Attachment 2

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October 14, 2014

The Honorable David S. Michaels
Assistant Secretary of Labor for
Occupational Safety and Health
U.S. Department of Labor
Room N-2625
200 Constitution Avenue N.W.
Washington, D.C. 20210

SUBMITTED ELECTRONICALLY: www.regulations.gov

Re: Comments on OSHA Docket No. OSHA-2013-0023; Improve Tracking of Workplace Injuries and Illnesses, Supplemental Notice of Proposed Rulemaking (79 Fed. Reg. 47605, August 14, 2014)

Dear Dr. Michaels:

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

OSHA's Supplemental NPRM to the rulemaking to Improve Tracking and Workplace Injuries and Illnesses ("supplemental NPRM", "supplemental") purports to address problems OSHA believes were revealed during the January 9-10, 2014 public meeting on the underlying proposed regulation that would require employers to submit their injury and illness records to OSHA electronically, after which OSHA would post them on the internet. However, OSHA provides no data or evidence to support the notion that either the problem it thinks exists really does, or that this supplemental would be an effective response. The only support OSHA offers for this supplemental is comments made by a few participants at the public meeting. The supplemental is thus grounded on a presumption of employer malfeasance without any verification or other support.

Furthermore, the exact nature of what OSHA has published is not entirely clear. The supplemental falls short of an actual notice of proposed rulemaking as it lacks several key elements, not the least of which is proposed regulatory text. It also lacks any indication that

OSHA satisfied various rulemaking requirements such as considering the impact under certain laws and executive orders. The supplemental actually reads more like an Advance Notice of Proposed Rulemaking posing a series of questions and seeking input rather than describing specific requirements employers would have to meet. However, OSHA gives no indication that any other regulatory action or publication will happen before a final regulation is issued.

Finally, far from merely clarifying an employer's responsibility under the record keeping regulations as OSHA claims, the supplemental NPRM would make fundamental and dramatic changes to the operation of the whistleblower protections under Section 11(c) that would impact Chamber members across all sectors, large and small and in every industry. The supplemental indicates OSHA's intent to thoroughly upend the whistleblower protections under Section 11(c) so that instead of employers being held accountable for disadvantaging employees who come forward, the only trigger would be an OSHA inspector's belief that the employer had suppressed or in some way prevented an employee from coming forward.

Accordingly, the Chamber believes the supplemental NPRM must be withdrawn. Further elaboration on these reasons follows. The Chamber also endorses the comments submitted by the Coalition for Workplace Safety and refers OSHA to those comments for more extended treatment of the issues raised in our comments, as well as other issues not raised here

I. OSHA Provides No Data or Support for the Changes Suggested by the Supplemental

In the same way that OSHA failed to support the underlying rulemaking with adequate data and science, OSHA has utterly failed to provide sufficient data or evidence of the problem the agency claims it is addressing, or that the responses suggested but not actually proposed in the supplemental would address these issues. OSHA states that at the public meeting held January 9-10, 2014,

> A prevalent concern expressed by many meeting participants was that the proposal might create motivations for employers to under-record injuries and illnesses, since each covered establishment's injury and illness data would become publically available on OSHA's Web site. Some participants also commented that some employers already discourage employees from making injury and illness reports by disciplining or taking other adverse action against employees who file injury and illness reports. These participants expressed concern that the increased visibility of establishment injury and illness data under the proposal would lead to an increase in the number of employers who adopt practices that have the effect of discouraging employees from reporting recordable injuries and illnesses. OSHA is concerned that the accuracy of the data collected under the new proposal could be compromised if employers adopt these practices. In addition, OSHA wants to ensure that employers, employees, and the public have access to the most accurate data about injuries and illnesses in

> their workplaces so that they can take the most appropriate steps to protect worker safety and health.

