU
17 is what is already in place, and there was
18 implementation begun and an initial report was done.
19 But it was left aside for many years, and it can be
20 picked up. And that -- your question is addressed that
21 -- that the FAA joint committee with OSHA would identify
22 areas that could be appropriate for rulemaking for new

1 standards, as well as the ones they already identified.
2 And if there was a safety problem in terms of aviation
3 safety, the FAA could bring that up and work that out
4 with OSHA.

5 RICHARD FAIRFAX: Good. John, I have a
6 question for you on the Safety and Health Management
7 Systems program standard. With something like
8 50 million chemicals now that have been, you know,
9 created and identified and our PEL's cover roughly 400,
10 450 chemicals, how -- how do you see -- and I asked this
11 of other people -- how do you see -- or do you see a
12 safety health program standard or management system
13 being able to address chemicals for which we don't have
14 permissible exposure limits? As far as evaluating the
15 risk, requiring employers to -- to manage it and provide
16 that sort of protection?

17 JOHN MORAWETZ: Well, my first answer to that
18 is that certainly there was no constraint for OSHA to
19 promulgate the House Communications standard. There's
20 no PEL for 49,000 of those.

21 RICHARD FAIRFAX: Right.

22 JOHN MORAWETZ: So I think you can still move

1 forward to say, if workers are exposed to these
2 chemicals, the company has to have a plan to say how to
3 address them. Now, I don't know whether it's going to
4 be so chemical-specifically driven. My guess is that it
5 may be more process driven. I mean, you got to start
6 with the job hazard analysis.

7 RICHARD FAIRFAX: Sure.

8 JOHN MORAWETZ: And then go from there.

9 RICHARD FAIRFAX: Okay.

10 DAVID MICHAELS: I'm wondering, Pamela, have
11 you looked at -- or in these things, looked at the
12 reporting patterns of injuries in these hotels and what
13 gets put onto logs? What goes into Workers Comp and
14 what just disappears?

15 PAMELA VOSSENAS: Well, the one comment I
16 didn't get to was that having looked at now, you know,
17 thousands of injuries, predominantly of hotel
18 housekeepers, first problem we have is a lot of the
19 information is -- it's not useful. It will say "pain
20 hand." It does not include more descriptive
21 information. So we really don't know what the
22 circumstances were, and so then you'd have to request

1 the 301's for example.

2 The additional problem that we have in hotels
3 is regular intimidation of hotel housekeepers not to
4 report injuries. Then we have the -- the disincentives
5 to reporting; Safety Bingo, you know, raffling of TV's,
6 whatever. And then there are also in certain workplaces
7 the discipline for -- for being injured. More
8 discipline or points accumulated if you stay home from
9 -- from work due to an injury.

10 I think Dr. Nicolas Krauss (ph) and other
11 authors did a study that estimated that about, I think,
12 two-thirds of housekeepers do not report injuries. So
13 what we were able to report in our study, we know, as
14 we've always known about OSHA logs, but we have even a
15 better idea now, you know, to what degree is this an
16 underestimation of -- of the actual injuries occurring
17 in the workplaces?

18 DAVID MICHAELS: Okay. Thanks. Anything?

19 DOROTHY DOUGHERTY: Yeah, if I could just
20 follow up, Pamela.

21 PAMELA VOSSENAS: Sure.

22 DOROTHY DOUGHERTY: How do you think OSHA can

1 improve its capturing and tracking of the injury and
2 illness -- illnesses which befall immigrant workers on
3 the OSHA recordkeeping log?

4 PAMELA VOSSENAS: So specifically about
5 capturing it on the log?

6 DOROTHY DOUGHERTY: Mm-hmm.

7 PAMELA VOSSENAS: Well, I think -- I think
8 enforcement of the OSHA recordkeeping standard would be
9 a good place to start. And I -- I mean that sincerely.
10 I -- I think the quality of the data that's entered, I
11 don't believe they're fulfilling their requirements
12 under the OSHA recordkeeping standard. You know, we
13 seriously question that these disincentive programs are
14 in compliance with the OSHA recordkeeping standard.

15 I think OSHA reaching out to employers and to
16 workers about the responsibilities of employers to
17 record and the rights of workers to report is one step,
18 but it has to be more than education. Workers regularly
19 exercise their rights. Unionized workers and non-union
20 workers exercise their rights in the workplace and do
21 suffer the consequences. So I think a lot more has to
22 be done on the enforcement end.

