

September 28, 2015

The Honorable Thomas E. Perez
Secretary
Department of Labor
200 Constitution Ave., N.W.
Washington, D.C. 20210

Dear Secretary Perez:

We write today to express concern about the process used to develop three guidance documents recently issued by the Occupational Safety and Health Administration (OSHA): “Process Safety Management of Highly Hazardous Chemicals and Covered Concentrations of Listed Appendix A Chemicals” (chemical concentration guidance) issued June 5, 2015; “Process Safety Management of Highly Hazardous Chemicals and Application of the Retail Exemption (29 CFR 1910.119(a)(2)(1))” (retail exemption guidance) issued July 22, 2015; and “RAGAGEP in Safety Process Management Enforcement” (RAGAGEP guidance) issued June 5, 2015. These three guidance documents are expected to dramatically expand the universe of regulated parties, create extreme logistical and financial burdens on regulated parties, and convert flexible recommended practices into mandatory requirements—all without the opportunity for public comment. We therefore ask that OSHA immediately withdraw these memoranda. In the case that OSHA decides to pursue these policies further, we ask that it only does so through the rulemaking process.

These guidance documents took effect immediately when they were issued; therefore, parties not previously subject to certain requirements were deprived of notice that they were about to fall subject to OSHA enforcement. For example, OSHA’s chemical concentration guidance substantially expanded the universe of chemical manufacturers and distributions subject to the process safety management standard. Likewise, under the retail exemption, an estimated 4,800 previously exempted facilities will be subject to the revised process safety standard. The guidance pertaining to recognized and generally accepted good engineering practices (RAGAGEP) is especially troublesome because it converts recommended “generally accepted” practices that engender flexibility among individual refiners to mandatory practices. This closely resembles a legislative rule that requires notice and comment by law.¹ Whether or not the RAGAGEP guidance is properly designated as such, we ask OSHA to err on the side of good governance and withdraw the memorandum.

The manner in which OSHA issued the guidance documents also deprived regulated parties of the ability to comment on compliance costs and the overall regulatory burden the guidance

¹ Administrative Procedure Act, 5 U.S.C. §§ 500, *et seq.*

documents would impose. For example, the Agricultural Retailers Association believes that OSHA's compliance cost estimates stemming from the revised retail exemption are grossly underestimated. In particular, their members estimate the actual cost for compliance with the revised standard would approach \$27,500 per facility—ten times OSHA's estimate of \$2,160 per facility. Similarly, one company overseeing facilities now required to follow the revised RAGAGEP guidance estimates that compliance with just one standard would cost \$10 million per refinery; another company estimates that the initial cost of compliance would total \$172 million, with additional annual compliance costs exceeding \$18.5 million. Regulated parties subject to the revised chemical concentration guidance also expect their compliance costs to skyrocket. These estimates suggest that, because each of these guidance documents could have an estimated economic effect of over \$100 million, OSHA should, at a minimum, have deemed them significant. If it had done so, at least the guidance documents would have been subject to the regulatory review policies and procedures articulated in the Office of Management and Budget's (OMB) Final Bulletin for Agency Good Guidance Practices.² However, it appears these guidance documents escaped OMB review as well.

We can agree that a commitment to workplace safety is a high priority, but we are troubled by the process in which OSHA has altered its longstanding interpretations in favor of more expansive, binding, and burdensome guidance documents without inviting public comment. We therefore ask that OSHA withdraw these memoranda, and pursue these policies only through the rulemaking process.

Sincerely,

Senator James Lankford
Chairman
Subcommittee on Regulatory Affairs
and Federal Management, U.S. Senate
Committee on Homeland Security and
Governmental Affairs

Senator Lamar Alexander
Chairman
U.S. Senate Committee on Health, Education,
Labor and Pensions

² Office of Mgmt. and Budget, *Final Bulletin for Agency Good Guidance Practices*, 72 Fed. Reg. 3432 (Jan. 25, 2007).

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Senator Heidi Heitkamp
Ranking Member
Subcommittee on Regulatory Affairs
and Federal Management, U.S. Senate
Committee on Homeland Security and
Governmental Affairs

Senator Joni Ernst

Senator Steve Daines