

**EXAMINING VOLUNTARY EMPLOYER COMPLIANCE
PROGRAMS THAT IMPROVE OCCUPATIONAL
SAFETY AND HEALTH**

HEARING

BEFORE THE
SUBCOMMITTEE ON WORKFORCE PROTECTIONS
OF THE
COMMITTEE ON EDUCATION
AND THE WORKFORCE
U.S. HOUSE OF REPRESENTATIVES
ONE HUNDRED NINTH CONGRESS

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EXAMINING VOLUNTARY EMPLOYER COMPLIANCE PROGRAMS THAT IMPROVE OCCUPATIONAL SAFETY AND HEALTH

**Thursday, May 12, 2005
U.S. House of Representatives
Subcommittee on Workforce Protections
Committee on Education and the Workforce
Washington, DC**

The Subcommittee met, pursuant to notice, at 10:33 a.m., in room 2175, Rayburn House Office Building, Hon. Charlie Norwood [Chairman of the Subcommittee] presiding.

Present: Representatives Norwood, Biggert, Kline, Marchant, Price, Drake, Owens, and Woolsey.

Staff present: Kevin Frank, Professional Staff Member; Ed Gilroy, Director of Workforce Policy; Donald McIntosh, Legislative Assistant; Jim Paretti, Workforce Policy Counsel; Molly McLaughlin Salmi, Deputy Director of Workforce Policy; Deborah L. Samantar, Committee Clerk; Kevin Smith, Senior Communications Advisor; Loren Sweatt, Professional Staff; Margo Hennigan, Minority Legislative Assistant; Marsha Renwanz, Minority Legislative Associate; Peter Rutledge, Minority Senior Legislative Associate/Labor.

Chairman NORWOOD. A quorum being present, the Subcommittee on Workforce Protections of the Committee on Education and the Workforce will come to order. We're meeting today to hear testimony on examining voluntary employer compliance programs that improve occupational safety and health.

Under Committee rule 12(B), opening statements are limited to the Chairman and the Ranking Minority Member of this Subcommittee. Therefore, if other Members have statements, they may be included in the hearing record. With that, I ask unanimous consent for the hearing record to remain open 14 days to allow Members statements and other extraneous materials referenced during the hearing to be submitted to the official hearing record.

Without objection, so ordered.

STATEMENT OF HON. CHARLIE NORWOOD, CHAIRMAN, SUBCOMMITTEE ON WORKFORCE PROTECTIONS, COMMITTEE ON EDUCATION AND THE WORKFORCE

Chairman NORWOOD. Today's hearing will examine voluntary employer compliance programs that improve occupational safety

and health. We will explore the voluntary efforts employers and workers are undertaking to improve workplace safety. Our witnesses are from a broad spectrum of the safety and health community. I want to thank you for being here and sharing your information and time with this Committee.

I've heard employers say many times that, actually from my own first-hand knowledge, that OSHA regulations are too complex and difficult to understand. Clearing up this regulatory jungle has been one of my top priorities since coming to Congress in 1995, and continues to be so today. I believe a regulatory jungle is an apt description for the myriad of OSHA rules, regulations, gigantic documents, and interpretive letters that employers must come to understand. With all of these documents and the increased use of outside materials that are incorporated by reference, the small businessman, and that was what I was, is quite literally being choked by the underbrush of government regulations.

Small businesses want to comply with the nation's health and safety laws—frankly, because it makes very good sense to do so. It pays to do so. However, OSHA must simply find a way to simplify the process to ensure that businesses are operating in a safe manner.

Proactive and voluntary compliance with agency health and safety regulations, after all, is far more effective than the “gotcha” enforcement tactics that drive businessmen and women into the bunker and away from agency cooperation. Fortunately, OSHA has already recognized the need for compliance assistance, and Secretary Chao, in my opinion, is to be commended for a vision and leadership in this regard. The cooperative strategies that have been implemented in the past 5 years, we are beginning to see positive results, and result is all that really counts, the bottom line far fewer people or more people being made safe and healthy by what we're trying to do. That's the whole point of all of this.

In March 2004, the Government Accountability Office, GAO, evaluated these results in a study of voluntary compliance and found that safety improvements were being made by companies involved in OSHA's compliance programs, programs that have contributed to the safest workforce in our nation's modern history.

Indeed, one of the key recommendations from GAO during the course of its study was to urge Congress to gather more data on the utility of the voluntary compliance programs. It is my hope that we can begin that process today, through the holding of this hearing.

During today's proceedings we will also hear about voluntary efforts employers are making to work with private consultants and industrial safety specialists to actually foster a safer workplace. This is an important story that needs to be told. After all, it is a simple fact that OSHA will never have the resources to visit every American workplace to ensure compliance. We can wish for that until the cows come home. This government will never have enough inspectors to go into every small business in this country. Once we recognize that, then we have to go down the road to find another, more sensible, way to try to solve the problem.

Given that fact, we should encourage employers to proactively take steps to ensure that workplaces are safe, healthy, and OSHA-

compliant. I especially look forward to our witnesses shedding additional light on these issues. Employers should be congratulated for their proactive efforts in implementing comprehensive safety and health programs. Further, they should be encouraged to invite OSHA to their work sites and engaged the agency and compliance assistance without fear of reprisals from Federal bureaucrats. That is critical to this.

However, I think there's still resistance to cooperative programs for fear that the government is only looking to punish and not to praise. We can have another hearing and go over all the examples we know about. Given my own experience with the "gotcha" tactics the agency employed in unfairly citing my business many, many years ago, I can certainly understand that fear. But that fear should not prevent this Committee from further examining the potential of voluntary compliance, and that is exactly what we are going to do today.

There are many proposals to expand compliance programs and encourage employers to implement comprehensive, safe, and healthy programs and to leverage OSHA's existing resources. Today we will examine some of these proposals and weigh the employers' exposure when they work with OSHA, and hear the positives and the negatives of going beyond compliance.

I look forward to the testimony of our distinguished panel of witnesses, and I am very eager to learn how current law encourages or discourages employers from taking these very crucial steps.

With that, I would like to recognize my good friend from Brooklyn for any opening statement that he may wish to make.

[The prepared statement of Chairman Norwood follows:]

Statement of the Hon. Charlie Norwood, Chairman, Subcommittee on Workforce Protections, Committee on Education and the Workforce

Good Morning, the Subcommittee on Workforce Protections will now come to order.

Today's hearing, Examining Voluntary Employer Compliance Programs that Improve Occupational Safety and Health, will explore the voluntary efforts employers and workers are undertaking to improve workplace safety. Our witnesses are from a broad spectrum of the safety and health community, and I welcome them here today.

I have heard employers say many times, and know from my own firsthand knowledge, that OSHA regulations are too complex and difficult to understand.

Clearing up this regulatory jungle has been one of my top priorities since coming to Congress in 1995, and it continues to be today.

I believe that "a regulatory jungle" is an apt description for the myriad OSHA rules, regulations, guidance documents, and interpretive letters that employers must come to understand.

With all these documents, and the increased use of outside materials that are incorporated by reference, the small businessman is quite literally being choked under the "brush" of onerous government regulations.

Small businesses want to comply with our nation's health and safety laws because it pays for them to do so.

However, OSHA must find a way to simplify the process to ensure that businesses are operating in a safe manner.

Proactive and voluntary compliance with Agency health and safety regulations, after all, is far more effective than "gotcha" enforcement tactics that drive business men and women into the bunker and away from Agency cooperation.

Fortunately, OSHA has already recognized the need for compliance assistance, and Secretary Chao is to be commended for her vision and leadership in this regard. Through cooperative strategies implemented in the past five years, we are beginning to see positive results; and results are all that count.

In March 2004, the Government Accountability Office (GAO) illuminated these results in a study of voluntary compliance, and found that safety improvements were being made by companies involved in OSHA's compliance programs; programs that have contributed to the safest workforce in our nation's modern history.

Yet one of the key recommendations from GAO during the course of its study was to urge Congress to gather more data on the utility of the voluntary compliance programs. It is my hope that we can begin that process today by holding this hearing.

During today's proceedings, we will also hear about voluntary efforts employers are making to work with private consultants and industrial safety specialists to foster a safer workplace.

This is an important story that needs to be told. After all, it is a simple fact that OSHA will never have the resources to visit every American worksite to ensure compliance.

Given that fact, we should encourage employers to proactively take steps to ensure their workplaces are safe, healthy, and OSHA-compliant.

I especially look forward to our witnesses shedding additional light on this issue.

Employers should be congratulated for their proactive efforts in implementing comprehensive safety and health programs.

Further, they should be encouraged to invite OSHA to their worksite and engage the Agency in compliance assistance without fear of reprisals from federal bureaucrats.

However, I believe there is still resistance to cooperative programs for fear that the government is only looking to punish, not to praise.

Heck, given my own experiences with the "gotcha" tactics the Agency employed in unfairly citing my business not too many years ago, I certainly understand that fear.

But that fear should not prevent this Committee from further examining the potential of voluntary compliance, and that is exactly what we are going to do today.

There are many proposals to expand compliance programs, encourage employers to implement comprehensive safety and health programs, and to leverage OSHA's existing resources.

Today we will examine some of those proposals, weigh an employer's exposure when they work with OSHA, and hear the positives and negatives of going beyond compliance.

I look forward to the testimony of our distinguished panel of witnesses, and am eager to learn how current law encourages—or discourages—employers from taking these steps.

With that I would like to recognize my good friend from New York for any opening remarks that he may have.

Mr. OWENS. Thank you very much. Mr. Chairman, I have a written statement for the record that I would like to have submitted in its entirety.

Chairman NORWOOD. So ordered.

**STATEMENT OF HON. MAJOR R. OWENS, RANKING MEMBER,
SUBCOMMITTEE ON WORKFORCE PROTECTIONS, COM-
MITTEE ON EDUCATION AND THE WORKFORCE**

Mr. OWENS. I would like to make a few modifications by saying at the outset that let us not go to extremes, from one extreme to the other. You're proposing extreme voluntary compliance and you're going to surrender completely to the voluntary process. We've never had adequate inspections and have sought to get some kind of reasonable percentage of businesses and industries inspected. We are, as a result of the emphasis on voluntary compliance, allotting less and less resources to the existing feeble system of inspections. Voluntary compliance in this day and age seems certainly to have no evidence in other sectors to recommend it.

You know, we have for a long time left corporations to take care of their own business in terms of their books. We have Enron, you know, voluntary. We have WorldCom. We have the drug problem in the baseball, football, and basketball sectors, and they are all

saying that we have taken care of it by voluntary compliance. Every day more and more evidence indicates that where you have human beings, a great proportion of them are going to be honest and you can depend upon them to comply and to seek to do what is right.

But there is a percentage, always, that will violate the normal and seek to swindle others. It is like corruption—where there is intelligence, there is corruption. All we can hope in this society is to have enough regulation, enough inspection to hold the corruption to a minimum, and to minimize the suffering.

That's the real purpose here. Everybody wants to—I mean most Americans, they file their income taxes properly and they seek to obey the law. But nobody would propose that we don't have any tax audits. The very existence of a tax audit and the possibility that there may be tax audits helps to keep the situation reasonably under control in terms of a minimal amount of dishonesty and corruption.

So we shouldn't go to extremes and go overboard, as we are here, in the area of pushing voluntary compliance. Let's be more reasonable and look at voluntary compliance as an adjunct and extension of what exists already, instead of what is actually happening—that is, there is an effort to replace it, to use voluntary compliance to replace what exists already. As we increase voluntary compliance, we decrease the resources for inspections.

With that said, let me switch to the topic I was told would be the focus of this hearing, and that's an overall look at voluntary programs to assist employers in achieving OSHA standards for safety and health. According to the official GAO report that you requested, and you quoted at great length, in the 108th Congress, OSHA has an exemplary track record in providing a range of voluntary employer compliance options. Thirty years ago, OSHA established the State Consultation Program, which provides smaller companies in hazardous industries on a voluntary basis with free and confidential individualized worksite safety assessments as well as workable solutions. This voluntary employer compliance program is available in all 50 states, with OSHA footing the bill. In fiscal year 2003, OSHA sent \$53 million—more than 10 percent of its entire budget—to state governments to carry out these voluntary consultations.

The 2004 GAO report also highlighted three other voluntary employer compliance programs administered by OSHA. They include the Voluntary Protection Program, Strategic Partnerships, and Alliances. I do not have the time here to summarize the business targets and cornerstone principles of each of these voluntary programs. However, I wish to draw attention to the central finding in this GAO report. GAO emphasized that although OSHA's voluntary employer programs show promise, each must be carefully evaluated before any of them are expanded.

GAO repeated numerous times that to date, the data used to assess program outcomes has been entirely anecdotal. In fact, GAO felt so strongly about this that they put this central finding in the report's title. The reports title is "OSHA's Voluntary Compliance Strategies Show Promising Results, but Should Be Fully Evaluated before They Are Expanded."

GAO also documented that between 1996 and 2003, the percentage of OSHA's budget devoted to voluntary compliance efforts increased by 8 percent, whereas that designated for enforcement decreased by 6 percent.

I want to remind my colleagues on the other side of the aisle that OSHA's enforcement efforts are a key statutory requirement. The Occupational Safety and Health Act of 1970 clearly states at the outset that the Secretary of labor shall set mandatory workplace safety and health standards and shall enforce them effectively. Thus, volunteer programs are an adjunct to OSHA's central mission of setting and enforcing occupational safety and health standards.

As I said before, it should not be a substitute. We should not go to extremes of moving the mandatory statutory requirements in favor of experimenting with voluntary programs.

