



## Office of Advocacy

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# Report of the Small Business Advocacy Review Panel on the Draft Safety and Health Program Rule

December 18, 1998

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## 1. INTRODUCTION

This report has been developed by the Small Business Advocacy Review Panel consisting of representatives of the Occupational Safety and Health Administration, the Office of Advocacy of the Small Business Administration, and the Office of Information and Regulatory Affairs of the Office of Management and Budget, for the proposed Safety and Health Program rule that OSHA is currently developing. On October 20, 1998, OSHA's Small Business Advocacy Panel Chair convened this panel under section 609(b) of the [Regulatory Flexibility Act](#) (RFA), as amended by the [Small Business Regulatory Enforcement Fairness Act](#) (SBREFA). Section 609(b) requires the convening of a review panel prior to the publication of any Initial Regulatory Flexibility Analysis that an agency may be required to prepare under the RFA. In addition to the chair, Marthe Kent, the panel consists of the Associate Solicitor for Occupational Safety and Health, Joseph Woodward; the senior OSHA economist for this rule, Robert Burt; the Acting Administrator of the Office of Information and Regulatory Affairs within the Office of Management and Budget, Don Arbuckle; and the Chief Counsel for Advocacy of the Small Business Administration, Jere Glover.

This report provides background information on the proposed rule being developed and the types of small entities that would be subject to the proposed rule, describes the Panel's efforts to obtain the advice and recommendations of representatives of those small entities, summarizes the comments that have been received to date from these representatives, and presents the findings and recommendations of the Panel. The complete written comments of the small entity representatives are attached as Appendix A of this report.

Section 609(b) of the RFA directs the review panel to report on the comments of small entity representatives and make findings about issues related to certain elements of the [Initial Regulatory Flexibility Analysis](#) (IRFA), as outlined in Section [603](#) of the [RFA](#):

- o a description of and, where feasible, an estimate of the number of small entities to which the proposed rule will apply;
- o a description of the projected reporting, record keeping and other compliance requirements of the proposed rule, including an estimate of the classes of small entities that will be subject to the requirements and the type of professional skills necessary for preparation of the report or record;
- o an identification, to the extent practicable, of all relevant Federal rules that may duplicate,

- overlap or conflict with the proposed rule; and
- o a description of any significant alternatives to the proposed rule that accomplish the stated objectives of applicable statutes (in this case the OSH Act) and that minimize any significant economic impact of the proposed rule on small entities.

This Panel Report will be provided to the Assistant Secretary for OSHA, and OSHA must include this report in the rulemaking record. OSHA may also, as appropriate, modify the proposed rule, the [Initial Regulatory Flexibility Analysis](#), or the decision as to whether an Initial Regulatory Flexibility Analysis is needed, based on the Panel's recommendations.

It is important to note that the Panel's findings and discussions are based on the information about the safety and health program rule available at the time this report was drafted. OSHA is continuing to conduct analyses relevant to the proposed rule, and additional information may be developed or obtained during the remainder of the rule development process. The Panel makes its report while development of the proposed rule is still underway, and its report should be considered in that light. At the same time, the report provides the Panel and OSHA with an opportunity to identify and explore potential ways of shaping the proposed rule to minimize the burden of the rule on small entities while achieving the rule's statutory purposes (i.e., protection of the safety and health of workers on the job). Any options the Panel identifies for reducing the rule's regulatory impact on small entities may require further analysis and/or data collection to ensure that the options are practicable, enforceable, and consistent with the Occupational Safety and Health Act.

Table 1 provides, for background purposes, OSHA's summary of its reasons for developing the draft safety and health program rule.

### **Table 1. OSHA'S Reasons for Developing the Draft Safety and Health Programs Rule**

See [Viewing Utilities](#) if necessary.

In developing its draft proposed regulation, OSHA has relied on its substantial experience with safety and health programs and those of the states, private firms, trade associations, and insurance companies during the 1980s and 1990s. OSHA believes that those experiences clearly show that: 1) various entities have required, implemented, or endorsed safety and health programs as an effective way to reduce occupational injuries, illnesses and fatalities; 2) those programs achieve that objective; 3) OSHA's proposal is consistent with these other efforts; and 4) the proposal is also firmly grounded in the OSH Act and in other OSHA policies and experiences. OSHA believes the main lesson to be learned from these experiences is that employers with effective, well-managed safety and health programs achieve a higher level of compliance with OSHA standards and the General Duty Clause and have substantially lower injury, illness and fatality rates and lower workers' compensation costs than is the case for employers without such programs. A safety and health regulation could generalize this experience to all employers and employees in covered workplaces.

