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NOMINATION OF GREGORY JACOB AND HOWARD RADZELY

HEARING

OF THE

COMMITTEE ON HEALTH, EDUCATION, LABOR, AND PENSIONS

UNITED STATES SENATE

ONE HUNDRED TENTH CONGRESS

FIRST SESSION

ON

NOMINATION OF GREGORY JACOB, OF NEW JERSEY, TO BE SOLICITOR OF LABOR, U.S. DEPARTMENT OF LABOR; AND HOWARD RADZELY, OF MARYLAND, TO BE DEPUTY SECRETARY OF LABOR, U.S. DEPARTMENT OF LABOR

NOVEMBER 1, 2007

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NOMINATION OF GREGORY JACOB AND HOWARD RADZELY

THURSDAY, NOVEMBER 1, 2007

U.S. SENATE,
COMMITTEE ON HEALTH, EDUCATION, LABOR, AND PENSIONS,
Washington, DC.

The committee met, pursuant to notice, at 10:40 a.m. in Room SD–430, Dirksen Senate Office Building, Hon. Edward M. Kennedy, chairman of the committee, presiding.

Present: Senators Kennedy, Brown, and Enzi.

OPENING STATEMENT OF SENATOR KENNEDY

The CHAIRMAN. We'll come to order.

Today, our committee is considering the nominations of Mr. Howard Radzely, to be Deputy Secretary of Labor, and Gregory Jacob, to be Solicitor of Labor. Along with the Secretary of Labor, these positions are vital in determining Department policy and enforcing the law on behalf of America's workers. These are positions of great influence and responsibility that affect the lives of every man, woman, and child in America. They ensure that hardworking families who rely on overtime pay will be able to make ends meet. They protect the safety and health of workers performing difficult and dangerous work, and they determine whether parents who need to care for sick children can meet their family needs and still return to their jobs. They defend vulnerable workers who are abused by unscrupulous employers.

It's essential that these officials have the experience and dedication to defend America's working families, especially now, when this Administration has shown a troubling lack of commitment to protect workers' rights.

Under this Administration, workers have seen their overtime rights under attack. More than 6 million workers lost overtime rights when the Department revised its overtime rules in 2004. Workers have also lost the vital protection of our prevailing wages. After the Gulf Coast storms, when workers were desperate to support their families, the Administration suspended Davis-Bacon protections, preventing workers in the recovery zone from earning a living wage.

We've seen appalling failures in mine safety. In 2006, we had 72 mining fatalities, the highest rate in 5 years, while MSHA's inspection rate dropped to a record low level.

We also have seen a complete failure to enforce essential ergonomics regulations. In 2005, there were more than 375,000

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ergonomic injury cases, and yet, the Administration issued only one citation for ergonomic injury.

We've also seen an unprecedented decline in enforcement activity. Since this Administration took office, the number of workers whose workplaces have been inspected by OSHA has declined by 42 percent, the Wage and Hour Division has completed 30 percent fewer enforcement actions, more workers are getting back wages, but the Division is not pursuing real penalties against the employers who violate the law. Civil penalties have declined by more than 25 percent under this Administration.

But, while the Department claims to be focusing its enforcement efforts on low-wage workers, its record in such industry has been dismal. The number of concluded cases is down by 68 percent in the garment industry, 39 percent in the agricultural industry, 32 percent in the healthcare industry, since this Administration took office.

The Department of Labor was created to protect American workers. We're looking to these two nominees for realistic assurances that they'll carry out their important missions.

We know that working families are facing unprecedented challenges that are likely to increase in the coming years. We've lost more than 3 million manufacturing jobs to outsourcing. Seven of the ten occupations with the largest job growth are low-skill, service-sector jobs, where workers are vulnerable, wages are low, and violation or evasion of our labor laws is common. Failure to enforce the laws has serious economic consequences for all employees and for the entire Nation.

In facing these challenges, employees can't go it alone. In many areas, such as the enforcement of the Occupational Safety and Health Act, or enforcement of prevailing wage protections, workers have no remedy under the law. They have no way to protect their rights, unless the Department of Labor is willing to fight for them. Now more than ever they need the Department firmly in their corner, aggressively battling for workers' rights.

We need to return to the days when the Department of Labor was a proactive partner in the fight for working families. We need a more effective enforcement of the laws. We need compliance audits to assure how well our laws are protecting workers. We need comprehensive information about the challenges facing working families. We need reforms to protect workers and prevent the kinds of workplace crises that cost American lives.

The positions before us today will help determine whether the Department can fulfill these critical missions. The Deputy Secretary of Labor is the No. 2 official in the Department. He manages all of the legislative, regulatory, legal, and policy issues under the Department's jurisdiction, and oversees its $59 billion budget; under the leadership of the Secretary, the Deputy determines what the Department's priorities will be.

The Solicitor of Labor is in charge of enforcing more than 180 labor laws, addressing issues of vital importance to all working families, oversees a staff of more than 400 attorneys, and provides advice and guidance on policy, legislative, regulatory, and enforcement initiative. The Solicitor is truly the workers' lawyer, and must be a zealous advocate for workers' rights.

These are challenging and important responsibilities. The laws enforced by the Department of Labor are about basic fairness. We need strong leadership at the Department to make these rights a reality for all Americans. And we thank you for joining with us today, and we'll look forward to introducing you after the comments of my friend and colleague Senator Enzi.

OPENING STATEMENT OF SENATOR ENZI

Senator ENZI. Thank you, Mr. Chairman. And I thank you for holding this nomination hearing. And I thank these two for being willing to go through the process. Quite often, not just in this committee, but in other committees, I wonder why anybody ever volunteers to take one of these appointments that has to go through the nomination process.

But today we will be considering the President's nominees for two of the most significant labor positions in the Federal Government, that of the Deputy Secretary of Labor and that of the Solicitor of Labor. The individuals who fill these positions will be crucial in assisting the Secretary of Labor in implementing and overseeing our Nation's key labor and employment laws.

Last year, we passed two monumental pieces of legislation that were enacted into law: the Mine Improvement and New Emergency Response Act, to the MINER Act, and the Pension Protection Act. These laws were the first comprehensive update of Federal mining and employee retirement benefit laws since the 1970s. Currently, the Department of Labor is working on implementing both through regulations, guidance, and enforcement oversight.

The Deputy Secretary of Labor and the Solicitor of Labor will be instrumental in ensuring that these laws and other key laws overseen by the Department are properly implemented and given the appropriate regulatory and enforcement oversight. Individuals seeking these two prominent positions must possess the skills, qualifications, and knowledge to carry out these duties.

Mr. Radzely is well known to the committee, as he's successfully served as the Solicitor of Labor for the past 4 years. And Mr. Jacob previously served as Mr. Radzely's Deputy Solicitor for nearly a year and a half, and has served in other jobs throughout the Administration. This hearing will give both nominees the opportunity to outline their skills and expertise for these two highly prominent labor positions.

The committee has received a letter of support for Mr. Radzely from the Sergeants Benevolent Association of New York City, which is the police labor organization, representing over 10,000 active and retired New York City police sergeants. And I request that this letter be made a part of the hearing record.

The CHAIRMAN. It'll be so included.

[Editor's Note: The information previously referred to may be found in Additional Material.]

Senator ENZI. Again, thank you for holding this hearing, and I look forward to the hearing with the nominees as they present their qualifications before the committee.

The CHAIRMAN. Thank you very much.

Senator Murray, who's the chairman of our subcommittee, intended to be here, but was unable to. They're in a conference.

Senator Brown will be representing, and we'd welcome it, if you wanted to make a brief comment.

OPENING STATEMENT OF SENATOR BROWN

Senator BROWN. Thank you, Mr. Chairman.

In considering our nominees today, we have to do so in the context, I believe, that Senator Kennedy suggested, in the context of Department of Labor's overall performance over the past 7 years or so. As we've seen throughout this Administration, there's a trend of appointing officials who don't appear to believe in the laws that they're asked to protect, which seems to be the case, as we've seen, this week, with the Consumer Product Safety Commission.

New and emerging challenges face the Nation's workforce, and how well the Federal Government helps workers meet these challenges will define our record generations from now. In my view, we're way behind in meeting these challenges.

Particularly troubling to me are three areas. First is, as the chairman said, the record of hostility protecting overtime and wages. Since the Wage and Hour Division has been underfunded, it shouldn't be surprising that enforcement is failing, the actual number that the enforcement—enforcement of these provisions, is falling. The annual number of concluded wage-and-hour cases has declined 31 percent since 2001, while the number of complaints has remained the same. There have also been failures by the Administration to protect the rights of men and women rebuilding the Gulf Coast by suspending the prevailing wage laws under Davis-Bacon.

Second, the Department has suspended OSHA enforcement after catastrophes, leaving workers without protections from serious hazards.

And, third, the Department's attempts to weaken the Family Medical Leave Act. In an economy where inequality is rising, and middle-class families are struggling to get by, families often need two salaries just to afford life's necessities. Congress intended the Family Medical Leave Act to be used for unscheduled, intermittent needs of workers, yet this Administration has continually altered the treatment of intermittent leave under the Family Medical Leave Act.

The list goes on and on, but I will not do that.

What I'm interested in hearing from our nominees is not just why they believe they're qualified—and they are—I'd also like to know what attracts them to defending the rights and protections of hardworking men and women. I hope to determine from your answers this morning whether you will fight to advance the well-being of workers or to continue to undermine their well-being.

I look forward to hearing from you today.

Thank you, Mr. Chairman.

The CHAIRMAN. We welcome Howard Radzely, who has served at the Department of Labor since 2001, as Deputy Solicitor of Labor, Solicitor of Labor, and currently as Acting Deputy Secretary of Labor. Prior to his time in public service, he was in private practice with Wiley, Rein & Fielding, a labor and employment law firm here in Washington. Mr. Radzely holds an undergraduate degree from

the University of Pennsylvania's Wharton School of Business, law degree from Harvard. He is joined today by his wife, Lisa, his young sons, Brendan and Devin, and his parents, Ed and Jackie Radzely, and his mother-in-law, Janet Burton.

I believe Brendan was here the last time at your confirmation. I believe that was 5 years ago. And if our records are correct, I commented on what a patient and well-behaved young man he was——

[Laughter.]

The CHAIRMAN. [continuing]. Being able to last through these hearings. So, we welcome him back. I'm sure we'll have as successful a hearing today, as well, as then. But we're glad that you have the members of your family with you.

Gregory Jacob has recently served as Special Assistant to the President for Domestic Policy. Prior to joining the White House, Mr. Jacob served as the Deputy Solicitor of Labor, as an attorney in the Office of Legal Counsel, Department of Justice; he received a bachelor of arts from Amherst College, and a law degree from the University of Chicago. He is joined here today by his parents, Fred and Debbie Jacob, and his brother, Scott. Today's a family affair.

Mr. Radzely, we look forward to hearing from you.

STATEMENT OF HOWARD RADZELY, OF MARYLAND, NOMINEE TO BE DEPUTY SECRETARY OF LABOR, U.S. DEPARTMENT OF LABOR

Mr. RADZELY. Thank you, Mr. Chairman, Senator Enzi, and distinguished members of the committee. It is an honor to appear before you today as you consider my nomination to be the Deputy Secretary of Labor.

At the outset, I would like to express my gratitude to the President of the United States for nominating me for this position, and to the Secretary of Labor, Elaine L. Chao, for the support and confidence she has demonstrated in recommending me for this position.

I would also like to thank the committee for considering my nomination and holding this hearing today during this very busy time.

Finally, I would like to thank my wife, Lisa, my 7-year-old son Brendan, and my 3-year-old son Devin, who are with me today, for all the sacrifices they have made to allow me to serve in the government for the past nearly 6½ years, and for the sacrifices they will make if I am confirmed to be the Deputy Secretary of Labor.

The Department of Labor arguably has one of the broadest reaches of any domestic department and handles issues of importance to nearly every American, from youth to retiree. The Department regulates a workforce of over 150 million workers, and oversees programs for Americans who are hoping to acquire additional skills and education to either further or change their careers. The Department enforces statutes and regulations ranging from child labor protections to provisions that protect American workers, retirement security, and everything in between.

I see the Department of Labor as having one of the most important missions in the Federal Government. The Department has an extremely critical task to help prepare the workforce for the challenges of the 21st century. Through the Employment and Training

Administration, the Veterans Employment and Training Service, the Office of Disability Employment Policy, the Women's Bureau, and Job Corps, DOL provides programs and assistance to help Americans obtain the skills needed to succeed in today's economy.

For those already employed, the Department has enforcement functions in a wide range of areas to help protect workers. Among the Department's many important tasks are enforcing health and safety laws, wage and hour laws, the Family Medical and Leave Act, Executive Order 11246, the Employee Retirement Income Security Act, numerous whistleblower laws, the Labor Management Reporting and Disclosure Act, and the Uniform Services Employment and Re-Employment Rights Act.

The Department also has a number of critical additional tasks carried out by agencies such as the Office of Workers Compensation Programs, the Bureau of Labor Statistics, and the Bureau of International Labor Affairs.

Since coming to the Department of Labor, in June 2001, and serving as Deputy Solicitor, Acting Solicitor, and Solicitor, I have worked with the dedicated career attorneys in the Solicitor's Office to use the Department's resources and enforcement tools effectively. Since becoming designated Acting Deputy Secretary earlier this year, I have had the opportunity to work on many important issues in a new capacity.

If confirmed as Deputy Secretary, I would function largely as the chief operating officer of the Department. I am prepared to help the Department advance its important mission in a new role. I am eager to continue working with the career professionals at the Department on management, program, and regulatory initiatives to serve American workers.

I am also committed to seeing that the Department implements in a timely manner the new laws for which the Department has responsibility, including the Pension Protection Act and the MINER Act, both enacted into law last year. Many of the requirements of these new statutes have already been implemented, and the Department is preparing to complete a number of additional critical tasks over the coming months.

In sum, as Acting Deputy Secretary, and if confirmed as Deputy Secretary, I understand and appreciate the great responsibility I bear. Thank you, again, for considering my nomination, and I would be happy to answer any questions that you may have.

The CHAIRMAN. Fine.

Mr. Jacob.

STATEMENT OF GREGORY JACOB, OF NEW JERSEY, NOMINEE TO BE SOLICITOR OF LABOR, U.S. DEPARTMENT OF LABOR

Mr. JACOB. Thank you, Mr. Chairman.

Mr. Chairman, Senator Enzi, and distinguished members of the committee, it is an honor to appear before you today as you consider my nomination to be Solicitor of Labor. I am eager to get to work enforcing the Nation's labor and employment laws on behalf of the job seekers, wager earners, and retirees of the United States, and I am deeply grateful for the committee's expeditious scheduling of today's hearing.

I want to thank the President of the United States for nominating me for the position, and Secretary Elaine L. Chao for the confidence she has shown in me by recommending me for the position.

Finally, I want to thank the family members and friends who are here supporting me today.

I have been blessed, in my career as an attorney, with diverse experiences that have been both challenging and rewarding. After a time in private practice, I decided to embark upon a career of public service. My first position with the Federal Government was as a career attorney in the Justice Department's Office of Legal Counsel. My first day was the Monday after September 11. I remember thinking that morning, as I walked through the Department's massive front doors on Pennsylvania Avenue, that, at a time when the entire Nation was hurting and every citizen was looking for a chance to contribute, I had been given a rare and awesome opportunity, but also entrusted with a heavy responsibility, to fairly and faithfully administer the law, and to advise other Federal agencies on how to do the same.

I later served as Deputy Solicitor at the Department of Labor, a position that expanded my legal horizons, not only to the management of an office of more than 425 attorneys and nearly 600 employees, but also to the application and enforcement of a body of laws that touch and affect the lives of virtually every worker in America.

Most recently, I served at the White House as Special Assistant to the President for Domestic Policy, with a portfolio that included justice and immigration issues. During the recent immigration debate in Congress, I got to spend a lot of time here at the Dirksen building and over at the Capitol, and had the pleasure of getting to know many members of your staffs.