1 And -- and the reporting of injuries is one
2 thing, but we -- we need OSHA to get into workplaces.
3 We need OSHA to get into hotels, inspect hotels. You
4 know, inspect the hotels where you have these at-risk
5 workers which would include immigrant workers. You
6 know, inspect the hotels of employers that have the
7 highest rate. In our case for this study, it was Hyatt,
8 for example.

9 DOROTHY DOUGHERTY: Then, just one question
10 for John. Tosca (ph) reform is currently being
11 discussed. Is this an area you think could help OSHA to
12 address occupational hazards?

13 JOHN MORAWETZ: It would certainly help
14 workers. I think it would help our country. I -- you
15 know, I -- I haven't looked at Tosca reform in terms of
16 OSHA. But certainly expanding the base of knowledge as
17 to what these 50,000 chemicals are doing implicitly
18 would be helpful for all of us.

19 DAVID MICHAELS: Great. Chris?

20 CHRIS WITKOWSKI: One question. We've -- as
21 Dinkar mentioned earlier, the -- the FAA does not really
22 look at the occupational safety and health consequences

1 of the things that they approve for aviation operations.
2 One example of this was in the 1960's, they moved from
3 Ram Air, which was bought directly from outside the
4 aircraft to supply the cabin and the flight deck, to
5 engine bleed air, which is air bled off the engine, but
6 sometimes is contaminated with toxic engine -- jet
7 engine oil with organophosphates.

8 And we've had a lot of injuries over the
9 years, illnesses, related to that. And that's because
10 there's no agency or group within FAA that looks at the
11 occupational health and safety consequences.

12 And so I -- since -- the question was asked by
13 Rich, I think, about if the MOU -- I mean, if the policy
14 statement from 1975 was simply rescinded, what would
15 happen? Well, the MOU, itself, does provide a process
16 for first looking at all the -- the consequences and
17 establishing a new policy statement that would allow for
18 certain OSHA regulations to apply and then point out
19 some safety issues that have to be addressed. And that
20 can be done.

21 And so I would hope that we can get your
22 commitment that we could meet and discuss the process

1 for moving forward with implementing the MOU.

2 DAVID MICHAELS: We'll certainly look at it
3 with you. So --

4 JOHN MORAWETZ: John. Thank you.

5 DAVID MICHAELS: Thank you all.

6 DEBORAH BERKOWITZ: Thank you very much.

7 DAVID MICHAELS: You want to stand up and
8 stretch?

9 DEBORAH BERKOWITZ: Yeah. Two and a half
10 hours I think is --

11 DAVID MICHAELS: I know. I would --
12 (inaudible). Okay. Very good.

13 (Brief pause in the proceedings.).

14 DEBORAH BERKOWITZ: Okay. So we have Rick
15 Inclima, Jason Zuckerman, Richard Renner and --

16 DAVID MICHAELS: Tim sharp.

17 DEBORAH BERKOWITZ: Tim Sharp? Okay.

18 DAVID MICHAELS: Tim?

19 DEBORAH BERKOWITZ: He's from Alaska, so he
20 may have been -- long walk, right.

21 DAVID MICHAELS: Well, we'll put him on last
22 to make sure his plane got here. Thank you all for your

1 patience. One more very important panel.

2 DEBORAH BERKOWITZ: Yes, this is it.

3 DAVID MICHAELS: So -- okay.

4 UNKNOWN SPEAKER: It's the last one right?

5 DEBORAH BERKOWITZ: Last but not least.

6 DAVID MICHAELS: No, no. There's a surprise
7 guest afterwards -- no.

8 DEBORAH BERKOWITZ: Yeah.

9 DAVID MICHAELS: Okay. Jason?

10 DEBORAH BERKOWITZ: You want to start?

11 JASON ZUCKERMAN: Yeah, happy to do that.

12 Good afternoon. My name is Jason Zuckerman, and my
13 perspective on this issue is that my law practice,
14 almost full-time, is to bring claims before the DOL on
15 behalf of individuals in a wide range of industries
16 including the airline industry, the financial services
17 industry, including the nuclear industry, who blew the
18 whistle, who did the right thing, and as a result of
19 that, have had to deal with various adverse actions
20 which could include that they are not employed at that
21 job anymore. But beyond that, what's happened to a few
22 of my clients is they're completely, completely

1 blacklisted from an entire industry.