Let me point out that both corporate lobbyists and AFL-CIO members agree about the condition of OSHA's chronically underfunded inspection system. Both cite a statistic that given current funding and current staffing levels at OSHA, it would take 108 years—given the situation as it is now—it would take 108 years to inspect every workplace in America. So, Mr. Chairman, I request that the next Subcommittee hearing be focused on ways to reinvigorate OSHA's enforcement apparatus, from reconfiguring the targeted inspection process to stepping up citations and penalties for repeated safety violators.

Mr. Chairman, let me close by reminding everyone that we have a serious corporate manslaughter problem in this country. Even by conservative estimates, a worker is killed on the job every 96 minutes as a result of an employer's gross negligence and safety lapses. As we will hear from our witness Mr. Migliaccio, who represents millions of workers in the building and construction trade unions, we know how to prevent these deaths. We know how to prevent trench collapses where workers are suffocated and free falls from construction sites.

Part of the blame here must be laid at the congressional doorstep. Every year in the appropriations process, we exempt businesses with 10 or fewer employees from targeted OSHA inspections. Yet as we will learn, more than half of all construction fatalities occur in these small businesses.

I welcome Mr. Migliaccio to this hearing. I look forward to hearing his testimony and that of the other witnesses. I yield back the balance of my time, Mr. Chairman.

[The prepared statement of Mr. Owens follows:]

Statement of Hon. Major R. Owens, Ranking Member, Subcommittee on Workforce Protections, Committee on Education and the Workforce

Mr. Chairman, this is a small Subcommittee with a membership of only 5 Democratic Representatives and 7 Republican Representatives. In representing our Congressional districts and constituencies, we routinely disagree on legislative matters and policy issues within this Subcommittee's jurisdiction.

It is our sworn duty as Members of Congress to do just that—uphold the U.S. Constitution, represent our respective constituencies, and vote according to individual conscience. But hearings in this Subcommittee should not become "caveat emptor" or "minority members beware" scenarios. We ought to be able to get our signals straight on whether a hearing is to be an oversight session on a given topic or a legislative hearing about specific bills.

Especially in light of our small size, we ought to be able to have clear communication channels about that. Now it was my understanding—and that of all the Members on this side of the aisle—that this was to be an oversight hearing on voluntary employer compliance approaches to occupational safety and health. In reviewing the written testimony last night of witnesses selected by your side of the aisle, however, this appears to have morphed into a hearing about specific bills to amend the Occupational Safety and Health (OSH) Act. Mr. Chairman, we need some truth-in-advertising here. By all means, you have the prerogative as Chair to call a legislative hearing at any time. But it is only fair to disclose that fact in advance to Members on this side of the aisle, so we can prepare ourselves and the one witness we are granted accordingly.

That said, let me switch to the topic I was told would be the focus of this hearing—voluntary programs to assist employers in achieving OSHA standards for safety and health. According to the official GAO report you requested in the 108th Congress, OSHA has an exemplary track record in providing a range of voluntary employer compliance options. Thirty years ago, OSHA established the State Consultation Program, which provides smaller companies in hazardous industries on a voluntary basis with free and confidential individualized worksite safety assessments as well as workable solutions. This voluntary employer compliance program is available in all 50 States, with OSHA footing the bill. In fiscal year 2003, OSHA sent \$53 million dollars—more than 10 percent of its entire budget—to state governments to carry out these voluntary consultations.

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Chairman NORWOOD. Thank you very much, Mr. Owens. We will begin with our panel of distinguished witnesses, and I would like to introduce all of you, and then Mr. Turnipseed, we will start with you.

Our first witness today is Mr. Jon Turnipseed, the safety program manager for the city of San Bernardino Municipal Water Department. Mr. Turnipseed is also a certified safety professional, certified safety supervisor, and certified occupational hearing conservationist, and we do welcome you, Mr. Turnipseed.

Next, we're going to hear from Mr. David Pressly, the president of Pressly Development Company and the incoming president of the National Association of Homebuilders. The Pressly Development Company builds single-family homes and light commercial projects. Mr. Pressly has been involved in the home building industry for more than 25 years.

Our next witness will be Mr. Frank L.—all right, I'm going to try—Migliaccio, is that—say it out loud for me?

Mr. MIGLIACCIO. Migliaccio.

Chairman NORWOOD. Well, you're most welcome, and with your permission, I will call you Frank and you can call me Charlie.

[Laughter.]

Chairman NORWOOD. Frank is Executive Director of Safety and Health of the International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, and you're most welcome.

And finally, we will hear from Mr. Dennis Morikawa. How did I do?

Mr. MORIKAWA. You can call me Dennis.

Chairman NORWOOD. OK.

[Laughter.]

Chairman NORWOOD. That will work, you can call me Charlie. That will be fine. A partner at Morgan Lewis and specializing in employment law. Dennis assists his clients with OSHA Voluntary Protection Programs and represents clients in a variety of matters regarding the Occupational and Safety Health Act. He is also the author of several articles regarding occupational safety and health and employer compliance.

Now, before our witnesses start with their testimony, I want to remind our Members that we will ask questions after the entire panel has testified. In addition, the Committee Rule 2 imposes a 5-minute limit on all questions. Now, I don't like to impose on our guests, but I do point out to you that in front of you there is a set of lights, and when you see that yellow light, I would ask you to start thinking about closing up before it gets to be red, so that we can do this in an expedient manner.

Mr. Turnipseed, you're up for 5 minutes.

STATEMENT OF JON TURNIPSEED, M.S., CSP, SAFETY PROGRAM MANAGER, CITY OF SAN BERNARDINO MUNICIPAL WATER DEPARTMENT, SAN BERNARDINO, CA

Mr. TURNIPSEED. Chairman Norwood and Members of the Subcommittee, I want to thank you for this opportunity to represent 30,000 members of the American Society of Safety Engineers who all share your interest in finding ways to advance our nation's commitment to occupational safety and health.

I am a certified safety professional who has worked in the profession for over 20 years. Since 1996, I have been the safety program manager for the city of San Bernardino one municipal water Department in California. From my experience I can tell you that the

ideas that the Subcommittee is examining today, like third-party audits and providing more useful information on OSHA closing conferences, are ideas that complement and strengthen OSHA's enforcement role, which our members also support.

However, enforcement is never enough. The challenge ASSE members face in today's workplace is to help employers move beyond compliance toward establishing proactive safety and health measures. The ideas under consideration today will encourage more employers to do that. ASSE has long supported legislation that would encourage employers to engage in voluntary safety and health audits.

The approach of Senator Enzi's "SAFE Act" calls for a third-party independent audit and evaluation program separate from OSHA. These voluntary audits will not supplant OSHA's enforcement and cooperative efforts only add one more tool to increase the number of safe and healthy workplaces. OSHA is simply not given enough resources to provide the inspections and consultation services that can reach as many employers as we would all like.

Qualified auditors with necessary experience, education, and skills, to be set by the Department of Labor advisory committee, would perform workplace inspections and provide consultation services to employers. Their greatest value will be in helping employers provide a safe culture to those businesses lacking the internal resources for their own health and safety programs.

Reaching out to such employers may be the biggest challenge for OSHA. ASSE believes creative ways to meet this challenge, like this program, are needed. To help ensure auditors' competence, a program must rely on widely accepted mechanisms for certifying safety and health professionals who can participate. Auditors should have professional safety and health credentials like the CSP or CIH that meet the stringent requirements of quality accreditation bodies such as the NCCA, CESB, and ANSI's ISO.

With the assistance of qualified auditors, employers would be more open to making suggested improvements, especially if a safe harbor from routine OSHA penalties were offered as an incentive for participation.

A third-party audit program would not lessen OSHA's enforcement. It would provide additional resources for employers and encourage them in a less intimidating and positive way to take responsibility for safe and healthy workplaces.

ASSE also believes that proactive employer efforts to advance safety and health can be encouraged through Senator Tiahrt's proposal to provide employers with a written statement on OSHA closing conferences. An OSHA inspector would be required to provide written results of the inspection as well as provide to the employer rights to conference and contest penalties and procedures involved in exercising these due process rights.

Most important is that this measure would give employers timely notice of any perceived hazards or regulatory violations so that the employers could take prompt voluntary corrective actions to protect workers. It would also assist employers, especially small businesses, by giving fair notice of procedural requirements minimizing the potential for confusion when dealing with OSHA.

Important also is that this requirement would not unduly burden OSHA, since any procedural information could easily be given through a preprinted statement. However, one difficulty needs to be addressed before the bill goes forward. At the closing conference it is unlikely that an OSHA inspector can know precisely which citations OSHA officials will ultimately approve. Additional review following accident investigations or help monitoring analysis, for example, may be necessary. While the inspectors should identify specific conditions that pose a threat to the workers' health and safety, initial citation recommendations at the closing conference cannot be made binding by OSHA.

With the support of ASSE, with these changes, ASSE hopes the Committee can support this proposal.

Mr. Chairman, we thank you for this opportunity, and ASSE looks forward to working with the Subcommittee to advance these initiatives and help encourage employers to proactively address workplace safety and health risks.

[The prepared statement of Mr. Turnipseed follows:]

Statement of Jon Turnipseed, M.S., CSP, Safety Program Manager, City of San Bernardino Municipal Water Department, San Bernardino, CA

Chairman Norwood and Members of the Subcommittee:

My name is Jon Turnipseed and I am a member of the Government Affairs Committee of the American Society of Safety Engineers (ASSE). In my professional capacity, I am Safety Program Manager for the City of San Bernardino Municipal Water Department in California. On behalf of ASSE, I am pleased to submit the following testimony on the subject of "Examining Voluntary Employer Compliance Programs that Improve Occupational Safety and Health."

ASSE is the oldest and largest society of safety engineers and safety professionals in the world. Founded in 1911, ASSE represents approximately 30,000 dedicated safety and health professionals. ASSE's membership includes Certified Safety Professionals, Certified Industrial Hygienists, and Professional Engineers who are leaders in their fields with the knowledge and expertise needed to move safety and health forward on a global level.

We will focus our comments today in two areas: incentives to implement third party safety and health audits and, the significance of closing conferences in the Occupational Safety and Health Administration (OSHA) inspection process.

ASSE's members support safety and health agencies such as OSHA and believe these agencies help maintain a national focus on the importance of occupational safety and health. However, ASSE believes that enforcement is but one facet of a national effort. Our members strive to help their companies, and those outside employers who are assisted by their consultative efforts, to move beyond compliance by focusing on proactive measures rather than reactive remedial steps. More forward-looking initiatives are needed if American business hopes to break through the plateau of injuries and illnesses that currently exists.

The Role of Third Party Audits In Improving Workplace Safety

ASSE has consistently supported legislative initiatives that would encourage employers to conduct voluntary safety and health audits. The "third party audit" envisioned in previous legislative proposals, such as Senator Enzi's "SAFE Act," encompass these aspects and ASSE is hopeful that, once employers realized the benefits of such evaluative action, they would continue to implement this practice voluntarily on a regular basis.

The "SAFE Act" approach calls for a "third-party independent audit and evaluation program" separate from OSHA. It would establish qualified "auditors" who would provide consultation services to employers and perform workplace inspections. The qualifications for such auditors could be established by an advisory committee under the U.S. Department of Labor, to ensure that the participating safety and health professionals had the experience, education and skills to perform the assigned functions within their respective areas of expertise.

The participating professionals would not be "deputized" OSHA inspectors but would help increase safety awareness and improve the safety culture of businesses that lack internal resources to initiate their own programs. Because there would be

no enforcement action associated with identification of hazards or non-compliant situations, employers would be more open to making the suggested improvements—especially if a safe harbor from routine OSHA inspections was offered as an incentive for participation. Employers who resist making improvements to identified hazardous conditions would, of course, not qualify for any inspection-related incentives.

The third party audit program will both impart an improved attitude toward safety among the business community and have practical, positive impacts on actual workplace conditions by identifying problems and implementing suggestions proactively. Simply put, the federal government does not have the resources necessary to provide either the inspections or consultation services necessary to help ensure safe and healthy workplaces across the country.

If OSHA compliance officers had to visit every workplace, this would only occur once every 102 years. Under the current system, most businesses will complete their entire life cycle without the experience of an OSHA inspection—and without the purported benefits of compliance assistance gained by this experience, unless they are ultra-hazardous industries. OSHA normally inspects a worksite only after there is an accident, an employee complaint, or a plainly visible hazard that is brought to OSHA's attention by agency personnel or a professional referral. This approach is not geared toward prevention, but toward “after-the-fact” punishment.

The “third party audit” legislative approach encourages voluntary efforts of employers to seek out safety and health practitioners with proven competence and professional independence to put in place effective safety and health programs. These voluntary audits will not supplant federal enforcement and cooperative efforts but will add another tool for increasing the number of safe and healthy workplaces. We disagree with those who claim that such audits are an impermissible delegation of OSHA's enforcement authority. Moreover, there is precedent within the federal government for this approach. The U.S. Department of Transportation (DOT) has contracted with outside entities to conduct third party audits of “new entrant” motor carriers. Specific criteria ensure the qualifications of those auditors and also effectively address conflict of interest issues.

Similar criteria could be applied by OSHA most effectively to any third party audit program. If OSHA developed a network of qualified third party auditors—to be deployed either voluntarily through agency policy or under a statutory mandate—they would have more flexibility to provide compliance assistance than under their current system. With a process that insures consistency in the application of the compliance audit process and the prohibition of conflicts of interest, this system should work very well.

With respect to “credentialing” of program participants, ASSE recommends that legislation recognize the administrative mechanisms for credentialing/certifying safety and health professionals that have been in place for decades in the private sector. Our recommendation is that future legislation should specify that certifications be accredited by one of the following accreditation bodies: the Council of Engineering and Scientific Specialty Board (CESB), the National Commission for Certifying Agencies (NCCA) and ISO/ANSI.

