effectively and according to its own internal requirements.

Examples of information which might be collected include types of grievances filed, nature of disputed issues, final dispositions of grievances, levels of review required, compliance with time limits, and reasons for dispositions of grievances.[30]

b. *Confidentiality.* To prevent reprisals, it is important to keep records of individual inmate use and participation in grievance mechanisms out of the reach of fellow inmates and staff. Similarly, to prevent individuals or bodies making parole decisions from considering inmate use or involvement in grievance procedures as a factor in their deliberations, strict precautions must be taken to ensure that such material is not available to them. Fear on the part of inmates that use of or participation in grievance procedures could affect release decisions negatively may restrict use of the grievance procedure. In addition, fear that testimony or evidence produced during grievance proceedings will become known to persons making release decisions may restrict inmate participation in the proceedings and impede efforts to develop fully and accurately the factual bases of grievances.

Although institutional records are exempted from the disclosure requirements of freedom of information acts in many states, it is not the intent of this standard to override such disclosure requirements where they exist under state law.

Section 40.11 Evaluation

Only through periodic evaluations can administrators and outside reviewers guarantee that grievance procedures serve the institutional purposes of administrators while also resolving inmates' grievances fairly. An important concern is the availability of information on grievance processing. Development and implementation of record-keeping as discussed in Standard IX will aid in conducting informed evaluations. The standard requires review of the evaluation by a person or group that is not associated with the institution to assist the administrators of the grievance procedure in maintaining compliance with the standards. The evaluation and the review are to be submitted to the Attorney General to assist him in acquitting his obligation to review certified procedures for continuing compliance with the standards.

An additional concern involves criteria used in evaluations to measure the effectiveness of grievance mechanisms. Criteria should be based upon the specific objectives of the grievance mechanism. Due to the inherent difficulties in determining whether grievance mechanisms meet the general objectives of reducing levels of frustration, tension, and violence among prisoners, Keating et al. recommend that criteria of effectiveness simply reflect prisoners' use of grievance mechanisms and whether such use results in clarification and changes in institutional policies.[31]

2. A new § 0.18 to read as follows, is added to Title 28, Code of Federal Regulations:

§ 0.18 Office of Inmate Grievance Procedure Certification.

The Office of Inmate Grievance Procedure Certification shall be under the direction of a Director. Under the supervision of the Deputy Attorney General, the Director shall review and certify, in accordance with Part 40 of this title, plans for inmate grievance procedures submitted by States or their political subdivisions.

Dated: January 12, 1981.

Benjamin R. Civiletti,

Attorney General.

[FR Doc. 81-1528 Filed 1-15-81; 8:45 am]

BILLING CODE 4410-01-M

[30] Hepburn et al. *supra* note 3, at 262-264. The standard allows inmates and staff to handle records where necessary for clerical purposes. The most effective method to implement this Standard may be to establish a separate record-keeping system for inmate grievance records. Whenever possible, such records should not be managed or handled by inmates.

[31] Keating et al., *supra* note 3, at 31.

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

29 CFR Part 1903

Walkaround Compensation

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

ACTION: Final rule.

SUMMARY: This document amends 29 CFR 1903.8 to require employers to compensate employees who participate in walkaround inspections and related activities. The requirement will protect the statutory right of employees to participate in inspections of their working conditions with the OSHA inspector and will facilitate walkaround participation, thus increasing the effectiveness of inspections and thereby promoting occupational safety and health.

EFFECTIVE DATE: February 17, 1981.

FOR FURTHER INFORMATION CONTACT: Mr. James Foster, Office of Public Affairs, Occupational Safety and Health Administration, Third Street and Constitution Avenue, NW., Room N-3641, Washington, D.C. 20210 (Tel. 202-523-6151).

SUPPLEMENTARY INFORMATION:

I. Background

A. Introduction

On November 14, 1980, the Occupational Safety and Health Administration ("OSHA" and the "agency") published in the Federal Register proposed amendments to 29 CFR 1903.8 and 1977 requiring employers to compensate employees who participate in walkaround inspections and related activities, 45 FR 75232. The agency invited the public to submit written data, views and arguments with respect to the proposed amendments and all issues involved therein. Comments were to be postmarked on or before December 29, 1980.

The agency has received numerous comments from businesses, unions, trade associations, law firms and others. In addition, comments relating to the issues in this proceeding were received from OSHA field personnel. All submissions were made part of the record and were duly considered.

B. Statutory Framework

The Occupational Safety and Health Act of 1970, 29 U.S.C. 651 *et seq.* (the "Act" and the "OSH Act"), was enacted "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources." In order to carry out these purposes, section 8(a) of the Act authorizes the Secretary of Labor ("Secretary") to conduct inspections and investigations of workplaces in order to determine whether violations of the Act are present. An essential feature of such inspections is set forth in section 8(e) of the Act, which provides:

> 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 under subsection (a) for the purpose of aiding such inspection. Where there is no authorized employee representative, the Secretary or his authorized representative shall consult with a reasonable number of employees concerning matters of health and safety in the workplace.

Thus, the Act grants employer representatives and employee representatives an express right to accompany an OSHA inspector for the purpose of aiding the inspection and provides for consultation with employees by the inspector where there is no authorized employee representative. In addition, section 8(f)(2) of the Act grants employees the right to complain to OSHA compliance officers prior to or during an inspection about possible violations of the Act, and section 8(a)(2) provides that OSHA compliance officers may question employees about workplace conditions. The right to accompany an OSHA inspector may be implemented by the promulgation of regulations pursuant to section 8(e) of the Act. In addition, this provision, as well as other provisions such as sections 8(a)(2), 8(e) and 8(f)(2), may be implemented pursuant to section 8(g)(2) of the Act, which provides:

> The Secretary and the Secretary of Health, Education and Welfare shall 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.

C. History of Walkaround Compensation Regulation

In 1973, the Assistant Secretary of Labor for Occupational Safety and Health, relying in part upon the Solicitor of Labor's opinion that walkaround time was not "hours worked" under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. 203(o) (1976), concluded that an employer's failure to pay employees for the time spent with the OSHA inspector was not a *per se* violation of section 11(c). (See 38 FR 2681, 2684 (January 29, 1973) (codified at 29 CFR 1977.21(a) (1975)).

In 1974, a federal district court upheld the Department of Labor's interpretation in a civil action brought by employees to recover wages lost because of participation in an OSHA inspection. *Leone* v. *Mobil Oil Corp.*, 377 F. Supp. 1302 (D.D.C. 1974).

