August 22, 2002

OSHA Docket Office
Docket Number GE2003-1
Room N-2625
United States Department of Labor
200 Constitution Avenue N.W.
Washington, DC 20210

Re: Comments of the U.S. Chamber of Commerce
on OSHA’s Draft Ergonomics Guidelines for Retail Grocery Stores

Dear Sir/Madam:

The U.S. Chamber of Commerce (“Chamber”) is pleased to submit these comments on OSHA’s Draft Ergonomics Guidelines for Retail Grocery Stores (“Guidelines”). The Chamber is an association of more than 3,000,000 businesses that encompass every segment of the American economy. Its members include businesses of all sizes, from large Fortune 500 companies to home-based, one-person operations. Many of its members are small enterprises; indeed, 96% of its members employ fewer than 100 employees. Its ranks include many retail grocery operations directly affected by the Guidelines, but all of its members are interested in the broad application that the Guidelines may have to other businesses engaged in analogous activities.

The Chamber agrees with the sound justifications for OSHA’s decision to address ergonomics through voluntary guidelines. It respectfully submits, however, that this draft, like OSHA’s prior guidelines for the nursing home industry (“Nursing Home Guidelines”), does not adhere to these policies.

The Guidelines Recommend a “Cookie-Cutter” Program Parallel to the Rejected Standard

When Congress rescinded OSHA’s former ergonomics rule two years ago, Secretary of Labor Elaine Chao observed: “One of the biggest weaknesses of the previous standard was its universal nature. Every workplace is different and will need different tools and approaches to prevent ergonomic injuries.” Secretary Chao therefore promised a policy that would “recognize
the unique nature of individual workplaces, and avoid an unworkable one-size-fits-all approach.”

The Guidelines, however, fall short of this promise. The draft recommends a seven-part “ergonomics process.” As shown in the following table, this formula not only is carried over from the former standard, but also is reproduced nearly verbatim in all of the guidelines that OSHA has issued to date:

<table>
<thead>
<tr>
<th>Rescinded Standard</th>
<th>Nursing Home Guidelines</th>
<th>Retail Grocery Guidelines</th>
<th>Poultry Processing Guidelines</th>
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</thead>
<tbody>
<tr>
<td>Management leadership</td>
<td>Provide management support</td>
<td>Provide management support</td>
<td>Providing management support</td>
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<tr>
<td>Employee participation</td>
<td>Involve employees</td>
<td>Involve employees</td>
<td>Involving employees</td>
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<tr>
<td>Job hazard analysis</td>
<td>Identify problems</td>
<td>Identify problems</td>
<td>Identifying problems</td>
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<tr>
<td>Job control</td>
<td>Implement solutions</td>
<td>Implement solutions</td>
<td>Implementing solutions</td>
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<td>MSD management</td>
<td>Address reports of injuries</td>
<td>Address reports of injuries</td>
<td>Addressing reports of injuries</td>
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<td>Training</td>
<td>Provide training</td>
<td>Provide training</td>
<td>Providing training</td>
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<tr>
<td>Program evaluation</td>
<td>Evaluate ergonomics efforts</td>
<td>Evaluate progress</td>
<td>Evaluating ergonomics efforts</td>
</tr>
</tbody>
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The content of these seven elements does not vary in any meaningful fashion. In many cases, OSHA articulated them merely by copying long passages from its nursing home document with no change at all except the substitution of “grocery store” where “nursing home” used to

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1 Secretary of Labor Elaine L. Chao, Ergonomics Hearing Opening Remarks, George Mason University, July 16, 2001 (www.dol.gov/sec/media/speeches/20010716_ergonomics.htm).
appear.\textsuperscript{2} Even when the wording changed, the thrust did not. At bottom, OSHA prescribes the same “systematic process” as the former rule, Guidelines at 2, which it asserts will allow employers to meet “the goal of reducing work-related MSDs,” \textit{id.} at 4.

Answers to the complex issue of ergonomics are not that easy. Ergonomic “systems” and “formulas” are just as problematic when recycled in a series of “guidelines” as they were when promulgated in the standard that Congress rejected.

