



**AMERICAN SOCIETY
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January 11, 2006

Ms. Lisa Jones
Office of Information and Regulatory Affairs
Office of Management and Budget
725 17th Street, N.W.
New Executive Office Building, Room 10201
Washington, DC, 20503

VIA E-MAIL AND FACSIMILE

Dear Ms. Jones,

On behalf of the 30,000 members of the American Society of Safety Engineers (ASSE), I am pleased to submit these comments concerning the proposal by the Office of Management and Budget/Office of Information and Regulatory Affairs (OMB/OIRA) to promulgate a *Bulletin for Good Guidance Practices*. See 70 Fed. Reg. 71866 (Nov. 30, 2005). ASSE commends OMB/OIRA for taking a proactive stance to ensure that agencies can readily provide interpretation and guidance of regulations, but still do so in a manner that affords due process to the regulated community and that is in accordance with the requisites of the Administrative Procedure Act, 5 USC 551 et seq.

ASSE is a professional society whose members are often the individuals responsible for implementation of, and compliance with, regulations set forth by the Occupational Safety and Health Administration (OSHA), Mine Safety and Health Administration (MSHA), Environmental Protection Agency

(EPA), Department of Transportation (DOT), Department of Homeland Security (DHS) and other federal agencies. Utilization of the myriad compliance documents and advisory guidelines is a daily part of many ASSE members' activities.

ASSE wishes to emphasize that it does not seek to limit the ability of agencies to issue policy or guidance materials as these are extremely beneficial overall to the regulated community in terms of providing insight on why regulations are needed, assistance in the implementation of and compliance with mandatory standards, and offer useful suggestions on how to improve safety, health and environmental programs. Adding more transparency to the process, as suggested in the OMB Bulletin, can only improve the utility of such guidance materials. But we caution that extraneous levels of review or layers of bureaucracy should not bog down the issuance process to the extent that information becomes untimely or loses its effectiveness.

This is not the first time that agency guidance materials have come under scrutiny. Therefore it may be helpful for OMB to review ASSE's testimony before the House Subcommittee on National Economic Growth, Natural Resources, and Regulatory Affairs concerning the issue of "backdoor rulemaking" through the use of guidance materials. We have attached a copy of that February 2000 testimony as *Attachment A* to these comments. As noted at that time, these non-binding materials are sometimes selectively employed by agency personnel in enforcement activities to expand existing regulatory requirements. This is clearly a problem when the APA is violated or the members of the regulatory community are not otherwise accorded fair notice and due process with respect to what is required for compliance with codified standards.

In other instances, there may be confusion over whether a particular document is binding or non-binding, as well as its legal consequences. For example, the sets of guidelines propounded by OSHA for certain industry sectors related to ergonomics are not binding rules, but they have been used by the agency at times to substantiate citations under the agency's General Duty Clause (Section 5(a)(1) of the OSH Act). To its credit, OSHA did seek comment from the public on these guidelines and has publicly stated that these do not constitute binding rules, but a certain level of confusion remains.

Another problem has been guidance materials that appear and disappear, or which undergo substantive revision, without notice from agency websites, which creates a lack of consistency in what can be expected in terms of compliance. It is often difficult to predictably know whether a reference will still be posted a month or a year after it may be cited by an employer in a manual or other safety-related training materials. Moreover, such guidance materials may also be used in other settings (e.g., tort litigation) to establish prior knowledge or to indicate an industry's presumed standard of care. Therefore, as noted below, including a listing of new and rescinded policy on

agency websites will be extremely helpful in allowing practitioners to remain current with respect to prevailing policy positions of regulatory agencies.

ASSE believes that regulatory information should be clearly understood and that the current procedures for rulemaking should not be circumvented through guidance materials. However, we would not support any policies that would hamper the ability of agencies to issue guidance in a timely manner or that might have a chilling effect on their publication of such materials in the first instance. Having uniform procedures, government-wide, is likely beneficial since it will ensure that only legitimate interpretations of regulations are disseminated and all will have fair notice of when such materials are published or when the agency intends to revise or withdraw existing guidance information.