In 1975, the U.S. Court of Appeals for the District of Columbia Circuit affirmed the district court's decision and held that because walkaround time primarily benefits employees and because the walkaround is conducted beyond the employer's control, walkaround time does not constitute "hours worked" under the FLSA. *Leone, supra,* 523 F.2d 1153, 1163–64. Furthermore, the court held that a walkaround payment requirement could not be inferred from the provisions of the Occupational Safety and Health Act. *Id.* at 1159–61.

In 1977, the Solicitor of Labor reevaulated the original legal position and, in September 1977, issued a new opinion, based on further study and the agency's experience, which stated that walkaround time was "hours worked" under the FLSA, that an employer's failure to pay employees for that time was inherently destructive of the walkaround right, and that therefore the failure to pay was discrimination prohibited by section 11(c)(1) of the Act. On September 20, 1977, the Assistant Secretary promulgated a rule declaring that "an employer's failure to pay employees for time during which they are engaged in walkaround inspections is discriminatory under section 11(c)." 42 FR 47344. Because the rule was considered "an interpretive rule and general statement of policy," 42 FR 47344, public participation was not provided in accordance with the provisions of the Administrative Procedure Act ("APA"). 5 U.S.C. 553.

In 1978, a federal district court, in an action challenging the validity of the new regulation, concluded that the regulation was interpretive and therefore exempt from the notice-and-comment procedures of the APA. *Chamber of Commerce of the United States of America* v. *OSHA*, 465 F. Supp. 10 (D.D.C. 1978), *rev'd* No. 78–2221, 8 BNA OSHC 1648 (D.C. Cir. 1980). The court held that OSHA did not exceed its statutory authority in issuing the new regulation. On appeal, the U.S. Court of Appeals for the District of Columbia Circuit reversed the judgment of the district court and remanded the case to that court with instructions to vacate the regulation. *Chamber of Commerce of the United States of America* v. *OSHA*, F. 2d , No. 78–2221, 8 BNA 1648 (D.C. Cir. 1980). The Court of Appeals held that walkaround time did not constitute "hours worked" within the meaning of the FLSA because the employer did not select or regulate the employee representative during the walkaround, nor was the employer the primary beneficiary of the walkaround. The court also held that the Act itself neither prohibited nor compelled pay for walkaround time. Therefore, according to the court, the regulation was not interpretive but legislative. Because OSHA did not comply with the notice-and-comment procedures of the APA for the promulgation of legislative rules, the court concluded that the walkaround pay regulation was invalid and should be vacated. The court expressed no view on whether the Assistant Secretary could reissue the same rule after complying with the notice-and-comment procedures of 5 U.S.C. 553.

On remand, the district court vacated the regulation. On October 31, 1980, the Assistant Secretary deleted the regulation (45 FR 72118) and instructed OSHA field staff to cease enforcing its provisions.

D. Summary of the Proposed Amendment

On November 14, 1980, OSHA proposed regulations requiring employers to compensate employees who participate in walkaround inspections and related activites. In the preamble to the proposal, the agency noted its disagreement with the *Chamber* decision that walkaround time is not "hours worked" under the FLSA but noted that the proposal was not based on any determination that walkaround time is "hours worked" under the FLSA.

Under paragraph (e)(1)(i) of the proposed additions to 29 CFR 1903.8, the employer would have been required to provide to an authorized representative of the employees walkaround benefits for time during which the representative participates in any OSHA inspection of the workplace, including attendance at the opening and closing conferences. Paragraph (e)(1)(ii) of the proposal stated that if a new employee representative replaces an employee representative then on the inspection team, the employer would be required to provide walkaround benefits to each representative for that portion of the walkaround in which each representative participated. Paragraph (e)(1)(iii) provided that if compliance officers inspect different parts of a workplace at the same time or at different times, one employee representative for each inspection team would be entitled to walkaround benefits. Paragraph (e)(1)(iv) would have required employers to provide to any employee walkaround benefits for time spent in other activities related to the inspection. Paragraph (e)(1)(v) defined walkaround benefits. Paragraph (e)(2) provided the method of enforcement of the regulation. Paragraph (e)(3) provided for an effective date of the regulation.

The proposal would have also added a new 29 CFR 1977.21 to Part 1977 which provided that an employer's failure to pay for walkaround time was *per se* discrimination against employees because of the exercise of employee rights and therefore violative of section 11(c)(1) of the Act. With respect to the proposed amendment to 29 CFR Part 1977, the agency has decided, for the reasons discussed below, not to promulgate the proposal at this time.

As noted earlier, the agency has received numerous comments in

response to the November 14, 1980 Federal Register notice. Several commentors requested public hearings on the proposed amendments. The agency reviewed these requests and determined that public hearings would not be held. Since the proposed regulations at 29 CFR 1903.8 and 1977 are not occupational safety and health standards as defined by section 3(8) of the Act, 29 U.S.C. 652(8), the provisions of section 6(b) of the Act, 29 U.S.C. 655(b), do not apply. Additionally, hearings are not required by the APA when, as here, an agency is engaged in informal rulemaking. 5 U.S.C. 553; *Vermont Yankee Nuclear Power* v. *National Resources Defense Council, Inc.*, 435 U.S. 519 (1978). Accordingly, the agency has determined not to conduct public hearings in this matter.

Many commentors requested that the comment period be extended beyond the December 29, 1980 deadline established in the November 14, 1980 Federal Register Notice of Proposed Rulemaking. Most of these commentors cited Executive Order 12044 (43 FR 12661 (March 24, 1978)) and Department of Labor guidelines (44 FR 5570 (January 26, 1979)) in support of their requests.

First, the instant rulemaking was conducted in conformance with the notice-and-comment requirements of the APA. Neither the Executive Order nor the Department of Labor guidelines require a 60-day comment period in every rulemaking proceeding. Both contemplate situations in which the 60-day period will not be provided and require that in such circumstances the regulation be accompanied by a statement of reasons for the shorter time period. The purpose of the provisions of the Executive Order and the Department guidelines is to assure that full public discussion of the issues in the rulemaking be afforded. Here, we believe that this purpose has been more than adequately achieved. As noted in the Notice of Proposed Rulemaking, 45 FR at 75237, the issues relating to pay for walkaround have already been subject to extensive public discussion since the agency's original interpretation was made several years ago. Moreover, since a notice was published by OSHA on October 31, 1980, (45 FR 72118) deleting the walkaround pay interpretive regulation and stating that OSHA was planning to propose a walkaround compensation regulation shortly, as a practical matter, the public had approximately 60 days to prepare and submit comments from the time OSHA first announced its intention to propose a new regulation. Accordingly, the agency determined that the full 60-day comment period was unnecessary and that the comment period should not be extended.