As a government official, I believe it is important to stay directly in touch with the impact that government policy has on ordinary citizens. Accordingly, while serving in each of the positions I have held with the Federal Government, I have simultaneously been involved in one or more cases outside the government on a pro bono basis. I entered each of these cases through the auspices of Justice for Children, a nonprofit organization that seeks to provide legal representation to protect children who are the victims of physical or sexual abuse. This work, which has been among the most meaningful of my career, has kept me actively involved in both trial and appellate litigation, and has given me the opportunity to personally get to know some truly courageous individuals, parents who persevere through every difficulty and frustration to protect their children from the horrible specter of abuse, and men and women who have dedicated their lives to providing those families the support and resources they need to succeed.

In addition to my work experience, I have tried to remain academically engaged, as well. I have written one law journal article each year for the last 5 years, and, since early 2002, I have served as editor and then senior editor for the law journal *The Green Bag*.

I believe my tripartite career of public service, regular pro bono representation, and scholarly endeavor has prepared me well for the challenges of running the Solicitor's Office. I like to think of the

Office of the Solicitor as the Labor Department's muscle on the ground, playing a critical role in helping the Department fulfill its mission to foster and promote the welfare of the job seekers, wage earners, and retirees of the United States.

Inspectors and investigators alone cannot secure full compliance with the law. If workers are to truly enjoy the rights and protections Congress has established for them, the Department's enforcement agencies must be backed by active and dedicated lawyers who stand ready to prosecute violators.

Every area of law that the Solicitor's Office enforces is important. Nevertheless, there are some enforcement areas that, if confirmed, I would make particular priorities:

Wage and hour enforcement in low-wage industries, such as poultry and agriculture, where workers tend to be least able to defend their statutory rights, has long been an enforcement priority for the Department, and I would continue that emphasis.

Recent tragedies have highlighted the incredible importance of enforcing safety and health laws, where the very lives of workers are at stake.

In the area of Federal contract compliance, I believe it is critical that the Solicitor's Office expand on its record recoveries by continuing to bring cases against those who fail to comply with the law and maintain deterrence through vigorous enforcement. Aggressive USERRA enforcement is particularly important, in light of the continued deployment of our troops abroad.

The reach of the Solicitor's Office is co-extensive with that of the Department, and its work must be excellent in every area that it touches. No single attorney can be an expert in all the areas of law that fall within the purview of the Office, but I believe my broad experience as Deputy Solicitor, assisting in the enforcement of virtually all the areas of law entrusted to the Department, combined with my respect for, and good working relationships with, the Department's knowledgeable and seasoned career attorneys, have prepared me well to serve as Solicitor of Labor. If confirmed, I am confident that my background will allow me to hit the ground running in fairly and vigorously enforcing the Nation's labor and employment laws.

Thank you, again, for considering my nomination.

The CHAIRMAN. Thank you very much.

We recognize—Senator Enzi has some questions, and also some schedule conflicts, and so, we'd welcome his questions at this time.

Senator ENZI. Mr. Chairman, I thank you so much for the courtesy. I have to help solve a couple of other problems, but, I'm so pleased that both of you are willing to do this.

Mr. Jacob, that was a tremendous mission statement that you just presented, and I look forward to watching you fulfill that. I particularly like the phrase that you will be the "muscle on the ground." That's good.

For both of you, I have a question. This committee is rightfully proud of both the MINER Act and the Pension Protection Act that we did last year. I mentioned that the MINER Act was the first major change in mining law in 28 years. And, normally, major changes around here only take 6 years. And this committee happened to do it in 6 weeks, and it passed both houses unanimously,

and we're very interested in providing the oversight on that and to make sure that, if there are any additions that need to be done, that we can do them. But part of the critical part of that is the enforcement. And I'd like to know what each of your personal experience has been with the Mine Safety and Health Act and with ERISA, and would like to know what you think the Deputy Secretary and the Solicitor should be doing to ensure these laws are enacted in a timely and effective manner, and also, what other priorities that you plan to be focusing on for the next 2 years.

Mr. Radzely.

Mr. RADZELY. Thank you. I appreciate the opportunity to address that.

I've had a lot of experience with ERISA, in general, during my time in the Solicitor's Office. And, actually, one of the things that I focused on, Senator, during my time, was a series of amicus briefs on remedies under ERISA. We noticed a disturbing trend of attempts to limit the remedies under ERISA. And so, we have filed numerous amicus briefs on behalf of former participants, arguing that they have standing to be able to sue in court. We've also filed briefs arguing that the phrase "appropriate equitable relief" under the act includes money—monetary recoveries against breaching fiduciaries—and another area where some have argued that, if you don't sue on behalf of every person in a plan, you don't have a right to sue, so we argued that individuals or groups can sue on behalf of the plan, even if not everyone was affected by the particular violation. So, I've spent a lot of time in various areas of ERISA enforcement, but that's one particular area. And, as Deputy Secretary and as Acting Deputy Secretary, I have, and I will, if confirmed, work with the Employee Benefits Security Administration to help see that they timely implement the many regulations that are required as a result of the reforms Congress passed and the President signed last year.

In terms of the MINER Act, I've worked closely, while I was in the Solicitor's Office, with the career professionals in the division that handles mine safety legal work in the Solicitor's Office. We started, for example, last year a scofflaw initiative, in an attempt to go after companies and/or individuals that hadn't paid their fines. And so, I've had a lot of experience working on the Mine Safety Act, and, as Acting Deputy Secretary, and, if confirmed, as Deputy Secretary, will work with MSHA to ensure that they implement in a timely fashion all of the provisions of the MINER Act.

Senator ENZI. Thank you.

Mr. Jacob.

Mr. JACOB. Thank you, Senator.

As Deputy Solicitor, I was involved in enforcement activities with respect to both enforcement of the Mine Act and enforcement of ERISA and the activities of the Employment Benefit Safety Administration.

With respect to the Mine Act, I reviewed a number of briefs and helped to make sure that the Department was making the most effective enforcement arguments possible to ensure that our views of the law were being upheld. I have to say, with respect to the MINER Act, which Congress passed last year, in reading some of the early briefs, I thought it was a typo, what the penalty levels

were, and I know that the MINER Act has increased those penalty levels. I think that's appropriate and will help the Department ensure that it's protecting workers adequately.

Now, with respect to ERISA, part of the problem with being Howard's deputy during that time is, there's something known as "me too" to the amicus program. I did a lot of work with appellate briefs during my time there, and worked on ensuring that workers who were plan participants were able to recover their rights, even if not the entire plan was affected by a fiduciary breach, and also ensuring that they were able to recover losses as equitable relief. And so, both of those issues are now before the U.S. Supreme Court, in the LaRue case and I believe that the U.S. Supreme Court will ensure that the Department's views are upheld in favor of the Department's ability to effectively enforce the law.

Thank you.

Senator ENZI. Thank you. And my time is expired here. I have several other questions, and I would ask to be able to submit those, and would ask for your speedy answers.

The CHAIRMAN. Fine.

Senator ENZI. Thank you, Mr. Chairman——

The CHAIRMAN. Thank you.

Senator ENZI [continuing]. For your courtesy.

The CHAIRMAN. Good. Thank you. Thank you very much, Senator Enzi.

I want to direct your attention to the issues on wage and hour overtime. And I'm going to put a couple of charts up here that kind of summarize a bit about where we find ourselves.

This is the enforcement of wage and hour laws. This is from 2002, number of wage and hour investigators has declined rather dramatically. This is some 25 percent from 2002 through 2007.

Then, if you look at another indicator on this, you'll find out that employers don't face the real penalties for violating the wage and hour laws. Lawbreaking employers are facing fewer penalties for violating workers' rights. Civil penalties are down some 25 percent from 2001 to 2006.

And then, Department of Labor enforcement efforts in low-wage industries are inadequate. These are the garment, agriculture, and healthcare industries. From 2001, in the garment, agriculture, and health—you'll see the number of completed cases declined significantly under this Administration's watch. This is all data from the Department of Labor.

The annual number of completed wage and hour cases—as I mentioned, declined 31 percent, while the number of complaints filed has remained about the same. As we mentioned, the trends are even starker in the low-wage industries. I appreciate Mr. Jacob indicating this is going to be a priority of his. While DOL claims to spend 60 percent of its enforcement hours at low-wage industries, according to DOL's own data there's been a 68-percent decline in completed cases in the garment industry, 39 in agriculture, 32 in the health industry. So, we have every reason to believe that there's still rampant lawbreaking that persists in these industries. The Brennan Center, for example, in its recent study, examined 13 low-wage industries in New York City, found systematic patterns

of lawbreaking, including wage theft, overtime violations, and forcing employees to work off-the-clock.

So, Mr. Radzely, how do you explain the disturbing decline in the number of wage and hour cases completed by the Department? And what do you plan to do, if anything, to reverse the decline?

Mr. RADZELY. Mr. Chairman, I appreciate that.

In terms of low-wage industries, I think one of the things Wage and Hour is doing, and plans to do in the coming year, is expand the number of low-wage industries that they looked at. I think previously the focus has been in three areas: ag, healthcare, and garment. And one of the things I believe Wage and Hour is doing is trying to expand and broaden the industries into other ones, like daycare, restaurants, guard services, hotel and motel, janitorial services, temporary help, other low-wage industries, where we tend to find violations. And, in fact, in fiscal year 2006 the back wages collected in these low-wage industries, combined, increased by 10 percent. This is going to continue to be a focus for myself and for the Department.

The CHAIRMAN. Well, it's difficult for us to put this into some proportion when we see what the record has been in recent time. During the Clinton administration, the Department conducted extensive surveys to determine the level of Fair Labor Standards Act compliance in selected industries with changing workforce demographics or the poor enforcement history. They did surveys with the industries.

Now, under your Administration, under the current Administration, the Department has discontinued these surveys. So, if confirmed, are you going to commit to re-instituting the industry compliance surveys, where there's at least evidence that existing enforcement efforts aren't working?

Mr. RADZELY. Mr. Chairman, I'm not familiar with what industry surveys Wage and Hour does now, but I would certainly be happy, as Acting Deputy Secretary, and, if confirmed, to look into that and get back to the committee.

The CHAIRMAN. I don't know what the reasons were when they dropped that in the Department, but it was an attempt to try and do the surveys for these different industries so that they could be prioritized, and they dropped it, and then, we see a corresponding reduction, in terms of the compliance in these other areas. So, if you'll take a look at that, I'd be interested in your view.

The CHAIRMAN. Mr. Jacob, what do you believe are the reasons behind the decline in the number of actions completed by the Department? And, if confirmed, what steps would you take to increase the Department's enforcement efforts?

Mr. JACOB. Mr. Chairman, as I mentioned in my opening statement, I believe that vigorous enforcement in this area of low-wage industries is absolutely essential. We're talking about workers who work in these industries who aren't always well apprised of what their legal rights are, and it's particularly appropriate for the Department to step in, in those cases, and ensure that it is making sure that their rights are fully protected.

I certainly will consult with the administrator of the Wage and Hour Division to see how the cases are being handled at this time. My goal, certainly, as Solicitor, would be to take every case that

was referred to us by the Wage and Hour Division that was well supported, and ensure that we provided all of the legal support necessary to ensure that the rights of workers were protected.

Thank you.

The CHAIRMAN. But, do you have any kind of reaction, when you see these kinds of figures by the Department? And give us any understanding of why this kind of trend—we've listened to your statements and comments about what you're going to do in the future, but we're asking about these trends that we have seen in the recent time by the Department, and we're trying to find out how we should evaluate your own performance against the background of these indicators. What kind of confidence can we have, in the future, that you're going to be able to, or willing to, see the kind of protections which I think the law requires and that we expect?

Mr. JACOB. Mr. Chairman, I know that the Department, last year in the area of low-wage industries, had record recoveries of about $50 million, which was up about 50 percent from 2001. So, I know that we are making sure that, with respect to those cases that are referred to us in the Solicitor's Office, that we're doing everything that we can with them to secure the fullest recovery we can on behalf of those workers.

I know that the Department has expanded its focus within low-wage industries, from beyond the traditional agriculture/healthcare sectors, to now include daycare, restaurants, and others. So, whether that has affected the number of cases within each particular industry as we've expanded the number of industries we've focused on, I'm not entirely certain, but it's certainly something that I would be happy to look into and report back to the committee.

The CHAIRMAN. OK. I'm going to recognize Senator Brown and come back to this. He has to preside over the Senate in a very short time. So, we thank him, he's very involved in the protection of workers. And we're——

Senator BROWN. Thank you, Mr. Chairman.

The CHAIRMAN [continuing]. Very appreciative of all of his good efforts in this area.

Senator BROWN. Thank you, Mr. Chairman.

I mean, I want to support both of you. I am troubled, though, by the history of the Labor Department the last 5 years. There's a chart that—Mr. Jacob, you said that you want to continue this to be a priority enforcement, but how can you—when the budget of Wage and Hour in the last—the President's proposed budget for this year, compared to the 2001 levels, the Wage and Hour's gone down 1 percent; OSHA enforcement, down 5 percent; and OLMS, which includes the work you do on the LM–30, which I want to get to in a moment, has gone up 52 percent. How can you even—I mean, convince me that it has been a priority. You made the statement you want to continue it being a priority. Just convince me of that, both of you, that when budget figures speak so loudly to priorities, we increase money for the war on terrorism, because we all agree that's something we need to do. Many of us want to increase money for children's health, because we believe in children's health. What are those—don't those budget figures speak pretty loudly? Why should I be convinced that you really do want to enforce Wage and Hour and OSHA and move in that direction?

Mr. RADZELY. Senator, I see the chart, but I'm not familiar with where you're getting those numbers from, because my understanding was the Department saw increases in, not only OLMS, but also in Wage and Hour and OSHA, and, I believe, in this year's budget has sought an increase for additional Wage and Hour inspectors, as well. So, my understanding is, the Department has——

Senator BROWN. This is——

Mr. RADZELY [continuing]. Sought——

Senator BROWN. I'm sorry to interrupt, but I only have 5 minutes. I apologize. It's possible that the President increased its budget this year, but it's been in context of having cut the budget over the last 5 years. So, if, in fact, there is now more of an interest than before, there isn't much more of one, because it's still been a decrease in the budget over the last 7 years, when the Labor Department's entire budget has obviously gone up. OLMS has jumped by half, and two of the most important functions of this agency, the agency that you want to continue to be part of under Elaine Chao, who makes these requests—I don't know if it's her priorities or the President's priorities or your priorities, but they don't speak very loudly about your really wanting to protect workers.

Mr. RADZELY. If I can make two points, I do believe that the actual money the President requested this year is significantly over the amount in 2001, but I'd be happy to look into that.

Senator BROWN. These are——

Mr. RADZELY. But——

Senator BROWN. These are inflation-adjusted, so, they're in real dollars.

Mr. RADZELY. OK.

Senator BROWN. So——

Mr. RADZELY. And I——

Senator BROWN. But, either way, you look at the huge difference there——

Mr. RADZELY. I think, a couple of things. When I was in the Solicitor's Office, I did not hesitate to ask for additional resources. And, in fact, I think we would have had additional resources in the Solicitor's Office last year, but for the year-long CR. And, again, this year there's a significant increase in requests in the Solicitor's Office to help enforcement, because, in any enforcement program, it's critical that you have lawyers to back up the inspectors and bring the cases that are contested.

In addition, I think the reason the OLMS figure is so large is that the budget had been significantly cut. I think they were down by hundreds of employees from what they had previously been, to the point where there had not been, I think, a single audit of a large union.

But, I want to be clear, my priorities are that every program the Department has is important and needs to be vigorously enforced. And, I think, while I was Solicitor of Labor we took a number of steps in each of the program areas, including OSHA and Wage and Hour, which demonstrates my commitment to that.

Senator BROWN. I am not in any way personally questioning the motives of either of you. I do question the philosophy of your boss, whichever of your bosses—I mean, whether it's the President or whether it's Secretary Chao, and the direction which they take.

So, let me just shift, for the last question. What's the impetus behind the LM–30 changes? A question for either of you.