Finally, there is little incentive for a consultant to go against the tenets of the “SAFE Act” as they would risk criminal prosecution by the federal and/or state governments, civil penalties, loss of certification/licensure, potential tort litigation exposure, and the loss of reputation and livelihood. We hope that this Subcommittee will agree that the qualified consultants who would be eligible to participate in such a program would be an asset to employers, employees, government, and the country. Their proven level of integrity would be an overall enhancement to safety and health in the workplace.

More Effective Utilization of OSHA Closing Conference Will Improve Safety

ASSE also wishes to comment on the pending legislative proposal contained in HR 979, which was introduced by Rep. Todd Tiahrt (R-KS). This legislation would amend Section 8 of the Occupational Safety and Health Act of 1970 (29 USC 657, the “OSH Act”) to require OSHA to provide the employer with a written statement at the closing conference, following completion of an inspection, that clearly and concisely provides information on the results of the inspection, including each alleged hazard and each citation that would be issued. The inspector would also provide written information on the rights of the employer to conference and contest citations, penalty assessments and the procedures involved in exercising these due process rights.

The Society believes this legislation will contribute to enhanced safety and health by providing timely notice to employers of any perceived hazards and/or regulatory violations so that they can take prompt and appropriate corrective action. HR 979 would also assist employers—especially small businesses—by providing fair notice

of procedural requirements and minimizing the potential for confusion that has resulted in some cases becoming final by mistake.

We do not see providing the procedural information as being unduly burdensome on the agency, insofar as this procedural information could easily be imparted through a preprinted written "statement of rights" handed to the employer at the time of the closeout. Employers who do not understand this information should have an opportunity to ask questions of the inspector at the closing conference. This could be especially important for non-English speaking employers who may not be able to comprehend written information but who can converse with many of OSHA's multi-lingual compliance officers.

With regard to a written statement of findings, ASSE believes that it is both practical and necessary for OSHA to give prompt notice of the results of the inspection and to identify the hazards at this stage, rather than waiting up to six months (under current law) to issue citations to the employer and having such citations be the first notification of the allegedly violative conditions.

Section 8 of the OSH Act is silent concerning closing conferences. However, OSHA policy calls for three main phases of inspection activity: in addition to the actual "walkaround" portion, the CSHO is also required to conduct an opening conference, and a closing conference. OSHA's Field Inspection Reference Manual (the "FIRM", CPL 02-00-103 (1994)), states, in relevant part: "The CSHO shall describe the apparent violations found during the inspection and other pertinent issues as deemed necessary by the CSHO."

OSHA's May 1996 Construction Safety and Health Outreach Program document describes the Closing Conference in the following manner:

It is a time for free discussion of problems and needs; a time for frank questions and answers. The compliance officer discusses with the employer all unsafe or unhealthful conditions observed on the inspection and indicates all apparent violations for which a citation may be issued or recommended. The employer is told of appeal rights. The compliance officer does not indicate any proposed penalties. Only the OSHA area director has that authority, and only after having received a full report.

Reading these policies, it would appear that the agency—at least informally—comprehends the value of prompt communication to the employer concerning hazardous or allegedly violative conditions at the conclusion of an inspection or voluntary compliance audit. If this were actually occurring, HR 979 would largely be redundant. Unfortunately, the experience of ASSE members appears to be that the closing conference sometimes lacks this vital element and, as such, as been stripped of much of its safety value.

The lack of prompt notice is especially harmful in the construction industry, where conditions change quickly and a project may be completed (or a building fully demolished) between conclusion of the inspection and issuance of the citations. If a General Contractor does not receive timely notice of an alleged violation, not only will workers continue to be at risk but the "GC" may find it impossible to fully identify all parties involved and to ascertain what actually occurred, who participated in creating the hazard, who was exposed, and what conditions were present. This interferes with the GC's ability to hold subcontractors accountable for OSHA compliance and to utilize contractual disciplinary provisions fully.

ASSE does wish to clarify that, at the closing conference, it is unlikely that the inspector will know precisely what citations will ultimately be approved by OSHA officials as this may require additional review of documentation obtained through the accident investigations and/or analysis of health monitoring and other samples.

Finally, although the compliance officers should identify with specificity those conditions that he/she believes pose a threat to worker safety and health, their initial citation recommendations must not be binding on the agency in terms of precluding deviation when the formal citations ultimately are issued. It may be sensible to modify the language of this paragraph to reference "citations under consideration" rather than those that "will be issued."

Conclusion

The American Society of Safety Engineers greatly appreciates the opportunity to provide testimony at this important hearing on significant issues affecting the safety and health of American workers and the ability of their employers to manage workplace safety. We look forward to working with this subcommittee and Congress to advance these and other legislative initiatives that will encourage proactive steps to more effectively protect people, property and the environment.

We will be happy to answer any questions you may have and will work to provide any additional information that may be requested.

Thank you.

Chairman NORWOOD. Thank you very much, Jon. I appreciate your timeliness there.

David, you're up next for 5 minutes.

STATEMENT OF DAVID PRESSLY, INCOMING PRESIDENT, NATIONAL ASSOCIATION OF HOMEBUILDERS, WASHINGTON, DC

Mr. PRESSLY. Mr. Chairman, Ranking Member, and Members of the Subcommittee, on behalf of the more than 220,000 members of the National Association of Home Builders, I would like to thank you for the opportunity to testify before you today. My name is David Pressly, and I am a home builder and developer from Statesville, North Carolina. I will be the president of NAHB in 2006.

Mr. Chairman, let me begin by saying that home builders made only acknowledge a legal and moral obligation to provide their employees with a safe workplace, they share the concerns of this Committee, as well as OSHA, to ensure the health and safety of all of their employees in the home building industry.

As a small business owner, I know that taking seriously the health and safety of my employees is one of my most important jobs. I have in my hand my own company's safety policy and health plan, which I wrote about 15 years ago with the help of NAHB, and I understand the importance of providing our employees with safety orientation and ongoing safety awareness training.

Now, the vast majority of NAHB's members are classified as small businesses. Over 80 percent of NAHB's members build fewer than 25 homes a year, and a typical member firm employs fewer than 10 workers. Many of our small homebuilders are often puzzled by the complexity and range of OSHA requirements. Most don't have a full-time safety professional or a legal team at the ready, because it is simply not possible or affordable for them. Builders use their limited resources to target and prevent serious job site hazards. Most, due to their size, will never have the opportunity to participate in OSHA's voluntary protection program, or VPP Program.

NAHB has long been successful in collaborating with OSHA in a variety of voluntary endeavors to advance job safety in an industry. Let me give you several examples of our collaboration. First, participation in the OSHA Alliance program, where NAHB and OSHA combine resources to focus attention on safety needs in our industry. The alliance has helped increase awareness at OSHA of the differences between "best practices" at residential versus commercial construction job sites.

Next is participation in OSHA's Harwood Training Grant program, which has allowed NAHB to provide valuable safety training for thousands of our smallest members, helping us target the growing Hispanic workforce in our industry with Spanish safety materials, such as this book we developed with OSHA on scaffold safety. So we continue to urge OSHA to ensure that their safety materials target this Hispanic population, as well.

Finally, we participate within the OSHA Partnership program by our local associations, which has a positive impact on construction safety in our industry. We are concerned, however, that recent poli-

cies issued by OSHA will jeopardize the ability of our small members to continue participating in the Partnership program.

Collaborative efforts with OSHA have helped improve the regulatory environment so it is effective, efficient, and has assured that construction job sites are safer than ever. However, additional efforts are required to improve OSHA's inspections and citation process, including reviewing the amount of time OSHA is allotted to issue citations. The Occupational Safety and Health Act allows OSHA to issue citations up to 6 months following an inspection. Far too often in our industry, OSHA utilizes all of the allowable 6 months to issue a citation. Home builders have received citations from OSHA 5 months and 28 days after the inspection. Typically, a house takes about 3 months to build, and often OSHA issues a citation, although the house is no longer under construction and legally turned over to the homeowner. The employees and supervisors of this site are no longer there, and in the residential construction industry time is of the essence.

In order for a builder to appropriately correct a violation and retrain employees that might have committed the infraction, OSHA must be required to issue the citations in a timely manner.

Additionally, OSHA requires a response from employers within 15 days for contesting the citations. Often, a small business like ours have a lot on their plate and inadvertently miss the deadline, or misplace paperwork, leaving no recourse to contest OSHA citations.

So we support Chairman Norwood's legislation, H.R. 739, and any legislation which would provide flexibility on the 15-day contest period if the missed deadline was the result of a mistake, inadvertence, or surprise.

We also believe that prompt notification in the form of a written summary at the conclusion of an OSHA inspection, before they leave the job site, would be beneficial to our industry. This would provide timely notice to homebuilders of potential safety hazards and allow them to correct any hazard or violation quickly.

Finally, we strongly believe that at the conclusion of an inspection, OSHA should be required to provide employers with all of the necessary information to help them understand the OSHA citation procedures. Inspectors should explain in clear, plain English and Spanish how the citation process works, what the employer's rights are. For this type of reform, though small, it is an important step in helping our small businesses.

Mr. Chairman, it is our pleasure to be with you, and I look forward to entertaining your questions.

[The prepared statement of Mr. Pressly follows:]

Statement of David Pressly, Incoming President, National Association of Home Builders, Washington, DC

Introduction

Mr. Chairman, Ranking Member, and members of the Subcommittee, on behalf of the more than 220,000 members of the National Association of Home Builders (NAHB), I would like to thank you for the opportunity to testify before you today on the issue of Occupational Safety and Health Administration (OSHA) reform and to further express the housing industry's support for efforts to address some of the most frequent concerns our members have when dealing with the OSHA inspection and citation process. My name is David Pressly and I am the First Vice President

of NAHB and a home builder and developer of both single family homes and apartments in Statesville, North Carolina. I will be the President of NAHB in 2006.

Meaningful OSHA reform remains one of the housing industry's legislative priorities—just as it ranks highly for so many other small businesses across the United States. In recent years, OSHA has significantly increased its inspection activities in the home building industry, and the process by which many of those inspections were undertaken has raised concerns from our members about OSHA's enforcement practices and procedures. We believe that there are several ways in which we can improve OSHA's procedures that would make regulatory compliance more cost-effective and make OSHA more user friendly for small businesses, while improving housing affordability and continuing to protect the safety of workers in the home building industry. We applaud the efforts of Chairman Norwood to promote several pieces of procedural reform legislation that were approved by the full House Education and the Workforce Committee in April, and look forward to the opportunity to discuss other ideas for procedural and process reforms.

Mr. Chairman, let me begin by saying that home builders not only acknowledge a legal and moral obligation to provide their employees with a safe workplace, they share the concerns of this committee, as well as OSHA, to ensure the health and safety of all men and women employed in the home building industry. Further, we share the same ultimate goal of ensuring a safe working environment. Builders know that creating a safe work environment makes good business sense. It is no secret that safety saves lives—and money. Builders have learned that the money saved through reduced workers' compensation costs, lost time due to worker injuries, and less time spent on accident claims and reports can be converted to improvements in the way they operate their businesses, including the management of safety and health on the jobsite. It is also no surprise that a safe jobsite is also the key to retaining good employees. The building industry anticipates that we will need to build almost 18 million new homes during the next decade. The continuing increase in the demand for housing will create almost 1 million new jobs in the residential construction industry. As a small business owner, I know that taking the health and safety of my employees seriously is not only my moral obligation, but also one of the best ways I have of recruiting and retaining good employees.

About the Home Building Industry

NAHB is a building trade association that represents more than 220,000 member companies nationwide. Our membership consists of builders and remodelers of single-family homes, townhomes, apartments, and condominiums, as well as thousands of specialty trade contractors. A vast majority of NAHB's members are classified as "small businesses" and our members employ approximately 8 million people nationwide. Our association's builder members will construct about 80 percent of the more than 1.8 million new housing units projected for 2005, making housing one of the largest engines of economic growth in the country. Our members provide Americans the opportunity to realize the American dream of homeownership.

The home building industry continues to be one of the most heavily regulated industries in the nation, which is a significant reason why home ownership is beyond the reach of many Americans. Currently, small businesses in the United States bear a disproportionate share of the cost of our nation's regulatory burden. According to the Small Business Administration, federal regulations cost small businesses 60 percent more per employee than it costs large businesses, and compliance with these existing regulations can be very costly—averaging \$7,000 per employee. In our industry, a sizeable share of these regulations comes from OSHA, and the costs imposed by OSHA regulations are financially onerous to every aspect of the home building industry.

The majority of the home building industry is comprised of very small businesses. Over 80 percent of NAHB's member's build fewer than 25 homes per year and more than half build fewer than 10 homes per year. A typical NAHB member firm is truly a small business, employing fewer than 10 workers.

In most small home building companies the owner is the president or chief executive officer. Many businesses are a family affair with husband and wife teams, brothers, sisters, or kids frequently involved in the business. Many times, owners employ only a few workers and view them as family, regularly working in the same conditions as their employees. The staff and owners at these small companies also wear many hats, such as: investor—responsible for funding construction projects; salesman—meeting with prospective home buyers; purchasing manager—in charge of ordering construction materials and supplies; marketing manager—promoting the company and its products; accountant—ensuring creditors and employees are paid; construction manager—ensuring that the home gets built on time and within bud-

et; and even construction worker—swinging the hammer to ensure a quality product.

Many small home builders are often puzzled by the complexity and range of OSHA requirements imposed upon them. Most small construction firms do not have a full-time safety professional to implement the array of regulations because it is simply not possible or economically feasible for these small businesses. They use their limited resources to prevent recognized and serious jobsite hazards, such as falls, excavations/trenching, electrical safety and improving other worker safety and health concerns. A safe and productive workforce is crucial to any company, particularly a small one, and it should be stressed again that these employers want jobsites free of dangerous hazards.