II. Basis and Purpose of the Regulation

A. Statutory Basis

As noted above, section 8(e) expressly authorizes the Secretary to issue regulations implementing the walkaround requirements of that section. In addition section 8(g)(2) empowers the Secretary to promulgate regulations as he may deem necessary to carry out his responsibilities under the Act, including regulations dealing with inspections. The regulation, an addition to 20 CFR 1903.8, which details procedures for selection of employer and employee walkaround representatives, is based on the Secretary's authority under sections 8(e) and 8(g)(2). As discussed more fully below, compensation for time spent in walkaround and related activities will facilitate employee participation in these activities and as a result will enhance the effectiveness of OSHA's inspections. Thus, the regulation being promulgated is necessary to implement the walkaround requirement of section 8(e) and is necessary to effectively carry out the Secretary's responsibilities to conduct occupational safety and health inspections, in accordance with section 8(g)(2).

B. Importance of Employee Walkaround Representative

In proposing the amendments to 29 CFR 1903.8, the agency noted the crucial importance of employee involvement to the successful enforcement of the Act. The Act itself underscores the importance of employee participation in the inspection process and grants employees an express right to accompany an OSHA inspector for the purpose of aiding the inspection. *See* section 8(e) of the Act, 29 U.S.C. 657(e). Other provisions of the Act also seek to facilitate employee participation by attempting to assure a free and open exchange of information between representatives of the Secretary and employees. Thus, the Act expressly provides in section 8(f)(2) that employees have the right to notify the OSHA inspector prior to or during the inspection itself of violations which they have reason to believe exist in the workplace. In addition, section 8(a)(2) of the Act provides that OSHA compliance officers may question employees about workplace conditions and section 8(e) provides that compliance officers may consult with a reasonable number of employees about occupational safety and health matters where there is no employee representative.

The remarks of Senator Williams, Chairman of the Senate Labor Committee and one of the main sponsors of the OSHA bill, reflect the crucial importance of employee participation in the walkaround process:

> During the field hearings held by the subcommittee on labor, the complaint was repeatedly voiced that under existing safety and health legislation, employees are generally not advised of the content and results of a Federal or State inspection. Indeed, they are often not even aware of the inspector's presence and are thereby deprived of an opportunity to inform him of alleged hazards. Much potential benefit of an inspection is therefore never realized, and workers tend to be cynical regarding the thoroughness and efficacy of such inspections. Consequently, in order to aid in the inspection and provide an appropriate degree of involvement of employees themselves in the physical inspections of their own places of employment, the committee has concluded that an authorized representative of employees should be given an opportunity to accompany the person who is making the physical inspection * * * [T]he inspector should have an opportunity to question employees in private so that they will not be hesitant to point out hazardous conditions which they might otherwise be reluctant to discuss.

Legislative History of the Occupational Safety and Health Act of 1970, 92d Cong. 1st Sess., p. 151 (Committee Print, 1971) (Hereinafter *"Leg. Hist."*).

> Certainly no one knows better than the working man what the conditions are, where the failures are, where the hazards are, and particularly where there are safety hazards. The opportunity to have the working man himself and a representative of other working men accompanying inspectors is manifestly wise and fair, and in arriving at the objectives of this legislation I think it is one of the key provisions of the bill * * *

Remarks of Senator Williams, *Leg. Hist.* p. 430; *see also Leg. Hist.*, pp. 852, 1216–17.

In addition to the above statements in the legislative history, it has been the agency's experience that employee participation and cooperation at the inspection stage have proved to be crucial to enforcement efforts under the Act. Throughout the agency's nine-year enforcement experience, employees have provided assistance and information essential to enable representatives of the Secretary to determine whether violations of the Act exist and what abatement action should be taken. Employee participation in the walkaround process and related activities has aided the Secretary in the performance of his duties and responsibilities under the Act to conduct

comprehensive and effective inspections.

The importance of employee involvement in the inspection process is substantiated beyond peradventure by the numerous comments addressing the issue. Numerous OSHA field personnel have documented for the record the many ways in which employee participation has aided the Secretary in the performance of his duties and responsibilities. For example, there have been many instances where employees have informed OSHA during the inspection of hazards which might otherwise not have been detected by the compliance officer. *See,* e.g., Exhibits 3–4 at p. 5; 3–6 at p. 6; 3–7 at pp. 4, 5; 3–8 at p. 5; 3–18 at p. 1; 3–19 at p. 9; 3–27 at p. 1. By virtue of their familiarity with the workplace and its operations, employee representatives have ensured that all locations and all phases of workplace activities are examined for possible hazards. *See,* e.g., Exhibits 3–5 at p. 7; 3–7 at p. 2; 3–8 at p. 2; 3–8 at p. 7; 309 at p. 7; 3–10 at p. 4; 3–35 at p. 1. Employees often explain to OSHA inspectors how machinery operates. *See,* e.g., Exhibits 3–4 at p. 4; 3–6 at p. 2; 3–9 at p. 12; 3–25 at p. 2; 3–33 at p. 2. The increasingly complex nature of workplace hazards, as in the health area, has imposed greater burdens on the Secretary in detecting these hazards and has correspondingly made the need for employee involvement at the inspection stage even more compelling. *See,* e.g., Exhibits 3–8 at p. 4; 3–33 at p. 15. In several instances, compliance officers have found that employee representatives clarify or correct representations made to the inspector by employer representatives. *See,* e.g., Exhibits 3–3 at p. 4; 3–4 at p. 2; 3–19 at p. 26; 3–38 at p. 2. Many OSHA personnel have expressed the view that the presence of the employee representative in the inspection team often serves to encourage other employees to discuss workplace conditions with the OSHA inspector. As a result, the statutorily preferred open channels of communication between the Secretary and employees are better facilitated. *See,* e.g., Exhibits 3–4 at pp. 3, 4; 3–8 at pp. 4, 8; 3–9 at pp. 7, 9; 3–11 at pp. 1, 6; 3–12 at pp. 1, 3; 3–19 at p. 9. One compliance officer indicated that the presence of an employee representative reduces tensions among all parties and results in greater cooperation between the inspector and the employer representative. *See* Exhibit 3–11 at p. 3. Moreover, some OSHA personnel believed that the absence of an employee representative makes the conduct of the inspection more difficult. *See,* e.g., Exhibits 3–6 at p. 3; 3–19 at p. 13; 3–25 at p. 3; 3–28 at p. 1. Other inspectors, on the basis of actual experience, have concluded that inspections without the benefit of employee representatives are more difficult to conduct and less efficient than those in which an employee representative participates. *See,* e.g., Exhibits 3–6 at p. 8; 3–8 at p. 8; 3–19 at pp. 11, 15, 16; 3–23 at p. 1.