In general, ASSE supports the proposed Bulletin and we agree that the Bulletin should not create a private right of action with respect to judicial review. With respect to the specific provisions of this Bulletin, ASSE makes the following recommendations:

Section I (Definitions): In the definitions, it may be useful to interpret what constitutes a "material" effect on a sector of the economy. There are certain industry sectors that will be impacted by rulemaking, to the exclusion of other sectors, and where such rules would never reach an annual effect of \$100 million (e.g., coal mining or certain industrial classes within general industry) because of the relatively small number of business entities involved. OMB has modeled the definition of "significant guidance document" on similar terminology under the Regulatory Flexibility Act and in Executive Order 12866. However, because agencies rarely will examine the discreet sector-specific impact, we believe clarifying "material" would eliminate any ambiguity and ensure that sectors are not adversely affected by future guidance materials.

Section II (Basic Agency Standards): The Bulletin states that "Agency employees may depart from significant guidance documents only with appropriate justification and supervisory concurrence." This is somewhat ambiguous and troubling as it is difficult to imagine (at least in a safety, health and environmental context) where departure from guidance would be warranted and permitting each OSHA area office to decide whether or not to abide by national guidance could be tremendously disruptive of programs adopted by multi-state companies. Any departures should have supervisory concurrence at the national level, rather than permitting a piecemeal approach to adoption of guidance by local officials.

Section III (Public Access and Feedback): ASSE strongly supports maintenance of a list of guidance on agencies' website, as well as a listing of new, revised and withdrawn guidance. We further recommend that old guidance should simply be clearly labeled with this expiration date or rescission date (even marked "outdated" if this would simplify things) but the original documents must be left available for reference as historical

documents on the website. This is important since litigation involving evidentiary matters that use guidance to show what a "reasonable person" could have known or relied upon at a specific point of time may still be pending when an agency withdraws or modifies the document. Access to historical documents would be critical in such instances.

ASSE also support providing a comment mechanism electronically for guidance documents, but this should not be limited to "significant guidance documents" for the reasons outlined in Section I above. This should not impose a hardship given that the Bulletin does not require a formal response to such comments by the agency.

Section IV (Notice and Comment for Economically Significant Guidance Documents): ASSE agrees that economically significant guidance documents should be published for notice and comment in the Federal Register, as well as via the agency's website. For such economically significant rules, the final version (with agency comment) should be included.

We further urge agencies to consider applicable national consensus standards when developing policy, as such standards are defined in the Technology Transfer Act of 1995, as implemented through OMB Circular A-119. The Bulletin is silent with respect to the inclusion of, or reference to, transparent, national consensus standards (e.g., ANSI, ASTM, NFPA materials) in agency policy. Currently, many agency guidance materials do contain references to these consensus documents. ASSE is concerned that requiring publication in the Federal Register under the procedures in the Bulletin could result in agencies publishing such consensus materials in their entirety. This would violate federal copyright laws and have a financially chilling effect on the ability of organizations to develop such standards (as the work is paid for by sales of the standards by the issuing organizations and/or the organizations that serve as secretariat for individual standards). Therefore, we ask OMB to make it clear in the final bulletin that consensus materials that are "referenced" by agency guidance materials are not, themselves, materials that must be made "available to the public" as the phrase is defined in § I(4).

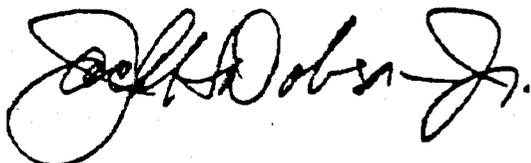
ASSE urges agencies that publish such economically significant guidance to make it absolutely clear that the guidance does not modify existing mandatory standards. This will help ensure that such guidance is not improperly used to impose new requirements, and can help limit the potential for litigating arising from these guidance materials.

Finally, ASSE encourages agencies to use outside resources (subject matter experts) to assist in reviewing, commenting upon and developing guidance documents in the first instance, but especially where documents are not of the nature that they would be otherwise be subject to public notice and comment under the Bulletin's criteria. Such outside resources include, but are not limited to, professional organizations specific to the affected industry sector, professional safety and health organizations, and the consensus

organizations described above. This initial level of review can only improve the substantive content of such guidance.

Thank you for considering the perspective of the American Society of Safety Engineers. We look forward to working with you in the future on this and other issues that help enhance protection of people, property and the environment.

Sincerely,

A handwritten signature in black ink, reading "Jack H. Dobson, Jr." in a cursive style.

