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VIA ELECTRONIC SUBMISSION

The Honorable David S. Michaels
Assistant Secretary of Labor for
Occupational Safety and Health
U.S. Department of Labor
Room N-2625
200 Constitution Avenue NW
Washington, D.C. 20210
c/o OSHA Docket Office
Docket No. OSHA-2013-0024

Re: Comments of the American Fuel & Petrochemical Manufacturers on the Occupational Safety and Health Administration's Notice of Proposed Rulemaking on Improving Tracking of Workplace Injuries and Illnesses - *OSHA Docket No. OSHA-2013-0023*

Dear Dr. Michaels:

The American Fuel & Petrochemical Manufacturers (AFPM) is pleased to submit these comments on the Occupational Safety and Health Administration's (OSHA) Notice of Proposed Rulemaking (NPRM or proposed rule) for Improving Tracking of Workplace Injuries and Illnesses (*OSHA Docket No. OSHA-2013-0023).* AFPM welcomes the opportunity to comment on the NPRM and provide industry-specific insight to OSHA's proposal.

AFPM is a trade association whose members include more than 400 companies, representing virtually all U.S. refiners and petrochemical manufacturers. Its member companies provide consumers with a variety of products, including gasoline, home heating oil, diesel fuel, as well as the petrochemicals used as building blocks for thousands of vital products in daily life. The protection of our workers, our contractors and our neighborhoods is of paramount importance. AFPM members are committed to ensuring facility safety through continual re-evaluation of safety and health management systems, investing in safety system upgrades as well as their commitment to OSHA's Voluntary Protections Program (VPP).

The NPRM will have a profound impact on the way all of AFPM's members will maintain and report their injury and illness records to OSHA. Accordingly, our members have a substantial interest in this rulemaking and make the comments below.

I. OSHA overstates the benefits of the proposed rule by erroneously assuming the reported data represents a reliable and complete measure of an employer's safety record.

The touchstone of OSHA's proposed rule is providing public access to employers' injury and illness records online.[1] Indeed, the core benefits cited in the NPRM are derived from "[u]ninhibited [public] access" to employers' records.[2] Because the data will be publicly available through a searchable database, OSHA asserts that: (1) potential employees can make "a more informed decision about a future place of employment," (2) "members of the public will be able to make more informed decisions about current and potential places to do business with," and (3) "researchers might identify previously unrecognized patterns of injuries and illnesses…."[3] OSHA heavily relies on these anticipated benefits to make the general argument that its proposed rule will improve workplace safety and health.[4]

The Agency's analysis, however, incorrectly assumes that the information made available is a reliable indicator of an employer's safety record. Judging from the Agency's April 22, 2013 Mockup of the searchable database, the database will communicate very little useful information and the information will be provided out of context.[5] As the NPRM has failed to acknowledge, there are many factors that contribute to employee injuries and illnesses that are completely out of the employer's control.

Many recordable injuries and illnesses have nothing to do with an employer's safety program or its dedication to safety. Injuries from freak accidents or unpreventable employee misconduct do not reflect upon the quality of an employer's safety program; yet these types of injuries or illnesses must still be recorded under the provisions of 29 C.F.R. § 1904. For example, an employee may accidentally trip and fall over his own feet moving from one work duty to the next and break his ankle. While this type of injury is not indicative of the employer's safety program, the employer would be required to report it. The statistic becomes even more misleading when it is added to the generic, aggregate number of total employer injuries without

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[1] *See* 78 Fed. Reg. 67258 (Nov. 8, 2013) ("OSHA plans to post the injury and illness data online, as encouraged by President Obama's Open Government Initiative").
[2] *Id.* at 67258-59.
[3] *Id.* at 67259.
[4] *Id.* at 67258 ("The Agency believes that public access to timely, establishment-specific injury and illness data will improve workplace safety and health").
[5] *See Follow-on Mockup to Proposed Web-Based Mechanism for OSHA's Injury/Illness Data Collection: Public Access to Data (4/22/13)*, https://www.osha.gov/recordkeeping/LDCsys-rulemaking-Search.pdf.

further explanation. This will result in a deceptive inflation of the employer's injury/illness profile.

