

## DEPARTMENT OF LABOR

## Occupational Safety and Health Administration

## 29 CFR Part 1903

[Docket No. OSHA–2023–0008]

RIN 1218–AD45

## Worker Walkaround Representative Designation Process

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: Final rule.

**SUMMARY:** In this final rule, OSHA is amending its Representatives of Employers and Employees regulation to clarify that the representative(s) authorized by employees may be an employee of the employer or a third party; such third-party employee representative(s) may accompany the OSHA Compliance Safety and Health Officer (CSHO) when, in the judgment of the CSHO, good cause has been shown why they are reasonably necessary to aid in the inspection. In the final rule, OSHA also clarified that a third party may be reasonably necessary because of their relevant knowledge, skills, or experience with hazards or conditions in the workplace or similar workplaces, or language or communication skills. OSHA concluded that these clarifications aid OSHA's workplace inspections by better enabling employees to select representative(s) of their choice to accompany the CSHO during a physical workplace inspection. Employee representation during the inspection is critically important to ensuring OSHA obtains the necessary information about worksite conditions and hazards.

**DATES:**

*Effective date:* This final rule is effective on May 31, 2024.

*Docket:* To read or download comments or other information in the docket, go to Docket No. OSHA–2023–0008 at <https://www.regulations.gov>. All comments and submissions are listed in the <https://www.regulations.gov> index; however, some information (e.g., copyrighted material) is not publicly available to read or download through that website. All comments and submissions, including copyrighted material, are available for inspection through the OSHA Docket Office. Contact the OSHA Docket Office at (202) 693–2350 (TDY number 877–889–5627) for assistance in locating docket submissions.

When citing exhibits in the docket in this final rule, OSHA includes the term

“Document ID” followed by the last four digits of the Document ID number. Citations also include, if applicable, page numbers (designated “p.”), and in a limited number of cases a footnote number (designated “Fn.”). In a citation that contains two or more Document ID numbers, the Document ID numbers are separated by semi-colons (e.g., 0001; 0002).

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*Copies of this Federal Register notice and news releases:* Electronic copies of these documents are available at OSHA's web page at <https://www.osha.gov>.

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**I. Executive Summary**

Since the Occupational Safety and Health Act of 1970 (OSH Act or Act) was passed in 1970, section 8(e) of the OSH Act has required that, subject to regulations issued by the Secretary of Labor (via OSHA), a representative of the employer and a representative authorized by employees “shall” each have the opportunity to accompany OSHA during the physical inspection of the workplace (i.e., “the walkaround”) for the purpose of aiding OSHA's inspection. One of section 8(e)'s implementing regulations, at 29 CFR 1903.8(c), provided that a representative authorized by employees “shall be an employee(s) of the employer.” However, that regulation also created an exception for “a third party who is not an employee of the employer” when, “in the judgment of the Compliance Safety and Health Officer, good cause has been shown” why the third party was “reasonably necessary to the conduct of an effective and thorough physical inspection of the workplace. . . .” 29 CFR 1903.8(c) (1971). The regulation pointed to two non-exhaustive examples—a safety engineer and an industrial hygienist.

While OSHA has long permitted employee representatives to be third parties pursuant to 29 CFR 1903.8(c), in

2017, a district court concluded that interpretation was not consistent with the regulation. Because the first sentence of 1903.8(c) explicitly stated that employee representatives “shall be employees of the employer,” it rejected OSHA’s interpretation as “flatly contradict[ing]” the regulation. *Nat’l Fed’n of Indep. Bus. v. Dougherty*, No. 3:16–CV–2568–D, 2017 WL 1194666, at \*11 (N.D. Tex. Feb. 3, 2017) (*NFIB v. Dougherty*). However, the district court also recognized that OSHA’s interpretation that third parties could be employee representatives was a “persuasive and valid” reading of section 8(e) of the OSH Act. *Id.* at 12. The court concluded that “the Act merely provides that the employee’s representative must be authorized by the employees, not that the representative must also be an employee of the employer.” *Id.*

This final rule has a narrow purpose and makes two changes to 1903.8(c). First, in response to the district court’s decision, it clarifies that consistent with Section 8(e) of the OSH Act, employee representatives may either be an employee of the employer or a third party. Second, consistent with OSHA’s longstanding practice, it clarifies that a third-party representative authorized by employees may have a variety of skills, knowledge, or experience that could aid the CSHO’s inspection. The latter revision clarifies that employees’ options for third-party representation during OSHA inspections are not limited to only those individuals with skills and knowledge similar to that of the two examples (industrial hygienist or safety engineer) provided in the prior regulatory text. OSHA has retained the longstanding requirement in 1903.8(c) that third-party representatives may accompany the CSHO when good cause has been shown why they are reasonably necessary to the conduct of an effective and thorough physical inspection of the workplace.

These revisions to 1903.8(c) do not change the CSHO’s authority to determine whether good cause has been shown why an individual is reasonably necessary to the conduct of an effective and thorough physical inspection of the workplace. See 29 CFR 1903.8(b). The revisions also do not affect other provisions of section 1903.8, such as the CSHO’s authority to deny the right of accompaniment to any individual whose conduct interferes with a fair and orderly inspection (29 CFR 1903.8(d)), the requirement that the conduct of inspections preclude unreasonable disruption of the operations of the employer’s establishment (29 CFR 1903.7(d)), or the employer’s right to

limit entry of employee authorized representatives into areas of the workplace that contain trade secrets (29 CFR 1903.9(d)).

As discussed below, OSHA’s revisions will better align the language in 1903.8(c) with the language and purpose in section 8(e) of the OSH Act, 29 U.S.C. 657(e). By clarifying who can serve as employees’ walkaround representative, the rule facilitates improved employee representation during OSHA inspections. Employee representation is vital to thorough and effective OSHA inspections, and OSHA finds these changes will improve the effectiveness of OSHA inspections and benefit employees’ health and safety. OSHA determined that the rule appropriately recognizes employees’ statutory right to a walkaround representative and OSHA’s need for thorough and effective inspections while still protecting employers’ privacy and property interests. Additionally, OSHA has concluded that this rule will not increase employers’ costs or compliance burdens.

## II. Background

### A. The OSH Act and OSHA’s Inspection Authority

The OSH Act was enacted “to assure so far as possible every working [person] in the Nation safe and healthful working conditions and to preserve our human resources” (29 U.S.C. 651(b)). To effectuate the Act’s purpose, Congress authorized the Secretary of Labor to promulgate occupational safety and health standards (see 29 U.S.C. 655). The Act also grants broad authority to the Secretary to promulgate rules and regulations related to inspections, investigations, and recordkeeping (see 29 U.S.C. 657).

Section 8 of the OSH Act states that OSHA’s inspection authority is essential to carrying out the Act’s purposes and provides that employers must give OSHA access to inspect worksites “without delay” (29 U.S.C. 657(a)). Section 8(e) of the Act provides specifically that “[s]ubject to regulations issued by the Secretary, a representative of the employer and a representative authorized by [its] employees shall be given an opportunity to accompany [the CSHO] for the purpose of aiding such inspection” (29 U.S.C. 657(e)). Section 8(g) further authorizes the Secretary to promulgate such rules and regulations as the agency deems necessary to carry out the agency’s responsibilities under this Act, including rules and regulations dealing with the inspection of an employer’s establishment (29 U.S.C. 657(g)).

### B. Regulatory History and Interpretive Guidance

On May 5, 1971, OSHA proposed rules and general policies for the enforcement of the inspection, citation, and penalty provisions of the OSH Act. (36 FR 8376, May 5, 1971). OSHA subsequently issued regulations for inspections, citations, and proposed penalties at 29 CFR part 1903. (36 FR 17850, Sept. 4, 1971).

The OSH Act and 29 CFR part 1903 provide CSHOs with significant authority to conduct OSHA’s inspections. Part 1903 contains specific provisions that describe the CSHO’s authority and role in carrying out inspections under the OSH Act. For example, the CSHO is in charge of conducting inspections and interviewing individuals and has authority to permit additional employer representatives and representative(s) authorized by employees to accompany the CSHO during the physical inspection of the workplace. See 29 CFR 1903.8(a). In addition, the CSHO has the authority to resolve any disputes about who the employer and employee representatives are and to deny any person the right of accompaniment if their conduct interferes with a fair and orderly inspection. See 29 CFR 1903.8(b), (d). The CSHO also has authority to use various reasonable investigative methods and techniques, such as taking photographs, obtaining environmental samples, and questioning individuals while carrying out their inspection. 29 CFR 1903.7(b); see also 1903.3(a).

Section 1903.8(c), the subject of this rulemaking, authorizes the CSHO to determine whether third-party representatives would aid OSHA’s physical inspection of a workplace. Prior to this rulemaking, section 1903.8(c) provided: “The representative(s) authorized by employees shall be an employee(s) of the employer. However, if in the judgment of the Compliance Safety and Health Officer, good cause has been shown why accompaniment by a third party who is not an employee of the employer (such as an industrial hygienist or a safety engineer) is reasonably necessary to the conduct of an effective and thorough physical inspection of the workplace, such third party may accompany the Compliance Safety and Health Officer during the inspection.” 29 CFR 1903.8(c) (1971). This paragraph, which primarily addresses employer and employee representatives during inspections, had not been revised since it was adopted in 1971.

Since issuing its inspection-related regulations, OSHA has provided guidance on its interpretation of section 1903.8(c) and the meaning of “representative authorized by employees” for purposes of the OSHA walkaround inspection. For example, on March 7, 2003, OSHA issued a letter of interpretation to Mr. Milan Racic (Racic letter), a health and safety specialist with the International Brotherhood of Boilermakers (Document ID 0002). Mr. Racic asked whether a union representative who files a complaint on behalf of a single worker could then also act as a walkaround inspection representative in a workplace that has no labor agreement or certified bargaining agent (Document ID 0002). In its response letter, OSHA stated that there was no “provision for a walkaround representative who has filed a complaint on behalf of an employee of the workplace” (Document ID 0002).

On February 21, 2013, OSHA issued a letter of interpretation to Mr. Steve Sallman (Sallman letter) of the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (Document ID 0003). Mr. Sallman asked whether workers at a worksite without a collective bargaining agreement could designate a person affiliated with a union or a community organization to act on their behalf as a walkaround representative. OSHA responded in the affirmative, explaining that such person could act on behalf of employees as long as they had been authorized by employees to serve as their representative.

OSHA further explained that the right is qualified by 29 CFR 1903.8, which gives CSHOs the authority to determine who can participate in an inspection. OSHA noted that while 1903.8(c) acknowledged that most employee representatives will be employees of the employer being inspected, the regulation also “explicitly allows walkaround participation by an employee representative who is not an employee of the employer when, in the judgment of the OSHA compliance officer, such representative is ‘reasonably necessary to the conduct of an effective and thorough physical inspection’” (Document ID 0003). OSHA explained that such representatives are reasonably necessary when they will make a positive contribution to a thorough and effective inspection (Document ID 0003).

OSHA gave several examples of how an authorized employee representative who was not an employee of the

employer could make an important contribution to the inspection, noting that the representative might have a particular skillset or experience evaluating similar working conditions in a different facility. OSHA also highlighted the usefulness to workers and to the CSHO of an employee representative who is bilingual or multilingual to better facilitate communication between employees and the CSHO during an inspection.

Additionally, OSHA noted that the 2003 Racic letter had inadvertently created confusion among the regulated community regarding OSHA’s interpretation of an authorized employee representative for walkaround inspection purposes. OSHA explained that the Racic letter merely stated that a non-employee who files a complaint does not necessarily have a right to participate in an inspection arising out of that complaint, but that it did not address the rights of workers without a certified or recognized collective bargaining agent to have a representative of their own choosing participate in an inspection. OSHA withdrew the Racic letter to eliminate any confusion and then included its interpretation of 29 CFR 1903.8(c) as to who could serve as an authorized employee representative when it updated its Field Operations Manual (FOM) CPL 02–00–159 on October 1, 2015 (Document ID 0004). The FOM explained that “[i]t is OSHA’s view that representatives are ‘reasonably necessary’, when they make a positive contribution to a thorough and effective inspection” and recognized that there may be cases in which workers without a certified or recognized bargaining agent would authorize a third party to represent the workers on the inspection (Document ID 0004). OSHA noted that “[t]he purpose of a walkaround representative is to assist the inspection by helping the compliance officer receive valuable health and safety information from workers who may not be able or willing to provide such information absent the third-party participants” (Document ID 0004).

### C. Litigation and Subsequent Agency Action

In September 2016, several years after OSHA issued the Sallman letter, the National Federation of Independent Business (NFIB) filed a suit in the district court for the Northern District of Texas challenging the Sallman letter, arguing it should have been subject to notice and comment rulemaking and that it conflicted with OSHA’s regulations and exceeded OSHA’s statutory authority. *NFIB v. Dougherty*,

2017 WL 1194666. On February 3, 2017, the district court concluded that OSHA’s interpretation as stated in the Sallman letter was not consistent with 29 CFR 1903.8(c) and such a change to a regulation could not be made without notice and comment rulemaking. *Id.* at \*11. The district court held that the letter “flatly contradicts a prior legislative rule as to whether the employee representative must himself be an employee.” *Id.*

Nevertheless, the court rejected NFIB’s claim that the Sallman letter conflicted with the OSH Act, finding that OSHA’s Sallman letter of interpretation was “a persuasive and valid construction of the Act.” *Id.* at \*12. The court concluded that “the Act merely provides that the employee’s representative must be authorized by the employees, not that the representative must also be an employee of the employer.” *Id.*

Following this decision, on April 25, 2017, OSHA rescinded the Sallman letter (Document ID 0006). OSHA also revised the Field Operations Manual to remove language that incorporated the Sallman letter (CPL 02–00–163 (09/13/2019), Document ID 11544).

On August 30, 2023, OSHA published a notice proposing revisions of 29 CFR 1903.8(c) to clarify who may serve as a representative authorized by employees for the purpose of OSHA’s walkaround inspection (88 FR 59825).

### III. Legal Authority

The OSH Act authorizes the Secretary of Labor to issue safety and health “standards” and other “regulations.” See, e.g., 29 U.S.C. 655, 657. An occupational safety and health standard, issued pursuant to section 6 of the Act, prescribes measures to be taken to remedy an identified occupational hazard. See 29 U.S.C. 652(8) (an occupational safety and health standard “requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment.”). In contrast, a “regulation” is issued pursuant to general rulemaking authority found, *inter alia*, in section 8 of the Act, and establishes an “enforcement or detection procedure designed to further the goals of the Act generally.” *Workplace Health and Safety Council v. Reich*, 56 F. 3d 1465, 1468 (D.C. Cir. 1995). Although the U.S. Chamber of Commerce (Chamber of Commerce) suggested that this rule should be subject to the requirement that “occupational safety and health standards” be “reasonably necessary”

under section 3(8) of the OSH Act, (Document 1952, p. 2), inspection-related requirements, such as the requirements in 1903.8(c), are properly characterized as regulations because they do not require “conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment.” 29 U.S.C. 652(8).

In this rulemaking, OSHA is revising its existing regulation at 1903.8(c) pursuant to OSHA’s authority under section 8 of the OSH Act. See 29 U.S.C. 657(e) (describing the Secretary’s authority to promulgate regulations related to employer and employee representation during an inspection); 657(g)(2) (describing the Secretary of Labor’s and the Secretary of Health and Human Services’ authority to “each prescribe such rules and regulations as [they] may deem necessary to carry out their responsibilities under this Act, including rules and regulations dealing with the inspection of an employer’s establishment”). This rule clarifies employees’ statutory right to a walkaround representative under section 8 of the OSH Act and does not impose any new substantive inspection-related requirements.

Several provisions of the OSH Act underscore OSHA’s authority to promulgate inspection-related requirements, including those that relate to the rights of employees to have an authorized representative accompany OSHA during a physical inspection of their workplace. Section 2 of the OSH Act states that the Act’s express purpose is “to assure so far as possible every working man and woman in the Nation safe and healthful working conditions.” 29 U.S.C. 651(b). To effectuate that purpose, Congress provided OSHA with broad authority under section 8 to conduct inspections of workplaces and records, to require the attendance and testimony of witnesses, and to require the production of evidence. See generally 29 U.S.C. 657. OSHA’s ability to carry out workplace inspections is critical to the OSH Act’s entire enforcement scheme. See 29 U.S.C. 658 (authorizing OSHA to issue citations for violations following an inspection or investigation); 659 (citations shall be issued within a reasonable time after inspection or investigation). Moreover, any approved State occupational safety and health plan must provide for an OSHA inspector’s right of entry and inspection that is at least as effective as the OSH Act. See 29 U.S.C. 667(c)(3).

In addition to granting OSHA broad authority to conduct workplace

inspections and promulgate regulations to effectuate those inspections, Congress also recognized the importance of ensuring employee participation and representation in the inspection process. The legislative history of section 8 of the OSH Act shows Congress’ intent to provide representatives authorized by employees with an opportunity to accompany the inspector in order to benefit the inspection process and “provide an appropriate degree of involvement of employees.” S. Rep. No. 91–1282 91st Cong., 2nd Sess. (1970), reprinted in *Legislative History of the Occupational Safety and Health Act of 1970* at 151 (Comm. Print 1971). Senator Harrison A. Williams of New Jersey, who was a sponsor of the bill that became the OSH Act, explained that the opportunity for workers themselves and a representative of their choosing to accompany OSHA inspectors was “manifestly wise and fair” and “one of the key provisions of the bill.” Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 92d Cong. 1st Sess., reprinted in *Legislative History of the Occupational Safety and Health Act of 1970*, at 430 (Comm. Print. 1971).

The OSH Act’s legislative history further indicates that Congress considered potential concerns related to the presence of a representative authorized by employees at the inspection and ultimately decided to expressly include this right in section 8(e) of the Act. Congressional debate around this issue included concern from some members of Congress that the presence in the inspection of a representative authorized by employees would cause an undue burden on employers or be used as “an effort to ferment labor unrest.” See Comments of Congressperson William J. Scherle of Iowa, 92d Cong. 1st Sess., reprinted in *Legislative History of the Occupational Safety and Health Act of 1970*, at 1224 (Comm. Print 1971); see also Comments of Congressperson Michel of Illinois, *id.* at 1057. Similarly, Senator Peter Dominick of Colorado proposed an amendment to the Senate bill that would have removed the right of a representative authorized by the employees to accompany the CSHO and instead would have only required that the CSHO consult with employees or their representative at “a reasonable time.” Proposed Amendment No. 1056, 92d Cong. 1st Sess., reprinted in *Legislative History of the Occupational Safety and Health Act of 1970*, at 370 (Comm. Print 1971). One of the stated reasons for the proposed amendment was a concern that “[t]he mandatory

‘walk-around’ provisions now in the bill could . . . lead to ‘collective bargaining’ sessions during the course of the inspection and could therefore interfere both with the inspection and the employer’s operations.” *Id.* at 372. This proposed amendment was rejected, and section 8(e) of the OSH Act reflects Congress’ considered judgment of the best way to strike the balance between employers’ concerns about workplace disruptions and the critical importance of employee representation in the inspection process.

And while section 8(e) underscores the importance of employer and employee representation in OSHA’s workplace inspection, the Act places only one criterion on who can be an employer or employee representative and that is that the representative “aid[] such inspection.” 29 U.S.C. 657(e). It does not state that the representative must be an employee of the employer. See *Matter of Establishment Inspection of Caterpillar Inc.*, 55 F.3d 334, 338 (7th Cir. 1995) (“[T]he plain language of § 8(e) permits private parties to accompany OSHA inspectors[.]”); *NFIB v. Dougherty*, 2017 WL 1194666, at \*12 (“[T]he Act merely provides that the employee’s representative must be authorized by the employee, not that the representative must also be an employee of the employer.”). Instead, the Act authorizes the Secretary of Labor (via OSHA) to issue regulations and determine who may be a representative for purposes of the OSHA inspection. 29 U.S.C. 657(e). Congress intended to give the Secretary of Labor the authority to issue regulations related to determining the specifics and resolving the question of who could be a representative for purposes of the walkaround inspection. See *Legislative History of the Occupational Safety and Health Act of 1970*, at 151 (Comm. Print 1971) (“Although questions may arise as to who shall be considered a duly authorized representative of employees, the bill provides the Secretary of Labor with authority to promulgate regulations for resolving this question.”).

The National Retail Federation (NRF) argued that the “Saxbe Amendment” to the OSH Act demonstrates that an “authorized” representative must be “one selected through the NLRA selection process” (Document ID 1776, p. 8). The Saxbe Amendment sought to “clarif[y] and protect[] from abuse” the right of accompaniment by adding “provisions making such right clearly subject to regulations of the Secretary, defining the purpose of such accompaniments as aid of the inspection, and extending mandatory consultation rights to a reasonable

number of employees where there is no ‘authorized’ representative of employees.’ Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 92d Cong. 1st Sess., reprinted in Legislative History of the Occupational Safety and Health Act of 1970, at 197–98 (Comm. Print. 1971). NRF points to the reason given for this amendment, which was to avoid scenarios in which the Secretary would have to “resolve union organizing issues which have no relationship to this legislation.” (Document ID 1776, p. 9) (citing Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 92d Cong. 1st Sess., reprinted in Legislative History of the Occupational Safety and Health Act of 1970, at 198 (Comm. Print 1971)).

This reference to union organizing simply reflects Congress’s acknowledgement that in some workplaces there may be disputes concerning union representation. However, it cannot be read to deny accompaniment rights to employees in non-union workplaces. See Comments of Congressperson William J. Scherle of Iowa, 92d Cong. 1st Sess., reprinted in Legislative History of the Occupational Safety and Health Act of 1970, at 1224 (Comm. Print 1971) (“The bill provides that union representatives *or any employee representative* be allowed to accompany inspectors on their plant tours.” (emphasis added)). Moreover, the concern raised about union organizing has been addressed both through OSHA policy and regulations. As discussed in Section IV.E, National Labor Relations Act and Other Labor-Related Comments, it is OSHA’s longstanding policy to avoid being interjected into labor relations disputes. See also OSHA Field Operations Manual, Chapter 3, Sections IV.G–H (“Under no circumstances are CSHOs to become involved in a worksite dispute involving labor management issues or interpretation of collective bargaining agreements”). OSHA’s regulations also provide that the inspection shall “preclude unreasonable disruption of the employer’s establishment,” 29 CFR 1903.7(d), and that the CSHO may deny the right of accompaniment to any person whose conduct “interferes with a fair and orderly inspection.” 29 CFR 1903.8(d). Further, where there is a dispute that prevents the CSHO from determining with reasonable certainty who is the authorized employee representative, the CSHO will consult with a reasonable number of employees concerning matters of safety and health in the workplace. 29 CFR 1903.8(b).

This final rule does not infringe on employer’s Fourth Amendment rights.

The Fourth Amendment protects employers against “unreasonable searches and seizures,” and, absent consent from an employer, OSHA is required to obtain a warrant to conduct a physical inspection of their workplace. See *Marshall v. Barlow’s Inc.*, 436 U.S. 307 (1978). Where the government has sought and obtained a search warrant supported by probable cause and acted within its scope, the resulting search is presumptively reasonable under the Fourth Amendment. See *Sims v. Labowitz*, 885 F.3d 254, 268 (4th Cir. 2018). “And for the search to be reasonable, it does not have to be conducted flawlessly nor by the least intrusive means.” *Id.* (citing *Skinner v. Ry. Labor Executives’ Ass’n*, 489 U.S. 602, 629 n.9 (1989)). This rule comports with the Fourth Amendment’s prohibition against “unreasonable searches and seizures” because all OSHA inspections, including those in which employees authorize a third-party walkaround representative under this final rule, will be carried out either with the employer’s consent or pursuant to a duly issued inspection warrant. Furthermore, while the OSH Act grants the Secretary of Labor broad authority to inspect workplaces “without delay” to find and remedy safety and health violations, 29 U.S.C. 657(a)(1), these inspections must be carried out “during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner.” *Id.* at 657(a)(2); see also 29 CFR 1903.7(d) (“The conduct of inspections shall be such as to preclude unreasonable disruption of the operations of the employer’s establishment.”).

Some commenters argued that allowing a third-party employee representative to accompany OSHA during the walkaround inspection would make OSHA’s search unreasonable (see, e.g., Document ID 1976, p. 19). However, as discussed in Section IV.D.2, Fourth Amendment Issues, the mere presence of a third-party employee representative on the employer’s premises does not render OSHA’s inspection unreasonable for Fourth Amendment purposes. See *Bills v. Aseltine*, 958 F.2d 697, 703 (6th Cir. 1992) (noting that a third party’s entry onto subject’s private property may be “justified if he had been present to assist the local officers”); see also *Wilson v. Layne*, 526 U.S. 603 (1999) (holding that bringing members of the media into a home during the execution of a search warrant violated the Fourth Amendment when the presence of the third parties in the home was *not* in aid of the execution of the warrant).

Additionally, contrary to the concerns expressed by some commenters opposed to the rule, this rulemaking does not grant third parties “unfettered access” to an employer’s private property (see, e.g., Document ID 0040, p. 4; 0045; 0235, p. 2; 0528; 1757, p. 3; 1762, p. 3; 1974, p. 2; 9316). Rather, as explained in Sections IV.A, IV.C, and IV.D.II, the role of the third-party representative is limited to aiding the inspection; they are only permitted to accompany the CSHO, and they may not stray from the CSHO or conduct their own searches.

This final rule preserves the requirement that the CSHO must first determine “good cause has been shown” why the accompaniment by a third party is “reasonably necessary to the conduct of an effective and thorough physical inspection of the workplace.” 29 CFR 1903.8(c). And, under OSHA’s existing regulations, the CSHO is authorized to deny the right of accompaniment to any person whose conduct interferes with a fair and orderly inspection. 29 CFR 1903.8(d). Accordingly, OSHA inspections conducted pursuant to this rule will comport with the Fourth Amendment’s reasonableness requirement because the role of the third-party employee representative will be limited to aiding OSHA’s inspection. Indeed, the CSHO will ensure the inspection is conducted in a reasonable manner per section 8(a)(2) of the Act and 29 CFR 1903.3(a). See *Matter of Establishment Inspection of Caterpillar Inc.*, 55 F.3d at 339 (“[T]he Act and its regulations establish a number of administrative safeguards that adequately protect the rights of employers and limit the possibility that private participation in an inspection will result in harm to the employer.”).

Moreover, because OSHA’s inspections are conducted in accordance with the Fourth Amendment, they do not constitute a “physical taking” under the Takings Clause of the Fifth Amendment. Under the Fifth Amendment’s Takings Clause, the government must provide just compensation to a property owner when the government physically acquires private property for public use. See *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Plan. Agency*, 535 U.S. 302, 321 (2002). However, the Supreme Court has recognized that “[b]ecause a property owner traditionally [has] had no right to exclude an official engaged in a reasonable search, government searches that are consistent with the Fourth Amendment and state law cannot be said to take any property right from landowners.” *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2079 (2021).

Nonetheless, some commenters argued that the rule would affect an unconstitutional *per se* taking under *Cedar Point Nursery* because it would grant third parties access to the employer's property (Document ID 0043, p. 2–3; 1952, p. 8–9; 1976, p. 18–19). As discussed more fully in Section IV.D.3, Fifth Amendment Issues, this rule does not constitute a *per se* taking because the presence of third-party employee representatives on the employer's property under this rule will be limited to accompanying the CSHO during a lawful physical inspection of the workplace and their sole purpose for being on the employer's premises will be to aid the inspection. See 29 CFR 1903.7(d), 1903.8(b); see also *Matter of Establishment Inspection of Caterpillar Inc.*, 55 F.3d at 339.

Based on the foregoing, OSHA has determined that it has legal authority for its revisions to OSHA's existing regulation at 29 CFR 1903.8(c).

#### IV. Summary and Explanation

On August 30, 2023, OSHA proposed amending its existing rule for the Representatives of Employers and Employees at 29 CFR 1903.8(c) to clarify who may serve as a representative authorized by employees during OSHA's walkaround. 88 FR 59825. OSHA provided sixty days for public comment and subsequently extended the comment period for an additional two weeks. 88 FR 71329. By the end of the extended comment period, OSHA had received 11,529 timely comments on the proposed rule that were posted to the docket.

Prior to this rulemaking, the rule stated that a representative authorized by employees "shall be an employee(s) of the employer." However, that regulation also created an exception for "a third party who is not an employee of the employer" when, "in the judgment of the Compliance Safety and Health Officer, good cause has been shown" why the third party was "reasonably necessary to the conduct of an effective and thorough physical inspection of the workplace. . . ." 29 CFR 1903.8(c) (1971). The regulation also listed two non-exhaustive examples of such third parties—a safety engineer and an industrial hygienist.

OSHA proposed two revisions of 29 CFR 1903.8(c). First, the agency proposed to clarify that the representative(s) authorized by employees may be an employee of the employer or a third party. Second, OSHA proposed that a third-party representative authorized by employees may be reasonably necessary to the conduct of an effective and thorough

physical inspection of the workplace by virtue of their knowledge, skills, or experience. This proposed revision was intended to clarify that the employees' options for third-party representation during OSHA inspections are not limited to only those individuals with skills and knowledge similar to that of the two examples provided in prior regulatory text: Industrial Hygienist or Safety Engineer.

OSHA noted in the Notice of Proposed Rulemaking (NPRM) that the proposed revisions to section 1903.8(c) would not change the CSHO's authority to determine whether an individual is a representative authorized by employees (29 CFR 1903.8(b)). Also, the proposed revisions would not affect other provisions of 29 CFR part 1903 that limit participation in walkaround inspections, such as the CSHO's authority to prevent an individual from accompanying the CSHO on the walkaround inspection if their conduct interferes with a fair and orderly inspection (29 CFR 1903.8(d)) or the employer's right to limit entry of employee authorized representatives into areas of the workplace that contain trade secrets (29 CFR 1903.9(d)). As always, the conduct of OSHA's inspections must preclude unreasonable disruption of the operations of employer's establishment. See 29 CFR 1903.7(d).

OSHA sought public comment on all aspects of the rule, including why employees may wish to be represented by a third-party representative and examples of third-party representatives who have been or could be reasonably necessary to the conduct of an effective and thorough walkaround inspection. OSHA also sought examples and information about any other unique skills that have been helpful or added safety and health value to OSHA's inspection. Additionally, OSHA solicited input on regulatory options, such as whether the agency should maintain the "good cause" and "reasonably necessary" requirement.

OSHA received comments in favor of the rule and opposed to it, ranging from requests to withdraw the rule entirely to criticism that the rule does not go far enough to ensure that employees are able to select a representative of their choice. Many organizations representing employers contended that the rule represents a significant change to OSHA's procedures and will facilitate union organizing. Among other arguments, these organizations generally argued that the rule: (1) conflicts with the OSH Act and existing OSHA regulations; (2) infringes on employers' Constitutional rights, particularly

property rights; (3) imposes substantial costs, particularly for small businesses; and (4) will be difficult for OSHA to administer. Conversely, organizations representing employees praised the rule for encouraging employee representation, ensuring thorough and effective inspections, and promoting workers' safety and health. Some organizations representing employees also argued that OSHA should eliminate the "good cause" and "reasonably necessary" requirement for third parties.

OSHA considered all issues raised, and, as explained in depth below, determined that revising 1903.8(c) more clearly aligns with the language and purpose of section 8(e) of the OSH Act, 29 U.S.C. 657(e). Moreover, OSHA's revisions to 1903.8(c) better ensure employee involvement in an OSHA inspection, which is a critical component to conducting an effective and thorough inspection. As explained further below, OSHA has decided to retain the existing "good cause" and "reasonably necessary" requirement in the final rule. Additionally, because of commenter concerns that the use of the word "participation" in the NPRM suggested the employee representative had a role in conducting OSHA's inspection, OSHA removed that term in favor of "accompaniment" in the final rule.