The agency's experience that employee participation is an essential part of the inspection process is also supported by the comments submitted by the public. *See,* e.g., Exhibits 2–4; 2–58; 2–61; 2–116; 2–141; 2–146; 2–271. Many commentors expressed the view that the worker is in the best position to understand and identify workplace hazards and their location. *See,* e.g., Exhibits 2–69; 2–109; 2–111; 2–123; 2–146; 2–169; 2–215; 2–282, 2–289. Some commentors noted that hazards may go undetected by OSHA inspectors who do not have the benefit of an employee representative's knowledge and experience. *See,* e.g., Exhibits 2–34; 2–61. Other commentors expressed concern that, in the absence of an employee representative, some employers make incomplete or incorrect representations to the inspector regarding workplace practices or conditions. *See,* e.g., Exhibits 2–69, 2–155, 2–256, 2–267, 2–282, 2–307. Also noted were the views that the presence of an employee representative in the inspection team alerts other employees to the inspector's presence and encourages other workers to express their concerns regarding hazardous conditions to the inspectors. *See,* Exhibits 2–196, 2–217.

In view of the above, the agency concludes that the participation of employee representatives in walkaround and related activities is crucial to effective and efficient enforcement of the Act. In reaching this conclusion, the agency is not unmindful of some comments which question the usefulness of employee representatives. *See,* e.g., Exhibits 2–1; 2–44; 2–78; 2–151; 2–185; 2–186; 2–211; 2–214; 2–253; 2–257; 2–261; 2–265; 2–272; 3–9 at p. 15. However, the overwhelming evidence in the record confirms the value of employee participation in the inspection process substantiating the agency's experience and supporting the above finding.

The agency recognizes that a considerable number of walkaround inspections are conducted without the participation of employee walkaround representatives. However, this fact in no way detracts from the importance of employee involvement in the walkaround. Rather, it indicates that in some instances, particularly in non-union establishments, the selection of an employee walkaround representative would be impractical or would entail complex and time-consuming procedures that would seriously delay the conduct of inspections and effective and efficient enforcement of the Act. Section 8(e) of the Act recognizes that in some situations the participation of an employee representative would not be possible; in those cases, the Act requires that the OSHA inspector consult with a reasonable number of employees at the workplace during the course of the inspection. OSHA field instructions require compliance officers to make every effort to determine if an employee walkaround representative can be designated, and where the selection is "impractical" the inspector is directed to proceed to the inspection, interviewing employees as he or she makes the physical tour of the workplace. *See,* Field Operations Manual, V–8. However, the record overwhelmingly shows that where an employee representative has been selected his or her participation is crucial to effective inspection activity.

C. Pay for Employee Representatives

As noted in the November 14, 1980 proposal, the agency believes that forcing employees to suffer economic detriment through loss of pay or other benefits would constitute a serious disincentive to an employee from participating in a walkaround inspection. As a consequence, the failure to pay for walkaround would interfere with the statutory right of employees to accompany the OSHA inspector and to notify compliance officers of hazards prior to and during inspections, a right expressly granted to employees under section 8(f)(2) of the Act. When employees are discouraged from present and future participation in the walkaround and related activities, the open channels of communication between employees and the Secretary would be seriously impaired. OSHA compliance personnel would be substantially limited to reliance on information provided by employers—the subject of the inspection—thereby reducing the likelihood of obtaining complete, objective and useful information on workplace hazards, as discussed earlier. Thus, the failure to pay for walkaround would be harmful not only to the exercise of employees' protected rights but also to the entire enforcement scheme of the Act.

That an employee would be more reluctant to participate in a walkaround if he or she would lose pay for the time involved is, in the view of the agency, a

matter of common sense in light of experience. This view was corroborated by many comments in the record. Commentors stated that walkaround compensation is essential in order to ensure proper administration and enforcement of the Act. *See*, e.g., Exhibits 2–9, 2–271, 2–276, 2–307. Commentors expressed concern over the chilling and deterring effects that the failure to pay walkaround compensation has on employee participation in the inspection. *See*, e.g., Exhibits 2–9, 2–58, 2–116, 2–175, 2–203, 2–269, 2–283, 2–306. Other commentors have noted the inability of many employees to afford a loss of earnings caused by participation in a walkaround. *See*, e.g., Exhibits 2–34, 2–61, 2–94, 2–109, 2–160, 2–210, 2–290. According to several commentors, employees will choose to remain at their work station when presented a choice between receiving pay or accompanying the OSHA inspector without pay, thereby depriving other employees of representation and the inspector of their assistance. *See*, e.g., Exhibits 2–58, 2–133, 2–155, 2–290. This is especially true when lengthy inspections are conducted and significant amounts of compensation would be lost. *See*, e.g., Exhibit 2–276.

In addition to the above, specific instances noted in the record demonstrate that the failure to pay for time spent during the walkaround discourages employee participation in such activities. In one case, the treasurer of the company refused to pay the union representative for time spent on the walkaround and the representative then chose not to accompany the compliance officer. The inspector noted that not having an employee representative made it difficult to ascertain that all work areas and all operations were seen during the high hazard industry inspection of the large facility. *See* Exhibit 3–6, at p. 8.

In another case, the company refused walkaround pay to any person wishing to accompany OSHA personnel during the walkaround, and the union could not pay any of the plant personnel. The president of the union, not a plant employee, was invited to participate in the walkaround but he declined the offer. The inspector noted several ways in which the effectiveness of the inspection was seriously diminished, including a reluctance of employees to speak to the inspector and a very uncooperative attitude on the part of the employer's supervisory personnel. *See* Exhibit 3–19 at p. 11.

In another instance, a company denied walkaround pay to the representative of a local union. The representative spent a few days participating in the inspection conducted in response to a complaint of worker overexposure to carcinogenic and highly toxic chemicals, but after the third day of the inspection he could no longer afford financially to continue on the walkaround. Because of the size and complexity of the facility, as well as the seriousness of the alleged health hazards, the commentor was convinced that the effectiveness of the inspection was diminished by the lack of union representation on the walkaround. *See* Exhibit 2–276.

In another case, a complaint was filed by a union in response to an explosion that killed eight workers and another incident in which exposure to benzene was allegedly found. The complaint triggered a lengthy, complex inspection which at times consisted of up to five inspection teams in the facility at one time, with one union representative on each team. Two weeks into the inspection, the company announced that it would pay walkaround compensation for only one union representative. Thereafter, the union had to reduce the size of its walkaround representation. *See* Exhibit 2–276.