Jack H. Dobson, Jr., CSP
President

ATTACHMENT A**TESTIMONY OF
AMERICAN SOCIETY OF SAFETY ENGINEERS ("ASSE")****On the Matter of:****"Is the Department of Labor Regulating the Public
Through the Backdoor?"**

Presented by

Adele L. Abrams, Esq., February 15, 2000

Chairman McIntosh and Esteemed Members of this Committee: My name is Adele Abrams. I am an attorney who represents the American Society of Safety Engineers ("ASSE") at the national level. I am also a professional member of ASSE's National Capital Chapter. In addition to practicing occupational safety and health law, I am an MSHA-certified instructor, conduct workplace safety audits, and am recognized in the National Registry of Safety Professionals and Other Registrants.

It is an honor for me to represent ASSE, which is the oldest and largest Society of safety professionals in the world. Founded in 1911, ASSE represents almost 33,000 dedicated safety professionals and serves as Secretariat of seven American National Standards Institute ("ANSI") Committees, developing voluntary consensus safety and health standards used by both government agencies and the private sector. ASSE is dedicated to excellence, expertise, and commitment to the protection of people, property, and environment on a worldwide basis.

Today, my testimony focuses on how ASSE views the administrative procedures used by the Occupational Safety and Health Administration ("OSHA") and the Mine Safety and Health Administration ("MSHA") when issuing letters of interpretation, memoranda, procedural documents, and other policy statements. We are also submitting a longer statement, which we ask to be included in the hearing record.

The membership of the Society probably requests and receives more letters of interpretation from OSHA and MSHA than those of any other organization involved with occupational safety and health. These interpretative documents and policy statements are a significant part of both agencies' compliance and consultation assistance activities.

ASSE supports and encourages the issuance of information that assists employers in complying with OSHA and MSHA standards and ensuring the safety of their workers. Our members make decisions on a daily basis that literally have life and death consequences, and the actions they choose to take may be guided by such cutting-edge information. It is in the best interests of safety and health in the workplace that such information be available rapidly, both through publication and broadcast on the agencies' websites.

We hope that this subcommittee will not overlook the positive benefit that such interpretative materials can have for small businesses. Small business compliance assistance is of growing interest for our members, and we have long encouraged federal agencies to dedicate more of their resources to this area. Many of ASSE's 2,300 members in the Consultants Division work with small businesses, advising them on safety and health issues. Both consultants and employers routinely write to OSHA, MSHA and the National Institute for Occupational Safety and Health ("NIOSH") to obtain interpretative statements concerning particular subject areas.

ASSE also notes that while overall results have been excellent in getting guidance from OSHA and MSHA, in some cases there have been significant delays in issuing a response. Generally, however, the information provided assists businesses in implementing their occupational safety and health program in an efficient and effective manner. Both employees and employers receive direct benefit from this "win-win" approach. Consequently, ASSE strongly recommends that OSHA and MSHA continue to provide and disseminate interpretative materials publicly, in order to provide much-needed guidance and clarification.

7

Although not legally binding, some of the agencies' more "formal" interpretative documents - for example, MSHA's program policy manual and OSHA's numerous Directives (such as the "CPLs") -- are instructive in determining how an agency has interpreted a standard or regulation in the past. We should not forget that they are also utilized by the courts to determine whether an enforcement action is "reasonable" and the degree of deference that should be accorded based on the consistency of the agency's interpretation of a particular standard. The agencies should, however, make it clear to the public that these "guidance" documents are of a non-binding nature, and guard against extending the scope of existing standards and regulations through such interpretative materials.

ASSE notes that guidance documents can be non-binding and still provide real value. Since the Society is secretariat of seven (7) ANSI committees, and regularly writes letters of interpretation for such standards, we can directly attest to the importance in maintaining such a process. However, although safety professionals (and attorneys) are aware that interpretative materials are not legally binding, the public may not be clear on this point. Therefore, OSHA, MSHA and other agencies should consider including a statement to this effect on all future materials that are intended to be interpretative policies, rather than substantive rules. Chairman McIntosh's new legislation, The Congressional Accountability for Regulatory Information Act of 2000 (H.R.3521, Section [4-b]), addresses this very issue. This appears to be a reasonable requirement and we look forward to hearing the debate on this legislation.