79 Fed. Reg. 47606.

In actuality, "many meeting participants" really means the comments of representatives from the Teamsters, the SEIU, and the AFL-CIO. The recitation of comments and assertions made at the public meeting is as close as OSHA gets to providing support for the actions the agency is "proposing." The same public meeting comments and assertions are repeated elsewhere in the Federal Register notice, but nowhere does OSHA offer any independent validation or verification that would make these comments enough to support a new NPRM.

Not only are these comments insufficient to support this NPRM, they are not even new. In fact, OSHA has been chasing the chimera that employers actively suppress employees from coming forward with injuries since the inception of this administration. Soon after coming into office, with $1 million from the FY 2009 Omnibus Appropriations Act, OSHA launched a National Emphasis Program on recordkeeping, "to determine **whether there are policies and practices in place that cause incomplete reporting of injuries and illnesses by employees**." *Report on the findings of the Occupational Safety and Health Administration's National Emphasis Program on Recordkeeping and Other Department of Labor Activities Related to the Accuracy of Employer Reporting of Injury and Illness Data* ("OSHA NEP Report to Congress"), May 7, 2012, page 2. (emphasis added)

The NEP was explicitly premised on the belief that employers must be hiding injuries. It targeted employers with the best safety records in the most hazardous industries—claiming that they could not possibly have such a low rate of injury. Companies were chosen because they were better than their peers. OSHA conducted exhaustive and intrusive audits of over 550 establishments, including reviewing employee medical records to determine if they had been treated for workplace injuries, and even inquired directly of employees about whether any employer policies, such as incentive programs with as trivial a reward as a pizza party, had discouraged them from reporting any injuries or illnesses.

Yet, based on the report OSHA was directed to submit to Congress, OSHA was unable to uncover any such "policies and practices." Further confirmation that OSHA did not find any employer practices of this nature is that *nowhere in this supplemental* is the NEP on recordkeeping even mentioned. If OSHA had some data from that NEP that corroborated the comments and allegations made at the public meeting, the agency would most certainly have relied on it and used it to underpin this NPRM. Instead, there are no references to the NEP and nothing but unsupported comments as the foundation for this "proposal."

II. The Supplemental Fails as an NPRM Lacking Proposed Regulatory Text or Any Indication That OSHA Satisfied Other Rulemaking Requirements

In addition to lacking any supporting evidence or data, the supplemental fails as any kind of an NPRM. Indeed, it reads much more like an Advance Notice of Proposed Rulemaking

(ANPR), with the agency asking questions and seeking information to determine the next step it should take.

The main content of the supplemental is a series of 18 questions rather than setting forth explicit regulatory text for notice and comment. However, these questions show a distinct anti-employer bias and are generally not able to be answered by employers who will have to comply with whatever flows from this supplemental. The following questions are among the ones that are clearly not directed at employers:

1. Are you aware of situations where employers have discouraged the reporting of injuries and illnesses? If so, describe any techniques, practices, or procedures used by employers that you are aware of. If such techniques, practices, or procedures are in writing, please provide a copy. 79 Fed. Reg. 47607

2. Will the fact that employer injury and illness statistics will be publically available on the internet cause some employers to discourage their employees from reporting injuries and illnesses? Why or why not? If so, what practices or policies do you expect such employers to adopt? *Id.*

8. Are you aware of any examples of reporting requirements that you consider to be unreasonably burdensome and could discourage reporting? What are they? 79 Fed. Reg. 47608.

10. Are you aware of employer practices or policies to take adverse action against persons who report injuries or illnesses? Please describe them. *Id.*

These questions reveal a presumption by OSHA that employers are engaging in "policies and practices in place that cause incomplete reporting of injuries and illnesses by employees" ("The provisions will at most serve to counter the additional motivations for employers to discriminate against employees attempting to report injuries and illnesses." 79 Fed. Reg. 47609.). Furthermore, they make clear OSHA is still trying to find support for this theory, even after conducting the NEP.

