**COMMONWEALTH OF PUERTO RICO**
**DEPARTMENT OF LABOR AND HUMAN RESOURCES**
**Office of the Secretary**
**Hato Rey, Puerto Rico**

*DEPARTMENT OF STATE*
*No.* 7708
*Date:* June 15, 2009
*Approved:* Hon. Kenneth D. McClintock
*Secretary of State*
*By:* _____
*Lcdo. Eduardo Arosemena Muñoz*
*Assistant Secretary for Services*

# RESOLUTION

I, Miguel Romero Lugo, Secretary of Labor and Human Resources, pursuant to the authority conferred by Section 8 of the Puerto Rico Occupational Safety and Health Act, Number 16 of August 5, 1975 as amended (29 LPRA 361 et. seq.), hereby amend the Puerto Rico Occupational Safety and Health Regulation, Number Four (Part 1910), Number Ten (Part 1926) and Number Twelve (Part 1915-18) by adopting the following federal rules:

**PART 4 OSH 1910:**

**Clarification of Employer Duty to Provide Personal Protective Equipment and Train each Employee: Final Rule.**

73 FR, No. 240, (75568-75589), December 12, 2008

**PART 10 OSH 1926:** ✓

**Clarification of Employer Duty to Provide Personal Protective Equipment and Train each Employee: Final Rule.**

73 FR, No. 240, (75568-75589), December 12, 2008

**PART 12 OSH 1915-18:**

**Clarification of Employer Duty to Provide Personal Protective Equipment and Train each Employee: Final Rule.**

73 FR, No. 240, (75568-75589), December 12, 2008

This regulation is going to be cited as "4 OSH 1910", "10 OSH 1926" and "12 OSH 1915-18" instead of "CFR 1910", "CFR 1926" and "29 CFR 1917-1918.

Given at San Juan, Puerto Rico on this March 25th, 2009

**MIGUEL ROMERO**
Secretary
DEPARTMENT OF LABOR AND
HUMAN RESOURCES

treated as proprietary interests in T immediately prior to the transaction. Under paragraph (e)(6)(ii)(A) of this section, the value of the proprietary interest of each of the senior creditors' claims is $5x (the fair market value of the senior creditor's claim, $25x, multiplied by a fraction, the numerator of which is $10x, the fair market value of the proprietary interests in the issuing corporation, P, received in the aggregate in exchange for the claims of all the creditors in the senior class, and the denominator of which is $50x, the sum of the amount of money and the fair market value of all other consideration (including the proprietary interests in P) received in the aggregate in exchange for such claims). Accordingly, $5x of the stock that each of the senior creditors receives is counted in measuring continuity of interest. Under paragraph (e)(6)(ii)(B) of this section, the value of the junior creditor's proprietary interest in T immediately prior to the transaction is $100x, the value of his claim. Thus, the value of the creditors' proprietary interests in total is $110x and the creditors received $55x worth of P stock in total in exchange for their proprietary interests. Therefore, P acquired 50 percent of the value of the proprietary interests in T in exchange for P stock. Because a substantial part of the value of the proprietary interests in T is preserved, the continuity of interest requirement is satisfied.

(ii) *One class of creditor receives issuing corporation stock and cash in disproportionate amounts.* T has assets with a fair market value of $80x and liabilities of $200x. T has one class of creditor with two creditors, A and B, each having a claim of $100x. T transfers all of its assets to P for $60x in cash and shares of P stock with a fair market value of $20x. A receives $40x in cash in exchange for its claim. B receives $20x in cash and P stock with a fair market value of $20x in exchange for its claim. The T shareholders receive no consideration in exchange for their T stock. The P stock is not de minimis in relation to the total consideration received. Under paragraph (e)(6) of this section, because the amount of T's liabilities exceeds the fair market value of its assets immediately prior to the potential reorganization, the claims of the creditors of T may be proprietary interests in T. Because the creditors of T received proprietary interests in P in the transaction in exchange for their claims, their claims and the T stock are treated as proprietary interests in T immediately prior to the transaction. Under paragraph (e)(6)(ii)(A) of this section, the value of the proprietary interest of each of the senior creditors is $10x (the fair market value of a senior creditor's claim, $40x, multiplied by a fraction, the numerator of which is $20x, the fair market value of the proprietary interests in the issuing corporation, P, received in the aggregate in exchange for the claims of all the creditors in the class, and the denominator of which is $80x, the sum of the amount of money and the fair market value of all other consideration (including the proprietary interests in P) received in the aggregate in exchange for such claims). Accordingly, $10x of the cash that was received by A and $10x of the P stock that was received by B are counted in measuring continuity of interest. Thus, the value of the creditors' proprietary interests in total is $20x and the creditors received $10x worth of P stock in total in exchange for their proprietary interests. Therefore, P acquired 50 percent of the value of the proprietary interests in T in exchange for P stock. Because a substantial part of the value of the proprietary interests in T is preserved, the continuity of interest requirement is satisfied.

(9) * * * The sixth sentence of paragraph (e)(1)(i) of this section, the last sentence of paragraph (e)(1)(ii) of this section, paragraph (e)(3) of this section, paragraph (e)(6) of this section, and *Example 10* of paragraph (e)(8) of this section apply to transactions occurring after December 12, 2008.

**Linda E. Stiff,**

*Deputy Commissioner for Services and Enforcement.*

Approved: December 3, 2008.

**Eric Solomon,**

*Assistant Secretary of the Treasury (Tax Policy).*

[FR Doc. E8–29271 Filed 12–11–08; 8:45 am]

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## DEPARTMENT OF LABOR

### Occupational Safety and Health Administration

### 29 CFR Parts 1910, 1915, 1917, 1918 and 1926

**[Docket No. OSHA–2008–0031]**

**RIN 1218–AC42**

## Clarification of Employer Duty To Provide Personal Protective Equipment and Train Each Employee

**AGENCY:** Occupational Safety and Health Administration (OSHA), U.S. Department of Labor.

**ACTION:** Final rule.

**SUMMARY:** In this rulemaking, OSHA is amending its standards to add language clarifying that the personal protective equipment (PPE) and training requirements impose a compliance duty to each and every employee covered by the standards and that noncompliance may expose the employer to liability on a per-employee basis. The amendments consist of new paragraphs added to the introductory sections of the listed Parts and changes to the language of some existing respirator and training requirements. This action, which is in accord with OSHA's longstanding position, is being taken in response to recent decisions of the Occupational Safety and Health Review Commission indicating that differences in wording among the various PPE and training provisions in OSHA safety and health standards affect the Agency's ability to treat an employer's failure to provide PPE or training to each covered employee as a separate violation. The amendments add no new compliance obligations. Employers are not required to provide any new type of PPE or training, to provide PPE or training to any employee not already covered by the existing requirements, or to provide PPE or training in a different manner than that already required. The amendments simply clarify that the standards apply to each employee.

**DATES:** This final rule becomes effective on January 12, 2009.

**ADDRESSES:** In accordance with 28 U.S.C. 2112(a), the Agency designates Joseph M. Woodward, Associate Solicitor of Labor for Occupational Safety and Health, Office of the Solicitor of Labor, Room S–4004, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210, to receive petitions for review of the final rule.

**FOR FURTHER INFORMATION CONTACT:** Contact Ms. Jennifer Ashley, Director, Office of Communications, OSHA, U.S. Department of Labor, Room N–3647, 200 Constitution Avenue, NW., Washington, DC 20210; telephone (202) 693–1999 or fax (202) 693–1634.

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### II. Background

*A. Personal Protective Equipment (PPE)*

The use of personal protective equipment, including respirators, is often necessary to protect employees from injury or illness caused by exposure to toxic substances and other workplace hazards. Many OSHA standards in Parts 1910 through 1926 require employers to provide PPE to their employees and ensure the use of PPE. Some general standards require the employer to provide appropriate PPE wherever necessary to protect employees from hazards. *See, e.g.*, §§ 1910.132(a); 1915.152(a); 1926.95(a). Other standards require the employer to

Part 10 OSH 1926 (73 FR No. 240)

provide specific types of PPE or to provide PPE in specific circumstances. For example, the logging standard requires employers to provide cut-resistant leg protection to employees operating a chainsaw, 29 CFR 1910.266(d)(1)(iv); the coke oven emissions standard requires the employer to provide flame resistant clothing and other specialized protective equipment, § 1910.1029(h); and the methylene chloride standard requires the employer to provide protective clothing and equipment that is resistant to methylene chloride, § 1910.1052(h). OSHA's respirator standards follow a similar pattern. Section 1910.134, revised in 1998, requires employers to provide respirators "when such equipment is necessary to protect the health of the employee." § 1910.134(a)(2). The section includes additional paragraphs requiring employers to establish a respiratory protection program, to select an appropriate respirator based upon the hazard(s) to which the employee is exposed, to provide a medical examination to determine the employee's ability to use a respirator, to fit-test the respirator to the individual employee and to take other actions to ensure that respirators are properly selected, used and maintained. *E.g.*, § 1910.134(c) through (m); 63 FR 1152–1300 January 8, 1998 (Respiratory Protection rule). A variety of other standards require the employer to provide respirators when employees are or may be exposed to specific hazardous substances. *See, e.g.*, § 1910.1101(g)(asbestos); § 1910.1027(g)(cadmium). The 1998 Respiratory Protection rule revised the substance-specific standards then in existence to simplify and consolidate their respiratory protection provisions. 63 FR 1265–68. Except for a limited number of respirator provisions unique to each substance-specific standard, the regulatory text on respirators for these standards is virtually the same. The construction industry asbestos standard's initial respirator paragraph, which is virtually identical to the initial respirator paragraphs in most substance specific standards, states that, "[f]or employees who use respirators required by this section, the employer must provide respirators that comply with the requirements of this paragraph." § 1926.1101(h)(1). The standard also states that, "the employer must implement a respiratory protection program in accordance with [certain requirements in § 1910.134]." § 1926.1101(h)(2).

*B. Training*

Training is also an important component of many OSHA standards. Training is necessary to enable employees to recognize the hazards posed by toxic substances and dangerous work practices and protect themselves from these hazards. Virtually all of OSHA's toxic-substance standards, such as the asbestos, vinyl chloride, lead, chromium, cadmium and benzene standards, require the employer to train or provide training to employees who may be exposed to the substance. Many safety standards also contain training requirements. The lockout/tagout standard, for example, requires the employer to provide training on the purpose and function of the energy control program, § 1910.147(c)(7), and the electric power generation standard requires that employees be trained in and familiar with pertinent safety requirements and procedures. § 1910.269(a)(2).

The regulatory text on training varies from standard to standard. Some standards explicitly state that "each employee shall be trained" or "each employee shall receive training" or contain similar language that makes clear that the training must be provided to each individual employee covered by the requirement. *E.g.*, process safety management, § 1910.119(g)(i) (each employee shall be trained); lockout/tagout, § 1910.147(c)(7)(A) (each employee shall receive training); vinyl chloride, § 1910.1017(j) (each employee shall be provided training); construction general safety and health provisions, § 1926.20(b) (instruct each employee); construction fall protection, § 1926.503(a) (provide a training program for each employee).

Other standards contain a slight variation; they state that "employees shall be trained" or that the employer must "provide employees with information and training." *E.g.*, Electric power generation, § 1910.269(a)(2) (employees shall be trained); Benzene, § 1910.1028(j)(3)(i) (provide employees with information and training); Hazard communication, § 1910.1200(h) (provide employees with effective information and training).

Finally, some standards state that the employer must "institute a training program [for exposed employees] and ensure their participation in the program" or contain similar language. For example, the asbestos standard's initial training section states that "[t]he employer shall institute a training program for all employees who are exposed to airborne concentrations of asbestos at or above the PEL and/or excursion limit and ensure their participation in the program." § 1910.1001(j)(7). *See also, e.g.*, § 1926.1101(k)(9) (Construction asbestos); § 1910.1025(l) (Lead); § 1910.1027(m)(4) (Cadmium).

The Agency interprets its PPE and training provisions to impose a duty upon the employer to comply for each and every employee subject to the requirement regardless of whether the provision expressly states that PPE or training must be provided to "each employee." Neither the Commission nor any court has ever suggested that an employer can comply with the PPE and training provisions in safety and health standards by providing PPE to some employees covered by the requirement but not others, or that the employer can train some employees covered by the training requirement but not others. The basic nature of the employer's obligation is the same in all of these provisions; each and every employee must receive the required protection.

Therefore, the agency's position is that a separate violation occurs for each employee who is not provided required PPE or training, and that a separate citation item and proposed penalty may be issued for each. However, as discussed in the Legal Authority section, a recent decision of the Review Commission in the *Ho* case suggests that minor variations in the wording of the provisions affect the Secretary's authority to cite and penalize separate violations. *Secretary of Labor* v. *Erik K. Ho, Ho Ho Ho Express, Inc. and Houston Fruitland, Inc.*, 20 O.S.H. Cas. (BNA) 1361 (Rev. Comm'n 2003), *aff'd, Chao* v. *OSHRC and Erik K. Ho*, 401 F.3d 355 (5th Cir. 2005). The agency is proposing to amend its standards to make it unmistakably clear that each covered employee is required to receive PPE and training, and that each instance when an employee subject to a PPE or training requirement does not receive the required PPE or training may be considered a separate violation subject to a separate penalty.

Where an employer commits multiple violations of a single standard or regulation, OSHA either groups the violations and proposes a single penalty, or cites and proposes a penalty for each discrete violation. Although "grouping" is the more common method, OSHA proposes separate "per-instance" penalties in cases where the resulting heightened aggregate penalty is appropriate to deter flagrant violators and increase the impact of OSHA's limited resources. Per-employee penalties for violations of PPE and training requirements are no different in kind than other types of per-instance

penalties the agency has proposed under this policy. OSHA's current policies for issuing instance-by-instance violations are described in OSHA Instruction CPL 2.80 issued on October 21, 1990. These detailed instructions to OSHA's field offices and the National Office ensure that the policy is only used when a particularly flagrant violation is discovered, and that each case receives careful review by the Agency's senior officials before such citations are issued. Approximately seven instance-by-instance, or egregious, citations are issued each year (Ex. 69).

Accordingly, on August 19, 2008, OSHA proposed to amend the respirator and training provisions in the standards in Parts 1910 through 1926 to: (1) Revise the language of the initial respirator paragraphs adopted in the 1998 respiratory protection rule to explicitly state that the employer must provide each employee an appropriate respirator and implement a respiratory protection program for each employee, (2) revise the language of those initial training paragraphs that require the employer to institute or provide a training program to explicitly state that the employer must train each employee, and (3) add a new section to the introductory Subparts of each Part to clarify that standards requiring the employer to provide PPE, including respirators, or to provide training to employees, impose a separate compliance duty to each employee covered by the requirement and that each instance of an employee who does not receive the required PPE or training may be considered a separate violation (73 FR 48335–48350).

OSHA received approximately 50 comments on the proposal, and, in response to several requests, held a hearing on October 6, 2008. A 30-day period was established for post-hearing comments and briefs, and seven post-hearing submissions were received by the Agency.

Following the notice and comment period, an informal rulemaking hearing, and careful Agency deliberation, OSHA finds that its preliminary conclusions are appropriate and is therefore issuing this final standard clarifying employers' responsibilities to provide required PPE and training to each and every one of their employees.

**Federal Register** documents, comments, the transcript from the hearing, and post hearing submissions can be accessed electronically at *http://www.regulations.gov*, docket No. OSHA–2008–0031. Comments received are identified at regulations.gov as Exhibits "OSHA–2008–0031–XXX". However, in the discussion below, comments will simply be referenced as "Ex. XXX" to shorten the references and make the document more readable.

Please note that the title of the final rulemaking has been changed from the title used in the proposal. The proposed rulemaking title "Clarification of Remedy for Violation of Requirements to Provide Personal Protective Equipment and Train Each Employee" caused some confusion as to the nature of the rulemaking. Therefore, OSHA has changed the title to "Clarification of Employer Duty to Provide Personal Protective Equipment and Training to Each Employee" to show that the rulemaking does not impose penalties, but rather clarifies each employer's duty to provide PPE and training to each and every employee covered by the standards and informs employers that the failure to provide PPE or training to an employee may be considered a separate violation.