Mr. RADZELY. I think OLMS took a look at their forms, and started by looking at the LM–2, which hadn't been updated, I think, in some 40 years or so—and, similarly with the LM–30—that it was a confusing form, relatively few people filed it, OLMS worked with, I believe it was, the AFL–CIO to get individuals to file it under a grace period. And I think their experience was that it was a confusing form, it didn't provide useful information, it was difficult to fill out, and that OLMS wanted to revise the form to provide meaningful information to union members so they can exercise their rights under——

Senator BROWN. So——

Mr. RADZELY [continuing]. The law.

Senator BROWN [continuing]. A "confusing form" would lead me to think you would want to shorten it. The form now has gone from 2 pages to 9 pages; instructions, from 9 pages to 17 pages. Does that connote clarity?

Mr. RADZELY. I believe it does. I think a lot of the transactions, even folks who filed it—and I think there are about 100 filings a year, before the grace period, and many of them had trouble filing them. I think there were a number of instances where they were filed wrong. And these are people that obviously were trying to comply with the law. So, I think OLMS felt the need to make the form clear, but also to provide meaningful information in the 21st century economy, with a sophistication of transactions, to enable union members to exercise their rights under the act.

Senator BROWN. Newt Gingrich, back in 1992, asked for a similar—I know it's ancient history, but he sent a memo to the last Republican administration's Department of Labor chair calling for more audits and more—some of us would say "harassment," and others could say "oversight"—of these mostly volunteer or not well-paid union officials. He said, "We should weaken our opponents and encourage our allies." I just find it curious that this is an Administration that does no oversight and no recordkeeping and no auditing, or very little, of contractors spending billions of dollars in Iraq, and then you put this kind of effort into disclosing mortgages and car payments and all the information that volunteer union activists have to disclose about their financial lives. And I just find that—I mean, I know you're not in charge of auditing Blackwater or Halliburton or Bechtel or the hundreds of other companies that have squandered and lost billions—tens of billions of dollars in Iraq, but I just find the inconsistency curious, that this is the group you want to go after in the Department of Labor, especially when they're volunteers, to disclose all of this financial information.

Mr. RADZELY. Senator, I think OLMS tried to balance the need for information against the burden on union officials; and so, for example, increased the de minimis exemption to $250. But I will say, as I indicated earlier—and Secretary Chao feels the same way—each of the laws within our jurisdiction needs to be vigorously enforced, and we've taken similar vigorous enforcement efforts, for example, under ERISA, which is probably the closest compare there to OLMS and the Department of Labor, and had record recoveries there in recent years.

Senator BROWN. OK. Thank you very much, Mr. Radzely.

The CHAIRMAN. Thank you very much, Senator Brown.

Just to come back, Mr. Jacob, on the issue of the back pay and the indication of the recovery of the back pay, which you mentioned has increased over the period of these last few years, I think that's understood, and certainly valuable and useful. But, when the Department, as has been reported, settles easy cases quickly, that's not really deterring the employers from violating the law. So, it's critical to remember that the back pay is just giving workers what they were owed in the first place, it's not really punishing the employers for breaking the law. And, when you look at the monetary penalties assessed by the Wage and the Hour Division, that number actually decreased substantially last year. Do you know why that was?

Mr. JACOB. Mr. Chairman, I do not know why there was a decrease, but it is certainly something that I would look into. I think that it is important that the Solicitor's Office use all of the tools in its arsenal to defend the rights of workers, including not just recovery of back pay, but also civil monetary penalties, where that's appropriate. And I would commit to assessing that in every case——

The CHAIRMAN. All right.

Mr. JACOB [continuing]. That is brought to my attention.

The CHAIRMAN. Let me go through some other particular areas. One, tip workers. Mr. Radzely, while you were serving as the Solicitor, were there any efforts to improve enforcement of wage and hour laws among restaurant workers? Has the Department undertaken any special initiatives to educate workers in this industry about their rights? We know, from the recent study in New York City, almost 60 percent of tip workers are reported of being a victim of overtime pay violations. In a series of articles, the New York Times recently reported even more appalling abuses: restaurant delivery workers being paid as little as $1.40 an hour, far less than the Federal minimum wage.

Mr. RADZELY. Senator, yes, the Department is focused on the restaurant industry. In fact, I think, the largest industry in which we do low-wage-directed cases or do low-wage cases—I believe most of them are restaurants. In fact, out of the some 11,000 cases in the last fiscal year, some 4,300-plus were actually in the restaurant industry. So, this is a focus of Wage and Hour, and I would expect it to continue to be a focus of Wage and Hour and its low-wage-industry effort in the coming year.

The CHAIRMAN. Mr. Jacobs, if you're confirmed as the Solicitor General, Labor, what steps would you take to improve the enforcement of the wage-and-hour tipped employees? Would you address the unique enforcement challenges facing that population, which is particularly vulnerable?

Mr. JACOB. Mr. Chairman, I would. I believe that it's a particularly important area to ensure that we are vigorously enforcing, and I would certainly consult with the career attorneys in the office and with the administrator of the Wage and Hour Division to determine the most effective way to address the issues that you've raised.

The CHAIRMAN. Let me move to the safety and health issues that we've had. In the aftermath of 9/11, Hurricane Katrina, brave Americans answered the call to help fellow citizens. These workers face serious risks to their health. The New York City firefighters, the police officials, construction workers were immersed in the clouds of hazardous dust and debris. Gulf Coast reconstruction workers faced a new toxic stew of mold and asbestos. After both disasters, the Bush administration suspended OSHA enforcement—for approximately 9 months at ground zero, and almost a year in New Orleans. Workers are now paying a high price for the Administration's neglect. Tens of thousands of ground zero workers have terrible respiratory and gastrointestinal issues which could have been prevented, I believe, if OSHA had enforced its standards, requiring personal protective equipment, like respirators. We've heard no such problems in California, where thousands of firefighters recently battled the terrible wildfires.

Time is enormously important, in terms of these disasters. I mean, 1 or 2 days, or 3 days, understandable, but 8 or 9 months—does that make sense, when we're facing these kinds of tragic circumstances, whether it is ground zero or whether it's New Orleans, whether it is other kinds of disasters?

Mr. RADZELY. Mr. Chairman, my understanding is, they did not suspend enforcement, but they suspended directed investigations. So, if there were complaint investigations and were there any fatalities in the affected zone, OSHA would, and I believe did, go out and investigate those, if there were any. However, what they were focused on is making sure that the workers had the protective equipment and were trained in using it. In the case of ground zero, many of the workers, in fact, were not within OSHA's jurisdiction, because they were local or State workers, and they would have been workers that would not have been within OSHA's jurisdiction to take enforcement action, in terms of a directed investigation.

The CHAIRMAN. Well, there were still the suspension of the requirements. In my understanding, New York City officials repeatedly asked regional OSHA officials to enforce the respirator standard, because they were concerned about workers' health. I thought the New York officials made the argument to OSHA that only the fear of citations would motivate employers to make sure that workers had respirators. And that was one of the powerful examples.

It seems to me that, in these kinds of circumstances, the workers who are most vulnerable and—disaster workers are the most vulnerable, they need the greatest kinds of protections, rather than the suspension of the protections. What is your view? I mean, generally speaking.

Mr. RADZELY. Mr. Chairman, I think the Department should do everything it can in those situations to protect workers. And if that means devoting additional resources to working with employees, unions, employers cooperatively to make sure that they have the necessary expertise, in terms of working in a very dangerous situation, both in terms of possible respirators, but many other types of potential injuries and illnesses, which, my understanding was, were avoided after 9/11, despite the significant dangers to workers, of slipping, falling, you know, possibly getting killed in the recovery effort. But I think there needs to be a balance, and I think the tra-

dition in OSHA has been to focus on complaint and fatality inspections, while working with the first responders, and not doing directed investigations during that period of time.

The CHAIRMAN. Well, it seems that it is particularly important that the Department enforce the OSHA standards, because, in times of crisis, the workers obviously can't enforce the law themselves.

Let me ask you, Mr. Radzely, about the Department. Why did the Department deny the petition for an emergency temporary standard for pandemic flu?

Mr. RADZELY. Mr. Chairman, the Department denied the standard—emergency temporary standard for pandemic flu because the Acting Solicitor in the Solicitor's Office, determined that it did not meet the legal requirements for an emergency temporary standard. But the Department is, and has been for a number of years, taking steps to work and be prepared for a pandemic flu, should one hit. They have put out guidance to employers and employees on steps to take. We are currently working, and expect to release in the near future, a respirator stockpiling guideline. Numerous materials are available to assist employees and employers. And, as well, there are many standards that would come into play, should a pandemic hit—for example, the respirator standard and others—that could be used, and would be used by OSHA, were a pandemic flu to hit.

The CHAIRMAN. Well, CDC actually recommended exposure controls, in addition to the use of respirators. And those other measures aren't covered by the OSHA's action, are they?

Mr. RADZELY. I'm not intimately familiar——

The CHAIRMAN. OK.

Mr. RADZELY [continuing]. With the CDC standards.

The CHAIRMAN. Also, why is the Department taking so long to issue the specific standard against TB in the workplace. Do you know why?

Mr. RADZELY. As I recall, Senator, the Department does have an enforcement program in TB, and has issued a number of citations, I believe, under the general duty clause, but I'd be happy to look into that——

The CHAIRMAN. Yes, please.

Mr. RADZELY [continuing]. And get back to you.

The CHAIRMAN. Also, about diacetyl, why did the Department deny the petition for a temporary standard for that, do you know?

Mr. RADZELY. Mr. Chairman, I think, for similar reasons, that it did not meet the legal test for an emergency temporary standard. But the Department is taking a number of actions on diacetyl, as well. In addition to issuing a safety and health information bulletin, engaging on a national emphasis program, the Department also recently announced that it was engaging in rulemaking on the issue, and had a stakeholder meeting, I believe it was last month or the month before, to begin the process.

The CHAIRMAN. Yes. I think the point that is of enormous concern to the American people—that is, if the pandemic flu isn't a potential emergency, what is?

Mr. RADZELY. Senator, we believe it's a potential emergency, and we are taking steps to be very proactive. In fact, I led a tabletop

exercise at the Department just recently to test our preparedness and what we needed to work on and to improve. So, we are taking numerous steps to be prepared for a pandemic flu, should one hit.

The CHAIRMAN. Well, the question is, will it be too late to issue the standard? Is there any evidence that employers are voluntarily complying with any standards now on pandemic flu?

Mr. RADZELY. The entire Administration is focused on working on this issue, and we are working with outside groups, in terms of, as I said, stockpiling respirators, as well as providing numerous materials to guide them on steps to take now, rather than waiting until a pandemic flu hits.

The CHAIRMAN. What about the protections for workers and first responders? We have some biologic or chemical kind of—I mean, if we have some kind of an attack—what are we doing to make sure that workers that we're going to send out as the first responders are going to have the kind of protections that they're going to need?

Mr. RADZELY. Again, I think, depending on what the hazard is, an assessment will have to be made about what is necessary to protect the workers, and OSHA will work with the affected first responders, State agencies, etc, to respond to any such incident.

The CHAIRMAN. What do you have, in effect, now to protect those workers? Would you have any regulations or rules to protect them now?

Mr. RADZELY. Senator, there are numerous rules and regulations that would apply, depending upon what the situation is, from the respirator standard to hazardous communication, etc. I think it would depend upon the particular disaster that the first responders were responding to.

The CHAIRMAN. On ergonomics, it's obviously, a very important worker safety problem in America today, that affects hundreds of thousands of workers every year. After the regulations were withdrawn, the Department of Labor announced that it would issue voluntary industry-specific guidelines to help employers prevent ergonomic injuries, but, since that time, the Department has only completed three sets of guidelines, covering only 5.3 million workers. The original regulations would have covered over 100 million workers. So, 5 years have passed, Mr. Radzely—they've passed since the Department announced its plan. Why has the Department finalized only 3 of the 16 guidelines it promised? If you are confirmed, will you commit to issuing the rest of the guidelines before the end of the Administration? And how can we expect employers to protect workers if the Department fails to even issue the voluntary guidance?

Mr. RADZELY. The Department's doing a number of things in the ergonomic area. First of all, the fourth guideline in shipyards is now out for public comment, or recently just finished public comment, and that will be finalized shortly. OSHA is now currently considering the next sets of guidelines that it wants to focus on. In addition, earlier this year, OSHA announced a policy of following up on the ergonomic hazard alert letters it issued, to see if the employers have taken the steps that were recommended in the letters; and, if not, we'll evaluate those particular employers for citation. The Department's overall approach to ergonomic injuries has re-

sulted, I think—between 2002 and 2005—the ergonomic injury rate declined by 25 percent during this period.

The CHAIRMAN. Well, how many general duty citations for ergonomic injuries have been issued over the last 2 years?

Mr. RADZELY. I believe, since the Department announced its policy, there have been 17, total, under the general duty clause.

The CHAIRMAN. It's only 17 general duty citations total—and only 8 in the 4 years, since you've been in, Mr. Radzely and none in the last 2 years. These are the figures that we have from 2001, 2002, 2003, 2004, and 2005. Your reaction, or your response, on it?

Mr. RADZELY. I think the ergonomic hazard alert letter follow up policy which OSHA is embarking on will likely lead them to evaluate a number of cases for possible citation and referral to the Solicitor's Office for litigation.

The CHAIRMAN. But why hasn't OSHA still issued any citations this year, do you know?

Mr. RADZELY. Senator, I'm not aware, but I do know that they're focused on the hazard alert letter follow up policy, and that will be a big focus over the coming year.

The CHAIRMAN. OK.

On the issue of immigration—nice to see Mr. Jacob—I know, who has not forgotten about our days on immigration, and we'll be justified in the course of history. We have to take that satisfaction.

[Laughter.]

The CHAIRMAN. It's quite clear about what the law is in the circumstances where the undocumented, as I understand, are picked up, and where there's a labor dispute, that there has to be the resolution of the labor dispute. I think you're probably familiar with this recent case in Tennessee. If confirmed, Mr. Jacob, what steps would you take to ensure the violations of the labor law—discovered by ICE—are thoroughly investigated and pursued by the Department of Labor? And how can DOL and ICE effectively communicate about labor law violations without creating a disincentive for undocumented workers to report the violations?

Mr. JACOB. Mr. Chairman, we have a memorandum of understanding with ICE, at this time, that allows us to consult about violation of the labor and employment laws that they may happen upon, so that we can take those into account, refer those to our enforcement agencies, and take appropriate enforcement action. Of course, we also need to make sure that we are not discouraging people from making reports of things. I know that one of the things the Solicitor's Office confronted when I was Deputy Solicitor was the—ICE using—pretending to be OSHA enforcement officers.

The CHAIRMAN. Yes.

Mr. JACOB. And we strongly objected to that, and we have worked with them to——

The CHAIRMAN. Yes.

Mr. JACOB [continuing]. That they, as a matter of policy, do not do that anymore. So, I will certainly commit to you, if confirmed as Solicitor, that I will continue to work with them to ensure that undocumented workers are not intimidated during the course of those investigations, so as to ensure that labor and employment violations can be brought to our attention freely so that we can enforce the law.

The CHAIRMAN. OK. Has an agreement been reached between ICE and the Department to ensure that ICE officials can't pose as Wage and Hour inspectors or MSHA inspectors or other DOL staff?

Mr. JACOB. Mr. Chairman, although I haven't been at the Department for the last year or so, it is my understanding that we do have such an agreement.

The CHAIRMAN. All right. Would you find out and let us know about that?

Mr. JACOB. Yes, Mr. Chairman.

The CHAIRMAN. On the Uniform Service Employment and Re-Employment Rights Act—we mentioned that in the earlier comment—it protects the men and women returning from the military service. With more than 500,000 members of the National Guard and Reserve mobilized since 9/11, record numbers of workers are facing potential discrimination when they return. Unfortunately, GAO reports that the agencies charged with enforcing USERRA, including the Department of Labor, have been ineffective in assisting our returning service members. For example, if DOL cannot resolve a Federal employee's claim, the employee can ask DOL to refer his case to the Office of Special Counsel for litigation, but GAO reports that, in half of such cases, DOL failed to notify servicemembers of these rights. In addition, over a year and a half DOL has referred only six cases to OSC, and DOL recommended litigation in only one case. Incredibly, their office took an average time of 247 days to review and refer each of these six claims.

