March 10, 2014
Via Electronic Submission: www.regulations.gov

The Honorable David Michaels, Ph.D., MPH
Assistant Secretary
Occupational Safety and Health Administration
United States Department of Labor
200 Constitution Ave. N.W.
Washington, D.C. 20210

Re: Docket Number OSHA-2013-0023
Proposed Rule - Improve Tracking of Workplace Injuries and Illnesses

Dear Assistant Secretary Michaels:

As students interested in the modern administrative state and specifically in disclosure as an alternative to direct regulation, we wish to comment on OSHA's Proposed Rule, Improve Tracking of Workplace Injuries and Illnesses ("the Proposed Rule").[1] While numerous aspects of the Proposed Rule merit discussion, this comment focuses on OSHA's proposal to make information gathered by the agency available online. We wish to make three principal points concerning this aspect of the Proposed Rule. First, OSHA has the legal authority both to mandate that employers disclose the information sought by the Proposed Rule and to mandate disclosure of that information. Second, mandatory disclosure of information concerning workplace safety issues can be an effective, efficient, and flexible alternative or supplement to OSHA's current regulatory efforts. Finally, particularly responding to OSHA's call for public input as to which categories of information would be useful to publish,[2] we suggest how OSHA could best present this information. Specifically, we argue that OSHA should provide proper context for the information disclosures, and we identify some of the possible issues presented by such disclosures which the final rule should address.

I. LEGAL AUTHORITY

The OSH Act clearly gives OSHA authority to require reporting of information of the type sought here. As the district court in *Sturm, Ruger & Co. v. Herman* noted in its assessment of the OSHA Data Initiative (ODI), "Congress enacted the OSH Act 'to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources.' To that end, the Act 'provid[ed] for appropriate reporting procedures with respect to occupational safety and health.'"[3] Several sections of the OSH Act speak to OSHA's authority to collect information, and the combined effect of these sections relevant to this discussion is two-part: First, OSHA can—and sometimes must—prescribe regulations identifying the information concerning workplace injuries and illnesses that is necessary to achieve the goals of the statute, and to compile and analyze that data; second,

[1] Improve Tracking of Workplace Injuries and Illnesses, 78 Fed. Reg. 67,254 (proposed Nov. 8, 2013) (to be codified at 29 C.F.R. pts. 1904, 1952).
[2] *Id.* at 67,263, 67,271.
[3] 131 F. Supp. 2d 211, 212 (D.D.C. 2001) (citations omitted).

employers are required to report information on qualifying employee injuries and illnesses sought by the regulations described above.[4] This includes the authority to collect information concerning worker injuries such as that currently sought by Forms 300, 300A and 301.[5]

Further, the OSH Act gives apparent authority to OSHA to provide public access to information it collects under the auspices of that act. That act states "the Secretary [of Labor] and Secretary of Health and Human Services are authorized to compile, analyze, *and publish, either in summary or detailed form, all reports or information obtained under this section*."[6] As discussed below, publication of information concerning worker injuries and illnesses facilitates the OSH Act's goals of "stimulat[ing] employers and employees to institute new and to perfect existing programs for providing safe and healthful working conditions"[7] and "providing for research in the field of occupational safety and health [and] . . . developing innovative methods, techniques, and approaches for dealing with occupational safety and health problems."[8] As OSHA has the authority to collect information and require its disclosure, the questions become whether OSHA should do so, and if so, how? Part II argues OSHA should require disclosure, as doing so can be an effective supplement to direct regulation. Part III addresses what information OSHA should disclose and the issues such disclosure may present.

II. DISCLOSURE AS A REGULATORY TOOL

The Proposed Rule has two apparent primary purposes. First, the Proposed Rule aims to increase efficiency in the collection of information concerning workplace injury and illnesses that OSHA already requires.[9] Second, the Proposed Rule seeks public disclosure of this

[4] *See* 29 U.S.C. § 657(c)(1) (2012) ("Each employer shall . . . make available to the Secretary . . . such records regarding his activities . . . as the Secretary . . . may prescribe by regulation as necessary or appropriate for the enforcement of this chapter or for developing information regarding the causes and prevention of occupational accidents and illnesses."); *id.* § 657(c)(2) ("The Secretary . . . shall prescribe regulations requiring employers to maintain accurate records of, and to make periodic reports on, work-related deaths, injuries and illnesses . . . ."); *id.* § 657(g)(2) ("The Secretary . . . shall each prescribe such rules and regulations as he may deem necessary to carry out their responsibilities under this chapter . . . ."); *see also id.* § 673(a)(1) ("[T]he Secretary shall compile accurate statistics on work injuries and illnesses which shall include all disabling, serious, or significant injuries and illnesses, whether or not involving loss of time from work . . . ."); *id.* § 673(e) ("On the basis of the records made and kept pursuant to section 657 of this title, employers shall file such reports with the Secretary as he shall prescribe by regulation, as necessary to carry out his functions under this chapter.").