## III. Legal Authority

### *A. Introduction*

The final rule does not impose any new substantive requirements. The regulatory text clarifies that the duty to provide personal protective equipment of all types, including respirators, and training to employees is a duty owed to each employee covered by the requirement. This adds no new compliance burden; the nature of the employer's duty to protect each employee is inherent in the existing provisions. To comply with existing PPE and training provisions, the employer must provide PPE to each employee who needs it and train each employee who must be informed of job hazards. The employer is not in compliance if some employees are without personal protection or are untrained. The final rule achieves greater consistency in the regulatory text of the various respirator and training provisions in Parts 1910 through 1926, provides clearer notice of the nature of the employer's duty under existing PPE and training provisions, and addresses the Commission's interpretation that the language of some respirator and training provisions does not allow separate per-employee citations and penalties.

Before OSHA can issue a new more protective standard, the agency must find that the hazard being regulated poses a significant risk of material health impairment and that the new standard is reasonably necessary and appropriate to reduce that risk. *Industrial Union Department, AFL–CIO* v. *American Petroleum Institute*, 448 U.S. 607 (1980). OSHA must also show that the new standard is technologically and economically feasible, and cost effective. *American Textile Mfrs. Inst., Inc.* v. *Donovan*, 452 U.S. 490 (1980). These requirements are not implicated in this final rule because the amendments merely clarify the obligations under the existing PPE and training provisions and add no additional requirements. See sections V and VI *infra*. The agency met its burden of showing significant risk, feasibility and cost effectiveness in promulgating the existing PPE and training requirements.

### *B. General Principles Governing Per-Instance Penalties*

Section 9(a) of the Act authorizes the Secretary to issue a citation when "an employer has violated a requirement of * * * any standard." 29 U.S.C. 658(a). A separate penalty may be assessed for "each violation." *Id.* at 666(a), (b), (c). "The plain language of the Act could hardly be clearer" in authorizing a separate penalty for each discrete instance of a violation of a duty imposed by a standard. *Kaspar Wire Works, Inc.* v. *Secretary of Labor*, 268 F.3d 1123, 1130 (DC Cir. 2001).

What constitutes an instance of a violation for which a separate penalty may be assessed depends upon the nature of the duty imposed by the standard or regulation at issue. If the standard "prohibits individual acts rather than a single course of action," each prohibited act constitutes a violation for which a penalty may be assessed. *Secretary of Labor* v. *General Motors Corp., CPCG Oklahoma City Plant*, 2007 WL 4350896, 35 (*GM*) (Rev. Comm'n 2007); *Sanders Lead Co.* 17 O.S.H. Cas. (BNA) 1197, 1203 (Rev. Comm'n 1995). Applying this test, the Commission has held that the recordkeeping regulation's requirement to record each injury or illness is violated each time the employer failed to record an injury or illness, *Secretary of Labor* v. *Caterpillar Inc.*, 15 O.S.H. Cas. (BNA) 2153, 2172–73 (Rev. Comm'n 1993); the machine guarding standard's requirement for point-of-operation guards on machine parts that could injure employees is violated at each unguarded machine, *Hoffman Constr. Co.* v. *Secretary of Labor*, 6 O.S.H. Cas. (BNA) 1274, 1275 (Rev. Comm'n 1975); the fall protection standard's requirement to guard floor and wall openings is violated at each location on a construction site where appropriate fall protection is lacking, *Secretary of Labor* v. *J.A. Jones Constr. Co.*, 15 O.S.H. Cas. (BNA) 2201, 2212 (Rev. Comm'n 1993); the trenching standard's shoring or shielding requirement is violated at each

unprotected trench, *Secretary of Labor* v. *Andrew Catapano Enters., Inc.*, 17 O.S.H. Cas. (BNA) 1776, 1778 (Rev. Comm'n 1996) and the electrical safety standard is violated at each location where non-complying electrical equipment is installed. *A.E. Staley Mfg. Co.* v. *Secretary of Labor*, 295 F.3d 1341, 1343 (DC Cir. 2002).

The failure to protect an employee is a discrete act for which a separate penalty may be assessed when the standard imposes a specific duty on the employer to protect individual employees:

> Some standards implicate the protection, etc. of individual employees to such an extent that the failure to have the protection in place for each employee permits the Secretary to cite on a per-instance basis. However, where a single practice, method or condition affects multiple employees, there can be only one violation of the standard.

*Secretary of Labor* v. *Hartford Roofing Co.*, 17 O.S.H. Cas. (BNA) 1361, 1365 (Rev. Comm'n 1995). In *Hartford Roofing*, the Commission held that abatement of an unguarded roof edge required the single action of installing a motion stopping system or line that would constitute compliance for all employees exposed to a fall. *Id.* at 1367. Accordingly, the failure to abate the hazard could be cited only once regardless of the number of exposed employees. *Ibid.* However, where the employer fails to protect employees from falls at several different locations in the same building, a violation exists at each such location. *J.A. Jones*, 15 O.S.H. Cas. (BNA) at 2212. Thus, what constitutes an "instance" of a violation varies depending upon the standard. "Per-instance" can mean per-machine, or per-injury, or per-location depending upon the nature of the employer's compliance obligation.

Per-employee violations are no different from other types of per-instance violations. Just as the employer must ensure that electrical equipment is safe in each location where it is installed, *Staley*, 295 F.3d at 1343, the employer must ensure that each employee who requires PPE or training receives it. *Hartford Roofing*, 17 O.S.H. Cas. (BNA) at 1366. The failure to provide an individual employee with an appropriate respirator is a discrete instance of a violation of the general respirator standard, 29 CFR 1910.134, because the standard requires an individual act for each employee:

> As long as employees are working in a contaminated environment, the failure to provide each of them with appropriate respirators could constitute a separate and discrete violation * * *. [T]he condition or practice to which the standard is directed * * * [is] the individual and discrete failure to provide an employee working within a contaminated environment with a proper respirator.

17 O.S.H. Cas. (BNA) at 1366. *Hartford Roofing* reflects the guiding principle that provisions requiring the employer to "provide" respirators to employees because of environmental or other hazards to which they are exposed are intrinsically employee-specific because such provisions require protection for employees as individuals. The Commission reaffirmed this principle in subsequent cases. In *Secretary of Labor* v. *Sanders Lead Co.*, 17 O.S.H. Cas. (BNA) 1197, 1203 (Rev. Comm'n 1995), the Commission held that the lead standard's requirement for semiannual respirator fit-tests could be cited on a per-employee basis because it involved evaluation of individual employees' respirators under certain conditions peculiar to each employee. Furthermore, in *Catapano*, 17 O.S.H. Cas. (BNA) at 1780, the Commission indicated that the general construction training standard, § 1926.21(b)(2), clearly supported per-employee citations for each individual employee not trained. However, the Commission in *Catapano* found that the Secretary had not cited training violations on a per-employee basis, but rather, had impermissibly cited the employer for each inspection in which employees were found not to have been trained. Thus, the Commission affirmed only a single violation of the standard. *Ibid.*

In the *Ho* decision, the Commission veered from these principles and adopted an analysis focused on the presence or absence of certain specific words in the respirator or training provision at issue. 20 O.S.H. Cas. (BNA) at 1369–1380. Under this approach, the agency's ability to enforce respirator and training violations using per-employee citations in appropriate cases turns on minor variations in the wording of the requirements.

Erik Ho, a Texas businessman, was cited for multiple violations of the construction asbestos standard's respirator and training provisions. Ho's conduct was particularly flagrant. He hired eleven undocumented Mexican employees to remove asbestos from a vacant building without providing any of them with appropriate protective equipment, including respirators, and without training them on the hazards of asbestos. Ho persisted in exposing the unprotected, untrained employees to asbestos even after a city building inspector shut down the worksite, at which point Ho began operating secretly at night behind locked gates. The citations charged Ho with separate violations for each of the eleven employees not provided a respirator. The respirator provision then in effect stated, in relevant part, that "[t]he employer shall provide respirators and ensure that they are used * * * [d]uring all Class I asbestos jobs." § 1926.1101(h)(1)(i). Ho was also charged with separate violations for each of the eleven employees not trained in accordance with § 1926.1101(k)(9)(i) and (k)(9)(viii). Paragraph (k)(9)(i) requires the employer to "institute a training program for all [exposed] employees and * * * ensure their participation in the program;" paragraph (k)(9)(viii) states that "[t]he training program shall be conducted in a manner that the employee is able to understand * * * [and] the employer shall ensure that each such employee is informed of [specific hazard information]."

A divided Occupational Safety and Health Review Commission vacated all but one of the respirator and one of the training violations. According to the majority, the requirement to provide respirators and ensure their use involved the single act of providing respirators to the employees in the group performing the specified asbestos work. 17 O.S.H. Cas. (BNA) at 1372. Thus, the majority concluded, "the plain language of the standard addresses employees in the aggregate, not individually." *Ibid.* The majority reached this conclusion despite acknowledging that various subparagraphs immediately following the cited provision required particularly employee-specific actions, such as fit-testing individual employees. *Ibid.* n. 12.

The majority adopted an equally narrow interpretation of the requirement in § 1926.1101(k)(9)(i) to "institute a training program" for all [exposed] employees and ensure their participation in the program." According to the majority, this language requires the employer to have a single training program for all exposed employees and imposes a single duty to train employees generally. *Id.* at 1374. Although paragraph (k)(9)(viii) explicitly states that, "the employer shall ensure that each such employee is informed of [specific hazard information]," the majority found that "the mere use of the terminology 'each such employee' under (k)(9)(viii) does not demonstrate that these [training] provisions define the relevant workplace exposure in terms of exposure of individual employees." *Ibid.* One Commissioner dissented, arguing that the plain wording of the respirator and training provisions

authorizes OSHA to treat as a discrete violation each employee not provided and required to use an appropriate respirator, and each employee not trained in asbestos hazards. *Id.* at 1380–86 (Rodgers, Comm'r dissenting).

A divided panel of the U.S. Court of Appeals for the Fifth Circuit affirmed the result reached by the Commission, in part on different grounds than those articulated by the Commission majority. 401 F.3d at 368–376. The majority agreed with the Commission that the language of the respirator provision did not support per-employee penalties for Ho's failure to provide a respirator to each employee who performed covered asbestos work. *Id.* at 373–74. Disagreeing with the Commission, the majority found that the language of the training provision permits per-employee citations. *Id.* at 372. However, the majority concluded that the agency's decision to cite and penalize Ho for each untrained employee was unreasonable absent circumstances showing that different training actions would have been required because of uniquely employee-specific factors. *Id.* at 373. Judge Garza dissented. He read the respirator provision to require action on a per-employee basis. *Id.* at 379 (Garza J. dissenting). He also found no support for the majority's "employee-specific unique circumstances" requirement under the training provision and concluded that, in any event, the requirement was met by Ho's failure to train the employees and ensure that they understood the training. *Id.* at 379–80.

In two subsequent decisions, the Commission stated that respirator and training requirements worded slightly differently from those at issue in *Ho* may be cited on a per-employee basis. In *Secretary of Labor* v. *Manganas Painting Co.*, 21 O.S.H. Cas. (BNA) 1964, 1998–99 (Rev. Comm'n 2007), the Commission indicated that the initial respiratory protection paragraph of the 1993 construction lead standard, § 1926.62(f)(1), authorizes per-employee citations. That paragraph states, in relevant part, "[w]here the use of respirators is required under this section the employer shall provide * * * and assure the use of respirators which comply with the requirements of this paragraph." The Commission distinguished *Ho* on the ground that the language in the cited provision requiring the employer to provide respirators "which comply with the requirements of this paragraph" means that compliance with paragraph (f)(1) is predicated upon compliance with all of the requirements in paragraph (f), including fit-testing requirements in another section of the paragraph that are uniquely employee-specific.[1] *Ibid.* In contrast, in *Ho* the language requiring compliance with such provisions immediately followed the cited initial provision, and the Commission declined to read the initial provision in light of the subsequent requirements. However, the Commission's interpretation in *Manganas* that the lead standard authorizes per-employee violations may not be part of the holding of the case. After stating that the standard could be cited on a per-employee basis, the Commission then stated that it declined to determine whether Manganas's failure to provide respirators to multiple employees constituted a single violation or multiple violations on the ground that the amount of the total penalty would not be affected under the circumstances of that case. *Id.* at 1999.

In December 2007, the Commission decided *GM.* 2007 WL 4350896. The case involved citations issued in 1991 charging GM, *inter alia*, with separate violations for each of six employees not trained in accordance with the lockout/tagout (LOTO) standard's initial training paragraph, § 1910.147(c)(7)(i). This paragraph states, in relevant part, that "[t]he employer shall provide training to ensure that the purpose and function of the energy control program are understood by employees * * *. (A) Each authorized employee shall receive training * * *." The citation also charged GM with separate violations for each of twelve employees not retrained in accordance with the standard's retraining provision, § 1910.147(c)(7)(iii)(B), which requires retraining whenever the employer is aware of inadequacies in the employee's knowledge or use of the energy control procedures.

The Commission affirmed all of these per-employee violations. It held that the LOTO training paragraph, unlike the initial paragraph at issue in *Ho*, states that "each employee" is to be trained and therefore "imposes a specific duty on the employer to train each individual employee." 2007 WL 4350896 at 36. The Commission also noted that other requirements in paragraph (c)(7) clarify the individualized nature of the training duty, such as the requirement to record the employees' names and dates of training; that the preamble indicates that training involves consideration of employee-specific factors, and that "the core concept of lockout/tagout is *personal protection.*" *Id.* at 37 (emphasis added). The Commission did not refer to the portion of its *Ho* decision that rejected reliance on "each employee" language in the training requirement at issue there or that refused to consider any requirements in the standard other than the cited initial provision in deciding the nature of the employer's duty.

For similar reasons, the Commission affirmed separate violations of the requirement to retrain whenever the employer becomes aware of deviations from or inadequacies in the employee's knowledge or use of the energy control procedures. *Ho* (construing 29 CFR 1910.147(c)(7)(iii)(B)). This provision, the Commission found, "specifically targets deviations from or inadequacies in the employee's knowledge or use of the energy control procedures, an occurrence that would trigger an employer's obligation to retrain only that particular employee." *Ibid.* (internal quotations omitted).

The Commission held that because the training provisions impose a specific duty on the employer to train each employee, it is irrelevant whether the employer may choose to provide the required training collectively, such as holding a single training session for all employees. *Id.* at 36. Under the wording of the standard, the Commission concluded, "any failure to train would be a separate abrogation of the employer's duty to train each untrained employee." *Ibid.* The Commission distinguished the *Ho* decision on the ground that the language at issue there, requiring "a training program for all employees," pertained to a single group of employees collectively exposed to identical hazards. *Ibid.*

*C. The Agency's Interpretation*

The Agency's position is that despite minor differences in their wording, all PPE and training provisions in safety and health standards impose the same basic duty on the employer to protect employees individually—by providing personal protective equipment, such as a respirator, or by communicating hazard information through training. The individualized nature of the duty to comply does not change because of the presence or absence of the words "each employee," or other words explicitly stating that the employer's duty runs to each individual employee. Thus, the existing PPE provisions may be cited separately for each employee who requires PPE but does not receive it, and the training provisions may be cited separately for each employee who requires training but does not receive it.

[1] The current version of § 1926.62(f)(1) is virtually identical to the 1993 version at issue in *Manganas.* The provision now states in relevant part, "[f]or employees who use respirators required by this section, the employer must provide respirators that comply with the requirements of this paragraph."

The employee-specific nature of the employer's duty to provide PPE and training may be demonstrated in several different ways. First, the employer must take a separate abatement action for each individual employee. Where respirators are required, the employer must give a separate respirator to each individual employee. Where training is required, the employer must impart specific hazard information to each individual employee. The employee-specific nature of the training requirements is not altered because the employer may choose to conduct training in a group session. As the Commission held in *GM*, the duty to provide training is specific to each individual employee subject to the requirement. 2007 WL 4350896. Thus regardless of how the training is conducted, the employer must ensure that each individual employee receives the required information at the appropriate time.

