



**Coalition for Workplace Safety**

October 7, 2009

Senator Tom Harkin, Chairman  
Senate Committee on Health, Education,  
Labor and Pensions  
U.S. Senate  
Washington, DC 20510

Senator Michael Enzi, Ranking Member  
Senate Committee on Health, Education,  
Labor and Pensions  
U.S. Senate  
Washington, DC 20510

Senator Patty Murray, Chairwoman  
Subcommittee on Workforce Protections  
Senate Committee on Health, Education,  
Labor and Pensions  
U.S. Senate  
Washington, DC 20510

Senator Johnny Isakson, Ranking Member  
Subcommittee on Workforce Protections  
Senate Committee on Health, Education,  
Labor and Pensions  
U.S. Senate  
Washington, DC 20510

Dear Chairman Harkin, Chairwoman Murray, and Ranking Members Enzi, and Isakson:

The undersigned groups write to request a hearing on President Obama's nominee for Assistant Secretary of Labor for the Occupational Safety and Health Administration (OSHA), Professor David Michaels of the George Washington University School of Public Health. Michaels has advocated for more government regulation, even when the available science and data to support such regulations is inadequate or unsettled. Because workplace safety is everyone's concern and we are committed to working with OSHA to meet our shared goal of improving safety in the workplace, we believe a hearing is warranted to thoroughly explore Professor Michael's views on key areas of OSHA operations, the direction the agency will take, and how his professional career might influence the decisions he would make in this position.

Michaels has advocated for more government regulation, even when the available science and data to support such regulations is inadequate or unsettled. He has also attacked the landmark, unanimous Supreme Court decision in *Daubert v. Merrell Dow Pharmaceuticals*,<sup>1</sup> which stands for the proposition that scientific evidence in litigation must meet certain standards to be admitted. Michaels has also been the beneficiary of product liability actions which have been shown to be without merit. Finally, nominees for the OSHA Assistant Secretary have traditionally been subject to a hearing before their confirmations moved forward. We see no reason why Professor Michaels should be an exception. Accordingly, as detailed below, we believe his views warrant a hearing and thorough examination before his nomination can proceed.

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<sup>1</sup> 113 S. Ct. 2786 (1993).

***The CWS is comprised of associations and employers who believe in improving workplace safety through cooperation, assistance, transparency, clarity, and accountability.***

## **Professor Michaels' Views on the Need for Scientific Support for Regulation**

Michaels' writings frequently cast corporations as perennial bad actors in need of regulation. He also suggests that any studies or analyses industry may offer demonstrating the costs versus benefits of such regulations or otherwise demonstrating potential downside to such regulation are, by definition, flawed. Indeed, his book *Doubt is Their Product* compares those who have challenged efficacy or scientific soundness of various regulations to the tobacco industry. In so doing, Michaels fails to acknowledge that doubt can be legitimate or the possibility that the critique of the regulation might actually have merit.

A hearing is warranted to examine Michaels' views on what level of debate is appropriate surrounding the science and data used by OSHA for its regulations. Furthermore, as the Obama administration is expected to resurrect the ergonomics issue and may pursue a new regulation, his views on the science surrounding this controversial area would certainly be appropriate subject matter for a confirmation hearing.

## **Michaels' Objections to the *Daubert* Decision**

The Supreme Court's 1993 unanimous decision, *Daubert v. Merrell Dow Pharmaceuticals*, established the principle that scientific evidence could be subject to challenge and review according to the Federal Rules of Evidence. The court placed reliance on the Federal Rules of Evidence, particularly rule 702, which focuses on relevance and reliability as the standards for admissibility of scientific evidence, and gave judges the role of "gatekeepers" in determining whether proffered scientific evidence meets these thresholds. *Daubert* has resulted in keeping drugs on the market that help people, and preventing judgments based on junk science that would have put companies out of business and people out of work. The principles of the decision have benefited both plaintiffs and defendants in litigation.

Michaels, however, objects to the impact of the *Daubert* decision in allowing scientific evidence to be admitted that keeps plaintiffs from collecting in product liability litigation. Furthermore, he cautions against any attempt to apply the relevance and reliability criteria to data used in the regulatory process.<sup>3</sup> In other words, Michaels' view is that agencies such as OSHA should proceed with regulations even in the face of uncertainty, and relying upon science and data that may not have been subjected to rigorous examination, or be the most relevant and reliable.

Michaels' views on the criteria for selecting studies and data that OSHA relies upon for its regulations should be explored in a confirmation hearing.

## **Michaels' Project on Scientific Knowledge and Public Policy Aligns with Product Liability Lawyers**

Professor Michaels directs the Project on Scientific Knowledge and Public Policy

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<sup>3</sup> David Michaels & Celeste Monforton, *Manufacturing Uncertainty: Contested Science and the Protection of the Public's Health and Environment*, American Journal of Public Health, Supplement: Public Health Matters, September 2005, at S. 44.

Support (SKAPP) at the George Washington University School of Public Health and Health Services. SKAPP is funded by various foundations and funds, many of which are associated with political agendas and the trial lawyer industry. Among these are the Open Society Institute (a George Soros foundation which provides funding for a wide array of organizations associated with political causes including ACORN and the Center for American Progress), and the Common Benefit Trust, a fund established pursuant to a court order in the Silicone Gel Breast Implant Products Liability litigation. While SKAPP posts a disclaimer on their website indicating that their opinions are not cleared in advance by their funders, the positions taken by the project are consistent with public positions identified by these funding sources.

The views promoted by SKAPP, and Michaels' association with them, and how they would influence his approach to OSHA's agenda and regulations should be explored more thoroughly during a confirmation hearing.

### **Other Issues That Warrant a Hearing**

Among other areas worth exploring in a confirmation hearing would be Michaels' views on the role of compliance assistance as a tool for improving workplace safety. He should also be asked whether he agrees with the strong rhetoric of Secretary Solis about emphasizing enforcement measures more than compliance assistance programs that were initiated by the Clinton administration and continued by the Bush administration. He should also be asked whether he accepts data showing that workplace injuries, illnesses and fatalities are at all time lows, and what role OSHA has played in producing these results.

We also note that nominees for OSHA Assistant Secretary have traditionally had to appear at a hearing, even when the administration and the Senate were controlled by the same party. With the Obama administration indicating an aggressive agenda for OSHA, Michaels' nomination should be treated no differently than the other nominees who were given a hearing.

Sincerely,

American Bakers Association  
American Foundry Society  
American Iron and Steel Institute  
American Trucking Associations, Inc.  
Associated Builders and Contractors  
Associated General Contractors  
Council for Employment Law Equity  
Food Marketing Institute  
Independent Electrical Contractors  
International Foodservice Distributors  
Association  
International Franchise Association

IPC - Association Connecting Electronics  
Industries  
National Association of Home Builders  
National Association of Manufacturers  
National Council of Textile Organizations  
National Electrical Contractors Association  
National Oilseed Processors Association  
North American Die Casting Association  
Printing Industries of America  
Retail Industry Leaders Association  
Shipbuilders Council of America  
U.S. Chamber of Commerce