## **2. OSHA's OVERVIEW OF THE PROPOSED SAFETY AND HEALTH PROGRAM RULE**

To ensure that the proposed regulation could be applied to all employers and workplaces in the general industry and maritime sectors, OSHA has developed a performance-oriented rule. The proposed rule would require that employers:

- o establish responsibilities for managing safety and health at the workplace;
- o provide employees with opportunities for participation in establishing, implementing, and evaluating the workplace safety and health program;
- o undertake the systematic identification and assessment of workplace hazards covered under the OSH Act and to which an employee is reasonably likely to be exposed;
- o provide for the systematic control of those hazards;
- o ensure that each employee covered by the rule is provided with information and training about the workplace safety and health program and about the serious hazards to which the employee is exposed;

evaluate the workplace safety and health program to ensure that it is effective and appropriate to workplace conditions; and

- o ensure that appropriate information about hazards, controls, safety and health rules, and emergency procedures is provided to all employers at multi-employer workplaces.

Each of these requirements is described in the proposed rule in a plain language, question and answer format. Each of the basic requirements is applicable to all kinds of employers. Each provision is written broadly to allow employers flexibility in its application so that compliance can differ in small and large firms, in technologically simple and complex environments, and in low and high hazard firms. To ensure that this flexible, performance-oriented approach is maintained in the actual enforcement of the rule, OSHA has developed a draft enforcement policy designed to assure that penalties under this rule are limited to cases where employers systematically fail to identify and control significant hazards. In this context, a systematic failure means that employees are exposed to a pattern of serious hazards that are inadequately controlled or are not controlled. Penalties will not be issued in situations in which the employer has failed to carry out purely procedural requirements but has nevertheless successfully controlled the hazards in the workplace. OSHA generally will not use this safety and health program rule to penalize employers twice for the same offense. OSHA will only penalize the employer for a failure to comply with an underlying requirement in a particular standard or for failure to comply with the General Duty Clause unless the employer has also systematically failed to identify and control significant hazards, in which case penalties may be issued under this regulation as well.

### **3. APPLICABLE SMALL ENTITY DEFINITION**

To define small entities, OSHA used, to the extent possible, the Small Business Administration (SBA) industry-specific criteria published in 13 CFR Section 121. Because these definitions apply to 4-digit SIC code industries and OSHA did not conduct its analysis at this level of detail, and because some industry classifications use small business definitions requiring data not readily available from general data sources (such as kilowatt hours of electricity produced), OSHA instead used the definitions of small entities for industry divisions, except in cases where there was no division definition; in such cases, OSHA used the industry (2-digit SIC code) definition of small entity.

### **4. INDUSTRIES THAT MAY BE SUBJECT TO THE PROPOSED REGULATION**

The proposed rule would apply to all employers in general industry, shipyard employment, marine terminals, and longshoring operations. In terms of standard industrial classification codes, this means that the standard would apply to certain small entities in SICs 07, agricultural services; 08, forestry; 09, fisheries; 14, oil and gas well drilling, and SICs 20 to 99, with the exception of some operations in SIC 45, railroads, and SIC 44, water transportation (other than longshoring and marine terminals). The proposed rule would also apply to small public entities in State-plan states; approximately 50% of all state and local employees work in State-plan states and would be covered by the proposed rule.

The proposed rule would cover 4.16 million establishments operated by 3.93 million entities defined as small by the SBA. About 72.7 percent of the total number of affected establishments are operated by small entities. The proposed rule covers 4.08 million establishments operated by 3.93 million very small entities, defined for analytical purposes as entities employing fewer than 20 workers. About 71.3 percent of the affected establishments are operated by these very small firms. Entities meeting the SBA small business criteria have 32 million employees and account for 32.24% of all employees within the scope of this rule. Very small entities (i.e., entities with fewer than 20 employees) have 16 million employees and account for 16.52% of all employees within the scope of the rule.

### **5. SUMMARY OF OSHA'S SMALL ENTITY OUTREACH**

#### General Outreach

Even before SBREFA's enactment, the Panel notes that OSHA had conducted extensive outreach about this rule to employer and employee organizations, including organizations that represent small

employers, in the affected industries. In October of 1995, OSHA held the first series of stakeholder meetings to discuss preliminary ideas for a safety and health program rule and the significant issues raised by such a rule. This first session was a two-day meeting with more than 50 participants. (Notes summarizing the stakeholder meetings, and a transcript of the first series of meetings, are available in the docket for this rulemaking (Docket S-027).) As a result of the input received at this meeting and the interest expressed by stakeholders, OSHA decided to hold additional meetings at regular intervals during the development of the regulation to assure that all interested persons had an opportunity to participate in the development of the safety and health program rule. For example, during November and December of 1995, OSHA staff met with representatives from organizations such as the National Plumbing, Heating, and Cooling Contractors Association; the Synthetic Organic Chemical Manufacturers Association; the National Association of Manufacturers; the U.S. Chamber of Commerce; the American Petroleum Institute; the Chemical Manufacturers Association; Organization Resources Counselors; the American Farming Association; the American Trucking Association; and the Industrial Safety Equipment Association. These meetings were informal two-way discussions of the issues and often involved the sharing of information on best practices.