Second, unlike standards that do not permit per-employee citations, the PPE and training requirements logically permit the employer to comply for one employee and not another. In *Hartford Roofing*, the Commission found that installation of a motion stopping system at a roof edge was a single discrete action unaffected by the number of employees on the roof, and therefore could not be cited on a per-employee basis. 17 O.S.H. Cas. (BNA) at 1368–69. The employer could not have complied for one employee without also complying for all other employees exposed to the hazard.

By contrast, the actions necessary to comply with PPE and training requirements for one employee do not constitute compliance for any other employee. To fully comply with these requirements the employer must take as many abatement actions as there are employees to be protected. The fact that the employer may comply for one or a few employees, while leaving many others unprotected, strongly supports the availability of per-employee citations. *Ho*, 401 F.3d at 379 (Garza, J. dissenting).

Finally, compliance with PPE and training provisions requires the employer to account for differences among individual employees. To comply with respirator requirements, the employer must, among other things, select respirators based on the specific respiratory hazards to which the employee is exposed and perform individual face-fit tests. *E.g.*, § 1910.134(d), (f). To comply with training requirements, the employer must ensure that each employee receives the required information. *E.g.*, § 1910.1001(j)(7)(iii) (asbestos). The employer must therefore account for factors such as when individual employees commence work subject to the training requirement and when they are available for training. Individual language differences also play a role. For example, if one employee understands only English, and another employee understands only Spanish, training must account for this difference. The actions necessary to fit a respirator to an individual employee's face and to ensure that hazard information is received by an employee therefore clearly entail consideration of individual factors.

1. The Ho Decision

The Secretary believes that the Commission majority's analysis in *Ho* is fundamentally flawed for several reasons discussed below. We discuss this issue because it is important to an understanding of the Secretary's interpretation of her standards and of the clarifying amendments to the PPE and training provisions. This final rule confirms the Secretary's interpretation of standards of this kind.

a. The Ho majority's analysis is inconsistent with the proper analytical framework outlined above. The requirement to provide respirators because of environmental hazards involves a separate discrete act for each employee exposed to the hazard. *Hartford Roofing*, 17 O.S.H. Cas. (BNA) at 1367. Eric Ho had eleven employees performing Class I asbestos work; therefore, he had to provide eleven separate respirators and ensure that each of the eleven employees used the devices. Ho also had to ensure that each employee received training on asbestos hazards. The cited asbestos respirator and training provisions required analytically distinct acts for each employee, and therefore permitted per-employee citations.

b. The majority's analysis does not reflect either Commission precedent preceding *Ho*, or more recent Commission caselaw. *Hartford Roofing* reflects the guiding principle distinguishing between requirements that apply individually to each employee, such as respirator provisions, and those that address hazardous conditions affecting employees as a group. 17 O.S.H. Cas. (BNA) at 1366–67. *Manganas* recognizes the principle that a requirement to provide respirators should be read in light of the associated provisions requiring individualized actions such as individual fit-testing. 21 O.S.H. Cas. (BNA) at 1998. And *GM* holds that a training requirement containing "each employee" language, which was also contained in the standard cited in *Ho*, imposes a specific duty to train each individual employee and may be cited on a per-employee basis. 2007 WL 4350896 at 24. *Ibid.*

c. The majority's analysis amounts to a "magic words" test for determining the nature of the duty to comply with PPE and training requirements that is at odds with the Secretary's intention and does not make practical sense. There is only a minor difference between the language of the respirator requirement in *Manganas* and that in *Ho*. In *Manganas* the requirement to comply with the provisions of the standard as a whole is stated explicitly in the standard's first sentence, while in *Ho* the requirement was implicit in that sentence and was explicitly stated by the remaining provisions of the standard. Similarly, in *GM* the "each employee" language was in the first enumerated subsection of the training standard, while in *Ho* it was in a later subsection. As the preceding discussion makes clear, the agency did not intend that minor wording variations among various PPE and training provisions affect the agency's ability to cite on a per-employee basis. Furthermore, there is no sound reason for distinguishing among the various PPE and training requirements based on minor differences in wording when all such requirements impose the same basic duty—provision of appropriate respirators and training to each employee covered by the requirements. The requirements at issue in *Ho* were not substantively different than those in *Manganas* and *GM*, and there should be no difference in the availability of per-employee citations under these requirements. Moreover, applying the *Ho* majority's analysis creates perverse incentives in that an employer who provides no respirators at all is eligible for only a single citation under the respirator provision at issue in *Ho*, while the employer who provides respirators, but fails to comply with the specific fit-test requirements is liable for per-employee violations.

Although the Secretary does not acquiesce in the *Ho* majority's interpretation of the asbestos respirator and training requirements at issue, the agency is modifying the language of most of the initial respirator provisions adopted in the 1998 rule to expressly state that the employer must provide each employee an appropriate respirator. There are several reasons for this. First, although the Secretary believes that the respirator requirements clearly support per-employee citations, employers may have some uncertainty in light of the *Ho* decision. Second,

although the Commission indicated in *Manganas* that language similar to that in the 1998 rule permits per-employee penalties, that aspect of the decision could be viewed as dicta. Finally, the 1998 respirator language is virtually the same in all standards with respirator requirements, and the same wording can be used to amend all of the standards. The agency intends the new language to clearly convey that the respirator provisions in all OSHA standards impose a duty to provide an appropriate respirator to each individual employee who requires respiratory protection. The failure to provide an appropriate respirator to each such employee may expose the employer to per-employee citations.

OSHA also believes that the existing language of the training provisions in safety and health standards makes reasonably clear that the training obligation extends to each individual employee. Some of these provisions explicitly state that "each employee" must be trained. For example, the process safety management standard states that "each employee presently involved in operating a process * * * must be trained." 29 CFR 1910.119(g)(i); 29 CFR 1926.64(g) (construction); the logging standard states that "[t]he employer shall provide training for each employee," § 1910.266(i); the vinyl chloride standard states that "[e]ach employee engaged in vinyl chloride or polyvinyl chloride operations shall be provided training," § 1910.1017(j); and the chromium standard states that "[t]he employer shall ensure that each employee can demonstrate knowledge of [the § 1926.1126(j)(2) (construction). The Commission in *GM* held that provisions that explicitly require training for "each employee" may be cited separately for each employee not trained. 2007 WL 4350896 at 36. Accordingly, these provisions require no amendatory action.

Some standards contain provisions stating that the employer must train "employees" exposed to the hazard addressed by the standard. For example, the hazardous waste operations standard states that "[a]ll employees [exposed to hazardous substances] shall receive training," § 1910.120 (e)(1); while the benzene standard states that "the employer shall provide employees with information and training at the time of their initial assignment to a work area where benzene is present." § 1910.1028(j)(3)(i). There is no substantive difference between the requirement to train "employees" exposed to a hazard and the requirement to train "each employee" exposed to the hazard. Under both formulations, the exposed employee is the subject of the training requirement, and compliance cannot be achieved unless and until each such employee receives the required training. Therefore provisions requiring the employer to provide training to employees exposed to a hazard, or to ensure that employees receive training, or that contain similar language, are plainly susceptible to per-employee citations in appropriate cases. *GM*, 2007 WL 4350896 at 36. No additional language is needed to clarify the intent of these provisions.

A minority of training provisions state that the employer must "institute a training program for all [exposed] employees and ensure their participation in the program" or contain similar language. *See e.g.*, § 1910.1001(j)(7)(i) (asbestos); § 1910.1018(o)(1)(i) (inorganic arsenic); § 1910.1025(l)(1)(ii) (lead); § 1910.1027(m)(4)(i) (cadmium). The Agency disagrees with the *Ho* majority's conclusion that this language requires the employer to have a training program, but does not impose a specific duty to train each exposed employee. The requirement that the employer "institute" the training program and ensure employee "participation" indicates that the focus of the provision is on the communication of hazard information to each employee. Furthermore, virtually all of the provisions requiring a training program also contain language explicitly stating that "each employee" must be informed of specific hazard information. *See* § 1910.1001(j)(7)(iii) (asbestos); § 1910.1018(o)(1)(ii) (inorganic arsenic); § 1910.1025(l)(1)(v) (lead); § 1910.1027(m)(4)(iii) (cadmium). Accordingly, the duty to "institute a training program" runs to each individual employee subject to the training requirement, and a discrete violation occurs for each such employee who does not receive training.

*Ho*, however, states the Commission's current interpretation as to the meaning of the construction asbestos standard's training provision. The *Ho* majority considered the language in § 1926.1101(k)(9)(i) to impose a duty to have a training program for employees collectively. The failure to train each of a number of individual employees on asbestos hazards was therefore considered a single violation. Although the Secretary does not accept the *Ho* majority's interpretation, the decision may be a significant impediment to the consistent and effective enforcement of the asbestos standard and other standards that contain similar wording. Accordingly, OSHA believes it is appropriate to amend those standards that require the employer to "institute a training program" to clarify that the employer's duty is to train each employee in accordance with the training program. The revised language expressly identifies the subject of the training requirement as "each employee" and therefore imposes a "specific duty on the employer to train each individual employee." *GM*, 2007 WL 430896 at 36. The agency intends the revision to clarify without question that the failure to train each individual employee covered by the training requirement may be considered a separate violation with a separate penalty.

2. Comments of the U.S. Chamber of Commerce

The U.S. Chamber of Commerce, joined by the Associated Builders and Contractors, Inc. and the National Association of Home Builders, submitted comments challenging the Secretary's legal authority to promulgate the final rule. (Exs. 28.1, 40.1, 82.1). The Chamber agrees with OSHA that insubstantial differences in the wording of the PPE and training standards should not affect resolution of the unit of violation, and appears to question the correctness of the Commission's analysis in *Ho*. (Ex. 28.1 at 1). Nevertheless, the Chamber argues that the Secretary lacks authority under section 6(b) of the Act to issue a rule clarifying that each employee not provided PPE or training as required by the PPE and training standards may be considered a separate violation for penalty purposes. (Ex. 28.1 at 1–3). In the Chamber's view, section 6(b) limits the Secretary's rulemaking authority to defining the conditions or practices required to provide safe and healthful workplaces, while section 17 commits to the Commission alone the determination whether one or more violations of standards have occurred. The Administrative Procedure Act is a further limitation on the Secretary's authority, the Chamber argues, as section 558(b) states that "[a] sanction may not be imposed * * * except within jurisdiction delegated to the agency and as authorized by law." 5 U.S.C. 558(b) (1994).

The Chamber also disagrees with the proposition in the proposed rule's preamble that a separate violation occurs for each employee who is not provided PPE or training. The Chamber maintains that there might be only one violation if the employer failed to cover a certain point in training a group of employees or failed to provide the right cartridge for the respirators provided a group of similarly exposed employees.

(Ex. 28.1 at 4, 5). In light of these asserted legal defects in the proposed rule, the Chamber recommends that the Secretary address the problem presented by the Ho case by continuing to litigate the issue before the Commission. (*Id.* at 4).

*a.* OSHA disagrees with these arguments for the following reasons. First, the Chamber fundamentally misinterprets both the rule and the Act in suggesting that the amendments usurp the Commission's authority under Section 17 to determine the amount of penalties. As the new paragraphs to the introductory sections of the subparts make clear, the final rule does not purport to set penalty amounts. Instead it clarifies that the employer's substantive duty under existing PPE and training standards is to comply with respect to each individual employee who must use PPE or receive training, and it provides clear notice that employers may be cited on a per-employee basis for violations. For example, § 1910.9 states "[s]tandards in this part requiring personal protective equipment (PPE), including respirators and other types of PPE, because of hazards to employees *impose a separate compliance duty with respect to each employee covered by the requirement.* The employer must *provide PPE to each employee required to use the PPE and each failure to provide PPE may be considered a separate violation.*" (emphasis added).

Section 6(b) of the Act authorizes the Secretary to "promulgate, modify or revoke any occupational safety or health standard" by following certain procedures, and the Secretary is exercising this express authority here. As explained in the preceding subsections, current Commission precedent indicates that the specific wording of some respirator and training provisions may not support per-employee citations while the slightly different wording of other respirator and training provisions does support such citations. While the Secretary believes that the PPE and training standards already support her interpretation, she is amending the standards to conform to the Commission's view that precise language is necessary. The amendments also address the Commission's concern that the current language of some standards may not provide fair notice. Only the Secretary has the authority to amend her standards in this manner.

The Secretary's exercise of her express authority to amend her standards to add language the Commission has indicated is necessary is hardly a usurpation of the Commission's authority. To the contrary, the final rule amendments recognize and respect the Commission's adjudicative role under section 10(c) of the Act.

The Commission's authority under section 17 to assess penalties is not implicated by this final rule. Where the Secretary has cited separate violations of the same standard, the Commission may be required to determine whether the standard authorizes the type of per-instance violations charged. That issue, however, turns entirely on the proper interpretation of the standard's text. *Hartford Roofing,* 17 O.S.H. Cas. (BNA) at 1367. The Commission's role is limited to determining whether the Secretary's interpretation that the standard permits per-instance violations is reasonable. *Martin* v. *OSHRC,* 499 U.S. 144 (1991). Where a standard is reasonably susceptible to citation on a per-instance basis, the Secretary's authority to propose a separate penalty for each such violation is clear. "The plain language of the Act could hardly be clearer" in authorizing a separate penalty for each discrete instance of a violation of a duty imposed by a standard. *Kaspar Wire Works, Inc.* v. *Secretary of Labor,* 268 F.3d 1123, 1130 (DC Cir. 2001).

The Commission's authority under section 17(j) to "assess all civil penalties provided in this section" does not permit it to review the Secretary's prosecutorial decision to cite and propose a separate penalty for each discrete violation of a standard. *Chao* v. *OSHRC (Saw Pipes USA, Inc. and Jindal United Steel Corp.),* 480 F.3d 320, 324 n. 3 (5th Cir. 2007). The Commission's adjudicative functions are to determine whether the facts support the multiple violations charged, and to apply the statutory criteria to determine the amount of the penalty to be assessed for each proven violation. *Id.* at 325. These functions are not affected by the final rule, which concerns only the Secretary's interpretation that the PPE and training standards are susceptible to per-employee citations.

*Reich* v. *Arcadian Corp.,* 110 F.3d 1192 (5th Cir. 1997), does not support the Chamber's argument. There, the Fifth Circuit observed that OSHA standards address "conditions" and "practices" and that the unit of violation of a standard must reflect the particular hazardous conditions regulated. 110 F.3d at 1198. While most standards require abatement of hazardous conditions affecting employees collectively, the condition or practice to which the PPE and training standards are directed is the protection of individual employees. *Hartford Roofing,* 17 O.S.H. Cas. (BNA) at 1366–67 ("[T]he condition or practice to which [the general respirator] standard is directed, within the meaning of section 3(8) of the Act, is * * * the individual and discrete failure to provide an employee working in a contaminated environment with a proper respirator."). The *Arcadian* court expressly recognized that an individual employee may be the unit of prosecution "if the regulated condition or practice is unique to the employee (*i.e.,* failure to train or remove a worker)". 110 F.3d at 1199 (citing *Hartford Roofing,* 17 O.S.H. Cas. (BNA) 1361).

The foregoing discussion plainly disposes of the Chamber's claim that the final rule imposes a sanction without an express authorization, in violation of § 558 of the APA. Nothing in the final rule imposes a sanction. Insofar as the rule addresses penalties, it does so only indirectly, by informing the public that the agency may exercise prosecutorial discretion to cite on a per-employee basis for violations of PPE and training standards. The Secretary's charging decision whether to issue a single citation or separate per-employee citations is not itself a penalty. *Chao* v. *OSHRC,* 480 F.3d at 325. Moreover, citations reflect only the Secretary's proposed penalty amounts—the Commission, not the Secretary, actually assesses penalties. *American Bus Ass'n* v. *Slater,* 231 F.3d 1 (DC Cir. 2000), cited by the Chamber, is obviously distinguishable in that the rule at issue there authorized the agency to levy fines in specific amounts directly against regulated entities for violations of bus accessibility requirements. In any event, section 9(a) of the OSH Act expressly authorizes the Secretary to issue a citation for violation of "a requirement * * * of any standard," and section 17 states that a penalty may be assessed "for each violation." Thus, the final rule clearly falls "within jurisdiction delegated to the agency" and does not violate section 558 of the APA.