As a small business owner, I am concerned for the safety and health of my workers—my company's most important asset. I have brought with me today a copy of my own company's safety and health plan. I understand the importance of providing our employees safety orientation and ongoing safety awareness training, and I am not alone. Tens of thousands of home builders across the nation also recognize the value of providing a safe construction site for their workers.

Alternative to More Regulation

NAHB supports alternatives to the regulatory approach for ensuring worker safety, and we have been successful in collaborating with OSHA in a variety of voluntary endeavors to advance jobsite safety throughout the home building industry.

Similar to our efforts with the Environmental Protection Agency to improve the storm water permitting program and with the U.S. Fish and Wildlife Service to enhance its methods for designating critical habitat under the Endangered Species Act, we believe that our collaborative efforts with OSHA have helped our home builders work more safely, which has saved them time and money—savings which builders can then pass on to home buyers. Some of the collaborative efforts between NAHB and OSHA that have had a positive impact on construction safety in the home building industry include:

- Participation in the OSHA Alliance program, where NAHB and OSHA have combined its collective resources and focused its attention on addressing the safety educational needs of the home building industry workforce. This Alliance has been vitally important to increasing the awareness at OSHA, and among OSHA inspectors, of the differences between residential and commercial construction jobsites, and the often crucial differences between “best practices” at residential vs. commercial build sites.
- Participation on the OSHA Crane and Derrick Negotiated Rulemaking Advisory Committee (C-DAC), which has helped us to ensure that OSHA better understands how this revised regulation will impact the home building industry.
- Participation in OSHA's Harwood Training Grant program, which has allowed NAHB to provide valuable safety training, for free, at our local home building associations to nearly 1500 home builders and trade contractors. Participating in this program has given us a greater ability to reach some of our very small builders, who otherwise would have no access to organized OSHA training opportunities. Additionally, this program has helped us to target the growing Hispanic workforce in our industry. As many of the small businesses in our industry will tell you, it is vitally important that the training and safety materials we provide reach the non-English speaking employee population. NAHB is working hard to get Spanish-language safety materials out to our builder members, and we continue to urge OSHA to do more to ensure that their inspectors and safety materials can target this population.
- Participation on the OSHA's Advisory Committee on Construction Safety and Health (ACCSH), which has opened line of direct communication for home builders with OSHA and has ensured that home builders' viewpoints and opinions are taken into account prior to OSHA issuing construction safety regulations.
- Participation in the OSHA Partnership program by our local associations, which has improved communication between our members and OSHA and has had a positive impact on construction safety in our industry.

NAHB is not an opponent of safety regulations, as long as these safety regulations are practical, feasible, cost-effective, and improve worker safety, but we believe that more can be accomplished working collectively—through non-regulatory efforts—to improve worker safety in our industry.

We believe that collaborative efforts with OSHA have helped improve the regulatory environment so it is effective, but not inefficient, and has ensured that construction jobsites are safer than ever. The hope is that these collaborative efforts will continue far into the future.

Need for OSHA Reform Legislation

NAHB believes that additional efforts are required to fix OSHA's inspection and citation process. For example, one of the most pressing issues among our members is the lengthy amount of time that often occurs between an inspection and the receipt of a citation. The Occupational Safety and Health (OSH) Act directs OSHA to issue violation citations with "reasonable promptness" following a site inspection, but allows OSHA to issue citations up to 6 months following any violation found during a jobsite inspection. In addition, any citation issued by OSHA includes a timeframe for correcting the alleged violation.

Far too often in our industry, OSHA utilizes all of the allowable six months to issue a citation. NAHB believes that allowing OSHA up to 6 months to issue a citation creates uncertainty for home builders and does not improve safety of workers. I would like to offer an example of how OSHA has issued citations to our members:

- Home builders have received citations from OSHA 5 months & 28 days after the jobsite inspection. Typically, a house takes approximately 90 days to build. In this scenario, OSHA has issued a citation and proposed a date to abate the alleged violation, although the house is no longer under construction and legally turned over to home owner.

A review of, and changes to, the OSHA citation process would improve jobsite safety by allowing for prompt notification AND correction of any jobsite hazards discovered during an OSHA inspection. If OSHA issues a citation nearly 6 months after the jobsite inspection, how "serious" can the alleged violation be if it takes this much time to notify the builder of a potential jobsite hazard? It does no good to issue a citation months after the home is completed, when the site is no longer operating, and the opportunity to alert the employees and site supervisors to the hazard—and how to correctly fix the hazard—no longer exists. OSHA must realize that, in the residential construction industry, time is of the essence. In order for a builder to appropriately correct a violation, and re-train the employees who might have committed the infraction, OSHA must be required to issue the citations in a more timely manner.

In addition, if a company receives an OSHA citation, OSHA requires a response from employers within 15 days for contesting citations. Often, small businesses have too much on their plate and inadvertently miss the 15 day deadline or even misplace paper work, further delaying a response to OSHA. In these circumstances where the 15 day deadline has passed, the small business owners have no recourse to contest OSHA citations. We support Chairman Norwood's legislation, H.R. 739, and any legislation that would provide flexibility on the 15-day contest period if the missed deadline was the result of a mistake, inadvertence, surprise, or excusable neglect.

The imbalance of OSHA utilizing 6 months to issue a citation, while employers must contest any citation within 2 weeks is not only unfair to employers, but most importantly does not improve safety on the job. NAHB believes that OSHA procedural reforms would go a long way to ensure that small businesses are able to contest OSHA citations and any proposed penalties by leveling the playing field and by making OSH Act easier to understand.

In addition, NAHB supports another procedural OSHA reform that could improve jobsite safety in our industry. Prompt notification, in the form of a written summary at the conclusion of the OSHA inspection. This would provide timely notice to home builders of potential safety hazards and allow them to correct and hazard or violation quickly. The alternative to a written summary after the inspection of for builders to wait several weeks, and possibly up to 6 months, for OSHA to issue citations notifying them of the nature of a violation found during the inspection. Employers have a right to know about any potential hazards discovered by OSHA on the jobsite, without any delay. This full disclosure by OSHA following an inspection, and before they leave the jobsite, would allow for the timely abatement of safety hazards by home builders, which provides the desired protection to construction workers.

Additionally, we strongly believe that OSHA should be required to provide employers with all of the necessary information to help them understand the OSHA citation procedures. Employers should be given clear, plain-English information on how the citation process works, what their rights are to contest any citations they receive, and how the process of contesting the citation takes place, including the procedures undertaken at the OSH Review Commission (OSHRC). Finally, all employers should be provided with a list of contacts at the local or regional OSHA office, so that they can call with questions about their inspection or citations. We believe that this type of procedural reform, though small, is an important step towards helping our small business employers who are so often intimidated and confused by the OSHA inspection and citation process.

Conclusion

In conclusion, I would like to reiterate that the members of NAHB are committed to worker safety and health. We urge Congress to review the OSHA citation and inspection process, and make changes that will ensure fair and consistent OSHA enforcement practices in the home building industry.

NAHB is firmly committed to OSHA reform in the 109th Congress. We intend to work with the members of the appropriate committees and others in the House of Representatives to deliver meaningful, responsible OSHA reform legislation to President Bush for enactment as soon as possible.

I thank the Chairman and Members of the Subcommittee for allowing me the opportunity to testify on behalf of the 220,000 member firms of NAHB. We look forward to working with this committee, the Congress, and the administration to pass needed OSHA reform.

Thank you.

Chairman NORWOOD. Thank you very much for your testimony. Frank, you're now recognized for 5 minutes.

STATEMENT OF FRANK L. MIGLIACCIO, JR., EXECUTIVE DIRECTOR OF SAFETY AND HEALTH, INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL, ORNAMENTAL AND REINFORCING IRON WORKERS, WASHINGTON, DC

Mr. MIGLIACCIO. Thank you. Mr. Chairman, Members of the Committee, my name is Frank Migliaccio, and I am the Executive Director of Safety and Health for the International Association of Bridge, Structural, Ornamental, and Reinforcing Iron Workers. I am here today to testify on behalf of the 3 million members and 15 unions that make up the Building and Construction Trades Department of the AFL-CIO, where I serve as chairman of the Safety and Health Committee. I appreciate the opportunity to testify today. Workers in the construction industry suffer more fatal injuries than any other industry sector.

The building and construction trade has long been a strong proponent of voluntary joint labor-management safety and health initiatives as a supplement to mandatory OSHA enforcement, not as a replacement for OSHA enforcement. We believe that any measure to substitute OSHA inspections and enforcement with an unproven third-party certification and penalty exemption scheme would significantly decrease safety and health protection for workers.

The GAO's Workplace Safety and Health Report, dated March 2004, provided the Chairman of the Subcommittee on Workforce Protections, Committee on Education and the Workforce, and House of Representatives a state of the OSHA Voluntary Compliance Strategies; it shows promising results, but should be fully evaluated before they are expanded. To be effective, safety and health programs have to be site-wide and should include the employer and control of the entire site. Evaluations must be based on the actual work site, and the worker participation is key to the success of any program. The larger employers already do this and have the resources to do this. OSHA needs to focus its resources on the small employers and others at high risk.

The targets of the VPP are generally your larger contractors, the 1.1 percent of construction employers with more than 100 employees—the employers with 30 percent of the construction workers. Yet they suffer only 14 percent of construction fatalities. The larger companies usually have safety and health programs already in

place. These programs commonly use some form of voluntary third-party or internal performance auditing without legally exempting such audits from fact-finding by the court.

Similarly, safety audits should not be made exempt from court fact-findings. The VPP should try and target for small companies that employ one to ten employees. These companies employ 23 percent of the construction workers, yet suffer more than 50 percent of construction fatalities, double the average of the construction industry. Hispanic construction workers make up 16.6 percent of the construction workforce, but suffer 19.6 percent of the fatalities. The small companies and the Hispanic workforce are the groups that need to be reached.

The Federal Government employs approximately 25 percent of the construction dollars. There's a lot of room for improvement, and the government has control over these jobs. On such jobs, safety and health programs should be required in the job specifications. One job specification requirement should be that every worker in their position have an OSHA 10-hour construction workers standard safety and health card. This training is very generic, but requires that workers have some background on safety and health training. By requiring this, you reach the small one to ten employee contractors and also the Hispanic workforce, some of which do not even know that OSHA exists.

By providing large contractors with VPP status without inspecting every job site would dilute the health and safety programs they have in existence already. Each job site has different subcontractors, supervisors, suppliers, rules and regulations, and a new workforce. Any assumption that you can inspect and/or audit only one employer's work site and predict conditions on other sites is false. You must evaluate performance by looking at each site you wish to be recognized as a model or VPP status.

Reducing enforcement and lowering penalties will only lead to more unsafe jobs, injuries, and fatalities. Any company that knowingly puts workers in harm's way should have increased criminal and civil penalties placed upon them. The best way to improve voluntary compliance is to pass the Workplace Wrongful Death Accountability Act and the Protect the American Workers Act. Without the passage of these two Acts, the burden is placed on all taxpayers to pay the bill for those employers with uncontrolled hazards, including disability costs, uncompensated medical care, lost productivity, lost income tax revenue, and other costs.

Voluntary protection programs like VPP require a great deal of OSHA manpower to provide what amounts to free consulting time for those employers or sites which already have some of the most effective safety and health programs in existence.

In order for any VPP program to work, you must have worker and employer participation. Any voluntary program must engage workers and provide mechanisms for addressing hazards even when their immediate supervisors or employers have different priorities.

In closing, I would like to again thank this Committee for the opportunity to testify in front of the Committee. Thank you.

[The prepared statement of Mr. Migliaccio follows:]

Statement of Frank L. Migliaccio, Jr., Executive Director of Safety and Health, International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Washington, DC

Mr. Chairman, members of the committee. My name is Frank Migliaccio, Executive Director of Safety and Health for the International Association of Bridge, Structural, Ornamental, & Reinforcing Iron Workers. I am here today to testify on behalf of the 3 million members and 15 unions that make up the Building and Construction Trades Department (BCTD) of the AFL-CIO, where I serve as Chairman of the Safety and Health Committee. I appreciate the opportunity to testify today to present the BCTD's views on voluntary OSHA compliance programs including the Voluntary Protection Program or VPP. Workers in the construction industry suffer more fatal injuries than any other industry sector, and we recognize and control serious occupational hazards every day on the job.

The BCTD has long been a strong proponent of voluntary joint labor-management safety and health initiatives as a supplement to mandatory OSHA enforcement activities. Voluntary compliance programs, which may include internal or third-party audits, are a key part of efforts to take the next step beyond minimal OSHA compliance. These should not, however, be seen as a replacement for OSHA enforcement. Given that for most employers the average time between OSHA inspections can be measured in decades, the unions within the BCTD work closely with our employers and site owners (in cooperation with the Construction Users Roundtable) to make safety and health a priority in our dangerous industry. Where employers or owners want to implement voluntary programs that go beyond the minimal requirements of OSHA compliance, we are ready to step up with a highly skilled workforce to solve problems and move paper programs into real improvements in working conditions. We believe that any measures to substitute OSHA inspections and enforcement with an unproven third-party certification and penalty exemption scheme would significantly decrease safety and health protections for workers. Several proposals have been advanced that include taking away workers' rights to an OSHA site inspection in response to a complaint and permitting warnings instead of citations for most violations. We do not believe that reducing penalties, or shifting OSHA enforcement resources to support voluntary efforts by large employers with model safety programs, will prevent occupational injuries and illnesses. OSHA should have greater flexibility to use workers' compensation data and other data sources to experiment with more effective inspection targeting processes. Occupational injuries and illness cost our economy billions of dollars per year and result in preventable pain and suffering. Ignoring existing hazards or reducing penalties and paperwork for employers does not control these hazards. These are real problems that need to be recognized and solved on a day to day basis.