##### A. The Need for and Benefits of Third-Party Representation

The text of the OSH Act provides that, "[s]ubject to regulations issued by the Secretary, a representative of the employer and a representative authorized by his employees shall be given an opportunity to accompany the Secretary or his authorized representative during" physical workplace inspections. 29 U.S.C. 657(e) (emphasis added). There is nothing in the OSH Act to suggest that employee (or employer) representatives must be employees of the employer. The only criterion the statute imposes is that the representative will "aid[] such inspection." In the NPRM, OSHA explained that, based on its experience, there are a variety of third parties who might serve as representatives authorized by employees who could aid the OSHA walkaround inspection. 88 FR at 59829–30. As an example, OSHA highlighted an inspection where a worker for a company removing asbestos at a worksite reported safety concerns to OSHA and a third party. The third party contacted OSHA and a community organization on behalf of the workers to ensure their safety and health concerns were fully communicated to and understood by the

CSHO. The community organization's attorney and a former employee of the workplace were chosen as the employees' representatives to participate in the walkaround inspection. OSHA found the presence of both individuals to be very beneficial to the inspection because the representatives were able to clearly identify and communicate safety concerns to the CSHO during the walkaround. Many of the exposed workers on this worksite were not fluent in English and having representatives who the workers trusted and could facilitate communication with the CSHO enabled OSHA to conduct numerous worker interviews and better investigate the workplace conditions. 88 FR 59830.

In the NPRM, OSHA sought public comment on any other examples where third parties benefitted OSHA inspection, the reasons why employees may desire a third-party representative, and any data or anecdotal examples of individuals who may serve as third parties, among other questions. In response, many commenters, both for and against the proposed rule, commented on the need for third-party employee representatives and the benefits they bring to OSHA's inspections.

After reviewing the comments, as summarized below, OSHA has concluded that third-party representatives authorized by employees may have a variety of skills, knowledge, or experience that could aid the CSHO's inspection. This includes, but is not limited to, knowledge, skills, or experience with particular hazards or conditions in the workplace or similar workplaces, as well as any relevant language or communication skills a representative may have to facilitate better communication between workers and the CSHO. OSHA has therefore deleted the two enumerated examples in the current regulation—industrial hygienists and safety engineers—to clarify that different types of individuals may be reasonably necessary to OSHA's inspection. These revisions do not preclude an industrial hygienist or safety engineer from serving as an employee representative; instead, the revisions more properly focus the CSHO's determination on factors such as the knowledge, skills, or experience of the third party rather than the third party's professional discipline. 88 FR 59829.

#### 1. Comments Supporting Third-Party Representation

OSHA received numerous comments demonstrating the importance and

benefits of third-party representation—many of which included real-life examples of how third-party representatives have assisted OSHA over the years. Commenters supporting the rule emphasized the benefits of third parties' technical and/or subject matter expertise. They also appreciated OSHA's effort to clarify that various types of third parties, and not just those with the above expertise, can aid OSHA's inspections based on a variety of knowledge, skills, or experience (see, e.g., Document ID 1972, p. 3–4). As one commenter noted, third-party representatives need not be “certified expert[s]” to meaningfully contribute to an inspection (Document ID 0022).

In particular, commenters supporting third-party representation pointed out that: (1) third parties can possess helpful technical and/or subject-matter expertise with hazards, industries, and OSHA's investigation process; (2) third parties can provide critical language skills and related cultural competencies; (3) third parties can facilitate employee cooperation by increasing employees' trust in the inspection process; (4) third-party representation greatly benefits inspections involving multi-employer worksites; and (5) third-party representation empowers workers and appropriately balances the rights and needs of all parties during the inspection process.

First, numerous commenters emphasized that third parties can possess helpful technical and/or subject-matter expertise with particular hazards, industries, or the investigation process (see, e.g., Document ID 1753, p. 5–7). The United Steelworkers Union (USW) noted that it has brought in technical experts to serve as designated employee representatives in OSHA inspections involving issues related to combustible dust, combustion safety, electrical safety, and occupational medicine (Document ID 1958, p. 5). The Amalgamated Transit Union also stated that its union officials, including those in the Health and Safety Department, have transit safety and health knowledge that could be relevant to an OSHA investigation, such as technical expertise regarding transit vehicle designs, transit maintenance equipment, and a “big-picture view” of the hazard; it also pointed to union officials' ability to assemble workers for interviews, identify relevant evidence, and bring a level of familiarity and comfort in speaking with government agents that employees might lack (Document ID 1951, p. 1–2).

Similarly, the USW provided examples of where its familiarity with OSHA inspections was beneficial. In

one such example involving an explosion and fatalities at a USW-represented workplace, a USW safety representative from the union's headquarters traveled to the site to assist (Document ID 1958, p. 4–5). Because access to the area at issue was initially restricted to OSHA and others, the safety representative assisted OSHA with determining who should be interviewed and what information OSHA should request from the employer; the third-party union representative was also needed to help the local union and OSHA obtain employees' involvement during interviews and the walkaround (Document ID 1958, p. 4–5).

In addition, the USW commented that “[w]orkplaces that do not have a collective bargaining representative may be especially vulnerable to safety hazards, and employees in these workplaces benefit from the expertise and advocacy experience that a community group, safety expert, or labor organization can provide in a walkaround inspection” (Document ID 1958, p. 3). Farmworker Justice agreed, recognizing that third parties such as union representatives and worker advocates have industry-specific or workplace safety expertise that they can use to help workers identify and communicate workplace safety concerns to OSHA (Document ID 1763, p. 3–4).

Several commenters emphasized the benefits of third parties' industry-specific expertise in particular. For example, the Utility Workers Union of America (UWUA) noted that, in recent years, the UWUA national union provided a walkaround representative in numerous incidents that “have proven the difference between a fair investigation and one that unfairly weighs in the employer's balance” (Document ID 1761, p. 1). UWUA described one inspection in Pennsylvania involving the death of an overhead lineman who had been working with a crew operating a bucket truck when that truck unexpectedly rolled downhill and overturned in the road (Document ID 1761, p. 1). UWUA explained that the national union representative was able to inform the CSHO about technological and work practice changes in the industry, including the use of an inclinometer, that were not immediately apparent even to the workers themselves due to inadequate training (Document ID 1761, p. 1). OSHA's inspection benefitted from the national union representative's industry-specific expertise (Document ID 1761, p. 1).

Similarly, the USW also highlighted an OSHA inspection that benefitted

from a third-party representative who had industry-specific expertise (Document ID 1958, p. 3). In that inspection, where a USW mechanic died in a flash fire involving a dust collection system, a USW safety representative from the union's headquarters accompanied the CSHO along with local union representatives who had never been part of an OSHA inspection or a fatality investigation (Document ID 1958, p. 3). The USW safety representative's experience in the industry, experience serving on one of the National Fire Protection Agency's combustible dust committees, and experience with prior OSHA inspections and fatality investigations benefitted the inspection (Document ID 1958, p. 3–4). According to the USW, the CSHO confirmed that the third-party's assistance made the inspection more “through[] and complete” (Document ID 1958, p. 3).

In the healthcare industry, one commenter, a former director of the safety and health program for the American Federation of State, County and Municipal Employees (AFSCME), provided examples of where this commenter was able to assist CSHOs during past inspections with hazards that were not well-known at the time (Document ID 1945, 2–3). This commenter stated that they were able to provide guidance to CSHOs regarding workplace violence and bloodborne pathogens and what similar facilities were doing to abate similar problems and hazards (Document ID 1945, p. 2–3).

In addition, the International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of the United States, Its Territories and Canada, (“IATSE”) asserted that third-party representation can also benefit inspections in their industry, as “[t]erminology, specific job functions, equipment, and procedures might be unfamiliar to an industry outsider” (Document ID 1970, p. 1). As an example, IATSE explained that, if a worker was injured in a remote location during a motion picture production, a third-party walkaround representative could explain the industry practice of equipment rentals, camera placement, crew positions, and other industry-standard procedures (Document ID 1970, p. 1).

Several of these commenters explained that the expertise of third parties is helpful to OSHA because CSHOs cannot be expected to have knowledge or expertise with every industry, craft, task, hazard, occupation, or employer (Document ID 1969, p. 14; see also 1753, p. 5–7). Commenters

noted that third parties can assist when hazards are hidden or not immediately apparent to the CSHO (see, e.g., Document ID 1753, p. 7).

Second, many commenters, including the National Employment Law Project (NELP), also identified a need for third-party representatives with language skills when CSHOs interact with workers from a linguistic or other background with which the CSHO is unfamiliar (see, e.g., Document ID 1972, p. 4). Numerous commenters noted the importance of third-party representatives who can interpret for limited-English proficient workers (see, e.g., Document ID 0030; 0037; 0526, p. 1–2; 1958, p. 2). For example, the USW explained that “employees can offer significantly more information when they can comfortably communicate in a language in which they are fluent” (Document ID 1958, p. 2). MassCOSH described the importance of having a “respected, culturally and linguistically competent” employee representative to ensure the CSHO obtains information needed for a complete and thorough inspection (Document ID 1750, p. 3). MassCOSH provided an example where several Central American immigrant workers suffered from lead poisoning at a lead recycling facility in Massachusetts (Document ID 1750, p. 3). The CSHO did not speak Spanish and could not communicate with Spanish-speaking workers, and so was unable to identify areas of lead contamination (Document ID 1750, p. 3). Workers subsequently contacted MassCOSH, which contacted OSHA and provided a Spanish-speaking representative to accompany the CSHO on a second inspection (Document ID 1750, p. 3). The representative was able to facilitate communication between the CSHO and workers, who pointed the CSHO to the areas that were particularly contaminated with lead but were not easily found (Document ID 1750, p. 3).

Similarly, Justice at Work described how a worker organization it collaborates with in Massachusetts, Centro Comunitario de Trabajadores (CCT), works with workers who face significant language barriers because many in the community do not speak English, and some are not fluent in Spanish and need K'iche' interpretation (Document ID 1980, p. 2). Justice at Work noted that a CCT leader was selected by workers to assist OSHA during a fatality investigation several years ago and workers were “immediately comfortable to see a member of their community there; they spoke freely with the CCT leader and pointed out the danger areas in the worksite” (Document ID 1980, p. 2).

United Brotherhood of Carpenters and Joiners of America (UBC) explained that union representatives may be aware of languages spoken by a workforce in a specific geographic area and have the language skills necessary to communicate with these workers (Document ID 1753, p. 6–7). UBC further noted that when serving as a third-party representative, these union representatives can bring these skills to assist CSHOs who may lack such a familiarity with the languages spoken by workers in that specific geographic area, such as Polish in the Chicago-area (Document ID 1753, p. 6–7). Nebraska Appleseed, which partners with hundreds of immigrant community members in advocating for safer working conditions, explained that workers in meat and poultry processing facilities often speak Spanish, Somali, Karen,<sup>1</sup> Vietnamese, and other languages not typically spoken by local OSHA staff (Document ID 1766, p. 1–3). Similarly, United Food and Commercial Workers (UFCW) explained that many union members struggle with language barriers, noting that in Nebraska and South Dakota, the immigrant population makes up over half the working staff (Document ID 1023, p. 3–4). Project WorkSAFE noted that, in Vermont, there is an increasing need to have individuals at a worksite who speak Spanish and English for translation purposes, but, in their experience, none of the CSHOs in Vermont OSHA speak Spanish (Document ID 0037).

A third-party's language skills can prevent situations “where employers or ‘ad hoc’ interpreters are the go-betweens for the CSHO and the worker” (Document ID 0526, p. 2). Justice at Work Pennsylvania explained that when supervisors translate for workers, flawed interpretations or even full fabrications may result, and a translator can facilitate “an accurate and complete” conversation between CSHOs and workers (Document ID 0526, p. 2). NELP stated that “poor communication between workers onsite and OSHA inspectors is not solely a function of language access. OSHA compliance officers may lack the cultural competence, community knowledge, and existing relationships with workers that are necessary to facilitate trust and frank communication” (Document ID 1972, p. 4). The USW also added that third-party representatives can provide “language justice” by ensuring “cultural competency, trust and knowledge” (Document ID 1958, p. 2). Even when a CSHO has the requisite language skills

<sup>1</sup> Karen languages are spoken in parts of Burma and Thailand.



or access to an interpreter, third-party representatives can provide needed “language and cultural competency skills” or have a prior relationship with workers, (Document ID 1972, p. 4–5; see also 1969, p. 18), and thereby bridge the gap between workers and CSHOs (see Document ID 1763, p. 4; 1972, p. 4). The AFL–CIO provided such an example when immigrant workers chose a faith leader from their community to be a representative during an OSHA inspection (Document ID 1969, p. 14). This faith leader helped the workers overcome their fear of speaking to the CSHO by drawing upon a prior relationship with the workers and by interpreting for them (Document ID 1969, p. 14).

Third, commenters explained that, in addition to technical expertise, third-party representatives may also benefit inspections by increasing employees’ trust in the inspection process and thereby their cooperation (see, e.g., Document ID 1972, p. 5–6). Commenters identified several reasons that employees may be reluctant to speak to an OSHA official, such as unfamiliarity with OSHA and their rights under the OSH Act, fears of retaliation, negative immigration consequences, language or cultural barriers, or their age, among other reasons (see, e.g., Document ID 0526, p. 3; 1031; 1763, p. 2–4). The AFL–CIO explained that many employers discourage workers from engaging with OSHA, noting that workers have shared that their employer threatened them with getting in trouble, personally fined, or losing their job as a result of an OSHA inspection (Document ID 1969, p. 13). The AFL–CIO noted that vulnerable workers, including immigrant workers and refugees, may fear that speaking with OSHA will jeopardize their ability to stay and work in the United States (Document ID 1969, p. 13). Similarly, Justice at Work Pennsylvania shared that, in one client’s workplace, employees were too fearful to cooperate with OSHA after their employer called U.S. Immigration and Customs Enforcement on a co-worker (Document ID 0526, p. 3). Several commenters noted that employees “may feel unsafe speaking to OSHA inspectors without a trusted representative. . . .” such as worker centers, unions, community organizations, and attorneys (see, e.g., Document ID 0031; 0034; 1031).

Commenters identified several ways that such third-party representation can promote employee trust and cooperation. For instance, commenters explained that a trusted employee representative can help workers understand OSHA’s inspection process

(see, e.g., Document ID 0042). Commenters also stated that third-party representatives can guide and support workers through the inspection process, providing assurances that it is safe and worthwhile to provide information and encouraging employees to communicate openly with OSHA (see, e.g., Document ID 0526, p. 3; 1969, p. 13). The AFL–CIO noted several examples of situations where workers were willing to speak with OSHA when a trusted representative was present, including the example described above where workers chose a faith leader who they knew personally and trusted (Document ID 1969, p. 14).

Additionally, commenters noted that third-party representatives can also serve as a buffer between the employer and employees who fear retaliation (see, e.g., Document ID 0014; 0022; 0089; 0120; 0526, p. 3; 1023, p. 5; 10725) and can communicate employees’ concerns for them (see, e.g., Document ID 1728, p. 3). As the National Black Worker Center explained, “We understand the layered experience of Black workers on the job, including the fear of reporting health and safety issues due to employer retaliation. We are uniquely suited to support workers who may have reservations about calling out issues on the job” (Document ID 1767, p. 2–3). The National Black Worker Center explained that allowing worker centers to provide a third-party employee representative will ensure that “the specific concerns and experiences of workers, including those who have been historically underserved and underrepresented, are given due consideration during inspections” (Document ID 1767, p. 3).

Some commenters also mentioned that a third-party representative can be especially helpful during fatality investigations, which are “particularly sensitive” (Document ID 1969, p. 17) and “stressful” for employees (1958, p. 3–5). In these situations, third-party representatives can put employees at ease and enable them to feel more comfortable interacting with CSHOs (see, e.g., 1958, p. 3–5; 1969, p. 17).

Several commenters also referenced an OSHA investigation in Palmyra, Pennsylvania where third-party representatives from the National Guestworkers Alliance (NGA), a workers’ advocacy group, had developed a relationship with the foreign students who worked at the inspected facility and assisted them by filing an OSHA complaint and accompanying OSHA during the inspection (see, e.g., Document ID 1945, p. 4–5; 1958, p. 3; 1978, p. 4–6). Commenters explained that OSHA

benefitted from NGA’s representation of these workers in identifying and understanding workplace safety issues (see, e.g., Document ID 1945, p. 4–5).

Fourth, several commenters pointed out the benefits of third-party representation on multi-employer worksites (see, e.g., Document ID 1747, p. 2; 1969, p. 16; 1970, p. 2). For example, the AFL–CIO pointed to an inspection involving a multi-employer worksite with union and non-union workers; the non-union workers designated a union agent who represented other workers on site as their walkaround representative (Document ID 1969, p. 16). The union agent assisted OSHA by providing information on the workplace respiratory procedures, which revealed violations of the respiratory protection standard and recordkeeping requirements (Document ID 1969, p. 16). In addition, IATSE stated that third-party representation can be helpful for inspections involving multi-employer worksites in the entertainment industry; IATSE explained that touring workers may be unfamiliar with worksite-based hazards and a location-based representative may better aid the CSHO during an inspection (Document ID 1970, p. 2).

Fifth, and last, commenters also expressed support for allowing third-party employee representatives on walkaround inspections because there is a need to balance employee and employer rights under the OSH Act. As the UWUA explained, “[a]lthough the value of having a worker’s chosen representatives involved in the investigation process cannot be mathematically quantified, . . . [a] worker representative brings the possibility of worker trust, subject matter expertise, language justice, empowerment, and protection to a situation that can otherwise simply devolve into the meting out of blame by an employer seeking only to protect itself” (Document 1761, p. 2). As another commenter similarly noted, third party representation can empower workers and thereby minimize the employer’s ability to control what information is shared by employees, which enables CSHOs to gather more accurate information (Document ID 0526, p. 2). Other commenters also pointed to employers’ “unrestricted ability” to select their walkaround representative and argued that OSHA should go beyond the current proposal and provide employees that same right without qualification and employer interference (see, e.g., Document ID 1958, p. 5–6). A commenter asserted that when workers are allowed to

designate their own representatives, workers have increased trust in OSHA, and inspections are more efficient, complete, and accurate (Document ID 1958, p. 1–2).

## 2. Comments Opposed to Third-Party Representation

Many commenters disputed the need for and benefits of third parties and raised numerous arguments to support their positions. These arguments included: (1) that OSHA has not presented evidence demonstrating a need for third parties; (2) third parties cannot aid OSHA's inspections when they are unfamiliar with the particular worksite being inspected; (3) industry-specific concerns should preclude third-party representation; (4) third parties may discourage employer cooperation; (5) third-party representatives will disenfranchise employees; (6) the use of third parties will lower the qualifications to be a CSHO; (7) third parties may have ulterior motives and could engage in conduct unrelated to the inspection; (8) the potential disclosure of confidential business information and trade secrets outweighs the need for third-party representation; and (9) alternatively, if third parties are allowed to serve as employee representatives, they should be limited to individuals with technical expertise or language skills.

First, commenters argued that OSHA has failed to demonstrate a need for third-party representation during the walkaround. For example, some commenters asserted that OSHA did not provide evidence that the rule will facilitate more efficient inspections, aid CSHOs during the walkaround inspection, or otherwise promote the safety and health of workers (see, e.g., 1776, p. 10; 1939, p. 4; 1953, p. 4; 1976, p. 4 fn. 9). Commenters questioned why CSHOs were not capable of handling inspections on their own and needed third parties to assist them or were passing off their inspection responsibilities to others (see, e.g., Document ID 0046; 1938, p. 1; 1974, p. 3–4; 3347). The Pacific Legal Foundation also asked why OSHA needed third parties on an employer's premises when third parties could accomplish their activities, such as communicating with employees, offsite (Document ID 1768, p. 5).

Relatedly, other commenters argued that OSHA does not need third-party employee representatives during its inspections because OSHA's current inspection procedures are sufficient (see, e.g., Document ID 1960, p. 1). For example, one commenter stated that employees are already empowered to

participate in OSHA's inspections since they can file anonymous complaints and speak with CSHOs in private (Document ID 1955, p. 3). Similarly, commenters asserted that the FOM already accounts for situations where CSHOs need third-party translation and that the current regulation allows for third parties with technical expertise to accompany CSHOs in "limited situations" (Document ID 1960, p. 3–4; see also 1952, p. 2). Ultimately, commenters asserted that "OSHA is improperly seeking to address a nonexistent issue" (Document ID 1955, p. 3; see also 1976, p. 4) and that "[t]here is no pressing need for this change" (Document ID 9002).

Second, commenters expressed skepticism that third parties who are unfamiliar with a specific worksite could have anything meaningful to contribute to an OSHA inspection (see, e.g., Document ID 0033). For example, the American Chemistry Council asserted that each chemical manufacturing facility and its hazards are unique and that merely having a general understanding of hazards is insufficient to truly aid an OSHA inspection (Document ID 1960, p. 2). Commenters argued that employees of the employer, and not third parties, are better suited to be representatives because employees understand the specific tasks at issue by virtue of their employment and may have received job-specific training (see, e.g., Document ID 1960, p. 2). NFIB also took issue with the type of knowledge, skills, or experience that OSHA indicated could aid the inspection, asserting that "[w]hat constitutes relevant knowledge or skills is left vague" and that it is unclear whether the phrase "with hazards or conditions in the workplace or similar workplaces" modifies "experience" or also "relevant knowledge" and "skills" (Document ID 0168, p. 5).

Third, commenters also raised a number of industry-specific safety and security concerns. For instance, in the manufacturing industry, the Illinois Manufacturer's Association raised safety concerns, asserting that third-party representatives were unnecessary because they could pose safety risks to themselves or others, or to the employer's products due to their lack of expertise and/or training (see, e.g., Document ID 1762, p. 2–3; 1770, p. 4; 1774, p. 4; 1937, p. 2; 1974, p. 2–3; 1946, p. 7; 1942, p. 5). In addition, commenters raised safety and security-related concerns for their industries. The National Council of Farmer Cooperatives explained that some agriculture employers are required to

restrict access to their facilities to only authorized personnel who are trained in practices of ensuring food safety; this commenter expressed concerns that the proposed rule could result in noncompliance with that requirement (Document ID 1942, p. 5). The Food Industry Association asserted that the presence of third parties could create serious food safety hazards in food production and warehousing, noting the need for following strict sanitation protocols (Document ID 1940, p. 3). The American Chemistry Council similarly raised concerns about third parties in the chemical industry who have not undergone background checks or who lack credentials through the Chemical Facility Anti-Terrorism Standards program or the Transportation Worker Identification Credential program (Document ID 1960, p. 5).

Commenters also raised concerns in the healthcare context (see, e.g., Document ID 0234, p. 2). Hackensack Meridian Health shared two examples: (1) at one of its hospitals, a union brought in a third party to provide feedback on a workplace safety issue and shared information with OSHA that was not scientifically sound (though OSHA did not ultimately use the information); and (2) employees brought in an expert for a walkaround who did not recognize a patient safety concern, which the employer's internal team later identified and remediated (Document ID 0234, p. 2). According to Hackensack Meridian Health, both instances could have resulted in harm to patients or team members because the third party did not possess the requisite expertise (Document ID 0234, p. 2).

Fourth, commenters expressed concerns that third parties could discourage cooperation from employers. Commenters argued that third parties could "discourage[] employer cooperation in the inspection process" (see, e.g., Document ID 1938, p. 1). One commenter asserted that most employers currently cooperate with inspections by not requiring warrants; however, it predicted that more employers will request warrants if employee representatives can be third parties, including due to the fear of union organizing (Document ID 1938, p. 9; see also 1772, p. 1).

Fifth, some commenters also asserted that third-party representation would "disenfranchise" employees by replacing employee representatives with third-party representatives (see, e.g., Document ID 1120; 1123; 1163). A commenter asked, "Would you like for someone off the street to come in and tell you to 'pack up your stuff and leave,

I'm replacing you?" I wouldn't think so" (Document ID 1163).

Sixth, commenters also asserted that third-party representation could result in lowering the qualifications to be a CSHO. For example, some commenters, such as Larson Environmental, expressed concern that the proposal would result in "soften[ing] or water[ing] down the need for technical expertise and training of OSHA employees" (Document ID 1109; see also 0033).

Seventh, commenters argued that third parties may not benefit OSHA's inspections because third parties may have ulterior motives and be engaged in conduct unrelated to the inspection (see, e.g., Document ID 1775, p. 6; 1937, p. 5). For example, commenters suggested that third parties could engage in union organizing (Document ID 0168, p. 5–6; see also 1964, p. 2). Commenters also expressed concerns that attorneys or experts serving as third-party representatives could use the walkaround to conduct pre-litigation discovery in personal injury or wrongful death actions (Document ID 1938, p. 5; 1976, p. 11–12) or that attorneys could use the walkaround to solicit clients (Document ID 1953, p. 5). Others also worried about disgruntled former employees engaging in workplace violence or causing conflict (see, e.g., Document ID 1762, p. 3–4; 1781, p. 2), and raised concerns about the conduct of other third parties such as competitors, relatives or friends of injured or deceased employees, job applicants who did not receive a job, or individuals with ideological differences (see, e.g., Document ID 1272; 1533; 1701; 1762, p. 3–4; 1937, p. 5; 1976, p. 11–12). For example, the American Family Association asserted that "[a]llowing facility access to a third-party representative who might hold views antithetical to AFA's mission could easily disrupt the current requirement that OSHA conduct a 'fair and orderly inspection'" (Document ID 1754, p. 3).

Eighth, commenters also argued that the need to protect trade secrets and other confidential information outweighs the need for third parties. For example, commenters voiced concerns that a third-party representative, such as competitor or someone who is hostile to the employer being inspected, could obtain and disclose trade secrets or other confidential business information (see, e.g., Document ID 0040, p. 4; 0175, p. 2; 11515) or relatedly, pose antitrust issues (Document ID 1937, p. 3; 1960, p. 6). With regard to the manufacturing industry in particular, commenters explained that "the manufacturing

process itself constitutes proprietary trade secrets that would be impossible to protect from disclosure" (Document ID 0175, p. 2) and that "[e]ach manufacturing process may have unique or specialized features that give them a competitive edge" (Document ID 1937, p. 3).

Commenters also raised concerns about the unauthorized disclosure of confidential business information generally; as examples of such information, they pointed to an employer's operations, customer and supplier data, intellectual property, or employees' sensitive information (see, e.g., Document ID 1774, p. 3, 6; 11487). The International Foodservice Distributors Association (IFDA) provided additional examples of confidential information, including: "the layout of the facility, staffing, large pieces of equipment, materials used, and other information that cannot be easily kept away from a third-party representative" (Document ID 1966, p. 3). Commenters argued that the unauthorized disclosure of confidential information could occur due to the NPRM's "lack of a set definition of 'trade secrets'" (Document ID 1774, p. 3) and the fact that OSHA's existing regulation at 1903.9 is limited to trade secrets (Document ID 1966, p. 3).

In addition, the Utility Line Clearance Safety Partnership argued that while OSHA is not permitted to disclose trade secrets or other confidential business information, which it notes is protected from disclosure in a Freedom of Information Act request, the rule fails to prevent third parties from disclosing the same information (Document ID 1726, p. 7). NRF recommended that the rule "provide authority for injured employers to bring claims against the Secretary for monetary remedies and other sanctions" if a third-party representative obtains trade secrets and proprietary information (Document ID 1776, p. 3–4). The Workplace Policy Institute likewise asserted that disclosure of confidential information and trade secrets to competitors or the public would result in litigation requiring OSHA staff testimony (Document ID 1762, p. 3).

Ninth, and lastly, several commenters argued that, if the final rule ultimately permitted third-party employee representatives, the rule should be narrow and limit third-party representatives to certain professions. Some commenters asserted that third parties should be limited to the enumerated examples in the current regulation—industrial hygienists and safety engineers—or to individuals with technical expertise or certain

professional certifications (see, e.g., Document ID 1384; 1937, p. 2). For example, the American Family Association commented that the rule should require third-party representatives to "possess demonstrable safety and health expertise, relevant to the workplace being inspected" (Document ID 1754, p. 2).

Several commenters, including U.S. Representative Virginia Foxx and the U.S. Apple Association, contended that the previous regulation only permitted third-party employee representatives with technical or safety expertise (see, e.g., Document ID 1756, p. 2; 1936, p. 1; 1939, p. 1–2; see also 1966, p. 4–5). The North American Insulation Manufacturers Association asserted that under the previous regulation, a third-party employee representative "must normally have specialized safety knowledge" (Document ID 1937, p. 2). According to a coalition of state-based think tanks and public interest litigation groups (the State Policy Network), the inclusion of industrial hygienists and safety engineers as examples was intended to "establish minimum floor threshold qualifications" for third-party representatives; the State Policy Network further argued that, according to "historical OSHA policy manuals," such individuals "must have minimum levels of education, experience, and certification granted by professional organizations and/or State-level administrative agencies" (Document ID 1965, p. 13). The Mom and Pop Alliance of SC also expressed concern that the proposal would "eliminate the requisite technical credentials necessary for non-employees to participate" in the inspection (Document ID 0528).

Other commenters supported limiting the universe of potential third parties but were open to both technical experts and interpreters serving as third parties (see, e.g., Document ID 10797; 1782, p. 3). For example, the Flexible Packaging Association explained that it did not necessarily object to a third-party representative participating in a walkaround inspection, particularly if that representative was a translator, industrial hygienist, or safety engineer, but expressed concern that the proposal would permit a "seemingly unlimited variety of people" who can serve as third-party representatives, and urged OSHA to limit third-party representatives to technical experts and translators (Document ID 1782, p. 3). A private citizen commented that industrial hygienists and safety engineers should not be deleted, but "language expert" should be added as an additional example to "help the

focus of inspections to remain on health and safety and clear communication of such” (Document ID 10797).

### 3. Conclusion on the Need for and Benefits of Third-Party Representatives

After reviewing the comments, OSHA has decided to adopt its proposed revisions because allowing third-party representatives as discussed in this rule better comports with the OSH Act. Nothing in section 8(e) expressly requires “a representative authorized by . . . employees” to be an employee of the employer. 29 U.S.C. 657(e). Rather, the statute merely states that the representative must “aid[] the inspection.” *Id.* The revisions adopted by this final rule better conform with section 8(e)’s requirement by eliminating the text in the regulation requiring employee representatives to be an employee of the employer. In addition, the revisions ensure employees are able to select trusted and knowledgeable representatives of their choice, leading to more comprehensive and effective OSHA inspections. Through the agency’s own enforcement experience and based on numerous comments, particularly those with real-life examples, OSHA has determined that there are a wide variety of third parties who can aid OSHA’s inspection. OSHA has therefore concluded that it is appropriate to delete the examples of industrial hygienists and safety engineers in the prior rule to make it clear that a third party is not reasonably necessary solely by virtue of their professional discipline. Rather, the focus is on how the individual can aid the inspection, *e.g.*, based on the individual’s knowledge, skills, or experience. The final rule, however, does not change the requirement that, once the CSHO is notified that employees have authorized a third party to represent them during a walkaround inspection, the third party may accompany the CSHO only if the CSHO determines that good cause has been shown that the third party is reasonably necessary to an effective and thorough inspection.