*b.* The Chamber's criticisms of isolated statements in the proposal's preamble are irrelevant to the issue of the Secretary's legal authority to promulgate the final rule. (Ex. 28.1 at 4, 5). The Chamber chiefly challenges the proposal's statement that a separate violation occurs for each employee not provided required PPE or training, arguing that in some situations, the employer's failure to provide PPE or training to a class of employees can be considered a single violative condition or practice for which only a single citation could be issued. (Ex. 28.1 at 4, 5). However, the Secretary clearly has the authority to make specific changes

to the wording of her PPE and training standards, and to announce her interpretation of the amended rules, by following the procedures in section 6(b). At most, the Chamber's criticisms go to the legal effect of amendments in some specific circumstances. Whether the Secretary's interpretation will be accepted by the Commission or a court in these circumstances, if and when they arise, is a matter to be resolved in an enforcement proceeding.

In any event, the Chamber's arguments are wholly unpersuasive on their merits. The Chamber asserts that there might be only one training violation if the employer fails to cover a certain required element in training a group of employees and there might be only one respirator violation if the employer fails to provide the right cartridge for respirators used by a class of employees exposed to the same hazard. (Ex. 28.1 at 4, 5). In these cases, the Chamber suggests that the violation involves a single action by the employer affecting multiple employees alike. *Id.* The Secretary rejects this reasoning for the same reasons she rejects the Commission majority's analysis in *Ho.*

The hazardous "condition" or "practice" addressed by the PPE and training standards is the failure to protect each individual employee—through personal protective equipment or training—from the hazards of his or her or work environment. *Hartford Roofing,* 17 O.S.H. Cas. (BNA) at 1367. The hazardous condition addressed by the standards is always the same regardless of the actions taken by the employer to comply or not comply. It does not matter that a single action or decision by the employer results in several employees being exposed to hazardous working conditions without PPE or training—the unit of violation remains the individual unprotected employee. See *Chao* v. *OSHRC,* 380 F.3d. at 323 (although multiple recordkeeping violations may stem from a single company policy, each failure to record may represent a separate and distinct violation). *Secretary of Labor* v. *Caterpillar Inc.,* 15 O.S.H. Cas. (BNA) 2153, 2173 (Rev. Comm'n 1993). For the same reason, the availability of per-employee training violations does not depend upon whether the employer could have conducted a single group training session. *GM,* 2007 WL 4350896 at 36.

The Chamber's approach is also internally inconsistent. The Chamber appears to acknowledge that per-employee citations should have been available in the *Ho* case. (Ex. 28.1 at 1, 4). There is no logical distinction between the situation in *Ho,* where the employer failed to provide any respirators to employees, and a case where the employer provides noncomplying respirators to employees. (Ex. 28.1 at 4). In both cases, employees are not protected. The Chamber asserts that "it all depends upon whether there are different violative conditions," but fails to explain how or why factual differences between *Ho* and its hypothetical case would support the availability of per-employee citations in one case but not the other.

*c.* Finally, the Chamber's proposed solution to the problem presented by the *Ho* case is no answer at all. The Chamber urges the Secretary to continue to litigate the issue by raising the arguments in the proposed rule directly to the Commission in the next appropriate case. Thus, the Chamber posits that while the Secretary lacks statutory authority to issue a rule clarifying her interpretation that the PPE and training standards are susceptible to per-employee citations, the Commission would accept this interpretation as a litigating position and change its doctrine. This appears wholly counterintuitive. The central tenet of the Secretary's position is that the statute supports her approach. To accept the Chamber's comments as a basis for not adopting a final rule would substantially weaken, if not destroy, the legal underpinning of the Secretary's position. For these reasons, the Secretary rejects both the Chamber's legal arguments and its recommendation for a non-regulatory course of action.

## IV. Summary and Explanation of the Proposed Rule

In this final standard, OSHA is amending the standards in 29 CFR Parts 1910, 1915, 1917, 1918 and 1926 to provide additional clarity and consistency about the individualized nature of the employer's duty to provide training and personal protective equipment (including eye, hand, face, head, foot and hearing protection, respirators, and other forms of PPE) under standards in these parts. The final rule revises existing regulatory language and adds new sections to the introductory subparts to Parts 1910 through 1926. The following discussion addresses comments to the proposed language, OSHA's response to those comments, the actual final rule language, and how the final rule is to be interpreted.

A number of commenters offered broad support for the revisions (*see, e.g.,* Exs. 3, 5, 18.1, 21.1, 29.1, 32.1, 39.1, 44.1, 83.1, 84.1). ORC Worldwide remarked that the rulemaking is an appropriate action to eliminate confusion and ensure consistent and effective enforcement of OSHA's standards (Ex. 29.1). The American Federation of Labor and Congress of Industrial Organizations (AFL–CIO) added that the rule will remove any doubt that employers are obligated to provide required PPE and training to each worker and that employers who fail to do so for each individual employee are subject to per-instance citations for each employee left unprotected (Ex. 32.1). The American Industrial Hygiene Association (AIHA) urged OSHA to "[m]ove forward with the completion of this proposed rule in as timely a manner as possible to avoid any potential delays in the protection of workers" (Ex. 18.1).

A number of commenters also opposed the rulemaking (*see, e.g.,* Exs. 2, 19.1, 20.1, 22, 25.1, 26.1, 27.1, 28.1, 30, 38.1, 40.1, 41.1, 45.1, 48.1, 49.1, 51.1, 79 pp 35–46, 79 pp 73–77, 79 pp 87–92, 80.1, 81.1, 82.1). Several commenters expressed concern about OSHA's authority to promulgate the standards (*see, e.g.,* Exs. 28.1, 40.1, 80.1, 82.1). OSHA's response to these concerns is in the legal authorities section of this preamble. A number of commenters also expressed concerns about the cost impact of the standards on employers. These concerns are addressed in the economic analysis sections below. Remaining objections and recommendations are discussed in the following sections.

### *New Sections Added to Subpart A of Parts 1910 Through 1918, and Subpart C of Part 1926*

OSHA has added a new section to Subpart A of Parts 1910, 1915, 1917 and 1918, and to Subpart C of Part 1926. These subparts contain general information about the scope and applicability of the standards in each part. The proposed new sections contain two paragraphs, which are identical for each new section. The first paragraph expressly states that, for standards in the part requiring employers to provide PPE, employers must provide PPE to each employee required to use the PPE, and each failure to provide PPE to an employee imposes a separate compliance duty, and thus may be considered a separate violation. The new paragraph applies to all standards in the part that require provision of PPE, regardless of their wording. For example, § 1910.132 requires employers to provide PPE when needed, and also recognizes that an employer may allow an employee who voluntarily provides appropriate PPE he or she owns to use that PPE in place of the employer-provided equipment. See

§ 1910.132(h)(6). The underlying obligation to provide PPE to each employee is the employer's, and each employee who lacks required PPE may be considered a separate violation. The second paragraph expressly states that standards in the part requiring training on hazards and related matters, such as standards requiring that employees receive training or that the employer train employees, provide training to employees or institute or implement a training program, impose a separate compliance duty to each employee covered by the requirement. Each failure to adequately train an employee may be considered a separate violation.

The new sections reflect the agency's intent, as discussed in the preceding sections of this preamble, that standards requiring the employer to protect employees by providing personal protective equipment or imparting hazard information through training impose a specific duty to protect each individual employee covered by the requirement. The new sections are placed in the introductory subparts of each part because the principle expressed in each section applies generally to all PPE and training standards in the part. OSHA intends the new sections to apply regardless of differences in wording between the PPE and training provisions in the various parts. The new sections provide unmistakable notice to employers that they are responsible for protecting each employee covered by the PPE and training standards, and consequently, that they may be subject to per-employee citations and proposed penalties for violations.

The AFL–CIO, supported by the Building and Construction Trades Department, proposed two changes to these general language sections (Ex. 32.1, 39.1, 70 pp. 82–83, 83.1, 84.1). As proposed, these sections read as follows:

(a) Personal protective equipment. Standards in this part requiring the employer to provide personal protective equipment (PPE), including respirators, because of hazards to employees impose a separate compliance duty to each employee covered by the requirement. The employer must provide PPE to each employee required to use the PPE, and each failure to provide PPE to an employee may be considered a separate violation.

(b) Training. Standards in this part requiring training on hazards and related matters, such as standards requiring that employees receive training or that the employer train employees, provide training to employees, or institute or implement a training program, impose a separate compliance duty to each employee covered by the requirement.

The employer must train each affected employee in the manner required by the standard, and each failure to train an employee may be considered a separate violation.

The AFL–CIO's first concern was that the first sentence of paragraph (a), by singling out respirators as an example of the PPE involved, "[c]ould lead to the view that the requirement focuses more narrowly on respirators and not on the employer's more expansive duty to provide all forms of PPE to each worker" (Ex. 32.1). It suggested that new text be inserted after the word "including," which listed various specific types of PPE, such as foot, hand, and eye protection. Second, the AFL–CIO suggested inserting the words "with respect" after the word "duty" in the first sentence of paragraphs (a) and (b) to make clear that the employer's separate compliance duty was owed to each employee.

The Agency agrees with these recommendations in large part and has made corresponding changes in the final rule. It is not OSHA's intent to limit the PPE duties referenced in these sections to respirators only. But rather than include a list of types of PPE, which might itself be read as limiting, the final rule merely inserts the words "and other types of PPE" after the word "respirators" in the first sentence of paragraph (a). The final rule also includes the words "with respect" where suggested by the unions.

*Alternative Approach*

The Blueoceana Company (Ex. 77.) expressed a concern that OSHA's proposal to include these general language sections did not provide enough clarity in OSHA's regulations, and that the Agency should change the language of each training and PPE standard to make the requirement to provide PPE and training to each employee clear within each of those standards. Specifically, Blueoceana recommended that:

While we assume that all such PPE and Training regulations will be included within the embrace of any final rule, it would have been much "cleaner" to go directly to the source of any regulatory ambiguity and rectify such defects right where they exist. As proposed, the "per employee rule" will leave, unmolested, the dichotomies complained of in *Ho*, and will cause employers and employees to then look quizzically at the "newly finalized" sections while scratching their heads (Ex. 77).

OSHA does not believe that it is necessary to change each PPE and training standard to clarifiy the agency's interpretation. Most employers already understand that they must provide required PPE and training to each covered employee, so there is not widespread confusion on this matter. The final paragraphs make clear that they apply to all of the standards, and it will be quite clear that they apply throughout all the standards. This is also an approach used successfully in other rules. For example, in the PPE payment standard, the Agency requires employers to pay for PPE throughout each part by language stated in only one standard in the part (72 FR 64342, November 15, 2007). The Agency is unaware of any confusion caused by the approach used in PPE payment, and it does not expect any confusion for this clarification of the training and PPE standards. Nevertheless, in its future PPE and training standards, or when existing standards are modified, the Agency will attempt to make the requirement to protect each employee clear, so as to avoid additional confusion about the matter.

**OSHA's Egregious Policy**

A number of commenters expressed a concern about OSHA's instance-by-instance citation policy and the impact of the rulemaking on that policy (*see, e.g.*, Exs. 2, 14.1, 19.1, 22, 25.1, 27.1, 30, 36, 37.1, 38.1, 40.1, 41.1, 42.1, 45.1, 49.1, 51.1, 77, 79 pp 87–92, 80.1, 82.1). For example, the American Association of Homes and Services for the Aging (AAHSA) remarked that:

[t]he Occupational Safety and Health Administration ("OSHA") states that the practice of "grouping" violations into a single citation is the more common method of dealing with multiple violations, whereas "per instance" violations are generally used to deter "flagrant violators." This principle is documented in OSHA's CPL 2.80 Directive, entitled "Handling of Cases to be Proposed for Violation-by-Violation Penalties," released on October 21, 1990 (the "Directive"). Specifically, the Directive provides that only flagrant violations of the Occupational Safety and Health Act (the "Act") are appropriate bases for "per instance" violations. Despite the plain meaning of the Directive, the Clarification does not distinguish between flagrant violations for which "per instance" citations are appropriate and non-flagrant or unintentional violations for which "grouping" is appropriate. As a result, the standards should be revised to make this distinction (Ex. 36.1).

Con-Way Inc. remarked that "The proposed rule effectively penalizes the employer multiple times for one infraction. There is no limitation within the language to make it apply to only egregious circumstances as OSHA has indicated. And that's a problem" (Ex. 79, p 89). The American Society of Safety Engineers (ASSE) added that:

The failure to provide appropriate PPE or provide adequate training on how to use PPE

can be an egregious act by an employer with little or no regard for employee safety and health. In practicality and in most workplaces, however, violations of PPE standards are largely technical in nature and do not result in harm to an employee. Violations often can reflect unintended mistakes in its use by employees, a supervisor's mistaken understanding, or an individual's failure to follow an employer's or SH&E professional's best efforts to help that employee be protected. In such cases, where the overall intent of the employer is to meet or even exceed the OSHA standard and the overall approach in the workplace reflects a commitment to safety and health, a final rule should protect such employers against the application of the "per employee" penalty (Ex. 37.1).

The National Maritime Safety Association (NMSA) remarked: "We note that nowhere in the proposed rule is there a reference to the OSHA Compliance Directive 'Handling of Cases to be Proposed for Violation by Violation Penalties' policy. If OSHA truly intends for this regulation to apply to flagrant or egregious violators then the proposed rules must state this in unequivocal language. Moreover, relevant Compliance Directives should be appropriately promulgated and implemented" (Ex. 80.1). The Associated Builders and Contractors, Inc. (ABC) suggested OSHA incorporate its instance-by-instance policies directly into the rulemaking to ensure OSHA's egregious policies would not be changed in the future, stating that:

> The final rule's regulatory language, as opposed to the preamble, needs to be revised to make absolutely clear that the more expansive interpretation is not intended and cannot arise out of this rulemaking, i.e., that any (and every) PPE training violation will not be "considered a separate violation." The codified regulatory language, not the preamble, should specify the particular circumstances under which an employer's failure to train will be considered as separate violations. This could be done, for example, by expressly incorporating the specific criteria set forth in CPL 02–00–080 (formerly CPL 2.80) that identifies the conditions under which the Commission would consider as a flagrant violation has occurred (Ex. 40.1).

A few commenters incorrectly believed that the final rule amendments would require OSHA inspectors to issue instance-by-instance citations and penalties (*see, e.g.*, Exs. 2, 14.1, 30, 38.1, 41.1, 49.1, 51.1). Michal L. Illes (Ex. 2) recommended that any instance-by-instance penalty system for training should be limited to employers with 50 or more employees. The Printing Industries of America/Graphic Arts Technical Foundation (PIA/GATF) stated that:

> While OSHA compliance inspectors may have the flexibility to group multiple violations under a single penalty or propose aggregate, per-instance violations, the proposed language does not provide inspectors with enough guidance at the time of an inspection regarding when to apply the per-instance penalties versus a single penalty. OSHA should reserve issuing per-instance violations for only the worst-case offenders that require strong deterrents to violating health and safety standards. The proposed language seems to direct an OSHA inspector to the per-instance approach regardless of the circumstances or the degree of violation. This potential practice could cause unnecessary economic and time constraints on small businesses that have not committed flagrant violations of the Administration's health and safety standards (Ex. 38.1).

OSHA wants to make it absolutely clear that this final rule simply clarifies that the PPE and training standards are legally susceptible to per-employee citations. Nothing in the final rule addresses the circumstances in which the Secretary will or will not issue per-employee citations in particular cases. The issuance of per-employee citations, like other types of per-instance citations, is a matter of prosecutorial discretion wholly outside the scope of this rulemaking.