Small employers are at greatest risk, yet are unlikely to participate voluntarily without clear and immediate incentives

In construction, more than 80% of the establishments have less than 10 employees. These 1-10 employee establishments employ 23% of the construction workforce, but they suffer more than 50% of the fatal injuries. Hispanic construction workers (60% foreign born) are also at high risk, making up 16.6% of the workforce and suffering 19.6 % of the fatal injuries (2001). The only way very small employers currently participate in programs like those promoted in VPP is if the client/owner of the site, or the construction manager on the site requires contractors and subcontractors to participate. Yet OSHA chooses to focus enforcement on the 1.1% of construction employers with more than 100 employees. These employ over 30% of the construction workforce, and yet they suffer only 14% of the fatalities. Although there is always room for improvement, programs like OSHA VPP, focus on large employers with model programs and little need for government assistance. Funds for voluntary compliance assistance should be shifted to enforcement focusing on those employers that are truly at high risk and high risk worker training.

Accurately identifying and publicly recognizing model safety programs is of value

Whether recognition is from private organizations, professional associations, or the federal government, recognizing the true top safety performers can raise the visibility of safety concerns. As the number of recognized firms increases and the minimum standards required for recognition decrease, VPP designation is of less and less value. Reduced enforcement is not a necessary component of a voluntary program. Increased penalties may provide a more effective incentive.

Voluntary Compliance is Undermined by Reduced Enforcement and Low Penalties

Whether it is paying taxes or controlling work site hazards that could kill an employee, most of us voluntarily comply with laws and regulations. Penalties for non-

compliance both create an incentive and are a statement that certain actions are unacceptable in our society. Reducing OSHA enforcement and accepting low penalties for violations, says quite clearly that you find killing workers to be an expected part of doing business in high-risk industries.

The best thing Congress could do to improve voluntary compliance is to pass the “Workplace Wrongful Death Accountability Act” and “Protecting Americas Workers Act” and increase the criminal and civil penalties that are appropriate for willful acts which put workers lives at risk.

If, instead, Congress and OSHA were to reduce the incentives for compliance, the effect would be to place the burden on all taxpayers to pay the bill for those employers with uncontrolled hazards including disability costs, uncompensated medical care, lost productivity, lost income tax revenue, and other costs.

For workplace safety programs to be effective, employers that control the work must share responsibility for compliance.

On multi-employer job sites, and on sites where subcontractors, employers of joint venture partners, self-employed or temporary workers are simultaneously engaged in work, it is common that someone other than a worker’s formal employer controls workplace conditions and workplace hazards. OSHA compliance, even in the context of a voluntary compliance program, must focus on the entity that is in the position to best ensure compliance on a worksite, whether it is the owner, construction manager or general contractor, or other subcontractors.

Conditions and practices on one site cannot predict practices on other sites

OSHA has proposed admitting employers to its VPP program based on their records on other worksites, or on a sample of worksites. This is extremely problematic. Construction work sites are constantly changing as the project progresses. Workers, employers, managers, kinds of work, the safety problems, and the manner in which all of these elements interact change continuously. Any assumption that you can inspect or audit one of an employer’s work sites and predict conditions on other sites, is false. To determine whether to grant an employer VPP status, OSHA must evaluate performance at the actual sites to be recognized as model or VPP sites.

Effective compliance programs should not effect enforcement but should effect penalties

Construction is a complex and dangerous industry, and even with model programs, mistakes are made. Employers who implement effective safety programs should receive special consideration in defining penalties. As in other corporate crime, the existence of “effective” compliance programs should logically be a consideration in sentencing or setting penalties. It should not simply be an OSHA’s certification of a site as VPP, but the employer’s direct documentation of its effective safety program on the work site, which should legitimately be considered in determining appropriate penalties. In other parts of the law, including anti-trust and price-fixing, the Federal Sentencing Commission has defined criteria for effective corporate compliance programs. The government does not subsidize or formally approve corporate compliance programs related to these financial regulations. Why is it necessary or appropriate for the government to approve (with VPP status) and subsidize (with free OSHA manpower) large employer corporate compliance programs for OSHA? Logically, OSHA compliance should be a part of an employer’s overall corporate compliance system.

OSHA should be required to use the most effective inspection targeting and enforcement strategies

Because OSHA doesn’t have enough inspectors to reach the millions of US employers, it must depend on news of criminal penalties and citations reaching employers and creating an incentive for them to voluntarily evaluate risks and control hazards. VPP in its current form, third party safety audits, and other voluntary safety initiatives may have benefits on the specific site where OSHA provides its free services, but they provide no incentives for other employers to comply. Direct, aggressive, and highly visible enforcement remains the way to maximize visibility and create the most benefit to workers per dollar of OSHA budget. OSHA should pilot and evaluate innovative inspection targeting strategies. Evaluations must consider the overall impact on the safety and health of the US workforce, rather than the presumably positive impacts on VPP sites as a result of OSHA allocating disproportionate resources to assist a small number of receptive employers with model safety programs and already low reported injury rates.

Federal subsidies for the best corporate compliance programs is unnecessary

Our opposition to VPP or other voluntary programs is not because they don't work, but because they represent an inefficient use of OSHA resources. Voluntary programs like VPP require a great deal of OSHA manpower to provide what amounts to free consulting time for those employers or sites which already have some the most effective OSH programs in the nation. This group of employers would employ safety and health professionals even if VPP did not exist. To the extent that paper plans are actually moved into the multiemployer workplace, they can be very positive, and should be considered in determining penalties but not in inspection targeting. Larger employers have corporate compliance programs to oversee legal compliance, and OSHA enforcement should allow these compliance efforts to be easily integrated into broader corporate compliance efforts. These programs commonly use some form of voluntary 3rd-party or internal performance auditing, without legally exempting such audits from fact finding by the courts. Similarly, safety audits should not be made exempt from court fact finding. As with any form of audit, failing to act on identified problems is not good. However, the fact that compliance audits are conducted demonstrates that many employers have decided that the risks of not knowing the problems exist is greater.

Federal OSHA certification (with VPP Star status) of private programs is of limited value, unless it is for the government's contractors and vendors

Although OSHA involvement can have a positive impact and identify persistent safety problems in work sites pursuing VPP status, these are already among the safest worksites in the nation. There are a variety of industry consensus standards including ANSI A10.38 Construction Safety Programs and the new ANSI Occupational Health and Safety Management Systems Z10 standard, that provide guidance for those interested in voluntarily improving their safety performance. Since a variety of trade and professional organizations provide recognition of top performing employers/members, and national and international standard setting bodies have defined guidelines similar to VPP, duplicating these efforts within the federal government at taxpayer expense is of limited value. Efforts to codify voluntary compliance programs in the law would inappropriately divert funds from enforcement and training. Corporate compliance programs focused on compliance with financial statutes such as anti-trust and price-fixing laws function effectively without government certification or personalized government assistance too employers interested in developing these programs. Private consultants, third-party auditors, and legal specialists implement programs with no government involvement until the effectiveness of such a corporate compliance program is considered in the sentencing phase of a trial to support reductions in penalties.

Worker Participation or Employee Involvement is Central to any Voluntary Program

Workers must be involved in any effective safety program. Any voluntary program must engage workers, and provide mechanisms for addressing hazards even when their immediate supervisor or employer have different priorities. The importance of this involvement is made clear in OSHA VPP and in ANSI consensus standards. OSHA's proposed budget eliminates all funding for safety and health training grants. This reflects a fundamental misunderstanding of the importance of employees in identifying and controlling hazards in the workplace. While safety and health is the employer's responsibility, if workers themselves are not able to anticipate or recognize hazards and work with their employer to implement controls, then construction workers will continue to die on the job. These OSHA training funds should be renewed and increased.

I would also like to submit for placement in the record

1. BCTD comments on OSHA VPP in construction dated November 1, 2004 (OSHA Docket No. C-06).

2. Statement of Lynn Rhinehart, Associate General Counsel, AFL-CIO. Submitted to the Subcommittee on Employment and Workplace Safety Of the Senate Committee on Health, Education, Labor and Pensions On The Occupational Safety and Health Act and Small Employers. May 10, 2005.

[The information referred to has been retained in the Committee's official files.]

Chairman NORWOOD. Dennis Morikawa, how did I do that time?
Mr. MORIKAWA. You did very well.

Chairman NORWOOD. OK, you're recognized for 5 minutes.

**STATEMENT OF DENNIS J. MORIKAWA, ESQ., MORGAN, LEWIS
& BOCKIUS LLP, WASHINGTON, DC**

Mr. MORIKAWA. Thank you. Mr. Chairman and distinguished Members of the Subcommittee, I am very pleased and honored to be here today to provide commentary to the Subcommittee in pursuit of your very valuable task.

My name is Dennis Morikawa, and I am a partner in the law firm of Morgan, Lewis and Bockius and Philadelphia, Pennsylvania. I am past management co-chair of the Committee on Occupational Safety and Health Law of the American Bar Association. Since 1974, I have focused my practice on occupational safety and health law issues from enforcement matters to rulemaking, and in the last several years advising clients with respect to their participation in the very valuable OSHA cooperative compliance programs, including Voluntary Protection Programs or VPP's, and OSHA's Strategic Partnerships or OSP's as they are referred to.

Now, I think it's very clear that the magnitude of the task facing OSHA in its dual role of providing enforcement as well as cooperative programs is a daunting job. The realities are and there over seven million workplaces in the United States. OSHA currently conducts inspections at the rate of 39,000 inspections per year, but at that rate, as Mr. Owens correctly points out, it would take OSHA almost 180 years to visit every single workplace in America just once.

With respect to cooperative programs, which I think have been very, very successful, VPP's, Partnerships and Alliances, the reality is they are scarcely 1500 such programs in the United States when faced with more than seven million workplaces.

Now I am here to tell you today, Congress needs to support Cooperative Compliance efforts by OSHA, and I think it's very, very important. What can be done? A former partner of mine once told me something that I have never forgotten. He said that if you don't know where you're going, any road will get you there. Well, I'm here to tell you today, that we need a plan. There has to be an approach. We have to take into account OSHA's limited resources and its abilities with respect to enforcement and cooperative programs, to face the reality that Congress can indeed help OSHA in this very valuable task.

First, clarify, direct and support OSHA in working with employers in determining and preventing workplace accidents through these types of cooperative programs.

Second, and very importantly, remove disincentives that discourage employers from engaging in voluntary compliance efforts, and create incentives for employers to engage in these voluntary compliance issues, such as voluntary auditing, and third-party auditing.

Current policies, while calling for voluntary self-audits as it currently exists, encouraging employers on one hand to voluntarily self-audit their compliance with OSHA standards, but at the same time, this policy allows OSHA to use the results of these self-audits against these employers in enforcement actions. This makes no sense. Indeed, we believe this has had a chilling effect on employers' willingness to engage in self-critical analysis of OSHA compliance issues.

Now, we urge the Subcommittee to provide immunity for these self-audits so that employers will be incented to engage in this very valuable activity. I am not suggesting that Congress remove enforcement powers from OSHA, indeed, OSHA enforcement activity is very important to its mission. But we have to face the stark reality and that is OSHA simply can get the job done by itself. It needs help from the community that it regulates.

Voluntary programs such as VPP, OSHA Strategic Partnerships, alliances and other programs reflect a growing acknowledgment that the industries themselves can and should be encouraged to collaborate and join hands to find common solutions through a process of acknowledgment, commitment, identification, enablement, and execution. These programs, indeed, leverage OSHA's resources dramatically by providing maximum impact on large numbers of employees that simply could not be reached by OSHA enforcement efforts. Therefore, we believe these are the kinds of programs that the Subcommittee should back.

The National Electrical Transmission and Distribution Partnership is one such example. A combination of union and nonunion companies. Nonunion companies and the IBEW, the International Brotherhood of Electrical Workers, banding together—these are prime competitors in an industry all across the country who have joined together and joined hands to face the realities of workplace injuries, and try to bring down injuries in their industry. They have collaborated and joined in a partnership with OSHA. A high hazard industry has for the first time confronted these issues and is working successfully now to reduce injuries in their industry—a great achievement. I will be happy to answer questions about that later.

There's nothing in the Act regarding any of these programs. Congress should clarify and direct OSHA regarding them. But even with cooperative programs, OSHA doesn't have the resources to partner with every workplace in America. Congress needs to find ways to encourage employers to help direct their safety and compliance issues themselves. We believe that providing immunity for self-critical analyses and audits is one tool that can be used by employers to accomplish those valuable goals.

I appreciate the opportunity to address the Committee today, and I will be available to answer questions.

[The prepared statement of Mr. Morikawa follows:]

**Statement of Dennis J. Morikawa, Esq., Morgan, Lewis & Bockius LLP,
Washington, DC**

Chairman Norwood and members of the subcommittee, I am pleased and honored to be here today. Thank you for your kind invitation.

By way of introduction, I am a partner at the law firm of Morgan, Lewis & Bockius LLP. I work in Philadelphia, Pennsylvania. My practice focuses on advising employers regarding occupational safety and health matters—both compliance advice and litigation of citations and penalties. I have been practicing in this area of law for more than 30 years—since 1974. I am a past Management Co-Chair of the Occupational Safety and Health Law Committee of the American Bar Association. I am testifying today on behalf of myself—but with the experiences of many clients behind me.