[5] OSHA has used the current Forms 300 and 300A to collect information on workplace injuries since January 1, 2005. *Frequently Asked Questions for OSHA's Injury and Illness Recordkeeping Rule for Federal Agencies*, OSHA.GOV, https://www.osha.gov/dep/fap/recordkeeping_faqs.html (last visited Mar. 7, 2014).

[6] 29 U.S.C. § 657(g)(1) (emphasis added).

[7] 29 U.S.C. § 652(b)(1).

[8] *Id.* § 652(b)(5). While this section of the OSH Act appears to refer to efforts within the act to facilitate research into occupational safety by OSHA itself, it can also be read as more broadly seeking to facilitate research efforts by other interested entities into trends and responses into occupational health and safety issues.

[9] Specifically, the Proposed Rule would electronically submit to OSHA the same information they are already required to provide. Improve Tracking of Workplace Injuries and Illnesses, 78 Fed. Reg. 67,254, 67,257 (proposed Nov. 8, 2013) (to be codified at 29 C.F.R. pts. 1904, 1952). Many commentators to the Proposed Rule contend the electronic reporting requirement will unduly burden companies, especially smaller ones. *E.g.*, *Comment from Good, William; National Roofing Contractors Association (NRCA)*, REGULATIONS.GOV (Jan. 10, 2014), http://www.regulations.gov/#!documentDetail;D=OSHA-2013-0023-0150. OSHA has performed a cost-benefit analysis of this proposed electronic reporting requirement and concluded it "will have economic costs of $11.9 million per year, including $10.5 million per year to the private sector, with costs of $183 per year for affected

information in order to enhance public awareness of enterprise injury rates.[10] This second purpose, while consistent with OSHA's mission, uses disclosure to the public at large as a supplement to direct regulation, and so raises issues distinct from those associated with the agency's more commonplace information collection. This part of our comment argues that disclosure can be a useful regulatory tool, and concludes the Proposed Rule can potentially enhance workplace safety through disclosure.

A. Disclosure Requirements Can Be an Effective and Low-Cost Alternative or Supplement to Direct Regulation

As Professor (and former Office of Information and Regulatory Affairs (OIRA) Administrator) Cass Sunstein argues, agencies can meet their statutory mandates by using disclosure as an "effective, low-cost, choice-preserving" alternative or complement to direct regulation.[11] Disclosure requirements, long built into financial and securities regulation,[12] are increasingly making their way into official policy as one of the preferred methods of regulating particular practices and industries.[13] Professor Sunstein distinguishes between summary disclosure, which provides consumers with brief summaries of relevant information at the point of purchase or decision, and full disclosure, which is often provided on the internet and is meant to complement summary disclosure with comprehensive information.[14] We believe the Proposed Rule's disclosure requirement is most accurately categorized as full disclosure. Particularly in the case of full disclosure requirements, a disclosure program may not be directed toward any particular group of consumers, but rather may promote industry or activity-wide disclosures for the benefit of the public.[15] Disclosure regimes of both types, when properly implemented, have the potential to increase agency efficiency and effectiveness in satisfying their statutory missions while at the same time avoiding the strictures of direct regulation and giving the covered organizations greater flexibility.[16]

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establishments with 250 or more employees and $9 per year for affected establishments with 20 or more employees." Improve Tracking of Workplace Injuries and Illnesses, 60 Fed. Reg. at 67,271. We are not equipped to comment on whether the electronic reporting requirement will significantly adversely impact small or large businesses, but we believe this Proposed Rule can bring OSHA's existing requirements up to date for the Information Age. The focus of our comment is on disclosure as regulation. For our commentary on the cost-benefit analysis with respect to the Proposed Rule's disclosure requirement, see *infra* Part III.C.

[10] Improve Tracking of Workplace Injuries and Illnesses, 60 Fed. Reg. at 67,259–60.

[11] Cass R. Sunstein, *Empirically Informed Regulation*, 78 U. CHI. L. REV. 1349, 1349 (2011) [hereinafter Sunstein, *Informed Regulation*].

[12] Paula J. Dalley, *The Use and Misuse of Disclosure as a Regulatory System*, 34 FLA. ST. U. L. REV. 1089, 1090–91 (2007)

[13] *See, e.g.*, Exec. Order No. 13,563, 3 C.F.R. 215 (2011), *reprinted in* 5 U.S.C. § 601 app. at 816–17 (2012) (directing agencies to consider disclosure requirements as regulatory approaches); Memorandum from Cass R. Sunstein, Adm'r, Office of Info. & Regulatory Affairs, to the Heads of Executive Departments and Agencies 3 (June 18, 2010) [hereinafter Sunstein, OIRA Memo], *available at* http://www.whitehouse.gov/sites/default/files/omb/assets/inforeg/disclosure_principles.pdf ("In many statutes, Congress requires or permits agencies to use disclosure as a regulatory tool.")

[14] Sunstein, *Informed Regulation*, *supra* note 11, at 1366, 1383–84; Sunstein, OIRA Memo, *supra* note 13, at 3.

[15] Sunstein, *Informed Regulation*, *supra* note 11, at 1384.

[16] *See* Cynthia Estlund, *Just the Facts: The Case for Workplace Transparency*, 63 STAN. L. REV. 351, 353–54 (2011) ("For many law and economics scholars, disclosure mandates are seen as a comparatively market-friendly form of state intervention.").