OSHA can provide a helpful service by serving as a clearinghouse for ideas and “best practices.”\textsuperscript{3} The section of the draft setting forth “various solutions that have been implemented by grocery stores,” which OSHA describes as the “heart of the guidelines,” \textit{id.} at 2, is a good start.\textsuperscript{4} OSHA gets off the track, however, when it moves beyond these industry-specific ideas to recommend a formal “program.”

\begin{footnotesize}
\begin{enumerate}
\item Compare, e.g., Nursing Home Guidelines at 5 (“Involve Employees” section) with Guidelines at 6 (corresponding section of current draft).
\item The Chamber’s website, \url{www.uschamber.com/government/issues/labor/ergonomics.htm}, includes a variety of such ideas, developed in cooperation with OSHA. These materials would provide a useful reference, both for these Guidelines and for similar documents in other industries.
\item We defer to industry-specific associations and companies with direct experience and knowledge concerning the retail grocery industry (such as the Food Marketing Institute and the National Grocers Association) for any reaction to the specifics of these solutions. The Chamber is concerned, however, that the suggestions in this draft do not align with the agency enforcement practices that are emerging under the general duty clause, 29 U.S.C. § 654(a)(1). The Guidelines state that OSHA cannot provide “specific solutions for every department of every grocery store” and that managers are only expected to use the suggestions as “examples.” Guidelines at 12. The draft also asserts that “[s]imple, low cost solutions are often available to solve problems.” \textit{I}d. at 10. Yet, far from granting the promised “flexibility” to “managers,” ergonomics citations issued recently assert that “[e]ngineering controls” should be “designed by a qualified ergonomist.” Requested “abatements,” moreover, include “stand-up pallet jacks with forks,” “self-adjustable palletizers,” and redesigning of the “tiers” in storage racks. Many of these measures, such as palletizers, are not mentioned in the Guidelines at all, while others seem to be subordinated to less expensive suggestions. At bottom, neither the retention of expensive consultants nor the installation of costly equipment has proven benefits for employee safety and health. Nor are these approaches within the means of most Chamber members, particularly small businesses. Flexible guidance and new ideas are helpful, but OSHA should also take steps to
\end{enumerate}
\end{footnotesize}
The Guidelines Fail To Recognize Scientific Uncertainty

One of the most important reasons why the former standard failed – and a key justification for OSHA’s decision to forgo another rule – is uncertainty about the science. As Secretary Chao noted last year, there is a “lack of consensus within the scientific and medical communities about whether the existing understanding of ergonomic hazards and the injuries they may cause” is sufficient to support a standard. Letter from Secretary Elaine Chao to Sen. Edward Kennedy, June 24, 2002.

This uncertainty, however, is not appropriately acknowledged in the Guidelines. In several passages, OSHA properly uses terms such as “comfort” and “productivity” to describe the benefits of many recommendations. E.g., Guidelines at 15 (“body positions that are comfortable and productive”); id. at 16 (“work within the zones . . . promotes productivity and comfort”). These subjective advantages of “human factors engineering” are widely recognized, and require no scientific verification. OSHA confuses the issue, however, by assuring readers that it has “reviewed available scientific information regarding work activities that may benefit from ergonomic improvements and specific solutions.” Guidelines at 2. According to the draft, OSHA has concluded that the “risk factors” of force, repetition, and awkward postures “can lead to injury and illness,” id. at 3, which can be “reduced” through “injury prevention efforts focusing on ergonomic concerns,” id. at 4. The Guidelines, in this respect as well, repeat broad pronouncements in OSHA’s parallel documents for other industries. Compare Nursing Home Guidelines at 4-6; Draft Guidelines for Poultry Processing at 5-6.

Despite the confidence suggested by these sweeping statements, the “scientific information” cited in the document is extraordinarily thin. The 1997 National Institute for Occupational Safety and Health (“NIOSH”) report5 is mentioned only twice for propositions peripheral to OSHA’s main conclusions.6 The sole specific study that OSHA considers, ensure that overzealous enforcement personnel do not stray from the agency’s declared approach.


6 The NIOSH Report is initially invoked as “evidence that reports of MSDs may be linked to certain psychosocial factors such as job dissatisfaction, monotonous work and limited job control.” Guidelines at 4. NIOSH certainly supports that conclusion, see NIOSH Report at 7-1 to 7-16, but there is far stronger and more recent evidence on the predominating nexus
moreover, is an eleven-year-old, unpublished, non-peer reviewed paper on hand and wrist “disorders” allegedly attributable to checkout scanners. OSHA never considers far more recent published research that raises serious questions about the connection between repetitive work activities and hand and wrist disorders such as carpal tunnel syndrome. Nor does it take into account the consensus of the 2001 National Academy of Sciences report, which conceded that ergonomic interventions have not been proven to “prevent carpal tunnel syndrome or, indeed, any other upper-extremity disorder.”