Moreover, employees will not be able to make an "informed decision" about a potential employer's safety record given the little amount of information that would be available. First, there is no way for the prospective employee to discern that he would be performing the same job duties as the employee who suffered the recordable injury or illness. All that would be provided in the searchable database is the non-descriptive work title of the injured employee and a very brief description of what happened. Second, the proposed OSHA database will offer very little background on the recordable injury or illness, omitting important explanatory and mitigating information. One example entry used in the April 22, 2013 OSHA Mockup lists the recordable injury as a "back strain lifting a box."[6] The corresponding OSHA 301 offers little more clarity, stating that the employee was "[l]ifting boxes on shelves while restocking products."[7] There is no additional information provided on potentially mitigating factors such as whether any work rules were broken (*e.g.,* rules on proper bending, load weight limits, and Personal Protective Equipment) or whether this was part of the employee's job duties. The general public would find it difficult to make meaningful determinations about an employer's safety program based on generic job titles, paraphrasing, and incomplete descriptions of how an injury or illness occurred.

Furthermore, OSHA has not presented any evidence demonstrating that the proposed rule will achieve the cited benefits. No survey, academic study, research, or anecdotal evidence is referenced in the NPRM when discussing the proposed rule's benefits.

II. Providing unfettered public access to employers' raw injury and illness data will result in irreparable damage to employers' reputations, and therefore, their economic well-being.

Without a reliable index with which to judge the employer's safety record, the public will be significantly misled by the raw injury and illness information OSHA posts online. As a result, the employer may be unfairly portrayed as a "bad actor" when it comes to safety, tarnishing its reputation. The immediate impact to the employer will be severe. Having the wrong impression about the employer's commitment to safety, a talented employee may choose to work for a competitor instead. For the same reason, the employer may also be wrongly deprived of business opportunities with potential investors, business partners and contractors, all based on an incorrect interpretation of OSHA's misleading safety data.

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[6] *Follow-on Mockup to Proposed Web-Based Mechanism for OSHA's Injury/Illness Data Collection: Public Access to Data (4/22/13)*, at 6.
[7] *Id.* at 7.

The proposed rule's effort to categorize employers in this manner parallels the criticism OSHA is currently facing for its Severe Violator Enforcement Program (SVEP); namely, the Agency's controversial practice of placing employers in SVEP – announced by a press release to the general public – without properly waiting for adjudication of the citations. The Agency can expect similar criticism should the proposed rule be promulgated.

Posting misleading data online also invites outside parties to further tarnish the employers' reputation for their own personal gain. The limited discussion about each recordable injury and illness provides an opportunity for the media, competitors, unions, and their allies to distort the employer's data and publically misrepresent them as "bad actors" or as having an inadequate safety program. In addition, plaintiff's attorneys will be enabled to purposefully misconstrue the employer's safety record so as to unfairly enhance their party's claims.

These points collectively undermine OSHA's assertion that "public access to [the reported information] will encourage employers to maintain and improve workplace safety/health in order to support their reputations as good places to work and/or do business with."[8] In reality, posting the injury/illness data online will have the opposite effect. When there is any doubt, employers will be incentivized to underreport injuries and illnesses to preserve their reputation in light of the litany of risks described above. In this context, OSHA's support of the proposed rule is ironic given its hard-line policy against rate-based safety incentive programs that (as the Agency claims) similarly "provide employees an incentive to not report injuries."[9]

OSHA attempts to justify the proposed rule by indicating that employers' injury and illness information is already available to the public;[10] however, annual summary data and making data available during an inspection are far less imposing on an employer's privacy than what OSHA is currently proposing. With respect to posting annual summary data, the information stays within the place of employment. Even if an employee decided to distribute the information, its reach would probably be limited to the immediate, surrounding area. As for furnishing data to OSHA inspectors, the NPRM readily admits that "OSHA inspections are a rare event for the typical business…."[11] However, even if OSHA did inspect and collect records from the establishment, there are many steps that would have to be taken before the information became public. First, a Freedom of Information Act (FOIA) request, or state open records request would have to be made. Before complying, OSHA would be statutorily required to evaluate whether the requested information fell into any one of the exemptions that prohibits public dissemination. Then the Agency would have to provide the employer with an opportunity to express their opinion if the requested information was business confidential, requiring even