Agencies can use disclosure as a regulatory tool for several legitimate administrative purposes. First, some disclosure schemes are intended to provide information to decisionmakers who are about to engage in an economic transaction in order to reduce their search costs and improve the efficiency of markets.[17] Second, by remedying information asymmetries, disclosure may result in better decisions and behavior in addition to improving the decisionmaking process.[18] Third, disclosure can improve the operation of government by providing regulators the information they need to design and enforce regulatory schemes.[19] Fourth, disclosure regimes can improve the performance of managers "by providing information that can be used to monitor agents, by creating information that managers would otherwise not have available to them, or by forcing firms to confront the facts by forcing them to gather data."[20] Finally, disclosure can increase public awareness by generating interest in the information itself.[21] Overall, there are many different benefits of the use of disclosure as a regulatory tool, and any disclosure requirement must be assessed on the basis of these benefits.

B. Framework for Efficient and Effective Disclosure

Professor Sunstein stresses the need for the agency to consider which information it should require to be proffered in order to satisfy the goals of the program. He notes that "even accurate disclosure of information may be ineffective if the information is too abstract, vague, detailed, complex, poorly framed, or overwhelming to be useful."[22] In order to be most effective, required disclosures should be concrete (avoiding abstract statements), properly contextualized, and supportive of competition through promotion of comparison shopping by the targeted consumers.[23] Furthermore, in order to satisfy each of these goals, disclosures should be clear in both substance and form, giving the intended end users of the information a clear picture of its significance, both as to the disclosing entity standing alone and as relative to other disclosing entities.[24] In addition to assessing what should be disclosed, agencies should carefully evaluate the costs and benefits of disclosures. Indeed, Executive Order 13,536 contains an explicit requirement that agencies should "use the best available techniques to quantify anticipated present and future benefits as accurately as possible."[25] In assessing the benefits of disclosure, "agencies should study in advance the actual effects of . . . disclosure designs to ensure that

[17] Dalley, *supra* note 12, at 1108–10; Sunstein, *Informed Regulation*, *supra* note 11, at 1381–83.
[18] Dalley, *supra* note 12, at 1110.
[19] *Id*. at 1110–11.
[20] *Id*. at 1111–12 (footnotes omitted).
[21] *Id*. at 1112.
[22] Sunstein, *Informed Regulation*, *supra* note 11, at 1369.
[23] *Id*. at 1369–1383.
[24] Sunstein, OIRA Memo, *supra* note 13, at 3–5; *see also* Sunstein, *Informed Regulation*, *supra* note 11, at 1354 ("Information that is vivid and salient can have a larger impact on behavior than information that is statistical and abstract."); *id.* at 1370 ("A good rule of thumb is that disclosure should be concrete, straightforward, simple, meaningful, timely, and salient.").
[25] Sunstein, *Informed Regulation*, *supra* note 11, at 1388 (citing Exec. Order No. 13,563, 3 C.F.R. 215 (2011), *reprinted in* 5 U.S.C. § 601 app. at 816–17 (2012)); *see also* OIRA Memo, *supra* note 13, at 6 ("*Principle Seven: Where feasible and appropriate, agencies should identify and consider the likely costs and benefits of disclosure requirements.*"). While OMB Circular A-4, implementing the requirements of executive orders, applies only to those regulations with an annual impact of greater than $100 million, Professor Sunstein notes that the guidance provided in executive orders can be seen as "a way of policing and disciplining regulations by ensuring that agencies have relied not on intuitions, anecdotes, or guesswork, but on a careful assessment of the likely consequences of proposed courses of action." Sunstein, *Informed Regulation*, *supra* note 1, at 1388.

information is properly presented and will actually inform consumers."[26] If disclosure requirements are not carefully designed, they can lead to ineffective, confusing, and misleading disclosures.[27]

C. Examples of Past, Successful Programs

Several historical examples show the potential for programs using disclosure as an alternative to direct regulation can be highly effective in effectuating agency efforts to increase compliance with statutory requirements by regulated entities. As noted by Professor Peter Strauss's comment to this Proposed Rule, the EPA's publicly-accessible Toxic Release Inventory (TRI) database has been lauded as successful in reducing toxic emissions through industry self-regulation by increasing public pressure on polluters.[28] The TRI program, established in 1987, "requires facilities that manufacture, process, or otherwise use [toxic chemicals] to report annually how much they released into the air, land and water or transferred offsite."[29] The program makes this data available to the public through an online national database.[30] The EPA reports that the TRI program has been highly successful in reducing toxic releases.[31] Commentators have also argued the TRI program has proven to be an efficient, cost-effective, and flexible tool with which the EPA can achieve its mandate to regulate and reduce toxic releases.[32] The TRI program has been successful because it generates public information which both stakeholders and regulators can use "to evaluate and track performance, demand improvements, and hold managers accountable."[33]