As noted previously, and throughout these comments, the supplemental provides no proposed regulatory text. Although Part 1904 is a regulation, not "standards," Congress' instructions on how standards are to be issued are instructive. Section 6(b)(2), which describes the process for the issuance of standards requires that "The Secretary shall publish a proposed rule promulgating, modifying, or revoking an occupational safety or health standard in the Federal Register and shall afford interested persons a period of thirty days after publication to submit written data or comments." 29 U.S.C. 655 (b)(2). Clearly Congress expected OSHA, when proposing a new requirement for employers, to actually provide the text of that requirement when issuing the proposal. Absent this text, "interested persons" are unable to intelligently comment, particularly with respect to proposals that are as vague as these.[1] OSHA has not even provided well-articulated descriptions of what the requirements will say.

[1] Basic rulemaking principles, under the Administrative Procedure Act, require specificity in an NPRM in order to facilitate comments and meaningful participation by interested parties. While agencies may have considerable

This supplemental further fails as an NPRM as OSHA has not shown that many of the requirements for a rulemaking have been satisfied. OSHA is required to discuss how it has complied with the Regulatory Flexibility Act, the Paperwork Reduction Act, Executive Orders 12866 and 13563 (regulatory and rulemaking policy), 13132 (federalism), and the Unfunded Mandates Reform Act. Of these, OSHA provides cursory discussions of how it claims to have met the requirements of the Regulatory Flexibility Act and E.O. 13132. No mention is made of any of the other laws or executive orders that apply to OSHA rulemakings. OSHA does not even suggest that the agency has discharged its obligations under these laws through the initial proposal. This may be a function of OSHA not offering any proposed regulatory text since compliance with these various requirements is predicated on analyzing the proposed regulation's impact. Instead OSHA discusses how this supplemental does not trigger an Environmental Impact Assessment under the National Environmental Policy Act. 79 Fed. Reg. 47609. Either OSHA has ignored this requirement in previous rulemakings, notably the underlying proposal for this rulemaking, or the agency just discovered the requirement to analyze its proposals under this law. Either way, this discussion is jarringly out of place in the supplemental.

Furthermore, this supplemental was never reviewed by the Office of Information and Regulatory Affairs under the interagency review process established by E.O. 12866. This lack of OIRA review meant it was never posted on OIRA's website and therefore its issuance was a complete surprise. This approach is not consistent with an administration that likes to proclaim its devotion to being transparent.

III. The Supplemental Would Upend Section 11(c) by Creating a New Enforcement Scheme Congress Never Intended

By far the most profound and troubling concept advanced by this supplemental is OSHA's vision to enforce the whistleblower protections under Section 11(c) through a traditional inspection/citation process. While never fully described or proposed, OSHA refers at various places to "this provision." 79 Fed. Reg. 47608, 47609.

In addition to the traditional whistleblower penalties an employer would suffer for taking an adverse action against an employee who reports an injury or illness, OSHA wants to bestow upon itself the authority "to cite an employer for taking adverse action against an employee for reporting an injury or illness, **even if the employee did not file a complaint**." 79 Fed. Reg. 47607. (emphasis added) This means OSHA would be able to bring an action for whistleblower violations *without a whistleblower*. This is utterly in conflict with the provisions of Section 11(c) that clearly indicate the trigger for any action is that an employee must "file a complaint with the Secretary alleging such discrimination." 29 U.S.C. 660 (c) (2).