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[8] 78 Fed. Reg. 67256.
[9] *See* March 12, 2012 Richard Fairfax Memorandum to Regional Administrators, https://www.osha.gov/as/opa/whistleblowermemo.html.
[10] 78 Fed. Reg. 67276 ("injury and illness records kept under Part 1904 are already available to OSHA and the public in a variety of ways").
[11] *Id.* (emphasis added).

further analysis by the Agency.[12] OSHA's proposed rule, on the other hand, would circumvent these steps and make the information readily available to anyone with an internet connection.

III. While overstating the expected benefits, OSHA has significantly underestimated the proposed rule's total costs.

OSHA's economic analysis underestimates the proposed rule's costs across the board. With respect to direct compliance costs, the NPRM estimates that employers with 250 or more employees will incur a compliance cost of $183 per year and employers with 20 or more employees will incur a compliance cost of $9 per year.[13] OSHA arrives at this estimate by assuming it will only take 10 minutes to enter and submit all injury and illness record data for both the OSHA 300 and 300A forms and 10 additional minutes for each OSHA 301 submission.[14]

This estimate is highly inaccurate and significantly understates the costs given the amount of time it will take for employers to learn how to use and navigate the proposed electronic reporting system, enter all the required information into multiple text boxes, review and confirm the accuracy of each record, and confirm the accuracy of the information entered into the electronic system. OSHA claims that data entry will be a "simple and quick matter."[15] Judging from the Agency's complicated flowchart of data collection, alone, entering data will be anything but a "simple and quick matter."[16] Even if the employer decides to submit a "batch upload" (which is never adequately explained in the NPRM), there is no guarantee that its software will be compatible with OSHA's "acceptable formats" for receiving the upload.[17] The March 2012 OSHA Mockup indicates that "MS Excel or XML" would be acceptable formats to submit the reported data. Yet many employers that already maintain injury and illness data electronically utilize other programs which may not be compatible. For example, some of AFPM's members use specialized software specifically developed for their own, unique needs. OSHA, however, fails to account for these employers and the significant costs that will have to be sustained when fundamentally changing the format in which data is maintained.

In addition to missing the mark for employers' compliance costs, OSHA drastically underestimates its own costs for maintaining the online database of injury and illness records. According to the NPRM, almost 480,000 establishments will be subject to the proposed rule's

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[12] *See* Executive Order 12600 (Predisclosure Notification Procedures for Confidential Commercial Information).
[13] *See* 78 Fed. Reg. 67271.
[14] *See* 78 Fed. Reg. 67273.
[15] *Id.* at 67272.
[16] *See* March 21, 2012, pg. 1, *Mockup of Proposed Web-Based Mechanism for OSHA's Injury/Illness Data Collection*, https://www.osha.gov/recordkeeping/LDCsys-rulemaking-mockup.pdf.
[17] *Id.* at 6.

electronic filing requirements.[18] Despite the vast amount of information that will be submitted by hundreds of thousands of establishments, OSHA intends to employ only "three full-time-equivalent workers to administer the new electronic recordkeeping system."[19] With so little man-power to manage and review the staggering amount of data, errors and backlogs are a certainty. These problems are exacerbated by the additional amount of time it will take OSHA personnel to redact employee names which not only appear in the "employee name" column, but in the injury or illness descriptions as well. The redactors will therefore be forced to examine every single injury description to ensure no employee names are included. Even if the three employees were working 24 hour days, seven days a week, it would be impossible for them to timely address these issues for 480,000 establishments.

The NPRM also omits several indirect costs imposed on employers that further drive up the price of the proposed rule. As discussed in Section II, jobs and potential business opportunities will be lost based upon the false public perception of a bad safety record. Employers will also have to bear the costs of defending attacks from unions, plaintiff attorneys and competitors who distort and misuse the reported data against the employer.