There are several other examples of past successful disclosure requirements. Nutrition labeling has successfully reduced informational asymmetries and altered consumer behavior by encouraging consumption of healthier foods.[34] Campaign finance disclosure has helped voters decide how to vote and discouraged corruption by drawing attention to donation patterns.[35] In one particularly relevant recent example, in 2011 the SEC adopted rules incorporating the Dodd-Frank Act's requirement that mining companies disclose mine safety information in financial

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[26] Sunstein, *Informed Regulation*, *supra* note 11, at 1371 (noting carefully designed focus groups are useful, but experimental or quasi-experimental studies are preferred).
[27] *Id.*
[28] *Comment from Strauss, Peter; Citizen*, REGULATIONS.GOV (Feb. 11, 2014), http://www.regulations.gov/#!documentDetail;D=OSHA-2013-0023-0187; *see also* William F. Pedersen, *Regulation and Information Disclosure: Parallel Universes and Beyond*, 25 HARV. ENVTL. L. REV. 151, 162–63 (2001) (stating that, despite reservations about the substantive scope and coverage of chemicals under TRI, the program "led to 'voluntary' efforts that reduced release levels from these sources far more quickly and efficiently than any mandatory regulation, and without any additional cost to the government beyond the expenses of TRI itself"); Sunstein, *Informed Regulation*, *supra* note 11, at 1383 (citing JAMES T. HAMILTON, REGULATION THROUGH REVELATION: THE ORIGIN, POLITICS, AND IMPACTS OF THE TOXICS RELEASE INVENTORY PROGRAM 248 (2005)).
[29] *Keeping Track of Toxics Through TRI*, U.S. ENVTL. PROT. AGENCY, http://www.epa.gov/region1/enforcement/epcra/tridata.html (last visited Mar. 3, 2014).
[30] *Id.*
[31] For example, the EPA attributes a 42.2% reduction in toxic releases from New England facilities from 2001 to 2009 to the TRI program. *Id.*
[32] *E.g.*, Bradley C. Karkkainen, *Information as Environmental Regulation: TRI and Performance Benchmarking, Precursor to a New Paradigm?*, 89 GEO. L.J. 257, 289–94 (2001).
[33] *Id.* at 263, 294–331.
[34] Dalley, *supra* note 12, at 1109–10; Sunstein, *Informed Regulation*, *supra* note 11, at 1368.
[35] Dalley, *supra* note 12, at 1126–27.

reports.[36] The effect of this disclosure requirement on mine safety has yet to be seen. Overall, many different agencies have used disclosure requirements as efficient, effective, and flexible alternatives to direct regulation.

In addition to demonstrating the benefits of disclosure requirements, historical programs show that employers—and other regulated entities—often prefer to cooperate with regulators when faced with the alternative of direct regulation. While some comments to the Proposed Rule expressed the intuitive reaction that disclosure requirements might incentivize employers to misreport injuries to OSHA,[37] past programs have shown the Proposed Rule may have the opposite effect. One informative example is OSHA's "Maine 200" program. In the late 1990s, the Maine OSHA office implemented a cooperative regulatory approach where it invited "[t]he 200 industries with the highest reported number of workers' compensation claims" to voluntarily work to identify and correct safety problems.[38] All but two of the 200 firms joined the program, and in return OSHA promised them a reduction in "wall-to-wall inspections," fines, and sanctions.[39] The results were overwhelmingly positive: workers' compensation claims at the 198 firms fell by 47.3% and the state as a whole experienced a 27% decrease in claims.[40] Despite the success of the program, OSHA's attempt to implement it nationwide was ultimately struck down by the D.C. Circuit on procedural grounds which are irrelevant here.[41] While this program did not involve a mandatory disclosure regime, its practical success demonstrates that, given the options of cooperation or direct regulation, businesses will likely choose the former. This logic, applied to the Proposed Rule, leads to the possible conclusion that employers will be more willing to make accurate and complete injury and illness disclosures if the OSHA disclosure regime ultimately reduces the need for direct regulation. Overall, the EPA's TRI program, OSHA's Maine 200 directive, and other regulations demonstrate that disclosure requirements can and should be used as an effective alternative to direct regulation.

III. FITTING THE PROPOSED RULE WITHIN THE FRAMEWORK FOR EFFECTIVE AND EFFICIENT DISCLOSURE REQUIREMENTS

We believe that the stated objectives of the Proposed Rule are consistent with the general goals of disclosure as a regulatory tool. However, regulators should not only decide *whether* to require disclosure; they must also consider *what* should be disclosed. This section compares the goals of this program in light of previously noted benefits which can be achieved through disclosure regimes, assesses the suggested information inputs in light of Professor Sunstein's suggested framework, and suggests several additional pieces of information which merit

[36] Mine Safety Disclosure, 75 Fed. Reg. 80,374 (Dec. 22, 2010) (codified at 17 C.F.R. pts. 229, 239, 249); *see also* 15 U.S.C. § 78m-2 (2012) (codifying mine safety disclosure requirements of Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1503 (2010)).

[37] E.g. *Comment from Moore, Dale; American Farm Bureau Federation*, OSHA.GOV (Mar. 7, 2014) [hereinafter *Moore Comment*], http://www.regulations.gov/#!documentDetail;D=OSHA-2013-0023-1113.