I am sure that you are aware of the magnitude of the task confronting the Department of Labor's Occupational Safety and Health Administration (OSHA). OSHA is responsible for enforcing the Occupational Safety and Health Act (OSH Act) and its regulations and standard for the 7.2 million workplaces in the United States. As

you are aware, no employer is exempt from the OSH Act, no matter how small. Over the past five years OSHA has conducted an average of 39,000 inspections per year. At that rate, if OSHA started tomorrow, it would take them 184 years and 7 months to inspect every workplace in America once.

Obviously OSHA does not have the resources to rely solely on compliance inspections to enforce the OSH Act and Standards. Thus, almost from its inception OSHA began exploring compliance assistance efforts under which individual employers partner with OSHA to reduce injuries and illnesses and to comply with OSHA standards. In exchange for their undertakings, some employers have enjoyed immunity from or deferral of general scheduled inspections, although they are not exempt from either employee complaint inspections or inspections triggered by worksite fatalities or catastrophes. This immunity or deferral offers employers a respite from traditional enforcement and leverages OSHA's limited resources. In addition, OSHA's compliance assistance efforts offer employers the ability to resolve difficult compliance issues in non-adversarial settings. Unfortunately, skeptics of voluntary compliance measures both inside and outside the agency seek to limit OSHA's efforts. Further, OSHA routinely seeks employer self audits for use against employers in citation cases. These actions unnecessarily limit the cooperative compliance absolutely necessary to prevent accidents.

Background On OSHA's Cooperative Programs and Incentives

A. The Voluntary Protection Program

Although it arose out of the agency's earliest efforts at cooperative compliance, OSHA's Voluntary Protection Program (VPP) was not an official program until the Reagan administration formally implemented it and recognized the first worksite in 1982, more than 10 years after the effective date of the OSH Act. VPP was designed to recognize and promote effective safety and health management. Under VPP, management, labor, and OSHA establish a cooperative relationship at an individual workplace with a strong safety and health record (primarily identified by a days away, restricted and transfer (DART) injury and illness rate below the industry average)¹, with the following understandings:

1. management agrees to operate an effective program that meets an established, detailed set of criteria;
2. employees agree to participate in the program and work with management to assure a safe and healthy workplace;
3. OSHA initially verifies that the program meets the VPP criteria; then OSHA publicly recognizes the site's exemplary program and removes the site from routine scheduled inspection lists (though OSHA may still investigate major accidents, valid formal employee complaints, and chemical spills); and
4. OSHA periodically reassesses the site to confirm that it continues to meet VPP criteria (every three years for the STAR program; every year for the MERIT program).

OSHA has published guidance for Voluntary Protection Programs, which enumerate the specific requirements of VPP. After initial application and approval of their safety management systems and safety and health programs, employers are subject to a compliance inspection by a team of OSHA enforcement personnel. Any noncompliance identified during the inspection must be corrected within 90 days but no citations or penalties will be issued. Unfortunately, as currently established, under VPP OSHA will only partner with those employers who already have low injury and illness rates and excellent programs. By setting application criteria for its primary cooperative program so high, OSHA has eliminated the perceived risk of partnering with an employer to the detriment of those employers who could probably benefit most from cooperative programs.

B. Consultation Service and SHARP

Although it was the first formal compliance assistance offered by OSHA, the Consultation Service did not become a cooperative program with incentives from federal OSHA until after VPP was established. As originally established, and currently operated, the Consultation Service allows employers to request an on-site inspection and review of safety and health compliance from OSHA. Rather than reviewing compliance or conducting an inspection itself, OSHA uses state government staff—usually through a state department of labor—or consultants to conduct the inspection. The results of the inspection are kept confidential and not normally shared with

¹The current VPP requirements exclude from participation any facility whose DART rate is above its industry average. Accordingly, those employers whom OSHA identifies as having the high injury and illness rates in the country—presumably those most in need of compliance assistance—are excluded from participation in VPP.

OSHA. Rather, a participating employer's only obligation is to commit itself to correcting "serious" job-safety problems and health hazards identified during the inspection. In a situation where a serious violation would exist under OSHA criteria, the employer and consultant are required to develop and agree to a reasonable plan and schedule to eliminate or control the hazard. Consultants will offer general approaches and options and they may also suggest other sources for technical help. In rare instances, a consultant may find an "imminent danger" situation; if so, the employer must take immediate action to protect its employees.

After working with Consultation Services for several years, OSHA established the Safety and Health Achievement Recognition Program (SHARP) whereby small employers, which have had a consultation inspection, can request recognition. To participate in SHARP, an employer must:

- Request a consultation visit that involves a complete hazard identification survey;
- Involve employees in the consultation process;
- Correct all hazards identified by the consultant;
- Implement and maintain a safety and health management system that, at a minimum, addresses OSHA's 1989 Safety and Health Program Management Guidelines;
- Lower the company's Lost-Workday Injury and Illness rate (LWDII) and Total Case Incident Rate (TCIR) below the national average; and
- Agree to notify your state Consultation Project Office prior to making any changes in the working conditions or introducing new hazards into the workplace.

Certification of compliance with these requirements will qualify the small employer for a one-year exemption from routine OSHA inspections.

While such state-supported programs constitute an important step in closing the "credibility gap" between OSHA and private employers, employers participating in this program sometimes find that the state-provided consultants are not fully cognizant of OSHA's standards, because they do not enforce them routinely. In the worst cases, employers utilizing the Consultation Service have found that consultants have failed to identify OSHA-covered hazards when federal OSHA conducts an inspection and issues citations. In addition to substantive problems, employers often find that the states sometimes lack adequate funding and personnel to conduct inspections. Because of their limited funding, states limit or prioritize inspections in favor of small employers and exclude larger employers. Even where small employer requests for inspections are approved, it may take weeks or months to schedule the inspection. Finally, like VPP, membership in SHARP is predicated on being below the national average injury rate for the employer's industry thus excluding many employers.

C. OSHA Strategic Partnerships

The OSHA Strategic Partnership Program for Worker Safety and Health (OSPP), adopted on November 13, 1998 and revised December 9, 2004, is an expansion and formalization of OSHA's pilot programs and experiments with voluntary compliance outside of VPP. In a partnership, OSHA enters into an extended, voluntary, cooperative relationship with groups of employers, employees, and employee representatives (sometimes including other stakeholders, and sometimes involving only one employer) in order to encourage, assist, and recognize their efforts to eliminate serious hazards and achieve a high level of worker safety and health. OSHA and its partners have the opportunity to identify a common goal, develop plans for achieving that goal, and cooperate in implementation. Most of the worksites that have chosen to partner with OSHA are small businesses, with an average of 22 employees. Many of these partnerships focus on areas of concern addressed in OSHA's Strategic Plan. Some of these partnerships are seeking solutions to silica and lead exposures and serious hazards in the nursing home, food processing, shipbuilding, logging, and construction industries. Unlike VPP, employer eligibility criteria for entry into a partnership are not rigidly defined but OSHA maintains a discretionary ability to refuse to partner with any employer. Accordingly, employers seeking to partner with OSHA must demonstrate their commitment to OSHA and propose a partnership that is of value to the agency.

Among other benefits, participating in a partnership program with OSHA may provide employers with Onsite Non-enforcement Verification inspections where no citations or penalties are issued. It is important to understand, however, that all partnerships must stipulate that partnering employers remain subject to OSHA inspections and investigations in accordance with established agency procedures. The agency's policies do, however, allow deferral of programmed inspections where focused verification inspections are part of the Partnership Agreement.

Advantages and Disadvantages of Cooperative Programs

Although the programs outlined above are similar to one another, there are some key differences that employers must consider. A critical difference between Strategic Partnerships and VPP relates to the so-called “immunity provision,” which exempts VPP sites from general scheduled inspections. OSHA has been careful to explain that Strategic Partnerships are different from VPP in that they do not offer complete exemption from inspections and that employers that fail to abate alleged safety and health violations identified during the course of the audit and review process could find themselves subject to inspections and citations for noncompliance. Similarly, utilization of the Consultation Service does not provide inspection immunity or deferral unless the employer takes the further step of certifying its programs and allowing verification of abatement of all Serious violations.

On the other hand, if an employer is looking to simply further its working relationship with OSHA without attempting to assert itself as the best in industry in all areas of health and safety, a Strategic Partnership may be appropriate. While these programs do not necessarily provide exemptions from inspections similar to VPP, employers that are willing to make the commitment to engage in a voluntary compliance program under a partnership arrangement with OSHA can expect to enjoy distinct but intangible advantages not generally available to an employer that does not enter into such a partnership. These advantages include, for example, constant interaction with OSHA with respect to compliance programs and the establishment of a cooperative relationship.

One such partnership I had the privilege of helping negotiate is the Electrical Transmission and Distribution Construction Contractors Partnership. This national partnership among OSHA, the International Brotherhood of Electrical Workers (IBEW), the major electrical transmission and distribution contractors—normally fierce commercial competitors—both union and non-union, the Edison Electric Institute, and the National Electrical Contractors Association, was formed when the CEOs of these contractors—representing more than 70% of this industry—decided that their high hazard industry was not preventing enough accidents. These employers did not start with the best injury rates—indeed for the first time that I can remember OSHA partnered with a group that had high injury rates. Instead they started with a plan to reduce injury rates by doing all that they could to review their accidents as a group, to identify the causes of those accidents, to establish general qualifications for performing the work, for training, and for best practices. They started with an agreement to work as a group to consistently apply their actions across the country and to raise the bar for everyone. Even though this partnership involves no inspection or citation immunity—and indeed OSHA’s lawyers demanded that right of OSHA to use information generated by the partnership against the participating employers be maintained—there was opposition to the partnership from within OSHA. The argument was that OSHA would be stopped or limited in its ability to cite these employers for violations, particularly willful violations, in the event of an accident or inspection because the employers were doing all that they could—in conjunction with OSHA, the IBEW, and the trade associations—to prevent accidents. Thankfully, smart and courageous people within OSHA were willing to work with industry to prevent accidents and not simply to wait and develop a pattern of blame and try to punish those who have accidents. And this partnership is working. It has identified four areas of concern with respect to fatalities and is working to develop best practices to address these areas. It has also reviewed voluminous data for benchmarking, worked to develop training for employees and supervisors, and developed best practices to be implemented by partnering employers. In part through this partnership, OSHA has worked to overcome its role as simply an investigator of fatalities and accidents and to become a partner in the prevention of accidents. Prevention, not punishment, should remain OSHA’s primary mission.

Neutrality: Voluntary Self-Audits Without OSHA Involvement

In early 2000, I was a member of an advisory committee requested by then Assistant Secretary Charles Jeffress to review a draft of a self audit policy prepared by OSHA. The audit policy was a response by OSHA to growing congressional criticism of its enforcement policies, which permitted OSHA compliance officers to seek employer self-audits during the course of compliance inspections. A congressional bill introduced by Representative Cass Ballenger in 1998 would have made employer self-audits immune from disclosure, in order to encourage employers to evaluate their own OSHA compliance without fear that their own analyses could later be used against them in subsequent enforcement actions. On July 28, 2000, OSHA published its Final Policy Concerning the Treatment of Voluntary Employer Safety and Health Self-Audits in the Federal Register. Unfortunately many of the advisory committee’s comments were rejected in the final version of the policy.

OSHA's audit policy has four main components. First, it provides that OSHA will not "routinely request self-audit reports at the initiation of an inspection." Second, the audit policy provides that where a voluntary self-audit identifies a hazardous condition and the employer corrects it prior to an OSHA inspection (or a related accident, illness, or injury triggering the inspection), no citation will be issued so long as steps have been taken to prevent recurrence of the condition. Third, it provides that where a voluntary self-audit identifies a violation, so long as the employer is responding in "good faith," OSHA will not use the audit report to cite the employer for a willful violation. Finally, the audit policy provides that a self-audit may be used for a good faith reduction in any penalties assessed.

While the audit policy represents a so far successful attempt by OSHA to head off Congressional criticism and to attempt to assure the regulated community that it will not be seeking self-audits as part of routine compliance inspections, there are some aspects of the policy that are problematic. For example, OSHA's policy on the avoidance of willful violations does not offer clear guidance; worse, it suggests that for an employer who is not acting in "good faith"—or not taking "reasonable, timely, and diligent" action after the audit—its audit can be evidence of willfulness.

The most troublesome aspect of the policy, however, is part C(1)(b), which provides that compliance officers can request an employer audit during the course of an inspection. This includes situations where OSHA "has an independent basis to believe that a specific safety or health hazard warranting investigation exists." Unfortunately, this exception is so broad that it seems to encompass the entire rule. The policy permits any compliance officer to request an audit so long as he believed a safety or health hazard exists. Of course, one might reasonably suppose that the very reason a compliance officer was conducting an inspection was because of a belief that such a hazard might exist; and indeed, this provision would appear to be met in the event of any employee complaint or referral investigation. In addition, the audit policy describes situations involving fatalities or catastrophic accidents as incidents in which OSHA has a "significant interest" in evaluating whether the employer had prior knowledge of circumstances that could have been corrected prior to the accident. Thus OSHA might more often request self-audits in the very cases in which employers have the most exposure. Indeed, in our experience representing clients we have often found this to be the case with OSHA inspectors routinely asking for copies of self audits, audits by consultants, and even subpoenas for insurance company audits.

Overall, the current policy does not do enough to protect against abuse. As it now stands, there is not enough encouragement of employers to audit their worksites voluntarily. What is needed is to afford employer audits protection from discovery in all but the most exigent cases. Otherwise, employers' concern about their own work being used against them will inhibit the undertaking of the sorts of detailed and documented audits that could really make a difference in the safety and health of America's workers.