On May 6, 1996, OSHA sent stakeholders a summary of the provisions then under consideration for a program rule for general industry to serve as a focus for discussions at upcoming stakeholders' meetings. By this time, approximately 200 stakeholders had expressed an interest in participating in the development of the rule. In response to this interest, OSHA held four half-day stakeholder meetings on June 5-6, 1996. These meetings provided invaluable input to the Agency in formulating the requirements of the rule and minimizing its impacts on small businesses.

On November 15, 1996, OSHA sent a draft of the regulatory text of the proposed safety and health program rule to stakeholders in preparation for discussions at additional stakeholder meetings. Again, because so many stakeholders expressed interest in participating in the development of the proposal, OSHA scheduled six half-day stakeholder meetings for December 10-12, 1996. At these meetings, OSHA discussed its responses to ideas generated during the earlier stakeholder meetings and described its thinking on the provisions of the rule. Again, the discussion advanced the development of the proposal substantially.

The Panel is keenly aware of the potential impact that a safety and health program regulation may have on small businesses; many small businesses and organizations representing small businesses attended the stakeholder meetings, and staff from the Office of Advocacy of the Small Business Administration were also present at several of the stakeholder meetings. To ensure that small businesses throughout the country had an opportunity to be heard and to tell OSHA about their experiences, OSHA joined with the Small Business Administration to sponsor regional meetings with small business employers in Atlanta, GA, Philadelphia, PA, Columbus, OH, and Portland, OR. These meetings, held in the Summer of 1997, gathered input on the special problems of small businesses and their successes with safety and health programs in anticipation of the formal convening of the panel. Each meeting was attended by 15-25 small business owners, representatives, and trade association representatives. The Panel understands that these meetings were particularly useful to OSHA because the Agency was able to gain insights about small business at the grass roots level. The input also helped OSHA advance the rulemaking to the point where the Panel could commence. Summaries of these stakeholder meetings will be entered into the docket.

In December of 1997, the Massachusetts Coalition on Occupational Safety and Health arranged a meeting to enable OSHA to meet with small business employees to discuss the need for a safety and health program rule and hear about their experiences on the front line. Hearing from workers from small firms provided a unique perspective on the methods used by small business employers to identify hazards as well as the pressures often faced by small business and their employees.

The stakeholder meetings featured many frank and open exchanges of opinion, and written summaries have been entered into the docket for most of these meetings. For example, some stakeholders expressed support for a rule, while others opposed a regulatory approach. Similarly, some stakeholders favored the inclusion of all small business within the scope of the rule, while others felt that some exemption of small businesses would be appropriate. Two critical issues at these

stakeholder meetings on which there was wide agreement were the importance of a consistent and reasonable enforcement policy and of good outreach programs.

### The SBREFA Panel

On October 20, 1998, the OSHA SBREFA Panel chair convened the Panel for this rulemaking. The Panel provided small entity representatives with initial drafts of the rule, a summary of the rule, the Initial Regulatory Flexibility Analysis, a summary of the benefits and costs of the rule as it affected firms in the small entity representative's industry, OSHA's draft enforcement policy for the rule, and a list of issues of interest to panel members. The Panel held teleconferences with the SERs on November 12th and 13th, in which most of the small entity representatives participated and which allowed for interactive discussion. After these teleconferences, the Panel received the written comments of small entity representatives; these comments, and the Panel's responses to them, form the principal basis for the Panel's report.

## **6. SMALL ENTITY REPRESENTATIVES**

In consultation with the Office of Advocacy of the Small Business Administration, OSHA invited 18 small entity representatives (SERs) to participate in the panel process. Table 1 shows the names, affiliations, and industries of the SERs that chose to participate in the process, and indicates whether a particular SER submitted written comments. At least 5 of the SERS were participants in either OSHA's VPP or SHARP programs.