In sum and contrary to OSHA's assertions, the proposed rule's costs clearly outweigh the speculative benefits.

IV. Posting employers' injury and illness data online will compromise the confidentiality of business proprietary information and employee privacy.

The proposed rule will result in the online publication of employer information that is proprietary and confidential. Details about how an injury occurred, the number of employees and the number of hours worked may reveal information that the employer considers proprietary and wishes to keep private from business competitors. This type of information clearly falls into the category of "trade secrets" as defined in 29 C.F.R. §1903.9 and 18 U.S.C. § 1905, the statute which § 1903.9 explicitly references.[20]

OSHA itself has admitted this on numerous occasions, asserting that the information it now seeks to publish should remain confidential because it includes proprietary business information.[21] In *OSHA Data/CIH, Inc. v. U.S. Dep't of Labor*, the Secretary had rejected a FOIA request for an employer's Lost Work Day Injury and Illness (LWDII) rates, arguing that

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[18] *See* 78 Fed. Reg. 67273 (NPRM estimates that 38,094 establishments with 250 or more employees and 440,863 establishments with 20 or more employees will be subject to this section).
[19] *Id.* at 67275 (emphasis added).
[20] The job being performed at the time of injury, number of working employees, and hours worked all bear on "operations" as used in 18 U.S.C. § 1905.
[21] *See New York Times Co. v. U.S. Dep't of Labor*, 340 F. Supp. 2d 394 (S.D.N.Y. 2004); *OSHA Data/CIH, Inc. v. U.S. Dep't of Labor*, 220 F.3d 153 (3d Cir. 2000).

public dissemination posed "the possibility of substantial competitive harm" to employers.[22] This is because those rates could be reverse engineered to ascertain the total number of hours worked at the respective establishment. The Third Circuit agreed, ruling that "the DOL had acted appropriately in concluding that it had 'reason to believe that disclosure of the information could reasonably be expected to cause substantial competitive harm.'"[23] Moreover, in a 2004 sworn declaration, OSHA's Co-Counsel for Administrative Law stated that the recordkeeping information contained in the OSHA 300, 300A and 301 forms (which the proposed rule aims to publish) "is potentially confidential commercial information because it corresponds with business productivity."[24] In addition to the issues described above, the reported information could also very well reveal the employer's possession of certain valuable or hazardous chemicals to the public, compromising both the security of the employer's establishment and its employees.

Employee privacy may also be jeopardized in the process. OSHA indicates that it will keep all employee personal information confidential, redacting the injured employee's name for the searchable database.[25] However, there is still enough circumstantial information provided for the public to identify the injured employee (*e.g.,* date of injury, title, circumstances of injury, location of establishment). This is especially true for smaller communities where it would be a relatively simple matter to connect the dots on a particular injury given a smaller sample size.

Practical concerns of administrative human error and potential cyber-security threats only exacerbate this concern over employee privacy. In the past few years, the government has had a poor track record with regard to inadvertent disclosures and data breaches concerning personal information. According to a December 2013 United States Government Accountability Office (GAO) Report, in 2012, the federal government had a total of 22,156 incidents of data breach that revealed personal information, either by cyber attack or inadvertent disclosure.[26] .

V. OSHA's proposed rule runs contrary the Agency's "no-fault" approach to employer recordkeeping.

When OSHA revised its recordkeeping requirements in January of 2001, the Agency recognized a no-fault approach to work-related injuries and illnesses. According to the "geographic presumption" that highlighted the revisions, if an injury or illness occurred at the workplace, it would be deemed work-related, notwithstanding the incident's surrounding circumstances. At the same time, OSHA clarified that "the presumption encompasses cases in

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[22] *Id.* at 163.
[23] *Id.* at 167.
[24] *New York Times Co.*, March 12, 2004, Decl. of Miriam McD. Miller ¶ 5.
[25] *See Follow-on Mockup to Proposed Web-Based Mechanism for OSHA's Injury/Illness Data Collection: Public Access to Data (4/22/13)* (employees' names are redacted).
[26] *See* GAO, Report to Congressional Requesters, *Agency Responses to Breaches of Personally Identifiable Information Need to be More Consistent,* http://www.gao.gov/assets/660/659572.pdf.

which injury or illness results from an event at work that are outside the employer's control, such as a lightning strike, or involves activities that occur at work but that are not directly productive, such as horseplay."[27] *I.e.*, OSHA acknowledged that it would not presume employer fault for its reported workplace injuries and illnesses.