In deciding to adopt its proposed revisions, OSHA agreed with commenters who explained how third-party employee representatives can greatly aid OSHA inspections. In a variety of ways, third parties can assist OSHA in obtaining information and thereby ensuring comprehensive inspections. For example, the comments submitted in support of the proposed rule demonstrated that third parties can provide valuable technical expertise and support to CSHOs during walkaround inspections. This includes inspections

involving workplace hazards that do not fall under a specific standard and worksites that contain hazards that are not readily apparent to the CSHO.

Third parties also may be more likely to understand industry standards than an employee of the employer, and many comments demonstrated the benefits of having a third-party representative with industry-specific expertise. Several commenters provided compelling examples of this, such as the UWUA’s national representative providing guidance to a CSHO about changes in the utility industry, including the use of an inclinometer (Document ID 1761, p. 1), and the USW safety representative’s contribution to a fatality inspection involving a dust collection system due to that representative’s experience in the industry and service on a combustible dust committee of the National Fire Protection Association (Document ID 1958, p. 3–4). A former director of AFSCME also provided a first-hand example of how he, as a third-party employee representative, was able to draw from his knowledge and experience in the healthcare industry not only to provide guidance to the CSHO on less well-known hazards but also to share how other workplaces in the industry had addressed similar hazards (Document ID 1945, p. 2–3).

While several commenters opposed to the rule argued that third parties will lack industry-specific expertise and pose safety risks to themselves or others, or to the employer’s products, comments supporting the rule demonstrate that many third parties can and do in fact possess industry-specific knowledge and expertise and that such expertise has assisted OSHA’s inspections. However, even if a third party lacked such industry-specific knowledge or expertise, it does not necessarily mean they will pose a risk or cause harm, as Hackensack Meridien Health contended.

Hackensack Meridien Health asserted that employees or patients could have been harmed on two separate occasions—once, when a third party provided safety feedback to OSHA that Hackensack Meridien Health did not feel was scientifically sound and, on another occasion, when an expert did not recognize a patient safety concern. However, in the first example, which does not indicate whether the third party was a walkaround representative, Hackensack Meridien Health acknowledged that OSHA did not rely on the advice. In addition, in the second example, a walkaround representative is not expected or required to identify patient concerns or replace the CSHO, as the representative’s role is to aid

OSHA’s inspection into workplace hazards that could harm employees. Furthermore, these examples do not show that a third party caused any harm or that OSHA’s inspection procedures related to employee representation were inadequate.

Concerns about risks third parties pose in certain industries are speculative and ignore the roles of both the third party and the CSHO during the inspection. Third-party representatives have a specific purpose—to aid OSHA’s inspection. Therefore, they must stay near the CSHO and are not permitted to wander away from the inspection or into unauthorized areas. While some commenters in the chemical industry discussed the need for third parties to follow the facility’s sanitation protocols, and some commenters in the chemical industry discussed the need for third parties to have certain credentials, OSHA has ample experience conducting investigations in worksites with such requirements. During the opening conference, the CSHO inquires about any such work rules or policies, such as policies related to PPE, areas requiring special precautions, whether any safety briefings are necessary, and any other policies relevant to the inspection. CSHOs have long adhered to such policies in conducting inspections in facilities with unique requirements, and any third party would generally need to do as well, as long as those rules and policies apply equally to all visitors and are not implemented or enforced in a way that interferes with an employee representative’s right to accompany the CSHO. OSHA will consider facility-specific concerns on a case-by-case basis, but anticipates that the agency’s existing inspection procedures adequately address concerns about potential harm from third parties in any given industry.

In addition to certain types of expertise third parties may have, third parties can also offer interpretation skills for employees with limited English proficiency and provide greater language access by using their cultural competence and prior relationships with workers. With regard to interpretation, third parties can help ensure employees are able to have accurate and complete conversations with CSHOs and that employees do not have to rely on supervisors to interpret or on ad hoc interpreters. This can prevent situations where supervisors or ad hoc interpreters provide flawed or fabricated versions of employees’ statements. While commenters have argued that OSHA could instead use bilingual CSHOs or hire outside interpreters, these comments ignore an

important component of third parties' interpretation assistance—their cultural competencies. Employees may not be as comfortable when the interpreter is a law enforcement official, such as a CSHO, or when the interpreter is unknown to them. In contrast, as commenters supporting the rule explained, if an interpreter is from a workers advocacy group or union designated by the employees, employees may trust the interpreter more and, as a result, be more willing to provide information.

Likewise, third parties can increase worker involvement in the inspection by facilitating communication between workers and OSHA. Multiple commenters submitted examples of situations where third-party representatives were trusted by workers and successfully encouraged them to speak more openly with CSHOs. Several commenters argued that employees may fear retaliation if they speak to an OSHA official, and both comments in the record and OSHA's own enforcement experience demonstrate that workers are more likely to speak openly and participate in an OSHA inspection if they have a representative who they trust. Several commenters noted that workers are the "eyes and ears of a workplace, and are in the best position to provide OSHA with the inspection information it needs regarding the presence of hazards, the frequency and duration of worker exposure to them, and the employer's awareness of both hazards and exposures" (Document ID 1934, p. 2; see also 1031; 1769, p. 3). Without employee cooperation and participation, OSHA may not be able to gather all the relevant information during a workplace inspection. Ensuring that workers have a trusted representative so that they are able to cooperate in an OSHA inspection is critical.

In addition, third parties may have cultural competency skills that can facilitate communication not only with employees who need interpreters but also for a number of other employees. Employees may not trust or understand government processes, and third parties, particularly third parties known to the employees, allow the employees to be more at ease or forthcoming during the OSHA inspection. The presence of third parties can also be beneficial in workplaces where employees fear retaliation or intimidation by their employer and are afraid to speak up. Employees may either feel more empowered to participate or may feel more comfortable relying on the third party to represent their interests without

revealing a particular employee's identity.

Third parties may also aid inspections that are complex, include multiple employers, or involve fatalities or serious injuries. While third-party representatives do not need to be safety engineers or industrial hygienists to aid an inspection, representatives can often possess important technical or safety expertise necessary for a thorough inspection even if they are not specifically employed as safety and health professionals. In support of this, commenters asserted that union officials and worker advocates often have industry-specific or workplace safety expertise that is helpful to a CSHO's inspection and, most importantly, helps to facilitate a CSHO's communication with workers about workplace safety.

OSHA has revised the final rule to make explicit that a representative may be reasonably necessary if they facilitate communication between workers and the CSHO. As explained above, there are a number of reasons, other than language skills, why a third party may be able to facilitate communication between workers and the CSHO, including because of their trusted relationship with workers, their cultural competence, or because they can put employees at ease and enable them to speak more candidly with the CSHO. Ensuring that employees have a voice during the inspection and have the ability to speak openly and candidly with the CSHO is critical to ensuring that OSHA obtains the necessary information about worksite conditions and hazards to conduct a thorough inspection. Accordingly, OSHA has revised paragraph (c) to add communication skills to the exemplar skills that could be reasonably necessary to an effective and thorough inspection. Several commenters incorrectly asserted that the previous regulation only permitted third-party representatives with technical or safety expertise (see, e.g., Document ID 1756, p. 2; 1936, p. 1; 1939, p. 1–2; see also 1966, p. 4–5), and the State Policy Network referenced an OSHA guidance document in support of its arguments that representatives "must have minimum levels of education, experience, and certification granted by professional organizations and/or State-level administrative agencies" (Document ID 1965, p. 13).

These comments are misguided; OSHA did not previously limit 1903.8(c) to technical or safety experts, nor do those commenters point to any evidence to support their claims. The only OSHA document referenced by the State Policy Network is an OSHA

booklet titled "The Occupational Health Professional's Services and Qualifications: Questions and Answers" (Occupational Health Q & A), available at <https://www.osha.gov/sites/default/files/publications/osh3160.pdf>. This guidance document relates to how employers select health care professionals to "assist the employer in achieving a safe and healthful work environment" (Occupational Health Q & A, p. 7). Although the guidance document references occupational health care professionals' education and training, it has nothing to do with who employees may select as their walkaround representative under 1903.8(c).

Industrial hygienists and safety engineers were included in the prior regulation as examples of individuals who *may* be reasonably necessary to an inspection but were not intended to limit employees' ability to authorize the participation of third-party representatives with other skills or expertise. And the examples provided by unions and worker advocates, discussed above, show that OSHA applied paragraph (c) to allow third-party employee representatives to accompany the CSHO on the walkaround where they aid the inspection even though they were not industrial hygienists or safety engineers. The record is replete with examples of how third parties with a variety of knowledge, skills, or experience beyond technical expertise made them reasonably necessary to the conduct of an effective and thorough physical inspection. OSHA emphasizes that the examples in paragraph (c) are illustrative and not exhaustive; while the phrase "with hazards or conditions in the workplace or similar workplaces" modifies "knowledge, skills, and experience," there may be other types of knowledge or skills that could be reasonably necessary to the conduct of an effective and thorough inspection.

OSHA also rejects comments asserting that permitting third-party employee representatives to accompany the CSHO indicates that OSHA is not competent to conduct inspections. In explaining why an employee representative must be given the opportunity to accompany the CSHO on an inspection under section 8(e) of the OSH Act, Senator Williams explained that "no one knows better than the working [person] what the conditions are, where the failures are, where the hazards are, and particularly where there are safety hazards." Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 92d Cong. 1st Sess., reprinted in *Legislative History of the Occupational*

Safety and Health Act of 1970, at 430 (Comm. Print. 1971). While CSHOs have significant expertise, training, and experience in identifying safety and health hazards, it is not reasonable to expect every CSHO to have comprehensive knowledge of every aspect of site-specific equipment, materials, work practices, and safety requirements without assistance from employees. By permitting employees to designate representatives of their choice, OSHA will be better able to obtain information from employees that is necessary to conduct a comprehensive inspection. More comprehensive OSHA inspections will be more protective of worker safety and health.

Likewise, contrary to some commenters' arguments, this rule will not result in OSHA lowering its qualifications for CSHOs or decreasing the amount or quality of training provided to CSHOs. This rule will not diminish the CSHO's role in an OSHA inspection. CSHOs will continue to be in charge of conducting inspections and have the authority to use various reasonable investigative methods and techniques, such as taking photographs, obtaining environmental samples, and questioning individuals while carrying out their inspection. See 29 CFR 1903.3(a); 1903.7(b); 1903.8(a). Rather than weakening the CSHO's role, this rule will enable CSHOs to obtain more comprehensive information during an inspection.

Commenters additionally argued that OSHA's current procedures (such as anonymous complaints and CSHO's private interviews with workers) are sufficient and that third parties can conduct all activities offsite; however, many other comments demonstrated otherwise and established that third-party representatives are critically important during the walkaround portion of the inspection. OSHA also finds that third-party representatives, including those from unions or worker advocacy groups, are needed to accompany CSHOs during inspections because representatives explaining OSHA processes or protections against retaliation before or after the inspection would not be sufficient to adequately assure workers. The physical inspection is a key part of OSHA's investigation; it is often difficult to obtain information from workers after the inspection because workplace conditions change, or workers leave employment or recall less about the circumstances of an incident that was the subject of the inspection. Having third-party representatives accompany a CSHO during the inspection can reassure

workers during this vital step and allow the CSHO to gather information more effectively and efficiently. Additionally, even if workers are reassured about OSHA processes outside of the physical inspection, workers could still be intimidated or confused when faced with a CSHO without the presence of an authorized third-party representative.

In addition, OSHA disagrees with comments that asserted that employees, and not third parties, are always better suited to serve as employee representatives due to employees' familiarity with the worksite and job tasks. These comments ignore the variety of knowledge, skills, or experience third parties offer, as well as the particularities of different inspections, and the fact that employees may sometimes prefer to have nonemployee representatives accompany the CSHOs. They also disregard the many reasons employees may be reluctant or scared to participate in an inspection, much less as the employee representative. While employees who are willing to be a walkaround representative certainly aid OSHA's inspections and are entitled to be the representative if authorized by employees, OSHA disagrees with the suggestion that only employees, and never third parties, could contribute to an OSHA inspection.

OSHA does, however, recognize that there may be situations where a third-party representative will not aid OSHA's inspection during the walkaround. By maintaining the requirement that good cause be shown that the third-party representative is reasonably necessary to the conduct of an effective and thorough physical inspection of the workplace, OSHA will allow third-party representatives to accompany the CSHO only when they will aid the inspection. Concerns about potential misconduct, injury, or malfeasance from third-party representatives, and how OSHA would respond, are discussed in more detail herein, including in Sections IV.E, IV.G, IV.H.

In addition, OSHA disagrees with commenters that argued that the protection of trade secrets or other confidential business information outweighs the need for third parties. These concerns can be addressed while still allowing third parties to serve as walkaround representatives. OSHA's existing regulations expressly afford employers the right to identify areas in the workplace that contain or might reveal a trade secret, and request that, in any area containing trade secrets, the authorized employee representative shall be an employee in that area or an

employee authorized by the employer to enter that area. See 29 CFR 1903.9(c), (d). Although one commenter criticized the NPRM for not defining "trade secrets," this term is defined in section 15 of the OSH Act by reference to 18 U.S.C. 1905, as information concerning or related to "processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association." See also OSHA Field Operations Manual, Chapter 3, Section VII.E.

If an employer identifies something as a trade secret, OSHA will treat it as a trade secret if there is "no clear reason to question such identification." See 29 CFR 1903.9(c); OSHA Field Operations Manual, Chapter 3, Section VII.E. Accordingly, OSHA finds that existing requirements and policies are sufficient to protect employers' trade secrets and proprietary information, but will address any unique circumstances on an inspection-by-inspection basis.

While two commenters asserted that a third-party walkaround representative from a competitor could raise antitrust or anticompetition concerns, this assertion appears highly improbable. First, any third-party must be authorized by the employer's employees, and it seems unlikely that employees would authorize a competitor who would then engage in anticompetitive conduct to represent them. Further, the CSHO must find good cause has been shown that a third party is reasonably necessary to the conduct of an effective and thorough physical inspection of the workplace. This requirement ensures that the representative will aid the inspection. Additionally, if a third party engages in conduct that is unrelated to the inspection, the CSHO has the authority to terminate the third party's accompaniment.

OSHA also disagrees with commenters that argued third parties are not needed because third parties can discourage employer cooperation or disenfranchise employees. Concerns about diminished employer cooperation and an increase in warrants are discussed in more detail in Sections IV.G. Further, commenters have also failed to show how workers will be disenfranchised by allowing third-party representatives because workers still have the right to designate employee representatives. Because third-party representatives must be authorized by workers, they cannot "disenfranchise" workers. Rather, they can facilitate worker participation during inspections.

Finally, comments arguing that the purpose of this rule is to facilitate union organizing are incorrect. Employee representation during the inspection is critically important to ensuring OSHA obtains the necessary information about worksite conditions and hazards. In addition, the rule does not limit third-party representatives to union representatives but clarifies that varying types of third parties may serve as employee representatives based on their knowledge, skills, or experience. Third-party representatives' sole purpose onsite is to aid OSHA's inspection, 29 U.S.C. 657(e), and CSHOs have authority to deny the right of accompaniment to third parties who do not do that or who interfere with a fair and orderly inspection. 29 CFR 1903.8(a)–(d).

Ultimately, as evidenced herein, OSHA disagrees with commenters that assert that there is no need or not a pressing need for this rulemaking. The district court's decision in *NFIB v. Dougherty* necessitated this rulemaking to explain OSHA's "persuasive and valid construction of the Act." 2017 WL 1194666, \*12. Moreover, neither the plain text of the OSH Act nor its legislative history support arguments that OSHA is required to show that there is a "pressing need" to clarify who is eligible to be a third-party representative. For a fuller discussion of OSHA's rulemaking authority, see Section III, Legal Authority.

For the reasons discussed above, OSHA has determined that permitting employees to select trusted and knowledgeable representatives of their choice, including third parties, facilitates the CSHOs' information gathering during OSHA inspection, which will improve the effectiveness of OSHA inspections and benefit employees' health and safety. Employee representatives can ensure that CSHOs do not receive only the employer's account of the conditions in the workplace. As National COSH explained, employees are a key source of information as to specific incidents, and they also may possess information related to an employer's history of past injuries or illnesses and an employer's knowledge of or awareness of hazards (Document ID 1769, p. 2). By obtaining comprehensive information, OSHA can not only better and more timely identify dangerous hazards, including hazards that may be hidden or hard to detect, but ensure the hazards are abated quickly and do not injure or kill employees. Accordingly, OSHA concludes that its rule is necessary. See 29 U.S.C. 657(g)(2).

### *B. The "Good Cause" and "Reasonably Necessary" Requirement*

In the NPRM, OSHA proposed to revise 29 CFR 1903.8(c) to clarify that the representative(s) authorized by employees may be a third party and that third parties are not limited to the two examples listed in the existing rule. However, as the NPRM explained, the proposed revisions would not alter the regulation's existing requirement for the CSHO to determine that "good cause" had been shown why the third party was "reasonably necessary to the conduct of an effective and thorough physical inspection of the workplace." The NPRM requested public input regarding the "good cause" and "reasonably necessary" requirement for third-party employee representatives. The NPRM also set forth the following three questions, suggesting alternatives to OSHA's proposed revisions.

1. Should OSHA defer to the employees' selection of a representative to aid the inspection when the representative is a third party (*i.e.*, remove the requirement for third-party representatives to be reasonably necessary to the inspection)?

2. Should OSHA retain the language as proposed, but add a presumption that a third-party representative authorized by employees is reasonably necessary to the conduct of an effective and thorough physical inspection of the workplace?

3. Should OSHA expand the criteria for an employees' representative that is a third party to participate in the inspection to include circumstances when the CSHO determines that such participation would aid employees in effectively exercising their rights under the OSH Act? Why or why not? If so, should OSHA defer to employees' selection of a representative who would aid them in effectively exercising their rights?

OSHA received many comments both for and against the "good cause" and "reasonably necessary" requirement, and many commenters specifically addressed the possible alternatives. After reviewing the comments, summarized below, OSHA has decided to retain the existing "good cause" and "reasonably necessary" requirements in the final rule. Therefore, if the representative authorized by employees is a third party, the third party may accompany the CSHO during the physical inspection of the workplace if in the judgment of the CSHO, good cause has been shown why the third party's accompaniment is reasonably necessary to the conduct of an effective and thorough inspection of the workplace (including, but not limited

to, because of their relevant knowledge, skills, or experience with hazards or conditions in the workplace or similar workplaces, or language or communication skills).

### 1. Comments That Supported Removing the CSHO's "Good Cause" and "Reasonably Necessary" Determination Requirement in Some Form

A number of commenters asserted that OSHA should abandon the existing "good cause" and "reasonably necessary" requirement for third-party employee representatives and adopt one of the proposed alternatives in the NPRM. For example, some commenters requested that OSHA pursue the first proposed alternative—removing the CSHO's "reasonably necessary" determination, with the CSHO deferring entirely to the employees' selection of a representative (*e.g.*, Document ID 1023, p. 3; 1763, p. 5–6, 7–8; 1769, p. 4–5; 1777, p. 3–4; 1934, p. 4–5; 1948, p. 2; 1958, 8–9, 13; 1969, p. 2–8; 1972, p. 7–8; 1978, p. 1–2; 11231). According to these commenters, the "good cause" and "reasonably necessary" requirement is contrary to the text of the OSH Act, infringes upon workers' rights, and impairs the Act's safety and health goals.

First, several commenters argued that the "good cause" and "reasonably necessary requirement" is contrary to the language of the OSH Act. For example, National COSH contended that requiring employees to demonstrate "good cause" as to why a representative is "reasonably necessary" is an "extra hurdle the employees' representative needs to clear before qualifying" that is not supported by the language of the Act (Document ID 1769, p. 5). According to National COSH, section 8 of the Act "properly determines when the employees' selected representative has a right to participate in the inspection: that is, when their purpose is to aid the inspection" (Document ID 1769, p. 5). Likewise, the AFL–CIO stated that "[w]orkers' belief that their chosen representative will support them is sufficient reason to find that the representative will aid the investigation" (Document ID 1969, p. 6). In the AFL–CIO's view, "there is no distinction between deferring to workers' choice of representatives and finding that the workers' choice is reasonably necessary to aid the OSHA investigation" (Document ID 1969, p. 6).

In addition, commenters argued that section 8 does not authorize CSHOs to decide whether good cause has been shown that a third-party employee representative is "reasonably necessary." For example, Farmworker

Justice argued that employees' right to a representative "should not depend on a determination by the CSHO" (Document ID 1763, p. 8). Additionally, the AFL-CIO asserted that "giving a CSHO discretion to exclude an employee's third-party representative as not 'reasonably necessary' is contrary to the plain terms of the Act" (Document ID 1969, p. 3-4), and that "the Secretary does not have authority to impose limitations on employees' rights that are inconsistent with the Act." (Document ID 1969, p. 4). Similarly, National COSH argued that under section 8, employees' selected representative has a right to participate in the inspection regardless of whether the representative's "participation is 'reasonably necessary' to the conduct of an effective and thorough inspection,' as determined in the judgment of the CSHO" (Document ID 1769, p. 4). The AFL-CIO recommended that OSHA remove the "good cause" and "reasonably necessary" requirement to "ensure that the full benefits of the workers' choice is not limited by misinterpretation or CSHO variability, aligning with the purpose and language of the OSH Act" (Document ID 1969, p. 6). Similarly, Sur Legal Collaborative recommended "OSHA remove the proposed language in 1903.8(c) that 'in the judgment of the Compliance Safety and Health Officer, good cause' must be shown" (Document ID 11231). Additionally, U.S. Representative Robert "Bobby" Scott advocated for an unqualified right for workers' lawyers to act as "representatives in all phases of OSHA inspection, enforcement, and contest" (Document ID 1931, p. 8).

Second, various commenters contended that requiring good cause be shown that a third-party employee representative is "reasonably necessary" infringes upon workers' rights by imposing a higher burden for employee representatives than for employer representatives. The AFL-CIO argued that although "the plain language of the Act places no greater restriction on who employees may choose as their representative than it does on who the employer may choose," the "existing regulation and the new, proposed rule, on the other hand, only place restrictions on employees' choice of representative, creating unequal access to the right granted both parties by the OSH Act" (Document ID 1969, p. 3) (emphasis omitted). Similarly, National Nurses United argued that because employers are not required to demonstrate "good cause" at "any part of the investigation process, OSHA should not require employees to justify

their choice of representative" (Document ID 1777, p. 3).

The American Federation of Teachers (AFT) argued that this language allows CSHOs too much discretion to reject a third-party representative that employees have selected and that disallowing third-party certified bargaining agents "is incongruent with rights secured by the [NLRA] or public sector labor relations laws" (Document ID 1957, p. 2). National COSH argued that OSHA should defer to employee choice because the "presence of a representative chosen by workers helps ensure workers can participate in the process without experiencing retaliation" (Document ID 1769, p. 3). According to National COSH, "when workers are accompanied by a trusted community, labor, or legal representative, they can more easily overcome the threat of retaliation and other barriers to give OSHA the information it needs for a comprehensive inspection" (Document ID 1769, p. 3). More generally, UFCW asserted that OSHA should defer to employee choice because "limiting the employee's ability to choose representation for a matter as serious as an OSHA inspection is unfairly restrictive of the workers basic rights" (Document ID 1023, p. 3).

Third, other commenters asserted that the inclusion of the "good cause" and "reasonably necessary" requirement impairs the safety and health goals of the OSH Act. For example, the AFL-CIO stated that "[i]t is inarguable that worker participation improves OSHA investigations by increasing the CSHO's knowledge of the workplace and hazards" and that "[w]orker participation is enhanced by the presence of a worker advocate through increasing trust, increasing knowledge and expertise, providing language justice, protecting workers from retaliation, and empowering workers in the investigation process to create a safer workplace" (Document ID 1969, p. 6).

In addition to commenters that supported eliminating the "good cause" and "reasonably necessary" requirement altogether, the Texas RioGrande Legal Aid (TRLA) supported the second alternative proposed in the NPRM and advocated for adding a presumption that a third-party representative authorized by employees is reasonably necessary to the conduct of an effective and thorough physical inspection of the workplace (Document ID 1749, p. 2). TRLA suggested that employers can rebut the presumption by "show[ing] good cause to the contrary" (Document ID 1749, p. 2).

Farmworker Justice supported the third alternative proposed in the NPRM, arguing that "OSHA should expand the criteria for an employees' representative that is a third party to participate in the inspection to include circumstances when the CSHO determines that such participation would aid employees in effectively exercising their rights under the OSH Act, and OSHA should defer to employees' selection of a representative who would aid them in effectively exercising their rights" (Document ID 1763, p. 8). The Strategic Organizing Center stated that no "additional criteria should be imposed on the workers' process for selecting their representatives, nor on the CSHOs for interpreting or approving of that process" (Document ID 1978, p. 2). However, the Strategic Organizing Center stated that if OSHA were to adopt "any criteria regarding worker selection of representation, it should be used only to help inform workers of their right to choose a designee" (Document ID 1978, p. 3).

## 2. Comments That Generally Supported Retaining the Existing "Good Cause" and "Reasonably Necessary" Requirement and Opposed the NPRM's Alternatives

In contrast, many commenters who were otherwise opposed to this rule responded that OSHA should not remove the "good cause" and "reasonably necessary" requirement for a third party to accompany the CSHO during the walkaround (*e.g.*, Document ID 1754, p. 2; 1762, p. 4-5; 1770, p. 3; 1954, p. 5; 1966, p. 4-5; 1974, p. 5).

Several commenters argued that the "good cause" and "reasonably necessary" standard ensures that the third party has a legitimate inspection purpose for being on-site (see, *e.g.*, Document ID 1762, p. 4-5; 1770, p. 3). For example, the American Petroleum Institute argued that the "good cause" and "reasonably necessary" requirement ensures that "the third party has a defined and accepted interest in the inspection," which "help[s] reduce the risk of potential security issues their participation could raise" (Document ID 1954, p. 5). The Chamber of Commerce stated that OSHA should retain the "good cause" and "reasonably necessary" requirement because providing employees discretion to authorize any third-party as a representative "will turn OSHA inspections into an opportunity for individuals or groups with grievances or an agenda against the employer to advance their interests by gaining full access to the employer's property" (Document ID 1952, p. 3). The



Employers Walkaround Representative Rulemaking Coalition also emphasized that because the purpose of a third-party representative is to aid the inspection, not to aid employees, OSHA should not defer to employee choice alone (Document ID 1976, p. 15–16).

Some commenters supported retaining the existing the “good cause” and “reasonably necessary” requirement without modification (e.g., Document ID 1974, p. 5), while other commenters had questions about how OSHA will determine whether good cause has been shown why employees’ chosen third-party representative is reasonably necessary and recommended that OSHA revise the requirement by providing further guidance (e.g., Document ID 1762, p. 4–5; 1770, p. 4; 1775, p. 4–6; 1776, p. 5–6; 1938, p. 2–3; 1954, p. 5; 1956, p. 3–4; 1965, p. 11–16; 1974, p. 5–7; 1976, p. 11–14).

Some of these commenters disapproved of the “discretion” afforded to CSHOs under the proposed rule and contended that the proposed rule lacked sufficient specificity and a “defined process” to determine the employee representative (Document ID 1976, p. 11–15; see also 0040, p. 4–5). For example, the State Policy Network contended that further guidance is necessary because “[t]he lack of measurable criteria, authoritative definitions, or concrete examples of what constitutes ‘good cause,’ ‘positive contribution,’ or ‘reasonably necessary’ delegates inappropriate and broad discretionary authority to the CSHO,” which it argued will “result[] in confusion, inconsistencies, potential financial and safety risks in workplaces, and overall uncertainty in the outworking of state plans” (Document ID 1965, p. 1, 11).

Along the same lines, many commenters asserted that the vagueness of the “good cause” and “reasonably necessary” requirement will result in disparate application (e.g., Document ID 1754, p. 2–3; 1762, p. 4–5; 1770, p. 4; 1775, p. 6–8; 1776, p. 5–6; 1938, p. 2–3, 11; 1956, p. 2–4; 1965, p. 1, 11–16). For instance, the Coalition of Worker Safety expressed concern that the rule “contains no mechanisms to enforce the ‘good cause’ or ‘reasonably necessary’ requirements beyond the CSHO’s discretion,” which it contends “puts employers at the mercy of the CSHO’s unfettered subjective decision making about the meaning of ‘good cause’ or ‘reasonable necessity’ [and] provides employers no recourse—aside from the warrant process—to challenge the CSHOs['] determinations” (Document ID 1938, p. 2).

Commenters also critiqued a lack of employer input in the determination process (Document ID 1726, p. 3) or asked whether there was any oversight over OSHA’s inspections (Document ID 0040, p. 4–5) and what “recourse [] a business owner h[as] to challenge the selection process” (Document ID 1771, p. 1). One individual critiqued the rule for “not provid[ing] any clear definition or rubric” for CSHOs to follow in their determinations (Document ID 11524). Some commenters, such as the National Association of Wholesaler-Distributors, expressed concern that CSHOs will be put “in a very unfair position” by an alleged lack of guidance in the proposed rule creating “additional burdens” on CSHOs which “are unrelated to their training and expertise” (Document ID 1933, p. 3). Another individual commenter asserted that employers are “at the mercy of the OSHA employees who will pick anyone they decide on” (Document ID 1116). Additionally, the State Policy Network submitted a report from the Boundary Line Foundation, which stated that the proposed rule “neglects to provide direction to the CSHO in the event a proffered third-party employee representative is disqualified by the CSHO” (Document ID 1965, p. 15). This comment suggested incorporating section 8(e)’s language to “consult with a reasonable number of [employees] concerning matters of health and safety in the workplace” where there is no authorized employee representative (Document ID 1965, p. 15).

Some commenters opposed the second alternative presented in the NPRM and stated that OSHA should not create a presumption that a third-party representative is reasonably necessary to aid an inspection. For example, the Employers Walkaround Representative Rulemaking Coalition argued that creating a presumption would “shift[] the burden of proof to the employer to show that an authorized representative is not reasonably necessary,” which they contended is not supported by the text of the Act (Document ID 1976, p. 16). Labor Services International (LSI) argued that a presumption should not be added because it would result in increased complexity and a question of who is responsible to overcome the presumption—the employer or the CSHO (Document ID 1949, p. 4).

Other commenters opposed the third alternative presented in the NPRM and stated that OSHA should not expand the criteria to allow for a third party to serve as employees’ walkaround representative when the CSHO determines that such participation would aid employees in effectively

exercising their rights under the OSH Act (Document ID 1974, p. 5). For example, LSI argued that this alternative proposal is “superfluous” because “the existing version of 29 CFR 1903.8(c) affords employees a role in the inspection procedure” (Document ID 1949, p. 4).

### 3. Conclusion on the “Good Cause” and “Reasonably Necessary” Requirement

OSHA has considered all arguments in favor and against each of the options and has decided to retain the existing “good cause” and “reasonably necessary” requirement in the final rule. Therefore, if the representative authorized by employees is a third party, the third party may accompany the CSHO during the physical inspection of the workplace if in the judgment of the CSHO, good cause has been shown why the third party’s accompaniment is reasonably necessary to the conduct of an effective and thorough inspection of the workplace (including, but not limited to, their relevant knowledge, skills, or experience with hazards or conditions in the workplace or similar workplaces, or language or communication skills).