**Table 1. Small Entity Representatives Participating in the Panel Process**

<b>Name(s)</b>	<b>Affiliation</b>	<b>Industry (SIC Number in parentheses)</b>	<b>Written Comments Provided</b>
Nancy Klim	D&E Industries, Inc.	Steel Foundries (SIC 3325)	No
Scott Rankin	Vulcan Spring And Manufacturing Co.	Reconstituted Wood Products (SIC 2493)	Yes
Clyde Stryker	Spirit Communications	Computer Systems (SIC 5045)	No
Sam Brooks	S. Brooks and Associates	Temporary Services (SIC 7363)	Yes
Andy Hathaway	Jones Stevedoring	Stevedoring (SIC 4491)	No
Laurie Anderson, Kenneth Schmidt	Anchor Manufacturing	Printing Equipment Cleaners (SIC 2893)	Yes
Steve Watkins	Boda Manufacturing	Power Generators (SIC 3621)	Yes
Steve Hays	G.H. Stenner	Chemical Control	No

	Company, Inc.	Pumps (SIC 3589)	
Frank Copple	T&G Industrial Equipment Inc.	Wholesale Paint Spraybooths, Conveyors, Dryers and Ovens (SIC 5084)	Yes
Mark Leguillon	Shinco Silicones Inc.	Chemicals (SIC 28)	Yes
Brian Landon	Landon's Carwash, Laundry, and Paint Touch Up	Carwash and Other Services (SICs 72 and 75)	Yes
Jim Balmain	Smith's Bakery	Retail Bakery (SIC	Yes
Katherine Gekker	The Huffman Press	Printing (SIC 27)	Yes
Mike Fagel	Aurora Packing Company	Food Products (SIC 20)	No
Ron Lyons	Stewart Brothers Paint Company	Paints (SIC 2851)	Yes
Peter Myer	Sequins International	Sequins (SIC 23)	No
Kevin Adkins	City of Goldsboro	Municipality	No

## 7. SUMMARY OF SER INPUT

This summary reflects both the oral comments expressed by the SERs in two teleconferences and the written views submitted by them to the Panel. The complete text of the written comments has been provided as Appendix A to this document, and will be submitted to the docket as part of this report.

### **Costs and Impacts**

#### Total Costs

Almost all of the SERs felt that the costs of compliance projected by OSHA were underestimated. Several stated that OSHA's costs might well be underestimated by a factor of ten to twenty. Some SERs provided estimates of the man-hours or costs the proposed rule would require to implement in their firms. Mr. Lyons estimated that program setup would require 72 to 96 hours to comply with the core elements of the rule and \$18,000 to \$20,000 to pay for hazard control. Mr. Watkins estimated that his firm had spent 300 man-hours developing and implementing its existing safety and health plan and had incurred hazard control costs of approximately \$5,000. Mr. Watkins estimated that the annualized costs for a 6- to 10-person firm in his industry would be approximately \$1,350 per year. Mr. Watkins felt that OSHA's estimate of 1 to 3 hazards discovered in the first year was in line with his firm's experience, but that the hazards had been much more expensive to control than OSHA estimated. Mr. Copple estimated that the program would cost around \$1,000 to set up for a firm with fewer than 10 persons. Mr. Leguillon estimated that his firm's program had required 180 hours to establish and \$1,000 for hazard control.

Several SERs believe that the costs for certain specific elements, in particular, were underestimated (see discussion below). Some SERs with fewer than ten employees also felt that OSHA had failed to recognize the costs of recordkeeping for facilities such as theirs. These SERs felt that, even though the draft does not specifically require a written program, they would need to have a written program to demonstrate compliance during an inspection. Some SERs also emphasized that training costs had been underestimated because all of the training required by existing OSHA requirements would far exceed OSHA's training cost estimates. Mr. Brooks stated that OSHA had failed to account for lost labor when it estimated training costs.

### Training

Many SERs were particularly concerned with training costs. One SER has found that "it is the training that takes time, effort, and costs." Another pointed out that his program required 55 hours of employee training per employee per year, and felt that small firms would not have the resources for this kind of effort. Mr. Landon noted that the many hats worn by employees in very small businesses would mean that a lot of training would be required per employee. Mr. Brooks, an SER in the temporary employment business, emphasized the special training problems of temporary employees, who would need to work in many different work sites.

### Special Costs for Small Businesses

Some SERs also believe that OSHA has not adequately considered that almost all of the work in setting up the program would need to be performed by the manager of a small firm, whose time has a special value because the manager would be unable to work on the fundamental business of the small firm while he or she was setting up the program. Some SERs felt that OSHA had generally not appropriately accounted for the opportunity costs of employees' (as well as the manager's) time. Some SERs questioned whether OSHA's belief that clerical time would be used to carry out some program-related activities was accurate, and expressed concern that, in small businesses, the manager's time would be needed instead.