At present, OSHA's policy on the issuance of per-instance citations and proposed penalties is outlined in Directive CPL 2.80, *Handling of Cases To Be Proposed for Violation-By-Violation Penalties.* The directive contains instructions to OSHA personnel on the criteria to be considered in determining whether to charge a separate violation and propose a separate penalty for each discrete instance of a violation of a standard or regulation. The directive covers the issuance of per-employee citations and proposed penalties for violation of PPE and training standards. The per-employee citations in the *Ho* and *GM* cases were issued pursuant to CPL 2.80.

OSHA does not believe that it is appropriate to refer in this final rule to Directive CPL 2.80, or to discuss the circumstances in which per-employee citations might be issued for PPE and training violations. As explained above, the agency's discretion to issue such citations is not a subject of this rulemaking. Furthermore, there is no ambiguity in the current directive as to its application to per-employee PPE and training violations. Thus, there is no need for further clarification on this point.

Several additional factors militate against including references to the directive in the final rule. The directive reflects the agency's current enforcement policy; it is not a standard or regulation and should not be construed as such. The Agency must have the flexibility to modify its enforcement and policies in order to deploy its enforcement resources efficiently, to meet its public policy goals, and to respond to changing conditions and unforeseen circumstances. To fix agency enforcement policies in a rulemaking such as this would limit that flexibility. Moreover, the directive applies to any number of OSHA standards, not just the PPE and training standards being modified in this rulemaking. For example, per-instance citations under OSHA's injury and illness recordkeeping regulation and machine guarding requirements are covered by the directive. There is no reason to affect the future enforcement of those rules in this action, which is limited to PPE and training requirements.

*Revisions to Specific Respirator Paragraphs*

OSHA proposed revisions to the initial respiratory protection paragraph in a number of standards in parts 1910, 1915 and 1926 to add language explicitly stating that the employer must provide an appropriate respirator to each employee required to use a respirator and implement a respiratory protection program for each such employee. The affected standards include the general respirator standard, § 1910.134, most general industry toxic-substance health standards in Subpart Z of part 1910, the shipyard employment asbestos standard, § 1915.1101, and the construction industry methylenedianiline, lead, asbestos, and cadmium standards, §§ 1926.60, 62, 1101, and 1127.

Section 1910.134 contains general respiratory protection requirements for General Industry (part 1910), Shipyards (part 1915), Marine Terminals (part 1917), Longshoring (part 1918), and Construction (part 1926). The existing section 1910.134(a)(2) states:

> [r]espirators shall be provided by the employer when such equipment is necessary to protect the health of the employee. The employer shall provide the respirators which are applicable and suitable for the purposes intended. The employer shall be responsible for the establishment and maintenance of a respiratory protection program which shall include the requirements outlined in paragraph (c) of this section.

OSHA proposed to revise the first and last sentences of paragraph (a)(2) of section § 1910.134. As proposed, the first sentence read, "[r]espirators shall be provided by the employer *to each employee* when such equipment is necessary to protect the health of such employee" (emphasis added). As

proposed, the last sentence read, "[t]he employer shall be responsible for the establishment and maintenance of a respiratory protection program, which shall include the requirements outlined in paragraph (c) of this section, *for each employee required by this section to use a respirator*" (emphasis added). This language has been carried through to the final rule, with one change discussed below. Section 1910.134, as revised in this rulemaking, will apply to construction under section 1926.103.

AAHSA noted that the proposed new language in the last sentence, when read literally, created an anomaly (Ex. 36.1). That is, the language requires employers to establish and maintain "a respiratory protection program * * * for each employee. * * *" It is not OSHA's intent that employers create separate programs for each of their employees; rather employers need have only one program covering all of their employees who wear respirators. OSHA has corrected this problem in the final rule by dividing the proposed sentence into two sentences, the last of which reads "The program shall cover each employee required by this section to use a respirator."

The National Paint and Coating Association was concerned that the proposed revision's requirement to provide respirators to each employee could be read to require that a separate respirator be assigned to each employee (Ex. 22). OSHA does not believe that this is a plausible construction of the language or that employers would be misled by this change. Rather, the plain language merely evinces the intent to ensure that appropriate respiratory protection is provided to each employee when needed on the worksite, and there is no requirement imposed by this language to assign particular respirators to particular employees.

OSHA proposed similar revisions to the initial respirator paragraphs of toxic substance standards in parts 1910, 1915 and 1926. The initial respiratory protection paragraph of the construction asbestos standard, which is virtually identical to all respirator sections revised in this rule, states that "[f]or employees who use respirators required by this section, the employer must provide respirators that comply with the requirements of this paragraph." § 1926.1101(h)(1). The standard also states that, "[t]he employer must implement a respiratory protection program in accordance with § 1910.134(b) through (d), (except (d)(1)(iii)), and (f) through (m)." § 1926.1101(h)(2).

OSHA proposed to revise the first sentence of paragraph (h)(1) of section 1926.1101 to state, "[f]or employees who use respirators required by this section, the employer must provide *each employee an appropriate* respirator that complies with the requirements of this paragraph" (emphasis added). The Agency proposed revising paragraph (h)(2)(i) to state, "[t]he employer must implement a respiratory protection program in accordance with § 1910.134(b) though (d) (except (d)(1)(iii)), and (f) through (m) *for each employee required by this section to use a respirator*" (emphasis added). Identical language revisions were proposed for the initial respirator paragraphs in other toxic-substance health standards; only the section and paragraph numbers were different. These revisions are carried through in the final rule with the change to "which covers each employee" to eliminate the potential ambiguity described above.

The National Association of Home Builders (NAHB) suggested that these amendments might create an ambiguity (Ex. 43.1, 59). Focusing on the requirement that employers select an "appropriate" respirator that "complies with the requirements of this paragraph," NAHB suggested that the word "appropriate" might impose some requirement in addition to being in compliance with the requirements of the paragraph. However, OSHA intends no such additional requirement; a respirator is "appropriate" if it complies with the requirements of the paragraph. The word "appropriate" is included to emphasize the employer's duty to provide an adequately protective respirator as delineated by the standard.

OSHA believes that all of these revisions are appropriate in light of the *Ho* majority's narrow interpretation of the asbestos respirator provision. OSHA is adding explicit "each employee" language to section 1910.134 and to the initial respirator paragraphs of toxic-substance health standards to address the Commission's concern that this language is necessary to inform employers of their specific duty to provide a respirator to each individual employee required to use a respirator. The revisions will improve these standards by conforming them to each other and to the revised section 1910.134, and contribute to a greater awareness of the importance of full compliance with these important requirements.

*Revisions to Specific Training Paragraphs*

The final rule carries through the proposed revisions to those training provisions in safety and health standards that require the employer to institute or provide a training program for employees exposed to hazards. The Commission had indicated that the requirement in section 1926.1101(k)(9)(i) to "institute a training program for all employees who are likely to be exposed in excess of a PEL and for all employees who perform Class I through IV asbestos operations, and shall ensure their participation in the program" is not sufficiently explicit as to the employer's duty to ensure that each employee is trained. A number of other standards include similarly worded training provisions. Accordingly, the final rule revises section 1926.1101(k)(9)(i) to state, in relevant part, "[t]he employer shall train *each employee* who is likely to be exposed in excess of a PEL, and *each employee* who performs Class I through IV asbestos operations, in accordance with the requirements of this section" (emphasis added). Similar revised language is adopted for training sections in other standards that contain similar wording to section 1926.1101(k)(9)(i). The amended training provisions will conform to the training provision that the Commission in *GM* interpreted to permit per-employee citations.

The Association of Environmental Contractors (AEC) objected to this language (Ex. 34.1). Its members are asbestos abatement contractors who have negotiated a collective bargaining agreement with a local union under which the union provides the training required. Its concern is that training provided by the union, which is otherwise compliant with the standard, might not be acceptable because it was not provided by the employer. This concern is unfounded. The intent of the new language is to impose a duty on employers to ensure each employee is properly trained, not to require each employer to actually conduct the training. The employer's duty to train each employee may be discharged by ensuring employees have received adequate training provided by a union or other third party, and indeed OSHA has long taken this position in interpreting similar language under the Hazard Communication Standard (Letter to Frank Pelligrini, May 11, 1988). There is no need to change the proposed language to accommodate AEC's comment.

Stericycle argued that this language "[i]mplies individual customized training rather than attending group training sessions." (Ex. 35.1.) OSHA disagrees, and does not believe that the new language can reasonably be read to exclude group training. Notably, no other participant in this rulemaking has suggested this interpretation of the

provision. Regardless, it is OSHA's intent that employers may satisfy this requirement through group training, provided that each employee in the group receives and understands the training.

*State Plan Issue*

The Public Risk Management Association (PRIMA), an organization of risk management professionals for public entities and local governments, argued against the proposal on the grounds that it would discourage states from pursuing authorization to administer a state plan under section 18 of the OSH Act. States would be discouraged, PRIMA argues, because "[t]hey may be subjecting themselves and their political subdivisions to prohibitive substantial financial penalties for a good faith effort toward compliance." (Ex. 26.1; see also Exs. 66.1, Ex. 79 p. 97.)

OSHA disagrees for a number of reasons. Initially, as explained in detail elsewhere in the preamble, the standard does nothing to change regulated entities' compliance obligations. The standard places no new duties on public entities covered under a state plan, and leaves both federal and state plan enforcement policy unaffected. Thus, the standard should not affect states' decisions on participation one way or the other. Moreover, while PRIMA is concerned with the potential that public employers would be subjected to large penalties for citations made on a per-employee basis, CPL 2.80 provides that state-plan states need not extend the egregious policy to public sector programs (Ex. 70). Indeed, OSHA does not require state plans to impose monetary sanctions on public employers if other adequate remedies are available. 29 CFR 1956.11(c)(2)(x). Finally, there is no evidence that any states have been discouraged from seeking or maintaining state-plan status. To the contrary, PRIMA conceded at the hearing that it was not aware of any state-plan states that were reconsidering their status as a result of this rulemaking, (Ex. 79 p. 99), and the Kentucky OSH Program submitted a comment in support of the proposal (Ex. 21.1).

*Multi-Employer Worksites*

Two comments were received regarding application of per-instance (or per-employee) citations to an employer under the multi-employer citation policy. The Associated General Contractors of America (AGC) noted that this rule "could extend citations to the general contractor" (Ex. 42.1). The American Society of Safety Engineers (ASSE) commented that the impact of the rulemaking is "ambiguous" with respect to a worksite where either the "general contractor, or a subcontractor is overseeing provision of PPE or training" (Ex. 37.1).

As explained above, this rulemaking does not address the circumstances in which per-employee citations might be issued. The final rule does not broaden or narrow the application of the Agency's current multi-employer citation policy. For more discussion on this issue, see the final rule for "Employer Payment for Personal Protective Equipment" (72 FR 64342, 64363).

This rulemaking does not impose any new substantive requirements for employers and serves only to clarify the duty to provide personal protective equipment and training to each employee. Therefore, the application of OSHA's multi-employer citation policy (CPL 02–00–124) is not affected.

*Employer Liability for Employee Misconduct*

Several rulemaking participants expressed concern that the proposed rule would increase employers' liabilities for citations when employees failed to adhere to work rules requiring the proper use of PPE, even when such employees were provided appropriate PPE and properly trained in its use (Exs. 16, 20.1, 25.1, 42.1, 48.1, 80.1). Representative of these is a submission by the American Health Care Association, which stated that:

> It is difficult to determine whether, when employees are not using PPE or are using it incorrectly, that it is due to insufficient training on the part of the employer or if it is the fault of the employee(s) involved. * * * [D]ocumentation that training has occurred, that PPE is supplied, and that employees stated that they understood the training upon its completion should be adequate evidence to OSHA that the employer is in compliance (Ex. 25.1).

Similarly, the National Maritime Safety Association (NMSA) stated that, during OSHA investigations, it is possible that a "[c]ompliance officer can casually observe employees in an otherwise compliance workplace * * * improperly using or not using PPE at all." NMSA argued that, under the new standard, employers could be cited for each of these employees who "[s]imply were lax and for a brief period in time failed to catch the attention of a supervisor who normally would have corrected their lapse." (Ex. 80.1) Finally, in their pre-hearing submission, ASSE stated that "* * * [v]iolations often can reflect unintended mistakes in its use by employees, a supervisor's mistaken understanding, or an individual's failure to follow an employer's or * * * [safety and health] professional's best efforts to help that employee be protected." (Ex. 37.1)

These comments appear to address situations in which an individual employee's failure to use required PPE may result from unpreventable employee misconduct; that is, misconduct that occurs despite the existence of an adequately communicated and enforced work rule that would have prevented the violation. Unpreventable employee misconduct is an affirmative defense to a violation of a standard. Thus, if the employer proves that the elements of the defense are satisfied with respect to a citation alleging a violation for an individual employee's failure to use required PPE, the employer is not liable. Nothing in the final rule affects the applicability of the affirmative defense of unpreventable employee misconduct to a citation issued on a per-employee basis. Therefore, OSHA does not agree with these commenters that the final rule will increase employers' liabilities for citations in situations involving employee misconduct in following an employer's established work rules.

*PPE and Training for Short-Term Employees*

In its submission to the record, the Finishing Contractors Association raised a concern with respect to providing PPE and training of short-term employees, stating that:

> As union contractors who hire temporary employees off the bench to supplement their regular crew, should the contractors be required to provide PPE and training for these employees who may be with the company a couple of weeks? Such a requirement provides an economic burden, particularly on the smaller contractors. These temporary employees, perhaps, should use their own safety equipment from their previous job, unless this is their first assignment. * * * It is also difficult for these contractors to honor their commitment to provide updated training for these temporary workers on fast-paced, contracted jobs, since time is of the essence. (Ex. 48.1)

This comment appears both to question the nature of a short-term employer's duty to comply with PPE and training standards and to suggest that the final rule could impose additional costs on these employers. Insofar as the comment relates to the cost of the rule, it is addressed in section VI below. The following discussion addresses the commenter's question about the applicability of the amendments to short-term employers.

OSHA's PPE and training standards require employers to ensure that their

employees are provided appropriate PPE and are adequately trained in its use. The final rule clarifies that employers have this obligation for each employee who is required to use PPE, but does not otherwise fundamentally alter the obligation to provide PPE and ensure that employees are properly trained. OSHA's PPE and training requirements apply to all employers covered under the Act, including those with short-term employees, whether referred to as temporary employees, piece workers, seasonal employees, hiring hall employees, labor pool employees, or transient employees. If an employer-employee relationship is established, then the employer must ensure that PPE is provided, used, and maintained in a sanitary and reliable condition, as required by 29 CFR 1910.132(a) (for general industry) and 29 CFR 1926.95(a) (for construction). However, as does commonly occur with short-term employees, both the general industry and construction standards permit employers to allow employees to use their own PPE provided that the PPE is appropriate for the hazards present at the worksite and is effectively maintained (see 1910.132(b) and 1926.95(b)). Where employers hire short-term employees, this final rule does not affect the employer's obligations to ensure that PPE is provided to each employee and that each employee is trained in its use.

*Implied Ownership of PPE*

One rulemaking participant, Stericycle, believed that the proposed language clarifying that PPE is to be provided to each employee implied that employees would own the PPE (Ex. 35.1). They suggested language be added to make clear that employers may "maintain custody" of PPE to ensure its availability. OSHA does not believe such clarification is necessary in the final rule since the Agency is simply clarifying its intent that PPE and training requirements apply to each employee covered by the requirements. The final rule does not affect ownership of PPE and employers are free to maintain ownership of PPE that they provide and pay for. For a further discussion of the ownership issue, employers may consult the preamble to the PPE payment final rule (72 FR 64359).

## V. Final Economic Analysis

OSHA has determined that the final standard is not an economically significant regulatory action under Executive Order (E.O.) 12866. E.O. 12866 requires regulatory agencies to conduct an economic analysis for rules that meet certain criteria. The most frequently used criterion under E.O. 12866 is that the rule will impose annual costs to the economy of $100 million or more. Neither the benefits nor the costs of this rule exceed $100 million. OSHA has also determined that the final standard is not a major rule under the Congressional Review provisions of the Small Business Regulatory Enforcement Fairness Act.