2 I saw up there that it says, "No one should
3 have to be injured or killed for a paycheck." In order
4 to achieve that end, OSHA has to insure that people who
5 blow the whistle and who are retaliated against can
6 bring a claim, and -- and that's very important.

7 I'll just give you a quick example. Had a
8 client who was supposed to go into a confined space.
9 And his -- his -- he pointed out to his employer, look,
10 we have to check the air. We certainly have to have the
11 right kind of equipment there. He asked his employer if
12 they even had a confined space permit.

13 They were not complying with any of these
14 rules. He would not go in there because he thought it
15 would put his life on the line. He was out of the job
16 right then. And my concern there is not only that my
17 client lost his job, but what's happened to every other
18 employee at that worksite? You can be darn sure that
19 those people saw that if they blow the whistle, they're
20 going to be out of their jobs.

21 And that's why these laws are so important.
22 Because they're not just about my clients who have lost

1 their job. They're about insuring that every workplace
2 that these laws apply to, individuals feel they can blow
3 the whistle without have to fear that they will lose
4 their job.

5 Without going through all the concerns I have
6 about how the process works right now, I thought I could
7 quickly point them out by trying to provide my
8 perspective and the perspective of my clients as they go
9 through this process at OSHA.

10 There's a wide range of laws. I think we're
11 now up to maybe 18 -- sorry -- that protect employees.
12 And that has, by the way, increased a lot just in the
13 past few years. And of course, as the U.S. Congress has
14 increased those laws, they did not increase -- and as
15 there's been a big increase in the workload here at
16 OSHA, there, of course, hasn't been any more
17 appropriations to deal with that increased workload.

18 But the way these laws work is that the --
19 these claims have to be brought before OSHA, and OSHA's
20 required to investigate these claims. And with all due
21 respect to OSHA, and -- and believe me, there are a lot
22 of hardworking people at OSHA who try very hard for my

1 clients. And I -- I've even had some clients who had a
2 very good outcome at OSHA. But in the vast majority of
3 these claims, OSHA does not truly look into the
4 allegations. What happens is my client will bring a
5 complaint. There will be an answer from the employer,
6 and what usually happens at OSHA is they say, well, the
7 employer had some concerns about your client's
8 performance. That's the end of it. And -- and it just
9 can't be that way anymore.

10 So what happens is I -- I -- sorry -- I'll
11 bring the complaint. And then I don't hear from OSHA
12 for a very long time. It can be up to half a year that
13 I hear back. And I'll get a call from OSHA, and they'll
14 say well, we got an answer from the employer, and they
15 had some concerns about your client's performance. I'm
16 probably going to close this out now, but if you want,
17 I'll speak to your client.

18 Again, that's not how the process is supposed
19 to work. And I'll say, well, can I please have a copy
20 of the answer? And I can't even get the answer.
21 There's an OSHA policy that came about three years ago
22 that has to be withdrawn where the employer will see the

1 complaint, but my client won't even see the answer. How
2 can my client even respond to the allegations that have
3 been made when they can't see the answer?

4 Then I'll ask the -- the person at OSHA, have
5 you spoken with any of the employees at this employer?
6 And they'll say, yes, I have. And I'll say, well, what
7 did they say? It's supposed to be an interactive
8 process where I can get information, and my client then
9 has a chance to respond to the information. But what
10 I'll hear from OSHA is, we can't provide any of that to
11 you. It's all confidential, when -- when it's really
12 not at all proprietary information.

13 Then I'll say to OSHA, look, there are a lot
14 of emails out there. There are a lot of other documents
15 that will prove my client's claim. And I'll propose to
16 them who they should interview, what emails they should
17 get, and they make no real effort to do that. And
18 instead they really rely only on what they're hearing
19 from the employer.

20 I -- I see I'm about done. Very, very
21 quickly, I -- I want to propose just a few quick ways
22 that the process can be improved. One, I think OSHA has

1 to comply with the laws that they're really supposed to
2 look into these claims. They're supposed to interview
3 people. They're supposed to collect key documents that
4 will allow my clients to prove their claims. My clients
5 are often out at the worksite. They don't have access
6 to those emails.