So, Mr. Radzely, if confirmed, what actions will you take to improve the Department's enforcement of USERRA? And what, specifically, will you do to resolve these claims faster and ensure that servicemembers are informed of their rights?

Mr. RADZELY. Certainly, Mr. Chairman.

The Department has embarked, over the last number of years, on an aggressive outreach program to inform returning servicemen and servicewomen of their rights. I'm not familiar with the GAO report you mention, but if the Department did fail to notify servicemen and servicewomen of their rights to have the case referred, that would certainly be something that needs to be swiftly rectified, if it already hasn't been. And servicemen and servicewomen need to know that. And we have recently, last year, signed an MOU with the Department of Justice, who handles the non-Federal cases, to more successfully bring those cases, and are working closely with the Office of Special Counsel, as well.

The CHAIRMAN. So, Mr. Jacob, don't you agree, 8 months is far too long to review and refer the cases? And what'll you do, as Solicitor, to reduce these waits? And what'll you do to ensure the Department refers more cases for litigation?

Mr. JACOB. Mr. Chairman, it is my understanding that the Department has already begun to look into this issue. Certainly, if I am confirmed as Solicitor, I will do everything I can to review the structure that exists right now, by which cases are referred to us, and to see whether there are things that we can do, from a management perspective, to ensure that those referrals are done more expeditiously. And if there are any places where we can trim that time down to make sure that people have their rights enforced as

quickly as possible, I certainly believe that that's an important function for the Solicitor's Office to fulfill.

The CHAIRMAN. I'm going to submit some questions to you, and hopefully we'll get early answers and get real resolutions for these, on your nominations.

But, I want to thank you very, very much for your responses, congratulate you on the nominations, and thank you for your willingness to serve. And we will be in touch with you very soon, and we're grateful for your presence and for all of the service that you've given in the past.

Thank you very much.

The committee stands in recess.

[Additional material follows.]

ADDITIONAL MATERIAL

LETTERS OF SUPPORT

SERGEANTS BENEVOLENT ASSOCIATION,
POLICE DEPARTMENT, CITY OF NEW YORK,
NEW YORK, NY 10013,
May 31, 2007.

Hon. EDWARD M. KENNEDY, Chairman,
Committee on Health, Education, Labor, and Pensions,
U.S. Senate,
Washington, DC. 20510.

DEAR CHAIRMAN KENNEDY: On behalf of the Sergeants Benevolent Association of New York City, a police labor organization representing over 10,000 active and retired New York City police sergeants, I am writing to respectfully request your favorable consideration of Howard Radzely's nomination to be Deputy Secretary of the U.S. Department of Labor.

Mr. Radzely has impeccable qualifications for this important position. He graduated with honors from Harvard Law School and served as a law clerk on the U.S. Fourth Circuit Court of Appeals and the Supreme Court of the United States. Following his clerkship, Mr. Radzely practiced labor and employment law for several years at a highly-regarded Washington, DC. law firm before re-entering government service.

During his tenure at the Department of Labor, Mr. Radzely played a central role in re-drafting the nation's overtime laws. This effort ensured overtime for many law enforcement officers in America and specifically clarified the overtime rights of many police sergeants. Mr. Radzely has also been aggressive in enforcing the overtime rights of all workers, including poultry workers and other low-wage workers.

As Solicitor, Mr. Radzely also played a leading role in improving the Wage and Hour opinion letter process. He ensured that improvements to this process were not delayed by successive changes in leadership at the Wage and Hour Division of the Employment Standards Administration. His oversight of this process demonstrates the kind of managerial skill required to be a successful Deputy Secretary of Labor.

The SBA has found Mr. Radzely to be an intelligent and hard working public servant worthy of the positions of trust he has held and deserving of confirmation to the position of Deputy Secretary of Labor.

Very Respectfully,

ED MULLINS,
President.

NATIONAL FRATERNAL ORDER OF POLICE ®,
WASHINGTON, DC. 20002,
October 30, 2007.

Hon. EDWARD M. KENNEDY, Chairman,
Hon. MICHAEL B. ENZI, Ranking Member,
Committee on Health, Education, Labor, and Pensions,
U.S. Senate,
Washington, DC. 20510.

DEAR MR. CHAIRMAN AND SENATOR ENZI: I am writing on behalf of the membership of the Fraternal Order of Police to advise you of our strong support for the nomination of Gregory F. Jacob to be the next Solicitor for the U.S. Department of Labor.

Mr. Jacob holds degrees from Amherst College and the University of Chicago Law School, and served on the University of Chicago Law Review. Prior to serving as Deputy Solicitor of Labor, he served for 1 year as a judicial clerk for the Honorable Jacques L. Wiener, Jr. on the United States Court of Appeals for the Fifth Circuit. He also served for 2½ years as an Attorney Advisor in the Office of Legal Counsel (OLC) at the U.S. Department of Justice. Mr. Jacob is currently serving as Special Assistant to the President for Domestic Policy where he has worked on the President's Prisoner Reentry Initiative, the Justice Department's Initiative on Safer Communities, the Summit on School Violence and implementation of the Combat Methamphetamine Act of 2005.

The FOP has worked closely with Mr. Jacob on several occasions, most recently and notably on issues surrounding the administration of the Hometown Heroes Act

of 2003. Mr. Jacob was extremely helpful in the effort to ensure that the surviving family members of public safety officers killed in the line of duty receive Federal benefits promptly and with minimum bureaucratic red tape. On all occasions, Mr. Jacob's profound concern for the welfare of workers is evident.

President Bush has made a fine choice in Gregory Jacob to be the next Solicitor for the Department of Labor and, on behalf of more than 325,000 members of the Fraternal Order of Police®, we are proud to support his nomination. If I can be of any further assistance on this matter, please do not hesitate to contact me or Executive Director Jim Pasco at my Washington office.

Sincerely,

CHUCK CANTERBURY,
National President.

GRAND LODGE FRATERNAL ORDER OF POLICE®,
WASHINGTON, DC. 20002,
October 23, 2007.

Hon. EDWARD M. KENNEDY, Chairman,
Hon. MICHAEL B. ENZI, Ranking Member,
Committee on Health, Education, Labor, and Pensions,
U.S. Senate,
Washington, DC. 20510.

DEAR MR. CHAIRMAN AND SENATOR ENZI: I am writing on behalf of the membership of the Fraternal Order of Police to advise you of our strong support for the nomination of Howard M. Radzely to be the next Deputy Secretary for the U.S. Department of Labor.

Mr. Radzely holds degrees from the University of Pennsylvania's Wharton School of Business and Harvard Law School, and served on the Harvard Law Review. Before entering private practice here in Washington, DC., he clerked for the Honorable J. Michael Luttig, U.S. Court of Appeals for the Fourth Circuit, and for the Honorable Antonin Scalia, Supreme Court of the United States. In June 2001, he joined the Labor Department as Deputy Solicitor. For the past 3 years, he has served as the Solicitor for the Department, a position he held in an Acting capacity from June 2001 to January 2002 and then again from January 2003 until his confirmation by the Senate in December of that year. In January of this year, Mr. Radzely was named Acting Deputy Secretary.

The FOP his consulted with Mr. Radzely on several occasions concerning membership issues involving overtime law and regulations and found him to be very responsive and helpful in every instance. He has never hesitated to share his keen legal insights, which have been extraordinarily valuable, particularly in the months immediately following the implementation of the new Federal Labor Standards Act overtime rules. On all occasions, Mr. Radzely's profound concern for the welfare of workers is evident.

President Bush has made a fine choice in Howard Radzely to be the next Deputy Secretary of Labor and, on behalf of the more than 325,000 members of the Fraternal Order of Police®, we are proud to support his nomination. If I can be of any further assistance on this matter, please do not hesitate to contact me or Executive Director Jim Pasco at my Washington office.

CHUCK CANTERBURY,
National President.

RESPONSE TO QUESTIONS OF SENATOR KENNEDY, SENATOR CLINTON, AND SENATOR GREGG BY GREGORY F. JACOB

QUESTIONS FROM SENATOR KENNEDY

Wage and Hour

Question 1. Under this Administration there have been several instances where the Department has entered into settlement agreements in wage and hour cases that undermine ongoing private enforcement actions. Such settlements can preclude larger recovery for workers through these private actions. If confirmed as Solicitor, what steps would you take to ensure that the Department of Labor does not enter into settlement agreements that would undermine the private enforcement of the Fair Labor Standards Act?

Answer 1. In settling cases, either through an administrative supervised agreement or a consent decree, the Department considers many factors, including the merits of the case, the nature of the violations, whether the affected employees

would benefit from a quick recovery of back wages, and whether the settlement would unduly affect pending private cases. Guidelines that I assisted in developing as Deputy Solicitor in 2005 require that when the Wage and Hour Division considers an administrative settlement, it must inquire whether there are any pending private lawsuits under section 16(b) of the Fair Labor Standards Act and make that information available to the Solicitor's Office. Moreover, the Solicitor's Office and the Wage and Hour Division typically exclude from litigated and administrative settlements employees who have brought or opted into private cases under section 16(b). If confirmed as the Solicitor, I would seek to ensure that settlement agreements do not undermine private enforcement of the FLSA.

Question 2. In your responses to the committee's written questions you state that the new overtime rules "seem to have been a catalyst for compliance." What evidence do you have to support this assertion? Does DOL have compliance surveys that show improvement?

Answer 2. Following promulgation of the new overtime rule, there were numerous reports that employers were reviewing their employee classification policies and deciding to pay employees overtime for the first time. For example, the Wall Street Journal reported on April 18, 2005, that "[n]ow that the dust has settled from last year's acrimonious debate, one thing has become clearer: More workers appear to have gained overtime protections than lost them as a result of the Bush administration's broad revision of the Fair Labor Standard Act's white-collar overtime rules." Similar articles appeared in the Raleigh News and Observer (April 19, 2004) (after a department of WakeMed spent about 10 weeks reviewing all positions, 60 employees will be entitled to overtime pay for the first time); Dallas Morning News (April 17, 2004) (a spokesman for J.C. Penney reported that some department managers are receiving a raise above the Part 541 salary level); Chicago Sun Times (August 11, 2004) (Sears, Roebuck determined that 2,000 workers now classified as exempt will be reclassified as non-exempt); Washington Post (July 28, 2004) (St. Jude Children's Research Hospital and the University of Missouri will start paying certain employees overtime for the first time). The Wage and Hour Division is diligently enforcing the new overtime rules. I understand that in fiscal year 2006, it collected over $13.2 million in back wages for approximately 12,000 employees for violations of the revised Part 541 rules. The violation most frequently cited in fiscal year 2006 involved situations where an employee's primary duty was not "the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers."

Question 3. At the hearing, you mentioned the importance of enforcing wage and hour laws on behalf of low-wage workers. What specific steps will you take if confirmed as Solicitor to strengthen the Department's enforce efforts on behalf of these vulnerable workers?

Answer 3. In fiscal year 2006, the Wage and Hour Division, with the assistance of the Solicitor's Office, collected over $50.5 million in back wages for 86,780 workers in nine low-wage industries—an increase of 56 percent in back wages for nearly 25 percent more workers in the same low-wage industries compared to fiscal year 2001. The Solicitor's Office has aggressively pursued litigation and filed amicus briefs in cases involving low-wage workers, including workers in car washes, restaurants, call centers, garment shops, construction companies, health care facilities, and poultry processing plants. If confirmed as Solicitor, I would continue to provide full legal support for the Wage and Hour Division's commitment to protect workers in low-wage industries. I would also continue to support the Wage and Hour Division's efforts to reach out to Mexican consulates and immigrant or low-wage communities to ensure that low-wage workers receive the pay to which they are legally entitled, and to file amicus briefs and bring litigation, including seeking civil money penalties, when appropriate.

FMLA

Question 1. If you are confirmed as Solicitor, one of your duties will be to advise the Department about the legality of proposed regulations. In your responses to written questions from the committee, you said that the FMLA was intended to protect "employees needing intermittent leave for planned medical treatment such as dialysis, radiation treatment or chemotherapy" and that the "use of FMLA leave for these types of scheduled medical appointments is working well." Don't you agree the FMLA was also intended to cover employees who need periodic partial-day absences that cannot be scheduled in advance? Don't you think that a worker undergoing chemotherapy should be able to take FMLA leave if she feels too sick to come to work on a day when she does not have a scheduled treatment?

Answer 1. The Department's FMLA regulations cover periods of either incapacity or treatment due to chronic serious health conditions. 29 CFR 825.114(a) (2)(iii) An employee who meets the test for FMLA eligibility and experiences unscheduled periodic partial-day episodes of incapacity would be covered under the regulations, provided that the condition satisfies the regulatory definition of a chronic serious health condition and the employee provides the employer with sufficient notice of the need for FMLA leave. 29 CFR 825.303 The Department's regulations provide that absences due to chronic serious health conditions are covered even if the employee does not receive treatment from a health care provider during the absence. 29 CFR 825.114(e) Accordingly, an employee who is incapacitated due to the effects of chemotherapy treatment would be covered under the FMLA provided that the condition satisfies the regulatory definition and the employee meets the eligibility and notice requirements.

Immigration

Question 1. At the hearing you testified that, in addition to the letter wherein ICE agreed not to masquerade as OSHA officials, the Department has also entered into an agreement with ICE prohibiting ICE from posing as wage and hour inspectors, MSHA inspectors or other DOL staff. Please provide a copy of that agreement, and describe any steps the Department is taking to ensure that the agreement is enforced. From the perspective of the Solicitor's office, what effect do such abuses of power by ICE have on labor law enforcement? What effect do they have on labor standards for American workers?

Answer 1. I believe that it is highly inappropriate for ICE officials to pose as investigators for OSHA, MSHA, the Wage and Hour Division, or any other Department of Labor agency. Such a practice breeds distrust of Federal employment law enforcement and discourages immigrant employees from cooperating in DOL investigations, which in turn adversely affects maintenance of labor standards. The Solicitor's Office raised objections with ICE when it learned of the ICE sting operation that occurred on Seymour Air Force Base in North Carolina on July 6, 2005. While DHS has not entered into a formal written agreement with the Department, Secretary Chertoff subsequently testified that "I think that [the North Carolina operation] was a bad idea and I have directed it not happen again . . I think a ruse that involves safety or health is not appropriate." See *Comprehensive Immigration Reform II, Hearings Before the Senate Committee on the Judiciary*, 109th Cong., 1st Sess. 11 (2005). Moreover, DHS's Office of Investigations issued a written memorandum to all ICE special agents in charge on March 6, 2006 stating that "[t]he use of ruses involving health and safety programs undermines efforts to increase safety in the workplace and undercuts workers willingness to report workplace safety violations based on a fear of law enforcement action being instituted against the reporting worker," and directing that "[e]ffective immediately, the use of ruses involving *health and safety* programs administered by a private entity or a Federal, State or local government agency, such as OSHA, for the purposes of immigration worksite enforcement, will be discontinued." *Memorandum from Marcy M. Forman, Director, to All Special Agents in Charge, Re: Use of Ruses in Enforcement Operations* (March 6, 2006) (emphasis in original). A copy of the testimony and of the ICE memorandum is attached.

Question 2. Last month, ICE detained a group of immigrant workers in the Coffee County jail in Tennessee. These workers had complained that they had not been paid. Their employer had them arrested on trumped-up charges of "trespassing." The charges were quickly dropped, but the workers still face deportation for trying to enforce their rights. Earlier this year, ICE raided a sweatshop in New Bedford, Massachusetts where workers were laboring under appalling conditions. Even in cases where workers can file claims for lost wages, these experiences strongly deter immigrant workers from asserting their rights. If confirmed, what steps would you take to ensure that violations of labor law discovered by ICE are thoroughly investigated and pursued by the Department of Labor? How can DOL and ICE effectively communicate about labor law violations without creating a disincentive for undocumented workers to report these violations?