[38] PETER STRAUSS ET AL., GELLHOHRN AND BYSE'S ADMINISTRATIVE LAW: CASES AND COMMENTS 75–76 (11th ed. 2011).

[39] *Id*. at 76.

[40] *Id.*

[41] See *Chamber of Commerce of the United States v. U.S. Dep't of Labor*, 174 F.3d 206, 213 (D.C. Cir. 1999) (holding that "[b]ecause the Directive is neither a procedural rule nor a policy statement," the Administrative Procedure Act required OSHA "to conduct a notice and comment rulemaking proceeding before issuing it," which OSHA had failed to do).

inclusion. We also address some impediments to providing information required by this framework in light of issues raised by other comments.

A. The Proposed Rule's Disclosure Requirements

OSHA argues that the Proposed Rule's public disclosure of injury and illness data will have several benefits. More specifically, it claims that online access to injury and illness data "will allow the public, including employees and potential employees, researchers, employers, and workplace safety consultants, to use and benefit from the data."[42] These potential benefits are consistent with the aforementioned benefits which can be achieved through use of disclosure as an alternative or supplement to regulation. First, this disclosure requirement can improve the decisionmaking process for and decisions made by current and future employees by informing them about the safety of their current or prospective workplaces. By being better informed, employees will be able to choose among employers based on rates of injury and illness commensurate with their risk preferences.[43] Second, the disclosure requirement may improve the performance of managers by drawing public attention to the illness and injury rates at their facilities. The disclosures give greater access to information to external monitors, such as shareholders, directors, and the general public, and in doing so incentivize employers to improve safety at their facilities. Finally, as OSHA claims, disclosure will generate interest in workplace safety by making it easier for researchers and workplace safety consultants to gather and report on workplace illness and injury data.[44] While the Proposed Rule has the potential to greatly enhance workplace safety, the disclosure requirement must be carefully evaluated to ensure it will actually satisfy this goal.

B. Fitting the Proposed Rule Within the Framework

As with the EPA's TRI program and other, similar programs noted in Part II.C, we believe that OSHA's suggested effort to require disclosure of workplace injuries and illnesses has significant potential to increase enterprise accountability for workplace safety. However, OSHA must assess what information must be disclosed for the Proposed Rule to have this intended beneficial impact. In Parts III.B.1 and III.B.2 we suggest what disclosures OSHA should require and how OSHA can tailor the requirements to present information in context. In Part III.B.3 we identify and address issues raised by the Proposed Rule. In Part III.C we comment on OSHA's current cost-benefit analysis of the Proposed Rule.

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[42] Improve Tracking of Workplace Injuries and Illnesses, 78 Fed. Reg. 67,254, 67,276 (proposed Nov. 8, 2013) (to be codified at 29 C.F.R. pts. 1904, 1952).

[43] *See* Estlund, *supra* note 16, at 355 (2011) ("Mandatory disclosure . . . can improve the operation of labor markets and the satisfaction of worker preferences by supplying the information workers need to choose among employers."); *Comment from Balk, Karen; Citizen*, REGULATIONS.GOV (Jan. 2, 2014), http://www.regulations.gov/#!documentDetail;D=OSHA-2013-0023-0145 (arguing information will help future employees make educated decisions when applying for jobs).

[44] Improve Tracking of Workplace Injuries and Illnesses, 78 Fed. Reg. at 67,259; *see also Comment from Johnson, James R.; National Safety Council (NSC)*, REGULATIONS.GOV (Mar. 4, 2014) [hereinafter *Johnson Comment*], http://www.regulations.gov/#!documentDetail;D=OSHA-2013-0023-0241 (arguing the Proposed Rule will make new research possible by making data more widely available).

1. Disclosures Suggested by the Current Proposed Regulation

The Proposed Rule lists what information could be disclosed, and then asks the public to comment as to what information actually should be disclosed. First, the Proposed Rule suggests that all data from Form 300A could be made available, as well as all data on Form 300 with the exception of the employee's name.[45] Further, the proposed rule suggests that all data from Form 301 under the heading "[i]nformation about the case" could be disclosed.[46] If adopted, this would permit OSHA to publish publicly the nature and extent of each injury, the location of each injury, the scenario and cause of the injury, the identity of the employer, and information about the enterprise's annual number of injuries and hours worked.[47] The Proposed Rule would not provide for disclosure of identifying information about injured employees, such as names, addresses, dates of birth, or treating physician.[48]

We believe that provision of this information is necessary to satisfy the requirements of Professor Sunstein's suggested framework for using disclosure as a regulatory tool. Disclosure of this information would give a concrete picture of individual injuries or illnesses and the total number of qualifying cases experienced within an enterprise during the reporting period. Further, disclosure of this information would provide context in two ways. First, it would give insight into the nature of an injury or illness and assist in distinguishing injuries which are properly attributed to failures in workplace safety from those which, though qualifying under relevant

[45] *See* Improve Tracking of Workplace Injuries and Illnesses, 78 Fed. Reg. at 67,259–60.

[46] *Id.* at 67,260.