7 And while OSHA, unfortunately, does not have
8 the power to subpoena documents, there's a lot more they
9 could do. For example, it could say to an employer, I'm
10 asking you for these documents. If you won't provide
11 them, I'm going to draw an adverse inference for the
12 employee.

13 Two, there is an Office of Whistleblower
14 protection at OSHA, but it appears at least that that
15 office does not really have very much control over the
16 process at all. I think that office has to be
17 authorized to review all OSHA determinations in these
18 claims and to overturn the conclusions of a regional
19 administrator. That will, one, enhance quality control,
20 but even more importantly, it will insure that the way
21 these claims are being looked at and the conclusions
22 that OSHA comes to is the same throughout the U.S.

1 Three, it's very important that the employer
2 not control -- not have the only control on what
3 information is reviewed by OSHA. There is no excuse at
4 all why the employer cannot be required to provide a
5 copy of the answer to the complainant. That -- that's
6 an area that OSHA could change right now.

7 Four, there should be more of an effort by
8 OSHA to work with the complainant to plan who should be
9 interviewed. And when people are interviewed, I believe
10 that OSHA should go back to the complainant, provide a
11 general idea of what it has obtained from those
12 interviews and give the employee a chance to respond to
13 that information.

14 The way it works now is the employer really
15 has sole control over who is interviewed, and moreover
16 there should be an option for low-level employees to
17 meet with OSHA outside of the presence of corporate
18 counsel. Because surprise, surprise, when you have
19 corporate counsel there in the room, a low-level
20 employee might not feel that they can be completely
21 forthcoming with OSHA.

22 DEBORAH BERKOWITZ: Finished? Okay.

1 JASON ZUCKERMAN: Sorry. Two -- very last --

2 DEBORAH BERKOWITZ: We have less than --

3 DAVID MICHAELS: We -- we have your written
4 testimony in here.

5 JASON ZUCKERMAN: Two very last -- two -- two
6 last things.

7 DEBORAH BERKOWITZ: Okay.

8 JASON ZUCKERMAN: One, I think there should be
9 an ADR program at OSHA to see if there's a way that
10 these claims can be resolved early. That's worked well
11 at the OALJ here, and at the NRC and at the EEOC.

12 And the very last point I have is this needs
13 to become a transparent process which it's not now. But
14 to conclude, I think it's very important that OSHA
15 actually do its job here, look into these claims. And
16 where -- where appropriate and -- insure that my clients
17 get the relief that they deserve.

18 DEBORAH BERKOWITZ: Thank you.

19 JASON ZUCKERMAN: Thank you.

20 RICHARD RENNER: Thank you. My name is
21 Richard Renner. I am Legal Director of the National
22 Whistleblower's Center. We have an action alert web

1 page with information for whistleblowers. I edit the
2 blog at our web page. And we try to make sure that
3 workers throughout the country are aware of their rights
4 when they discover fraud, illegality or other violations
5 at work.

6 And you all have been here a long time, right?
7 Past eight hours. Have you guys had a bathroom break?
8 I hope. Maybe someone should call the Department of
9 Labor.

10 You know, I had expected that when I saw the
11 schedule that, you know, we'd be bringing up the
12 whistleblowers issues here in this last panel, but I'm
13 pleasantly surprised that I've been hearing about them
14 all day. And I was particularly surprised that I heard
15 the first mention of them in the second panel when
16 Steven Sandherr of the Association of General
17 Contractors -- Dr. Michaels, when you asked him about
18 the metrics that you would use to evaluate success, he
19 talked about how their employer should strive for a
20 "culture of safety."

21 And -- and that really is what whistleblower
22 protection is all about. Making sure that every single

1 worker in America knows that if they see something
2 that's unsafe, if they know that there's a violation
3 there, if they're concerned, that they can raise their
4 concern and -- and it will be met in good faith with an
5 effort to try to improve safety, improve compliance, and
6 avoid violations and uncover corruption and fraud if --
7 if that's the issue.

8 It seems to me very similar to what the
9 Nuclear Regulatory Commission has done with their
10 Safety-conscious Work Environment regulations. And I
11 hope someday those types of regulations will find their
12 way into OSHA regulations to require that companies have
13 systems in place that demonstrate that raising concerns
14 is a natural part of our business. And it's what we
15 live on to make sure that safety issues are caught and
16 addressed with appropriate management.