The proposed rule, however, contradicts the Agency's explicit promise not to assume the employer is at fault. In stark contrast to the important caveat provided in OSHA's geographic presumption, the NPRM blatantly encourages prospective employees, potential business partners and the public at-large to make meaningful judgments about an employer's commitment to safety based upon the raw incident data that will be published out of context; *i.e.,* the NPRM encourages the public to assume the employer is at fault for all injuries and illnesses reported.[28] OSHA fails to address this significant contradiction, or the reasons behind it, anywhere in the NPRM.

VI. OSHA does not have the legal authority to promulgate the proposed rule.

OSHA does not possess the statutory authority to publicly post employers' injury and illness records. As the NPRM notes, Section 24 of the OSH Act requires OSHA to "develop and maintain an effective program of collection, compilation, and analysis of occupational safety and health statistics," and "compile accurate statistics on work injuries and illnesses which shall include all disabling, serious, or significant injuries and illnesses …."[29] However, nowhere in this statutory charge, or any provisions of the OSH Act, is OSHA authorized to publish those occupational safety and health statistics. Moreover, publishing injury and illness data has nothing to do with the overarching purpose of OSHA's recordkeeping mandate: allowing the Agency to "[develop] information regarding the causes and prevention of occupational accidents and illnesses."[30]

To this point, even if OSHA had the authority to publish the injury and illness statistics, OSHA lacks the statutory authority to also publish the corresponding employer's name. OSHA is charged with the requirement of developing a system of "collection, compilation, and analysis of occupational safety and health statistics," and "compile accurate statistics on work injuries and illnesses which shall include all disabling, serious, or significant injuries and illnesses…."[31] Webster's Dictionary defines "statistics" as "a branch of mathematics dealing with the collection, analysis, interpretation, and presentation of masses of numerical data," or "a collection of quantitative data."[32] The employer's identity has nothing to do with numerical or

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[27] 66 Fed. Reg. 5916, 5929 (January 19, 2001) (emphasis added).
[28] *See* 78 Fed. Reg. 67259.
[29] 29 U.S.C. § 673(a).
[30] 29 U.S.C. § 657(c)(1).
[31] 29 U.S.C. § 673(a) (emphasis added).
[32] "statistics." Merriam-Webster Online Dictionary. 2014. http://www.merriam-webster.com (1 Mar. 2014).

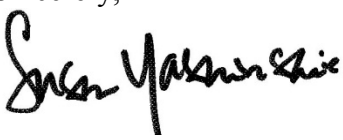
qualitative data and therefore is outside the purview of information OSHA can collect and post online.

Moreover, OSHA's proposed rule runs contrary to the purpose of the OSH Act. As the NPRM notes, the overarching purpose of the OSH Act is "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions…."[33] The Act achieves this goal "by providing for appropriate reporting procedures with respect to occupational safety and health which procedures will … accurately describe the nature of the occupational safety and health problem."[34] As thoroughly addressed above, the proposed rule's mechanism for collecting (and then posting) injury and illness data is anything but "accurate." Instead it will create false impressions about a given employer's safety record, tarnish the employer's reputation and mislead the public.

VII. Conclusion

For these reasons, AFPM respectfully requests the Agency abandon the proposed rule. AFPM thanks the Agency for the opportunity to submit these comments and convey its concerns with the NPRM on "Improving Tracking of Workplace Injuries and Illnesses," as it affects its members.

Sincerely,



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[33] 29 U.S.C. § 651(b).
[34] *Id.* at § 651(b)(12) (emphasis added).