Another case in which lack of compensation served as a disincentive to employee participation in a walkaround occurred during a recent state inspection that lasted three days a week for seven to eight weeks. Because of a past practice of paying the union representative for internal safety inspections, the company agreed to pay one representative for the safety inspection but would not pay for the health inspection participation. Since the local union could not afford to cover that cost, no employee representative covered the inspections for such hazards as lead, arsenic, and sulfur dioxide. *See* Exhibit 2–310.

Several commentors expressed the view that the agency has not provided sufficient evidence to support its conclusion that lack of pay discourages employee participation in inspection process. *See*, e.g., Exhibits 2–83, 2–104, 2–113, 2–114, 2–119, 2–120, 2–128, 2–137, 2–150, 2–202, 2–216, 2–252, 2–253, 2–254, 2–270, 2–279. More specifically, a number of instances were adduced in the comments where employees participated in the walkaround despite the fact that they were not paid. *See*, e.g., exhibits 3–9 at p. 3; 3–19 at p. 7; 3–26. However, these comments in all cases do not make clear whether the employee was not paid at all for the walkaround, or was not paid by the employer but paid by the union. Indeed, a number of cases were mentioned in the record where employees were paid for the walkaround by the union. *See*, e.g., Exhibits 3–9 at pp. 5, 11, 12; 3–25. If, as may well be the case, the employee in these situations was paid by the union, the facts would *not* establish that failure to pay for walkaround is not a disincentive to participation. On the contrary, such union reimbursement in the face of the employer's refusal to pay indicates a recognition by the union that, without such reimbursement, the employees would be reluctant to act as walkaround representatives; accordingly, the unions voluntarily undertook this obligation in order to eliminate the economic suffering which would result from the employees not being paid, thereby enabling them to participate in the walkaround.

We recognize however that the record does not contain numerous specific instances of employee non-participation in walkaround because of non-payment. There therefore remains the question on this record whether the employer who is being inspected should be required to make this payment, or, as has sometimes been the case, the unions should assume this obligation, or employees should be relied on to participate in walkaround without being paid, presumably out of a sense of public responsibility. For the following reasons, the agency concludes that employers should be required to pay for walkaround pay, and that this critical element in the inspection process should not be left to the vagaries of union payment or employees agreeing to participate in walkaround even though it means a loss of pay. In the first place, there will undoubtedly be many cases where no union exists in the plant where the inspection is taking place. Even where there is a union there will be circumstances where the union is unable for financial reasons to undertake this obligation, particularly where the inspection is lengthy and more than one employee walkaround representative is involved. *See*, e.g., Exhibit 2–276. Also, since the union is supported by employee dues, payment by the union for walkaround time in the last analysis must be viewed as employees paying themselves for participation in the walkaround. Finally, it is uncertain to what extent employees are now willing, and would continue to be willing, to assume the walkaround obligation at the sacrifice of wages, particularly in the context of lengthy inspections.

Our conclusion that employers should be mandated to assume this burden is impelled by yet another critical consideration. We have already stated that the inspection process—and the

walkaround which is integral to effective inspection activity—are essential ingredients in the statutory scheme for abatement of workplace hazards and protection of workers. As has been recognized on numerous occasions, Congress has placed on employers the economic burden of taking the necessary actions to neutralize these dangerous conditions. The Senate Labor Committee in its report made it clear that, "Final responsibility for compliance with the requirements of this Act remains with the employer." *Leg. Hist. supra, 150–51; see Atlantic & Gulf Stevedores, Inc.* v. *OSHRC*, 534 F. 2d 541, 553 (3d Cir. 1976). And Senator Eagleton, a member of the subcommittee which considered the OSHA bill, stated that "[t]he costs that will be incurred by employers in meeting the standards of health and safety to be established under the bill are * * * reasonable and necessary costs of doing business." *Leg. Hist.* at 1150; *see also Leg. Hist.* at 444. We conclude that just as employers must under the statutory scheme assume the financial burdens of complying with the standards, so must they be obligated to make payments to employees for walkaround time to assure that this critical aspect of Congress' procedure for effective enforcement is fully carried out and not left to the uncertainties of union payment or voluntary action by unpaid employees.

In a strikingly similar situation, the Court of Appeals for the District of Columbia recently upheld a provision of the lead standard requiring employers who removed employees from areas of excessive lead exposure to maintain the earnings and benefits of the removed employees. *See United Steelworkers of America* v. *Marshall*, No. 79–1048, 8 BNA OSHC 1810, 1835–1842 (D.C. Cir., August 15, 1980). The Court relied on various statutory provisions and statements in the legislative history, in concluding that employers had "general financial responsibility" under the Act. *See also American Federation of Labor, etc.* v. *Marshall*, 617 F. 2d 636, 674–75 (D.C. Cir 1979).

In sum, the record evidence supports the self-evident, common-sense proposition that compensation is critical to the effectuation of employees' walkaround rights, which in turn is crucial to effective inspection activity. Clearly, if employees receive no reimbursement for their time spent in engaging in walkaround and related activities, they will be confronted with the Hobson's choice between promoting safety and health and receiving their regular remuneration. Such a choice is antithetical to the remedial purposes of the Act. And, in light of the record, the statutory scheme and the policy considerations discussed above, the agency further concludes that it is employers who should be required to assume the burden of payment for walkaround time.

It should be emphasized that OSHA's requiring walkaround compensation is not based on the "hours worked" provisions of the Fair Labor Standards Act, as the proposal stated. It is also not based on section 11(c) of the Act, which prohibits discrimination against employees for exercising rights under the Act. In the proposal, the agency concluded that failure to pay for walkaround benefits should be considered *per se* discrimination under section 11(c) because of its chilling effect on employee participation. While the agency continues to believe in the validity of the rationale, it has concluded based on the record that the more appropriate means for enforcement of the walkaround pay obligation is through the amendment of 29 CFR 1903.8 and the issuance of citations, and penalties which are adjudicated through the Review Commission. The provision of alternate routes of enforcement—as proposed—would lead to redundancy and confusion. (See, e.g., Exhibit 2–270)