In summary, although ASSE's overall experience with agency interpretative materials has been very positive, and surveys indicate that ASSE members generally view the agency's policy process as an asset, that does not mean that there cannot be significant improvement. We encourage OSHA and MSHA to work with organizations such as ASSE more proactively when addressing such issues. There is a greater need for synergy in both the public and private sectors when writing interpretative materials. From its standards work, ASSE has the expertise to do so and is more than willing to work with these agencies.

Finally, in order to remain exempt from formal rulemaking under the Administrative Procedure Act ("APA"), interpretative documents cannot go beyond the plain language of the standard or create a "secret" rule. If an agency desires to impose new obligations or burdens on the regulated community, it must engage in formal "notice-and-comment" rulemaking. The APA's rulemaking procedures provide employers, employees and safety professionals with the opportunity to offer OSHA and MSHA valuable input and share real-world experience. The end result is an improved regulatory structure and enhancement of safety and health.

With that final statement, I thank you for your time today and would be pleased to answer any questions that you may have.

[End of verbal testimony; formal statement follows]

7

February 15, 2000

The Honorable David McIntosh
Chairman, House Subcommittee on National Economic
Growth, Natural Resources, and Regulatory Affairs
1610 Longworth House Office Building
Washington, DC 20515-1402

ASSE STATEMENT

"Is the Department of Labor Regulating the Public Through the Backdoor?" The Congressional Accountability for Regulatory Information Act of 2000 (H.R.3521)

Dear Chairman McIntosh:

The purpose of this statement to inform you of ASSE's position concerning the Subcommittee's February 15, 2000, hearing: Is the Department of Labor Regulating the Public Through the Backdoor? Our statement also addresses H.R. 3521, The Congressional Accountability for Regulatory Information Act of 2000.

Introduction

The American Society of Safety Engineers (ASSE), is the oldest and largest Society of Safety Professionals in the world. Founded in 1911, ASSE represents nearly 33,000 dedicated safety professionals. Included in this membership are Certified Safety Professionals, Professional Engineers, ergonomists, academicians, fire protection engineers, system safety experts, industrial hygienists, physicians, occupational nurses, and an impressive collection of other disciplines, skills, and backgrounds. ASSE is dedicated to excellence, expertise, and commitment to the protection of people, property, and environment on a world-wide basis.

ASSE serves as Secretariat of seven (7) American National Standards Institute Committees (ANSI) developing safety and health standards which are used by private sector organizations as well as state/Federal governmental agencies such as MSHA, OSHA, etc. ASSE members also sit on over forty (40) additional standards development committees and the Society sponsors educational sessions on standards development. The Society also has eleven (12) technical divisions consisting of: Construction, Consultants, Engineering, Environmental, Health Care, Industrial Hygiene, International, Management, Public Sector, Risk Management and Insurance, Mining, and Transportation. The ASSE members included in these divisions are leaders in their field, with the knowledge and expertise needed to move safety and health forward on a global level.

ASSE Insights on the Hearing

ASSE has great interest in the hearing issue: Is the Department of Labor Regulating the Public Through the Backdoor? We will focus on how our members view the administrative procedures used by OSHA and MSHA when issuing letters of interpretation, memoranda, and other policy statements.

Our members may well request and receive more letters of interpretation from OSHA and MSHA than any other organization involved with occupational safety and health. Letters of interpretation, memoranda, and other policy statements are a significant part of the agencies' compliance and consultation assistance activities. This is something ASSE has, and always will, strongly support. It is important to employers, employees, and safety professionals that measures be taken to encourage publication of such information. Our members make decisions on daily basis, that could literally have life and death consequences, that are drawn from such cutting edge information. It is in the best interests of enhancing safety and health in the workplace that such information be readily available.

What should be of significant interest to you and the members of your esteemed subcommittee is the positive benefit such interpretative materials can have for small businesses. We believe small business is of importance to the long term security of the U.S. economy. ASSE has a Consultants Division with approximately 2,300 members. These consultants work with a significant number of small business (having under 75 employees) on safety and health issues. Safety and health consultants, as a practice, will routinely write to OSHA and other safety and health agencies for interpretative statements on behalf of their small business clients. The results have generally been excellent in that cutting edge information is received, small businesses are able to enhance their occupational safety and health program in an efficient and effective manner, and both employees and employers receive direct benefit. We see such a program as win-win for all of those involved.