Future Prospects for Cooperative Programs and Voluntary Compliance Efforts

It is obvious from OSHA's commitment—in both monetary and personnel resources—that it will not abandon cooperative programs during this or any administration. The stated goal of the Agency is increased cooperative participation. Indeed, as of January 31, 2005 each program has an all time high participation rate: 1231 VPP worksites more than 215 active Partnerships.

The question should be: What limits employer participation in cooperative programs? Why aren't more employers attempting to obtain the benefits offered by the cooperative programs? As noted, historically VPP eligibility requirements made the program available only to the employers who already have the lowest injury and illness rates in their industry and excellent written programs. Through retention of absolute discretion regarding with whom it partners and the requirements it imposes, OSHA has similarly limited the number of partnerships. Thus, even if a given employer was willing to undertake the burden and commitment of VPP or a Partnership they might be excluded. OSHA maintains these exclusions in order to control the perceived risk of partnering with employers and to maintain maximum enforcement ability against employers. OSHA should eliminate these artificial barriers. OSHA should not allow its interest in maintaining the ability to cite employers to the maximum extent possible prevent the entry of willing and committed employers into cooperative programs. As is expressly stated in partnership agreements, employers entering into partnerships remain subject to programmed, complaint and fatality inspections in accord with agency procedures. Further, both VPP and partnership agreements provide that employers remain subject to citation and penalty. Congress should continue to review OSHA's programs and policies to make sure that eligibility requirements are not unduly limiting the number of employers par-

ticipating in cooperative programs. In addition, because OSHA does not have the resources to partner with every employer in America and actively excludes some employers, Congress should protect self audits conducted by employers from disclosure. While such protection would not be the same as the citation and penalty free inspections conducted by OSHA in VPP, SHARP, and partnerships, it would encourage excluded employers by removing the existing disincentives. I for one am in favor of any measure that would help an employer explain how it prevented an accident, rather than having to explain how a fatality occurred.

Chairman NORWOOD. Thank you very much, gentlemen. Very interesting testimony from all of you, and I look forward to everybody asking some questions.

Hopefully, you will be willing to submit some answers in writing, because we certainly can't get all of the questions asked. But there's a lot more I would like to know, and maybe we can put into the record.

With that, Mr. Kline, you are recognized for 5 minutes for questioning.

Mr. KLINE. Thank you, Mr. Chairman, and thank you, gentlemen, all for being here today. Interesting how we got to the first name basis here very quickly. The names don't look quite that hard to me, Mr. Chairman.

Chairman NORWOOD. Well, for now, some of them.

Mr. KLINE. Oh, no, no.

[Laughter.]

Mr. KLINE. No, no, I'm following up on your lead here. I thought that was very well, very well done.

I believe I can say that all of us on this Committee, and I know all of you down there, want to see safe workplaces. I think it's beyond question that as currently configured OSHA simply doesn't have the resources or the number of people to go and inspect every site, particularly challenging for home builders where the site exists for 90 days or so. So we have to look for ways to make it possible to ensure that our employers are providing safe workplaces for our employees in some sort of a reasonable way.

Mr. Morikawa—I'm trying, Mr. Chairman. We're working on it here. I think you stated very well when you say that OSHA doesn't have the resources and we have to find a way to do this, and with voluntary agreements and third parties and so forth.

I want to underscore and I want you to expand on that just a little bit.

But I want to underscore that certainly now when we are spending our resources in expanding our capability to defend Americans in homeland security and supporting our defense forces as we fight in this global war on terror overseas, the notion that we could possibly expand OSHA at this time to the number of inspectors and employees it would take to police the work site is just not reasonable. So we do have to look for some alternative sources.

You mentioned, and I got a little quote here, that it may be necessary to create third-party audit privilege, and to prevent the audit from being used in outside litigation. Could you expand on that and tell me also if we create such a privilege, how do we resolve the issue of companies that receive an audit and then don't do anything to correct the legitimate safety concerns that were identified in that audit?

Mr. MORIKAWA. Mr. Kline, the issue of self-critical analysis and self-audits has always been a topic of some controversy, because there was always a concern expressed and your question certainly includes that, that there are going to be employers in the United States who audit but don't correct violations as they find them.

My personal experience has been that companies that actually go to the trouble to engage in a self-audit program do so with the best intention in mind, with the purpose of correcting those violations. In other words, it would make little sense to self-audit your compliance with OSHA standards and then decide to do nothing about it.

I have seen many, many clients that we represent and represented by other companies in the United States who engage in self-auditing on a regular basis. They do that because they want to know what their workplace conditions are, and what are the causes of accidents they are experiencing.

The Homebuilders do this kind of activity. The transmission and distribution electrical construction contractors have engaged in this activity, and they have found remarkable things in these audits. They have found things that they could discuss, they can analyze, and they could develop rules and procedures to prevent accidents in the future. That's the valuable function of auditing.

Many times people have criticized OSHA because OSHA tends to be an accident investigator. OSHA comes in and they investigate totality. An OSHA official once told me something that I'll never forget. He said, "We come in and investigate a workplace facility. In that sense we've failed, because now we are investigating something that happened at a workplace that we didn't prevent or couldn't prevent."

I think self-auditing does provide a tremendous means for identifying and heading off the causes of injuries and fatalities in the workplace, and that's why I think auditing is such a valuable function.

Now, auditing should have an immunity for this reason. If every employee that engaged in self-auditing believed that OSHA would then walk in and use those audit results against them in enforcement proceedings, in litigation, they would be disinclined to do that for practical reasons, not creating a paper trail or creating a record that could be used against them, as an admission or as a legal matter.

It is important to engage in this type of self-auditing, and for Congress to encourage self-auditing because it will expand the scope of compliance to many, many more workplaces than OSHA can currently reach through their enforcement efforts, or even their formal compliance efforts. So we applaud this type of approach. We support companies that do this.

But we believe that we need Congress's help to try to make this an institutional requirement, a codification, a procedure that would be followed and supported by Congress, to let everybody know that Congress supports voluntary efforts in the United States to accomplish safety and health goals that can't be accomplished just by the agencies themselves.

Chairman NORWOOD. Thank you, Mr. Kline. Good question. Mr. Owens, you are now recognized.

Mr. OWENS. I yield to my colleague from California, Ms. Woolsey.

Ms. WOOLSEY. Thank you. Thank you, gentlemen. I heard most of you. I'm sorry that I got here late.

All right, here's the deal on resources. If OSHA was valued by our leaders, by our budgets, by our government, it would be funded, it would be staffed, we would have the resources to do what is necessary to prevent injury and consider and hold our workers in the highest regard.

But we don't do that. We instead make sure that the large corporations have huge tax breaks, and we could use that money to protect our workers.

Now, on the other hand, injuries, death—that's very costly, not only to the family, if it's the breadwinner, anybody in the family. The company costs just soar with insurance and workers' comp when that happens. So it makes good sense that good employers, smart employers, are going to take care of their workers from the get-go.

But what we're dealing with here is not that good, heads-up employer, whom you all represent when you're sitting here talking to us. We're talking about the employer that not only ignores an audit, but also would ignore a near-miss and pretend that near-miss wasn't—or couldn't tomorrow be somebody's eye being taken out, or something, or a death. But sometimes this employer will actually ignore a real serious injury or death.

To give an employer the right to self-audit is a big mistake. If somebody can tell me, up there, how we could take that irresponsible employer and give them the right to—the fox in the hen house—to oversee these programs, I'll listen some more. But maybe we could start at the head of the table. Why would that employer do the right thing when they are not doing it now?

Mr. TURNIPSEED. From my experience, a lot of these employers don't really understand what the requirements are. It's not so much an obvious thing of trying to not follow the laws and regulations. A lot of them are simply ignorant of the requirements.

I honestly believe by going to a voluntary program, where there is some relief from penalties, that would encourage those folks to bring in someone to look at them.

Ms. WOOLSEY. OK. Now we will move on to the next one. I'm going to tell you that any employer that is ignorant of OSHA laws now hasn't been around very long. I mean, that is just—I can't believe that.

Mr. PRESSLY. Thank you, Ms. Woolsey. I would love to address that. I'm a very small businessperson from North Carolina, and I have usually between 10 to 13 employees. Because of the close proximity, I have—not to impose on employees, but I have a personal interest and knowledge of what's going on in their lives. A technician that has been with me 7 years yesterday lost his wife from lung cancer. I know these things. I know in a very personal sense what their health and their safety means to these men and women who are on my team.

Ms. WOOLSEY. OK. So you're doing the right thing, right?

Mr. PRESSLY. For a handful of reasons.

Ms. WOOLSEY. OK.

Mr. PRESSLY. For personal interest. Second, I know as a small businessperson how costly it is to lose a key person, or to lose any

person—whether it's the training, recruitment, or missing production that takes place because a person is injured. So I wanted to say that at least from my personal experience, and the many folks that I work with, they care about their team.

Ms. WOOLSEY. Right.

Mr. PRESSLY. They care about their team, the team members—

Ms. WOOLSEY. What about your competitor who is going to turn their backs on their workers, because in the short-term is less costly to them to have poor work?

Mr. PRESSLY. I won't speak for anyone else, or characterize the thoughts of anyone else. But certainly in my business, as a small homebuilder, I know the financial cost that the loss or injury an employee makes to my bottom line, and I am not willing to take that chance as best I can.

Ms. WOOLSEY. Because then we should never have any accidents or injuries. Frank, do you want to respond to this?

Mr. MIGLIACCIO. Yes, ma'am. I have listened to what everybody else has said has so far, and it is usually the small contractor. It is that one to ten, and a good example was an accident that occurred in—it was a trenching accident in South Carolina at a school where two Hispanic workers were killed. They were engulfed in the trench. What happened here was the contractor probably—maybe knew, maybe didn't know what the rules were.

A lot of your contractors, smaller contractors, especially who are in business for two or 3 years, and then they're on their way. If they are—if their insurance mod does go up, you're going to see them change their name to something else, and go into business and start on again.

What happens when you have a company that doesn't care about their people—that's that type of company right there, if there had just been some sort of a training mechanism, and I think that the esteemed gentleman to my right here, David, does have training. He showed there's training given to his people.

You have to train the people, you have to let them know what's out there. Like I said in my oral statement, a lot of people don't know that OSHA exists, and most of those people are minorities, the Hispanic minorities.

Chairman NORWOOD. Ms. Woolsey, your time has expired, but I would like to ask Mr. Morikawa to respond to your question.

Ms. WOOLSEY. Thank you very much, Mr. Chairman.

Mr. MORIKAWA. Thanks, Ms. Woolsey. To respond to your question, my experience in representing companies in a wide variety of different industries has shown that employers that Frank has just identified who don't care don't generally audit, either.

Ms. WOOLSEY. Right.

Mr. MORIKAWA. They don't care so they don't audit. They are not trying to find out if they are in compliance or out of compliance with OSHA standards. Companies that do care do audit.

The issue here is does OSHA lose anything? The safety and health in America lose something by the fact that an employer audits and sometimes doesn't correct.

No. 1, the rule that we are asking for, the support from Congress that we are asking for, relates to the vast majority of good employers that do engage itself auditing and deserve this type of immunity.

You can't make a rule based on the fact that you have some bad apples who may audit but not correct violations. No. 1.

Second, with respect to OSHA's rights to inspect these workplaces, OSHA loses nothing in this. OSHA can still inspect workplaces and indeed they do. But we have seen in many cases is OSHA comes in and inspects an employer, and in the process of that inspection, they ask for the self audits.

Now, they can look into the workplace, they can inspect it, they can talk to employees, they can examine documents, all perfectly within their rights. All of that is made available through the investigation process.

What we're talking about is a small little category of self-audits that a company has done, which OSHA is now seeking, notwithstanding asking employers to engage in it. That's why we think immunity is important.

Ms. WOOLSEY. Mr. Chairman, may I just—

Chairman NORWOOD. No ma'am, time.

Ms. WOOLSEY. I'm not going to ask another question. I just wanted to finish my thought.

Chairman NORWOOD. Your time really is up, and it's somebody else's turn, and we have gone way over on your time out of courtesy to you.

Ms. WOOLSEY. And there is five panelists.

Chairman NORWOOD. I would like to remind Members that we are trying to stay in 5 minutes. If you want to ask a question that requires an answer from all four witnesses, please ask it first.

I now recognize Dr. Price for 5 minutes.

Mr. PRICE. Thank you, Mr. Chairman. I want to thank each of you for coming to be with us today as well, and I appreciate your testimony. I think it is once again important to mention that all of us up here are interested in safety on the job site, and the question is how do you get there.

In my experience, in my district, I believe and understand that the employers that I work with are interested and safe work sites. Their interest in safety for their employees. I also understand and appreciate that the three biggest cost drivers for doing anything or taxation, litigation and regulation, and we can regulate people out of business. There is no doubt about it.

Mr. Migliaccio, how was that?

Mr. MIGLIACCIO. Perfect.

Mr. PRICE. I appreciated your testimony and I am left with a question about how—you were talking about the need to look into the small employers—you have got to get down and find those folks that are 80 percent, as Mr. Pressly said, of the folks out there that are building homes in this instance.

How would you do that? How do you get down to the small employers? Do you hire an OSHA inspector for every single job site?

Mr. MIGLIACCIO. No sir, that's not feasible. Like everybody has said already, there's not enough money or inspectors to go around like that.

Mr. PRICE. How do you do it?

Mr. MIGLIACCIO. First of all, I guess I was there with a small employers that are constantly having accidents. If they're allowed to keep bidding, say, a Federal or State funded job, that's ridiculous.

Mr. PRICE. So you look at the outliers?

Mr. MIGLIACCIO. I would look at the outliers right there first. If there is a problem with this, I would say, well you know, I don't think I would let you bid on a job for, say 5 years, there would be a penalty to it.