The Regulatory Flexibility Act of 1980 (RFA), as amended in 1996, requires OSHA to determine whether the Agency's regulatory actions will have a significant impact on a substantial number of small entities. OSHA's analysis, based on the analysis in this section of the Preamble as well as in the later section "OMB Review Under the Paperwork Reduction Act" below, indicates that the final rule will not have a significant impact on a substantial number of small entities.

The final rule inserts two new paragraphs in the general industry health and safety standards (Part 1910), the shipyard employment standards (Part 1915), the marine terminal standards (Part 1917), the longshoring standards (Part 1918), and the construction standards (Part 1926). The new provisions, indentical in each part, clarify OSHA's position that personal protective equipment and training standards impose a separate compliance duty with respect to each employee covered by the PPE or training requirement, and each failure to provide necessary PPE or training may be considered a separate violation.

In addition, the Agency has also editorially revised provisions for respiratory protection, respiratory programs, and employee training across many existing standards. These editorial revisions emphasize the employer's responsibility to provide protection to each employee. For example, the existing language of Sec. 1910.134 (a) (2) "Respirators shall be provided by the employer when such equipment is necessary to protect the health of the employee" is replaced in the final rule by: "A respirator shall be provided to each employee when such equipment is necessary to protect the health of such employee."

There have been no changes in the final rule from the proposed rule that would have any new effect on costs. In the proposed rule, OSHA tentatively found that the proposed additions and changes to the affected rules would have no costs for two reasons. First, OSHA preliminarily concluded that the proposal would not represent any change in OSHA policy but instead, as explained in detail in the Summary and Explanation, would simply "make explicit the Agency's policy and warn employers of the potential cost and penalties of violations." Where there exists no change, there can be no costs. Second, OSHA pointed out that "These changes again do not impose any additional employer responsibility for providing respiratory protection, respiratory programs, or training for employees." OSHA also pointed out that the Agency examines the economic feasibility of its standards assuming full compliance, and therefore the costs of compliance with existing PPE and training standards have already been considered. Therefore, OSHA reasoned, though the proposed rule "may change the frequency or number of violations and amount of fines assessed, these are not material for estimating new costs to comply with a standard" (73 FR 48343).

After careful consideration of the rulemaking comments, OSHA finds no basis to depart from these preliminary conclusions. Many commenters objected that the rule would have substantial costs (*see, e.g.*, Exs. 1.1, 7.1. 13.1, 26.1, 30.1, 40.1, 51.1, 66.1, and 81.1) or expressed a special concern that the proposed rule could have significant costs for small entities, perhaps sufficient to require a regulatory flexibility analysis (*see, e.g.*, Exs. 5, 38.1, 41.1. 42.1, 43.1, and 74). Some of these commenters simply provided a generic statement that the proposed rule would have costs or economic impacts with no details as to why they thought this would be the case, or why they objected to OSHA's arguments concerning costs and impacts (*see, e.g.*, Exs. 7.1, 11.1, 13.1, 38.1, 40.1, 51.1, and 66.1). However some commenters also offered specific reasons for holding that the proposed regulation would have costs or significant impacts.

Some commenters expressed concerns that actually represent objections to the costs of the underlying rules—specifically, that assuring all employees are trained represents a substantial cost and undue burden on firms in industries with high turnover (Exs. 33, 48.1, and 81.1). For example, as noted above, one commenter argued "As union contractors who hire temporary employees off the bench to supplement their regular crew, should the contractors be required to provide PPE and training for employees who may be with their company for only a couple of weeks? Such a requirement provides an economic burden, particularly on the smaller contractors." Such comments represent objections to the costs and economic impacts of the underlying rules, which have already been analyzed and found technologically and

economically feasible based on full compliance. This rule does not change any obligation of employers, or add compliance costs not already accounted for in the underlying rules.

Some commenters were concerned with costs of penalties, or the economic impact or significance of such penalties (*see, e.g.*, Exs. 5, 26, 41.1, 43.1, and 48.1). None of these commenters addressed OSHA's point concerning penalty costs mentioned in the proposed rule. First, the changes to these rules are a clarification and not a change to existing policies. Second, penalty costs are totally avoidable—simply comply with the rule as OSHA has assumed employers will in all of its analyses, and there are no additional costs for penalties. In addition, it should be noted that penalty costs, while costs to employers, do not, by and large represent true costs to the economy, but only represent transfer from firms that choose not to comply with OSHA regulations to the government. However, even ignoring these points, the actual penalty costs of noncompliance and the number of firms directly affected are likely to be minimal. An average of seven firms a year have been subject to penalties based on a per-employee fine. Further, many of these firms have not been small firms. Thus even if one disagrees with OSHA's view that the amendments are only a clarification, that compliance costs have already been accounted for, and that penalties need not be incurred, the costs are minimal and the number of firms affected cannot rise to the level of a substantial number of small firms that would be needed for a regulatory flexibility analysis to be required.

Some commenters concerned with penalty costs also pointed out that affected firms would have both higher penalties and higher legal costs, since firms would be more likely to incur legal costs to fight higher penalties (Exs. 42.1 and 43.1). OSHA views this argument as irrelevant because there are no new costs for a rule that simply clarifies existing policy. Further, even if this point is ignored, the legal costs of fighting penalties are no more relevant than the penalties themselves for purposes of feasibility analysis. They are not compliance costs, are totally avoidable, and do not rise to the level of affecting a substantial number of firms.

One commenter (Ex. 42.1) was concerned that this regulation would cause some employers to incur significant new recordkeeping costs. Since the rule imposes no new obligations and simply clarifies existing policy in a regulatory framework, OSHA considers this argument to be of dubious merit. In most cases, the underlying PPE and training standards require no recordkeeping. To the extent that recordkeeping for training or PPE is normal and customary in these industries, OSHA sees no difference between the records appropriate for showing that every employee has received adequate PPE or training, and records appropriate for showing that each employee has received adequate PPE or training. The same exact records will suffice for either, if an employer chooses to keep such records.

Finally, one commenter (Ex. 43.1), expanding on the possibility of new costs, more generally argued that employers would incur costs because, in order to avoid higher penalties, they would "overprotect" their employees, providing unnecessary PPE or training. However, "overprotection" if it exists, is, by definition, not a requirement of any standard, and is therefore not properly considered a cost of compliance for the purposes of determining economic feasibility. Furthermore, commenters have not provided any evidence that could be used as a basis for estimating such costs or determining how many firms might "overprotect" their employees as a result of this final rule.

Having considered the comments arguing that this regulation imposes new costs, or has significant economic impacts on a substantial number of firms, OSHA finally concludes that this set of changes to existing rules represents no new requirements, imposes no new costs, and raises no new analytic issues not already considered in the development of the rules being modified.

## VI. Regulatory Flexibility Certification

In accordance with the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.* (as amended), OSHA examined the regulatory requirements of the final rule to determine if they will have a significant economic impact on a substantial number of small entities. As indicated in section V. ("Final Economic Analysis") of this preamble, the final rule is expected to have no effect on compliance costs and regulatory burden for any employer, large or small. Accordingly, the Agency certifies that the final rule will not have a significant economic impact on a substantial number of small entities.

## VII. Environmental Impact Assessment

OSHA has reviewed the final rule in accordance with the requirements of the National Environmental Policy Act (NEPA) of 1969 (42 U.S.C. 4321 *et seq.*), the regulations of the Council on Environmental Quality (40 U.S.C. part 1500), and the Department of Labor's NEPA procedures (29 CFR part 11). The Agency finds that the final rule will have no major negative impact on air, water or soil quality, plant or animal life, the use of land, or other aspects of the environment.

## VIII. Federalism

OSHA has reviewed this final rule in accordance with the Executive Order on Federalism (Executive Order 13132, 64 FR 43255, August 10, 1999), which requires that agencies, to the extent possible, refrain from limiting state policy options, consult with states prior to taking any actions that would restrict state policy options, and take such actions only when there is clear constitutional authority and the presence of a problem of national scope. Executive Order 13132 provides for preemption of state law only if there is a clear congressional intent for the Agency to do so. Any such preemption is to be limited to the extent possible.

Section 18 of the OSH Act (29 U.S.C. 651 *et seq.*) expresses Congress' intent to preempt state laws where OSHA has promulgated occupational safety and health standards. Under the OSH Act, a state can avoid preemption on issues covered by federal standards only if it submits, and obtains federal approval of, a plan for the development of such standards and their enforcement (State Plan state). 29 U.S.C. 667. Occupational safety and health standards developed by such State Plan states must, among other things, be at least as effective in providing safe and healthful employment and places of employment as the federal standards. Subject to these requirements, State Plan states are free to develop and enforce under state law their own requirements for safety and health standards.

This final rule complies with Executive Order 13132. As Congress has expressed a clear intent for Federal preemption on issues addressed by OSHA standards in states without OSHA-approved State Plans, this rule preempts state law in the same manner as any OSHA standard. States with OSHA-approved State Plans are free to develop policy options on issues addressed herein, provided their standards are at least as protective as this final rule.

## IX. Unfunded Mandates

For the purposes of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1501, *et seq.*, as well as E.O. 12875, this final rule does not include any Federal mandate that may result in increased

expenditures by State, local, and tribal governments, or increased expenditures by the private sector of more than $100 million.

### X. OMB Review Under the Paperwork Reduction Act of 1995

This final rule does not contain any new collection of information requirements that are subject to review by OMB under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501 *et seq.* and OMB regulations at 5 CFR part 1320.

Several commenters suggested that the rule could increase paperwork burdens on employers (*See, e.g.*, Exs. 40.1, 42.1, 80.1, 81.1). The Associated General Contractors of America (AGC) remarked that "This proposal has substantial economic impact on small business owners within the construction industry. Requiring a contractor to prove that he or she provided appropriate PPE and training for each employee would result in a considerable amount of recordkeeping, which would overly burden small employers" (Ex. 42.1). Associated Builders and Contractors, Inc. (ABC) recommended that OSHA "[i]nclude specific guidance on what evidence OSHA will require (or otherwise expect) employers to provide in order to document that the requisite training has in fact been provided" (Ex. 40.1).

As OSHA has stated numerous times throughout this preamble, these standards do not make any changes to the substantive requirements of the standards and thus do not impose any new duties on employers, including the duty to keep training and PPE records. The recordkeeping requirements of individual PPE and training requirements located in many of OSHA's standards vary on this matter: Some require training records, some require training certifications, and some do not require records at all. These requirements continue unchanged and OSHA therefore reiterates its finding that the rulemaking imposes no new paperwork burdens.

### XI. State Plan States

When federal OSHA promulgates a new standard or more stringent amendment to an existing standard, the 26 states or U.S. territories with their own OSHA-approved occupational safety and health plans must revise their standards to reflect the new standard or amendment, or show OSHA why there is no need for action, e.g., because an existing state standard covering this area is already "at least as effective" as the new federal standard or amendment. 29 CFR 1953.5(a). The state standard must be at least as effective as the final federal rule, must be applicable to both the private and public (state and local government employees) sectors, and must be completed within six months of the publication date of the final federal rule. When OSHA promulgates a new standard or a standards amendment which does not impose additional or more stringent requirements than an existing standard, states are not required to revise their standards, although OSHA may encourage them to do so. The 26 states and territories with OSHA-approved State Plans are: Alaska, Arizona, California, Connecticut (plan covers only State and local government employees), Hawaii, Indiana, Iowa, Kentucky, Maryland, Michigan, Minnesota, Nevada, New Mexico, New Jersey (plan covers only State and local government employees), New York (plan covers only State and local government employees), North Carolina, Oregon, Puerto Rico, South Carolina, Tennessee, Utah, Vermont, Virginia, Virgin Islands (plan covers only State and local government employees), Washington, and Wyoming.

With regard to this final rule, while it does not impose any additional or more stringent requirements, it adds language clarifying that the personal protective equipment and training requirements of OSHA's standards impose a compliance duty with respect to each employee covered by the requirements. State Plan states must ensure that their PPE and training standards are at least as effective as the federal standards as amended by this final rule. States must adopt revisions, if necessary, within six months of the publication of this rule.

### XII. Authority and Signature

This document was prepared under the direction of Thomas M. Stohler, Acting Assistant Secretary of Labor for Occupational Safety and Health, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210. It is issued under sections 4, 6, and 8 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, 657), section 941 of the Longshore and Harbor Workers' Compensation Act (33 U.S.C. 901 *et seq.*), section 3704 of the Contract Work Hours and Safety Standards Act (40 U.S.C. 3701 *et seq.*), Secretary of Labor's Order No. 5–2007, and 29 CFR part 1911.

Signed at Washington, DC, this 4th day of December, 2008.

**Thomas M. Stohler,**

*Acting Assistant Secretary of Labor for Occupational Safety and Health.*

### List of Subjects

*29 CFR Part 1910*

Chemicals, Gases, Hazardous substances, Occupational safety and health, Protective equipment.

*29 CFR Part 1915*

Chemicals, Gases, Hazardous substances, Longshore and harbor workers, Occupational safety and health, Protective equipment.

*29 CFR Part 1917*

Chemicals, Gases, Hazardous substances, Longshore and harbor workers, Occupational safety and health, Protective equipment.

*29 CFR Part 1918*

Chemicals, Gases, Hazardous substances, Longshore and harbor workers, Occupational safety and health, Protective equipment.

*29 CFR Part 1926*

Chemicals, Construction industry, Gases, Hazardous substances, Occupational safety and health, Protective equipment.

### The Final Standard

■ Parts 1910, 1915, 1917, 1918 and 1926 of Title 29 of the Code of Federal Regulations are hereby amended as follows:

## PART 1910—[AMENDED]

### Subpart A—[Amended]

■ 1. The authority citation for subpart A of 29 CFR part 1910 is revised to read as follows:

**Authority:** Sections 4, 6, and 8 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, and 657); Secretary of Labor's Order No. 12–71 (36 FR 8754), 8–76 (41 FR 25059), 9–83 (48 FR 35736), 1–90 (55 FR 9033), 6–96 (62 FR 111), 3–2000 (65 FR 50017), 5–2002 (67 FR 65008), and 5–2007 (72 FR 31159), as applicable.

Sections 1910.7, 1910.8, and 1910.9 also issued under 29 CFR Part 1911. Section 1910.7(f) also issued under 31 U.S.C. 9701, 29 U.S.C. 9a, 5 U.S.C. 553; Pub. L. 106–113 (113 Stat. 1501A–222); and OMB Circular A–25 (dated July 8, 1993) (58 FR 38142, July 15, 1993).

■ 2. A new section 1910.9 is added, to read as follows:

**§ 1910.9 Compliance duties owed to each employee.**

(a) *Personal protective equipment.* Standards in this part requiring the

employer to provide personal protective equipment (PPE), including respirators and other types of PPE, because of hazards to employees impose a separate compliance duty with respect to each employee covered by the requirement. The employer must provide PPE to each employee required to use the PPE, and each failure to provide PPE to an employee may be considered a separate violation.

(b) *Training.* Standards in this part requiring training on hazards and related matters, such as standards requiring that employees receive training or that the employer train employees, provide training to employees, or institute or implement a training program, impose a separate compliance duty with respect to each employee covered by the requirement. The employer must train each affected employee in the manner required by the standard, and each failure to train an employee may be considered a separate violation.

## Subpart G—[Amended]

■ 3. The authority citation for subpart G of 29 CFR part 1910 is revised to read as follows:

**Authority:** Secs. 4, 6, and 8 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, 657); Secretary of Labor's Order No. 12–71 (36 FR 8754), 8–76 (41 FR 25059), 9–83 (48 FR 35736), 1–90 (55 FR 9033), 6–96 (62 FR 111), 3–2000 (65 FR 50017), 5–2002 (67 FR 50017), or 5–2007 (72 FR 31159) as applicable; and 29 CFR part 1911.

■ 4. In section 1910.95, paragraph (k)(1) is revised to read as follows:

**§ 1910.95 Occupational noise exposure.**

* * * * *

(k) * * *

(1) The employer shall train each employee who is exposed to noise at or above an 8-hour time weighted average of 85 decibels in accordance with the requirements of this section. The employer shall institute a training program and ensure employee participation in the program.