[47] Form 300A requires that all establishments covered by Rule 1904 should provide:

- the total number of qualifying incidents, including total numbers cases involving deaths, days away from work and job transfers or restrictions;
- the total number of days away from work or of job transfer or restriction
- types of illnesses or injuries, along with several subcategories of potential afflictions
- establishment information, including the annual average number of employees and total number of employee hours worked in the reporting period.

Form 300, the Log of Work-Related Injuries and Illnesses, is the form on which employers compile information about the work-related injuries or illnesses that occurred during the year. OSHA suggests it could require disclosure of the following information from this form:

- employee's job title
- date of injury
- where the event occurred
- description of injury or illness, parts of body affected, and object/substance that directly injured person
- whether the incident resulted in death, days away from work, or job transfer or restriction
- number of days away from work or on job transfer or restriction
- whether the injury or illness was a regular injury, skin disorder, respiratory condition, poisoning, or hearing loss

Form 301, the Injury and Illness Incident Report, is the form employers must complete every time a reportable work-related injury or illness occurs. OSHA suggests it could require disclosure of information under the heading "Information About the Case," which would contain responses to the following open-ended questions:

- What was the employee doing just before the incident occurred?
- What happened?
- What was the injury or illness?
- What object or substance directly harmed the employee?
- If the employee died, when did death occur?

[48] The Proposed Rule states OSHA would not require disclosure of the employee's name included on Form 300, or items one through eight on Form 301, which include identifying information. *See* Improve Tracking of Workplace Injuries and Illnesses, 78 Fed. Reg. at 67,259–60.

OSHA reporting guidelines, are incidental to workplace safety conditions.[49] Second, the information contained within the reports gives context to the number of injuries experienced in an individual facility within the reporting period. Finally, a blanket public disclosure requirement for certain categories of information ensures that end users are capable of reviewing submissions from different enterprises next to one another and making educated assessments of the relevance of that information.

While some commentators have claimed that disclosure of this information will be misleading to end users,[50] we believe two safeguards can prevent this from happening. First, the disclosure requirement can be tailored to provide adequate context to end users, which we advocate in Part III.B.2, below. Second, if the tailoring does not prove adequate in all situations, the Information Quality Act requires agencies to provide mechanisms by which affected persons can "seek and obtain correction of information maintained and disseminated by the agency" that does not comply with "quality, objectivity, utility, and integrity" guidelines issued by the Director of the Office of Management and Budget.[51] Overall, we believe these two measures can adequately protect enterprises from public misunderstanding of disclosed information.

2. Tailoring the Information Disclosure Requirement

While the information which OSHA is already proposing to publicly disclose fits within Professor Sunstein's suggested framework, OSHA should also provide a relative scale for the number of an individual enterprise's reported injuries. Such a disclosure would put the injury and illness information in context and provide and a suitable basis for comparisons between enterprises by end users. More specifically, information concerning the frequency of an enterprise's reported injuries in relation to both national or industry-wide rates and that enterprise's past reporting history should accompany the proposed public disclosure. Providing the number of a firm's reported injuries without some insight into how that number compares to national or industry averages would effectively penalize larger companies as a simple function of the size of their workforce. Further, insight into an employer's prior reporting history would allow consumers to understand each year's disclosure in context. Such insight would also facilitate the assessment of individual enterprise trends by enabling the end user to view a particular year's disclosure as either consistent with or anomalous relative to that employer's history. This issue is particularly salient for smaller enterprises, where even a single reported injury could have a dramatic effect on injury and illness rates relative to other, similarly situated enterprises or its reporting history in prior years.

We believe the most suitable way for OSHA to provide this additional information is to use the annual number of employee hours worked and number of qualifying cases—information

[49] *See, e.g.*, Transcript from the Improve Tracking of Workplace Injuries and Illnesses Meeting at 146–47 (Jan. 9, 2014), *available at* http://www.regulations.gov/#!documentDetail;D=OSHA-2013-0023-0165 (recording comments of Tressi Cordaro, representative for Coalition for Workplace Safety, noting injuries such as laceration caused by turbulence in airplane bathroom, employee chasing feral cat, and other injuries "beyond the employer[s'] control" and not reflective of their safety program).

[50] *E.g.*, *Comment from Johnson, Karen Elin; Roughneck Concrete Drilling & Sawing Company*, REGULATIONS.GOV (Jan. 22, 2014), http://www.regulations.gov/#!documentDetail;D=OSHA-2013-0023-0162.

[51] Information Quality Act, Pub. L. No. 106-554, 114 Stat. 2763A-153 to -154 (2000) (codified at 44 U.S.C. §§ 3504(d)(1), 3516 (2012)).

that is already included on Form 300A—to generate a ratio of injuries to hours worked, much in the same way as it currently calculates the Lost Work Day Illness and Injuries (LWDII) rate.[52] This information should then be provided alongside both the corresponding average for the most relevant control group (e.g. a national, regional, or industry-specific average) and the historic average for the individual enterprise.[53] Making this information available would support both the consumer-comparison and contextualization goals voiced in Professor Sunstein's framework and adequately protect the interests of disclosing enterprises.