OSHA has determined that the existing “good cause” and “reasonably necessary” requirement continues to be the appropriate criteria for determining when a third-party will aid an inspection. This requirement is supported by the broad authority granted to the Secretary to promulgate rules and regulations related to inspections, investigations, and recordkeeping. See 29 U.S.C. 657(e), (g)(2); see also Section III, Legal Authority. As many commenters noted, the right of employees to authorize a representative to accompany them during the inspection of the workplace is qualified by the statutory requirement that the representative be authorized “for the purpose of aiding such inspection.” 29 U.S.C. 657(e). In other words, an authorized employee representative may accompany the CSHO only for the purpose of aiding the inspection. The requirement for the CSHO to determine that “good cause” has been shown why the third party is “reasonably necessary” to aid an effective and thorough inspection is consistent with the Act and ensures that an authorized representative aid in the inspection. See 29 U.S.C. 657(e), (g)(2). Thus, OSHA disagrees with commenters who suggested that OSHA lacks the authority to determine if a third party will aid an inspection.

OSHA’s interpretation of section 8(e) as requiring a showing of good cause and reasonable necessity is consistent

with the authority vested in the CSHO and OSHA's other longstanding regulations. CSHOs are "in charge of inspections" and "shall have authority to resolve all disputes as to who is the representative authorized by the employer and employees for the purpose of this section." 29 CFR 1903.8(a), (b). The Workplace Policy Institute stated that a third-party representative should only be "allowed on site when doing so will actually positively assist in the inspection, not simply because a third party wants to be there. The individual must have a reason for attending that is actually related to the inspection, and not some ulterior motive" (Document ID 1762, p. 4–5). OSHA agrees and believes that the existing "good cause" and "reasonably necessary" requirement assures that this will be so. Third-party representatives are reasonably necessary if they will make a positive contribution to aid a thorough and effective inspection.

While some commenters took issue with the terms "good cause," "reasonably necessary," and "positive contribution," OSHA notes that the "good cause" and "reasonably necessary" requirement is a single requirement and OSHA does not intend the regulation to require a separate "good cause" inquiry. OSHA considered deleting the term "good cause" from the regulation and using only the term "reasonably necessary" as the criterion for determining whether a third party could accompany the CSHO. OSHA rejected that approach because it could lead to unnecessary confusion. OSHA has implemented the "good cause" and "reasonably necessary" requirement, and it has been known to employees and employers, for more than fifty years. As such, OSHA finds no compelling reason to delete the term "good cause" from the revised regulation. Some commenters suggested that the "good cause" and "reasonably necessary" standard places a higher burden on third-party employee representatives than it does on third-party employer representatives. This is true, and OSHA has determined that a different standard is appropriate in the case of third-party employee representatives. As many commenters noted, the presence of such persons in the workplace raises property and privacy concerns that are not present where the employer has identified a third party as its representative. The "good cause" and "reasonably necessary" requirement protects against impermissible infringement of these interests by ensuring that third-party employee representatives will be present only

when they aid the inspection. And this requirement ensures that the third party's presence meets the reasonableness requirements of the Fourth Amendment (see Section IV.D.2, Fourth Amendment Issues). These property and privacy concerns are not implicated where the employee representative is an employee, or when the employer selects a third party to represent it in the walkaround.

Additionally, OSHA has determined that the "good cause" and "reasonably necessary" requirement does not infringe upon employee rights. Although some commenters asserted that this language gives CSHOs too much discretion to reject employees' third-party representative, including one who is the recognized bargaining agent (such as from a union's national or international office), CSHOs have the expertise and judgment necessary to determine, on an inspection-by-inspection basis, whether a third party will aid OSHA's inspection. Moreover, several unions provided examples where representatives from the national or international union were permitted to accompany the CSHO and aided the inspection (see, e.g., Document ID 1761, p. 1; Document ID 1958, p. 3–8). While CSHOs have the authority to deny the right of accompaniment to any representative that interferes with—and thus does not aid—the inspection, (see 29 CFR 1903.8(d)), OSHA anticipates that third-party recognized bargaining agents in a unionized workplace would generally be "reasonably necessary" to the inspection. Cf. OSHA Field Operations Manual, Chapter 3, Section VII.A.1 (explaining that "the highest ranking union official or union employee representative onsite shall designate who will participate in the walkaround"). OSHA's discussion of how this rule interacts with the NLRA is explained in detail in Section IV.E, National Labor Relations Act and Other Labor-Related Comments. Accordingly, OSHA does not believe that the "good cause" and "reasonably necessary" requirement infringes upon or is in tension with employee rights under the NLRA or public sector labor relations laws.

Likewise, OSHA disagrees with comments that there should be a rubric for CSHOs to follow in making their determination or that CSHOs need a defined process to determine whether good cause has been shown that a third-party walkaround representative is reasonably necessary. The statute provides that an employee representative is allowed if they aid the inspection. And the regulation provides further explanation of how OSHA will

implement that requirement. The regulation contains factors for the CSHO to consider in making the "good cause" and "reasonably necessary" determination, and the preamble describes numerous examples of the types of third parties who have made a positive contribution to OSHA's inspections. Accordingly, OSHA rejects the argument that the "good cause" and "reasonably necessary" requirement is too subjective, will result in disparate application, or that a rubric or defined process for determining whether a representative is reasonably necessary would be appropriate.

The OSH Act grants employees the right to a walkaround representative "for the purpose of aiding such inspection." 29 U.S.C. 657(e). As explained above, OSHA has determined that third parties can aid OSHA's inspections in a variety of different scenarios. However, not all third-party representatives will necessarily aid OSHA's inspection simply because employees have selected the individual. Several commenters raised concerns that some individuals may have motivations unrelated to safety or the inspection, such as unionizing a facility or "looking for lawsuit opportunities" (Document ID 1953, p. 5; see also 1775, p. 7–8; 1938, p. 2–3; 1975, p. 18–21). Maintaining the "good cause" and "reasonably necessary" requirement ensures that OSHA's inspection comports with section 8(e) of the OSH Act because the CSHO has determined that the representative will in fact aid the inspection. As such, this requirement does not conflict with the text of the Act or undermine the goals of the Act.

Contrary to several commenters' claims, the "good cause" and "reasonably necessary" requirement does not place a high burden on employees. Rather, the CSHO will determine whether a representative is reasonably necessary. To determine whether "good cause" has been established why a third-party representative is "reasonably necessary," the CSHO will inquire about how and why the representative will benefit the inspection, such as because of the representative's knowledge, skills, or experience with hazards or conditions in the workplace or similar workplaces, relevant language skills, or other reasons that the representative would facilitate communication with employees, such as their cultural competency or relationship with employees. For example, this may include the representative's familiarity with the machinery, work processes, or hazards that are present in the

workplace, any specialized safety and health expertise, or the language or communication skills they have that would aid in the inspection. The CSHO will speak with employees and the employees' walkaround representative to determine whether good cause has been shown that the representative is reasonably necessary. This requirement is not a "hurdle" that employees must overcome, but rather better enables OSHA to ensure that a third-party employee representative will aid OSHA's inspection.

While the State Policy Network suggested additional guidance to CSHOs in the event a proffered third-party employee representative is disqualified by the CSHO (Document ID 1965, p. 16–17), this suggestion is unnecessary. Section 1903.8(b) already instructs CSHOs what to do if there is no authorized employee representative or the CSHO cannot determine who is the authorized employee representative with reasonable certainty. See 29 CFR 1903.8(b) ("If there is no authorized representative of employees, or if the Compliance Safety and Health Officer is unable to determine with reasonable certainty who is such representative, he shall consult with a reasonable number of employees concerning matters of safety and health in the workplace.").

OSHA concludes that retaining the existing requirement also strikes the appropriate balance between workers' rights and employers' property and privacy concerns. Employees, like employers, have a statutory right to a representative to aid in the inspection. See 29 U.S.C. 657(e). OSHA has determined that this requirement enables sufficient flexibility for OSHA to realize the potential benefits that third parties may provide to an inspection while remaining consistent with Fourth Amendment reasonableness requirements. If a third-party representative engages in activity unrelated to the inspection, OSHA will attempt to resolve any potentially interfering conduct and retains the authority to deny individuals the right of accompaniment if their conduct "interferes with a fair and orderly inspection." 29 CFR 1903.8(d).

Finally, it is OSHA's intent that the general presumption of severability should be applied to this regulation; *i.e.*, if any portion of the regulation is held invalid or unenforceable or is stayed or enjoined by any court of competent jurisdiction, the remaining portion remains workable and should remain effective and operative. It is OSHA's intent that all portions be considered severable. In this regard, the agency intends that: (1) in the event that any

portion of the regulation is stayed, enjoined, or invalidated, all remaining portions of the regulation shall remain effective and operative; and (2) in the event that any application of the regulation is stayed, enjoined, or invalidated, the regulation shall be construed so as to continue to give the maximum effect to the provision permitted by law.

### *C. Role of the Employee Representative in the Inspection*

In response to comments received, OSHA has slightly revised the regulatory text in the final rule. OSHA's proposed revision to section 1903.8(c) stated that a third party representative could accompany the CSHO during the inspection "if, in the judgment of the Compliance Safety and Health Officer, good cause has been shown why their participation is reasonably necessary to the conduct of an effective and thorough physical inspection of the workplace (*e.g.*, because of their relevant knowledge, skills, or experience with hazards or conditions in the workplace or similar workplaces, or language skills)." 88 FR 59833–34.

The use of the word "participation" in the proposed regulation prompted several commenters to question whether the term reflected a change in the role served by the employee representative (see, *e.g.*, Document ID 1781, p. 2–3; 1941, p. 5; 1964, p. 3; 1974, p. 3–4), while a number of commenters observed that the revision could overly broaden the role of third-party representatives (see, *e.g.*, Document ID 1964, p. 3–4; 1974, p. 3; 1976, p. 21; 6991). Other commenters described scenarios in which third-party representatives could take advantage of ambiguity resulting from the revision by performing acts not authorized by the OSH Act, *i.e.*, acts that do not aid the inspection (see, *e.g.*, Document ID 1755, p. 1; 1964, p. 4; 1974, p. 3–4; 1976, p. 5; 6991).

Some commenters expressed concern that the revision could permit representatives to participate in private employee or management interviews, independently interview employees, or gain unauthorized access to employers' private records (see, *e.g.*, Document ID 1765, p. 2; 1774, p. 6; 1964, p. 3–4; 1976, p. 5). Commenters also opposed allowing representatives to make unauthorized image, video, or audio recordings during inspections and to use such recordings for purposes other than furthering the inspection (see, *e.g.*, Document ID 1762, p. 5; 1774, p. 6; 1966, p. 2). Relatedly, one commenter suggested that employee representatives should be subject to nondisclosure requirements and only be allowed to

share information with CSHOs (Document ID 8120). Commenters further asked whether third-party employee representatives could "weigh[] in with their own commentary," and "opin[e] on what is and is not safe," (Document ID 1762, p. 5). Additionally, the Office of Advocacy of the U.S. Small Business Administration asked what "participation" would entail and how it would affect small entities (Document ID 1941, p. 5).

While the terms "participate" and "accompany" are often used interchangeably in discussing employee walkaround rights (see, *e.g.*, OSHA Field Operations Manual, CPL 02–00–164, Chapter 3, Sections IV.D; VII.A), OSHA did not intend to change the role of the walkaround representative. Based on stakeholder comments, OSHA has determined that using the term "accompaniment" rather than "participation" maintains consistency with the OSH Act and other related OSHA regulations. See, *e.g.*, 29 U.S.C. 657(e); 29 CFR 1903.4 (establishing procedures upon objection to an inspection, including upon refusal to permit an employee representative to accompany the CSHO during the physical inspection of a workplace in accordance with 29 CFR 1903.8); 29 CFR 1908.6 (explaining procedures during an onsite consultative visit for an employee representative of affected employees to accompany the consultant and the employer's representative during the physical inspection of a workplace); 29 CFR 1960.27 (providing that a representative of employees shall be given an opportunity to accompany CSHOs during the physical inspection of any workplace, and that a CSHO may deny the representative's right of accompaniment if their participation interferes with a fair and orderly inspection). Accordingly, OSHA has removed the term "participation" in the final rule to clarify that the employee representative may accompany the CSHO when good cause has been shown why "accompaniment" is reasonably necessary to an effective and thorough workplace inspection.

OSHA received many comments related to what a third-party representative can or cannot do during the inspection (see, *e.g.*, Document ID 0234, p. 1–2; 1935, p. 1; 1937, p. 1, 4–5; 1938, p. 2–6). This rulemaking does not change the role of the third-party representative authorized by employees; the representative's role is to accompany the CSHO for the purpose of aiding OSHA's physical inspection of the workplace. The representative is permitted to accompany the CSHO

during the walkaround inspection, attend the opening and closing conferences (see OSHA Field Operations Manual, CPL 02–00–164, Chapter 3, Sections V.A, VII.A, and VIII.A), and ask clarifying questions to ensure understanding of a specific item or topic of discussion. While the representative may informally ask clarifying questions during the walkaround, private employees interviews conducted during the inspection are conducted by the CSHO in private unless the employee requests the presence of the representative.

One commenter urged that OSHA ensure that the third-party walkaround representative not be allowed to review physical and electronic records, including procedures, injury and illness logs, diagrams, emergency plans, and floor plans, along with the CSHO (Document ID 1765, p. 2). Although CSHOs may preliminarily review employer-provided documents such as safety and health manuals or injury and illness records during the walkaround inspection, in-depth review typically occurs away from the inspected worksite. However, this rule does not alter in any way the requirement that employers provide access to injury and illness records to “employees, former employees, their personal representatives, and their authorized employee representatives,” as those terms are defined in OSHA’s Recordkeeping and Reporting regulation (29 CFR 1904.35). Additionally, the third-party representative may review records that relate to work processes, equipment, or machines at the CSHO’s discretion if their review during the walkaround will aid the CSHO’s inspection.

Further, during an inspection, the CSHO will ensure an employee representative’s conduct does not interfere with a fair and orderly inspection. OSHA considers conduct that interferes with the inspection to include any activity not directly related to conducting an effective and thorough physical inspection of the workplace. OSHA Field Operations Manual, CPL 02–00–164, Chapter 3, Section VII.A. The FOM instructs the CSHO to advise the employee representative that, during the inspection, matters unrelated to the inspection shall not be discussed with employees. See OSHA Field Operations Manual, CPL 02–00–164, Chapter 3, Section V.E. Under section 1903.8(d), a CSHO may deny a representative the right to accompany the CSHO on an inspection if their conduct interferes with a fair and orderly inspection. Last, matters concerning the authorized representative’s conduct outside the

walkaround inspection is beyond the scope of this regulation or this rulemaking, and OSHA declines to add a nondisclosure requirement or other limitations to the sharing of information.

#### D. Constitutional Issues

##### 1. First Amendment Issues

OSHA received several hundred comments asserting that this rule could adversely affect religious liberty, such as by permitting someone opposed to a church to be a third-party employee representative (see, e.g., Document ID 1076; 1151; 1724; 1739; 6800). Other commenters suggested that churches should not be inspected (see, e.g., Document ID 1360). OSHA believes that the concerns expressed in these comments are unfounded.

First, under this rule and pursuant to the OSH Act, any third-party employee representative must be authorized by the employees. Employees do not have to designate a third-party representative if they do not want to. Thus, only a third party selected by the employees of the church or other religious organization will be eligible to accompany the CSHO on the inspection. Second, a third-party employee representative may accompany the CSHO only if the CSHO concludes that good cause has been shown that the third party is “reasonably necessary” to conduct a thorough and effective inspection. Third, the CSHO has the authority to deny the right of accompaniment to any third-party employee representative “whose conduct interferes with a fair and orderly inspection.” 29 CFR 1903.8(d).

While OSHA accommodates religious practices in carrying out its responsibilities under the OSH Act, see, e.g., OSHA Exemption for Religious Reason from Wearing Hard Hats, STD 01–06–005 (1994), available at <https://www.osha.gov/enforcement/directives/std-01-06-005>; Sikh American Legal Defense and Education Fund, OSHA Interpretive Letter (Aug. 5, 2011), available at <https://www.osha.gov/laws-regs/standardinterpretations/2011-08-05>, coverage of religious institutions is not at issue in this rulemaking. OSHA does conduct inspections at religious worksites, see, e.g., *Absolute Roofing & Constr., Inc. v. Sec’y of Labor*, 580 F. App’x 357, 359 (6th Cir. 2014) (involving OSHA’s inspection of a jobsite where a worker was injured while performing repair work on a church), but for the reasons stated above OSHA finds that this rule does not adversely affect religious liberty or

change OSHA’s long-exercised authority to do so.

Additionally, OSHA received a few comments asserting that this rule infringed on free speech rights (see, e.g., Document ID 1754, p. 2; 8781). However, these commenters did not explain why or how this rule limits free speech. This rule neither requires nor prohibits speech, and OSHA finds no merit to the argument that it limits the First Amendment right to freedom of speech.

##### 2. Fourth Amendment Issues

While the OSH Act grants the Secretary of Labor broad authority to inspect workplaces “without delay” to find and remedy safety and health violations, 29 U.S.C. 657(a)(1)–(2), there are constitutional and statutory components of reasonableness that an OSHA inspection must satisfy. The Fourth Amendment of the U.S. Constitution protects employers against “unreasonable searches and seizures.” See U.S. Const. amend. IV; *Barlow’s*, 436 U.S. 311–12. Under *Barlow’s*, a warrant is constitutionally necessary for nonconsensual OSHA inspections and, therefore, if an employer refuses entry, OSHA must obtain a warrant to proceed with the inspection. 436 U.S. at 320–21; see also 29 CFR 1903.4. Contrary to the concerns expressed by the Pacific Legal Foundation (Document ID 1768, p. 6–7), this rule will not disturb employers’ right under the Fourth Amendment, including their right to withhold or limit the scope of their consent, and employers will not be subject to a citation and penalty for objecting to a particular third-party representative. Moreover, both the Fourth Amendment and section 8(a) of the OSH Act require that OSHA carry out its inspection in a reasonable manner. See, e.g., *L.R. Willson & Sons, Inc. v. OSHRC*, 134 F.3d 1235, 1239 (4th Cir. 1998); *Donovan v. Enter. Foundry, Inc.*, 751 F.2d 30, 36 (1st Cir. 1984). Indeed, section 8(a) of the Act requires that OSHA’s on-site inspections be conducted at “reasonable times, and within reasonable limits and in a reasonable manner.” 29 U.S.C. 657(a)(2).

Some commenters have argued that allowing a third-party employee representative to accompany OSHA during its physical inspection of a workplace would not be a “reasonable” search under the Fourth Amendment (see, e.g., Document ID 1976, p. 19). For example, some commenters have asserted that the rule will force them to admit any third-party representative onto their property (see, e.g., Document ID 1976, p. 21; Document ID 1952, p. 3) with others arguing that OSHA is

attempting to create a “new . . . right” for third parties to access private property (see, e.g., Document ID 1952, p. 8). However, as an initial matter, the purpose of the Fourth Amendment is “to safeguard the privacy and security of individuals against arbitrary invasions by government officials.” *Camara v. Mun. Ct. of City & Cnty. of San Francisco*, 387 U.S. 523, 528 (1967) (emphasis added). Third-party employee representatives are not governmental officials and are not performing their own searches. Their presence on the employer’s premises—consistent with the terms of Section 8(e)—will be limited to aiding OSHA’s inspection (i.e., search). Additionally, this rule does not create any new rights; instead, it simply clarifies the already-existing right that employees have under section 8(e) of the OSH Act to select authorized representatives for OSHA’s walkaround inspection.

The reasonableness of OSHA’s search will initially turn on whether OSHA had administrative probable cause to initiate the inspection in the first place (such as responding to a complaint or conducting a programmed inspection). See *Barlow’s*, 436 U.S. at 320–21. Where the government has sought and obtained a search warrant supported by probable cause and acted within its scope, the resulting search is presumptively reasonable. See *Sims*, 885 F.3d at 268. This rule does not diminish or alter the legal grounds that are required for OSHA to initiate an on-site inspection. Instead, it merely clarifies the type of employee representative who can accompany OSHA during a lawful inspection.

Additionally, this rule, as well as OSHA’s existing regulations concerning the conduct of inspections, provides sufficient administrative safeguards to ensure the reasonableness of OSHA’s inspections, even when a private party accompanies the CSHO during the walkaround inspection. See *Matter of Establishment Inspection of Caterpillar Inc.*, 55 F.3d at 339. For instance, the rule maintains the provision that the CSHO must first determine good cause has been shown why accompaniment by a third party is reasonably necessary to an effective and thorough physical inspection of the workplace. 29 CFR 1903.8(c). This rule also does not diminish or alter administrative safeguards contained in other OSHA regulations. For instance, CSHOs still have the authority to resolve all disputes about who the authorized employee representatives are and to deny the right of accompaniment to any person whose conduct interferes with a fair and orderly inspection. 29 CFR

1903.8(b), (d). Section 1903.7(d) also mandates that “[t]he conduct of inspections shall be such as to preclude unreasonable disruption of the operations of the employer’s establishment.” 29 CFR 1903.7(d). Furthermore, employers have the right to identify areas in the workplace that contain or might reveal a trade secret, and may request that, in any area containing trade secrets, the authorized employee representative shall be an employee in that area or an employee authorized by the employer to enter that area. See 29 CFR 1903.9(c), (d).

In the NPRM, OSHA sought comment on whether it should add a presumption that a third-party representative authorized by employees is reasonably necessary to the conduct of an effective and thorough physical inspection of the workplace. 88 FR 59833. In response, the Employers Walkaround Representative Rulemaking Coalition commented that “[r]emoving the current constraints on third party involvement in OSHA inspections or permitting the participation of a third party not deemed ‘reasonably necessary’ . . . would contravene the Fourth Amendment’s prohibition against unreasonable searches and seizures” (Document ID 1976, p. 19). The Employers Walkaround Representative Rulemaking Coalition noted that in the criminal law context, the government violates the Fourth Amendment when it permits private parties with no legitimate role in the execution of a warrant to accompany an officer during the search (Document ID 1976, p. 19–20). As an initial matter, the requirements of administrative probable cause for OSHA inspections are less stringent than those governing criminal probable cause. *Barlow’s*, 436 U.S. at 320–21. Moreover, as explained in Section IV.B, The “Good Cause” and “Reasonably Necessary” Requirement, OSHA has retained the requirement that the CSHO first determine that good cause has been shown that accompaniment by a third-party is reasonably necessary to an effective and thorough inspection.

Indeed, criminal law cases demonstrate that third parties may aid or assist the government official in their investigation. For example, criminal law provides that a search warrant must be served and executed by an officer mentioned therein and by no other person “except in aid of the officer” executing the warrant. 18 U.S.C. 3105; see also *Wilson v. Layne*, 526 U.S. 603 (1999). In *Wilson v. Layne*, the Supreme Court held that “although the presence of third parties during the execution of a warrant may in some circumstances be

constitutionally permissible,” the presence of a news crew during the execution of an arrest warrant at a defendant’s home was unconstitutional. 526 U.S. at 613–14. The Court reasoned that the Fourth Amendment requires that police actions in execution of a warrant be related to the objectives of the authorized intrusion and because the news crew was on the premises to advance their own private purposes (and not to assist the police) their presence in defendant’s home was unreasonable. *Id.* at 611–12. In other cases involving third parties who are involved in police searches, courts have similarly held that “the civilian’s role must be to aid the efforts of the police. In other words, civilians cannot be present simply to further their own goals.” *United States v. Sparks*, 265 F.3d 825, 831–32 (9th Cir. 2001), *overruled on other grounds by United States v. Grisel*, 488 F.3d 844 (9th Cir. 2007).

The criminal caselaw also contains examples of searches involving third parties that courts have found to be reasonable under the Fourth Amendment. For instance, in *Sparks*, the court found reasonable a warrantless search conducted with the aid of a civilian, in part, because the police officer was in need of assistance. 265 F.3d at 831–32. Similarly, in *United States v. Clouston*, the court held that the presence of the telephone company employees during the execution of a search warrant was reasonable where the telephone company employees were present on the premises to aid officers in identifying certain electronic devices owned by their employer and their role in the search was limited to identifying such property. 623 F.2d 485, 486–87 (6th Cir. 1980). Like in the foregoing cases, OSHA’s rule—consistent with the plain text of the statute—also requires third-party employee representatives to benefit the inspection. Accordingly, the rule will maintain the language in the regulation that requires that good cause be shown why the third-party representative’s accompaniment is reasonably necessary to the conduct of an effective and thorough physical inspection of the workplace.

The Employers Walkaround Representative Rulemaking Coalition also expressed concern that “absent the possession of some technical expertise lacking in the CSHO and necessary to the physical inspection of the workplace, the presence of a third party outsider (e.g., union organizer, plaintiff’s attorney, etc.) with no connection to the workplace and acting in his own interests violates the Fourth Amendment’s prohibition against

unreasonable searches and seizures” (Document ID 1976, p. 21). The purpose of this rule is to clarify that, for the purpose of the walkaround inspection, the representative(s) authorized by employees may be an employee of the employer or, when they are reasonably necessary to aid in the inspection, a third party. For third-party representatives, the rule will require a showing of “good cause” for why they are reasonably necessary to the conduct of an effective and thorough physical inspection of the workplace (including, but not limited to, because of their relevant knowledge, skills, or experience with hazards or conditions in the workplace or similar workplaces, or language or communication skills). OSHA has determined that this rule best effectuates the text and purpose of section 8(e) of the Act, consistent with Fourth Amendment reasonableness requirements, without imposing an overly burdensome and restrictive “technical expertise” requirement on employees who want a representative to accompany the CSHO during an inspection of their workplace.

The Ohio Manufacturers’ Association expressed concern that the rule will “expand the plain view doctrine” and “convert a targeted inspection based on a complaint to an unnecessarily comprehensive and time-consuming ‘wall-to-wall’ inspection” because the third party will “constantly scan other parts of the employer’s facility to find potential violations of the OSH Act” (Document 0040, p. 3). The Chamber of Commerce also asked whether employee representatives’ observations could satisfy the “plain view” doctrine (Document ID 1952, p. 14). On the other hand, the National Council for Occupational Safety and Health and the Sur Legal Collaborative asserted that some employers have attempted to limit the scope of OSHA inspections by preventing CSHOs from seeing hazards that are otherwise in plain view and noted that employee representatives can point out other areas in the worksite where there are hazards (Document ID 1769, p. 2; 11231). Similarly, Worksafe described an inspection in California where the Cal/OSHA inspector did not observe areas where janitorial employees worked with bloodborne pathogens and did not inspect a garbage compactor that had serious mechanical failure because the employer was able to obscure the hazardous conditions (Document ID 1934, p. 3–4). Had Worksafe not intervened by sending Cal/OSHA videos and photos of the hazards, these hazards could have gone unabated, and employees could have

been seriously injured, become ill, or died on the job (Document ID 1934, p. 4).

The “plain view” doctrine allows the warrantless “seizure” of evidence visible to a government official or any member of the general public while they are located where they are lawfully allowed. *Wilson v. Health & Hosp. Corp. Of Marion Cnty.*, 620 F.2d 1201, 1210 (7th Cir. 1980). The rationale of the plain view doctrine is that once evidence is “in open view” and is observed by the government or a member of the public from a lawful vantage point, “there has been no invasion of a legitimate expectation of privacy” and thus the Fourth Amendment’s privacy protections do not apply. *Minnesota v. Dickerson*, 508 U.S. 366, 375 (1993); see also *Donovan v. A.A. Beiro Const. Co., Inc.*, 746 F.2d 894, 903 (D.C. Cir. 1984). Hence, third-party representatives may lawfully aid the inspection by informing the CSHO about hazards they observe in plain view during the walkaround. However, the authority to inspect areas in plain view “does not automatically extend to the interiors of every enclosed space within the area.” *A.A. Beiro Const. Co.*, 746 F.2d at 903. Because their role is to aid in “the conduct of an effective and thorough physical inspection of the workplace,” 29 CFR 1903.8(c), the third-party representative is only permitted to accompany the CSHO, and they are not permitted to stray from the CSHO or to conduct their own searches.

Moreover, the Ohio Manufacturers’ Association’s concerns about the inspection becoming a “wall to wall” inspection are overstated. The CSHO will conduct the walkaround inspection in accordance with the law and FOM and will inspect those areas where there are reasonable grounds to believe a violation could be found. Generally, OSHA conducts unprogrammed inspections (*i.e.*, inspections resulting from an employee complaint, referral, reported accident or incident) as partial inspections, which are limited to the specific work areas, operations, conditions, or practices forming the basis of the unprogrammed inspection. As explained in the FOM, however, the scope of an OSHA inspection can be expanded for a number of reasons, including employee interviews, among other reasons. OSHA Field Operations Manual, (CPL 02–00–164), Chapter 3, Section III.B.2. Hence, just like employee representatives employed by the employer, third-party employee representatives may communicate to the CSHO conditions they are aware of or observe in plain view while accompanying the CSHO on the

walkaround inspection. “The effectiveness of OSHA inspections would be largely eviscerated if compliance officers are not given some nominal right to follow up on observations of potential violations.” *A.A. Beiro Const. Co.*, 746 F.2d at 903.

Several comments also expressed concern that the rule would violate state laws against trespassing (see, *e.g.*, Document ID 1780, p. 2; 1938, p. 6–7). For example, the Coalition for Workplace Safety cited the “local-interest exception” to the NLRA in arguing that state trespass laws allow employers to exclude individuals from their property (Document ID 1938, p. 6–7). The local-interest exception allows states to regulate certain conduct that is arguably NLRA-protected without being preempted by the NLRA. See *Loc. 926 Int’l Union of Operating Eng’rs v. Jones*, 460 U.S. 669, 676 (1983). This exception typically applies when the state regulates “threats to public order such as violence, threats of violence, intimidation and destruction of property [or] acts of trespass.” See *Pa. Nurses Ass’n v. Pa State Educ. Ass’n*, 90 F.3d 797, 803 (3d Cir. 1996) (collecting cases). These cases are inapposite here both because they do not arise under the OSH Act and deal solely with the actions of private parties such as labor organizations.

Under the final rule, an authorized employee representative would accompany the CSHO, a government official, for the purpose of aiding a lawful inspection under the OSH Act. Moreover, courts apply the local-interest exception when, among other factors, the conduct at issue is only a “peripheral concern” of the NLRA. See *Loc. 926*, 460 U.S. at 676. Application of the exception here with respect to the OSH Act would be inappropriate because the right under section 8(e) for an authorized employee representative to accompany the CSHO is intended to increase the effectiveness of the walkaround inspection, an essential element of the OSH Act’s enforcement scheme. Thus it is “one of the key provisions” of the Act. See Subcomm. on Lab. of the S. Comm. on Lab. and Pub. Welfare, 92d Cong. 1st Sess., reprinted in *Legislative History of the Occupational Safety and Health Act of 1970*, at 430 (Comm. Print 1971).

### 3. Fifth Amendment Issues

Some commenters argued that the rule constitutes a *per se* taking under the Fifth Amendment by allowing employee representatives to be non-employees (see, *e.g.*, Document ID 0043, p. 2–4; 0168, p. 3–4; 1768, p. 7–8; 1779, p. 2–3; 1952, p. 8–9; 1976, p. 18). These

commenters asserted that the rule will deny employers the right to exclude unwanted third parties from their property (see, e.g., Document ID 0043, p. 3; 1952, p. 8–9; 1976, p. 18). Under the Fifth Amendment’s Takings Clause, the government must provide just compensation to a property owner when the government physically acquires private property for a public use. See *Tahoe-Sierra Pres. Council*, 535 U.S. at 321. However, the Supreme Court has recognized that “[b]ecause a property owner traditionally [has] had no right to exclude an official engaged in a reasonable search, government searches that are consistent with the Fourth Amendment and state law cannot be said to take any property right from landowners.” *Cedar Point Nursery*, 141 S. Ct. at 2079. Despite this important distinction, commenters raised various arguments in support of their assertion that a taking will occur, focusing on the identity of the employee representative and the nature of their activity onsite.