Answer 2. The November 23, 1998 Memorandum of Understanding between the Department of Labor and the former Immigration and Naturalization Service (now ICE), which continues in effect, sets out procedures to improve communications and coordination between the agencies. Under the MOU, when ICE obtains or receives information during the course of its worksite enforcement activities that indicates a possible violation of statutes within the jurisdiction of the Department of Labor, it is required to expeditiously notify the Wage and Hour Division (WHD) of the suspected violation. ICE also is required to contact WHD whenever ICE removes work-

ers from a workplace so that WHD can ensure that the workers' wages are collected and paid. Finally, the MOU provides that Labor Department investigators, when responding to workers' complaints alleging labor violations, will not refer suspected violations of immigration law to ICE. This ensures that there is no disincentive for workers to file complaints about labor and employment violations, regardless of their status. If confirmed as Solicitor, I would provide whatever legal assistance is necessary to the Wage and Hour Division to ensure that the MOU is effectively implemented.

Question 3. Under previous Administrations, there was an inter-agency worker exploitation task force co-chaired by the DOL Solicitor's office and the Assistant Attorney General for Civil Rights. This task force was instrumental in addressing inappropriate enforcement of immigration laws during labor disputes. If confirmed, would you consider re-instituting such a task force? If not, what alternate mechanisms would you put in place to ensure that advocates have a direct line of communication to the Department when this type of inappropriate enforcement takes place?

Answer 3. The November 23, 1998 Memorandum of Understanding between the Department of Labor and the former Immigration and Naturalization Service (now ICE), which continues in effect, sets out procedures to improve communications and coordination between the agencies. Under the MOU (section IV.A.), the agencies agreed to implement policies that avoid inappropriate worksite interventions where it is known or reasonably suspected that a labor dispute is occurring and the intervention may, or may be sought so as to, interfere in the dispute. If confirmed, I would examine whether this provision of the MOU is working well in practice and whether an interagency task force is necessary to correct any deficiencies.

Question 4. There are reports that the Department of Labor plans to alter the H-2A agricultural guest worker program's "50 percent rule," which requires employers to hire U.S. workers until half the season has elapsed. A study of this practice conducted during the Administration of President George H.W. Bush concluded that the benefits to employers and U.S. workers of this hiring preference substantially outweighed the minimal costs to employers.

a. Has the Department of Labor uncovered new information calling into question the findings of this study? Has the Department conducted a new study of the 50 percent rule's costs and benefits? If so, what are the findings of the study and the recommendations for policy?

b. Does the Department plan to recommend changes to the 50 percent rule? If so, what are those changes? Why are they being proposed?

Answer 4. The Department has received anecdotal information about the impact of the 50 percent rule from both employers and worker advocacy groups. The Department has not conducted any formal studies of the impact of the 50 percent rule, however, since 1990.

On August 10, 2007, the President directed the Department "to review the regulations implementing the H-2A program and to institute changes that will provide farmers with an orderly and timely flow of legal workers, while protecting the rights of laborers." Pursuant to the President's direction, the Department is evaluating all aspects of the H-2A program. On November 8, 2007, the Department submitted to the Office of Management and Budget a draft notice of proposed rulemaking that would propose revisions to the current H-2A regulations. That proposal is currently under review.

Question 5. The National Council of Agricultural Employers has asked the Department of Labor to change the wage rate formula under the H-2A program by adopting a special "prevailing wage" approach. Is the Department considering such a proposal? What would be the basis for such a change?

Answer 5. On August 10, 2007, the President directed the Department "to review the regulations implementing the H-2A program and to institute changes that will provide farmers with an orderly and timely flow of legal workers, while protecting the rights of laborers." Pursuant to the President's direction, the Department is evaluating all aspects of the H-2A program. On November 8, 2007, the Department submitted to the Office of Management and Budget a draft notice of proposed rulemaking that would propose revisions to the current H-2A regulations. That proposal is currently under review.

Question 6. The Department of Labor's National Agricultural Worker Survey found that 47 percent of crop workers are either U.S. Citizens or permanent resident immigrants, and that their earnings are quite low, averaging less than $13,000 per year. Do you believe that the H-2A program's wages, working conditions and

recruitment requirements are adequate to protect U.S. workers from adverse effects caused by the hiring of guestworkers? If not, what aspects of this program need to be improved to better protect domestic workers?

Answer 6. Several features of the H-2A program are designed to protect domestic workers. Specifically, the recruiting requirements are designed to ensure that domestic workers are aware of and able to apply for all agricultural job opportunities before H-2A workers can be solicited, and the housing, transportation, and wage requirements, among others, ensure that the total cost to employers of hiring H-2A workers does not undercut the wages and working conditions of domestic workers.

On August 10, 2007, the President directed the Department "to review the regulations implementing the H-2A program and to institute changes that will provide farmers with an orderly and timely flow of legal workers, while protecting the rights of laborers." Pursuant to the President's direction, the Department is evaluating all aspects of the H-2A program, including ways that protections for domestic workers can and should be enhanced. On November 8, 2007, the Department submitted to the Office of Management and Budget a draft notice of proposed rulemaking that would propose revisions to the current H-2A regulations. That proposal is currently under review.

LMRDA

Question 1. The Department has recently issued informal guidance in the form of a Frequently Asked Questions document that contradicts its new LM-30 regulation in several respects. For example, the final rule says that union volunteers must file an LM-30 form to report any of the interests described in the instructions, such as a mortgage. Contrary to this rule, the Department's FAQ document states that certain local members only have to report the time they volunteer and the value of that time, but no other financial information. If agency guidance goes well beyond the text of a final rule, and even contradicts the rule, would you advise that the agency should withdraw the rule and revise it, rather than facing a long and costly challenge in the federal courts?

Answer 1. I am not yet fully familiar with the Department's final rule on the LM-30. Nevertheless, I understand that the recently issued Frequently Asked Questions (FAQs) provide guidance to filers on the reporting requirements under the revised Form LM-30 regulation. I believe that guidance such as FAQs can be used to clarify regulatory requirements, but not to contradict them. However, it is my understanding that the FAQs in question are intended to clarify the final rule in a way that ameliorates the reporting burden on union officials without withdrawing or revising the rule. It is my understanding that neither the final rule nor the FAQs require union volunteers to file reports; the statutory reporting requirement applies only to individuals who are officers or employees of the union, but it does apply to all such individuals (other than exclusively clerical or custodial employees) who work under the control and direction of the union without regard to the amount, or method, of compensation for their service to the union.

QUESTIONS OF SENATOR CLINTON

Question 1. One area where the Department of Labor has come under criticism in recent months involves OSHA enforcement. Some have charged the Occupational Health and Safety Administration with failing to conduct a vigorous investigation of dangerous and even life-threatening hazards through the Enhanced Enforcement Program. Some have claimed, in particular, that even in cases where OSHA has already cited a company for a violation at one of its worksites, the company has felt free to permit similar or even identical hazards to remain in place at its other sites.

What role have you played in the administration of the Enhanced Enforcement Program? Do you believe the Program has been effective? Do you believe that OSHA has been sufficiently aggressive in investigating violations at multiple worksites within the same employer? Do you believe that OSHA needs additional legislative authority in order to fulfill its obligation to protect workers by undertaking corporate-wide investigations where appropriate?

Answer 1. It is my understanding that the Office of the Solicitor (SOL) has worked closely with OSHA to implement the Enhanced Enforcement Program (EEP), an enforcement initiative that targets employers who, despite OSHA's enforcement and outreach efforts, ignore their compliance obligations under the OSH Act and place employees at risk. Under the EEP, OSHA conducts targeted inspections of other worksites of the same employer in an effort aimed at obtaining compliance corporate-wide. In February 2005, SOL and OSHA issued specific guidance to Regional Solicitors and OSHA Regional Administrators on how to draft citations and settlements that would be suitable for summary enforcement proceedings under Sec-

tion 11(b) of the OSH Act, making this tool an even more effective component of the EEP.

As of September 30, 2007, after 4 years of implementation, OSHA had identified approximately 2,097 cases meeting the criteria for enhanced enforcement, many of which involved workplace fatalities. The program anticipated the need for aggressive monitoring of such employers and includes specific follow-up inspection procedures that may extend to other worksites of a company to verify abatement and determine if similar violations are being committed. OSHA has also issued eight "EEP Alert" memoranda to its field staff as a result of these inspections, which identify specific employers who have had multiple EEP cases, targeting them for additional enforcement emphasis on a company-wide basis. OSHA's EEP Alerts have resulted in approximately 84 additional inspections of these employers. OSHA is currently considering refinements to the program to make EEP an even more effective enforcement tool.

OSHA has authority under the act to undertake corporate-wide investigations where appropriate, and OSHA uses this authority under the EEP. If I am confirmed as Solicitor, I would ensure that SOL continues its strong support of the EEP program.

Question 2. One important aspect of the Department of Labor's responsibilities involves the lawful admission of temporary, nonimmigrant workers into the country through the H-2A program. We have heard from many farmers and advocates in the agricultural community who feel the Department of Labor has been unresponsive to their concerns about the farm labor shortage. Should you be confirmed, what steps do you plan to take to improve the effectiveness of the H-2A program in the absence of legislation?

Answer 2. On August 10, 2007, the President directed the Department "to review the regulations implementing the H-2A program and to institute changes that will provide farmers with an orderly and timely flow of legal workers, while protecting the rights of laborers." On November 8, 2007, the Department submitted a draft notice of proposed rulemaking to the Office of Management and Budget. That proposal is currently under review. On the enforcement side, WHD has designated agriculture as one of nine targeted low-wage industries on which it particularly focuses its enforcement efforts. If confirmed as Solicitor, I will ensure that the Solicitor's Office provides these initiatives the legal advice and support necessary for them to succeed.

Question 3. Today, women working full-time, year-round, still earn only 77 cents for every dollar earned by a man. In 2005, the median weekly pay for women was $486, or 73 percent of that for men—$663. A 2003 GAO report, "Women Work: Work Patterns Partially Explain Difference between Men's and Women's Earnings" found that even when accounting for all the other variables that are often used to justify the pay gap, such as time out of the workforce to care for children or part-time work, women still earn significantly less than men. The report also concluded that 20 percent of the wage gap could not be explained by factors other than discrimination.

Earlier this year, I joined with Senators Kennedy and Harkin to send a letter to the Government Accountability Office requesting a review of the Department of Labor's and the Equal Employment Opportunity Commission's enforcement, outreach and technical assistance activities with regard to cases of potential wage discrimination, as well as the Department of Labor's treatment of the Equal Opportunity Survey and the presence of pay disparities at Federal agencies and between job categories. As Solicitor of Labor, will you pledge to examine this report when it is released and consider the need to implement changes within the Department of Labor based on the findings?

Answer 3. If confirmed as Solicitor, I will examine the GAO Report once it is issued and consider any recommendations it puts forward that relate to the mission of the Solicitor's Office.

QUESTION OF SENATOR GREGG

Question 1. Following several court decisions, there are outstanding Department of Labor regulations and guidance on minimum wage, overtime, and other wage related laws and how they should apply to workers with the H-2A visas. Considering the unfortunate lack of progress that the Department has made on improving its administration of our guest worker programs and being responsive to input from our employers, can you please give me a status report on where the regulations and guidance are in the process? In addition, as the new Solicitor, what do you intend to do to help move the process along more expeditiously?

Answer 1. On August 10, 2007, the President directed the Department "to review the regulations implementing the H-2A program and to institute changes that will provide farmers with an orderly and timely flow of legal workers, while protecting the rights of laborers." On November 8, 2007, the Department submitted a draft notice of proposed rulemaking to the Office of Management and Budget. That proposal is currently under review. On the enforcement side, WHD has designated agriculture as one of nine targeted low-wage industries on which it particularly focuses its enforcement efforts. If confirmed as Solicitor, I will ensure that the Solicitor's Office provides these initiatives the legal advice and support necessary for them to succeed.

[Editor's Note: Due to the high cost of printing, previously published materials are not reprinted. To review the attachment submitted by Mr. Jacob's please go to http://www.gpoaccess.gov. Click on "A to Z Resource List." Scroll down to "Congressional Hearings" and click. Scroll down to "Search" and click. Scroll down to "109th Congress" and click on the box for "Senate Hearings." Scroll down to the end of the page and type in "Comprehensive Immigration Reform II","109–668". Click on "Submit." Scroll down the page to number "[15]" and click on "pdf." See pages 11, 21–22, 53–56, 62, and 65.]

RESPONSE TO QUESTIONS OF SENATOR KENNEDY AND SENATOR CLINTON BY HOWARD M. RADZELY

QUESTIONS OF SENATOR KENNEDY

Wage and Hour

Question 1. The Department claims to be doing intensive targeted enforcement efforts in low-wage industries, including directed investigations in high-violation industries. What do these directed investigations entail? How does the Department select particular workplaces for these investigations? Does the Department typically pursue enforcement actions against the employers involved, or provide compliance assistance?

Answer 1. The Wage and Hour Division (WHD) identifies potential problem areas by regularly analyzing case data and conducting independent research, internal and external audits, and office evaluations. For example, the annual DOL performance and accountability report for fiscal year 2006 discusses the results of WHD's most recent nationwide low-wage survey of prior violators (available at www.dol.gov/dol/aboutdol/budget.htm). The analysis developed by the national office of WHD is forwarded to local Wage and Hour officials to develop appropriate enforcement initiatives for their respective offices.

Directed, or targeted, investigations are conducted primarily in industries that employ large numbers of vulnerable, low-skilled workers and tend to have high rates of minimum wage and overtime violations. WHD does not disclose whether an investigation is being conducted as the result of a complaint, so an employer would not know whether a particular investigation is complaint-based or directed. The scope of the investigation as well as any applicable remedies for violations that are found are the same regardless of whether it is generated by a complaint or is a directed investigation.

The industries WHD focuses on include janitorial services, restaurants, agriculture, garment manufacturing, health care, day care, guard services, hotels and motels, and temporary help. WHD initially focused its low-wage program on the garment manufacturing, agriculture, and health care industries. In fiscal year 2004, WHD began expanding its low-wage program to include a broader group of identified low-wage industries. As a result of its analysis, WHD identified approximately 33 low-wage industries that are regularly targeted for directed investigations.

Question 2. How has the Department determined the impact of the 2004 overtime revisions? Have you compiled any data on how many people gained or lost overtime rights? Does the Department know how many people are currently covered by the overtime provisions of the FLSA? Why is this information no longer publicly available?

Answer 2. The Department has not conducted a formal study on the impact of the 2004 overtime revisions. In fiscal year 2006, WHD collected over $13.2 million in back wages for approximately 12,000 employees for violations of the revised Part 541 rules.

After the final rule was issued, there were many articles describing workers gaining overtime. For example, the Wall Street Journal reported on April 18, 2005, that "[n]ow that the dust has settled from last year's acrimonious debate, one thing has

become clearer: More workers appear to have gained overtime protections than lost them as a result of the Bush administration's broad revision of the Fair Labor Standard Act's white-collar overtime rules."

ESA estimates that in 2006, 84 million wage and salary workers were covered by the overtime provisions of the FLSA. I have been informed that under Public Law 104–66, Section 4(d)(1) reports are no longer required.

Question 3. Earlier this year, the Supreme Court upheld a Department of Labor regulation stating that home care workers are not entitled to Federal minimum wage and overtime protections, even when they are employed by third party agencies. Although the Court held that the regulation was a reasonable interpretation of Federal law, DOL clearly has the authority to alter its rules so that these workers receive Federal wage protections. If confirmed, would you start a new rulemaking proceeding to protect these workers? If not, what is your justification for continuing to deny them fundamental wage protections?

Answer 3. The Fair Labor Standards Act exempts "any employee employed in domestic service employment to provide companionship services." 29 U.S.C. § 213(a)(15). The Department's 1975 regulation on the companionship exemption concluded that the phrase "any employee" is most naturally read to include all employees providing such services, regardless of who employs them, 40 Fed. Reg. 7404, 7405 (1975), and the Supreme Court stated in its unanimous decision in *Long Island Care at Home, Ltd.* v. *Coke* that it could not identify "any significant legal problem with the Department's explanation," 127 S. Ct. 2339, 2351 (2007). The Department has no present plans to revisit this regulation.

Question 4. You were Solicitor of Labor at the time of the Gulf Coast storms. What role did you play in the Administration's decision to suspend the prevailing wage protections of the Davis-Bacon Act? Was the Administration concerned that suspending prevailing wage rules would drive down wages at a time families needed decent wages to get themselves and the New Orleans economy back on track?