3. Impediments to Providing Necessary Information

a. Disclosure of Confidential Business Information

The first impediment to requiring disclosure of the aforementioned information is the objection, voiced in several comments to the Proposed Rule, that the number of employees and work hours associated with a particular enterprise is proprietary information that should not—or must not—be publicly disclosed.[54] These objections, if taken at face value,[55] merit consideration as presenting a potential issue for disclosure of contextual information concerning both the relative frequency of injuries and the nature of individual incidents. With respect to the total number of injuries, disclosing a neutral ratio that gives only an enterprise's injuries on a set scale and an appropriate comparator would best address this concern. While this remedy appears to address both proffered business concerns and the need for a proper reference for consumers, it conflicts with the requirement of providing context through disclosure of information relating to individual incidents. Specifically, the combination of a neutral average of injuries with a more particularized description of incidents would seem to lend itself to reverse engineering of the two figures into a picture of number of employees or worker hours in an enterprise. Assuming that no suitable solution can be discovered which avoids this paradox, the question then becomes whether OSHA's interest in providing this information is suitably weighty to justify overriding the interests of the company in preventing disclosures concerning numbers of employees and hours. While this framing might seem to suggest that OSHA would not—or should not—be free to take this action, this is not our intent in posing this question.[56] Indeed, we note that that the

[52] *See, e.g.*, N.Y. Times Co. v. U.S. Dept. of Labor, 340 F. Supp. 2d. 394, 395–97 (S.D.N.Y. 2004) (discussing the LWDII rate calculations).

[53] For a detailed illustration of how such a calculation and comparison would work, see Thomas A. Lambert, *Avoiding Regulatory Mismatch in the Workplace: An Informational Approach to Workplace Safety Regulation*, 82 NEB. L. REV. 1006, 1044–48 (2004).

[54] *E.g., Notice of Intent to Appear (NOITA) from Freedman, Marc; U.S. Chamber of Commerce*, REGULATIONS.GOV (Dec. 16, 2013), http://www.regulations.gov/#!documentDetail;D=OSHA-2013-0023-0128.

[55] While we will take these objections seriously for the purposes of this analysis, we have doubts as to the real proprietary value of an enterprises' number of employees and work hours and believe there is a substantial possibility that this objection is merely a smokescreen for disagreement with the requirement of public disclosure and the possible resulting opprobrium. It is widely acknowledged that apparently nonsensitive information, when combined with other insights, may provide valuable business intelligence. *See* STRAUSS ET AL., *supra* note 38, at 505–506. However, it is difficult to see how information such as this, which is not particularly closely-held or insightful, merits any heightened degree of protection. *See* Improve Tracking of Workplace Injuries and Illnesses, 78 Fed. Reg. 67,254, 67,263 (proposed Nov. 8, 2013) (to be codified at 29 C.F.R. pts. 1904, 1952) ("[M]ost employers do not view injury/illness rates as confidential." (citing *N.Y. Times Co.*, 340 F. Supp. at 403)).

[56] Though most of the other comments to the Proposed Rule do not suggest there is a legal bar to providing this information, several of the comments referenced OSHA's previous treatment of an enterprise's employee hours as subject to FOIA Exemption 4. *See, e.g., Comment from Clouse, Robert; Private Citizen*, REGULATIONS.GOV (Mar. 7,

operation of the EPA's TRI program leads to similar disclosures and could lead to similar reverse engineering of an enterprise's manufacturing activities.

b. Disclosure of Confidential Personal Information

The second concern, raised in several comments, which conflicts with our assessment of information that should be disclosed is that employees' privacy could be compromised by public access to injury reports. Though, as we noted above, the Proposed Rule suggests certain measures be taken to reduce the risk of exposing employee privacy,[57] the identification of the type of injury may be sufficient to compromise employee privacy within their workplaces and surrounding communities. In a small company, identification would be particularly easy, as an enterprise might only report a handful of injuries during the course of a year.[58] However, even in larger industries, disclosure of certain details of an employee's injury could be sufficient to allow others familiar with some aspect of the incident to combine existing knowledge with that in the publicly-accessible report. While this concern can be mitigated to some degree by referencing only relatively broad details of an injury—that is, for example, by omitting the date and time of an injury or the precise extent of its consequences—the degree of intrusion on employees' privacy which could result from public access to employer reports should be considered in formulating additional safeguards within the disclosure requirements.[59]

c. Increasing Liability of Enterprises Subject to Regulation

Several comments to the Proposed Rule noted the potential that increasing access to