Despite this extraordinarily inadequate scientific base, OSHA reaches conclusions that are at least as sweeping as the rejected standard. Contrary the promise of specificity that was to be facilitated by an industry-specific approach, “risk factors” are described in the same flaccid terms that have been used before: “frequent hand activity,” “forceful or sustained awkward hand motions,” “very little hand activity,” and “substantial physical demands.” The Guidelines also make the same ambitious but scientifically unsustainable promises: that reductions of these “risk factors” – defined only through platitudes such as “changing work methods, equipment, or workstations so they do not exceed the capabilities of their workers” –

[Footnote continued from previous page]


National Research Council, National Academy of Sciences, see also Musculoskeletal Disorders and the Workplace: Low Back and Upper Extremities, at 459 (2001).
will “meet” the “goal of reducing work-related MSDs.” Id. Employers at the ergonomics hearings were left in the dark by such vague terms in the standard, and they will remain confused when this same terminology is repackaged as a “Guideline.”

Any issue as important and as complex as ergonomics demands careful and thorough consideration. Indeed, OSHA is legally obligated to exercise such care. “Information quality” requirements issued by the Office of Management and Budget (“OMB”), promulgated pursuant to a mandate from Congress, require agencies to use “the best available peer-reviewed science and supporting studies conducted in accordance with sound and objective scientific principles” for “influential” analyses of safety and health risks. OSHA has not satisfied this burden.

The Chamber recommends that OSHA take a different approach, which would enable it to avoid the difficult and controversial scientific debate altogether. OSHA should simply reaffirm what it has acknowledged before: that the science is in dispute as to the work-relatedness of particular “disorders” and the effectiveness of specific “solutions” in reducing “injuries.” There is universal agreement that “solutions” may be beneficial to employee comfort, efficiency, productivity, and morale. OSHA can perform a valuable service by providing guidance on this basis, without taking on an additional scientific burden that existing research does not equip it to satisfy.

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10 These predictions are made without even the veneer of meaningful consideration of existing research. For example, even though the draft acknowledges in a single paragraph the existence of psychosocial factors and non-work related influences, Guidelines at 4, the remainder of the draft entirely ignores these potential confounders.


12 Id. at 16. The Guidelines have “a clear and substantial impact on important public policies or important private sector decisions,” and thus are clearly “influential.” Id. at 14.

13 In fact, the credible, data-driven science strongly points against the causal relationship between physical workplace factors and the existence of pathoanatomic injury – the statutory limit of OSHA’s mandate. These comments, however, do not ask OSHA to adopt this position but only to recognize the indisputable: that there is disagreement as to scientific causation.
If the objective is, as has been so often stated by OSHA and the Department of Labor, to encourage employers to experiment with “best practices,” OSHA should not hesitate to accept and incorporate the Chamber’s comments. Any reluctance by the agency to acknowledge scientific uncertainty, on the other hand, will reinforce our concern that these Guidelines, in tandem with other so-called “voluntary” ergonomic initiatives, are the harbingers of mandatory ergonomic requirements. OSHA’s contemporaneous ergonomic citations against companies that have been widely recognized and praised for precisely the same kinds of programs and interventions listed in these proposed Guidelines, heightens the Chamber’s serious concerns about OSHA’s apparent direction in applying these Guidelines.

The Guidelines Rest on the Rejected Standard’s Unscientific, Anecdotal “Success Stories”

In lieu of sound science, the Guidelines rely heavily upon “success stories,” which purportedly establish that ergonomic interventions have “successfully reduced work-related injuries.” These anecdotes not only are completely unscientific and contrary to OMB Guidelines, but also are affirmatively misleading.

OSHA, for example, features Lucky Stores as an example of an employer that “reduced injuries by 55% by implementing a proactive safety program in which ergonomics was a primary component.”14 The supporting exhibit, however, is a brief, eleven-year-old newsletter blurb describing a general “safety program,” at one division of the company, which the employer credits for reducing “accident frequency” by 55 percent.15 Notwithstanding the reduction in “accidents,” this same employer reports that “since implementation of the program, workers compensation claims at Lucky for cumulative trauma disorders have doubled.”16

It is important to note that this is not an isolated anecdote within some unimportant part of the Guidelines. To the contrary, OSHA extrapolates from its already questionable interpretation of this news report about one division of one company to sweeping conclude that “[m]any grocery stores that have implemented injury prevention efforts have successfully reduced work-related injuries and workers’ compensation costs,” Guidelines at 1, and “[g]rocery stores that have implemented injury prevention efforts focusing on ergonomic concerns have reduced work-related injuries and associated workers' compensation costs,” id. at 4. The only documentation cited for these sweeping conclusions is the Lucky Star newsletter item. A weaker

14 Guidelines at 5.

15 Docket No. GE2003-1, Exh. 2-5.

16 Id. (emphasis added).
deck of cards could hardly be imagined, and obviously OSHA’s leaps in logic are woefully unjustified.