If OSHA were to issue such a citation, converting whistleblower actions into recordkeeping violations, it would lead to employers bringing their challenges before the Occupational Safety and Health Review Commission instead of the federal courts as specified in Section 11(c). That Congress intended whistleblower matters to be heard in federal courts is

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flexibility in how they propose a regulation, the fundamental concept is that those affected by it must be able to understand what will be expected of them.

unequivocal as the language of the Sections says so explicitly. *Id.* Indeed, the entire whistleblower section of the Act is under the larger heading of Section 11—Judicial Review (29 U.S.C. 660), rather than the section establishing the OSHRC, 29 U.S.C. 661. Removing these cases to OSHRC would force them to review cases about which they have no expertise. Their expertise, and jurisdiction under the Act, is in adjudicating substantive OSHA violations related to workplace health and safety. Had Congress wanted whistleblower actions to be heard by the Commission, instead of the federal courts, it would have said so, and could easily have done so. Merely because OSHA cannot get legislative changes that would give them more ability to use the whistleblower protections for their own enforcement purposes does not give OSHA the authority to rewrite how Section 11(c) operates.

Not only does OSHA's intention to reconfigure the whistleblower protections under the Act conflict with statutory authority, it is also inconsistent with the underlying rulemaking requiring electronic submission of injury and illness records. That proposal has built-in limitations as to which businesses would be required to submit records. Businesses in certain industries (now determined by the NAICS system, but previously the SIC system) are not required to maintain records and therefore will not be required to submit records under the proposed regulation. However, this reworking of the whistleblower protections under Section 11(c) has no such limitation or restriction. It is therefore incompatible with the underlying rulemaking this supplemental would modify.

Finally, and again, without any specific regulatory text to review on "this provision," particularly given its profound impact, employers are unable to know what will be expected of them. Not having the opportunity to actually see what OSHA is considering thoroughly undermines the value of this supplemental and erodes the administration's claim to operating transparently.

IV. OSHA's List of Adverse Actions That Would Constitute Violations of Section 11(c) is Problematic

The Chamber opposes employers disciplining, or taking adverse actions against, employees who report injuries and illnesses. A well-functioning safety program requires employee input about hazards, violations and injuries to make sure it remains finely tuned to the workplace and the ever changing safety issues. Employees have a duty to report these issues and comply with all standards and regulations, just as employers have a matching duty to provide a safe and healthful workplace. *See*, 29 U.S.C. 654.

Through this supplemental, however, OSHA seeks to impose an expansive view of what constitutes an adverse action that would be subject to action under the whistleblower protections of Section 11(c), or in the context of this supplemental OSHA's newly created enforcement ability under Section 11(c) to issue recordkeeping citations. Once again relying solely on comments made at the public meeting, OSHA would now include "requiring employees who reported an injury to wear fluorescent orange vests, disqualifying employees who reported two injuries or illnesses from their current job, requiring an employee who reported an injury to undergo drug testing where there was no reason to suspect drug use, automatically disciplining those who seek medical attention, and enrolling employees who report an injury in an ''Accident

Repeater Program'' that included mandatory counseling on workplace safety and progressively more serious sanctions for additional reports, ending in termination. (See Day 1 Tr. 36, 39–40, 203; Day 2 Tr. 58, 126–27, 142–143.)" 79 Fed. Reg. 47608.

OSHA's inclusion of several of these items is hypocritical. Requiring an employee who reported an injury to wear a fluorescent orange vest is *exactly* the type of shaming tactic that OSHA believes is so central to changing employer behavior. Indeed, the initial NPRM for this rulemaking proclaims this premise as one of the key reasons for posting employer injury and illness records on the internet under this rulemaking: "Public access to this information will encourage employers to maintain and improve workplace safety/health in order to support their reputations as good places to work and/or do business with." 78 Fed. Reg. 67256. Certainly, if OSHA is so convinced this tactic will work for employers, it should work also for employees. The items about disqualifying employees from their current job if they report multiple injuries, or requiring them to undergo some form of counseling are directly analogous to the president's recently issued Executive Order 13673 on Fair Pay and Safe Workplaces that would hold federal contractors and potential contractors more accountable for violations of various workplace and employment laws including the OSH Act.

Identifying drug testing as an adverse action taken by an employer that could discourage an employee from reporting an injury runs directly counter to many state workers' compensation laws as well as regulations from other departments. As a result this "proposal" conflicts with Section 4(b)(4) of the Act that prohibits OSHA from interfering with state workers compensation laws.