### Cost of Outside Assistance

Many SERs felt that small businesses would need consultants in order to implement their programs and that OSHA had not fully accounted for such costs. For example, Mr. Lyons felt that a consultant costing \$4,000 to \$5,000 would be necessary to help a firm like his set up this program. Mr. Balmain estimated the necessary consulting costs at approximately \$3,000. Another SER reported using a program that cost \$2,500 and provided the buyer with two workplace inspections and 6 employee seminars per year. This SER found this program particularly useful because the training was industry specific. On the other hand, Mr. Copple didn't think that his firm would need outside consultants to achieve compliance with the rule. All of the SERs whose programs had been established with the aid of OSHA or state consultation programs felt that this assistance had been essential in setting up their programs. Most SERs felt that some form of outside assistance would be necessary, but hoped that OSHA, industry associations, or states could provide the necessary assistance.

### Cost Pass-Through

In addition to feeling that costs were higher than OSHA had estimated, many SERs felt that they would be unlikely to be able to pass on their costs to consumers. One SER pointed out that prices rise and fall, and stated that a rise in price would simply result in a loss of business. Another SER said it is the big guy and not the little guy that can absorb costs. In the view of most SERs, competition with larger businesses and the overall competitive framework of their industries would prevent pass-through from happening.

### Benefits as an Offset to Costs

Some SERs pointed out, however, that the benefits from the program would serve to offset the costs. Mr. Watkins stated that his program had not only improved safety and health but also had resulted in improvements in productivity and operations. One SER argued that costs should not be a concern where employee safety is at stake.

### Benefits and Effectiveness of the Rule

Some SERs stated that the benefits of the rule would be low for smaller firms. Mr. Landon pointed out

that, based on BLS data, businesses with fewer than ten employees in industries other than agriculture and construction had injury rates of 1.9 per 100 fulltime workers, as compared to 7.5 per 100 fulltime workers for private industry overall. Mr. Landon also pointed out that very small businesses have employers who work alongside their employees, share the same tasks, and have strong personal relationships with their employees that contribute to health and safety. Ms. Gekker also pointed out that, as a small business manager, she walks the floor of her company every day. She also stated that none of the four serious accidents that had occurred in her business would have been prevented by this rule. Mr. Brooks felt that he had seen no measurable results from his existing safety and health program. Mr. Landon, as well as several other SERs, argued that the rule would accomplish little because most small businesses lack the training to identify and mitigate hazards. Only education, consultation, and outreach could in fact affect small businesses, in the opinion of these SERs. Ms. Gekker felt that there was no serious safety and health problem to be addressed in many small businesses. On the other hand, some SERs reported that they had achieved significant benefits from their own safety and health programs. One SER reported cutting his accident and illness rate by 79% as a result of his program. Another SER reported increasing his firm's productivity by 63% and having gone for two years without an accident.

#### Litigation and Labor/Management Relations

Mr. Balmain was concerned that OSHA had omitted the costs of, and problems potentially resulting from, litigation, liability and labor/management issues. Mr. Balmain argued that the draft rule would be used by plaintiffs to establish a "standard of care" and would be used by unions and employees to "harass, threaten, sue, organize, and/or extort cash from employers." Mr. Balmain was also concerned that employees might cite the rule and the absence of adequate training in "wrongful discharge" and other suits against their employers.

#### **Number of Small Entities**

In response to a request for comment on this topic, Ms. Gekker stated that there were 54,000 companies classified as commercial printing establishments and that approximately 80% of these employ 20 or fewer employees. No other SER commented on this topic.

#### **Description of Projected Requirements and the Expertise Required to Meet Them**

##### Clarity of the Rule

Many SERs found the rule clear. However, even some of those who found the rule clear were concerned that the rule's performance language was "open to many interpretations" (Mr. Lyons). Other SERs were concerned about the language of the rule, however. For example, Mr. Landon found the language of the rule "vague" and the implications for enforcement "troubling and scary." Mr. Balmain referred to the rule as being full of "weasel words" and gave as examples of unclear provisions the requirement to demonstrate the effectiveness of existing programs and the requirement to "systematically identify and assess hazards." Mr. Balmain concluded that the rule could not be clarified to eliminate misunderstandings: "even if the final rule...went on for a hundred pages, there still would be ambiguities on every page." Another SER asked how the term "near miss" was to be defined. Some SERs argued that cross- references to other rules and laws are confusing for small employers, and that the rule itself should provide explanations rather than cross-references to National Labor Relations Board (NLRB) requirements, the General Duty Clause, and other OSHA standards. Many SERs felt that the General Duty Clause was a key to understanding the requirements of the rule but felt that most small businesses would have no idea what the General Duty Clause required. Some SERs were unclear on the relationship between the requirements of the safety and health program and other OSHA requirements, particularly the requirements of other program rules such as bloodborne pathogens and hazard communication.

##### Need for Special Expertise

Almost all SERs felt that outside expertise would be necessary to achieve compliance, but some felt the program could be implemented without outside assistance. Ms. Gekker stated that " most small business owners have neither the background or the skill to develop a comprehensive safety and health plan." She supported this point by recalling the difficulties and assistance she had needed to

implement an OSHA-required hazard communication program. All SERs that implemented their program with the assistance of OSHA's (free) consultation service or its equivalent felt that such assistance would be essential to any small business trying to implement the rule.