OSHA also recites another 1992 anecdote concerning King Kullen Grocery Company, this one recycled from the failed rulemaking effort.\textsuperscript{17} The underlying exhibit – once again a brief newsletter article – draws an inference from “cumulative trauma disorder” claim counts in two isolated years. No information is provided concerning long term trends; nor is any there any evidence that the contrast was driven by ergonomic changes. The change could just as easily represent natural fluctuations in claims patterns, particularly when such small overall numbers are involved. It could also reflect biases, such as “Hawthorne effect,” that can only be controlled through careful scientific methodologies.

When similar concerns were raised during public comments on the Nursing Home Guidelines, OSHA responded by withdrawing some of the anecdotes that were criticized, but replacing them with others.\textsuperscript{18} The problem, however, is not the content of specific accounts; it is the “success story” approach as a whole. Anecdotes such as these are nothing more than superficial press accounts of individuals reporting about their own accomplishments. If OSHA wishes to justify ergonomic programs based on evidence that they can “reduce injuries,” it needs solid and objective information, not war stories.

\textbf{The Guidelines Create Further Confusion Through the Use of Poorly Defined Terminology and Inappropriate Assumptions}

One of the enduring challenges in the area of ergonomics, and an important barrier to meaningful scientific research, is the vagueness of core concepts. OSHA recognized this during the “forums” conducted in the wake of Congress’ repeal of the standard, when it posed the following question as the very first issue to be examined:

\begin{quote}
What is an ergonomics injury? The Department of Labor is interested in establishing an accepted definition that the
\end{quote}

\textsuperscript{17} \textit{Id.}, Exh. 2-13; compare 65 Fed. Reg. 68695 (Nov. 14, 2000).

\textsuperscript{18} Indeed, OSHA’s response to extensive criticism of the 114 references in the draft Nursing Home Guidelines was simply to delete all but 10 of them. This sleight of hand does not hide the fact that, just as anecdotes and speculative science did not support a regulation, the same retreads cannot buttress OSHA’s Guidelines. Without data-driven medicine to support them, OSHA must recognize the limitations of the entire exercise.
Occupational Safety and Health Administration, employers and their employees can understand and apply.19

Two years later, OSHA has been unable to construct a workable definition of “ergonomics injury” or “musculoskeletal disorder” (“MSD”). OSHA twice delayed a regulation that would have required separate recording of MSDs because “the agency has not yet decided on the correct approach for dealing with the Part 1904 MSD definition.”20 Secretary Chao justified this delay by explaining: “Until a definition is agreed upon, the data collected will not help us target the injuries that need to be eliminated.”21 Ultimately, the agency withdrew the proposal.22

Unfortunately, the draft Guidelines only exacerbate this confusion. According to the draft, “MSD” refers to “a variety of injuries and illnesses,” including “[c]arpal tunnel syndrome,” “[t]endinitis,” “[r]otator cuff injuries,” “[e]picondylitis,” “[t]rigger finger, and “[m]uscle strains and back injuries that occur from repeated use or overexertion.” Guidelines at 3. In the very next paragraph, however, the Guidelines state that “about 17,600 MSDs with days away from work” occurred within the industry – a figure derived from statistics for a different “variety” of reported incidents.23 Nearly 80 percent of these supposed “MSDs” were “sprains, strains, tears,” mostly to the back, which were attributed to “a single incident, event, or exposure”24 and not to the “repeated use or overexertion” described in the Guidelines. The remaining 20 percent consisted of diverse categories such as “rheumatism,” “dorsopathies,” “hernia,” “disorders of the peripheral nervous system,” and “nonspecified injuries and disorders.” The alignment of these

19 66 Fed. Reg. 31,694 (June 12, 2001)
21 Press Release, June 29, 2001 (announcing delay of MSD recordkeeping requirements).
23 Guidelines at 3 (citing statistics from Docket No. GE2003-1, Exh. 2-3).
conditions with the OSHA’s suggested MSD definition – and with the body of so-called work-related MSDs subject to OSHA’s jurisdiction – is highly questionable.25