For example, some commenters asserted that a *per se* taking would occur because the rule authorizes a third party who is not a government official to access private property (see, e.g., Document ID 0168, p. 3–4; 1952, p. 8–9; 1976, p. 18). OSHA’s rule provides that employees can select either a third party or another employee of the employer to accompany the CSHO. However, only the CSHO, as the government official, will conduct the inspection. Contrary to the argument made by some commenters (see, e.g., Document ID 1768, p. 8), OSHA is not delegating its inspection authority to third parties. The purpose of employee and employer representation during the walkaround is to aid—not conduct—OSHA’s inspection. See 29 U.S.C. 657(e). If OSHA is engaged in a reasonable search under the Fourth Amendment, the mere presence of such a third-party employee representative does not result in a taking. See *Bills*, 958 F.2d at 703 (noting that a third party’s entry onto subject’s private property may be “justified if he had been present to assist the local officers”).

Other commenters argued that the rule conflicts with the Supreme Court’s decision in *Cedar Point Nursery* because it would allow union representatives to accompany the CSHO (see, e.g., Document ID 0043, p. 2–3; 1952, p. 8–9; 1976, p. 18–19). In *Cedar Point Nursery*, the Supreme Court invalidated a California regulation that granted labor organizations a “right to take access” to an agricultural employer’s property for the sole purpose of soliciting support for unionization. 141 S. Ct. at 2069, 2080. The Supreme Court held that the

regulation appropriated a right to invade the growers’ property and therefore constituted a *per se* physical taking. *Id.* at 2072. The Court reasoned that “[r]ather than restraining the growers’ use of their own property, the regulation appropriates for the enjoyment of third parties the owners’ right to exclude.” *Id.* The circumstances in *Cedar Point Nursery* are not present in this rule, however. *Cedar Point Nursery* involved a regulation that granted union organizers an independent right to go onto the employer’s property for purposes of soliciting support for the union for up to three hours per day, 120 days per year. This rule does not. Rather, consistent with section 8(e) of the OSH Act, this rule—like the regulation that has been in effect for more than fifty years—recognizes a limited right for third parties to “accompany” CSHOs during their lawful physical inspection of a workplace solely for the purpose of aiding the agency’s inspection.

Additionally, the Supreme Court in *Cedar Point Nursery* stated that “many government-authorized physical invasions will not amount to takings because they are consistent with longstanding background restrictions on property rights.” *Id.* at 2079. “For example, the government owes a landowner no compensation for requiring him to abate a nuisance on his property, because he never had a right to engage in the nuisance in the first place.” *Id.* Here, OSHA’s rule will not constitute a physical taking because, as discussed in Section IV.D.2, Fourth Amendment Issues, OSHA’s inspections are conducted in accordance with the Fourth Amendment and the OSH Act. Unlike the union organizers in *Cedar Point Nursery*, the presence of third-party employee representatives on the employer’s property will be strictly limited to accompanying the CSHO during a lawful physical inspection of the workplace and their sole purpose for being there will be to aid the inspection.

One commenter stated OSHA’s rule does not fit within any of the Supreme Court’s recognized exceptions permitting government-authorized physical invasions because (1) access by third parties is not rooted in any “longstanding background restrictions on property” and “these searches [do not] comport with the Fourth Amendment,” and (2) “even if the [rule] could be characterized as a condition imposed in exchange for a benefit, the third-party tag-along is not germane to risks posed to the public” (Document 1768, p. 8) (citing *Cedar Point Nursery*, 141 S. Ct. at 2079). First, as discussed in Section IV.D.2, Fourth Amendment

Issues, an OSHA inspection can be reasonable under the Fourth Amendment even when it is conducted with the aid of a third-party. See, e.g., *Sparks*, 265 F.3d at 831–32 (finding warrantless search conducted with the aid of a civilian reasonable under the Fourth Amendment). Second, in *Cedar Point Nursery*, the Supreme Court stated that the government may require property owners to cede a right of access as a condition of receiving certain benefits, such as in government health and safety inspection regimes, without causing a taking so long as “the permit condition bears an ‘essential nexus’ and ‘rough proportionality’ to the impact of the proposed use of the property,” *Cedar Point Nursery*, 141 S. Ct. at 2079–2080 (citing *Dolan v. City of Tigard*, 512 U.S. 374, 386, 391 (1994) and *Koontz v. St. Johns River Water Management Dist.*, 570 U.S. 595, 599 (2013)). However, OSHA is not required to demonstrate the elements of “essential nexus” and “rough proportionality” because it does not condition the grant of any benefit such as a grant, permit, license, or registration on allowing access for any of its reasonable safety and health inspections.

Accordingly, OSHA has determined that this rule does not constitute a taking requiring just compensation under the Fifth Amendment. OSHA inspections conducted under this rule will be consistent with the Fourth Amendment and any third-party employee representatives that accompany the CSHO on their physical inspection of the workplace will be on the employer’s premises solely to aid the inspection.

#### 4. Due Process Issues

Some commenters argued that this rule would deprive employers of due process because of substantive or procedural deficiencies or because it is unconstitutionally vague (see, e.g., Document ID 1762, p. 4; 1776, p. 5; 1942, p. 4; 1955, p. 3, 8–9; 8124). For example, NRF asserted, “A CSHO’s decision to authorize a third-party representative to enter an employer’s property is a violation of substantive due process that an employer has no pre-entry/pre-enforcement means to address.” (Document ID 1776, p. 5). Other commenters asserted that employers’ due process rights are violated because there are not procedures for employers to challenge the CSHO’s “good cause” and “reasonably necessary” determination, object to the selection of employees’ third-party walkaround representative, or verify the third-party representative’s qualifications before the third party

enters their property (see, e.g., Document ID 1776, p. 2, 5, 6–7; 1955, p. 3, 8–9). OSHA does not find any merit to commenters' due process challenges.

NRF inaccurately asserts that permitting a third-party to enter an employer's property violates that employer's substantive due process rights (see Document ID 1776, p. 5). As discussed in Section IV.D.3, Fifth Amendment Issues, OSHA inspections do not result in the deprivation of property. Instead, they are law enforcement investigations to determine whether employers at the worksite are complying with the OSH Act and OSHA standards. And, as explained in Section IV.D.2, Fourth Amendment Issues, a third party may accompany OSHA during its inspection for the purpose of aiding such inspection, just as other law enforcement officials do, depending on the nature of the inspection.

This rule also does not change employers' ability to object to employees' choice for their walkaround representative. Employees have a right under section 8(e) of the Act to a walkaround representative, and, if an employer has concerns about the particular representative that employees choose, nothing in the Act or the rule precludes employers from raising objections to the CSHO. The CSHO may consider those objections when conducting an inspection in accordance with Part 1903, including when judging whether good cause has been shown that the employee representative's participation is reasonably necessary to conduct an effective and thorough inspection of the workplace.

Furthermore, as discussed in Section IV.D.2, Fourth Amendment Issues, OSHA's inspections are conducted with the employer's consent or via a warrant. If an employer denies or limits the scope of its consent to OSHA's entry because it does not believe a particular third party should enter, the CSHO will consider the reason(s) for the employer's objection. The CSHO may either find merit to the employer's objection or determine that good cause has been shown that the third party is reasonably necessary to a thorough and effective inspection. In the latter scenario, the CSHO would follow the agency's procedures for obtaining a warrant to conduct the physical inspection, and a judge would consider whether the search, including the third-party's accompaniment, is reasonable under the Fourth Amendment. See, e.g., *Matter of Establishment Inspection of Caterpillar Inc.*, 55 F.3d at 336 (employer objected to striking employee serving as walkaround representative and denied

OSHA entry, moved to quash OSHA's warrant granting entry, and then appealed district court decision denying employer's motion). Neither NRF nor the Construction Industry Safety Coalition have suggested that this process is constitutionally inadequate.

Other commenters argued that the rule is unconstitutionally vague. For instance, the Construction Industry Safety Coalition argues the rule "does not provide requisite notice of what is required to comply and will be unconstitutionally vague on its face and as applied." (Document ID 1955, p. 3, 8–9). Several commenters argued "the regulated community has no notice as to what the standards, procedures, and their rights will be under this proposed regulation and thus cannot meaningfully comment." (Document ID 1779, p. 2; see also 1751, p. 2; 1942, p. 2).

Constitutional due process requires regulations to be sufficiently specific to give regulated parties adequate notice of the conduct they require or prohibit. See *Freeman United Coal Mining Co. v. Fed. Mine Safety & Health Review Comm'n*, 108 F.3d 358, 362 (D.C. Cir. 1997) ("[R]egulations will be found to satisfy due process so long as they are sufficiently specific that a reasonably prudent person, familiar with the conditions the regulations are meant to address and the objectives the regulations are meant to achieve, would have fair warning of what the regulations require."); see also *AJP Const., Inc. v. Sec'y of Lab.*, 357 F.3d 70, 76 (D.C. Cir. 2004) (quoting *Gates & Fox Co. v. OSHRC*, 790 F.2d 154, 156 (D.C. Cir. 1986)) ("If, by reviewing the regulations and other public statements issued by the agency, a regulated party acting in good faith would be able to identify, with ascertainable certainty, the standards with which the agency expects parties to conform, then the agency has fairly notified a petitioner of the agency's interpretation).

Contrary to CISC's assertion, this rule is not unconstitutionally vague. As explained in Section IV.F, Administrative Issues, this rule provides greater clarity than the prior regulation by more explicitly stating that employees' walkaround representative may be a third party and that third parties are not limited to the two examples in the previous regulation. Accordingly, OSHA has determined that this rule does not infringe on employers' due process rights.

##### 5. Tenth Amendment Issues

Some commenters raised Tenth Amendment concerns (see Document ID 1545; 7349). For instance, one

commenter stated they oppose the rule "because it violates the 10th amendment of the US Constitution, which reserves all powers to the states and the people that are not explicitly named in the Constitution" (Document ID 7349). Another commenter expressed concern over "federal law overruling established state law concerning OSHA rules" (Document ID 1545). However, OSHA's authority to conduct inspections and to issue inspection-related regulations is well-settled and has been long exercised. See 29 U.S.C. 657(e) (describing the Secretary's authority to promulgate regulations related to employer and employee representation during an inspection); 657(g)(2) (describing the Secretary of Labor's and the Secretary of Health and Human Services' authority to "each prescribe such rules and regulations as he may deem necessary to carry out their responsibilities under this Act, including rules and regulations dealing with the inspection of an employer's establishment"); *Barlow's*, 436 U.S. at 309 (section 8(a) of the OSH Act "empowers agents of the Secretary of Labor (Secretary) to search the work area of any employment facility within the Act's jurisdiction."). Accordingly, OSHA concludes that this rule does not violate the 10th Amendment. For a discussion on how this rule will affect states, see Sections VII, Federalism and VIII, State Plans.

##### E. National Labor Relations Act and Other Labor-Related Comments

Several commenters opposed to the proposed rule discussed the National Labor Relations Act (NLRA). These commenters mainly asserted that the rule circumvents or conflicts with the NLRA by allowing union officials to be employee representatives in non-union workplaces (see, e.g., 1933, p. 4; 1955, p. 7–8). For example, commenters argued that under the NLRA, a non-union employer generally has the right to exclude union representatives engaged in organizing activity from their property (see, e.g., Document ID 1938, p. 6–7; 1955, p. 6–7; 1976, p. 10–11). The Chamber of Commerce also contended that non-union employers that allow a union official to serve as employees' walkaround representative could violate section 8(a)(2) of the NLRA by appearing to show favoritism to that union (Document ID 1952, p. 7). In addition, some commenters argued that representation rights under the NLRA are based on the concept of majority support, and therefore, a CSHO cannot allow an individual who lacks support from a majority of employees to serve as the employees' walkaround



representative during OSHA's inspection (see, e.g., Document ID 1939, p. 3; 1976, p. 8).

Relatedly, several commenters, including the Utility Line Clearance Safety Partnership, Coalition for Workplace Safety, and National Association of Manufacturers asserted that determining whether a third party is an authorized representative of employees is exclusively under the jurisdiction of the National Labor Relations Board (NLRB) (Document ID 1726, p. 4–5; 1938, p. 3; 1953, p. 5). The Coalition for Workplace Safety also argued that the NLRB alone has the authority to address the relationship between employees and their authorized representative and that “OSHA does not have the expertise or authority to meddle in the relationship” between employees and any authorized representative (Document ID 1938, p. 3–4). Lastly, some commenters raised the question of whether the rule would allow employees of one union to select a different union as their walkaround representative and asserted that this would conflict with the NLRA's requirement that a certified union be the exclusive representative of all employees in the bargaining unit (see, e.g., Document ID 1976, p. 9).

Conversely, other commenters, such as a group of legal scholars who support the proposed rule, denied that the rule implicated the NLRA and cited the legislative history of the OSH Act to show that the phrase “for the purpose of aiding such inspection” was added to section 8(e) of the OSH Act to limit potential conflict with the NLRA (Document ID 1752, p. 3–4). U.S. Representative Robert “Bobby” Scott compared section 8(e) of the OSH Act with section 103(f) of the Mine Safety and Health Act (Mine Act), which authorizes employee representatives during inspections, and noted that Federal courts of appeals have determined that allowing non-employee representatives under the Mine Act does not violate the NLRA (Document ID 1931, p. 9–10, citing *Thunder Basin Coal Co. v. FMSHRC*, 56 F.3d 1275 (10th Cir. 1995) and *Kerr-McGee Coal Corp. v. FMSHRC*, 40 F.3d 1257 (D.C. Cir. 1994)). The American Federation of Teachers, who commented in support of the proposed rule, noted that disallowing union representatives in unionized workplaces would be incongruent with the NLRA because union representatives are the legally authorized representatives of employees concerning terms and conditions of employment under the NLRA (Document ID 1957, p. 2).

OSHA concludes that the rule does not conflict with or circumvent the NLRA because the NLRA and the OSH Act serve distinctly different purposes and govern different issues, even if they overlap in some ways. Cf. Representative of Miners, 43 FR 29508 (July 7, 1978) (meaning of the word “representative” in the Mine Act “is completely different” than the meaning of the word in the NLRA). The NLRA concerns “the practice and procedure of collective bargaining” and “the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.” 29 U.S.C. 151. To effectuate this, the NLRB conducts elections to certify and decertify unions and investigates alleged unfair labor practices, among other activities. See 29 U.S.C. 159.

In contrast, the purpose of the OSH Act is to “assure . . . safe and healthful working conditions.” 29 U.S.C. 651. To effectuate this purpose, the OSH Act authorizes OSHA to conduct safety and health inspections and mandates that “a representative authorized by [an employer's] employees shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of [the workplace] for the purpose of aiding such inspection.” 29 U.S.C. 657(e). The NLRA contains no analogous provision. Further, the OSH Act does not place limitations on who can serve as the employee representative, other than requiring that the representative aid OSHA's inspection, and the OSH Act's legislative history shows that Congress “provide[d] the Secretary of Labor with authority to promulgate regulations for resolving this question.” 88 FR 59825, 59828–59829 (quoting Legislative History of the Occupational Safety and Health Act of 1970, at 151 (Comm. Print 1971)). As such, OSHA—not the NLRB—determines if an individual is an authorized representative of employees for the purposes of an OSHA walkaround inspection. OSHA's FOM instructs that in workplaces where workers are represented by a certified or recognized bargaining agent, the highest-ranking union official or union employee representative on-site shall designate who will participate as the authorized representative during the walkaround. OSHA Field Operations Manual, CPL 2–00–164, Chapter 3, Section VII.A.I. While some commenters questioned OSHA's expertise and authority to make such determinations,

OSHA has the statutory and regulatory authority to determine who is an authorized walkaround representative and has done so for more than fifty years. See 29 U.S.C. 657(e), (g)(2); 29 CFR 1903.8(a)–(d).

Because of the different nature of each statute and the different activities they govern, OSHA does not find any merit to the arguments about potential conflicts or circumvention of the NLRA. For example, some commenters pointed to Supreme Court cases, including *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956) and *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992), for the proposition that employers have a right to exclude unions from their property. (see, e.g., Document ID 1952, p. 8–9; 1955, p. 7; 1976, p. 9–11). However, those decisions did not bar unions from ever accessing worksites for any reason. Instead, the decisions concerned unions' ability to access employer property for the specific purpose of informing non-union employees of their rights under NLRA Section 7 to form, join, or assist labor organizations. See *Lechmere, Inc.*, 502 U.S. at 538 (“only where such access [to non-union employees by union organizers] is infeasible that it becomes necessary and proper to take the accommodation inquiry to a second level, balancing the employees' and employers' rights”); *Babcock*, 351 U.S. at 114 (“[The NLRA] does not require that the employer permit the use of its facilities for organization when other means are readily available”). In reaching these decisions, the Supreme Court noted that the NLRA affords organizing rights to employees and not to unions or their nonemployee organizers, and therefore, the employer is generally not required to admit nonemployee organizers onto their property. *Lechmere*, 502 U.S. at 532; *Babcock*, 351 U.S. at 113.

Conversely, the OSH Act explicitly affords employees the right to have a representative accompany OSHA “for the purpose of aiding” the inspection and does not require that representative to be an employee of the employer. 29 U.S.C. 657(e). If employees in a non-union workplace choose a nonemployee representative affiliated with a union as their walkaround representative during OSHA's inspection, OSHA will allow that individual to be the employees' walkaround representative only if good cause has been shown that the individual is reasonably necessary to the conduct of an effective and thorough inspection. That third-party walkaround representative will be onsite solely to aid OSHA's inspection. If the representative deviates from that role, OSHA's existing regulations afford the

CSHO the authority to terminate the representative's accompaniment. See 29 CFR 1903.8(d).

Additionally, in interpreting the Mine Act, which contains an analogous employee representative walkaround right, 30 U.S.C. 813(f), courts have rejected arguments that allowing a nonemployee union representative to accompany a Mine Safety and Health Administration (MSHA) investigator as the miners' representative during an inspection violates an employer's rights under the NLRA. See *U.S. Dep't of Lab. v. Wolf Run Mining Co.*, 452 F.3d 275, 289 (4th Cir. 2006) ("While a union may not have rights to enter the employer's property under the NLRA, miners do have a right to designate representatives to enter the property under the Mine Act."); *Thunder Basin Coal Co.*, 56 F.3d at 1281 (rejecting argument that allowing non-union workers to designate union representatives for MSHA inspections violated *Lechmere*); see also *Kerr-McGee Coal Corp.*, 40 F.3d at 1265 (rejecting the *Lechmere* standard because the Mine Act "defines the rights of miners' representatives and specifies the level of intrusion on private property interests necessary to advance the safety objectives of the Act."). Accordingly, NLRA case law does not prevent employees from authorizing nonemployee representatives under the OSH Act, including those affiliated with unions.

In addition, comments regarding the NLRA's requirements for majority support are misplaced. One commenter argued that because an employer can only bargain with a union representative who was designated or selected by a "majority of the employees" under the NLRA, unions must also have majority support to be the employees' representative under the OSH Act (Document ID 1976, p. 6–11). Relatedly, this commenter suggested that the showing to demonstrate majority support is higher under the OSH Act because the OSH Act does not exclude as many individuals from the definition of "employee" as the NLRA (Document ID 1976, p. 9). However, the OSH Act contains no requirement for majority support, nor has OSHA ever imposed one in determining who is the employees' walkaround representative. Cf. OSHA Field Operations Manual, Chapter 3, Section VII.A (noting that members of an established safety committee can designate the employee walkaround representative). Furthermore, the NLRA's requirements for majority support would not apply to a union representative accompanying OSHA in a non-union workplace as this representative would not be engaged in

collective bargaining. Their purpose, like any other type of employee representative, is to aid OSHA's inspection.

This rule also does not conflict with sections 7 and 8(a)(2) of the NLRA, contrary to the assertions of several commenters (see, e.g., Document ID 1776, p. 9–10; 1946, p. 6; 1952, p. 7). Section 7 of the NLRA grants employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection" as well as "the right to refrain from any or all of such activities[.]" 29 U.S.C. 157. This rule has no effect on employees' section 7 right to engage in or refrain from concerted activity, contrary to the assertions of NRF that this rule violates employees' section 7 rights by denying them a right to vote for or against an authorized representative (Document ID 1776, p. 9–10). Again, this rule has no effect on employees' rights under the NLRA to select a representative "for the purposes of collective bargaining." 29 U.S.C. 159(a). The purpose of the employees' walkaround representative is to aid OSHA's inspection, not engage in collective bargaining.

One commenter raised several hypothetical situations that could occur and asked whether these situations would be considered unfair labor practices under sections 8(a)(1) and 8(b)(1)(A) of the NLRA (Document ID 1976, p. 9). The question of whether certain conduct could violate another law is beyond the scope of this rulemaking and OSHA's authority. The NLRB, not OSHA, determines whether such conduct would constitute an unfair labor practice.

OSHA has determined this rule does not conflict with section 8(a)(2) of the NLRA, which prohibits employers from "dominat[ing] or interfer[ing] with the formation or administration of any labor organization or contribut[ing] financial or other support to it[.]" 29 U.S.C. 158(a)(2). NRF asserted that an employer providing a union organizer with access to its property during an OSHA inspection may be providing unlawful support to the union in violation of 8(a)(2) of the NLRA (Document ID 1952, p. 7). However, employees, and not the employer, select their representative, and the CSHO must also determine that good cause has been shown that this representative is reasonably necessary. Given that OSHA, not an employer, has the ultimate authority to determine which

representatives may accompany the CSHO on the walkaround inspection, see 29 CFR 1903.8(a)–(d), an employer that grants access to an employee representative affiliated with a union as part of an OSHA workplace inspection would not run afoul of section 8(a)(2) of the NLRA, even assuming that such access could conceivably implicate Section 8(a)(2).

Commenters also raised concerns about unionized employees selecting a different union to accompany OSHA because the NLRA recognizes certified representatives as the "exclusive representative" of the bargaining unit employees (see, e.g., Document ID 1976, p. 9). Other commenters raise concerns that the final rule inserts OSHA into "jurisdictional disputes between unions" (Document ID 11220; 11211). If employees at a worksite already have a certified union, OSHA does not intend to replace that union with a different walkaround representative. According to the FOM, "the highest ranking union official or union employee representative onsite shall designate who will participate in the walkaround." OSHA Field Operations Manual, CPL 02–00–164, Chapter 3, Section VII.A.1. However, the CSHO may permit an additional employee representative (regardless of whether such representative is affiliated with a union) if the CSHO determines the additional representative is reasonably necessary to the conduct of an effective and thorough inspection and will further aid the inspection. See 29 CFR 1903.8(a), (c).

Finally, even where the two statutes overlap at times, such as both the NLRA and OSH Act protecting employees' right to voice concerns to management about unsafe or unhealthful working conditions, there is no conflict between the two statutes when employees authorize a third-party affiliated with a union to accompany a CSHO on an inspection of a non-union workplace. As evidence that this intersection of statutes does not lead to conflict, OSHA and the NLRB have had Memoranda of Understanding (MOUs) since 1975 to engage in cooperative efforts and interagency coordination. Accordingly, OSHA finds no merit to the arguments that this regulation conflicts or circumvents the NLRA.

Comments Related to Labor Disputes, Organizing, and Alleged Misconduct

In addition to comments about the NLRA, some commenters expressed concerns that, by allowing a union representative to accompany OSHA at a non-union worksite, OSHA would give the appearance of endorsing a union

representative in a particular worksite or endorsing unions generally and thus departing from OSHA's longstanding policy of neutrality in the presence of labor disputes (see, e.g., Document ID 1976, p. 24–25; 1946, p. 6–7). Another commenter claimed that OSHA's 2023 MOU with the NLRB could pressure CSHOs "to allow non-affiliated union representatives to join their walkaround inspections" (Document ID 1762, p. 5).

These concerns are unfounded. OSHA does not independently designate employee representatives. Employees select their representative, and OSHA determines if good cause has been shown that the individual is reasonably necessary to the inspection. That inquiry does not depend on whether the representative is affiliated with a union. And a finding of good cause does not indicate that OSHA is favoring unions. Additionally, the FOM provides guidance to CSHOs to avoid the appearance of bias to either management or labor if there is a labor dispute at the inspected workplace. See OSHA Field Operations Manual, CPL 02–00–164, Chapter 3, Sections IV.G.3, IV.H.2.c ("Under no circumstances are CSHOs to become involved in a worksite dispute involving labor management issues or interpretation of collective bargaining agreements"); ("During the inspection, CSHOs will make every effort to ensure that their actions are not interpreted as supporting either party to the labor dispute."). Neutrality has been OSHA's longstanding policy, and OSHA rejects arguments that the final rule displays favoritism towards unions or will improperly pressure CSHOs to allow authorized representatives.

Finally, OSHA's MOU with the NLRB relates to interagency cooperation and coordination, and there is no basis for assuming that this interagency cooperation will interfere with OSHA inspections or neutrality. As explained previously, third-party employee representatives will accompany the CSHO on an inspection only when the CSHO determines good cause has been shown that the third-party employee representatives are reasonably necessary to an effective and thorough inspection. OSHA concludes that existing safeguards and the requirement for third party representatives to be reasonably necessary to the inspection will prevent such an appearance of bias or endorsement of unionization or particular unions.

Commenters in opposition to the proposed rule also voiced the possibility that third-party employee representatives from unions or other advocacy organizations would use the

walkaround inspection for organizing (see, e.g., Document ID 0021; 0040, p. 3). The National Federation of Independent Business discussed these concerns and alleges that third-party employee representatives "would gain access to information otherwise not available and could interact with employees in a way that could facilitate union organizing campaigns, political activity, mischief, and litigation" (Document ID 0168 p. 7). The North American Insulation Manufacturers Association claimed that "unions would monitor OSHA complaint filings, contact employees, and attempt to receive authorization to attend walkarounds so they can access the site to solicit for employee support" (Document ID 1937, p. 5).

Additionally, some commenters asserted that permitting union representatives in workplaces without a collective bargaining agreement is part of an "all-of-government" approach to union expansion" (see, e.g., Document ID 1776, p. 2). Similarly, some commenters argued that this rule is "designed to give union supporters access to company facilities that they would otherwise not be granted" and that it "promote[s] unions and collective bargaining" (Document ID 0033; 1030). Certain commenters in support of the proposed believed that the proposed rule was about ensuring union representation in inspected workplaces (see, e.g., Document ID 0056; 10725).

Alleged union misconduct is another concern of several commenters in opposition to the proposed rule. NRF alleges that they "have learned of anecdotal incidents wherein union business agents have relationships with CSHOs from some local area offices" and that these CSHOs have "pursued unjustifiable citations against companies during critical times" (Document ID 1776, p. 6–7). Some commenters also expressed concerns that third-party representatives affiliated with one union would "poach" employees from employees' existing union (see, e.g., Document ID 11275). Other comments raise misconduct of third parties generally as a basis for their opposition to the proposed rule. For example, the American Road & Transportation Builders Association (ARTBA) claims "ARTBA members have shared past experiences with bad actors attempting to access their job sites for reasons unrelated to worker safety and health" (Document ID 1770, p. 3).

NRF referenced amendments to the NLRA and the Landrum-Griffin Act, also known as the Labor-Management Reporting and Disclosure Act (LMRDA), which, according to NRF, "provides a

mechanism through which employees and employers can challenge the status of an Authorized Representative" (Document ID 1776, p. 6). NRF asserted that this "pre-enforcement mechanism" allows "an appeal and remedy before employees and employers must submit to representation by the Authorized Representative." (Document ID 1776, p. 6). NRF asserted that the policy rationale of limiting union misconduct was behind the amendments to the NLRA and passage of the LMRDA and suggested that the final rule should include similar safeguards to further the same policy rationale (Document ID 1776, p. 6).

U.S. Representative Virginia Foxx asserted that unions "weaponized the OSHA inspection process" after OSHA issued the Sallman letter, referencing four inspections where a representative affiliated with a union accompanied OSHA as the employee walkaround representative (Document ID 1939, p. 2–3). One commenter asserted that this rule could lead to compromised inspections and quoted an unnamed "Occupational Safety and Operational Risk Management Professional" who claimed to witness inspections where union officials allegedly argued with CSHOs and stated that CSHOs could not write a citation without the union's consent (Document ID 11506). No information about the date, location, employer, union, OSHA staff, or the witness was included.

Some commenters, including U.S. Senator Bill Cassidy, MD, called attention to the potential that the "presence of a union organizer, especially in a non-union workplace, could very well cause an employer to deny OSHA access" (Document ID 0021, p. 2; see also 1772, p. 1). Senator Cassidy stated that this would delay the inspection while OSHA seeks a warrant, which would be detrimental to worker safety and health (Document ID 0021, p. 1–2; see also 1772, p. 1). Winnebago Industries, Inc. stated their concerns about worker privacy when a third-party union representative accompanies an OSHA inspector (Document ID 0175, p. 2).

Those in support of the proposed rule, including UFCW, stated that third-party representatives from their union have not used OSHA inspections as pretext for organizing (Document ID 1023, p. 2). A former director of the safety and health program for AFSCME stated that when he served as a third-party representative in workplaces that AFSCME was attempting to organize that "no union issues were raised" (Document ID 1945, p. 3). Representative Scott, citing to a

prominent union organizer, noted that union organizing was unlikely to happen during a walkaround inspections because of the need for in-depth, one-on-one conversations between the organizer and workers during a campaign (Document ID 1931, p. 10–11). Representative Scott concluded that walkaround inspections do not allow for such conversations.

In response to these comments both for and against the rule, OSHA first reiterates that the purpose of this rulemaking is to allow CSHOs the opportunity to draw upon the skills, knowledge, or experience of third-party representatives and ensure effective inspections, not to facilitate union organizing or ensure union representation. OSHA strongly disagrees with NRF's suggestion that CSHOs have pursued unjustifiable citations due to union influence. Further, NRF provided no specific details to enable OSHA to evaluate these allegations. For the same reason, OSHA finds little support for the allegation that CSHOs have been improperly influenced by union officials and that this rule will lead to further improper influence. Assertions of general misconduct of third parties raised by commenters such as ARTBA do not appear linked to OSHA's inspections and lack specific details.

OSHA also disagrees with the notion that this rule allows the OSHA inspection to be "weaponized." Because any third-party representative, including those from unions or advocacy organizations, would need to be reasonably necessary for a thorough and effective inspection, the OSHA inspection cannot be "weaponized" against employers. Further, OSHA complaints are not publicly available, so is there no way for a union to "monitor" them and contact employees, contrary to the North American Insulation Manufacturers Association's claim.

While third-party employee walkaround representatives may observe workplace conditions, they only have access to this information for the specific purpose to aid an OSHA inspection. And, as explained above, they are not permitted to engage in any conduct that interferes with a fair and orderly inspection. See 29 CFR 1903.8(d). If a representative engages in conduct that interferes with a fair and orderly inspection, such as union organizing or any type of misconduct, OSHA will deny the representative the right of accompaniment and exclude the representative from the walkaround inspection. See 29 CFR 1903.8(d). CSHOs have extensive experience maintaining fair and orderly inspections, and, given the CSHO's

command over the inspection, OSHA finds that union organizing, political activity, or misconduct are unlikely during a walkaround. Furthermore, any union solicitation, such as handing out union authorization cards, would not aid the inspection and would be grounds to deny accompaniment.