#### Value of Recordkeeping Exemption

Some SERs also felt that the recordkeeping exemption would serve no useful purpose because small entities with fewer than ten employees would feel the need to keep records for compliance purposes anyway.

#### Clerical Time

Some SERs questioned whether OSHA's belief that clerical time would be used to carry out some program-related activities was accurate, and expressed concern that the manager's time would be needed instead.

### **Duplicative and Overlapping Rules**

Some SERs wondered how this rule might overlap with existing OSHA program requirements, such as the bloodborne pathogens rule. Mr. Balmain argued that everything important in the rule was already required by the General Duty Clause and therefore the rule was unnecessary. Mr. Balmain also questioned how employee participation would interact with NLRB requirements and how industry associations could provide adequate support without being subject to the Sherman Anti-Trust Act. One SER felt that health and safety was already adequately covered by the overlapping combination of State OSHA rules, EPA rules, local fire department rules, and the county's hazardous materials program. One SER felt that there would be an overlap between the rule and state workers' compensation rules.

### **Regulatory Alternatives**

#### Nonregulatory Approaches Preferred

Many, if not most, SERs felt that a rule would neither be a useful nor necessary way of implementing safety and health programs. Several SERs pointed out that OSHA's limited enforcement resources would be inadequate to enforce the rule in small businesses. SERs suggested a variety of nonregulatory approaches. Many SERs who had made use of OSHA's consultation services had high praise for that program. They urged that OSHA publicize and expand this program as an alternative to issuing a safety and health program rule. Some SERs urged OSHA to make more use of industry associations and the resources of these associations. For example, Mr. Rankin urged a general shift to consultation through the use of enforcement officers to provide consultation, with no fines for violations that the employer corrects within a reasonable time, and increased cooperation between industry association consultation services and OSHA consultation services.

#### Testing the Rule on a Subpopulation

Mr. Balmain suggested that the rule should first be tested on a sample population of employers to see if it performs as OSHA says it will. If it does, he suggested that OSHA then promulgate it more widely. In discussion, the possibility of trying the rule in a single industry sector as a pilot project was also suggested.

#### Exemptions to Coverage of the Rule

If it is decided to issue a rule, SERs suggested a variety of exemptions to the rule's coverage. Mr. Landon believes that firms with fewer than 10 employees have lower injury rates and higher costs and should therefore be exempted from the rule on these grounds. Mr. Balmain urged OSHA to consider exempting either all firms in low hazard industries or all small businesses in low hazard industries. Some SERs suggested an exemption for firms that were participants in the VPP or SHARP programs. Ms. Gekker pointed out that the nature of the hazards in an industry may change over time. In her industry, commercial printing, work has shifted from mechanical to computer methods, and even the remaining heavy press equipment is safer because it is computer controlled. Other SERs suggested establishment-specific approaches to exemption. For example, Mr. Schmidt suggested that firms with outstanding records should be exempted from the rule. Mr. Schmidt felt that outstanding firms

already have a culture in place which emphasizes safety and health. On the other hand, Mr. Lyons argued that firms with good records should not be exempted from the rule because "safety and health are a day to day function of all business and should remain that way."

Mr. Copple recommended that the recordkeeping exemptions for firms with fewer than 10 persons should apply only to firms that both had fewer than 10 employees and were in low hazard industries.

#### Alternatives with Respect to Enforcement

Some SERs also offered suggestions with respect to the Agency's enforcement policy. Mr. Copple and Mr. Leguillon suggested that there should be no penalties if the employer corrected the problem within some time limit. Mr. Copple suggested that the rule be enforced entirely at the State level. Mr. Copple felt that the enforcement policy would be less confusing if it simply stated "what...the result [would be] if an employer does not comply." Some SERs felt the enforcement policy should be part of the rule. Many SERs felt that OSHA must carefully train its compliance officers in its new approach and new enforcement policy. Some SERs remain concerned about the possibility of "double jeopardy," i.e., that the rule will result in two penalties for the same violation.

#### Importance of Outreach

Most SERs felt that a rule could only work in association with a strong outreach effort, with industry-specific and even firm-specific aid on how to implement the program. Several SERs felt that training videos and/or online help were an essential part of any outreach effort.