D. Statutory Objections to Walkaround Compensation Requirement

Employers and industry groups commenting on the proposal argue that OSHA exceeded its authority in promulgating a walkaround compensation regulation (*See*, e.g., Exhibits 2–202, 2–253, 2–254, 2–259, 2–265, 2–270). They contend on the basis of *Leone* v. *Mobil Oil Corporation*, 523 F.2d 1153, 1160–61, (D.C. Cir. 1975) that Congress was silent on the issue of walkaround pay and that therefore OSHA is forbidden to promulgate a regulation dealing with the subject. However, Congressional silence on the issue does not lead to this conclusion. We have already discussed at length the legal and policy basis for this regulation. The Act is silent on most specific safety and health issues, but, as *United Steelworkers of America, supra*, notes, the Act gives OSHA broad remedial powers to effectuate Congressional purposes, including section 8(g)(2), with which *Leone, supra*, did not deal. In the later decision on the issue of walkaround pay, *Chamber of Commerce of the United States of America* v. *OSHA*, No. 78–2221, 8 BNA OSHC 1648, 1653 (D.C. Cir., July 10, 1980), the District of Columbia Circuit specifically left open the question of "* * * whether ordering pay for walkaround time is indeed a statutorily authorized, rational, nonarbitrary, and noncapricious method of supplementing the Act's provisions."

Employers and industry groups also contend that since the Act expressly includes certain employee rights, such as the right to file complaints with OSHA under section 8(f), the right to be parties in Occupational Safety and Health Review Commission proceedings, as well as the right of an authorized employee representative to accompany an OSHA compliance officer during a walkaround inspection, the Act excludes all other types of employee rights, such as walkaround benefits. Thus they rely on the canon of construction *expressio unius est exclusio alterius* ("the expression of one is the exclusion of another"). An argument against medical removal protection benefits based on this canon was rejected in *United Steelworkers of America, supra*, which relied on the following language in *Nat'l Petroleum Refiners Ass'n* v. *FTC*, 482 F.2d 672, 676 (D.C. Cir. 1973), *cert. denied*, 515 U.S. 951 (1975):

> This maxim (*expressio unius est exclusio alterius*) is increasingly considered unreliable * * * for it stands on the faulty premise that all possible alternative or supplemental provisions were necessarily considered and rejected by the legislative draftsmen.

Thus it is incorrect to say that because Congress expressly granted certain rights, such as the walkaround right, it prohibited OSHA from using its broad section 8 rulemaking authority to provide other employee rights, where it determines, after rulemaking, that such rights are necessary to enable the agency effectively to carry out its responsibilities.

Another argument based on the canon *expressio unius* was made by employers and their associations (*See*, e.g., Exhibits 2–202, 2–253). They contend that the express Congressional inclusion of walkaround pay in section 103(f) of the Federal Mine Safety and Health Act of 1977 indicates that in passing the OSH Act in 1970 the Congress intended to preclude OSHA from requiring walkaround pay. This contention is similar to an argument which was rejected in *United Steelworkers of America, supra*, at 1837. In that case an employer association argued that because Congress provided for earnings protection for miners suffering from pneumoconiosis in the Federal Coal Mine Health and Safety Act of 1969, it was aware of the concept of medical removal protection (MRP) in 1970 when it passed the OSH Act and so its failure to require MRP in the OSH Act or to

expressly delegate to OSHA the authority to require MRP proves that Congress intended that OSHA may not include MRP in any standards. After detailing the difficulties inherent in the *expressio unius* canon, as noted previously, the court noted that the maxim can only apply sensibly when very similar statutes are compared. However, as the court noted, there is a crucial difference between the two laws. In the OSH Act the Congress granted OSHA extremely broad authority to prevent all kinds of safety and health hazards throughout American industry. In the Coal Act the Congress created a sharply focused statute with many detailed standards. As the court stated at 1837:

> Congress may well have avoided all mention of medical removal protection in the OSH Act simply because it thought that mandating such a specific program was inappropriate in a statute so much broader and so much more dependent on agency implementation than the Coal Act.

Likewise, the Federal Mine Safety and Health Act of 1977 (to a certain extent the successor to the Coal Act), which is the basis of the employers' argument in this rulemaking proceeding, is a sharply focused statute with many detailed standards. Congress may well have avoided all mention of walkaround pay in the OSH Act because it thought that mandating such a specific program was inappropriate in a statute so much broader and so much more dependent on agency implementation than the Federal Mine Safety and Health Act of 1977. *See also Marshall* v. *Whirlpool Corp.*, 593 F. 2d 715, 723–26 (6th Cir. 1979), *aff'd* 445 U.S. 1 (1980).

Another contention made by employers and industry groups is that an OSHA requirement of walkaround pay would constitute an unwarranted interference with the collective bargaining process (*See* e.g. Exhibits 20103, 2–113, 2–253, 2–254). This type of argument was also rejected in *United Steelworkers of America, supra,* at 1840. Although MRP is a mandatory subject of collective bargaining under federal law, the court held that this fact does not mean that an OSHA requirement for walkaround pay is precluded. As noted by the court, any issue directly related to worker safety or health is a mandatory subject of collective bargaining; in passing the comprehensive OSH Act Congress knew it was laying a basis for OSHA regulations that would replace or obviate the occupational safety and health provisions of many collective bargaining agreements, the court stated. In the view of the court, there is nothing in the OSH Act or other labor legislation to suggest that Congress removed from OSHA the authority to promulgate a regulation necessary in achieving occupational safety and health simply because such a program could otherwise be established through collective bargaining. Such an inference would contradict the principle that remedial welfare and labor laws are to be liberally construed, the court held. This reasoning, which was applied to sustain a provision for medical removal protection benefits, is directly applicable to a provision for walkaround benefits.

Some commentors who oppose the regulation rely upon the current practice of many employers to pay walkaround compensation. Such industry comments argue that since many employers already provide walkaround compensation the regulation is unnecessary. (*See,* e.g., Exhibits 2–113, 2–254, 2–270). However, there is no guarantee that employers will continue this practice. Further, there still are a number of employers which do not provide walkaround compensation (*See,* e.g., Exhibits 2–202, 2–253D, p. 18).

In conclusion, the Act permits OSHA to require employers to provide walkaround benefits. This imposition of the financial burden on employers is justified as a practical matter by the unpredictability of union reimbursement and of a voluntary employer-paid walkaround compensation program.

III. Summary and Explanation of the Regulation and Particular Issues

The following part discusses individual provisions of the regulation, including analysis of the particular issues involving the individual requirements, the record evidence, and the policy considerations underlying the various provisions of the regulation. The language of the regulation closely follows that of the proposed amendment of 29 CFR 1903.8 except for revisions based on OSHA's review of the rulemaking record.

Section 1903.8(e)(1)(i). This provision sets forth the general requirement that employers provide walkaround benefits to authorized employee representatives who accompany compliance officers during inspections. The rationale for this basic requirement has been discussed previously.