OSHA concludes that this rule, along with existing procedural and regulatory safeguards, are adequate to protect inspections from interference, union organizing, or misconduct. See 29 CFR 1903.7(d); 1903.8(a)–(d). Additionally, as discussed in Section IV.A, The Need for and Benefits of Third-Party Representation, any inspection with a third-party representative is subject to OSHA regulations on the protection of trade secrets. See 29 CFR 1903.9(a)–(d).

OSHA also disagrees with Winnebago Industries' suggestion that allowing authorized third-party representatives from unions will have a noticeable impact on worker privacy. Since 1971, OSHA has permitted employees to have a third-party walkaround representative, and no comment has provided a specific example of when a worker's privacy was adversely impacted by the actions of a third-party representative. In fact, one commenter noted that a representative selected by workers can offer workers more privacy to reveal issues away from surveillance by an employer (Document ID 1728, p. 3–4).

OSHA disagrees with NRF's comment that this rule should include procedures similar to the NLRB "before employees and employers must submit to representation by the Authorized Representative" (Document ID 1776, p. 6). It is unknown exactly which mechanism this comment is referring to, such as situations where an employer declines to sign an election agreement and proceeds to a formal hearing before an NLRB Hearing Officer or situations where employees vote against a union in an NLRB-held election. Under the NLRA, an employer has a limited right to challenge a candidate bargaining representative, pre-election, by filing a petition with the NLRB. See 29 U.S.C. 159(c)(1)(B).

In either case, the NLRB processes for union recognition are completely inapposite to the framework of the OSH Act. First, OSHA inspections are to be conducted "without delay," 29 U.S.C. 657(a)(1), and delaying an inspection to hold a hearing on who can be the employees' walkaround representative is antithetical to section 8(a) of the OSH Act. Second, as explained previously, nothing in the OSH Act requires majority support for a representative the way the NLRA does. Third, unlike the NLRA, the OSH Act does not include a

process by which employers object to employees' representative—or for employees to object to the employer's representative, for that matter. Nevertheless, employers may raise concerns related to the authorized employee representative with the CSHO, who will address them at the worksite. Where the employer's concerns cannot be resolved, the CSHO will construe the employer's continued objection as to the authorized employee representative as a refusal to permit the inspection and shall contact the Area Director, per Chapter 3, Section IV.D.2 of the FOM. OSHA will obtain a warrant when necessary to conduct its inspections. See *Barlow's*, 436 U.S. at 313; see also 29 CFR 1903.4(a).

Finally, because any third-party walkaround representative is subject to the good cause and reasonably necessary requirement, OSHA anticipates that the vast majority of employers will not deny entry simply because the employees' walkaround representative is a third party. However, OSHA will obtain a warrant when necessary to conduct its inspections. See *Barlow's*, 436 U.S. at 313; see also 29 U.S.C. 657(a)(1)–(2); 29 CFR 1903.4(a). In situations where the employer's past practice either implicitly or explicitly puts the Secretary on notice that a warrantless inspection will not be allowed, OSHA may seek an anticipatory warrant in order to conduct its inspection without delay. See 29 CFR 1903.4(b)(1). As such, OSHA does not believe that this rule will result in further delays that would be detrimental to worker safety and health.

#### F. Administrative Issues.

##### 1. Administrative Procedure Act

Some commenters argued that the proposal conflicted with the Administrative Procedure Act (APA) (See, e.g., Document ID 1776, p. 8, 10; 1953, p. 1, 3, 5; 1954, p. 2, 4). The APA requires an agency to provide notice of a proposed rulemaking and to include "either the terms or substance of the proposed rule or a description of the subjects and issues involved." 5 U.S.C. 553(b)(3). A final rule must be a logical outgrowth of the proposed rule and must allow affected parties to anticipate that the final rule was possible. See *Allina Health Servs. v. Sebelius*, 746 F.3d 1102, 1107 (D.C. Cir. 2014). In issuing a final rule an "agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of*

*U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)).

Several commenters asserted that the proposed rule was arbitrary and capricious under the APA because it was inconsistent with the OSH Act, other OSHA regulations, lacked a rational basis for adoption, lacked sufficient clarity on third-party qualifications, invited chaos, or because it gave CSHOs too much discretion (see, e.g., Document ID 0168, p. 4–6; 1754, p. 2–3; 1776, p. 2–3; 1782, p. 3–5; 1952, p. 12–13; 1953, p. 5; 1954, p. 4). As discussed below, OSHA has determined that this rule is consistent with APA and OSH Act rulemaking requirements.

#### a. Consistency With the OSH Act

Several commenters asserted that the proposed rule is arbitrary and capricious because it was not a valid construction of the OSH Act (see, e.g., Document ID 0168, p. 6; 1946, p. 4–5; 1952, p. 11–13). Some commenters asserted that the term “authorized employee representative” in section 8(e) of the OSH Act is limited to employees of the employer (see, e.g., Document ID 1768, p. 4; 11506). Others argued that the term is reserved for unions that represent employees for collective bargaining purposes (see, e.g., Document ID 1952, p. 6–7; 10808). Commenters further argued that defining this term to include all employee walkaround representatives, including non-union third parties, would directly conflict with existing OSHA regulations and procedural rules issued by the Occupational Safety and Health Review Commission (“Commission”) interpreting the same or similar terms (e.g., Document ID 1937, p. 4; 1946 p. 4–5; 1952, p. 6–8, 9–11; 1976, p. 6). OSHA has determined that this regulation is consistent with the plain language and legislative history of the OSH Act and finds that other, unrelated regulations do not require OSHA to limit its interpretation of “employee representative” in section 8(e) of the OSH Act to employees of the employer or unions that represent employees for collective bargaining purposes.

As explained in Section III, Legal Authority, the Act does not place restrictions on who can be a representative authorized by employees—other than requiring that they aid the inspection—and permits third parties to serve as authorized employee representatives. See *Matter of Establishment Inspection of Caterpillar Inc.*, 55 F.3d at 338 (“[T]he plain language of § 8(e) permits private parties

to accompany OSHA inspectors[.]”); *NFIB v. Dougherty*, 2017 WL 1194666, at \*12 (“[T]he Act merely provides that the employee’s representative must be authorized by the employee, not that the representative must also be an employee of the employer.”). Likewise, nothing in the OSH Act or its legislative history suggests that Congress intended to extend employee accompaniment rights only to unionized workplaces. See Comments of Congressperson William J. Scherle of Iowa, 92d Cong. 1st Sess., reprinted in *Legislative History of the Occupational Safety and Health Act of 1970*, at 1224 (Comm. Print 1971) (“The bill provides that union representatives or any employee representative be allowed to accompany inspectors on their plant tours.”) (emphasis added). Section 8(e) uses “representative authorized by his employees” and “authorized employee representative” as equivalents, and certainly employees can authorize an employee representative to accompany a walkaround inspection even if they are not unionized. There is no reason to think that Congress intended anything more.

Thus, section 8(e)’s plain meaning permits employees to select a walkaround representative, irrespective of whether that representative is employed by the employer, to serve as an “authorized employee representative.” Contrary to some commenters’ claims, section 8(e) does not limit the scope of authorized employee representatives to “only lawfully recognized unions” (Document ID 1952, p. 6). Furthermore, sections 8(e) and 8(g), respectively, expressly authorize the Secretary to issue regulations related to employee and employer representation during OSHA’s walkaround inspection as well as “regulations dealing with the inspection of an employer’s establishment.” 29 U.S.C. 657(e), (g)(2).

Furthermore, as discussed in Section III, Legal Authority, this rule is consistent with Congress’s expressed intent because Congress clearly intended to give the Secretary of Labor the authority to issue regulations to resolve the question of who could be an authorized employee representative for purposes of the walkaround inspection. See 29 U.S.C. 657(e); *Legislative History of the Occupational Safety and Health Act of 1970*, at 151 (Comm. Print 1971) (“Although questions may arise as to who shall be considered a duly authorized representative of employees, the bill provides the Secretary of Labor with authority to promulgate regulations for resolving this question.”).

Other commenters argued that this regulation is consistent with the plain language of the OSH Act (see, e.g., Document ID 1752, p. 1–3; 1969, p. 4). For example, the AFL–CIO argued that the Secretary’s interpretation “is strongly supported by judicial construction of the almost identical provision of the Federal Mine Health and Safety Act of 1977, 30 U.S.C. 813(f)” (Document ID 1969, p. 4). OSHA agrees.

The Mine Act contains nearly identical language conferring miners the right to have an authorized representative accompany the inspector as the OSH Act. Compare 30 U.S.C. 813(f) (“Subject to regulations issued by the Secretary, a representative of the operator and a representative authorized by his miners shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any coal or other mine[.]”) with 29 U.S.C. 657(e) (“Subject to regulations issued by the Secretary, a representative of the employer and a representative authorized by his employees shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any workplace[.]”). Courts have long held that this language in the Mine Act does not limit who can be employees’ representative. See *Utah Power & Light Co. v. Sec’y of Labor*, 897 F.2d 447 (10th Cir. 1990) (Section 103(f) of the Mine Act “confers upon the miners the right to authorize a representative for walkaround purposes without any limitation on the employment status of the representative.”).

As with the Mine Act, the nearly identical language in the OSH Act “does not expressly bar non-employees from serving as” authorized employee representatives. *Kerr-McGee Coal Corp.*, 40 F.3d at 1262. In *Kerr-McGee Coal Corp.*, the D.C. Circuit held that the Secretary’s interpretation of the Mine Act’s virtually identical language as allowing the “involvement of third parties in mine safety issues . . . is consistent with Congress’s legislative objectives of improving miner health and mine safety.” *Id.* at 1263; see also *id.* (“Obviously, if Congress had intended to restrict the meaning of ‘miners’ representatives’ in the 1977 Act, it could have done so in the statute or at least mentioned its views in the legislative history. It did neither. Consequently, in view of Congress’ clear concern about miners’ safety, the Secretary’s broad interpretation of the term is consistent with congressional objectives.”).

Moreover, Congress gave the Secretary of Labor the authority to issue regulations related to walkaround inspections and to resolve the question of who could be an authorized employee representatives for purposes of section 8(e) of the OSH Act. See 29 U.S.C. 657(e); Legislative History of the Occupational Safety and Health Act of 1970, at 151 (Comm. Print 1971). Given the nearly identical language in section 103(f) of the Mine Act, which was passed shortly after the OSH Act, and the similar purposes of the two statutes, here too the plain language of the OSH Act confers upon employees the right to authorize a representative irrespective of the representative's employment status. See *Smith v. City of Jackson, Miss.*, 544 U.S. 228, 233 (2005) (plurality opinion) (“[W]hen Congress uses the same language in two statutes having similar purposes, particularly when one is enacted shortly after the other, it is appropriate to presume that Congress intended that text to have the same meaning in both statutes.”).

The Chamber of Commerce also asserted that the plain meaning of the term “authorized” employee representative requires a legal delegation (see Document ID 1952, p. 10). In support, the Chamber cites two cases—*Anderson v. U.S. Dep’t of Labor*, 422 F.3d 1155, 1178–79 (10th Cir. 2005) and *United States v. Stauffer Chemical Co.*, 684 F.2d 1174, 1190–91 (6th Cir. 1982), *aff’d*, 464 U.S. 165 (1984) (Document ID 1952, p. 10). However, these cases are distinguishable and do not support the Chamber’s proposition that a legal delegation of authority is required.

In *Anderson*, the Tenth Circuit addressed whether a whistleblower complainant’s position as a political appointee precluded her from being an “authorized representative of employees” under the employee protection provisions of the Comprehensive Environmental, Response, Compensation, and Liability Act of 1980 (CERCLA) and other related environmental statutes. 422 F.3d at 1157. The Department of Labor’s Administrative Review Board (ARB) held that the complainant (Anderson) lacked standing to sue under CERCLA because the meaning of “authorized representative” under that statute requires “some tangible act of selection by employees in order for one to be an ‘authorized representative of employees.’” *Id.* at 1180. The ARB concluded that Anderson could not as a matter of law “represent” employees in her position as a political appointee under state law and, even if she was permitted to serve as an “authorized

representative,” she failed to establish that municipal employees or union officials “authorized” her to be their representative during her tenure.” *Id.* at 1178, 1180. On appeal, the Tenth Circuit held that, based on the statutory language and the legislative history of the applicable statutes, the ARB construction of “‘authorized representative’ to require some sort of tangible act of selection is a permissible one.” *Id.* at 1181.

The Chamber of Commerce argues that *Anderson* stands for the proposition that an employee representative is “authorized” under the OSH Act only where there is some “legal authority, rather than merely a request by employees to represent them.” (Document ID 1952, p. 10) (citing *Anderson*, 422 F.3d at 1178–79). However, this is an incorrect reading of *Anderson*. The court in *Anderson* did not hold—as the Chamber suggests—that “legal authority” is required for an employee representative to be “authorized” under any statute. Further, the holding in *Anderson* was limited to the meaning of “authorized representative of employees” as used in CERCLA (and other related environmental statutes). OSHA has never required an employee representative to have “legal authority” as a precondition to serving as a walkaround representative in the more than fifty years of implementing section 8(e) of the OSH Act, nor has any court. For example, OSHA’s FOM has long instructed that employee members of an established workplace safety committee or employees at large can designate a walkaround representative, see OSHA Field Operations Manual, CPL 02–00–164, Chapter 3, Section VII, A.1–A.2, even though that representative does not have “legal authority.”

Likewise, *Stauffer Chemical* is inapplicable to this rule. In that case, the U.S. Court of Appeals for the Sixth Circuit held that the term “authorized representative” of the EPA Administrator under the Clean Air Act’s provision governing pollution inspections means “officers or employees of the EPA” and cannot include employees of private contractors. *Stauffer Chem. Co.*, 684 F.2d at 1189–90. The Sixth Circuit, after reviewing the language of the Clean Air Act and its legislative history, determined that “[c]onstruing authorized representatives under section 114(a)(2) to include private contractors would lead to inconsistencies between that section and other parts of the Clean Air Act.” *Id.* at 1184. Contrary to the Chamber’s contention, *Stauffer Chemical* does not

hold that “an ‘authorized representative’ of an employee cannot be a third party but must be a fellow employee of the EPA.” (Document ID 1952, p. 10). That issue was not before the court. As discussed above, the court’s holding in *Stauffer Chemical* was limited to who is permitted to serve as an “authorized representative” of the EPA Administrator under the Clean Air Act and whether that includes private contractors or only officers and employees of the EPA. It has no bearing on the meaning of “authorized employee representative” in the context of 8(e) of the OSH Act.

The National Federation of Independent Business argued “[t]he proposed rule fails to incorporate properly the statutory requirement that any participation in an inspection by persons other than the OSHA inspector must be solely for the purpose of ‘aiding such inspection,’ and OSHA’s position that virtually any activity by a walking-around individual aids an inspection is arbitrary and capricious” (Document ID 0168, p. 6). OSHA rejects the premise that any activity by a third-party will aid the inspection under the final rule. The existing regulation contains a provision, which will remain in this final rule, requiring that the CSHO first determine that “good cause has been shown why accompaniment by a third party . . . is reasonably necessary to the conduct of an effective and thorough physical inspection of the workplace.” 29 CFR 1903.8(c); see also 1903.8(a) (representatives of employer and employees shall be given an opportunity to accompany the CSHO during the physical inspection “for the purpose of aiding such inspection”).

#### b. Consistency With Other OSHA Regulations

Some commenters asserted that this rule conflicts with other OSHA regulations (see, e.g., Document ID 1938, p. 4; 1946, p. 4–5). One commenter argued that this regulation directly conflicts with the definition of “authorized employee representative” in OSHA’s Recordkeeping and Reporting regulation at § 1904.35(b)(2)(i) (Document ID 1976, p. 6).

OSHA’s Recordkeeping and Reporting regulation provides that “an employee, former employee, personal representative, and authorized employee representative” may obtain copies of the OSHA 300 Logs and defines the term “authorized employee representative” as “an authorized collective bargaining agent of employees.” 29 CFR 1904.35(b)(2), (b)(2)(i). That regulation also provides for access to OSHA 301 Incident

Reports; however, “employees, former employees, and their personal representatives” may only access OSHA 301 Incident Reports “describing an injury or illness to *that* employee or former employee.” 29 CFR 1904.35(b)(2)(v)(A) (emphasis added). Only “authorized employee representatives” for an establishment where the agent represents employees under a collective bargaining agreement have access to OSHA 301 Incident Reports for the entire establishment (and only the section titled “Tell us about the case”). See 29 CFR 1904.35(b)(2)(i), (b)(2)(v)(B).

“Authorized employee representative” is defined narrowly in the Recordkeeping and Reporting regulation because of employee privacy interests and the role a union serves in safety and health matters when employees have an authorized collective bargaining agent. In the preamble to the 2001 Recordkeeping Rulemaking, OSHA explained the agency’s decision to grant expanded access to the OSHA 301 Incident Reports by extensively discussing the importance of protecting employees’ private injury and illness information while also recognizing the value of analyzing injury and illness data to improve injury and illness prevention programs. See 66 FR 6053–54, 6057. OSHA noted that the records access requirements were intended as a tool for employees and their representatives to affect safety and health conditions at the workplace, not as a mechanism for broad public disclosure of injury and illness information. See *id.* at 6057. OSHA also explained that granting access to unions serves as a useful check on the accuracy of the employer’s recordkeeping and the effectiveness of the employer’s safety and health program. See *id.* at 6055.

Therefore, in defining “authorized employee representative” as “an authorized collective bargaining agent of employees,” OSHA sought to strike a reasonable balance between employees’ privacy interests and a union representative’s more comprehensive role representing employees on safety and health matters in the workplace. See *id.* (describing the need to apply a “balancing test” weighing “the individual’s interest in confidentiality against the public interest in disclosure.”). Employee privacy concerns are not present in the context of this rule and, thus, a more inclusive definition to include any representative authorized by employees, regardless of whether the employees have a collective bargaining agent, is appropriate to effectuate the Act’s goal of ensuring

employee representation to aid the inspection.

Moreover, in exercising its authority to issue regulations implementing the walkaround rights granted to employees under section 8 of the Act, OSHA is not bound by the definition in the Recordkeeping and Reporting regulation. See, e.g., *Env’t Def. v. Duke Energy Corp.*, 549 U.S. 561, 575–76 (2007) (EPA could interpret term “modification” differently in two different regulations dealing with distinct issues). Unlike 29 CFR 1903.8(c), the Recordkeeping and Reporting regulation, including 29 CFR 1904.35(b)(2)(i), was promulgated under a different provision of the Act (section 8(c)). Accordingly, OSHA is permitted to define the same term differently in the Recordkeeping and Walkaround regulations because they implicate different regulatory, compliance, and privacy interests.

Several commenters also contended that this rule conflicts with the Commission’s existing regulation that defines “authorized employee representative” as “a labor organization that has a collective bargaining relationship with the cited employer and that represents affected employees who are members of the collective bargaining unit,” 29 CFR 2200.1(g) (e.g., Document ID 1938, p. 4; 1946, p. 4–5; 1976, p. 7). Some of these commenters incorrectly stated that 29 CFR 2200.1(g) is an OSHA regulation (e.g., Document ID 1976, p. 6). As an initial matter, the Commission is an independent agency and 29 CFR 2200.1(g) is a procedural rule promulgated by the Commission, not OSHA. Indeed, Congress delegated adjudicated authority to the Commission and delegated enforcement and rulemaking authority under the OSH Act to the Secretary. See *Martin v. Occupational Safety & Health Rev. Comm’n*, 499 U.S. 144, 151 (1991) (describing the “split enforcement” structure of the OSH Act). The Commission’s procedural regulations at 29 CFR 2200.1(g) were promulgated under 29 U.S.C. 661(g), which authorizes the Commission to promulgate rules only as are necessary for the orderly transaction of its proceedings. Under the “split enforcement” structure of the OSH Act, the Commission’s procedural rules apply only to its adjudicatory proceedings, and thus the Commission’s interpretation of “authorized employee representative” has no bearing on the Secretary’s authority to interpret and issue regulations on the meaning of “authorized employee representative” in Section 8(e) of the OSH Act. Notably, the term “authorized employee

representative” is not used in the Commission rules in an exclusionary way, as commenters have argued. Under Commission rules, employee representatives may participate in Commission proceedings even if they are not associated with a collective bargaining unit. See 29 CFR 2200.1(h); 2200.20(a); 2200.22(c).

The Chamber of Commerce argued that the proposed rule contradicts the Commission’s procedural rule at 29 CFR 2200.53 by allegedly allowing OSHA and “experts’ deemed qualified by OSHA inspectors alone” access to a worksite before the beginning of a Commission proceeding to engage in discovery (Document ID 1952, p. 15–17). There is no such contradiction as the Commission’s discovery rules have no applicability to OSHA’s investigation. OSHA has clear authority to access a worksite in order to conduct inspections. See 29 U.S.C. 657(a)(1)–(a)(2), (b).

#### c. Basis for the Rule

Some commenters argued that OSHA “proposed [the rule] without the reasoned explanation that is required” (Document ID 1952, p. 13), “failed to consider obvious and critical issues” (Document ID 1954, p. 4), failed to provide technical data that supports its reasonings (Document ID 1776, p. 10), and failed to provide a rational basis why the regulation will advance the agency’s mission (Document ID 1953, p. 3).

The APA requires an agency to “examine the relevant data and articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’” *Air Transp. Ass’n of Am., Inc. v. U.S. Dep’t of Agric.*, 37 F.4th 667, 675 (D.C. Cir. 2022) (internal citations omitted). If an agency relies on technical studies, those studies “must be revealed for public evaluation.” *Chamber of Com. of U.S. v. SEC*, 443 F.3d 890, 899 (D.C. Cir. 2006) (quoting *Solite Corp. v. EPA*, 952 F.2d 473, 484 (D.C. Cir. 1991)).

OSHA complied with APA rulemaking requirements by discussing and outlining its policy considerations and determinations in making this clarification via this rule. OSHA did not rely on any technical studies, but examined the record and based its determination that this rule will aid OSHA’s workplace inspections on evidence in the record and decades of enforcement experience. For example, commenters stated that this rule would particularly aid OSHA inspections involving vulnerable working populations in the farming industry and

meatpacking industry as well as specialized workplaces such as airports that involve several different employers and contractors (see, e.g., Document ID 1023, p. 3–4; 1728, p. 8–9; 1763, p. 2–3; 1980, p. 3).

Some commenters also argued the rule represents a departure from OSHA's prior position and its policy reasons are insufficient to support the change (see, e.g., Document ID 1952, p. 14; 1954, p. 4). The Chamber of Commerce, for example, contended that OSHA failed to acknowledge "that it is changing position" and failed to show "good reasons for the new policy." (Document ID 1952, p. 14). As explained throughout this final rule, by clarifying OSHA's interpretation of the OSH Act that third parties can serve as employee representatives for the purposes of the OSHA walkaround inspection, the revised regulation more closely aligns with the text of Section 8(e) and serves several beneficial purposes. Several commenters provided examples of third-party representatives who accompanied OSHA on walkaround inspections (Document ID 1750, p. 3; 1761, p. 1; 1945, p. 3; 1958, p. 3; 1980, p. 2). For example, one commenter who served as the director of AFSCME's safety and health program discussed serving as a third-party employee walkaround representative accompanying CSHOs on inspections of health care facilities in the 1980s (Document ID 1945, p. 3). Furthermore, OSHA's letter of interpretation to Mr. Steve Sallman (Sallman letter) clarified OSHA's interpretation that a third party may serve as a representative authorized by employee (Document ID 0003).

#### d. Specificity of the Rule

Some commenters argued the rule is overly broad and will invite chaos (Document ID 1113; 1779, p. 2, 3, 5; 1942, p. 1–2, 3, 5; 1952, p. 13; 1953, p. 1, 5). Some argued that the rule will leave "open-ended which individuals can be considered 'authorized representatives'" (Document ID 1952, p. 13; see also 1782, p. 3–5; 1953, p. 4–5). And they argued that, as a result, the rule is arbitrary and capricious because it will allow a "multitude of third parties" as representatives or a "seemingly unlimited variety of people who can represent employees during a plant walkaround" thereby leaving "employers unable to prepare for which individuals may enter their facilities during inspections and what such individuals may do while on their property" (Document ID 1782, p. 3–5; 1952, p. 13; 1953, p. 4–5). Finally, some commenters argued that the rule is arbitrary and capricious because it lacks

sufficient specificity of third-party qualifications and provides CSHOs too much discretion (Document ID 1754, p. 2; 1776, p. 2–3).

OSHA disagrees with these concerns. First, the final rule provides greater clarity and specificity regarding who may serve as a third-party representative than the prior regulation. OSHA's prior regulation included only two, non-exhaustive examples with no guiding criteria for determining if good cause had been shown that a third party was reasonably necessary. As explained in the NPRM, third-party representatives are reasonably necessary if they will make a positive contribution to a thorough and effective inspection. And, as discussed in Section IV.A, The Need for and Benefits of Third-Party Representation, there are many types of knowledge, skills, and experience that can aid the inspection. Therefore, the final rule provides several factors for a CSHO to consider when determining if good cause has been shown that a third-party employee representative is reasonably necessary to the conduct of an effective and thorough physical inspection.

Further, third-party representatives are subject to other inspection-related regulations, which allows the CSHO to deny access if the representative unreasonably disrupts the employer's operations or interferes with the inspection. See 29 CFR 1903.7(d), 1903.8(d). While some commenters asserted that this rule leaves them unable to "prepare" for the individuals who may come to the workplace, inspections under the OSH Act are unannounced and employers are not entitled to advanced notice to "prepare" for inspections. See 29 U.S.C. 657(a) (authorizing Secretary of Labor to enter, inspect, and investigate workplaces without delay); 29 U.S.C. 666(f) (providing for criminal penalties for "[a]ny person who gives advanced notice of any inspection"); see also *Marshall v. Shellcast Corp.*, 592 F.2d 1369, 1371 (5th Cir. 1979) (Congress considered the "'element of surprise' a crucial component" of OSHA inspections).

As such, OSHA finds that this rule is consistent with APA and the OSH Act.

#### 2. Public Hearing

Some commenters asserted that OSHA should have held public hearings (see, e.g., Document ID 1774, p. 6–7; 1955, p. 10). As OSHA explained in the proposal, because this rulemaking involves a regulation rather than a standard, it is governed by the notice and comment requirements in the APA (5 U.S.C. 553) rather than section 6 of

the OSH Act (29 U.S.C. 655) and 29 CFR 1911.11. Therefore, the OSH Act's requirement to hold an informal public hearing (29 U.S.C. 655(b)(3)) on a proposed rule, when requested, does not apply to this rulemaking.

Section 553 of the APA does not require a public hearing. Instead, it states that the agency must "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation" (5 U.S.C. 553(c)). In the NPRM, OSHA invited the public to submit written comments on all aspects of the proposal and received thousands of comments in response. OSHA extended its initial 60-day comment period by two weeks in response to requests from the public (88 FR 71329). No commenter identified any information that might have been submitted at a public hearing that was not, or could not have been, submitted during the written comment period. Accordingly, OSHA finds that interested parties had a full and fair opportunity to participate in the rulemaking and comment on the proposed rule through the submission of written comments.

#### G. Practical and Logistical Issues

Commenters raised various questions and concerns regarding how OSHA will implement and administer this rule. Many of these questions are beyond the scope of this rulemaking, while others are addressed by other regulations or enforcement guidance. While OSHA cannot anticipate every possible scenario, OSHA has provided responses below or otherwise herein. CSHOs will also continue to conduct inspections in accordance with OSHA's other regulations and the FOM. Further, OSHA intends to issue additional guidance for its CSHOs on administering this rule.

Commenters' questions and concerns can be grouped as follows: (1) how employees will authorize their walkaround representative(s); (2) how many employee walkaround representatives are permitted to accompany the CSHO; (3) whether advance notice of inspections will be provided; (4) how delays may impact inspections; and (5) how OSHA intends to respond to third-party interference or disruptions during the walkaround.

First, many commenters had questions about the process by which employees would authorize a walkaround representative (see, e.g., Document ID 1726, p. 3–4; 1748, p. 6; 1751, p. 4; 1759, p. 2; 1762, p. 2–3; 1763, p. 5–6, 8; 1775, p. 4–6; 1779, p. 2; 1782, p. 2–3, 6; 1936, p. 3; 1955, p.



4–6, 8–9; 1976, p. 12–14). For example, one commenter stated, “[a]s proposed, there are no established procedures for an employer’s employees to make a designation of an authorized representative that is not an employee of the employer” (Document ID 1779, p. 2). Several commenters asked how many employees are required to designate a representative (see, e.g., Document ID 1748, p. 6; 1751, p. 1; 1779, p. 5; 1936, p. 3; 1942, p. 4–5; 1946, p. 3, 7; 1953, p. 5; 1966, p. 5; 1976, p. 12–13), what the designation process entails (see Document ID 1030; 1759, p. 2; 1946, p. 3, 7; 1966, p. 5; 1976, p. 12–14; 9901; 11524; 11275), and whether the designation process would include a vote (see, e.g., Document ID 1976, p. 10, 13). Further, the Construction Industry Safety Coalition asserted that the rule also “fails to address how a CSHO is to identify if the employees have designated a third-party representative, or when” (Document ID 1955, p. 5). Commenters also asked whether OSHA would require evidence when determining that a representative is authorized (see, e.g., Document ID 1726, p. 3–4).

Other commenters also asked what OSHA would do if faced with requests for third-party employee representatives from competing unions (Document ID 1952, p. 3; 11275) as well as non-unionized worksites or worksites with unionized and non-unionized employees (Document ID 1782, p. 4; 1933, p. 3; 1960, p. 4–5; 1976, p. 8, 12–13; 11275). Some commenters asserted that the “rule does not provide clear guidance on how multiple Walkaround Representatives should be selected, especially when chosen by different employees or groups within the organization” (Document ID 1954, p. 3) and on multi-employer worksites (Document ID 1960, p. 2–3; 1774, p. 5).

Neither the OSH Act nor any OSHA regulations specify when or how employees should authorize their walkaround representative(s). As such, there is no single or required process by which employees can designate a walkaround representative. OSHA has never had a rigid designation process or required documentation to show that a representative is authorized. As explained above, OSHA has long permitted nonemployees to serve as employee walkaround representatives, and OSHA has not encountered issues with the ways employees may authorize their representative. Thus, because OSHA does not believe such measures are necessary and seeks to provide flexibility for employees’ designation process, OSHA declines to adopt specific procedures.

Likewise, there is no single way for employees to inform OSHA that they have a walkaround representative (whether that representative is an employee or a third party). For example, OSHA’s FOM provides that in workplaces where employees are represented by a certified or recognized bargaining agent, the highest-ranking union official or union employee representative on-site would designate who participates in the walkaround. See OSHA Field Operations Manual, CPL 002–00–164, Chapter 3, Section VII.A.1. Employees could also designate an authorized employee representative when they authorize them to file an OSHA complaint on their behalf. Additionally, employees may inform the CSHO during the walkaround inspection itself or during employee interviews, or they may contact the OSHA Area Office. This is not an exhaustive list but rather some examples of ways employees may designate their walkaround representative(s).

As explained previously, the OSH Act contains no requirement for majority support, nor has OSHA ever imposed one in determining who is the employees’ walkaround representative. Cf. OSHA Field Operations Manual, CPL 002–00–164, Chapter 3, Section VII.A.2 (noting that members of an established safety committee can designate the employee walkaround representative). The OSH Act does not require that a specific number or percentage of employees authorize an employee representative, and OSHA declines to do so through this rulemaking. However, in a workplace with more than one employee, more than one employee would be needed to authorize the walkaround representative pursuant to the language in section 8(e) of the OSH Act, which uses the phrase “representative authorized by [the employer’s] employees.” 29 U.S.C. 657(e). If the CSHO is unable to determine with reasonable certainty who is the authorized employee representative, the CSHO will consult with a reasonable number of employees concerning matters of safety and health in the workplace. See 29 CFR 1903.8(b).