Answer 4. The decision to suspend the Davis-Bacon requirements on September 8, 2005 (subsequently reinstated on November 8, 2005), was part of an Administration-wide effort to remove as many barriers as possible to the recovery efforts in the areas impacted by the Gulf Coast storms. The Office of the Solicitor (SOL) was consulted on legal issues with regard to suspension of Davis-Bacon provisions in the Gulf Coast region, and SOL provided guidance on the appropriate legal methods to suspend Davis-Bacon requirements.

Question 5. Despite longstanding clear instructions from the Supreme Court, employers continue to violate the rule that workers must be paid for time spent donning and doffing necessary protective equipment. For example, recently, in *Gorman* v. *The Consolidated Edison Company*, the Second Circuit ruled that nuclear power plant workers are not entitled to pay for time spent going through security or donning and doffing protective gear. The court's ruling was based on the regulatory definition of "principal activity" which the Department could change. What steps should the Department take to improve compliance with the donning and doffing decision, particularly in industries other than the poultry industry, where there has not yet been extensive litigation about the requirements governing employers? If confirmed as Deputy Secretary would you revisit the regulatory definition of a "principal activity?" If not, why not?

Answer 5. I remain concerned about the Second Circuit's recent holding in *Gorman* v. *Consolidated Edison Company*, No. 05–6546 (May 30, 2007), petition for rehearing denied (Sept. 17, 2007), that donning and doffing of required gear by employees of a nuclear power station is not integral to the employees' principal activities and thus not compensable. That holding seems to be in conflict with the Supreme Court's decision in *IBP* v. *Alvarez*, 546 U.S. 21 (2005) (in which the Department filed an amicus brief on behalf of the workers), *Steiner* v. *Mitchell*, 350 U.S. 247 (1956), and Wage and Hour Advisory Memorandum No. 2006–2 (May 31, 2006), as well as arguments advanced in amicus briefs over the past few years filed by the Department on behalf of workers in the poultry and other industries and in litigation brought by the Department. For example, in *Dege* v. *Hutchinson Technology, Inc.*, No. 06–3754 (D. Minn.), the Department recently filed an amicus brief in support of workers who manufacture disk drive suspension assemblies and medical devices who were not paid for time spent donning and doffing "cleanroom" gear. Also, the Department has settled a number of cases in the past few years against major car manufacturers requiring them to compensate their employees for donning and doffing of required clothing. The Department recently filed suit against a coal mining company seeking compensation for donning and doffing of safety equipment. The Department is monitoring whether the workers in Gorman seek Supreme Court re-

view. If they do, the Office of the Solicitor will work with the Solicitor General to determine the appropriate action. The Department will continue to monitor this issue.

Question 6. Under this Administration there have been several instances where the Wage and Hour division issued an opinion letter that clearly had the potential to influence pending litigation, notwithstanding the Department's articulated policy of not issuing opinion letters concerning matters which are currently under review by the courts. In one such circumstance, for example, the Department issued an opinion letter responding to an inquiry from a trade association when one of the association's member businesses was currently involved in a class action lawsuit addressing the issue that was the subject of the association's inquiry. Does the Department continue to maintain a policy of not issuing opinion letters concerning matters that are the subject of pending litigation? If confirmed, what steps would you take to ensure that this policy is not circumvented by trade associations or other special interest groups?

Answer 6. The Department instituted a policy generally not to issue an opinion letter where: (1) the opinion is sought by a party to pending private litigation concerning the issue addressed in the letter, or (2) the opinion is sought in connection with an investigation or litigation between a client or firm and the Wage and Hour Division (WHD) or the Department of Labor. The Department maintains an active amicus program where a party in litigation can seek WHD's input by requesting that the Office of the Solicitor, on behalf of the Department, file an amicus brief in support of one of the parties if there are important legal issues impacting or relating to the Department's programs. The Department will issue opinion letters to umbrella organizations such as trade associations, national unions, employee associations, etc., even though one or more of their members may be in litigation, because the purpose of opinion letters is to resolve issues of importance as well as to provide interpretive guidance on regulatory issues. If umbrella organizations, any one of whose many members or constituent unions may be involved in active litigation, were precluded from seeking opinion letters, WHD's ability to provide guidance would be unduly limited.

Question 7. At the hearing, you mentioned that tipped workers have been a focal point of the Department's efforts in the Wage and Hour Division this year. Please describe the nature of your efforts on behalf of tipped workers. Have these efforts focused more on compliance assistance for employers, or enforcement actions on behalf of workers? What signs can the Department point to suggesting that these efforts have been successful?

Answer 7. WHD balances strong enforcement, compliance assistance, and partnership activities to protect workers and to make employers aware of their obligations. In fiscal year 2007, in addition to its complaint-based investigations, WHD conducted 15 local initiatives targeting full-service restaurants. Preliminary fiscal year 2007 calculations indicate that WHD concluded 23 percent more directed cases in the restaurant industry than it did in fiscal year 2006, resulting in a 69 percent increase in back wage findings for 17 percent more employees. In fiscal year 2006, WHD recovered nearly $17 million for over 29,000 workers in the restaurant industry. In fiscal year 2008, WHD is planning to pursue over 20 initiatives focusing on the restaurant industry. In addition to enforcement activity, WHD disseminates compliance assistance materials to employers and employees in the restaurant industry. The "Restaurant and Fast Food Establishments" and "Tipped Employees Under the Fair Labor Standards Act (FLSA)" fact sheets, which are regularly distributed to employers, workers, and associations through various venues, summarize regulations related to tip credit. WHD is currently updating the "Tipped Employee" fact sheet to provide common examples and to address questions related to tip credit.

Misclassification

Question 1. In his written answers to the committee's questions, Mr. Jacob said that the Department is considering changes to its database to collect information on workers who are misclassified as independent contractors. Will you commit to implementing this change, if confirmed? What is the time frame for implementing this change?

Answer 1. In fiscal year 2008, the Wage and Hour Division (WHD) is planning to implement changes to track enforcement and compliance assistance activities related to the misclassification of workers as independent contractors. As Acting Deputy Secretary, and if confirmed as Deputy Secretary, I will support WHD's efforts in this area.

Question 2. Workers who are misclassified as independent contractors are often wrongly denied protection under other laws, such as State workers' compensation laws and the National Labor Relations Act. A recent GAO report faulted the Department for not doing enough to refer these cases to other State and Federal agencies. Don't you agree that the Department should do everything in its power to prosecute these kinds of cases and to alert other agencies when it discovers that workers are being denied their rights? If confirmed, would you commit to referring cases to agencies to protect workers' rights?

Answer 2. In response to the GAO recommendation that WHD evaluate the extent to which misclassification cases identified through FLSA investigations are referred to the appropriate Federal or State agency potentially affected by the misclassifications and take action to make improvements as necessary, WHD reviewed its internal processes for referral of potential employee misclassification to other agencies with first-line field managers and reminded them to follow the agency's longstanding Field Operations Handbook instructions. The FOH provides that possible violations of laws or regulations not enforced by WHD should be reported to WHD field managers for a determination of appropriate referral steps, if any. WHD recently directed field managers that IRS referrals should be made on alleged "independent contractor" cases where WHD determines that the putative "independent contractor" is an employee under FLSA.

WHD believes that an explicit policy of automatic referrals to all other agencies could have an adverse impact on WHD's mission and ultimately harm those workers whom the agency is tasked with protecting.

Immigration

Question 1. My office has received many complaints that DOL offices have become inaccessible in recent years. It is difficult to reach a human being at DOL offices, and hard to receive updates on the status of a case. This is particularly true for workers with language barriers. These communication problems create particular challenges when the Department is primarily relying on worker complaints, rather than the comprehensive industry compliance audits and targeted enforcement that we've seen in previous Administrations. What steps is DOL taking to ensure that its offices are accessible to workers, particularly workers with language barriers, day laborers, and other workers that may have difficulty navigating the system? If confirmed, would you commit to conducting a thorough independent audit of the accessibility of DOL offices and making substantial improvements in response to the findings?

Answer 1. The Department takes seriously its obligations to provide workers with access to DOL offices and provides translations of relevant worker protection information on the Department's Web site, on worker protection posters required at work sites, and on materials it disseminates to workers, employers and community groups. The two agencies with the most immediate contact with workers who may have "difficulty navigating the system" are OSHA and the WHD, both of which have undertaken significant efforts to provide access to the workers in question.

WHD utilizes a toll-free number with the ability to communicate with the public in some 150 languages to assist workers in locating the appropriate office to respond to their questions and needs. In fiscal year 2008, WHD plans to increase awareness of its toll-free help line by listing it on WHD posters and other compliance assistance materials. WHD also currently has some 104 compliance assistance materials available in languages other than English, including Spanish, Vietnamese, Thai, Korean, Chinese, and Haitian. WHD is also working to translate materials into Russian and Hmong. WHD has also developed worker rights cards and fact sheets for specific worker groups, including day laborers.

As described in its fiscal year 2008 Compliance Assistance Plan, WHD also works with organizations that provide assistance to immigrants and conducts its own direct outreach. For example, WHD works with Mexican Consulates, participates in Spanish-speaking radio programs, and attends community fairs. The agency is also considering expanding JEWP (Justice and Equality in the Workplace Program) and EMPLEO (Employment Education and Outreach) type partnerships—such as TIGAAR (The Information Group for Asian American Rights) in Houston, TX; REACH (Rapid Employee Assistance in Chinese Hotline) in New York City, NY; Alza Tu Voz (Lift Your Voice) in Philadelphia, PA; and PIECE (Protecting Immigrant Employees with Compliance and Education) in Kansas City, KS—to extend WHD's ability to serve immigrant populations throughout the country.

Other vulnerable populations, such as day laborers, are further served through WHD's partnership with Federal and State agencies, as well as other organizations and stakeholders. For example, WHD's New York City District Office works with local community groups in New York City to provide outreach to day laborers. Simi-

larly, other WHD offices, including Gulfport, Mississippi, and New Orleans, Louisiana, provide outreach to day laborers and frequently visit a variety of venues where day laborers congregate, as well as charities and community centers.

Similarly, OSHA operates a toll-free number, which also acts as a call center for after-hours complaints. Through the call center, a worker calling in with a complaint or requesting information is routed directly to designated individuals to answer questions. If they are interested in filing a complaint, they are routed directly to one of OSHA's field offices. This system also operates in Spanish. In areas of the country where there is a large Hispanic population, OSHA has hired Spanish-speaking compliance officers who also perform outreach and compliance assistance to the Hispanic community.

OSHA also conducts extensive outreach to immigrant communities with education, training activities and public service announcements (PSAs) and provides extensive compliance assistance information in Spanish, including OSHA's Spanish-language Web site, OSHA en Espanol, which received some 141,210 visits in fiscal year 2006. OSHA also engages in extensive outreach to vulnerable populations, such as day laborers. For example, in the aftermath of Hurricane Katrina, OSHA hurricane response teams provided safety and health advice to employers and employees at staging areas, parking lots of building supply stores, and many other places at which workers were likely to congregate. OSHA staff also worked closely with the Mexican Consulate in Houston and participated in a Hispanic Safety Fair in the Gulf Coast area in August 2006 to ensure that Hispanic workers had a forum to express concerns about workplace safety and health issues.

As Acting Deputy Secretary, and if confirmed as Deputy Secretary, I will work with DOL agencies as they work to further improve accessibility to all workers.

Question 2. In 2001 and 2002, the Department of Labor delayed issuing the annual H-2A program wage rates (the adverse effect wage rates for each State) until a lawsuit was filed by the United Farm Workers and others. This lawsuit was ultimately successful in requiring the agency to issue the wage rates each year. If confirmed, what steps would you take to make sure that the H-2A program wage rates for 2008 are issued on a timely basis at the very beginning of the year?

Answer 2. Beginning in 2003, the Department has annually issued the H-2A Adverse Effect Wage Rates (AEWRs) for each State and published the AEWRs in the Federal Register between February 21 and March 16 as follows:

February 26, 2003—Vol. 68, Number 38 (pages 8929–30)
March 3, 2004—Vol. 69, Number 42 (pages 10063–65)
March 2, 2005—Vol. 70, Number 40 (pages 10152–53)
March 16, 2006—Vol. 71, Number 51 (pages 13633–35)
February 21, 2007—Vol. 72, Number 34 (pages 87909–11)

The Employment & Training Administration (ETA) currently expects to publish the 2008 AEWRs in at least as timely a manner as in the past 5 years. This expectation, however, is based upon timely receipt from the Department of Agriculture of farmworker wage survey information, which ETA then publishes, by State, for use by our Nation's H-2A agricultural employers. As Acting Deputy Secretary, and if confirmed as Deputy Secretary, I fully support ETA's goal of continued timely publication of AEWRs.

Safety and Health

Question 1. In March 2007, I requested that the Department provide documents related to the withdrawal of two OSHA citations issued to Avalon Bay Communities construction sites in Massachusetts. The Department has informed my staff that it will not produce responsive documents and, instead, provided only limited access to the documents at the Department. Can you explain the legal basis for the Department's refusal? If confirmed, will you commit to providing the requested documents?

Answer 1. It is my understanding that the Department has provided some 1,427 pages of relevant documents requested by the committee. The Department initially made available for your staff's inspection a number of confidential internal documents regarding personnel issues, and explained that there was an ongoing investigation of a related matter by the Department's Office of the Inspector General (OIG). I further understand that after inspecting the confidential documents, committee staff requested copies, and I have been informed that the requested confidential materials were delivered to the committee on November 9, with the exception of 21 pages that the OIG has requested be withheld pending the outcome of their investigation.

There are also two additional OSHA investigation case files, one still open and one recently closed. I have been informed that the recently closed file should be transmitted to the committee shortly. Also, when the OIG determines it is appro-

priate to turn over the remaining 21 pages and when OSHA completes the remaining open investigation, the Department will promptly provide the remaining requested documents to the committee. I have asked that Department staff keep committee staff informed of the status of the open investigation in the interim.

Question 2. The Department has failed to issue a standard requiring employers to pay for employees' required safety equipment, such as hard hats, safety glasses, and chemical protective suits. Will you assure me that the Department will meet its promised November deadline for issuing this standard? Will you commit that the final rule will be no less protective than the rule proposed in 1999, and no less protective than OSHA's longstanding policy regarding the kinds of safety equipment employers must pay for?

Answer 2. OSHA's final rule regarding personal protective equipment has been transmitted to the Federal Register and is expected to be published next week. OSHA officials would be happy to provide the committee a briefing on the rule next week.

Question 3. At your confirmation hearing last week, you said that OSHA only suspended targeted investigations at Ground Zero, but that the Department continued other enforcement efforts. During the 9 months following the attacks of September 11th, were there any OSHA enforcement inspections or other enforcement actions against any employers at the World Trade Center site? If so, please provide a list of those inspections or enforcement actions and the results, including specifically whether any citations were issued.

Answer 3. I have been informed that there were no enforcement actions against employers for work at the World Trade Center (WTC) Emergency Project during the 9 months immediately following September 11, 2001, but that OSHA would have investigated any fatalities or formal complaints, if there had been any. Beginning in mid-October 2001, however, inspections were conducted in the areas around the WTC site. During the 9 months following September 11 (through May 28, 2002), OSHA conducted 76 inspections (69 citations with 142 serious violations, 4 other than serious violations, and 4 repeat violations) south of Canal Street in Manhattan. In addition, during the winter/spring of 2002, OSHA also conducted a Local Emphasis Program—Phase 1 that involved safety and health inspections of some 34 buildings immediately around the WTC site with visible or known damage. This effort included 51 inspections (9 citations with 22 total violations). All sites on the list were visited, but in some cases no inspection occurred because work was already complete or had not yet begun.

Question 4. At your confirmation hearing, you claimed that the Department's ergonomic enforcement activity is focused on issuing ergonomic hazard alert letters. Please explain why none of the Department's hazard alert letters has resulted in the issuance of a general duty citation. How does the issuance of these letters constitute effective enforcement, if it does not lead to any citations?