One specific issue that has been raised with respect to this provision is the requirement that the employee representative be paid for attendance at opening and closing conferences. Employers commented that opening and closing conferences are not part of the "physical inspection" mentioned in section 8(e) on walkaround rights and that therefore employee representatives have no right to participate in these conferences. (*See,* e.g., Exhibits 2–104, 2–113, 2–202, 2–216, 2–254, 2–270). To the contrary, opening conferences and closing conferences are integral parts of the physical inspection. During the opening conference the purposes of the inspection and procedures for the rest of the inspection are explained. One comment noted that the effectiveness of employee participation in the rest of the inspection is diminished when employee representatives do not understand the broader context of the inspection and cannot assist in planning the inspection because of their non-attendance at the opening conference. (*See* Exhibit 2–252A). The closing conference is also an important part of the inspection because at that time possible violations and abatement periods are discussed. The OSHA Field Operations Manual notes these important functions of the opening and closing conferences. In particular, the Field Operations Manual states that the compliance officer should conduct joint opening and closing conferences with employer and employee representatives; if such joint conferences are not practical separate conferences with employer representatives and employee representatives are to be conducted. *See* Field Operations Manual V–6.2, V–14. Since the opening and closing conferences are integral parts of physical inspections and employee representatives have the right to attend them, the rationale for employer walkaround compensation for the observation portion of the inspection, discussed previously, applies to walkaround compensation for the opening and closing conferences.

Paragraph (e)(1)(ii). Under this requirement, if a new employee representative replaces an employee representative then on the inspection team, the employer would be required to provide walkaround benefits to each representative for that portion of the walkaround in which each representative participated.

Paragraph (e)(1)(iii). Under this provision, if compliance officers, either individually or in groups inspect different parts of a workplace at the same time or at different times—for example, in a large facility—one employee representative for each inspection team would be entitled to walkaround benefits.

In general the regulation specifies the number of employee representatives which must be compensated. Under the regulation one employee representative

accompanying the compliance officer(s) during a walkaround inspection would be entitled to walkaround benefits. In some situations a group of two or more compliance officers will conduct an inspection jointly. In such circumstances only one employee representative would be entitled to benefits. Many union comments stated that if the compliance officer requests additional employee representatives all should receive walkaround benefits. (*See*, e.g., Exhibits 2-107, 2-181, 2-184, 2-268, 2-271, 2-275). Some industry comments opposed this concept on the grounds that compensating more than one employee representative for a single inspection team would be burdensome and disruptive (*See*, Exhibits 2-216, 2-259, 2-270). OSHA rejects the idea that more than one employee representative per inspection team should be compensated because to do so would be burdensome for employers. A single employee representative at a time can usually provide sufficient information to the compliance officer and any lack of information on his part may be supplied by interviews with individual employees at their worksite. Furthermore, compensating only one employee representative for an inspection would be consistent with section 103(b) of the Federal Mine Safety and Health Act of 1977, 30 U.S. 813(b).

As paragraph (e)(1)(iii) states, if more than one inspection team inspects different parts of a workplace at the same time or at different times, there will be more than one employee representative, but, as stated previously, only one for each team. Concern has been expressed about the number of inspection teams on a worksite at the same time (e.g., Ex. 2-270). As a general rule, more than one team is utilized only in large worksites.

A related issue is the number of employee representatives to be compensated at multi-employer worksites, such as construction sites. Concern has been expressed that payment of one employee representative for each employer would be burdensome. (*See* Exhibit 2-270). On the other hand, some unions have urged that each trade on a building site should have a compensated employee representative. (*See*, Exhibit 2-212). Under section 8(e) of the Act, a representative of the employees of each employer is entitled to accompany the compliance officer. Therefore, the representative of the employees of each employer on a multi-employer worksite shall be compensated. As a practical matter, this solution is helpful to the inspection because in any cases each contractor on the site does a different type of work, e.g. carpentry and plumbing, and an employee representative for each employer could provide information on the employer's individual work processes and hazards. However, compensating an employee representative for each trade, when more than one trade works for a single employer, would be unduly burdensome, for the reasons stated previously with respect to the general question of the number of compensated employee representatives for an inspection team.

It should be stated that 29 CFR 1903.8(a) does make provision for more than one employee representative for an inspection team when the compliance officer deems this necessary. Nothing in this regulation should be construed to affect the operation of that provision. Only compensation is affected by this regulation.

Paragraph (e)(1)(iv). The employer would also be required to provide to any employee walkaround benefits for time spent by employees in other activities related to the inspection. The rationale for this provision has been discussed previously.

Paragraph (v). The requirement that the employer provide walkaround benefits is defined to include maintenance not only of the earnings which the employee would have received if he had performed his work duties, but also of all other benefits, such as seniority and insurance, to which an employee would otherwise be entitled for working. The purpose of this provision is to ensure that the employee suffers no economic loss of any kind because of his participation in the inspection. The final regulation, as compared to the proposal, specifies that an employee be paid at the same wage rate during his walkaround activities as he would have been paid for performing his work duties at that time. (For a discussion of overtime pay see paragraph (e)(1)(vi) below.)

Paragraph (e)(1)(vi). Under the regulation employee walkaround representatives and employees engaged in related activities will be entitled to receive walkaround benefits only for time spent in the walkaround inspection during their regular working hours, or overtime hours, which were assigned or would have normally been assigned for purposes other than the inspection. Thus, for example, an employer would not be required to provide walkaround benefits to a representative whose regular working day has ended and has remained in the workplace or who returns to the workplace solely for the purpose of participating in a walkaround inspection.

Comments were specifically invited on the issue whether walkaround benefits should apply to any time during which an employee representative participates in a walkaround inspection or an employee engages in inspection-related activities. A number of unions supported this concept, saying, for example, that the failure to pay for any time, including unplanned overtime, would constitute a disincentive to participation during unplanned overtime hours. (*See*, e.g., Exhibits 2-190, 2-195, 2-204, 2-213, 2-255, 2-256, 2-260, 2-266, 2-268, 2-269, 2-271). A number of employers and employer groups objected to this idea, saying, for example, that if walkaround compensation is to be paid at all, the only type of overtime which should be the subject of compensation is previously scheduled overtime, that to compensate for unplanned overtime would be unlawful, and that an employee representative leaving his shift may be replaced by another representative. (*See*, e.g., Exhibits 2-113, 2-253, 2-254, 2-270). OSHA has determined that it would be unreasonable to require employers to provide walkaround compensation benefits for unplanned overtime because the employee, if he were denied compensation for such time, would not be losing expected compensation. However when an employee is entitled to overtime pay under this regulation because such overtime has been previously planned, the employee will be paid at his normal overtime rate. Such a requirement is necessary to assure that the employee receives the pay that he normally would expect. Failure to receive such expected payment would act as a disincentive to walkaround participation.