17 A few points, and Jason and I, I know, both
18 had longer written comments, but the study from the
19 University of Chicago that I mentioned that came out two
20 years ago found that whistleblowers are the best tool at
21 fighting corporate fraud. And -- and with the adoption
22 of Sarbanes-Oxley and Air 21 (ph) and the stimulus

1 package last year, you know, OSHA's Whistleblower
2 Program has to do with more than just workplace health
3 and safety. It's now responsible for making sure that
4 other types of whistleblower retaliation on which our
5 economy depends, you know the financial reports at the
6 SEC. You know, the safety and -- of aviation workers,
7 you know, those are definitely decided here at OSHA
8 today.

9 And in the corporate fraud area, the
10 University of Chicago study found that 82 percent of
11 people who raised fraud concerns lost their jobs, either
12 through termination or constructed discharge. And a
13 PricewaterhouseCooper study, their -- their annual
14 global crime survey also made similar findings, as did
15 the GAO report on the whistleblower program, finding
16 that most workers who raise concerns about violations
17 end up either being fired or forced out of their jobs.

18 So you know, it doesn't raise a good prospect.
19 And we got to figure out a way to reduce that rate. And
20 I think having a successful whistleblower program is the
21 best way to do that.

22 Unfortunately, the GAO study found that the

1 Whistleblower Protection Program that we have today is
2 not that -- that program. It tried to measure the
3 success rate and discovered first that it was hard to do
4 because OSHA wasn't keeping the right records. It was
5 hard to determine whether or not a settlement was really
6 a victory or a defeat for the worker and how it should
7 be scored in measuring a success rate.

8 GAO figured that including settlements as
9 successes, the success rate came to 19 percent. But
10 virtually all of those were settlements, so there were
11 very few actual merit determinations where OSHA -- an
12 OSHA investigator actually found retaliation when
13 workers were complaining about losing their jobs for
14 raising safety issues. So that's a problem.

15 And I -- I have a -- Oh. The best information
16 that I know of comes, you know, not from OSHA but from
17 the Massachusetts COSH committee which puts out their
18 annual worker Memorial Day report. And their report on
19 dying for work in Massachusetts looked at just the
20 Massachusetts office. And they found that for the
21 previous two years, the number of merit findings and
22 whistleblower complaints by OSHA was zero in both the

1 last two years.

2 And in the -- when you look for punitive
3 damages assessed for whistleblower violations, you had
4 to go back six years to find one example. So that's not
5 a very encouraging rate there. And -- and, you know,
6 the average American worker thinking about, gee, you
7 know, I'll probably get fired if I raise this. And if I
8 do raise it, you know, and I make a complaint, I'll
9 probably lose that complaint. You know, the combination
10 is not very inducive to that culture of safety that
11 we're looking for. And -- and we should try to find
12 ways to change that.

13 And that's why I support Jason Zuckerman's
14 call to centralize the decision-making whistleblower
15 complaints. Having the regional offices do it now, you
16 know, the whistleblower program is like a -- a
17 disfavored secondary program. And if we had a central
18 national whistleblower office, then that whole office's
19 mission would be to make sure that -- that workers have
20 a fair evaluation of whether or not they suffered
21 retaliation. And I think it would get better attention
22 then.

1 And I've got lots of other remarks, but my
2 time is up, and so you'll have to check it on the web
3 page.

4 DEBORAH BERKOWITZ: Thank you.

5 RICK INCLIMA: Thank you. I think it's safe
6 inform say good evening at this late hour. My name is
7 Rick Inclima, and I'm the Director of Safety for the
8 Brotherhood of Maintenance of Way Employees, division of
9 the Teamsters Rail Conference.

10 BMWWE is a rail labor union representing
11 approximately 35,000 rail employees who build, inspect,
12 maintain and repair the tracks, bridges, and railroad
13 infrastructure nationwide. We certainly want to thank
14 OSHA for holding this public hearing and allow us the
15 opportunity to speak.

16 BMWWE clearly understands the jurisdictional
17 framework under which both OSHA and FRA operate. And we
18 look forward to continuing our work with both OSHA and
19 FRA to improve safety and health conditions in the
20 railroad workplace. However, by virtue of the Railroad
21 Whistleblower Law, having been assigned to the
22 department's whistleblower enforcement section, BMWWE and

1 the rest of rail labor are kind of new kids on the block
2 in this new area of oversight and enforcement by OSHA.