Answer 4. As part of its enforcement plan for ergonomics, OSHA recently launched its follow-up program for ergonomic hazard alert letters (EHALs) to determine whether employers who received an alert letter have taken action to reduce those hazards. As of mid-September, OSHA had received responses from approximately 320 employers that originally received EHALs. OSHA reports that 280 employers have taken action to address the ergonomic hazards, 25 employers have apparently gone out of business, and OSHA is still analyzing the remaining responses.

Question 5. Please report how many cases the Department has referred to the Department of Justice for criminal prosecutions under the OSH Act since 2003. For those same years, please report the number of cases in which OSHA found willful violations that resulted in a worker fatality. In how many of the cases referred to the Department of Justice did the Department of Justice decline to prosecute? What was the disposition of the cases that the Department of Justice prosecuted?

Answer 5. Since my memorandum as Solicitor of Labor on September 5, 2003, requiring that the Solicitor's Office evaluate for criminal referral all cases involving a willful violation of an OSH Act regulation that causes the death of an employee, the Department referred 10, 10, 12, and 10 cases to the Justice Department under the OSH Act in fiscal year 2004–-2007, respectively. This is a significant increase from the average of 6.2 referrals a year for the preceding decade. OSHA found willful violations that resulted in a worker fatality in 30, 30, 38, and 17 cases for fiscal year 2004–2007, respectively. A chart noting the disposition of the referred cases is enclosed as Attachment A.

Question 6. The Chemical Safety and Hazard Investigation Board requested that OSHA provide information related to its investigation of the March 23, 2005 explosions and fires at the BP Texas City oil refinery. OSHA, however, refused to provide information on OSHA's enforcement of the Process Safety Management Standard. Please explain the basis for OSHA's refusal to provide this information to the CSB. If confirmed, will you commit to providing the Chemical Safety and Hazard Investigation Board with the inspection records that they requested?

Answer 6. OSHA provides the Chemical Safety Board (CSB) inspection records relevant to the CSB's investigations. Pursuant to the CSB's requests, OSHA provided the CSB extensive information from its inspections of BP's Texas City refinery, including the investigation of the March 2005 explosion and fire. I have been informed that OSHA provided all of the Texas City facility inspection records requested by the CSB that still existed. However, the CSB also requested voluminous materials that did not involve the Texas City refinery, but rather OSHA's internal operations related to overall enforcement efforts under the process safety management standard, such as OSHA's inspection priorities, targeting, staffing levels and inspection budgeting. In the Department's opinion, these requests went far beyond the CSB's statutory function. OSHA did not provide confidential information in light of CSB's position that it would not protect the information from public disclosure. Correspondence regarding OSHA's position is enclosed as Attachment B.

Question 7. Please report to the committee on the status of OSHA's response to the CSB's report and recommendations on the Texas City disaster, including copies of any correspondence between OSHA and CSB on its response and a detailed description of the steps that OSHA has taken to implement each recommendation made by the CSB. If no action has been taken on any recommendation, please explain.

Answer 7. OSHA has worked closely with the CSB to respond to the BP Texas City incident. On March 5, 2007, OSHA's Deputy Assistant Secretary and OSHA personnel met with CSB representatives to discuss the Board's draft recommendations. Since the CSB issued its final recommendations to OSHA, there have been informal discussions with CSB staff members both on the substance of their recommendations and on the progress OSHA has made in determining how it will respond to those recommendations.

OSHA is close to finalizing its response to the CSB. In the meantime, it is already taking actions that implement many of those recommendations. For example, OSHA has begun a large enforcement initiative to conduct programmed inspections at all of the Nation's refineries within Federal OSHA jurisdiction. The Petroleum Refinery Process Safety Management National Emphasis Program (CPL 03–00–004), implemented last spring, targets areas where OSHA has previously found deficiencies that resulted in large-scale accidental releases. The NEP requires specific evaluation of the safety of blowdown drums and stacks (blowdown systems) at refineries, which was one of the recommendations from CSB.

In addition, OSHA has implemented a training program that has already qualified more than 200 additional compliance officers to conduct PSM inspections, a course of action that implements the CSB's recommendation to "establish the capacity to conduct more comprehensive PSM inspections by hiring or developing a sufficient cadre of highly trained and experienced inspectors." A chart describing OSHA's responses to the CSB's recommendations is enclosed as Attachment C.

Question 8. In 2006, CSB proposed a rule that required employers to preserve records following chemical spills and other accidents. OSHA submitted comments on the proposed rule, alleging that CSB lacked the authority to impose the recordkeeping requirement. Please describe any contact or communication between OSHA and any employers or representatives of employers (such as trade associations) about the CSB's proposed rules. Did OSHA consult with or coordinate its comments with any entities outside of the government?

Answer 8. I am informed that OSHA did not consult with or coordinate its comments on this matter with entities outside of the State or Federal Government. I am also informed that the CSB's proposed rule was discussed in response to at least one inquiry from an outside entity to OSHA officials.

OLMS

Question 1. The new LM-30 rule requires union volunteers to contact every financial institution or company with which their families do business to ask whether they do business with their unions or with certain employers. If financial institutions won't provide this information, the members must contact the Department for assistance, and also make good faith estimates. Although this is clearly stated in the rule, top officials at the Office of Labor Management Standards have said that

they will not prosecute members who fail to contact financial institutions. Does the Department intend to prosecute union members who fail to follow the regulation's specific requirement that they must contact every financial institution with which they have a financial interest or income of $250? If you do not intend to prosecute, shouldn't the Department amend its rule so that union members know that they need not go through this onerous process?

Answer 1. The Labor-Management Reporting and Disclosure Act (LMRDA), enacted in 1959, required union officers and employees to file reports when they, their spouses or minor children receive payments from businesses that deal in substantial part with an employer whose employees the union represents or is actively seeking to represent, 29 U.S.C. § 202(a)(3), as well as payments from businesses that deal with their labor organization, 29 U.S.C. § 202(a)(4). According to the Office of Labor-Management Standards (OLMS) and SOL, the rule does not require union officials to contact "every financial institution with which they have a financial interest or income of $250" in order to comply with the LMRDA, much less to avoid criminal violations. For example, when a union officer or employee banks with a large commercial bank, even if the employer whose employees the union represents also does business with the same bank, it should not be necessary to ask whether that employer's business equals 10 percent of the large commercial bank's annual receipts (as the rule defines "substantial part").

Question 2. For nearly 50 years, only union officers and employees have been required to disclose and report limited aspects of their personal finances. Under the Department's new LM-30 regulation, hundreds of thousands of rank-and-file union members and their families will be subject to new disclosure rules, solely because they volunteer time during the workday. The Department has made this sweeping change without studying the time it will take for union members to record their no-docking and union-leave pay. What is the Department's basis for making such a sweeping change without studying the burden on ordinary members?

Answer 2. In the notice of proposed rulemaking, OLMS estimated that the annual filing rate would reach 2,046 reports. 70 Fed. Reg. 51166, 51199 (August 29, 2005). In the regulatory procedures section of the Final Rule, OLMS discussed in detail its estimates of the increased reporting and recordkeeping attributable to the new requirement that an individual who receives employer salary payments under a union-leave or no-docking policy to perform union work under the control and direction of the union is a union employee for reporting purposes. 72 Fed. Reg. 36105, 36151–36158 (July 2, 2007). After taking into consideration recent filing trends, comments received, and the requirements of the Final Rule, OLMS estimated 6,916 reports would be filed annually, over triple the amount estimated in the NPRM. 72 Fed. Reg. at 36153, 36156.

Question 3. The Department has recently issued informal guidance in the form of a Frequently Asked Questions document that contradicts its regulation in several respects. For example, the final rule says that union volunteers must file a LM-30 form to report any of the interests described in the instructions, such as a mortgage. Contrary to this rule, the Department's FAQ document states that certain local members only have to report the time they volunteer and the value of that time, but no other financial information. Indeed, OLMS acknowledges that the Department's FAQs purports to change several provisions of the final rule or create exceptions. How will the Department enforce the regulation in light of the contradictions? Does the Department intend to provide a new information collection submission to the Office of Management and Budget to reflect the changes in the informal guidance?

Answer 3. The recently issued Frequently Asked Questions (FAQs) provide guidance to filers on the reporting requirements under the revised Form LM-30 regulation and, in some instances, clarify ambiguities in the instructions. Neither the final rule nor the FAQs require union volunteers to file reports; the statutory reporting requirement applies only to individuals who are officers or employees of the union, but it applies to all such individuals (other than exclusively clerical or custodial employees) who work under the control and direction of the union without regard to the amount, or method, of compensation for their service to the union. Thus, the Department does not believe there is a contradiction between the FAQs and the Final Rule.

Question 4. Do you know whether the investigators for the Office of Labor-Management Standards are authorized to carry firearms into meetings with union officers or other individuals? If these investigators have been carrying firearms, what legal authority do they have to carry those firearms? If they have not carried fire-

arms or do not have the authority to carry them, would you take any actions to provide them with such authority?

Answer 4. OLMS investigators are not authorized to carry firearms. I am informed that, absent a legislative grant of additional law enforcement authorities, only a U.S. Marshal can authorize an OLMS investigator to carry a firearm, provided that the investigator has first successfully completed the Criminal Investigator Training Program through the Federal Law Enforcement Training Center or equivalent training. I do not support arming OLMS investigators. The Department is currently considering whether OLMS criminal investigators should be classified within the 1801 series or 1811 series, but this technical classification issue is separate from the question whether OLMS investigators should be armed, as both 1801 and 1811 investigators can be authorized to carry firearms.

QUESTIONS OF SENATOR CLINTON

Question 1. One area where the Department of Labor has come under criticism in recent months involves OSHA enforcement. Some have charged the Occupational Health and Safety Administration with failing to conduct a vigorous investigation of dangerous and even life-threatening hazards through the Enhanced Enforcement Program. Some have claimed, in particular, that even in cases where OSHA has already cited a company for a violation at one of its worksites, the company has felt free to permit similar or even identical hazards to remain in place at its other sites.

What role have you played in the administration of the Enhanced Enforcement Program? Do you believe the Program has been effective? Do you believe that OSHA has been sufficiently aggressive in investigating violations at multiple worksites within the same employer? Do you believe that OSHA needs additional legislative authority in order to fulfill its obligation to protect workers by undertaking corporate-wide investigations where appropriate?

Answer 1. During my tenure in the Solicitor's Office (SOL), SOL worked closely with OSHA to implement the Enhanced Enforcement Program (EEP), an enforcement initiative that targets employers who, despite OSHA's enforcement and outreach efforts, ignore their compliance obligations under the OSH Act and place employees at risk. One of the five prongs of EEP is targeted inspections of other worksites of the same employer and other efforts aimed at obtaining compliance corporate-wide. SOL has continued to be an active supporter of EEP throughout the program's existence. For example, in February 2005, then-Acting Assistant Secretary Jonathan Snare and I issued specific guidance to Regional Solicitors and OSHA Regional Administrators on how to draft citations and settlements that would be suitable for summary enforcement proceedings under Section 11(b) of the OSH Act, making this tool an even more effective component of the EEP.

EEP has proven to be an effective new enforcement tool. As of September 30, 2007, after 4 years of implementation, OSHA had identified approximately 2,097 cases meeting the criteria for enhanced enforcement, many of which involved workplace fatalities. The program anticipated the need for aggressive monitoring of such employers and includes specific follow-up inspection procedures that may extend to other worksites of a company to verify abatement and determine if similar violations are being committed. OSHA has also issued eight "EEP Alerto" memoranda to its field staff as a result of these inspections, which identify specific employers who have had multiple EEP cases, targeting them for additional enforcement emphasis on a company-wide basis. OSHA's EEP Alerts have resulted in approximately 84 additional inspections of these employers. OSHA is currently considering refinements to the program to make EEP an even more effective enforcement tool.

OSHA has authority under the act to undertake corporate-wide investigations where appropriate, and OSHA uses this authority under the EEP.

Question 2. One important aspect of the Department of Labor's responsibilities involves the lawful admission of temporary, nonimmigrant workers into the country through the H-2A program. We have heard from many farmers and advocates in the agricultural community who feel the Department of Labor has been unresponsive to their concerns about the farm labor shortage. Should you be confirmed, what steps do you plan to take to improve the effectiveness of the H-2A program in the absence of legislation?

Answer 2. On August 10, 2007, the President directed the Department "to review the regulations implementing the H-2A program and to institute changes that will provide farmers with an orderly and timely flow of legal workers, while protecting the rights of laborers." On November 8, 2007, the Department submitted a draft notice of proposed rulemaking to the Office of Management and Budget. That proposal is currently under review. On the enforcement side, the Wage and Hour Division has designated agriculture as one of nine targeted low-wage industries on which it

particularly focuses its enforcement efforts. As Acting Deputy Secretary, and if confirmed as Deputy Secretary, I will work with others in the Department of Labor to support the DOL agencies responsible for enforcing these protections.

Question 3. Today, women working full time, year-round, still earn only 77 cents for every dollar earned by a man. In 2005, the median weekly pay for women was $486, or 73 percent of that for men—$663. A 2003 GAO report, "Women Work: Work Patterns Partially Explain Difference between Men's and Women's Earnings" found that even when accounting for all the other variables that are often used to justify the pay gap, such as time out of the workforce to care for children or part-time work, women still earn significantly less than men. The report also concluded that 20 percent of the wage gap could not be explained by factors other than discrimination.

Earlier this year, I joined with Senators Kennedy and Harkin to send a letter to the Government Accountability Office requesting a review of the Department of Labor's and the Equal Employment Opportunity Commission's enforcement, outreach and technical assistance activities with regard to cases of potential wage discrimination, as well as the Department of Labor's treatment of the Equal Opportunity Survey and the presence of pay disparities at Federal agencies and between job categories. As Deputy Secretary of Labor, will you pledge to examine this report when it is released and consider the need to implement changes within the Department of Labor based on the findings?

Answer 3. As Acting Deputy Secretary, and if confirmed as Deputy Secretary, I, as well as others in the Department, will examine the GAO Report once it is issued. The Department will examine the findings and consider any recommendations the GAO puts forward.

ATTACHMENT A

Criminal Referrals by OSHA to DOJ or U.S. Attorneys

FY 2004 through FY 2007

Last update 10/17/2007 (Provided by the Office of the Solicitor)

Name of company	Referral date	Decided
Fiscal Year 2004 [10]		
# Company A	2/04	U.S. Atty. declined.
#,*,** Company B	3/04	No decision yet.
# Company C	3/04	DOJ declined 6/04.
# Company D	3/04	U.S. Atty. declined 7/04.
# Company E	4/04	U.S. Atty. declined 4/05.
Union Foundry (crushing)	4/04	Guilty plea 9/05 (OSH Act & RCRA counts) $4.25M fine & community service project; 3 yrs. probation.
# Company F	6/04	No decision yet.
# Company G	7/04	No decision yet.
** Jared Bailey (EKK Grading)	7/04	Indictment 8/05; Acquittal 12/05.
# Company H	7/04	U.S. Atty. declined 9/04.
Fiscal Year 2005 [10]		
# Company A (fall)	10/04	U.S. Atty declined 11/04.
Glen Wagner; Wagner Excavation Services (trenching)	11/04	Information filed 10/4/05; Guilty plea 10/12/05; Fined $50,000.
Kang Yeon Lee (Big Apple Constr.) (balcony collapse)	12/04	Guilty plea 4/05; 30 months jail; 2 years probation; $2M restitution and civil penalties.
*Ralph Guarnieri (Global Electric)	3/05	Indictment 6/8/06; Superseding Ind. 5/07.
#,* Company C	3/05	U.S. Atty declined 10/06.
# Company D	4/05	No decision yet.
** Nasir Bhatti & Tariq Alamgir (Metla Const.) (fall)	6/05	Complaint 5/06; Guilty pleas 12/06.
Greg Clark (Greg Clark Roofing) (fall)	6/05	Information 2/06; Guilty plea; Fine.
# Company G	7/05	No decision yet.
# Company H	7/05	U.S. Atty declined 11/05.
Fiscal Year 2006 [12]		
# Company A (electrocution)	12/05	No decision yet.

