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March 21, 2000

BY FACSIMILE

The Honorable Henry Solano
Solicitor
Department of Labor
200 Constitution Avenue, N.W. - Room S2002
Washington, D.C. 20210

Dear Mr. Solano:

This letter responds to your March 16, 2000 reply to my February 16th letter, following our February 15th hearing, entitled "Is the Department of Labor Regulating the Public Through the Backdoor?" You indicated that answers to three questions about withdrawn guidance (Q 7a and 7b) and types of guidance (Q 14) will be forthcoming. When will they be submitted to us? Unfortunately, your answers to ten questions (Q 1c, 2a, 2b, 2c, 2d, 2e, 2f, 3c, 11b and 11c) -- about Vice President Gore's Reinventing Government, the absence of an indication of no legal effect, the Office of Management and Budget's Congressional Review Act guidance, and the Department's ergonomics guidance documents -- are largely nonresponsive. Please provide best estimates for each of these questions. Additionally, your answer to Question 4b is not helpful to the Subcommittee. We would like to propose bipartisan legislation to address the very real public confusion problem demonstrated at the hearing. As a consequence, please submit legislative language, which is acceptable to you, to ensure the public's understanding of whether a non-codified guidance document is binding or not.

The 1997 non-codified guidance document, mentioned in Question 5, is not included in the Department's 3,374 documents submitted to the Subcommittee for the March 1996 - October 1999 period. Why not? How many other documents were not submitted in our response to my October 8, 1999 request? When will Labor's December 20, 1999 non-codified guidance document, mentioned in Question 8, be withdrawn?

Your answers to Questions 12a and 12b about the Department's use of contractors are quite troubling. Office of Management and Budget Circular A-76, "Performance of Commercial Activities," and Office of Federal Procurement Policy Letter 92-1, "Inherently Governmental Functions," are quite specific about the restrictive use of contractors only for commercial activities or for "special knowledge and skills not available in the Government." As a

consequence, under which specific legal authority is the Department using contractors "to perform specific tasks during peak workloads" and "when it would not be practical or cost effective to hire federal staff"?

In 1992, the Occupational Safety and Health Administration (OSHA) issued a final rule (57 FR 6356) exempting certain hydrocarbon fuels used solely for workplace consumption as a fuel from its Process Safety Management (PSM) standard (29 CFR §1910.119(a)(1)(ii)(A)). The accompanying preamble stated, "It is our understanding that OSHA's intention ... was to exclude the enormous number of small business locations across the nation ... Such activities are not the subject of this rule, and this exclusion is entirely appropriate." On November 23, 1999, OSHA issued an interpretive letter responding to a November 4, 1998 public query, which asked for confirmation that the exemption applied to the company's manufacture of table glassware. OSHA's new interpretive letter concluded that the exception does not apply. Since OSHA's interpretive letter could hurt small business and appears to be inconsistent with OSHA's codified rule, please explain why DOL did not subject this policy change to public notice and comment rulemaking procedures and Congressional review under the Congressional Review Act.

Your responses should be delivered no later than noon on Wednesday, April 5, 2000 to the Subcommittee majority staff in B-377 Rayburn House Office Building and the minority staff in B-350A Rayburn House Office Building. If you have any questions about this request, please call Professional Staff Member Barbara Kahlow on 226-3058.

Thank you for your attention to this request.

Sincerely,

David M. McIntosh
Chairman
Subcommittee on National Economic Growth,
Natural Resources, and Regulatory Affairs

cc: The Honorable Dan Burton
The Honorable Dennis Kucinich