## **8. PANEL DISCUSSIONS AND RECOMMENDATIONS**

### **Costs and Impacts**

#### Underestimation of Costs

The Panel is concerned that many SERs felt that OSHA had underestimated costs. Some suggested that costs had been underestimated by a factor of ten to twenty or more. The Panel finds that OSHA appears to have underestimated the costs of the rule. The Panel recommends that OSHA review its cost estimates in light of these comments, with specific attention to those comments that offered alternative cost and hour estimates or explanations of why they believed the costs to be underestimated. This review, with a presentation of the estimates provided by the SERs, should be included as part of a revised IRFA. If OSHA concludes that the costs were not significantly underestimated, OSHA should consider alternative approaches to presenting the costs so that they can be more readily understood by small businesses, or should explain the rule more clearly so that small businesses will not misunderstand the intended requirements.

#### Need for Clarity and Transparency

The Panel recognizes that many assumptions underlie OSHA's cost and benefits estimates, including the amount of time needed to implement the rule's requirements; the need for, and cost and availability of, consultants; when and how entities will incur regulatory costs; and whether presenting the costs as national or firm-specific costs best conveys the necessary information to the public. The Panel notes that the small entity representatives had difficulty using the average annualized cost estimates for a firm in their size-class and industry that OSHA developed and presented to them.

In the interest of transparency and full disclosure, the Panel recommends that OSHA clearly present, in the preamble to any proposed rule, information on the key assumptions and estimates underlying the estimated program-related costs, hazard control costs, and benefits associated with the rule. OSHA should also present, for both the program-related and hazard control costs and the benefits of the rule, information on the time stream over which these benefits and costs would be incurred, highlight initial costs, and seek comment on the reasonableness of these estimates and assumptions in the context of individual firms. In addition, OSHA should present several firm-specific examples showing the time stream of costs for the hazard control and program-related costs. The Panel recommends that the Preliminary Economic Analysis contain a description of the methodology and the assumptions used to develop OSHA's estimates.

### Costs for Entities Already in Compliance

The Panel noted that the economic analysis does not ascribe any costs to an entity with a health and safety program now in place. Comments received during the panel process suggest that some small entities may seek legal assistance to evaluate whether their existing programs meet the federal mandate. The Panel recommends that OSHA add to its cost analysis the cost of evaluating compliance by entities with existing health and safety programs, and seek comment on the need for legal assistance and the cost of such assistance when conducting such an evaluation.

### Treatment of Hazard Control Costs

The Panel recognizes that all of the benefits associated with the proposed rule arise from illness, injury, and fatality reductions resulting from hazard control steps taken as a result of a health and safety inspection program, i. e., the hazard identification activities that would be required by the rule. To the degree that benefits arise from the rule, so too do hazard control costs. The Panel recommends that descriptions of the rule's effects present both the costs of compliance for the health and safety program *and* the costs of hazard control. The Panel also recommends that presentations of the national benefits and costs clearly include the hazard control costs as part of the full effects of the rule.

### Effectiveness of State Program Rules

The Panel notes the OSHA bases its benefits analysis in part on its estimates of the success of State programs that contain requirements similar to those in the proposed rule in reducing the incidence of job-related illness and injuries. The Panel recommends that OSHA include more details of this analysis to justify this preliminary conclusion in the face of other evidence that seems contradictory. For example, Washington state has enforced comprehensive health and safety regulations for two decades, but over the past decade, the rate of injuries and illnesses reported in that state remains between 20 and 40 percent higher than the national average. Similarly, over the past decade, Minnesota's incidence rates fell below the national average, but in the two years after implementation of the state's health and safety regulations, the state's rates have exceeded the national average. The Panel also notes that illness and injury incidence rates vary from year to year and that a similar pattern of year-to-year variations arises in states with health and safety programs and in states without them. The Panel recommends that OSHA more clearly display the basis for its preliminary conclusion that state health and safety programs are effective in reducing job-related injuries and illnesses.

### Need for Outside Consulting Services

The Panel recommends that OSHA consider whether the Agency's analysis has underestimated the need for help from outside consultants and that OSHA examine the necessity for, cost, and availability of consultant services.

### Need for Recordkeeping

The Panel recommends that OSHA consider the possibility that even firms not required to keep records will nevertheless keep such records as a result of this regulation.

### Cost Pass-Through

The Panel recommends that OSHA reconsider the extent to which small firms can pass along any price increases to consumers or would suffer feasibility problems if such costs could not be passed along.

### Injury and Illness Rates in Small Entities

The Panel noted that BLS studies and data indicate that injury and illnesses rates in small entities (with 1 to 10 employees) are only 40 percent of the national average, a finding that holds for private industry as a whole and for each of the seven major industrial sectors. These data suggest potential cost-efficiencies associated with targeting regulatory proposals at large employers and reduced requirements at small employers. Other studies suggest different conclusions.