Criminal Referrals by OSHA to DOJ or U.S. Attorneys—Continued

FY 2004 through FY 2007

Last update 10/17/2007 (Provided by the Office of the Solicitor)

Name of company	Referral date	Decided
# Company B	12/05	No decision yet.
# Company C	12/05	No decision yet.
# Company D (caught in machine)	1/06	No decision yet.
# Company E (trench)	1/06	U.S. Atty declined 2/06.
#,* Company F	1/06	No decision yet.
Company G—American Asbestos Control (fall through skylight).	2/06	Guilty plea—1 yr. probation; $25,000 fine.
# Company H (fall)	4/06	No decision yet.
#, ** Company I	4/06	No decision yet.
# Company J (electrocution)	7/06	No decision yet.
# Company K (building collapse)	8/06	No decision yet.
#, * Company L	9/06	No decision yet.
Fiscal Year 2007 (10)		
# Company A (trench)	2/07	No decision yet.
# Company B (trench)	2/07	No decision yet.
# Company C (confined space)	2/07	No decision yet.
# Company D (fall from scaffold)	3/07	No decision yet.
# Company E (fall from scaffold)	3/07	No decision yet.
# Company F (fall from scaffold)	3/07	No decision yet.
# Company G (concrete collapse)	6/07	No decision yet.
# Company H (machine)	6/07	No decision yet.
# Company I (fall)	9/07	No decision yet.
# Company J (excavation)	9/07	No decision yet.
Fiscal Year 2008 (2)		
# Company A	10/07	No decision yet.
# Company B (excavation)	11/07	No decision yet.

*False statements (29 U.S.C. § 666(g); 18 U.S.C. § 1001).
**Interference with OSHA inspection (18 U.S.C. § 1505), or attempted bribery (18 U.S.C. § 210(b)(1)(A)).
#Company name withheld. Prosecution has not yet been initiated OR referral did not result in prosecution.

ATTACHMENT B

U.S. DEPARTMENT OF LABOR,
WASHINGTON, DC. 20210,
April 25, 2006.

Ms. CAROLYN W. MERRITT, Chairman,
U. S. Chemical Safety and Hazard Investigation Board,
2175 K Street NW, 4th Floor,
Washington, DC. 20037–1809.

DEAR CHAIRMAN MERRITT: This is in response to your February 3, 2006 letter requesting Occupational Safety and Health Administration (OSHA) files and interviews with OSHA personnel in relation to inspections of BP Texas City Refinery (BP TCR).

The following inspection files were sent to the U. S. Chemical Safety and Hazard Investigation Board's (CSB) Don Holmstrom by Janice Holmes, Deputy Regional Solicitor, Region VI, on February 9, 2006. A copy of the transmittal letter is enclosed.

1. Inspection files requested in your letter:

- 306480153 ("March 30, 2004 Ultraformer furnace fire");
- 308315910 ("May 25, 2004 OSHA inspection fire");
- 308316942 ("May 27, 2005 Ultraformer UU4 pipe corrosion incident");
- 308316314 ("July 28, 2005 Resid Hydrotreater Unit RHU incident"); and
- 308316322 ("August 10, 2005 Gas Oil Hydrotreating Unit incident.")

2. Additional information provided relates to the following inspection file numbers:

- 308314632;
- 308316751;
- 308314996;

- 3083155019; and
- 308314988.

The requested inspection file related to "[t]he August 8th, fatality incident involving a contract employee from Reactor Services International" was sent to Mr. Holmstrom on March 15, 2006. A copy of the transmittal letter is enclosed.

We are making Agency personnel available for interviews. We also note that you have acknowledged the concerns related to the criminal referral of the two BP incidents and have indicated that your interviewer will not ask questions related to the March 23, 2005 and September 2, 2004 incidents. OSHA will have the Region VI Deputy Regional Solicitor, Janice Holmes, present during all interviews to protect any privileges and confidential material and to ensure that material related to the two incidents still under investigation is not inadvertently discussed. The interviews can *not* be recorded or transcribed. The CSB's interviewer is welcome to memorialize the interviews by taking notes. Additionally, we ask that the interviews be conducted in our OSHA Houston-South Area Office. At this time, we are able to make the following individuals from the Houston-South Area Office available: James Lawrence and Terry Stibel.

The individuals listed below and mentioned in your letter all participated in the BP inspections subject to the criminal referral. Pursuant to advice from the Department of Justice, they will not be made available at this time: Terry Wilkins, Charles Williams, and Mike Marshall.

As indicated in your letter, John Miles has retired and no longer works for OSHA. Therefore, he is no longer subject to a request to this Agency. Mr. Miles has indicated to us that he may consent to an interview if Deputy Regional Solicitor Janice Holmes is present. The Department will make her available for the interview.

In your letter you indicate the CSB will not sign a confidentiality agreement prohibiting the use of information for public dissemination in its final report. Similarly, the CSB has not responded to Janice Holmes' earlier oral request that such an agreement be signed. Under these circumstances, we will be unable to provide written and oral information designated by BP as business confidential, as well as personal identifiers of government informants.

Please have Mr. Holmstrom contact Richard Fairfax, Director of OSHA's Directorate of Enforcement Programs (202–693–2100), to coordinate arrangements for the interviews. We will continue to assist the CSB in your important investigation of the BP TCR.

Sincerely,

EDWIN G. FOULKE, JR.

U.S. DEPARTMENT OF LABOR,
OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION,
WASHINGTON, DC. 20210,
January 19, 2007.

Mr. DON HOLMSTROM, Investigator,
U.S. Chemical Safety and Hazard Investigation Board,
2175 K Street, NW, Suite 400,
Washington, DC. 20037.

DEAR MR. HOLMSTROM: This letter constitutes OSHA's response to your July 17, 2006 interrogatories and records request The Solicitor's Office will respond to Chris Warner's letter to Howard Radzely, Solicitor of Labor, dated November 16, 2006.

Your letter refers to the CSB's ongoing investigation of the March 23, 2005, explosions and fire at the BP Texas City oil refinery. As you know, and in accord with the Memorandum of Understanding between our agencies, OSHA has cooperated fully with that investigation, and has provided the CSB with extensive information about the Texas City refinery, and the conditions there.

Your July 17 letter, however, does not ask for information about the 2005 Texas City explosion and fire. Instead, it primarily requests extensive information on internal OSHA operations relating to overall enforcement of the Process Safety Management (PSM) Standard, 29 CFR 1910.119, especially OSHA's program quality verification (PQV) inspections and the OSHA personnel involved in those inspections. Specifically, you request material related to: (1) OSHA's plans for scheduling PQV inspections, including specific targeting information, for all plans from 1995 to 2005; (2) any internal evaluations of those plans; (3) detailed information about every single PQV inspection conducted pursuant to those plans, as well as access to OSHA's Office of Statistics to obtain even more detailed data; and (4) the names and qualifications, including education and experience, of every OSHA Compliance Safety and Health Officer (CSHO) assigned to conduct PSM and PQV inspections.

This request is a departure from prior CSB practice and addresses issues that are committed to the exclusive discretion of the Secretary of Labor. The Clean Air Act Amendments of 1990 (CAAA), Public Law 101–549, November 15, 1990, which created the CSB, authorize the CSB to propose "corrective steps to make chemical production, processing, handling and storage as safe and free from risk of injury as is possible and [to] include in such reports proposed rules or orders which should be issued by . . . the Secretary of Labor under the Occupational Safety and Health Act **to prevent or minimize the consequences of any release** . . ." (emphasis supplied). The CAAA contains no indication that the CSB is authorized to provide oversight of OSHA's internal operations.

The Senate Report to the CAAA, which comprises virtually the entire legislative history relevant to the CSB, also explains that the CSB was intended to function "as an organizational stimulus to an appropriate amount of regulatory activity." CAAA, Senate Report No. 101–228, December 20, 1989 ("Senate Report").[1] This was described as an appropriate alternative to having Congress enact specific statutory requirements for "accident prevention" regulations, a course of action the report recognized "might be counterproductive." *Ibid.* This focus on accident prevention is consistent with the OSH Act, which authorizes OSHA to promulgate standards that are "reasonably necessary or appropriate to provide safe or healthful employment and places of employment," and places the duties to comply with OSHA standards and to provide a safe workplace with the employer. 29 USC 652(8); 654(a).

Consistent with this Congressional intent, the CSB has historically focused its investigations on an analysis of the specific causes of accidental releases, and on identifying potential gaps in OSHA standards that may have contributed to those causes. CSB's recommendations have suggested filling those gaps or issuing interpretative guidance to clarify the application of existing OSHA standards. We believe this focus on advising OSHA how its standards can best be formulated or explained to prevent or mitigate accidental releases is appropriate.

In contrast, OSHA's internal operations and resource allocations do not appear to be within the scope of authorized CSB recommendations. Moreover, because the CSB is only authorized to address a discrete subset of the hazards within OSHA's responsibility, the CSB could not rationally consider how OSHA's PSM enforcement strategy and resource allocation fits into OSHA's total enforcement program. In accord with established Federal law, OSHA's enforcement strategy is committed entirely to OSHA's discretion.

The information in request numbers 6 and 18 does not relate to internal OSHA operations; however, OSHA does not have any of the requested documents available at this time. The files relating to the Texas City inspection referred to in request 6 have been destroyed pursuant to OSHA's record retention policies. Request 18 seeks the type of information about workplace injury and illness rates that OSHA normally calculates when performing a programmed inspection. OSHA uses those rates to decide how comprehensive an inspection to perform. The inspections referred to in this request however, all occurred in response to catastrophic events, so OSHA would have conducted comprehensive investigations regardless of the facilities' injury and illness rates; therefore it may not have looked at the logs or recorded the injury and illness rates during those investigations. In addition, we note that two of the accidents involved occurred in State plan States (California and Washington), and likely were not investigated by Federal OSHA. Nonetheless, we have requested that any relevant files responsive to this request be retrieved from the Federal Archives, and we will provide the requested documents if they exist.

OSHA is declining to provide the records and information in the remaining records requests and the interrogatories for the reasons explained above. In addition, I note that even if it were appropriate for OSHA to provide some of these documents, pursuant to Federal record retention policies the majority of the records you request either have been destroyed or are otherwise unavailable.

OSHA remains committed to continued cooperation with CSB, as called for by the CAAA and the 1998 MOU. We recognize that Congress has given both OSHA and the CSB important functions to perform, and that both agencies have roles in protecting the safety and health of employees who may be exposed to chemical releases. We look forward to working with the CSB to achieve this goal.

Sincerely,

RICHARD E. FAIRFAX, DIRECTOR,
Directorate of Enforcement Programs.

[1] The Senate Report refers only to regulatory activity by the EPA, because the version of the statute under consideration at the time the report was prepared did not mention OSHA or the Secretary of Labor. OSHA was added later, with the CSB having authority to make the same type of recommendations to both agencies.

ATTACHMENT C

CSB Recommendations to OSHA Related to the BP TCR Investigation

CSB recommendation	OSHA's response	Implementation status
2005–4–I–TX–R5 ..... 1. Implement a national emphasis program for all oil refineries that focuses on: • The hazards of blowdown drums and stacks that release flammables to the atmosphere instead of to an inherently safer disposal system such as a flare. Particular attention should be paid to blowdown drums attached to collection piping systems servicing multiple relief valves; • The need for adequately sized disposal knockout drums to safely contain discharged flammable liquid based on accurate relief valve and disposal collection piping studies.	Prior to the issuance of this recommendation to OSHA, the Agency was in the process of developing a national emphasis program to inspect petroleum refineries. Since CSB issued this recommendation, OSHA has implemented the ***Petroleum Refinery Process Safety Management National Emphasis Program*** (Refinery NEP), which among other requirements, instructs inspectors to evaluate blowdown systems at all refineries in Federal jurisdiction. All the specific issues addressed by CSB related to blowdowns as well as others are addressed in Appendix A, Section C of the Refinery NEP.	Completed. The Refinery NEP was implemented on June 7, 2007 and is expected to be completed by June 7, 2009.
2005–4–I–TX–R5 ..... 2. Urge States that administer their own OSHA plan to implement comparable emphasis programs within their respective jurisdictions.	The Refinery NEP strongly encourages OSHA State-Plan States to adopt the NEP.	Completed. See Section VII, ***Federal Program Change*** of the NEP. The Refinery NEP was implemented on June 7, 2007. OSHA expects that most, if not all, State-Plan States will adopt the NEP.
2005–4–I–TX–R8 1. Strengthen the planned comprehensive enforcement of the OSHA Process Safety Management (PSM) standard. At a minimum:		

CSB Recommendations to OSHA Related to the BP TCR Investigation—Continued

CSB recommendation	OSHA's response	Implementation status
1.a.a. Identify those facilities at greatest risk of a catastrophic accident by using available indicators of process safety performance and information gathered by the EPA under its Risk Management Program (RMP).	Prior to the issuance of this recommendation to OSHA, the Agency was in the process of, determining which facilities and inspection strategy it should employ to conduct additional programmed inspections at PSM-covered facilities. From a review of OSHA's IMIS data base, the Agency determined that petroleum refineries had experienced more fatal and catastrophic incidents since 1992 (promulgation of PSM) than the next 3 industry sectors combined. From this data, OSHA decided that based on their history, petroleum refineries presented a great risk and consequently the Agency developed the Refinery NEP to address catastrophic type hazards covered by PSM. OSHA believes that its PSM fatality study it conducted based on its IMIS database provides as good if not better indicator of facilities at greatest risk of catastrophic type hazards as does EPA's RMP 5 Year Accident Database. Note: OSHA is currently updating its general PSM compliance directive. This directive covers all PSM-covered processes, not just refineries. As such OSHA is evaluating possible inspection targeting systems which will put our inspectors in facilities which are at greatest risk of catastrophic releases of highly hazardous chemicals. We are evaluating leading and lagging indicators that are publicly available that would be appropriate for use as targeting tools for the Agency.	Completed. The Refinery NEP was developed as a result of a data review of the types of facilities which experience the types of incidents PSM was promulgated to prevent and mitigate, i.e. fatal and catastrophic incidents which are a result of the release of ***highly hazardous chemicals***.
1.b. Conduct, or have conducted, comprehensive inspections, such as those under your Program Quality Verification (PQV) program at facilities identified as presenting the greatest risk.	OSHA has developed and implemented, ***Petroleum Refinery Process Safety Management National Emphasis Program (Refinery NEP)***. It contains an inspection strategy which utilizes ***"Inspection Priority Items"*** (IPI) that we feel is a better inspection strategy for conducting PSM inspections at refineries than our PQV inspection strategy. See the Refinery NEP, Section X.D., ***Inspection Process*** for a description of the IPI inspection strategy. Note: Inspections conducted under the NEP are programmed comprehensive inspections.	Completed. The Refinery NEP was implemented on June 7, 2007 and is expected to be completed by June 7, 2009.

CSB Recommendations to OSHA Related to the BP TCR Investigation—Continued

CSB recommendation	OSHA's response	Implementation status
1.c. Establish the capacity to conduct more comprehensive PSM inspections by hiring or developing a sufficient cadre of highly trained and experienced inspectors.	Last summer and prior to the CSB's recommendation, OSHA began an accelerated training initiative for its compliance officers (CSHOs) to conduct PSM inspections. In fiscal year 2007, OSHA trained 184 Federal students in PSM courses with another 110 estimated to complete courses by the end of the fiscal year, for a projected total of 294. Please note that other OSHA personnel who had received PSM training prior to our current initiative are available to conduct PSM inspections.	Completed/On-going.
1.d Expand the PSM training offered to inspectors at the OSHA National Training Institute.	See above response	Completed.
2005–4–I–TX-R9 ..... (CSB2005–04–I–TX–R9) 2. Amend the OSHA PSM standard to require that a management of change (MOC) review be conducted for organizational changes that may impact process safety including:. a. major organizational changes such as mergers, acquisitions, or reorganizations;. b. personnel changes, including changes in staffing levels or staff experience; and. c. policy changes such as budget cutting.	OSHA is currently evaluating this CSB recommendation and will respond to CSB when we have determined the Agency's course of action.	Evaluating recommendation.

[Whereupon, at 11:45 a.m., the hearing was adjourned.]

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