Second, several commenters asserted that the number of third-party representatives that employees may authorize for a single inspection is unclear or stated their opposition to having multiple representatives during an inspection (Document ID 1937, p. 4; 1946, p. 3, 7; 1953, p. 5; 1966, p. 5; 1976, p. 12–13; 9901). For example, the Air Conditioning Contractors of America claimed that the rule “lacks clear parameters regarding the number

of third-party representatives allowed during a single inspection and fails to provide guidance on the management and prioritization of multiple requests from employees for different representatives. This has the potential to result in impractical and chaotic inspection processes with a multitude of third-party participants” (Document ID 1935, p. 1; see also 1030; 11313). Similarly, the International Foodservice Distributors Association asserted the rule “lacks guidance or proposed language on how third-party representatives may be selected by the employees and any limiting principles on the number of representatives who may be selected. This will lead to confusion for both employees and employers” (Document ID 1966, p. 5).

Other commenters noted that the number of permitted representatives is complicated by unique worksites. For instance, the National Association of Home Builders (NAHB) questioned how “OSHA [will] identify who the ‘employee representative’ is of a general contractor who may only have one employee on the particular jobsite, while multiple trade subcontractors and their employees are also present?” (Document ID 1774, p. 5; see also 1960, p. 2–3). Within the packaging and manufacturing industry, the Flexible Packaging Association proposes that because the rule presents several issues and threats “for a large party of employees and their representatives, the CSHO, the employer, and his/her representatives on the manufacturing floor,” “each employee should be limited to no more than one representative, and the employer should be limited to one representative” with an exception for translators (Document ID 1782, p. 2–3).

Under OSHA’s existing regulations, a representative of the employer and a representative authorized by its employees can accompany the CSHO on the inspection, but the CSHO may permit additional employer representatives and additional authorized employee representatives if the additional representatives will further aid the inspection. See 29 CFR 1903.8(a). A different employer and employee representative may accompany the CSHO during each different phase of an inspection if this will not interfere with the conduct of the inspection. Id. OSHA’s FOM further explains that where more than one employer is present or in situations where groups of employees have different representatives, it is acceptable to have a different employer/employee representative for different phases of the inspection. OSHA Field Operations

Manual, CPL 002–00–164, Chapter 3, Section VII.A. However, if the CSHO determines that multiple representatives would not aid the inspection or if the presence of multiple representatives interferes with the inspection, the CSHO retains the right to deny the right of accompaniment to representatives. See 29 CFR 1903.8(a), (d).

Third, some commenters questioned whether, due to this rule, OSHA would begin providing advance notice of an inspection to employers, employee representatives, or both. For example, some commenters, like the American Trucking Association, stated that the proposed rule did not indicate whether OSHA would provide an employer with advance notice, prior to arriving at a worksite, that a third-party employee representative would be accompanying OSHA during the walkaround portion of its inspection (Document ID 1773, p. 3). The Flexible Packing Association recommended that OSHA give employers advance notice that a third-party representative will be accompanying the CSHO, “justify why the third-party would assist in an effective walkaround,” and then give an employer “10 days to respond to OSHA on such request” (Document ID 1782, p. 5).

Several commenters also addressed advance notice to employee representatives. For example, the AFT urged that in inspections where OSHA gives advance notice to the employer that “the complainant, union or other employee representative must be notified at the same time” (Document ID 1957, p. 6). In addition, the Service Employees International Union (SEIU) suggested that OSHA can give advance notice to third parties prior to the inspection of airports for the purpose of seeking assistance with industry-specific issues such as jurisdiction and security clearance, although it is unclear if that third party’s assistance would be limited to pre-inspection activity or if the SEIU also envisioned the third party being an employee walkaround representative (Document ID 1728, p. 8–9). The Office of Advocacy of the U.S. Small Business Administration asserted that “it appears to naturally flow from the proposed regulation that these non-employee third-party representatives will, for purposes of planning, be given advance notice of the inspection so they can arrange to meet the inspector at the workplace, when notice of the inspection is supposed to be strictly confidential” (Document ID 1941, p. 5 fn. 23; see also 1955, p. 5).

The OSH Act generally forbids advance notice of OSHA inspections; indeed, any person who gives advance

notice without authority from the Secretary or the Secretary’s designees is subject to criminal penalties. See 29 U.S.C. 666(f). However, OSHA regulations provide certain exceptions to this general prohibition. See 29 CFR 1903.6(a); OSHA Field Operations Manual, CPL 02–00–164, Chapter 3, Section II.D (discussing advance notice of OSHA inspections). These exceptions include: (1) “cases of apparent imminent danger” (29 CFR 1903.6(a)(1)); (2) “circumstances where the inspection can most effectively be conducted after regular business hours or where special preparations are necessary for an inspection (29 CFR 1903.6(a)(2)); (3) “[w]here necessary to assure the presence of representatives of the employer and employees or the appropriate personnel needed to aid in the inspection” (29 CFR 1903.6(a)(3)); and (4) “other circumstances where the Area Director determines that the giving of advance notice would enhance the probability of an effective and thorough inspection” (29 CFR 1903.6(a)(4)).

Given the OSH Act’s general prohibition against advance notice and limited exceptions, OSHA declines to further amend the rule to guarantee advance notice of inspections to either employers or third-party employee representatives. Whether or not an exception applies depends on the particular needs and circumstances of the inspection.

Fourth, and related to advance notice, some commenters also asserted that the proposed rule could result in delays to OSHA’s inspection (see, e.g., Document ID 1964, p. 5–6; 1966, p. 3; 1972, p. 8; 1976, p. 15). Reasons given for potential delays include: CSHO difficulty in determining who the authorized representative is among various vying third-party representatives (Document ID 1964, p. 5–6), fewer employers consenting to OSHA inspections if the CSHO is accompanied by a third-party employee representative (Document ID 0040, p. 4–5; 1933, p. 2–3; 1966, p. 3), employers failing to notify authorized employee representatives after being given advance notice of an inspection by OSHA (Document ID 1761, p. 3), representatives conferring with workers on personal issues (Document ID 1782, p. 3–4), workers needing to advocate to OSHA that their representative is reasonably necessary (Document ID 1972, p. 8), employers subjecting third-party representatives to background checks or other requirements for entry to employer property (Document ID 1960, p. 5), expansion of the inspection resulting from third-party representative involvement (Document ID 0040, p. 3), employers asserting that their property

contains proprietary information when faced with a third-party representative (Document ID 0040, p. 4), and CSHOs struggling to exercise their discretion because of a lack of guidelines in the proposed rule (Document ID 1976, p. 14–15).

The issues that have been raised are issues that CSHOs have long addressed in conducting inspections, and CSHOs are experienced and adept at conducting inspections without delay and in a reasonable manner. See 29 U.S.C. 657(a). OSHA will use its authority under 29 CFR 1903.8(b) to resolve potential disputes about third-party representatives expeditiously. As explained previously, OSHA anticipates that the vast majority of employers will not deny entry simply because the employees’ walkaround representative is a third party. However, OSHA will obtain a warrant when necessary to conduct its inspections. See *Barlow’s*, 436 U.S. at 313; see also 29 U.S.C. 657(a)(1)–(2); 29 CFR 1903.4(a). And, if the Secretary is on notice that a warrantless inspection will not be allowed, OSHA may seek an anticipatory warrant to conduct its inspection without delay. See 29 CFR 1903.4(b)(1). Accordingly, OSHA does not believe that this rule will result in further inspection delays that would be detrimental to worker safety and health.

Last, many commenters had questions about how OSHA would handle situations where a third party deviated from their role as the employees’ walkaround representative and engaged in conduct unrelated to the inspection—particularly conduct that interfered with OSHA’s inspection and/or disrupted the employer’s operations (see, e.g., Document ID 1762, p. 5). As discussed in Sections IV.A, IV.C, and IV.H, commenters raised a number of potential scenarios where third parties may have ulterior motives. Commenters also raised scenarios where third-party representatives may not have ulterior motives but nevertheless interfere with an inspection by engaging in conduct such as “[having] lengthy discussions of process equipment and safety designs, or products.” (Document ID 1782, p. 3–4).

Many commenters questioned CSHOs’ ability to stay in charge of such inspections (see, e.g., Document ID 1030; 1935, p. 1; 1938, p. 5), while others offered various suggestions. For example, one commenter stated that “once third parties are identified, they should be governed by the same inspection standards as the CSHO” (Document ID 1762, p. 5). In addition, the NRF requested that OSHA “define what constitutes appropriate conduct

for an Authorized Representative and give the employer the express authority to remove an Authorized Representative from the premises” (Document ID 1776, p. 4). The NRF also requested that OSHA “mandate a dress code for third parties” for the protection of employer products and equipment and to prevent clothing with “inappropriate messaging, language, campaign information.” (Document ID 1776, p. 4).

Commenters’ concerns about the CSHOs’ ability to address potential interference or disruptions to the workplace are unfounded. CSHOs have extensive experience conducting inspections and handling any interference or disruptions that may arise. During inspections, CSHOs will set ground rules for the inspection to ensure all representatives know what to expect. While OSHA declines to anticipate and categorize every type of conduct as appropriate or inappropriate or mandate specific rules, such as dress codes, OSHA intends to issue further guidance to the extent specific issues arise.

In addition, and as explained in Chapter 3 of the FOM, the employee representative shall be advised that, during the inspection, matters unrelated to the inspection shall not be discussed with employees. OSHA Field Operations Manual, CPL 02–00–164, Chapter 3, Section V.E. CSHOs will also ensure the conduct of inspections will not unreasonably disrupt the operations of the employer’s establishment. See 29 CFR 1903.7(d). If disruption or interference occurs, CSHOs will promptly attempt to resolve the situation. Depending on the severity and nature of the behavior, a warning may suffice in some instances. In other instances, the CSHO may need to terminate the third party’s accompaniment during the walkaround. As the FOM explains, the CSHO will contact the Area Director or designee and discuss whether to suspend the walkaround inspection or take other action. See OSHA Field Operations Manual, Chapter 3, Section V.E.

#### H. Liability Issues

Several commenters raised questions concerning liability. Specifically, they questioned who would be liable if a representative authorized by employees is injured, causes injury to others, or engages in misconduct (see *e.g.* Document ID 0527, p. 2; 1030; 1762, p. 2–3; 10253; 11228; 11482), or discloses trade secrets (Document ID 1953, p. 7). For example, the International Foodservice Distributors Association asserted that third-party representatives who are not affiliated with the

workplace and/or lack an appropriate level of industry experience or adequate safety training could be easily injured or cause injury during an inspection (Document ID 1966, p. 2). The Workplace Policy Institute also raised concerns about the conduct of third-party representatives, who are “likely” not state actors and not limited by due process requirements (Document ID 1762, p. 4). Some commenters asked if OSHA would bear any liability in these circumstances (see, *e.g.*, Document ID 1976, p. 15; 1835), while other commenters asserted that the proposed rule would increase employers’ liability (see, *e.g.*, Document ID 1933, p. 3). In addition, NRF requested that the rule be further amended to indemnify an employer against any “violent or damaging conduct committed by” the third-party representative while on site or provide for “felony prosecution of any CSHO that abuses their authority under the proposed rule” (Document ID 1776, p. 4, 7). Black Gold Farms argued that OSHA should train representatives on general and industry-specific topics, show the employer proof of this training, and then assume liability for the representative’s actions if they violate the employer’s policy or the law (Document ID 0046).

For several reasons, OSHA has determined it is unnecessary to amend the rule to assign liability or indemnify employers. As an initial matter, the OSH Act does not seek to “enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees.” 29 U.S.C. 653(b)(4). Varying bodies of law, including tort and criminal law, already regulate the scenarios that commenters have raised, and any regulation from OSHA on liability or indemnification would potentially upend those other laws. In fact, commenters identified worker’s compensation, tort law, 42 U.S.C. 1983, and 18 U.S.C. 202(a) as potentially relevant (Document ID 1762, p. 3; 1954, p. 4; 1955, p. 2–3; 1976, p. 21 fn. 79).

OSHA generally is not liable for the conduct of authorized employee representatives, who are not themselves officers or employees of a Federal agency. And, to the extent that any claim relates to OSHA’s conduct during an inspection, under the Federal Tort Claims Act (FTCA), the United States is not liable for “[a]ny claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary

function or duty on the part of a Federal agency or an employee of the Government, whether or not the discretion involved be abused.” 28 U.S.C. 2680(a). A number of U.S. Circuit Court of Appeals have held that general administrative inspections conducted by OSHA compliance officers fall under this “discretionary function” exception to the FTCA. See, *e.g.*, *Irving v. U.S.*, 162 F.3d 154, 164 (1st Cir. 1998). OSHA declines to opine on the merits of other legal bases for liability because determining liability is a fact-specific inquiry and it is beyond the scope of this rulemaking.

Commenters raised several hypothetical scenarios of injury or misconduct but failed to identify any specific or substantiated examples of when such scenarios have occurred during OSHA inspections. OSHA therefore anticipates that these scenarios involving injury or misconduct will be rare, and declines to adopt any training requirement for third parties.

Moreover, this regulation and OSHA’s other inspection-related regulations contain safeguards to reduce the likelihood of any misconduct. This final rule places limitations on who can serve as the employee walkaround representative. Per the rule, the CSHO must determine whether a potential third-party employee walkaround representative will aid the inspection. The CSHO will determine whether good cause has been shown why the individual is reasonably necessary to an effective and thorough OSHA inspection. The CSHO has authority to deny the right of accompaniment to any individual who is not reasonably necessary to the inspection. Moreover, the CSHO has authority to deny accompaniment to an employee walkaround representative who is disrupting the inspection. Further, OSHA’s regulation at 29 CFR 1903.9(d) provides employers the option to request that, in areas containing trade secrets, the employee walkaround representative be an employee in that area or an employee authorized by the employer to enter that area, and not a third party. OSHA has determined that the existing regulatory framework provides sufficient protection for the hypotheticals that commenters raised. In addition, at least one commenter, the Utility Line Clearance Safety Partnership, noted that some employers have existing policies and waivers for third parties that enter their sites, though OSHA declines to opine on the legal sufficiency of such documents (Document ID 1726, p. 5).

Finally, potential abuse of the walkaround provision does not

necessitate excluding walkaround rights for third parties altogether. In cases involving the Mine Act, which the Secretary of Labor also enforces, courts have rejected hypothetical arguments that third-party walkaround representatives may cause harm or abuse their position during an MSHA inspection. See *Thunder Basin Coal Co.*, 56 F.3d at 1281 (noting the potential for abuse “appears limited” as designation as the miners’ representative does not “convey ‘an uncontrolled access right to the mine property to engage in any activity that the miners’ representative wants’”) (quoting *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 217 (1994)); *Kerr-McGee Coal Corp.*, 40 F.3d at 1264 (“The motivations of a miners’ representative are irrelevant so long as the representative, through its actions, does not abuse its designation and serves the objectives of the Act.”); *Utah Power & Light Co.*, 897 F.2d at 452 (recognizing mine’s concern that walkaround rights may be abused by nonemployee representatives but holding that potential abuse “does not require a construction of the Act that would exclude nonemployee representatives from exercising walkaround rights altogether”). OSHA agrees. Because an authorized employee representative does not have uncontrolled access to the employer’s property and the CSHO is in control of the inspection, the risk of misconduct, damage, or injury appears limited.

#### I. Other Issues

Renner Bros. Construction, Inc. asked if they would need to fire or reassign their current safety representatives because of this rule (Document ID 1091). Third-party employee representatives are not employees or representatives of the employer being inspected, nor do they have a duty to the employer, and thus they should not be a consideration when employers make staffing decisions related to their safety representatives.

Additionally, the State Policy Network and other commenters that submitted a report to the Boundary Line Foundation asserted that OSHA presented a prior version of the Field Operations Manual, CPL 02–00–159 (10/1/2015) (Document ID 0004) “as a document integral to the development of and justification for the” rule (Document ID 1965, p. 22–28; see also 1967; 1968; 1973; 1975). It next claimed that OSHA’s submission of another prior Field Operations Manual, CPL 02–00–160 (Document ID 0005) into the docket misrepresented this FOM as the current FOM (see, e.g., Document ID 1965, p. 26–28). Next, it asserted that the FOM has no “color of authority” for

rulemaking purposes (Document ID 1965, p. 28–29; see also 1967; 1968; 1973; 1975). It finally argued that OSHA erred in failing to submit into the docket the two most recent FOMs (CPL 02–00–163 and CPL 02–00–164) (Document ID 1965, p. 27–28; see also 1967; 1968; 1973; 1975).

These comments are unsupported. As explained in Section II.B, Regulatory History and Interpretive Guidance, OSHA submitted into the docket two versions of the FOM (CPL 02–00–159 (10/1/2015), Document ID 0004 and CPL 02–00–160 (8/2/2016), Document ID 0005) to explain OSHA’s practice and interpretation of 29 CFR 1903.8(c). OSHA neither stated nor indicated the 2016 FOM was submitted as the most recent and effective FOM. The two most recent versions of the FOM are posted on OSHA’s website, available for any interested party to review if it so wished. See <https://www.osha.gov/enforcement/directives/cpl-02-00-164> and <https://www.osha.gov/enforcement/directives/cpl-02-00-163>. Furthermore, the FOM is merely guidance and does not create any duties, rights, or benefits. There is no merit to the Boundary Line Foundation’s argument that the fact that the record does not contain OSHA’s two most recent FOMs rendered the public “incapable of meaningful participation during the public comment period of this rulemaking process” (Document ID 1965, p. 27).

### V. Final Economic Analysis and Regulatory Flexibility Act Certification

#### A. Introduction

As described above, OSHA is revising 29 CFR 1903.8(c) to clarify that the representative(s) authorized by employees may be either an employee of the employer or, when reasonably necessary to aid in the inspection, a third party. Additionally, OSHA’s revisions further clarify that third parties may be reasonably necessary to an OSHA inspection due to skills, knowledge, or experience that they possess. OSHA has determined that, while these revisions may impose societal costs and that some employers may decide to undertake actions not directly required to comply with any requirements in this rule, the revisions impose no new direct cost burden on employers.<sup>2</sup>

<sup>2</sup> Executive Order 12866 requires agencies to consider costs that the regulated community may undertake regardless of whether those actions are directly required by a standard or regulation. OSHA’s requirements under the OSH Act and related court decisions require the agency to show that an occupational safety and health standard is economically feasible. While this analysis is not being undertaken to show the feasibility of this rule,

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of the intended regulation and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. Executive Order 14094 reaffirms, supplements, and updates Executive Orders 12866 and 13563 and further directs agencies to solicit and consider input from a wide range of affected and interested parties through a variety of means.

Under section 6(a) of Executive Order 12866, Regulatory Planning and Review, 58 FR 51735 (Sept. 30, 1993), the Office of Management and Budget’s (“OMB”) Office of Information and Regulatory Affairs (“OIRA”) determines whether a regulatory action is significant and, therefore, subject to the requirements of the Executive Order and review by OMB. Section 3(f) of Executive Order 12866, as amended by section 1(b) of Executive Order 14094, Modernizing Regulatory Review, 88 FR 21879 (Apr. 6, 2023), defines a “significant regulatory action” as an action that is likely to result in a rule that may: (1) have an annual effect on the economy of \$200 million or more in any 1 year (adjusted every 3 years by the Administrator of OIRA for changes in gross domestic product), or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, territorial, or tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise legal or policy issues for which centralized review would meaningfully further the President’s priorities or the principles set forth in this Executive order, as specifically authorized in a timely manner by the Administrator of OIRA in each case. OIRA has determined that

because it is not a standard, OSHA’s approach to this finding does not generally consider activities voluntarily undertaken to be costs of a rule for the purposes of showing feasibility or, in the context of the Regulatory Flexibility Analysis, a significant economic impact. The agency has clarified in this analysis that some unquantified costs as considered by Executive Order 12866 may be incurred and that these differ from direct costs of a rule typically considered in an OSHA economic feasibility analysis.

this final rule is a significant regulatory action under section 3(f) but not under section 3(f)(1) of Executive Order 12866, as amended by Executive Order 14094. Therefore, a full regulatory impact analysis has not been prepared.

This Final Economic Analysis (FEA) addresses the costs and benefits of the rule and responds to comments on those topics. The agency also evaluates the impact of the rule on small entities, as required by the Regulatory Flexibility Act (5 U.S.C. 605).

### B. Costs

This final rule imposes no new direct cost burden on employers and does not require them to take any action to comply. This rule merely clarifies who can be an authorized employee representative during OSHA's walkaround inspection. As explained in the Summary and Explanation above, this rule does not require or prohibit any employer conduct, and an employer cannot "violate" this regulation. Any costs of a rule are incremental costs—meaning, the cost of a change from the future (projected from the current situation) without the final rule to a world where the final rule exists.

In the NPRM's Preliminary Economic Analysis, OSHA preliminarily determined that the proposal did not impose direct costs on employers and welcomed comments on this determination and information on costs that OSHA should consider. Many commenters stated their belief that the final rule will impose additional costs. Some commenters, even those who expressed concerns about potential costs of the rule, acknowledged that OSHA's prior rule allowed third parties to accompany OSHA inspectors if good cause had been shown that they were reasonably necessary to the inspection (see, e.g., Document ID 0168, p. 2; 1941, p. 3; 1952, p. 2). Many commenters that stated the final rule will impose additional costs did not articulate exactly what changes this rule would introduce that would result in cost increase, and no commenter provided concrete evidence of actual costs it would incur because of the rule.

#### 1. Rule Familiarization

OSHA considers the cost of rule familiarization in many cases as part of the economic impact analysis. However, it is not necessary for employers to read or become familiar with this rule as there are no requirements that the employer must undertake to be in compliance with the rule. If an employer does not become familiar with this rule, there is no risk of being out of compliance or violating the rule.

Furthermore, this rule is a clarification of OSHA's longstanding practice with which employers are already familiar. Finally, the regulatory text is very brief. Even if employers did choose to read the revised regulation, it would take no more than a few minutes to do so.

Here, relying on the U.S. Census's Statistics of U.S. Businesses for 2017, it is estimated that the final rule will apply to inspections at approximately 7.9 million establishments. If familiarization takes, at most, five minutes per establishment and is performed by Safety Specialists (SOC 19–5011<sup>3</sup>) or comparable employees, the total rule familiarization costs, assuming the unlikely event that all employers covered by OSHA will read this rule, will be approximately \$40.5 million (= 7.9 million × [5/60] hour × \$37.77 × [100% + 46% + 17%]), or about \$5 per employer. This quantitative estimate portrays an unlikely upper bound assuming all employers will decide to read this regulation.

#### 2. Training

Commenters suggested that employers would be required to provide safety training for third-party representatives and would accordingly incur costs for such training (see, e.g., Document ID 1762, p. 2–3; 1782, p. 2–3, 5–6; 1974, p. 4; 1952, p. 4; 1774, fn. 17; 1976, p. 15). For example, NAHB suggested that OSHA's regulations require employers to train employees before they may use certain equipment, including personal protective equipment (PPE) (Document ID 1774, fn. 17), and the Phylmar Regulatory Roundtable stated that OSHA failed to consider the employer's need to provide third-party representatives with appropriate safety training "for their personal safety, the safety of the workplace, and mitigation of liability" (Document ID 1974, p. 4).

OSHA disagrees that employers will incur training costs as a result of this final rule. Training of third-party representatives is not required by the rule. OSHA's rules on training require an employer to train their employees. Because a third-party employee representative is not an employee of the employer undergoing an OSHA inspection, the employer has no

<sup>3</sup> The median hourly base wage is \$37.77 (per Occupational Employment and Wages, May 2022, <https://www.bls.gov/oes/current/oes195011.htm#nat><https://www.bls.gov/oes/current/oes195011.htm#nat>). A fringe benefits ratio (46 percent of earnings) is derived from Bureau of Labor Statistics Employer Costs for Employee Compensation data using variables CMU1020000000000D and CMU1030000000000D. Also, overhead costs are assumed to be 17 percent of the base wage.

obligation to train those individuals. Additionally, as stated in the NPRM, employers may have policies and rules for third parties to "participate in a safety briefing before entering" a jobsite. Given that such briefings would be given to the CSHO, OSHA finds there would be no further cost to an employer to have an additional visitor present during any potential safety briefing since any potential briefing would be given regardless of the number of individuals present. See 88 FR 59831. Commenters did not provide information that suggested otherwise. Based on this, and because such policies are not required by this rule, OSHA reaffirms that there are no costs attributable to this final rule for this activity.

Similarly, some commenters, including the Employers Walkaround Representative Rulemaking Coalition and the Chamber of Commerce, also said they would need to train employees to educate them on this final rule, or communicate with employees regarding the role of any non-employee third-party representative (see, e.g., Document ID 1782, p. 5–6; 1976, p. 23–24; 1952, p. 5). As explained above, this rule includes no requirement that employers provide training and, therefore, any associated costs are not attributable to this final rule. Since this rule creates no new obligations for employers, training should be unnecessary. Accordingly, OSHA does not attribute costs for training to this rule.

#### 3. Providing PPE

Several commenters were concerned that they would incur costs to provide PPE to third-party representatives (see, e.g., Document ID 1774, p. 5; 1782, p. 3; 1937, p. 3; 1938, fn. 2; 1940, p. 3–4; 1941, p. 4–5; 1952, p. 5; 1976, p. 23). For example, NAHB said that general contractors do not have "extra PPE to address every potential situation requiring PPE on a jobsite," and "small businesses will rarely have enough extra PPE or extra equipment that would enable all relevant parties to take part in an inspection on a moment's notice" (Document ID 1774, p. 5). This commenter also raises the issue of proper PPE fit for third-party representatives in light of OSHA's current rulemaking addressing correctly fitting PPE in construction (Document ID 1774, p. 5). That rulemaking addresses how the PPE that employers provide to their employees must fit properly but it does not introduce any obligation regarding the fit of PPE loaned or provided to non-employees who may be present on the worksite. Additionally, UFCW commented that

the cost of providing PPE to third-party representatives “is minimal when considering the price of PPE and the number of OSHA inspections taking place in one specific facility” (Document ID 1023, p. 8).

In the NPRM, OSHA considered that employers may have policies and rules for third parties, such as requiring visitors to wear PPE on site, but preliminarily concluded that this would not impose costs to employers because “PPE could be supplied from extra PPE that might be available on site for visitors or could be supplied by the third party.” 88 FR 59831. This final rule does not require employers to have policies that require visitors to wear PPE on jobsites and, therefore, any associated costs are not attributable to this final rule. However, where employers have such policies, it is likely that they would have extra PPE available for visitors in accordance with their own policies. OSHA’s enforcement experience indicates that where employers have such policies, it is generally the case that those employers make PPE available to visitors. Nonetheless, while employers may provide any extra PPE they have to the third-party, the employer is under no obligation to provide PPE to third-party representatives during the walkaround inspection, nor would the employer be responsible to ensure proper PPE fit for third parties. If the employer does not have PPE available for the third-party representative, the third party would need to supply their own PPE. If the third-party representative does not have PPE that would allow them to safely accompany the CSHO, the representative would be unable to accompany the CSHO in any area where PPE is required. Accordingly, OSHA has determined that employers will incur no costs associated with the provision of PPE to third-party representatives as a result of this rule.

#### 4. Policy Development, Revisions, and Planning

Some commenters, including the Office of Advocacy of the U.S. Small Business Administration and the Employers Walkaround Representative Rulemaking Coalition, said that this rule would impose costs related to preparing or updating policies and procedures around third-party visitors (see, e.g., Document ID 1782, p. 5–6; 1941, p. 4–5; 1974, p. 4; 1976, p. 23). As stated above, this final rule merely clarifies longstanding OSHA practice to permit third-party representatives to accompany CSHOs on inspections. Since this rule creates no new obligations for employers, it should be

unnecessary for employers to revise any policies or procedures that are currently in place.

#### 5. Legal Advice and Consultations

Some commenters said that they would need to obtain additional legal advice or consult with legal counsel, or otherwise would incur legal costs related to this rule (see, e.g., Document ID 1776, p. 7; 1782, p. 5–6; 1952, p. 5). For example, NAHB said that “employers may accumulate additional and unanticipated costs for consulting with counsel on how they and their respective employees should handle these interactions [with third-party representatives]” (Document ID 1774, p. 4), and the Employers Walkaround Rulemaking Coalition stated that employers would incur “legal fees for managing more complex and fraught inspection interactions” (Document ID 1976, p. 23). This commenter offered no evidence to support its assertion that interactions during inspections would be more difficult as a result of this rule.

As stated above, this final rule simply clarifies who can be an authorized employee representative during OSHA’s walkaround inspection. The rule creates no new obligations for employers, and OSHA disagrees with the assertion that the rule creates a need for employers to consult with legal counsel. Furthermore, as discussed in other sections, the rule creates no obligation for employers to consult with legal counsel and therefore, OSHA attributes no costs to this voluntary activity.

#### 6. Insurance and Liability Costs

Some commenters, including the Flexible Packaging Association, the Alliance for Chemical Distribution, and the Workplace Policy Institute said that this rule would raise their insurance premiums, necessitate purchasing additional liability or workers’ compensation insurance to cover injuries to non-employees, or otherwise create liability risks for employers (see, e.g., Document ID 1726, p. 8; 1762, p. 2–3; 1774, p. 3; 1974, p. 4–5; 1976, p. 21; 1781, p. 3; 1782, p. 5–6; 1952, p. 5). The Workplace Policy Institute stated that OSHA’s liability insurance, rather than the employer’s insurance, should cover injuries to third-party representatives to avoid imposing significant additional burden on employers (Document ID 1762, p. 3).

OSHA has determined that, as a result of this final rule, employers will not incur costs associated with insurance and liability for several reasons. First, because employers already have third parties who may come onto their worksites for a variety of reasons

unrelated to an OSHA inspection, employers’ insurance policies should already account for risks related to the presence of third parties. Second, given that there is an extremely low likelihood that an average employer would be inspected by OSHA,<sup>4</sup> that a third-party representative would be present during that inspection, and that that third party would be injured on the employer’s premises, insurers would not see that as something necessitating additional insurance coverage or higher premiums. Finally, as OSHA explained in the Summary and Explanation, the CSHO has the authority to deny accompaniment to an employee walkaround representative who is disrupting the inspection, and would exclude a representative from the walkaround if they are acting in a manner that creates a dangerous situation for themselves or others (see Section III, Summary and Explanation). No commenter provided any data or information other than speculation that premiums would increase. Accordingly, OSHA has determined that employers will incur no new costs associated with insurance and liability as a result of this final rule.

#### 7. Protecting Trade Secrets and Confidential Business Information

Some commenters, including the Chamber of Commerce, expressed concern that they would incur costs associated with protecting trade secrets or confidential business information during an inspection where a third-party representative was present, or from the harm resulting from their disclosure (see, e.g., Document ID 1952, p. 5). Similarly, some commenters, such as the Flexible Packaging Association and the Office of Advocacy of the U.S. Small Business Administration, said that they would incur costs associated with preparing and executing nondisclosure agreements (see, e.g., Document ID 1976, p. 23; 1782, p. 5–6; 1941, p. 4–5).