* * * * *

## Subpart I—[Amended]

■ 5. The authority citation for subpart I of 29 CFR part 1910 is revised to read as follows:

**Authority:** Sections 4, 6, and 8 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, and 657); Secretary of Labor's Order No. 12–71 (36 FR 8754), 8–76 (41 FR 25059), 9–83 (48 FR 35736), 1–90 (55 FR 9033), 6–96 (62 FR 111), 3–2000 (65 FR 50017), 5–2002 (67 FR 65008), or 5–2007 (72 FR 31160), as applicable, and 29 CFR Part 1911.

■ 6. In section 1910.134, paragraph (a)(2) is revised to read as follows:

**§ 1910.134 Respiratory protection.**

* * * * *

(a) * * *

(2) A respirator shall be provided to each employee when such equipment is necessary to protect the health of such employee. The employer shall provide the respirators which are applicable and suitable for the purpose intended. The employer shall be responsible for the establishment and maintenance of a respiratory protection program, which shall include the requirements outlined in paragraph (c) of this section. The program shall cover each employee required by this section to use a respirator.

* * * * *

## Subpart L—[Amended]

■ 7. The authority citation for subpart L of 29 CFR part 1910 is revised to read as follows:

**Authority:** Sections 4, 6, and 8 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, and 657); Secretary of Labor's Order No. 12–71 (36 FR 8754), 8–76 (41 FR 25059), 9–83 (48 FR 35736), 1–90 (55 FR 9033), 6–96 (62 FR 111), 3–2000 (65 FR 50017), 5–2002 (67 FR 65008), or 5–2007 (72 FR 31160), as applicable, and 29 CFR Part 1911.

■ 8. In section 1910.156, paragraph (f)(1)(i) is revised to read as follows:

**§ 1910.156 Fire brigades.**

* * * * *

(f)* * *

(1)* * *

(i) The employer must ensure that respirators are provided to, and used by, each fire brigade member, and that the respirators meet the requirements of 29 CFR 1910.134 for each employee required by this section to use a respirator.

* * * * *

## Subpart Z—[Amended]

■ 9. The authority citation for subpart Z of 29 CFR part 1910 is revised to read as follows:

**Authority:** Sections 4, 6, and 8 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, and 657); Secretary of Labor's Order No. 12–71 (36 FR 8754), 8–76 (41 FR 25059), 9–83 (48 FR 35736), 1–90 (55 FR 9033), 6–96 (62 FR 111), 3–2000 (65 FR 50017), 5–2002 (67 FR 65008), or 5–2007 (72 FR 31160), as applicable.

All of subpart Z issued under section 6(b) of the Occupational Safety and Health Act, except those substances that have exposure limits listed in Tables Z–1, Z–2, and Z–3 of 29 CFR 1910.1000. The latter were issued under section 6(a) (29 U.S.C. 655(a)).

Section 1910.1000, Tables Z–1, Z–2, and Z–3 also issued under 5 U.S.C. 553, Section 1910.1000 Tables Z–1, Z–2, and Z–3 but not under 29 CFR part 1911 except for the arsenic (organic compounds), benzene, cotton dust, and chromium (VI) listings.

Section 1910.1001 also issued under section 107 of the Contract Work Hours and Safety Standards Act (40 U.S.C. 3704) and 5 U.S.C. 553.

Section 1910.1002 also issued under 5 U.S.C. 553 but not under 29 U.S.C. 655 or 29 CFR part 1911.

Sections 1910.1018, 1910.1029 and 1910.1200 also issued under 29 U.S.C. 653.

Section 1910.1030 also issued under Pub. L. 106–430, 114 Stat. 1901.

■ 10. In section 1910.1001, paragraphs (g)(1) introductory text, (g)(2)(i), and (j)(7)(i) are revised to read as follows:

**§ 1910.1001 Asbestos.**

* * * * *

(g) * * *

(1) *General.* For employees who use respirators required by this section, the employer must provide each employee an appropriate respirator that complies with the requirements of this paragraph. Respirators must be used during:

* * * * *

(2) * * *

(i) The employer must implement a respiratory protection program in accordance with 29 CFR 134 (b) through (d) (except (d)(1)(iii)), and (f) through (m), which covers each employee required by this section to use a respirator.

* * * * *

(j) * * *

(7) * * *

(i) The employer shall train each employee who is exposed to airborne concentrations of asbestos at or above the PEL and/or excursion limit in accordance with the requirements of this section. The employer shall institute a training program and ensure employee participation in the program.

* * * * *

■ 11. In section 1910.1003, paragraphs (c)(4)(iv) and (d)(1) are revised to read as follows:

**§ 1910.1003 13 Carcinogens (4-Nitrobiphenyl, etc.).**

* * * * *

(c) * * *

(4) * * *

(iv) Each employee engaged in handling operations involving the carcinogens addressed by this section must be provided with, and required to wear and use, a half-face filter type respirator for dusts, mists, and fumes. A

respirator affording higher levels of protection than this respirator may be substituted.

* * * * *

(d) * * *

(1) *Respiratory program.* The employer must implement a respiratory protection program in accordance with § 1910.134 (b), (c), (d) (except (d)(1)(iii) and (iv), and (d)(3)), and (e) through (m), which covers each employee required by this section to use a respirator.

* * * * *

■ 12. In section 1910.1017, paragraphs (g)(1) and (g)(2) are revised to read as follows:

**§ 1910.1017 Vinyl chloride.**

* * * * *

(g) *Respiratory protection.* (1) *General.* For employees who use respirators required by this section, the employer must provide each employee an appropriate respirator that complies with the requirements of this paragraph.

(2) *Respirator program.* The employer must implement a respiratory protection program in accordance § 1910.134 (b) through (d) (except (d)(1)(iii), and (d)(3)(iii)(B)(1) and (2)), and (f) through (m) which covers each employee required by this section to use a respirator.

* * * * *

■ 13. In section 1910.1018, paragraphs (h)(1) introductory text, and (h)(2)(i), and (o)(1)(i) are revised to read as follows:

**§ 1910.1018 Inorganic arsenic.**

* * * * *

(h) * * *

(1) *General.* For employees who use respirators required by this section, the employer must provide each employee an appropriate respirator that complies with the requirements of this paragraph. Respirators must be used during:

* * * * *

(2) * * *

(i) The employer must implement a respiratory protection program in accordance with § 1910.134(b) through (d) (except (d)(1)(iii)), and (f) through (m), which covers each employee required by this section to use a respirator.

* * * * *

(o) * * *

(l) * * *

(i) The employer shall train each employee who is subject to exposure to inorganic arsenic above the action level without regard to respirator use, or for whom there is the possibility of skin or eye irritation from inorganic arsenic, in accordance with the requirements of this section. The employer shall institute a training program and ensure employee participation in the program.

* * * * *

■ 14. In section 1910.1025, paragraphs (f)(1) introductory text, (f)(2)(i), and (l)(1)(ii) are revised to read as follows:

**§ 1910.1025 Lead.**

* * * * *

(f) * * *

(1) *General.* For employees who use respirators required by this section, the employer must provide each employee an appropriate respirator that complies with the requirements of this paragraph. Respirators must be used during:

* * * * *

(2) * * *

(i) The employer must implement a respiratory protection program in accordance with § 1910.134(b) through (d) (except (d)(1)(iii)), and (f) through (m), which covers each employee required by this section to use a respirator.

* * * * *

(l) * * *

(1) * * *

(ii) The employer shall train each employee who is subject to exposure to lead at or above the action level, or for whom the possibility of skin or eye irritation exists, in accordance with the requirements of this section. The employer shall institute a training program and ensure employee participation in the program.

* * * * *

■ 15. In section 1910.1026, paragraphs (g)(1) introductory text and (g)(2) are revised to read as follows:

**§ 1910.1026 Chromium (VI).**

* * * * *

(g) * * *

(1) *General.* Where respiratory protection is required by this section, the employer must provide each employee an appropriate respirator that complies with the requirements of this paragraph. Respiratory protection is required during:

* * * * *

(2) *Respiratory protection program.* Where respirator use is required by this section, the employer shall institute a respiratory protection program in accordance with § 1910.134, which covers each employee required to use a respirator.

* * * * *

■ 16. In section 1910.1027, paragraphs (g)(1) introductory text, (g)(2)(i), and (m)(4)(i) are revised to read as follows:

**§ 1910.1027 Cadmium.**

* * * * *

(g) * * *

(1) *General.* For employees who use respirators required by this section, the employer must provide each employee an appropriate respirator that complies with the requirements of this paragraph. Respirators must be used during:

* * * * *

(2) * * *

(i) The employer must implement a respiratory protection program in accordance with § 1910.134(b) through (d) (except (d)(1)(iii)), and (f) through (m), which covers each employee required by this section to use a respirator.

* * * * *

(m) * * *

(4) * * *

(i) The employer shall train each employee who is potentially exposed to cadmium in accordance with the requirements of this section. The employer shall institute a training program, ensure employee participation in the program, and maintain a record of the contents of such program.

* * * * *

■ 17. In section 1910.1028, paragraph (g)(1) introductory text and (g)(2)(i) are revised to read as follows:

**§ 1910.1028 Benzene.**

* * * * *

(g) * * *

(1) *General.* For employees who use respirators required by this section, the employer must provide each employee an appropriate respirator that complies with the requirements of this paragraph. Respirators must be used during:

* * * * *

(2) * * *

(i) The employer must implement a respiratory protection program in accordance with § 1910.134(b) through (d) (except (d)(1)(iii), (d)(3)(iii)(b)(1) and (2)), and (f) through (m), which covers each employee required by this section to use a respirator.

* * * * *

■ 18. In section 1910.1029, paragraphs (g)(1) introductory text, (g)(2) and (k)(1)(i) are revised to read as follows:

**§ 1910.1029 Coke oven emissions.**

* * * * *

(g) * * *

(1) *General.* For employees who use respirators required by this section, the employer must provide each employee an appropriate respirator that complies with the requirements of this paragraph. Respirators must be used during:

* * * * *

(2) *Respirator program.* The employer must implement a respiratory protection

program in accordance with § 1910.134(b) through (d) (except (d)(1)(iii)), and (f) through (m), which covers each employee required by this section to use a respirator.

* * * * *

(k) * * *

(1) * * *

(i) The employer shall train each employee who is employed in a regulated area in accordance with the requirements of this section. The employer shall institute a training program and ensure employee participation in the program.

* * * * *

■ 19. In section 1910.1030, paragraph (g)(2)(i) is revised to read as follows:

**§ 1910.1030 Bloodborne pathogens.**

* * * * *

(g) * * *

(2) * * *

(i) The employer shall train each employee with occupational exposure in accordance with the requirements of this section. Such training must be provided at no cost to the employee and during working hours. The employer shall institute a training program and ensure employee participation in the program.

* * * * *

■ 20. In section 1910.1043, paragraphs (f)(1) introductory text, (f)(2)(i), and (i)(1)(i) are revised to read as follows:

**§ 1910.1043 Cotton dust.**

* * * * *

(f) * * *

(1) *General.* For employees who are required to use respirators by this section, the employer must provide each employee an appropriate respirator that complies with the requirements of this paragraph. Respirators must be used during:

* * * * *

(2) * * *

(i) The employer must implement a respiratory protection program in accordance with § 1910.134(b) through (d) (except (d)(1)(iii)), and (f) through (m), which covers each employee required by this section to use a respirator.

* * * * *

(i) * * *

(1) * * *

(i) The employer shall train each employee exposed to cotton dust in accordance with the requirements of this section. The employer shall institute a training program and ensure employee participation in the program.

* * * * *

■ 21. In section 1910.1044, paragraphs (h)(1) introductory text, (h)(2), and (n)(1)(i) are revised to read as follows:

**§ 1910.1044 1,2-dibromo-3-chloropropane.**

* * * * *

(h) * * *

(1) *General.* For employees who are required to use respirators by this section, the employer must provide each employee an appropriate respirator that complies with the requirements of this paragraph. Respirators must be used during:

* * * * *

(2) *Respirator Program.* The employer must implement a respiratory protection program in accordance with § 1910.134(b) through (d) (except (d)(1)(iii)), and (f) through (m), which covers each employee required by this section to use a respirator.

* * * * *

(n) * * *

(1) * * *

(i) The employer shall train each employee who may be exposed to DBCP in accordance with the requirements of this section. The employer shall institute a training program and ensure employee participation in the program.

* * * * *

■ 22. In section 1910.1045, paragraphs (h)(1) introductory text, (h)(2)(i), and (o)(1)(i) are revised to read as follows:

**§ 1910.1045 Acrylonitrile.**

* * * * *

(h) * * *

(1) *General.* For employees who use respirators required by this section, the employer must provide each employee an appropriate respirator that complies with the requirements of this paragraph. Respirators must be used during:

* * * * *

(2) * * *

(i) The employer must implement a respiratory protection program in accordance with § 1910.134(b) through (d) (except (d)(1)(iii), (d)(3)(iii)(b)(1), and (2)), and (f) through (m), which covers each employee required by this section to use a respirator.

* * * * *

(o) * * *

(1) * * *

(i) The employer shall train each employee exposed to AN above the action level, each employee whose exposures are maintained below the action level by engineering and work practice controls, and each employee subject to potential skin or eye contact with liquid AN in accordance with the requirements of this section. The employer shall institute a training program and ensure employee participation in the program.

* * * * *

■ 23. In section 1910.1047, paragraph (g)(1) introductory text and (g)(2) are revised to read as follows:

**§ 1910.1047 Ethylene oxide.**

* * * * *

(g) * * *

(1) *General.* For employees who use respirators required by this section, the employer must provide each employee an appropriate respirator that complies with the requirements of this paragraph. Respirators must be used during:

* * * * *

(2) *Respirator program.* The employer must implement a respiratory protection program in accordance with § 1910.134(b) through (d) (except (d)(i)(iii)), and (f) through (m), which covers each employee required by this section to use a respirator.

* * * * *

■ 24. In section 1910.1048, paragraphs (g)(1) introductory text and (g)(2)(i) are revised to read as follows:

**§ 1910.1048 Formaldehyde.**

* * * * *

(g) * * *

(1) *General.* For employees who use respirators required by this section, the employer must provide each employee an appropriate respirator that complies with the requirements of this paragraph. Respirators must be used during:

* * * * *

(2) * * *

(i) The employer must implement a respiratory protection program in accordance with § 1910.134(b) through (d) (except (d)(1)(iii), (d)(3)(iii)(b)(1), and (2)), and (f) through (m), which covers each employee required by this section to use a respirator.

* * * * *

■ 25. In section 1910.1050, paragraphs (h)(1) introductory text and (h)(2) are revised to read as follows:

**§ 1910.1050 Methylenedianiline.**

* * * * *

(h) * * *

(1) *General.* For employees who use respirators required by this section, the employer must provide each employee an appropriate respirator that complies with the requirements of this paragraph. Respirators must be used during:

* * * * *

(2) *Respirator program.* The employer must implement a respiratory protection program in accordance with § 1910.134 (b) through (d) (except (d)(1)(iii)), and (f) through (m), which covers each

employee required by this section to use a respirator.

* * * * *

■ 26. In section 1910.1051, paragraphs (h)(1) introductory text, (h)(2)(i), and (l)(2)(ii) are revised to read as follows:

**§ 1910.1051 Butadiene.**

* * * * *

(h) * * *

(1) *General.* For employees who use respirators required by this section, the employer must provide each employee an appropriate respirator that complies with the requirements of this paragraph. Respirators must be used during:

* * * * *

(2) * * *

(i) The employer must implement a respiratory protection program in accordance with § 1910.134(b) through (d) (except (d)(1)(iii), (d)(3)(iii)(B)(1), and (2)), and (f) through (m), which covers each employee required by this section to use a respirator.

* * * * *

(l) * * *

(2) * * *

(i) * * *

(ii) The employer shall train each employee who is potentially exposed to BD at or above the action level or the STEL in accordance with the requirements of this section. The employer shall institute a training program, ensure employee participation in the program, and maintain a record of the contents of such program.