In addition, OSHA's expressed opposition to such drug testing is directly conflicts with what the Department of Health and Human Services, Substance Abuse Mental Health Services Administration ("SAMHSA") advocates, as well as being contrary to requirements for Federal Workplace Drug Testing under Executive Order 12564 and Public Law 100-71 for agencies with drug testing policies for federal employees. In fact it even contradicts the Department of Labor's Drug-Free Workplace Policy.

For a complete discussion of how OSHA's views on drug testing under the whistleblower protections of Section 11(c) conflict with state workers' compensation programs and other federal agencies, the Chamber directs OSHA's attention the comments of the Coalition for Workplace Safety and those filed by Roger Kaplan of the law firm Jackson Lewis.

Furthermore, and again, whether any of these actions actually inhibit employees from coming forward was directly posed to employees during OSHA's NEP on recordkeeping. Based on the absence of any mention that these actions have that effect on employees in OSHA's report to Congress on the NEP, and the subsequent absence of any mention of the NEP in this supplemental NPRM, there is no other conclusion to draw but that OSHA was unable to find any evidence of these measures having that type of effect. The Chamber acknowledges that OSHA posting employer-specific injury and illness records on the internet may lead some employers to review more closely whether injuries and illnesses are sufficient enough and work-related enough to be recorded, compared to current practices where recording injuries and illnesses is likely to be the default. While this may lead to fewer injuries and illnesses being recorded, it will

be for wholly different reasons than the ones OSHA alleges; it will be the result of employers making legitimate decisions about what needs to be recorded, rather than employers illegitimately inhibiting employees from coming forward as OSHA has stated repeatedly.

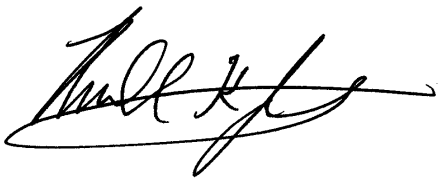
Finally, OSHA has failed to mention safety incentive programs among those employer actions it believes suppresses employees from coming forward, and would thus constitute a violation of Section 11(c). However, OSHA's views on this linkage are well known. In a March 2012 memo, then Deputy Assistant Secretary Richard Fairfax claimed "Incentive programs that discourage employees from reporting their injuries are problematic because, under section 11(c), an employer may not 'in any manner discriminate' against an employee because the employee exercises a protected right, such as the right to report an injury." In some way, this memo presaged this supplemental. OSHA's approach to attacking safety incentive programs is consistent with how the agency has handled all the other adverse actions it has identified: it has presented no support for the proposition that these programs inhibit employees from reporting, relying instead only on speculation and conjecture. Indeed, if these programs had this effect, this would have been revealed in the NEP and OSHA would surely have made that result known in the context of the Fairfax memo, this supplemental, and elsewhere.

V. Conclusion

Contrary to OSHA's thinking, this supplemental does not address any of the critical problems of the initial proposal that were exposed at the public meeting in January, 2014. This supplemental does nothing to cure the lack of statutory authority or logistical burden (of scrubbing injury and illness records of all employee identifying information) that characterize the underlying proposal. Instead of merely clarifying or emphasizing an employer's obligations to make sure employees are able to report injuries and illnesses, this supplemental NPRM presents its additional troubling issues.

The supplemental fails as an NPRM: it lacks any proposed regulatory text; it lacks any data or evidence to support OSHA's theories that employers are inhibiting employees from reporting injuries and illnesses; and it makes wholesale changes to the operation of the Section 11(c) whistleblower protections contrary to Congressional intent and without any authority to do so. The supplemental is not even styled as an NPRM, instead it reads much more like an ANPRM seeking information and suggestions, with the expectation of another regulatory action to come before a final regulation will be issued. Accordingly, the Chamber believes this supplemental NPRM must be withdrawn.

Sincerely,



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