3 The field offices of OSHA, although already
4 carrying a heavy case load, have willingly accommodated
5 the new influx of railroad whistleblower matters even
6 though they have significantly increased the burden on
7 those offices. I agree with the previous speakers about
8 the need for appropriations and allocations to fund the
9 whistleblower -- whistleblower issues and the
10 whistleblower enforcement situation.

11 We've been impressed up to this point with the
12 -- with the thoroughness of the investigations of the --
13 you know, the several complaints have been conducted by
14 OSHA thus far.

15 Whether supporting or denying the complaints
16 in the railroad industry, the field office's findings
17 and orders seem to be fairly detailed, balanced and --
18 and -- and carefully reasoned. The new administration
19 clearly wants to see an overall improvement in workplace
20 safety, as well as an improvement in specific problem
21 areas.

22 Of course, the Brotherhood of Maintenance of

1 Way shares these goals with the Department of Labor and
2 the administration. In our experiences so far, an even
3 and consistent balance has been maintained by the
4 department as to inputs and consideration for labor,
5 industry, and other affected stakeholders. DOL has also
6 made it quite clear its preference for cooperative and
7 consensus-based approaches to rulemakings in many other
8 processes.

9 The BMWWE can speak to the strengths of the
10 collaborative approach based on our years of experience
11 in consensus-based rulemaking through the Federal
12 Railroad Administrations Rail Safety Advisory Committee,
13 known as the ARSAC. We look forward to collaborating
14 with OSHA on railroad workplace whistleblower matters
15 and other issues of mutual concern.

16 As director of the BMWWE Safety Department, I
17 can attest that that there is a dire need for strong
18 whistleblower protection within the railroad industry.
19 Rail workers are still subjected to persuasive bullying,
20 harassment, and retaliatory dismissals for reporting
21 safety concerns and on-the-job injuries.

22 The FRA does what they can to uncover such

1 unlawful behavior, but they have great difficulty, as
2 does the union, in getting rail workers to speak out
3 because the workers are scared and intimidated by the
4 carrier's systemic retaliation.

5 Rail workers have never had strong
6 whistleblower protection in the past. And that is one
7 of the reasons why the Congress moved railroad
8 whistleblower cases to OSHA under section 20109.

9 Whistleblower protection is vitally important
10 to railroad safety and public safety and is in the
11 national interest. Unlawful retaliation against rail
12 employees who report injuries or safety violations has a
13 significant adverse affect on railroad safety and
14 railroad accident reporting because it prevents accurate
15 reporting. It supresses timely communication of
16 safety-critical information, and it has a debilitating
17 affect on railroad employees.

18 The culture of intimidation and retaliation on
19 the nation's rail carriers continues to cause serious
20 underreporting of injuries, underreporting of lost days
21 due to injury, and underreporting of safety violations
22 and safety hazards.

1 BMW strongly encourages the department to
2 continue to move with all due haste to preserve and
3 enforce the whistleblower rights of rail employees under
4 section 20109. Railroads have been aggressively
5 challenging the basic structure of 20109 in trying to
6 artificially limit the applicability of whistleblower
7 protection for rail employees. In our opinion, they
8 have attempted to mislead DOL as the agency grapples
9 with understanding the railroad industry.

10 DOL, however, has gone the extra mile to this
11 point to gather information, gather accurate
12 information, and has self-corrected as it works through
13 the numerous problems and challenges faced within the
14 railroad industry. We sincerely thank DOL for its extra
15 efforts and conscientious performance in these
16 enforcement programs.

17 We firmly believe that the oneverblown fears
18 and dire predictions of industry have not and will not
19 come true with regard to whistleblower protection. In
20 fact, we firmly believe that strong whistleblower
21 protection will improve railroad safety, improve the
22 accuracy of accident reporting, and open new lines of

1 communication for the prompt conveyance of
2 safety-critical information.

3 The Brotherhood of Maintenance of Way looks
4 forward to strengthening our relationship with OSHA and
5 the whistleblower enforcement section. And we look
6 forward to working with the department and all affected
7 stakeholders to address any issues affecting the full
8 implementation and enforcement of whistleblower
9 protection for rail workers under 20109.