Because information on injuries stands at the heart of OSHA's analysis of regulatory alternatives, the Panel recommends that OSHA display the information it has or can obtain that compares injury and

illness rates and death rates by entity size, and that OSHA present other empirical data it may have collected in a manner that clearly establishes any potential underreporting of injuries and illnesses by small entities. The Panel recognizes that the current OSHA estimates differ from the BLS data and therefore that the use of these estimates must be strongly supported by relevant data.

#### **Litigation and Employee/Employer Relations**

One SER expressed concern that OSHA had not considered the possibility of increased litigation and employee/employer relations problems. OSHA's experience suggests that increased employee participation, such as the draft rule would provide, decreases labor management problems because a two-way communication channel is in place. OSHA also does not believe that the rule will increase litigation; in fact, by reducing the number of unidentified hazards and non-compliances, it should reduce litigation. However, the Panel recognizes that the issue of increased litigation risk, including employers' perception of such risk, deserves further review and recommends that OSHA describe the issue in the preamble and solicit comment on it.

#### **Number of Small Entities**

The Panel recommends that OSHA solicit comment on whether OSHA's approach may have caused the Agency to incorrectly estimate impacts on small entities in those cases where the SBA small entity definition differs from that of the industry division.

#### **Description of Proposed Requirements**

As noted above, the Panel recommends that OSHA consider the extent to which outside consultants will be necessary for small firms to comply with the rule.

The Panel also recommends that OSHA evaluate, and clearly state as part of the IRFA, the levels of expertise needed for compliance with each requirement, and the possible role of clerical personnel in carrying out the activities required by the rule. The IRFA's discussion of the role of clerical personnel should consider the situation of very small businesses that may not have any clerical personnel.

The Panel also recommends that OSHA consider suggestions and solicit comment on the possibility of providing guidance that contains all cross-references in the rule and explains such concepts as the General Duty Clause so that small firms can understand these issues without having to go to other sources. The Panel also recommends that the proposed regulatory document provide a plain language description of the General Duty Clause and that the preamble provide further explanation and solicit comment on the rule's description of that clause.

The Panel recommends that OSHA solicit comment on whether there should be a checklist for the key provisions of the hazard identification requirement, the content of that checklist, and whether that checklist should be included in the regulatory document.

The Panel finds that outreach will be critical to the success of any regulatory or nonregulatory alternatives. The Panel recommends that OSHA further consider the forms of outreach that will be necessary and that OSHA solicit comment on the most useful types of outreach and guidance. The Panel recommends that the compliance guides include example programs and be as specific as possible. OSHA should specifically solicit comment on the need for industry-specific guidance.

The Panel finds that there is concern about OSHA's enforcement policy for the rule and agrees that this is a legitimate concern. The Panel recommends that OSHA clearly explain its draft enforcement policy in its regulatory document and solicit comment on the content of the enforcement policy and its possible inclusion in the regulatory document.

#### **Duplicative and Overlapping Rules**

The Panel recommends that OSHA clarify in its preamble the answers to the questions raised by some SERs concerning overlap with other OSHA rules, with the existing requirements of the General Duty

Clause, and with NLRB requirements.

## **Regulatory Alternatives**

The Panel recommends that OSHA analyze and solicit comment on the following alternative approaches, giving special attention and consideration to alternative 4, Targeted regulation based on industry risk data.

### **1. Non-regulatory guidance**

- This alternative would expand federal assistance programs but leave regulation to the States.

### **2. A phased approach to the regulation**

- This regulatory alternative would have OSHA implement its safety and health program requirements for certain industries. Only after evaluation of the requirements for successful program implementation, including the specific requirements needed to deal with the special challenge to small entities, would OSHA extend the program to other industries.

### **3. Exempt all small firms**

- Reflecting comments that small entities have lower BLS-reported injury rates than large employers and that small entities may incur disproportionate costs to implement the program, this alternative would regulate large employers, placing small employers into a guidance program.

### **4. Targeted regulation based on industry risk data**

- Reflecting comments and data showing that workplace risks vary substantially, depending on the industry involved, this alternative would regulate those industries with high risks, based on reports of injuries, illnesses and deaths. OSHA would identify high risk industries by arraying injury, illness, and fatality statistics along with affected worker populations and industries and would limit application of the regulation to those industries. This information would be included in the full Preliminary Economic Analysis. Other industries would continue to be regulated under existing OSHA standards, the General Duty Clause, and any applicable State safety and health program requirements.

### **5. Targeted regulation based on firm-specific risk data**

- This alternative would exempt firms that have low injury rates. One way of doing this would be to exempt small firms in low-hazard industries. Another would be to set a threshold rate and exempt any firms with recordable rates lower than the threshold. Another variant on this approach would be to exempt firms based on their individual records or achievements. For example, firms in the SHARP or VPP programs might be exempted from the rule.

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