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2014), http://www.regulations.gov/#!documentDetail;D=OSHA-2013-0023-1117. The Proposed Rule makes clear that OSHA does not intend to disclose information that "FOIA . . . provisions prohibit from release." Improve Tracking of Workplace Injuries and Illnesses, 78 Fed. Reg. at 67,263. However, the Southern District of New York has made clear that OSHA's mandated posting of Form 300A by employers demonstrates that "OSHA no longer regards employee hours as 'confidential commercial information,' and employers have no expectation of a competitive advantage based on their ability to keep the hours confidential." *N.Y. Times Co.*, 340 F. Supp. 2d at 402. One recent scholarly examination of the balance between confidentiality and disclosure in the employment context noted "trade secret law is mainly directed at private misappropriation for commercial gain," and generally "has much less traction . . . against mandatory public disclosure requirements." Estlund, *supra* note 16, at 392. Further, even if OSHA's treatment of employee hours revealed that the agency had consistently treated that information as confidential commercial information, this would not obligate the agency to keep the information private. In fact, the Obama Administration has encouraged agencies to make "discretionary disclosures of information" even where there is a viable argument that the information could fall under a FOIA exemption. Memorandum from the Attorney General to the Head of Executive Departments and Agencies 1 (Mar. 19, 2009), *available at* http://www.justice.gov/ag/foia-memo-march2009.pdf.

[57] Improve Tracking of Workplace Injuries and Illnesses, 78 Fed. Reg. at 67,263 ("OSHA will ensure that the names of employees with recorded injuries or illnesses are removed from any published information.").

[58] *See, e.g.*, *Comment from Moore, Dale; American Farm Bureau Federation*, REGULATIONS.GOV (Mar. 7, 2014), http://www.regulations.gov/#!documentDetail;D=OSHA-2013-0023-1113; *see also* Johnson Comment, *supra* note 44.

[59] We acknowledge the difficulties in formulating an effective response to this issue, as well as our limitations in suggesting remedies. For instance, we discussed the possibility that OSHA could protect employees' privacy by tailoring the information required to be disclosed based on the size of the enterprise being regulated, that is, by limiting the information companies with fewer employees must disclose. However, this solution conflicts with concerns over contextualizing injuries and the disproportionate effect that disclosure of a single injury could have on small enterprises. It may be that, in determining how best to respond to privacy concerns, OSHA will need to compromise some of the other priorities in the framework suggested above.

information concerning employee injuries could expose enterprises to greater liability through individual lawsuits.[60] We consider this argument to be largely, if not wholly, baseless. It is not access to information that generates liability, but rather the underlying incident being reported and the corresponding legal right of recovery. As such, arguing that information should not be provided publicly because it could lead to increased employer liability is, in essence, advocating for depriving employees of the ability to obtain recoveries to which they are legally entitled. Similarly, the argument that provision of such information could lead to a greater number of frivolous lawsuits concerning employee injuries is actually disagreement with the standards for bringing those suits, and not an argument about the public interest in obtaining the information. In other words, we believe that arguments about employer liability resulting from increased access to information are best left to another forum, as they are not in essence concerned with the validity of requiring disclosure of information.

C. Cost-Benefit Analysis

Beyond issues associated with presenting adequate and accurate information, we would also like to note the potential incompatibility between OSHA's failure to provide an assessment of the benefits of its potential program and the requirements of Executive Order 13,536 noted above. While OSHA has attempted to financially quantify the costs and benefits of the Proposed Rule, we believe OSHA should do more to ensure the disclosure requirement is carefully designed so as to avoid ineffective, confusing, or misleading disclosure. OSHA applied financially quantitative data to conclude that "if the proposed rule leads to either 1.5 fewer fatalities or 0.025% fewer injuries per year, the rule's benefits will be equal to or greater than the costs."[61] This analysis, while seemingly providing strong support for the proposition that the benefits of the Proposed Rule outweigh its costs, overlooks a critical element of the framework for evaluating regulatory disclosure requirements. OSHA has not performed any advanced study to insure the information required to be disclosed will actually inform end users in a meaningful way. In its analysis of costs of the rule, OSHA focuses on the costs to employers of uploading collecting and reporting illness and injury data, and the costs to the government of receiving and disclosing the information.[62] This cost analysis fails to assess the risk that the disclosed information may mislead or confuse the public. Though our review and analysis of information suggests that the information which OSHA proposes to offer is likely suitable to inform intended consumers without confusing them, the issue of how that information should be presented may merit further study. Before adopting the Proposed Rule, OSHA should update its cost-benefit analysis to determine whether the disclosure requirements are carefully designed to inform the public in a way that ultimately increases workplace safety.

IV. CONCLUSION

We believe that the stated goals of the Proposed Rule are consistent with those which are achievable through the use of disclosure as a supplement or alternative to direct regulation, and the information which OSHA proposes to make publicly accessible largely comports with the

[60] E.g., *Comment from Winslow, James*, REGULATIONS.GOV (Nov. 21, 2013), http://www.regulations.gov/#!documentDetail;D=OSHA-2013-0023-0038.
[61] Improve Tracking of Workplace Injuries and Illnesses, 78 Fed. Reg. at 67,277.
[62] *Id.* at 67,271–76.

framework we present above for maximizing the efficacy and efficiency of such programs. We do, however, believe that OSHA should commit to providing additional context for understanding the data provided relative to wider reporting trends and each enterprise's own reporting history. Further, we urge OSHA to consider carefully the potential privacy implications for employees whose workplace injuries will be the subject of disclosure, and to balance the value of disclosure of certain types of contextual information with the risk that such information could compromise those individual's privacy interests.

Sincerely,

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