ASSE strongly recommends interpretative materials should continue to be written and posted as public information since they do provide needed guidance and clarification. Some of the best safety and health materials we have seen can be of a non-binding nature. Since the Society is secretariat of seven (7) ANSI committees, and regularly writes letters of interpretation for our standards, we can directly attest to the importance in maintaining such a process. In addition, safety professionals are aware that interpretative materials are generally not binding.

ASSE Insights on H.R.3521 - Section [4-b]

The problem appears to be how to inform the general public on the difference between a binding substantive rule and public guidance information. Chairman McIntosh has introduced legislation, The Congressional Accountability for Regulatory Information Act of 2000 (H.R.3521), which addresses this very issue.

We look forward to hearing the debate on this legislation, but point out that our overall experience with the interpretative materials published by OSHA and MSHA has been very positive. We know from past surveys and questionnaires that ASSE members generally view the process as an asset. However, that does not mean that there cannot be significant improvement. The Society has spoken out before in the past on the need for the agencies to work with organizations like ASSE on a more proactive basis when addressing such issues. We believe there is a greater need for synergy in both the public and private sectors when writing interpretative materials.

ASSE takes the position that OSHA and MSHA should continue to issue and make public interpretative documents and memoranda, and compliance assistance materials, so long as such documents: (1) are treated as "non-binding" from a legal perspective and are so marked in the future; (2) do not impose new substantive requirements that go beyond the plain language of the standard or regulation; and (3) are not used by the agency for enforcement purposes. The courts uniformly conclude that if an agency labels a document as "interpretative," it cannot be enforced in the same manner as a substantive rule. If an agency wants to enforce an "interpretation" that imposes a new, binding requirement, it must go to formal "notice-and-comment" rulemaking.

The impression of some ASSE members is that OSHA and MSHA have, on occasion, attempted to craft new regulatory requirements through interpretative documents. The courts have rejected such requirements as an invalid exercise of rulemaking authority, in violation of the Administrative Procedure Act. Although the courts will defer to the agency's regulatory interpretation "as long as it is reasonable," this deference is greater when the "interpretation" was previously set forth in writing and lesser when the interpretation is announced for the first time through an enforcement action or differs significantly from a prior published interpretation. We believe the key issue for consideration is: Does the "interpretative" requirement naturally flow from the standard's preexisting language, or does it impose a new compliance obligation that our members will be responsible for implementing in the workplace?

Although OSHA and MSHA do submit their interpretative materials to the Solicitor of Labor for review, this is not necessarily indicative of a desire to have it "stand as a legal basis" for OSHA action. Rather, it

suggests that the agency does not want to depart from previously established interpretations or from precedential case law. Finally, it should be noted that the courts eschew finding that an agency is estopped from reversing a previously announced, non-binding interpretation. Thus, an employer or other member of the public relies upon agency "interpretation" at its own peril (although the existence of such a document supporting an employer's position can be helpful evidence with respect to negligence in an enforcement action). Similarly, OSHA can use a previously published interpretation as evidence that a current consistent enforcement posture is legitimate and in accordance with its longstanding interpretation of a standard or regulation.

Conclusion

In order to remain exempt from formal rulemaking under the Administrative Procedure Act, agency interpretative documents cannot go beyond the plain language of the standard or create a "secret" rule. If an agency desires to impose new obligations or burdens on the regulated community, it must engage in formal "notice-and-comment" rulemaking. These formal rulemaking procedures provide employers, employees and safety professionals with the opportunity to offer OSHA and MSHA valuable input and share real-world experience. However, non-binding interpretative documents also provide valuable compliance assistance to employers, workers, and safety and health professionals. By utilizing both formal substantive rulemaking and informal guidance, in a way that passes legal muster and affords adequate notice to the public as to the nature of a particular document, the end result will be an improved regulatory structure and enhancement of safety and health.

Representatives of the Society, ASSE's Governmental Affairs Committee, will be visiting Washington, DC on April 4, 2000. We hope to be able to meet with you and your staff in order to again discuss these issues.

We thank you for your attention to this matter, and if we can be of assistance, please feel free to contact the Society.

Sincerely Yours,

Frank H. Perry, PE, CSP
Society President, 1999-2000

Copy To: ASSE Board of Directors
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ASSE Governmental Affairs Committee
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