Paragraph (e)(2)(i). This regulation would be enforced like other OSHA regulations, such as those in Part 1904 on recordkeeping and reporting. If violations of the regulation are found, citations would be issued under section 9(a) and civil penalties, if appropriate, would be proposed. The employer would have the right to contest these citations before the Occupational Safety and Health Review Commission (see section 10), whose decisions are subject to review in the courts of appeals (see section 11(a)). The Secretary also has the right to seek enforcement of final Review Commission orders in the courts of appeals (section 11(b)).

Paragraph (e)(2)(iii). Under this provision employers found in violation of the other provisions of this regulation would be required to post a notice setting forth the regulation and stating

that a citation became a final order on a certain date with respect to a denial of walkaround compensation for a named employee and that the employer has complied with and promises to comply with the walkaround compensation regulation.

IV. Regulatory Assessment

In accordance with Executive Order No. 12044 (43 FR 12661, March 24, 1978), OSHA has assessed the potential economic impact of this regulation. Based on the economic identification guidelines of the Department of Labor (44 FR 5570, January 26, 1979), OSHA has concluded that the subject matter of this regulation is not a "major" action which would necessitate further economic impact evaluation and the preparation of a regulatory analysis.

In general, the guidelines provide that a regulatory analysis should be performed, if the regulation is likely to cause or result in:

(1) An increased cost of $100 million or more in any one year for the national economy;

(2) A $50 million or larger increase in costs or total revenues in any one year for a specific segment of the economy such as a specific industry, geographic regions or state or local government;

(3) A direct dislocation of 10,000 jobs or more;

(4) A substantial limitation on competition, marketing, market information or an increase in concentration in a market doing $100 million of business a year or more. (44 FR 5576).

The third and fourth factors are not relevant to the regulation. With regard to the first two factors, OSHA estimates that walkaround benefits will amount to approximately $5.3 million a year. This estimate has been made on the basis of statistics which take into consideration average wage rates, the number of federal and state OSHA inspections a year, and the average length of a federal OSHA inspection. It also assumes that the only increased costs, as a general matter, will be compensation for the employee representative's walkaround time because, according to OSHA's experience, employers generally do not deduct from wages for time spent by employees (who are not walkaround representatives) in the discusson of occupational safety and health matters with compliance officers during inspections. The average hourly earnings of a production of nonsupervisory worker on a private nonagricultural payroll during June, 1980, was $6.61. Bureau of Labor Statistics, "Employment and Earnings, September, 1980," "Vol. 27 No. 9 (Exhibit 3–1).

According to OSHA statistics, there were 146,288 federal and state OSHA safety inspections during fiscal year 1979, the latest year for which figures are available; there were 19,272 federal and state health inspections during that time. (Exhibit 3–2). The average length of a federal safety inspection during that year was 4.4 hours; the average length of a federal health inspection was 8.3 hours (Exhibit 3–39). (For this preliminary analysis, the average length of state inspections is assumed to be the same.) On the basis of these figures, the maximum cost of the proposed regulations would be approximately $5.3 million per year, which is clearly below the threshold for classifying a regulation as a major regulation. Moreover, this is a worst-case estimate since many employers already provide walkaround benefits to employee representatives and since many workplaces do not have authorized employee representatives for walkaround and thus the increased cost to employers from these regulations should be much less than $5.3 million. Accordingly, having considered the comments on the cost of walkaround compensation (*See,* e.g. Exhibits, 2–254 and 2–257), it is determined that preparation of a regulatory analysis is not necessary. The benefits of the proposal are significant. As discussed previously, the proposal will encourage walkaround participation, thus increasing the effectiveness of inspections and thereby promoting occupational safety and health.

V. Effective Date

The regulation will be effective with respect to walkaround benefits for time spent in walkaround or related activities on or after the thirtieth day after the promulgation of this regulation. This provision should give employers sufficient time to prepare for compliance with the new regulation as well as satisfy the legitimate expectations for compensation of employees who participate in inspections.

VI. Authority

This document was prepared under the direction of Eula Bingham, Assistant Secretary of Labor for Occupational Safety and Health, 200 Constitution Ave., NW., Washington, D.C. 20210.

Accordingly, pursuant to sections 8(e) and 8(g)(2) of the Occupational Safety and Health Act of 1970 (29 U.S.C. 657(e) and 657(g)(2)), 5 U.S.C. 553, and Secretary of Labor's Order 8–76 (41 FR 25059), OSHA amends Part 1903 of Title 29 of the Code of Federal Regulations by adding a new paragraph (e) to § 1903.8, as set forth below.

Signed at Washington, D.C. this 13th day of January 1980.

Eula Bingham,

Assistant Secretary, Occupational Safety and Health.

PART 1903—INSPECTIONS, CITATIONS AND PROPOSED PENALTIES

1. 29 CFR 1903.8 is amended by adding a new paragraph (e) to read as follows:

§ 1903.8 Representatives of employers and employees.

* * * * *

(e) *Walkaround compensation*—(1) *Requirements.* (i) The employer shall provide to the authorized representative of the employees walkaround benefits for the time during which the representative accompanies the Compliance Safety and Health Officer(s) in a walkaround inspection team during any physical inspection of a workplace, including attendance at the opening and closing conferences.

(ii) If a new employee representative replaces an employee representative during a walkaround inspection, each representative is entitled to walkaround benefits for the portion of the inspection in which each representative participated.

(iii) If more than one walkaround inspection team is utilized, the employee representative for each team is entitled to the walkaround benefits required by this section.

(iv) In addition, the employer shall provide walkaround benefits to any employee for the time during which (A) a Compliance Safety and Health Officer, in conducting the inspection consults with or questions the employee concerning matters of safety or health in the workplace; or (B) the employee notifies the Compliance Safety and Health Officer, while conducting the inspection, of an occupational safety or health hazard or violation of the Act which the employee has reason to believe exists in such workplace.

(v) For the purposes of this section, the requirement that an employer provide walkaround benefits means that the employer shall maintain the earnings, seniority, and other employment rights and benefits of an employee as though the employee had been performing work for the employer.

(iv) For the purposes of this section, the time spent by an employee for which the employer shall provide walkaround benefits includes only the regular working hours of the employee, or overtime hours which were assigned or