* * * * *

■ 27. In section 1910.1052, paragraphs (g)(1) introductory text and (g)(2)(i) are revised to read as follows:

**§ 1910.1052 Methylene chloride.**

* * * * *

(g) * * *

(1) *General.* For employees who use respirators required by this section, the employer must provide each employee an appropriate respirator that complies with the requirements of this paragraph. Respirators must be used during:

* * * * *

(2) * * *

(i) The employer must implement a respiratory protection program in accordance with § 1910.13(b) through (m) (except (d)(1)(iii)), which covers each employee required by this section to use a respirator.

* * * * *

## PART 1915—[AMENDED]

■ 28. The authority citation for part 1915 is revised to read as follows:

**Authority:** Section 41, Longshore and Harbor Workers' Compensation Act (33 U.S.C. 941); Sections. 4, 6, and 8 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, 657); Secretary of Labor's Order No. 12–71 (36 FR 8754), 8–76 (41 FR 25059), 9–83 (48 FR 35736), 1–90 (55 FR 9033), 6–96 (62 FR 111), 3–2000 (65 FR 50017), 5–2002 (67 FR 65008), or 5–2007 (72 FR 31160) as applicable; 29 CFR Part 1911.

### Subpart A—[Amended]

■ 29. A new section 1915.9 is added, to read as follows:

**§ 1915.9 Compliance duties owed to each employee.**

(a) *Personal protective equipment.* Standards in this part requiring the employer to provide personal protective equipment (PPE), including respirators and other types of PPE, because of hazards to employees impose a separate compliance duty with respect to each employee covered by the requirement. The employer must provide PPE to each employee required to use the PPE, and each failure to provide PPE to an employee may be considered a separate violation.

(b) *Training.* Standards in this part requiring training on hazards and related matters, such as standards requiring that employees receive training or that the employer train employees, provide training to employees, or institute or implement a training program, impose a separate compliance duty with respect to each employee covered by the requirement. The employer must train each affected employee in the manner required by the standard, and each failure to train an employee may be considered a separate violation.

### Subpart Z—[Amended]

■ 30. In section 1915.1001, paragraphs (h)(1) introductory text, (h)(3)(i), and (k)(9)(i), are revised to read as follows:

**§ 1915.1001 Asbestos.**

* * * * *

(h) * * *

(1) *General.* For employees who use respirators required by this section, the employer must provide each employee an appropriate respirator that complies with the requirements of this paragraph. Respirators must be used in the following circumstances:

* * * * *

(3) * * *

(i) Where respirator use is required by this section, the employer shall institute a respiratory protection program in accordance with § 1910.134(b), (d), (e), and (f), which covers each employee required by this section to use a respirator.

* * * * *

(k) * * *

(9) * * *

(i) The employer shall train each employee who is likely to be exposed in excess of a PEL and each employee who performs Class I through IV asbestos operations in accordance with the requirements of this section. Training shall be provided at no cost to the employee. The employer shall institute a training program and ensure employee participation in the program.

* * * * *

■ 31. In section 1915.1026, paragraphs (f)(1) introductory text and (f)(2) are revised to read as follows:

**§ 1915.1026 Chromium (IV).**

* * * * *

(f) * * *

(1) *General.* Where respiratory protection is required by this section, the employer must provide each employee an appropriate respirator that complies with the requirements of this paragraph. Respiratory protection is required during:

* * * * *

(2) *Respiratory Protection Program.* Where respirator use is required by this section, the employer shall institute a respiratory protection program in accordance with § 1910.134, which covers each employee required to use a respirator.

* * * * *

## PART 1917—[AMENDED]

■ 32. The authority citation for part 1917 is revised to read as follows:

**Authority:** Section 41, Longshore and Harbor Workers' Compensation Act (33 U.S.C. 941); Sections 4, 6, and 8 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, 657); Secretary of Labor's Order No. 12–71 (36 FR 8754), 8–76 (41 FR 25059), 9–83 (48 FR 35736), 1–90 (55 FR 9033), 6–96 (62 FR 111), 3–2000 (65 FR 50017), 5–2002 (67 FR 65008), or 5–2007 (72 FR 31160) as applicable; 29 CFR Part 1911.

### Subpart A—[Amended]

■ 33. A new section 1917.5 is added, to read as follows:

**§ 1917.5 Compliance duties owed to each employee.**

(a) *Personal protective equipment.* Standards in this part requiring the employer to provide personal protective equipment (PPE), including respirators and other types of PPE, because of hazards to employees impose a separate compliance duty with respect to each employee covered by the requirement. The employer must provide PPE to each employee required to use the PPE, and each failure to provide PPE to an

employee may be considered a separate violation.

(b) *Training.* Standards in this part requiring training on hazards and related matters, such as standards requiring that employees receive training or that the employer train employees, provide training to employees, or institute or implement a training program, impose a separate compliance duty with respect to each employee covered by the requirement. The employer must train each affected employee in the manner required by the standard, and each failure to train an employee may be considered a separate violation.

## PART 1918—[AMENDED]

■ 34. The authority citation for part 1918 is revised to read as follows:

**Authority:** Section 41, Longshore and Harbor Workers' Compensation Act (33 U.S.C. 941); Sections 4, 6, and 8 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, 657); Secretary of Labor's Order No. 12–71 (36 FR 8754), 8–76 (41 FR 25059), 9–83 (48 FR 35736), 1–90 (55 FR 9033), 6–96 (62 FR 111), 3–2000 (65 FR 50017), 5–2002 (67 FR 65008), or 5–2007 (72 FR 31160) as applicable; 29 CFR Part 1911.

### Subpart A—[Amended]

■ 35. A new section 1918.5 is added, to read as follows:

**§ 1918.5 Compliance duties owed to each employee.**

(a) *Personal protective equipment.* Standards in this part requiring the employer to provide personal protective equipment (PPE), including respirators and other types of PPE, because of hazards to employees impose a separate compliance duty with respect to each employee covered by the requirement. The employer must provide PPE to each employee required to use the PPE, and each failure to provide PPE to an employee may be considered a separate violation.

(b) *Training.* Standards in this part requiring training on hazards and related matters, such as standards requiring that employees receive training or that the employer train employees, provide training to employees, or institute or implement a training program, impose a separate compliance duty with respect to each employee covered by the requirement. The employer must train each affected employee in the manner required by the standard, and each failure to train an employee may be considered a separate violation.

## PART 1926—[AMENDED]

### Subpart C—[Amended]

■ 36. The authority citation for subpart C of 29 CFR part 1926 is revised to read as follows:

**Authority:** Sec. 3704, Contract Work Hours and Safety Standards Act (40 U.S.C. 333); secs. 4, 6, and 8, Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, 657); Secretary of Labor's Order No. 12–71 (36 FR 8754), 8–76 (41 FR 25059), 9–83 (48 FR 35736), 6–96 (62 FR 111), or 5–2007 (72 FR 31160) as applicable; and 29 CFR part 1911.

■ 37. In section 1926.20, a new paragraph (f) is added to read as follows:

**§ 1926.20 General safety and health provisions.**

* * * * *

(f) *Compliance duties owed to each employee.* (1) *Personal protective equipment.* Standards in this part requiring the employer to provide personal protective equipment (PPE), including respirators and other types of PPE, because of hazards to employees impose a separate compliance duty with respect to each employee covered by the requirement. The employer must provide PPE to each employee required to use the PPE, and each failure to provide PPE to an employee may be considered a separate violation.

(2) *Training.* Standards in this part requiring training on hazards and related matters, such as standards requiring that employees receive training or that the employer train employees, provide training to employees, or institute or implement a training program, impose a separate compliance duty with respect to each employee covered by the requirement. The employer must train each affected employee in the manner required by the standard, and each failure to train an employee may be considered a separate violation.

### Subpart D—[Amended]

■ 38. The authority citation for subpart D of 29 CFR part 1926 is revised to read as follows:

**Authority:** Section 3704 of the Contract Work Hours and Safety Standards Act (40 U.S.C. 3701 *et seq.*); Sections 4, 6, and 8 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, and 657); Secretary of Labor's Orders 12–71 (36 FR 8754), 8–76 (41 FR 25059), 9–83 (48 FR 35736), 1–90 (55 FR 9033), 6–96 (62 FR 111), 3–2000 (62 FR 50017), 5–2002 (67 FR 65008); or 5–2007 (72 FR 31160) as applicable; and 29 CFR part 1911.

Sections 1926.58, 1926.59, 1926.60, and 1926.65 also issued under 5 U.S.C. 553 and 29 CFR part 1911.

Section 1926.62 of 29 CFR also issued under section 1031 of the Housing and Community Development Act of 1992 (42 U.S.C. 4853).

Section 1926.65 of 29 CFR also issued under section 126 of the Superfund Amendments and Reauthorization Act of 1986, as amended (29 U.S.C. 655 note), and 5 U.S.C. 553.

■ 39. In section 1926.60, paragraph (i)(1) introductory text, and (i)(2) are revised to read as follows:

**§ 1926.60 Methylenedianiline.**

* * * * *

(i) * * *

(1) *General.* For employees who use respirators required by this section, the employer must provide each employee an appropriate respirator that complies with the requirements of this paragraph. Respirators must be used during:

* * * * *

(2) *Respirator program.* The employer must implement a respiratory protection program in accordance with § 1910.134 (b) through (d) (except (d)(1)(iii)), and (f) through (m), which covers each employee required by this section to use a respirator.

* * * * *

■ 40. In section 1926.62, paragraphs (f)(1) introductory text, (f)(2)(i), and (l)(1)(ii) are revised to read as follows:

**§ 1926.62 Lead.**

* * * * *

(f) * * *

(1) *General.* For employees who use respirators required by this section, the employer must provide each employee an appropriate respirator that complies with the requirements of this paragraph. Respirators must be used during:

* * * * *

(2) * * *

(i) The employer must implement a respiratory protection program in accordance with § 1910.134(b) through (d) (except (d)(1)(iii)), and (f) through (m), which covers each employee required by this section to use a respirator.

* * * * *

(l) * * *

(ii) The employer shall train each employee who is subject to exposure to lead at or above the action level on any day, or who is subject to exposure to lead compounds which may cause skin or eye irritation (*e.g.*, lead arsenate, lead azide), in accordance with the requirements of this section. The employer shall institute a training program and ensure employee participation in the program.

* * * * *

### Subpart R—[Amended]

■ 41. The authority citation for subpart R of 29 CFR part 1926 is revised to read as follows:

**Authority:** Sec. 3704, Contract Work Hours and Safety Standards Act (Construction Safety Act) (40 U.S.C. 333); Sec. 4, 6, and 8, Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, 657); Secretary of Labor's Order No. 3–2000 (65 FR 50017), No. 5–2002 (67 FR 65008), or No. 5–2007 (72 FR 31160) as applicable; and 29 CFR part 1911.

■ 42. In section 1926.761, paragraph (b) is revised to read as follows:

**§ 1926.761 Training.**

* * * * *

(b) *Fall hazard training.* The employer shall train each employee exposed to a fall hazard in accordance with the requirements of this section. The employer shall institute a training program and ensure employee participation in the program.

* * * * *

### Subpart Z—[Amended]

■ 43. The authority citation for subpart Z of 29 CFR part 1926 is revised to read as follows:

**Authority:** Section 3704 of the Contract Work Hours and Safety Standards Act (40 U.S.C. 3701 et seq.); Sections 4, 6, and 8 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, 657); Secretary of Labor's Orders 12–71 (36 FR 8754), 8–76 (41 FR 25059), 9–83 (48 FR 35736), 1–90 (55 FR 9033), 6–96 (62 FR 111), 3–2000 (62 FR 50017), 5–2002 (67 FR 65008), or 5–2007 (71 FR 31160), as applicable; and 29 CFR part 11.

Section 1926.1102 of 29 CFR not issued under 29 U.S.C. 655 or 29 CFR part 1911; also issued under 5 U.S.C. 553.

■ 44. In section 1926.1101, paragraphs (h)(1) introductory text, (h)(2), and (k)(9)(i) are revised to read as follows:

**§ 1926.1101 Asbestos.**

* * * * *

(h) * * *

(1) *General.* For employees who use respirators required by this section, the employer must provide each employee an appropriate respirator that complies with the requirements of this paragraph. Respirators must be used during:

* * * * *

(2) * * *

(i) The employer must implement a respiratory protection program in accordance with § 1910.134 (b) through (d) (except (d)(1)(iii)), and (f) through (m), which covers each employee required by this section to use a respirator.

* * * * *

(k) * * *

(9) * * *

(i) The employer shall train each employee who is likely to be exposed in excess of a PEL, and each employee who performs Class I through IV asbestos operations, in accordance with the requirements of this section. Such training shall be conducted at no cost to the employee. The employer shall institute a training program and ensure employee participation in the program.

* * * * *

■ 45. In section 1926.1126, paragraphs (f)(1) introductory text and (f)(2) are revised to read as follows:

**§ 1926.1126 Chromium (IV).**

* * * * *

(f) * * *

(1) *General.* Where respiratory protection is required by this section, the employer must provide each employee an appropriate respirator that complies with the requirements of this paragraph. Respiratory protection is required during:

* * * * *

(2) *Respiratory protection program.* Where respirator use is required by this section, the employer shall institute a respiratory protection program in accordance with § 1910.134, which covers each employee required to use a respirator.

* * * * *

■ 46. In section 1926.1127, paragraphs (g)(1) introductory text, (g)(2)(i), and (m)(4)(i) are revised to read as follows:

**§ 1926.1127 Cadmium.**

* * * * *

(g) * * *

(1) *General.* For employees who use respirators required by this section, the employer must provide each employee an appropriate respirator that complies with the requirements of this paragraph. Respirators must be used during:

* * * * *

(2) * * *

(i) The employer must implement a respiratory protection program in accordance with § 1910.134 (b) through (d) (except (d)(1)(iii)), and (f) through (m), which covers each employee required by this section to use a respirator.

* * * * *

(m) * * *

* * * * *

(4) * * *

(i) The employer shall train each employee who is potentially exposed to cadmium in accordance with the requirements of this section. The employer shall institute a training program, ensure employee participation in the program, and maintain a record of the contents of the training program.

* * * * *

[FR Doc. E8–29122 Filed 12–9–08; 4:15 pm]

BILLING CODE 4510–26–P

## DEPARTMENT OF THE TREASURY

### Fiscal Service

### 31 CFR Part 380

**[Docket No. BPD GSRS 08–02]**

### Collateral Acceptability and Valuation

**AGENCY:** Bureau of the Public Debt, Fiscal Service, Department of the Treasury.

**ACTION:** Final rule.

**SUMMARY:** The Department of the Treasury is amending regulations that govern the acceptability and valuation of collateral pledged to secure deposits of public monies and other financial interests of the government under Treasury's three Fiscal Service collateral programs. This final rule is a nonsubstantive, technical amendment that updates a Web site and a postal mailing address referenced in those regulations.

**DATES:** *Effective date:* December 12, 2008.

**ADDRESSES:** You may download this final rule from the Bureau of the Public Debt's Web site at *www.treasurydirect.gov* or from the Electronic Code of Federal Regulations (e–CFR) Web site at *www.gpoaccess.gov/ecfr.* It is also available for public inspection and copying at the Treasury Department Library, Room 1428, Main Treasury Building, 1500 Pennsylvania Avenue, NW., Washington, DC 20220. To visit the library, call (202) 622–0990 for an appointment.

**FOR FURTHER INFORMATION CONTACT:** Lori Santamorena (Executive Director) or Kurt Eidemiller (Associate Director), Department of the Treasury, Bureau of the Public Debt, Office of the Commissioner, Government Securities Regulations Staff, at (202) 504–3632 or e-mail us at *govsecreg@bpd.treas.gov.*

**SUPPLEMENTARY INFORMATION:**

#### I. Background

The Department of the Treasury ("Treasury") is amending 31 CFR part 380, which governs the acceptable types of collateral and their assigned values that may be pledged to secure deposits of public monies and other financial interests of the government under Treasury's Fiscal Service collateral programs.