10 Again, I thank you for the opportunity to
11 speak here today, and I thank you for your time and
12 attention. Thank you.

13 DAVID MICHAELS: Thank you very much. You
14 know, as I think all of you know, this is an area of
15 great importance to the country and to OSHA, and one we
16 are really grappling with, with limited resources and
17 many responsibilities to try to make sure we do the
18 right thing.

19 I have -- I fortunately had the opportunity
20 to spend an hour with Jason recently, so I don't really
21 have new questions for him, but, Rick, I do have a
22 question. You talk in your longer testimony about a

1 campaign around election of remedies. Could you go into
2 what that means?

3 RICK INCLIMA: Rick. Yes, and that's -- the
4 railroad industry has taken a position that if an
5 employee is brought into a hearing which the company
6 controls, they say, okay. You violated a rule or
7 violated a regulation, you come to a company hearing.
8 You've elected a remedy, and you are barred from
9 pursuing a 20109 case under this Doctrine of Election of
10 Remedy.

11 DAVID MICHAELS: If they're asked to come in,
12 and they come in voluntarily, they've elected --

13 RICK INCLIMA: It's not voluntarily. If they
14 don't come in, they don't come back to work. So
15 basically the -- the company owns the process. They are
16 the -- the judge and the jury. And we have a right to
17 defend against allegations of, you know, safety
18 violations or whatever the case might be, but we don't
19 have the ability to bring charges against a manager who
20 may, you know, harass or intimidate a person in -- you
21 know, a whistleblower type of situation. So we really
22 do need the OSHA whistleblower protections.

1 And these gentlemen here seem to have a little
2 more experience with the OSHA whistleblower area. But
3 we've had no whistleblower protection for, you know --
4 for the 30 years I've been around. And so to us it's a
5 breath of fresh air.

6 DAVID MICHAELS: Right.

7 RICK INCLIMA: And, you know, it's -- there is
8 a dire need for this type of protection for rail workers
9 because they're scared to death. And a lot of things
10 are going on that should not go on in any workplace in
11 America.

12 DAVID MICHAELS: Well, I'm certainly hoping we
13 can help you. Do you have any thoughts about this
14 election of remedy? Or you haven't run into this?

15 RICHARD RENNER: Yeah, employers have made
16 similar arguments under other laws, and in -- in my
17 view, it's completely baseless because the -- the
18 Railroad Safety Act that creates the whistleblower
19 protection for railway workers creates a statutory
20 remedy. And -- and, you know, there are some elections
21 that an employee can make as to, you know, how to pursue
22 the case, but, you know, it's been longstanding law that

1 pursuing a -- you know, if the union pursues a grievance
2 for example or, you know, there's some other complaint
3 made that should not interfere with the statutory right
4 that the employee has for the whistleblower complaint.

5 And I'll be happy to talk to Rick, and if, you
6 know, there's a case where they bring that type of case
7 on appeal for a decision, I'd certainly want our center
8 to participate in helping to enforce that right.

9 DAVID MICHAELS: Okay. Thank you. Any other
10 questions? We've --

11 RICHARD FAIRFAX: No, I just look forward to
12 working with you.

13 UNKNOWN SPEAKER: Yeah, one more population we
14 can try to help.

15 DAVID MICHAELS: We certainly appreciate that.

16 DAVID MICHAELS: All right. Well, thank you
17 all very, very much. And thank you all. I'm really
18 pleased with those of you who could be with us all day.

19 Our docket is still open. If you have
20 suggestions, write to us, and this is the beginning of a
21 long process. So thank you all for your participation.

22 (Conclusion of recorded material.)

CERTIFICATE OF NOTARY PUBLIC

I, NATALIA KORNILOVA, the officer before whom the foregoing meeting was taken, do hereby certify that the witness whose testimony appears in the foregoing pages was recorded by me and thereafter reduced to typewriting under my direction; that said hearing is a true record of the proceedings; that I am neither counsel for, related to, nor employed by and of the parties to the action in which this meeting was taken; and further, that I am not a relative or employee of any counsel or attorney employed by the parties hereto, nor financially or otherwise interested in the outcome of this action.

NATALIA KORNILOVA

NOTARY PUBLIC IN AND FOR THE

DISTRICT OF COLUMBIA

MY COMMISSION EXPIRES:

APRIL 14, 2012