OSHA has determined that, as a result of this rule, employers will not incur costs associated with the protection of trade secrets or the preparation of nondisclosure agreements. As explained in the NPRM, under 29 CFR 1903.9(d), employers maintain the right to request that areas of their facilities be off-limits to representatives who do not work in that particular part of the facility. See 88

<sup>4</sup> In Fiscal Year 2023, OSHA conducted about 34,000 inspections of the more than 8 million employers covered by the OSH Act, which means the average employer has about a 0.43 percent chance of being inspected in a given year. Commonly Used Statistics, available at <https://www.osha.gov/data/commonstats>.

FR 59826, 59830–31. This final rule does not alter or limit employers' rights under section 1903.9(d) and, therefore, employers should not incur costs related to the protection of trade secrets or confidential business information. To the extent employers choose to take additional action to protect trade secrets, including the use of nondisclosure agreements, the ensuing costs would be the result of voluntary actions taken by the employer.

#### 8. Hiring Experts

Some commenters were concerned about incurring additional costs associated with hiring experts (see, e.g., Document ID 1941, p. 4–5; 1782, p. 5–6). For example, the Office of Advocacy of the U.S. Small Business Administration stated that employers may incur costs from “providing additional staff and experts (including possible outside experts) to correspond to the variety of non-employee third-party participants during inspections and related activities” (Document ID 1941, p. 5). As explained above, this final rule clarifies longstanding OSHA practice. The final rule creates no new obligations for employers, so it should be unnecessary for employers to hire experts or other staff in response to the rule. Additionally, the final rule does not require employers to hire experts or other staff, so if employers choose to do so, the costs of such would derive from the employer's voluntary action.

#### 9. Costs to State Plan States

The State Policy Network commented that State Plan states would need to update their rules on third-party representation (Document ID 1965, p. 9). While this is true, OSHA-approved State Plans must routinely adopt standards and other regulations in order to remain at least as effective as Federal OSHA, which is a condition of the State Plan's continued existence. See also the discussion of State Plan obligations in Section VIII. State Plans take on a variety of forms and the method for each to adopt a rule varies widely. As a result, OSHA is unable to determine what, if any, opportunity costs are associated with State Plans adopting Federal OSHA rules. The agency believes these activities are already an anticipated part of the State Plan's budget (part of which is provided by the Federal Government) and will not represent spending above a State Plan's established budget.<sup>5</sup>

<sup>5</sup> State Plan participation is voluntary, and states are aware of the requirements—including those to adopt standards and other regulations in order to remain at least as effective as Federal OSHA—before undertaking the process to establish a State

#### 10. Societal Costs

As explained in the NPRM, this rule does not require the employer make a third party available, nor does it require the employer to pay for that third party's time. 88 FR 59831. There is an opportunity cost to the third party inasmuch as their time is being spent on an inspection versus other activities they could be engaged in. *Id.* This opportunity cost is not compensated by the employer undergoing the OSHA inspection and it is not a monetary burden on that employer. *Id.*

The American Petroleum Institute (API) commented that it was not reasonable for OSHA to conclude that the rule does not impose costs on employers because that would mean either third-party representatives will provide their services at no cost, or OSHA intends either employees or taxpayers to pay for their time (Document ID 1954, p. 1–2; see also 1091). In an attempt to calculate the cost of compensating third-party representatives for time spent accompanying CSHOs on walkaround inspections, API pointed to OSHA's FY 2022 Congressional Budget Justification, in which OSHA requests \$63,500,000 for Compliance Assistance-State Consultation to provide a total of 20,139 visits performed by all Consultation programs (Document ID 1954, p. 2). Based on these data, API concluded that OSHA's cost for providing onsite consultation services is approximately \$3,153 per engagement and, “[u]sing this information as a proxy for third-party walkaround representative(s), participating in 90,000 inspections [per year],” the cost impact is \$238.8 million (Document ID 1954, p. 2).

As an initial matter, this final rule does not require a third-party representative to be selected or participate in an inspection, nor does it require employees or taxpayers to pay for third-party representatives' time. Third-party representatives are generally employees of another organization (e.g., labor union, advocacy group, worker justice coalition, etc.) who are paid by that group. Third-party representatives' job duties would include providing employee representation, assistance, or support during OSHA inspections and in other situations. Therefore, third-party representatives are not paid by the employer under inspection, the

Plan. The continued participation by states in the OSHA State Plan program indicates that any costs associated with complying with the requirements of participation do not outweigh the benefits a state anticipates realizing as a result of participation in the program.

employer's employees, or the U.S. Government; rather, they are paid by the organizations that employ them. Similarly, it is not true that OSHA will need to expend resources to train CSHOs on “new responsibilities” under the rule (see, e.g., Document ID 1938, p. 10), because any CSHO training will be integrated into existing ongoing training curriculum and not impose any new resource requirements on the agency. Accordingly, OSHA's conclusion that the final rule will not impose direct costs on employers does not mean that employees or taxpayers will bear the cost instead.

Furthermore, API's interpretation of OSHA's FY 2022 Congressional Budget Justification and the application of those figures is incorrect for several reasons. First, the Congressional Budget Justification does not represent the actual budget of the agency and should not be interpreted as such. In this case, the FY 23 budget for State Compliance Assistance programs is \$62,661,000—\$839,000 less than OSHA's request in FY 22.

Second, some of the budget of the State Consultation program is spent on activities other than the salaries of the consultants. The funding includes the administrative costs of running the program, training and travel costs for the consultants, outreach and educational support, the administration of OSHA's Safety and Health Recognition Program, and other activities. There are no centralized administrative costs of third-party representation. To use the full budget of the State Consultation programs as the numerator in this equation would grossly overstate the costs of a third-party representative's participation by including irrelevant costs.

Third, the activities of an OSHA consultant and a third-party representative are different and not directly comparable. A consultant does work both before the consultation visit and after. They prepare a summary report about their visit and provide follow up services to the employers they are working with. On the other hand, a third-party representative simply accompanies the CSHO during an inspection. Even if one derived a per-engagement cost that stripped out unrelated administrative costs, the consultant would dedicate more hours to each engagement than would a third-party representative.

Finally, it is not correct to assume a third-party representative would participate in every OSHA inspection. While OSHA does not collect data on the frequency of third-party representative participation in OSHA

inspections, based on anecdotal evidence from CSHOs, employees are more typically represented by another employee during the walkaround inspection. When preparing a regulatory impact analysis, the cost of a rule is measured as incremental costs—the cost to go from the state of the world in the absence of a rule to the state of the world if the rule were promulgated. Under the previous rule, third-party representatives were already permitted to participate in OSHA inspections. So, the incremental costs of the rule would be the additional inspections that third-party representatives will now participate in that they would not have participated in before. OSHA does not collect data on the frequency of third-party participation in inspections and so is unable to determine the number of inspections that would newly involve third-party representatives. But, since this rule clarifies existing rights and does not expand or grant new rights, the number is likely to be very small.

In sum, OSHA does not collect data on the frequency of third-party participation in inspections, nor has the agency attempted to estimate how many inspections a third-party representative might participate in as a result of this rule. Because these data are not available, OSHA acknowledged the existence of, but has not attempted to estimate, societal costs for this analysis. As discussed above, OSHA also acknowledges that there are potentially some unquantified costs of activities that employers may voluntarily undertake as a result of this rule. However, the agency finds that this final rule does not impose any new direct cost burden on employers.

### C. Benefits

While there are no new costs borne by employers associated with this final rule, amending section 1903.8(c) will reinforce the benefits of the OSH Act. Third-party representatives—given their knowledge, expertise, or skills with hazardous workplace conditions—can act as intermediaries and improve communication about safety issues between employees and the CSHO. Improved communication can reduce workplace injuries and related costs such as workers' compensation or OSHA fines. As discussed in more detail in Section III, Summary and Explanation, this final rule will enable employees to select trusted and knowledgeable representatives of their choice, which will improve employee representation during OSHA inspections. Employee representation is critical to ensuring OSHA inspections are thorough and effective.

As illustrated by the examples set forth in Section III, Summary and Explanation, this final rule has important benefits on the effectiveness of OSHA's inspections and worker safety and health. Indeed, the record demonstrates that some of these benefits accrue in particular to underserved communities that are likely to benefit from third-party representatives with language or cultural competencies or trusted relationships with workers. These benefits are not the result of actions taken or not taken by employers necessarily, but instead, from the nonquantifiable societal costs of the third-party representatives' time. OSHA has not attempted to quantify these benefits since—unlike injuries avoided and fatalities prevented—they are relatively intangible. Executive Order 12866, as amended by Executive Order 14094, encourages agencies to quantify benefits to the extent reasonably possible, but to articulate them in detail, qualitatively, when they are not. As outlined throughout the preamble, OSHA has provided extensive explanation and information to support the agency's belief that the benefits of the rule, while unquantified, are substantial.

### D. Regulatory Flexibility Certification

In accordance with the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, OSHA examined the regulatory requirements of the final rule to determine if they would have a significant economic impact on a substantial number of small entities. As indicated in Section V, Final Economic Analysis, the final rule may have familiarization costs of approximately \$5 per establishment where employers are aware of and decide to read this regulation. The rule does not impose any additional direct costs of compliance on employers, whether large or small. Accordingly, the final rule will not have a significant impact on a substantial number of small entities.

Some commenters, including the Office of Advocacy of the U.S. Small Business Administration and the National Federation of Independent Business, disagreed (see, e.g., Document ID 0047; 0168, p. 6–7; 1774, p. 4–5; 1941, p. 3–6; 1952, p. 5; 5793). For example, the Office of Advocacy of the U.S. Small Business Administration stated that OSHA's certification that the proposed rule would not have a significant impact on a substantial number of small entities was “improper” because OSHA failed to provide a “factual basis” for certification (Document ID 1941, p. 4).

For the reasons explained in detail above, OSHA estimates that this rule potentially imposes an optional one-time cost for familiarization of approximately \$5 per establishment. Otherwise, the rule has no direct requirements for employers and no more than de minimis costs of activities employers may voluntarily undertake as a result of the final rule. The agency considered “direct and foreseeable costs” in the NPRM and this final rule and commenters offered nothing more than speculative costs that are neither required by the rule nor are they reasonable activities for employers to undertake. As explained in the NPRM and this final rule, the rule clarifies who can be an authorized representative during OSHA's walkaround inspection. It does not impose new cost burdens on employers or require them to take any action apart from the potential rule familiarization cost of \$5 per employer that decides to read it. Therefore, the final rule will not have a significant economic impact on a substantial number of small entities.

For the purposes of illustrating the threshold cost necessary for a rule to have a significant economic impact (costs that are equal to or greater than one percent of revenue), the agency presents the following. Table 1 below shows revenue per average establishment based on 2017 County Business Patterns and Economic Census (the most recent year that reports data at the level necessary to perform this analysis) and the one percent threshold in dollars for selected industries and size classes. OSHA looked at construction, manufacturing, and healthcare as industries that may be more likely to be inspected by OSHA or where there may be higher impacts. The agency also looked at both establishments with fewer than 500 employees (which roughly corresponds to or captures all small entities as defined by the U.S. Small Business Administration) as well as those with fewer than 20 employees, since some construction and healthcare employers are more likely to be very small. The table below also shows the hours that would need to be spent on compliance activities by a supervisor with a loaded wage of about \$94 (using the wage of Standard Occupation Classification code 11–1021 General and Operations Managers from the U.S. Bureau of Labor Statistics Occupational Employment and Wage Survey) in order to meet that threshold. Based on these calculations, a small entity would need to dedicate from nearly 100 hours to as many as 2,900 hours to compliance activities in



order to exceed that threshold, depending on the industry. For reference, this is the equivalent of more than two weeks of full-time work (assuming a 40-hour work week) up to

one and a half full-time employees dedicating all of their work time to compliance activities. For employers with fewer than 20 employees, those figures range from 35 hours—nearly a

full week of work—to more than 1,000 hours—equal to half of one full-time employee’s work time in a year.

TABLE 1—HOURS TO REACH SIGNIFICANT ECONOMIC IMPACT, SELECT INDUSTRIES BY NAICS INDUSTRY, <500 EMPLOYEES

NAICS	NAICS description	Establishments	Revenue (\$1,000)	Revenue per establishment (\$1,000)	1% of revenue per establishment	Manager per hour wages	Hours to exceed 1%
2361	Residential Building Construction	171,322	\$253,139,895	\$1,478	\$14,776	\$93.71	158
2362	Nonresidential Building Construction	41,400	324,165,303	7,830	78,301	93.71	836
2371	Utility System Construction	17,634	79,475,796	4,507	45,070	93.71	481
2372	Land Subdivision	4,874	8,476,481	1,739	17,391	93.71	186
2373	Highway, Street, and Bridge Construction	8,971	83,786,185	9,340	93,397	93.71	997
2379	Other Heavy and Civil Engineering Construction.	4,165	14,777,633	3,548	35,481	93.71	379
2381	Foundation, Structure, and Building Exterior Contractors.	92,477	161,721,189	1,749	17,488	93.71	187
2382	Building Equipment Contractors	180,621	321,134,919	1,778	17,779	93.71	190
2383	Building Finishing Contractors	115,503	122,271,617	1,059	10,586	93.71	113
2389	Other Specialty Trade Contractors	69,138	137,034,126	1,982	19,820	93.71	212
311	Food Manufacturing	23,740	174,677,989	7,358	73,580	93.71	785
312	Beverage and Tobacco Product Manufacturing.	8,518	31,557,244	3,705	37,048	93.71	395
313	Textile Mills	1,749	11,059,006	6,323	63,230	93.71	675
314	Textile Product Mills	5,544	10,384,706	1,873	18,731	93.71	200
315	Apparel Manufacturing	5,686	8,368,242	1,472	14,717	93.71	157
316	Leather and Allied Product Manufacturing	1,131	2,775,454	2,454	24,540	93.71	262
321	Wood Product Manufacturing	12,960	50,791,296	3,919	39,191	93.71	418
322	Paper Manufacturing	2,592	37,676,474	14,536	145,357	93.71	1,551
323	Printing and Related Support Activities	24,189	45,426,490	1,878	18,780	93.71	200
324	Petroleum and Coal Products Manufacturing.	1,117	30,652,067	27,441	274,414	93.71	2,928
325	Chemical Manufacturing	9,976	138,356,916	13,869	138,690	93.71	1,480
326	Plastics and Rubber Products Manufacturing.	9,574	82,161,688	8,582	85,818	93.71	916
327	Nonmetallic Mineral Product Manufacturing	11,175	48,381,252	4,329	43,294	93.71	462
331	Primary Metal Manufacturing	3,256	48,567,821	14,916	149,164	93.71	1,592
332	Fabricated Metal Product Manufacturing	50,939	188,740,011	3,705	37,052	93.71	395
333	Machinery Manufacturing	20,542	122,991,169	5,987	59,873	93.71	639
334	Computer and Electronic Product Manufacturing.	10,603	67,937,359	6,407	64,074	93.71	684
335	Electrical Equipment, Appliance, and Component Manufacturing.	4,626	33,346,239	7,208	72,084	93.71	769
336	Transportation Equipment Manufacturing	9,295	87,082,439	9,369	93,687	93.71	1,000
337	Furniture and Related Product Manufacturing.	13,960	36,138,030	2,589	25,887	93.71	276
339	Miscellaneous Manufacturing	26,481	55,483,581	2,095	20,952	93.71	224
611	Educational Services	97,786	137,228,479	1,403	14,034	93.71	150
621	Ambulatory Health Care Services	530,341	602,083,936	1,135	11,353	93.71	121
622	Hospitals	1,712	41,733,980	24,377	243,773	93.71	2,601
623	Nursing and Residential Care Facilities	56,163	113,790,097	2,026	20,261	93.71	216
624	Social Assistance	155,830	145,159,610	932	9,315	93.71	99

Source: OSHA, based on 2017 County Business Patterns and Economic Census.

HOURS TO REACH SIGNIFICANT ECONOMIC IMPACT, SELECT INDUSTRIES BY NAICS INDUSTRY, <20 EMPLOYEES

NAICS	NAICS description	Establishments	Revenue (\$1,000)	Revenue per establishment (\$1,000)	1% of revenue per establishment	Manager per hour wages	Hours to exceed 1%
2361	Residential Building Construction	166,548	\$142,652,292	\$857	\$8,565	\$93.71	91
2362	Nonresidential Building Construction	34,342	83,675,671	2,437	24,365	93.71	260
2371	Utility System Construction	13,854	18,796,751	1,357	13,568	93.71	145
2372	Land Subdivision	4,586	4,394,749	958	9,583	93.71	102
2373	Highway, Street, and Bridge Construction	6,205	13,358,821	2,153	21,529	93.71	230
2379	Other Heavy and Civil Engineering Construction.	3,550	4,180,174	1,178	11,775	93.71	126
2381	Foundation, Structure, and Building Exterior Contractors.	83,239	63,851,419	767	7,671	93.71	82
2382	Building Equipment Contractors	161,010	111,658,403	693	6,935	93.71	74
2383	Building Finishing Contractors	107,882	57,678,342	535	5,346	93.71	57
2389	Other Specialty Trade Contractors	62,284	52,959,403	850	8,503	93.71	91
311	Food Manufacturing	17,010	20,699,769	1,217	12,169	93.71	130
312	Beverage and Tobacco Product Manufacturing.	6,913	7,189,394	1,040	10,400	93.71	111
313	Textile Mills	1,122	1,357,262	1,210	12,097	93.71	129
314	Textile Product Mills	4,685	2,499,124	533	5,334	93.71	57
315	Apparel Manufacturing	4,789	2,306,249	482	4,816	93.71	51

HOURS TO REACH SIGNIFICANT ECONOMIC IMPACT, SELECT INDUSTRIES BY NAICS INDUSTRY, <20 EMPLOYEES—  
Continued

NAICS	NAICS description	Establishments	Revenue (\$1,000)	Revenue per establishment (\$1,000)	1% of revenue per establishment	Manager per hour wages	Hours to exceed 1%
316	Leather and Allied Product Manufacturing ..	922	623,259	676	6,760	93.71	72
321	Wood Product Manufacturing .....	9,230	9,107,739	987	9,868	93.71	105
322	Paper Manufacturing .....	1,138	2,503,951	2,200	22,003	93.71	235
323	Printing and Related Support Activities .....	20,213	11,430,249	565	5,655	93.71	60
324	Petroleum and Coal Products Manufac- turing.	488	2,148,587	4,403	44,028	93.71	470
325	Chemical Manufacturing .....	6,048	14,751,260	2,439	24,390	93.71	260
326	Plastics and Rubber Products Manufac- turing.	5,078	8,127,328	1,600	16,005	93.71	171
327	Nonmetallic Mineral Product Manufacturing	6,589	8,840,877	1,342	13,418	93.71	143
331	Primary Metal Manufacturing .....	1,806	3,595,790	1,991	19,910	93.71	212
332	Fabricated Metal Product Manufacturing ....	36,783	34,117,477	928	9,275	93.71	99
333	Machinery Manufacturing .....	13,539	18,377,762	1,357	13,574	93.71	145
334	Computer and Electronic Product Manufac- turing.	7,057	10,239,147	1,451	14,509	93.71	155
335	Electrical Equipment, Appliance, and Com- ponent Manufacturing.	3,011	4,501,315	1,495	14,950	93.71	160
336	Transportation Equipment Manufacturing ....	5,847	9,466,353	1,619	16,190	93.71	173
337	Furniture and Related Product Manufac- turing.	11,211	7,486,646	668	6,678	93.71	71
339	Miscellaneous Manufacturing .....	22,726	14,022,304	617	6,170	93.71	66
621	Ambulatory Health Care Services .....	446,980	289,281,532	647	6,472	93.71	69
622	Hospitals .....	118	1,144,688	9,701	97,007	93.71	1,035
623	Nursing and Residential Care Facilities .....	21,683	9,296,715	429	4,288	93.71	46
624	Social Assistance .....	99,490	32,772,130	329	3,294	93.71	35

Source: OSHA, based on 2017 County Business Patterns and Economic Census.

OSHA estimates for the cost of compliance with a rule assume that employers will take the most rational, lowest-cost option to comply. It is well known that OSHA only inspects a small fraction of workplaces in a given year and most businesses will never be subject to an OSHA inspection.<sup>6</sup> Only a small subset of those worksites inspected annually will have a third-party representative accompanying the CSHO because of the revisions to this final rule. While OSHA does not generally establish a threshold for what is considered a “substantial number of small entities,” other agencies in the Department of Labor, including the Employment and Training Administration and the Wage and Hour Division, define a substantial number to be more than 15 percent (see 80 FR 62957, 63056; 79 FR 60634, 60718). Commenters did not present any reasonable argument that a substantial number of employers (much less a substantial number of small employers) would dedicate a week or more to activities not required by OSHA for an inspection that only has a very small chance of occurring. Again, apart from the rule familiarization cost of \$5 per employer that chooses to read it, OSHA

finds that employers will incur no direct costs because of this rule. However, even if OSHA were incorrect in estimating that there were no such additional direct costs, this analysis shows that it is not reasonable to assume that such costs would have a significant economic impact. Therefore, OSHA certifies that the final rule will not have a significant economic impact on a substantial number of small entities.

*E. Small Business Regulatory Enforcement Fairness Act*

OSHA did not convene a Small Business Advocacy Review panel under the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA). The Chamber of Commerce asserted that OSHA failed to comply with requirements under SBREFA (Document ID 1952, p. 4–5). The Employers Walkaround Representative Rulemaking Coalition recommended that OSHA voluntarily establish a Small Business Advocacy Review (SBAR) panel to receive input directly from small businesses (Document ID 1976, p. 26).

OSHA considers the possibility of disproportionate impact on small businesses when deciding whether a SBAR panel is warranted. As explained above, because OSHA preliminarily determined that the proposed rule would not result in a significant economic impact on a substantial number of small entities (see 88 FR

59831), OSHA determined that a SBAR panel was not required. Nothing in the record has disturbed OSHA’s preliminary determination that this rule will not have a significant economic impact on a substantial number of small entities, nor did OSHA’s threshold calculations indicate that the preliminary determination was incorrect. Therefore, OSHA has concluded that a SBAR panel was not required for this rule.

**VI. Office of Management and Budget (OMB) Review Under the Paperwork Reduction Act**

This rule for Worker Walkaround Representative Designation Process contains no collection of information requirements subject to OMB approval under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501 *et seq.*) and its implementing regulations at 5 CFR part 1320. The PRA defines a collection of information as “the obtaining, causing to be obtained, soliciting, or requiring the disclosure to third parties or the public, of facts or opinions by or for an agency, regardless of form or format.” 44 U.S.C. 3502(3)(A). Under the PRA, a Federal agency cannot conduct or sponsor a collection of information unless OMB approves it, and the agency displays a currently valid OMB control number (44 U.S.C. 3507). Also, notwithstanding any other provision of law, no employer shall be subject to penalty for failing to comply with a collection of information if the

<sup>6</sup> As mentioned previously, the average employer has a 0.43 percent chance of being inspected by OSHA annually. At the current rate of inspection and enforcement staffing levels, it would take OSHA more than 100 years to inspect every covered workplace one time. See Commonly Used Statistics, available at <https://www.osha.gov/data/commonstats>.

collection of information does not display a currently valid OMB control number (44 U.S.C. 3512).

## VII. Federalism

OSHA reviewed this final rule in accordance with the Executive Order 13132 (64 FR 43255 (Aug. 10, 1999)), which, among other things, is intended to “ensure that the principles of federalism established by the Framers guide the executive departments and agencies in the formulation and implementation of policies.”

Several commenters submitted cover letters and attached a report from the Boundary Line Foundation (Boundary Line document) expressing a concern that OSHA failed to conduct consultation with States adequate to comply with Executive Order 13132 (see, e.g., Document ID 1965; 1967; 1968; 1973, 1975). The Boundary Line document also argues that OSHA’s rulemaking process “neglects to assess foreseeable impacts to State legislative or regulatory actions or consider alternatives that can only be revealed through the State consultation process” (see, e.g., Document ID 1965, p. 5–9; 1975, p. 5–9; 1968, p. 5–9).<sup>7</sup> OSHA disagrees.

In fact, the Boundary Line document, along with several State comments that reference this document, set out a number of alternatives, including not making the proposed changes or providing a more specific set of criteria to be referenced by the CSHOs (Document ID 1965, p. 11, 15–16, 21, 30; 1967; 1968; 1973, 1975). OSHA has considered and discussed those alternatives but did not select them for the reasons fully explained in the Summary and Explanation.

After analyzing this action in accordance with Executive Order 13132, OSHA determined that this regulation is not a “policy having federalism implications” requiring consultation under Executive Order 13132. This final rule merely clarifies OSHA’s longstanding practice under which third-party representatives may accompany inspectors conducting workplace safety and health inspections authorized by the OSH Act. It will not have substantial direct effect on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various

levels of government that would affect the States’ ability to discharge traditional State governmental functions.

The effect of the final rule on States and territories with OSHA-approved occupational safety and health State Plans is discussed in Section VIII, State Plans.

## VIII. State Plans

As discussed in the Summary and Explanation section of this preamble, this final rule revises the language in OSHA’s Representatives of Employers and Employees regulation, found at 29 CFR 1903.8(c), to explicitly clarify that the representative(s) authorized by employees may be an employee of the employer or a third party for purposes of an OSHA walkaround inspection. Additionally, OSHA clarified that when the CSHO has good cause to find that a representative authorized by employees who is not an employee of the employer would aid in the inspection, for example because they have knowledge or experience with hazards in the workplace, or other skills that would aid the inspection, the CSHO may allow the employee representative to accompany the CSHO on the inspection.

Among other requirements, section 18 of the OSH Act requires OSHA-approved State Plans to enforce occupational safety and health standards in a manner that is at least as effective as Federal OSHA’s standards and enforcement program, and to provide for a right of entry and inspection of all workplaces subject to the Act that is at least as effective as that provided in section 8 (29 U.S.C. 667(c)(2)–(3)). As described above and in the Summary and Explanation of this preamble, OSHA concludes that these clarifying revisions enhance the effectiveness of OSHA’s inspections and enforcement of occupational safety and health standards. Therefore, OSHA has determined that, within six months of the promulgation of a final rule, State Plans are required to adopt regulations that are identical to or “at least as effective” as this rule, unless they demonstrate that such amendments are not necessary because their existing requirements are already “at least as effective” in protecting workers as the Federal rule. See 29 CFR 1953.4(b)(3).

Several commenters representing state and local governments (but not State Plan officials) submitted similar comments and included the Boundary Line document. The Boundary Line document questioned OSHA’s application of section 18(c)(2) (29 U.S.C. 667(c)(2)) to State Plans’ obligations with respect to this rulemaking (see

Document ID 1965, p. 10–11; 1967, p. 10–11; 1968, p. 10–11; 1975, p. 10–11). (The report incorrectly cites 29 U.S.C. 677(c)(2), but this appears to be a typographical error.) Section 18(c)(2) of the OSH Act provides that one condition of OSHA approval is that a State Plan “provides for the development and *enforcement* of safety and health standards . . . which standards (*and the enforcement of which* standards) are or will be at least as effective in providing safe and healthful employment and places of employment” (emphasis added). Because this rule enhances the effectiveness of the enforcement of OSHA standards, section 18(c)(2) applies.

The same document also questioned the impact of this rulemaking on State Plans’ obligations to develop strategic plans (Document ID 1965, p. 9; 1967, p. 9; 1968, p. 9; 1975, p. 9). OSHA requires State Plans to submit 5-year strategic plans as a condition of receiving Federal funding grants pursuant to section 23(g) of the OSH Act (29 U.S.C. 672). This is distinct from State Plans’ statutory obligations under section 18 of the OSH Act to maintain at least as effective enforcement programs and inspections. Although a State Plan’s 5-year strategic plan might reference rulemaking obligations, OSHA is not prescriptive about whether specific rulemakings would need to be listed in such strategic plans.

Of the 29 States and Territories with OSHA-approved State Plans, 22 cover both public and private-sector employees: Alaska, Arizona, California, Hawaii, Indiana, Iowa, Kentucky, Maryland, Michigan, Minnesota, Nevada, New Mexico, North Carolina, Oregon, Puerto Rico, South Carolina, Tennessee, Utah, Vermont, Virginia, Washington, and Wyoming. The remaining seven States and Territories cover only state and local government employees: Connecticut, Illinois, Maine, Massachusetts, New Jersey, New York, and the Virgin Islands.

## IX. Unfunded Mandates Reform Act

OSHA reviewed this proposal according to the Unfunded Mandates Reform Act of 1995 (“UMRA”; 2 U.S.C. 1501 *et seq.*). As discussed above in Section V of this preamble, the agency preliminarily determined that this proposal would not impose costs on any private- or public-sector entity. Accordingly, this proposal would not require additional expenditures by either public or private employers.

As noted above, the agency’s regulations and standards do not apply to State and local governments except in

<sup>7</sup> Some of these commenters request that OSHA withdraw the rulemaking to complete “its obligation” to consult with states, ignoring section 11 of E.O. 13132 which specifies that the E.O. does not “create any right or benefit, substantive or procedural enforceable at law.” (64 FR 43255, 43259).

States that have elected voluntarily to adopt a State Plan approved by the agency. Consequently, this proposal does not meet the definition of a “Federal intergovernmental mandate.” See section 421(5) of the UMRA (2 U.S.C. 658(5)). Therefore, for the purposes of the UMRA, the agency certifies that this proposal would not mandate that State, local, or Tribal governments adopt new, unfunded regulatory obligations. Further, OSHA concludes that the rule would not impose a Federal mandate on the private sector in excess of \$100 million (adjusted annually for inflation) in expenditures in any one year.

#### X. Consultation and Coordination With Indian Tribal Governments

OSHA reviewed this final rule in accordance with Executive Order 13175 (65 FR 67249) and determined that it would not have “tribal implications” as defined in that order. The clarifications to 29 CFR 1903.8(c), do not have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

#### XI. Environmental Impact Assessment

OSHA reviewed the final rule in accordance with the requirements of the National Environmental Policy Act (NEPA) (42 U.S.C. 4321 *et seq.*), the

regulations of the Council on Environmental Quality (40 CFR parts 1500 through 1508), and the Department of Labor’s NEPA procedures (29 CFR part 11). The agency finds that the revisions included in this proposal would 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.

#### XII. List of Subjects in 29 CFR Part 1903

Occupational safety and health, Health, Administrative practice and procedures, Law enforcement.

#### XIII. Authority and Signature

Douglas L. Parker, Assistant Secretary of Labor for Occupational Safety and Health, U.S. Department of Labor, authorized the preparation of this document pursuant to 29 U.S.C. 657; 5 U.S.C. 553; Secretary of Labor’s Order 8–2020, 85 FR 58393 (2020).

Signed at Washington, DC.

**Douglas L. Parker,**

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

For the reasons stated in the preamble, OSHA is amending 29 CFR part 1903 to read as follows:

#### PART 1903—INSPECTIONS, CITATIONS AND PROPOSED PENALTIES

■ 1. The authority citation for part 1903 is revised to read as follows:

**Authority:** 29 U.S.C. 657; Secretary of Labor’s Order No. 8–2020 (85 FR 58393); and 5 U.S.C. 553.

■ 2. Revise paragraph (c) of § 1903.8 to read as follows:

#### § 1903.8 Representatives of employers and employees.

\* \* \* \* \*

(c) The representative(s) authorized by employees may be an employee of the employer or a third party. When the representative(s) authorized by employees is not an employee of the employer, they may accompany the Compliance Safety and Health Officer during the inspection if, in the judgment of the Compliance Safety and Health Officer, good cause has been shown why accompaniment by a third party is reasonably necessary to the conduct of an effective and thorough physical inspection of the workplace (including but not limited to because of their relevant knowledge, skills, or experience with hazards or conditions in the workplace or similar workplaces, or language or communication skills).

\* \* \* \* \*

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