The Guidelines similarly fail to answer the second, equally difficult question posed during the forums: “How can the Occupational Safety and Health Administration, employers and employees determine whether an ergonomics injury was caused by work-related activities or non-work-related activities?” 26 The draft offers only the following advice:

Employers should consider an MSD to be work-related if an event or exposure in the work environment either caused or contributed to the MSD, or significantly aggravated a pre-existing MSD. For example, when an employee develops carpal tunnel syndrome, the employer needs to look at the hand activity required for the job and the amount of time spent doing the activity. If an employee develops carpal tunnel syndrome, and his or her job requires frequent hand activity, or forceful or sustained awkward hand motions, then the problem may be work-related. If the job requires very little hand activity then the disorder may not be work-related.

Guidelines at 4.

Essentially, an employer using this approach would have to conclude, anytime certain job characteristics are present, that these characteristics “may” be the cause of any reported injury. Taken literally, the employer will not have concluded anything definitive or meaningful, since any number of other non-work related factors also “may” be the cause. If the passage means, however, that the employer must assume work-relatedness, it should be withdrawn. Determinations of work causation, quite simply, should be based on fact and not conjecture.

25 Docket No. GE 2003-1, Exh. 2-3. “Nonspecified injuries and disorders,” for example, encompass various “single incident” reports, including not only miscellaneous back pain but also “crushing injuries” and other incidents “not elsewhere classified.” “Disorders of the peripheral nervous system” include not only “carpal tunnel syndrome” but also “Bell’s palsy” (a form of facial paralysis), “toxic neuropathy” (nervous system reaction to the ingestion of a toxin), and other similar conditions. “Rheumatism” is characterized by pain or stiffness, such as arthritis. See generally Bureau of Labor Statistics, Occupational Injury and Illness Classification Manual, § 2.

OSHA Should Expand Its Disclaimer Language To Address These Concerns

After receiving numerous comments on its earlier Nursing Home Guidelines, OSHA addressed some concerns that were expressed by strengthening its “disclaimer” concerning the potential use of this document for enforcement purposes. Nursing Home Guidelines at 2. The same protective language has been carried forward to the retail grocery draft. Guidelines at 2. The revised provision is helpful, and the Chamber commends OSHA for incorporating it.

As noted above, however, the Chamber’s concerns are not limited to possible consequences in an enforcement context. Just as important are broader issues of agency policy, which remain unresolved after more than a decade of intense debate. The Guidelines can be most effective if OSHA is free to dispense advice and share ideas without committing itself to the same type of definitive conclusions it would have to reach (and defend) during formal rulemaking. OSHA’s work product should not convey the impression that the agency has made up its mind on the science, especially without research results to support these findings.

During the comment period on the previous guidelines for nursing homes, additional disclaimer language was suggested to help OSHA preserve its discretion. Such a disclaimer would not be inserted in lieu of the passage that already appears in the document, but rather would be added to the existing provision. The following language, which the Chamber endorses, would be fully suitable:

These Guidelines recognize the uncertainty and controversy that affects the issue of ergonomics and stands as a barrier to effective rulemaking. OSHA’s concerns include the lack of consensus within the scientific and medical communities on the nature and causes of MSDs, the difficulty in developing a workable definition of “MSD” or “ergonomic injury,” the inability to definitively determine work-relatedness, the variety work conditions and health outcomes, the lack of evidence concerning exposure-response relationships, and feasibility and cost considerations.

These Guidelines should be not interpreted as a resolution of open scientific or medical questions, the promulgation of a workable definition, or a finding that any particular situation or condition is related to work. Nor should the mention of “risk factors” or proposed methods for measuring exposures or expected outcomes be taken as an indication that such labels or measurements are valid in any particular situation, either within a retail grocery store or in other industries where similar work activities may occur. The inclusion of suggestions in this document likewise does not imply any particular view about feasibility or cost.
These Guidelines are offered as a means of sharing theories and ideas among employers and employees who may find them helpful, either to reduce injuries or MSDs (however defined) or to promote comfort and reduce overexertion and fatigue. They should not be interpreted, however, as an agency finding in support of any particular theory or idea to the exclusion of any other.

In light of all of the concerns mentioned above, and the continuing gaps in scientific knowledge, the Chamber respectfully requests that OSHA incorporate this additional provision.

Sincerely,

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