What I would do is try to get that same small employer to start some sort of informational highway to their workers, letting them know what's going on, what is expected of them, safety talks, whatever it takes. The insurance industry could regulate this also by allowing the small businesses to compete with a lower premium if they did offer some sort of informational highway to their workers.

Mr. PRICE. If we're looking at the outliers then we're going after the fact. Right? We're waiting for the accident to occur, and then going after the fact?

Mr. MIGLIACCIO. OK, if you're looking at the accident occurring, yes sir. The other way that I would do it is just go around and start making it before they even did the work, some sort of prerequisite or a specification in the job bids, either by the owner or the insurance industry, to show that they do have a record, they do have something that shows that they have a safety program.

Mr. PRICE. You would do that for all homebuilders?

Mr. MIGLIACCIO. I would do it for as many as I possibly could. That would be for one that has been in business for 1 year, or 5 years, or 50 years.

Mr. PRICE. Mr. Pressly, tell me your thoughts about—I was struck by the fact that a homebuilder can get a citation 6 months after the fact and be gone. I mean, the home is built, the family is in the home, and they are getting a citation and then had to respond to 15 days. That seems fairly ridiculous to me.

Mr. PRESSLY. It seems a bit disingenuous, but and the original statute there was a provision for a reasonable amount of time, which OSHA has interpreted to be 6 months.

Mr. PRICE. What do you think it is?

Mr. PRESSLY. To issue that citation? My thought is, I'm just an ordinary North Carolina boy and I don't know a lot about a lot of things, but I want my people to be safe. It would be meaningful to me if that inspector on my job site would say David, here are these—here's this frayed cord, here's this scaffold, here is a ladder in a bad place, to tell me right then or write me up right then, because at that moment I'm going to take action to make sure that accident doesn't occur.

Mr. PRICE. At the time. At the time.

Mr. PRESSLY. If it's any time after that, particularly 6 months, everybody is gone and everybody's forgotten about the situation. If indeed, I'm going to commit an infraction, I want to learn from that and I want to remedy it at that very moment.

Mr. PRICE. Thank you. Mr. Morikawa, I wanted to follow up with you on, you made the comment that it's important to remove the disincentives to safety on a voluntary basis for employers. Expand if you would please on those disincentives. You mentioned one of them. Are there others that we can address?

Chairman NORWOOD. Make note that the yellow light is on, so be as brief as you can.

Mr. MORIKAWA. I'll try to make my comments brief to that, Mr. Price.

Mr. PRICE. Thank you.

Mr. MORIKAWA. I was focusing for the purpose of this paper on the issue of disincentives in the current policy that OSHA uses which encourages self-audits on one hand, and then uses the self-audits and enforcement actions on the other.

I was part of the advisory committee that was consulted by the administration at that time on the development of the policy. A number of us who represented management on that site were urging that there should be a threshold test for when OSHA could get those types of self-audits, such as when the employer itself put into issue the fact that they were self-auditing, they were trying to demonstrate that they were acting in good faith. If you put the audit into issue, then it should be produced in a litigation case.

But what we objected to was the notion that a compliance officer in any case could just simply walk in and ask for the audit on the first day of an inspection—in some respects kind of short cut their way to finding violations.

Employers obviously are not incented to create ways for which OSHA can cite them very easily. It makes common sense. So that is why we believe it is a disincentive to engage in this type of voluntary activity.

I believe this self-auditing is an extremely valuable tool. Who knows better workplace conditions than the employer itself? They know. They know where they are. They know how to identify them.

In my experience, employers that engage in self-auditing also engage in self-correction. It has been a very a successful venture when companies have done it. I think having disincentives like that, that is the ability to use these audits against them, and only in that very limited area, I think it is something that should be eliminated, and I think that this Subcommittee could help in a large measure, in helping employers to accomplish that goal.

Mr. PRICE. Thank you. Thank you, Mr. Chairman.

Chairman NORWOOD. Mr. Owens, your recognized for questions.

Mr. OWENS. Thank you. I yield 2 minutes to my colleague, Ms. Woolsey.

Ms. WOOLSEY. Thank you. I won't take 2 minutes. Here is the fear, OK. We have all of a sudden less money for OSHA because, guess what, self-audits do the work of OSHA. Then there will be nobody to train, to help write the manuals, to help show small companies how to put together their safety programs and their safety committees. That's my fear.

The idea that you're saying here, Mr. Morikawa, is ideal, and I hope that it will work. But I don't think that we should let the company that self-audits and does not take care or have good faith steps of how they're going to fix what they find wrong off the hook, because self-auditing is only stepped on. I am going to leave it at that, and yield back to Mr. Owens.

Mr. OWENS. Yes, I would like to ask Mr. Migliaccio to look at the BP refinery situation in Texas City.

I understand that they had—15 workers were killed in an explosion 2 months ago there. They had already been cited for safety lapses which had killed workers in the year 2003 and 2004. What

effect would exempting employers who do self-audits from penalties for injuring or killing workers have in this kind of situation?

Mr. MIGLIACCIO. By using that as an example, I would say nothing.

Evidently they didn't learn from their first two accidents, fatal accidents, and they are probably not going to learn from the third one.

Here again, a person who wants to do something right is going to do it. People who choose not to do it, they're not going to do it under any circumstances, no matter what the fine is, no matter what the penalty is. You're going to have people like that, and they are the people you have to drive out. If it takes OSHA citations to drive them out through penalties, financial penalties, whatever it takes, that's what you're going to need.

But evidently this company you're speaking about hasn't learned, and they are a large company which is surprising. Usually your petroleum industry is very well regulated, very well educated out there, they do have training. But sometimes they have a subcontractor that might be working for them that really doesn't have it.

So I don't think that you're going—it's hard to reach a company that doesn't want to do something voluntarily. That's why the thing with the voluntary, you know making anything voluntarily, it is not going to happen.

It's like if the Federal Government asked me to pay my taxes voluntarily. Am I going to do it? I probably will. Would my brother, maybe not.

I just look at things and you have to have some sort of organization, you have to have somebody overseeing, looking over your shoulder all the time.

If you look at yourselves as the panel, your constituents back home look over your shoulder all the time. If you're not doing your job, you're looking for a job. It's the same way in our business. If our companies, our union companies out there putting up steel erection, if the company is not making their money and they are not doing it right, they are out of business. The companies, the general companies, the owners, they don't hire them. You've got to reach them. That's it.

Mr. OWENS. Mr. Turnipseed, you are a safety expert; what kind of qualifications would self-auditors have to have? For people who do self-audits would you want them to have some kind of licensing, some kind of provision for the person conducts self-audits, or the organization that pays somebody to conduct the self-audit, would there have to be some guidelines?

Mr. TURNIPSEED. Yes, there are several guidelines. As I said in my opening comments, there are independent accrediting associations that go through and validate that. Such organizations as the Board of Certified Safety Professionals, there's an Industrial Hygiene certification. These are all independently audited.

People have to have experience, they have to have testing. Myself, as a certified safety professional, I have a stamp very similar to professional engineer. The CSP is in fact equivalent to the engineer in training, the first step in becoming a professional engineer.

So in the safety and health area there are several areas where you can actually get people officially trained, certified by an independent agency that they are in fact experts.

Mr. OWENS. So self-auditing then, and employment of experts would be feasible only for very large companies that can afford it, right?

Mr. TURNIPSEED. To a certain extent, but if we go with this program were talking about Senator Enzi's SAFE Act, where you're going to have some of these voluntary audits, you should be able to go to an individual who is certified by the Department of Labor as an expert in whatever industry or profession, bring that individual in, you know, at the cost of the employer obviously, to do that audit.

I think some of the smaller companies could afford some of these things. It's not going to be cost prohibitive.

Mr. OWENS. Mr. Morikawa, why should OSHA pay for these third-party safety auditors, when OSHA already spends over 10 percent of its entire budget on the free and confidential state consultation programs in all 50 states? Do you think that program is working?

Mr. MORIKAWA. Mr. Owens, I think the state consultation programs are an excellent idea. I think they're necessary. I think that the consultation programs provide a valuable service to small employers, because they provide a means or expertise to be able to identify safety and health hazards.

The problem, as I see it, is that auditing, which is I think a very important component of any safety and health program, is something that can provide tremendous leverage in reaching compliance across broad spectrums. I think the whole idea of third party auditing is a good one, for this reason.

No. 1, it will encourage employers to use that service. It accomplishes OSHA's mission, and OSHA's mission isn't just punishing employers that violate OSHA standards. OSHA's mission also should be prevention of accidents, prevention of illnesses. If they need to do that through these types of programs involving third-party auditors, that is a worthy funding source. I think that is money well spent. I would support money to be channeled in that direction to support that activity, because I think you really will bring about this entire evolution of compliance on a voluntary basis across—

Mr. OWENS. Instead of the state consultation program you take some of that money and use of the self-audits, is that what you're saying?

Mr. MORIKAWA. Well, I can ask the question about how money should be allocated. That's for this Congress to decide. I can only say that there very many valuable functions that are performed by state consultation and Federal OSHA, a lot of different agencies trying to address the same issue.

I believe that we ought to try to reduce and eliminate redundancies were you have both State and Federal doing the same thing. But I certainly think that there ought to be collaborative efforts designed to use those funds in a way to accomplish maximum impact, bang for the buck, if you will.

Mr. OWENS. My time is up.

Chairman NORWOOD. Thank you, Mr. Owens. Well first, let me just make a comment. OSHA doesn't have anything. The American taxpayers pay for that. It may be something—including you gentlemen that are out there working every day. So it is sort of you are paying your way if we get third-party auditors. OSHA just doesn't have the right to pay anything.

Mrs. Drake, you're now recognized for 5 minutes.

Mrs. DRAKE. Thank you, Mr. Chairman. The first question that I have that hit my mind immediately as you all began to speak, is do you think, all of you, if you would each answer, that the American worker is safer because we have this audit, or do you think they are more in harm's way because of having this type of voluntary program?

Mr. TURNIPSEED. From my experience, I believe that the workers are very safe. I see this as another resource, another arrow in the quiver, that we can add to improving that. I've done some independent work as a consultant, and even in places around the world, and I can testify with all honesty that we do a very good program here. We can do better, though.

Mrs. DRAKE. Mr. Pressly.

Mr. PRESSLY. Mrs. Drake, we as a trade association have sought out opportunities not only to represent our members, but simply to do the right thing. We have coalesced with the Environmental Protection Agency, with Fish and Wildlife and with Endangered Species, and certainly with OSHA.

This is just one example of what I have given you of the alliance that we have had in the collaboration that we've had with this agency, this Federal Government agency, because they care about the safety of our—in this situation, care about the safety of our workers in this.

So I recognize in my life that I'm not going to achieve perfection this side of the Jordan, but I'm going to do everything I can in this context to have a personal worksite that these men and women who work for me, simply because I care about them. Thank you for that.

Mrs. DRAKE. Frank.

Mr. MIGLIACCIO. I would say yes, we are probably safer now, today, than we were 50 years ago. I wouldn't necessarily say it is because of the audit.

Here again, I feel as though it is somebody looking over everybody's shoulder. I think the training is a lot better out there now.

Mrs. DRAKE. But then, don't you think if there were a company that had violations and you knew they were a problem that possibly they could be done by OSHA, and we could be using the audits on other companies that don't have serious violations, and then use OSHA resources for companies like you described a little while ago?

Mr. MIGLIACCIO. I don't think, I mean, OSHA resources are already probably at their max right now. If I understand everything that has been said today, the audits supposedly—and the audit should be kept confidential and not be put out there. So if OSHA was to use them, then it is going against what has been said today.

Mrs. DRAKE. But OSHA would know if there were a fatality on a site.

Mr. MIGLIACCIO. That's correct, but they wouldn't know about the injuries sometimes. A lot of times injuries aren't reported. Sometimes they're not reported because the person that's working on the job, for fear of losing their job, wouldn't report an injury.

Mrs. DRAKE. Mr. Chairman, I just wanted to make the comment that I visited—I visit businesses in my district. I'll have a new question to ask them about whether they are doing any of these voluntary and audits or anything.

But a business recently told me that they had \$1 million worth of costs last year in injuries. They did something on their own, whether it was one of these voluntary, or they just did it within their own business. So far this year—I mean they went in and looked at what they were doing, they found right away that what they thought their workers knew and what their workers knew were two different things. They began really focusing on safety. They have had not one injury so far this year.

So I don't think there's any businessman out there ever that would want this kind of expense on their bottom line, when they could be doing things voluntarily to find, and I think you would agree with me, Dennis?

Mr. MORIKAWA. I do totally agree with you. In fact, I think an important point that needs to be made with respect to the concept of employer self-auditing is that this costs nothing for OSHA. These are employers who are volunteering to do this on their own, they are not asking for funding from OSHA. The Transmission and Distribution Electrical Construction Contractors Partnerships is a perfect example of that.

This is a case where the five leading companies in the industry get together. They're both union and nonunion. They partnered together with the Edison Electrical Institute, which is the large trade association. The National—

Mrs. DRAKE. Does that employer pay for that or does OSHA provide that? I've heard both things. I've heard the employer pays and I have heard that we're using all of this OSHA money.

Mr. MORIKAWA. Let me explain that. In this particular instance, this is funded by the partnership itself, by the members of the partnership.

Mrs. DRAKE. OK.

Mr. MORIKAWA. Not by OSHA. OSHA has basically agreed to provide some resources to the partnership to study the causes of injuries and to help devise best practices. But the bulk of the costs has been borne by the members equally. That is not just the companies and also the union, and this has worked very effectively.

We have found that this type of self-help, financed largely by the sector itself, not by the government is the way that we have been able to accomplish great, great strides in safety.

Mrs. DRAKE. Thank you for answering that. Mr. Chairman, I just want to comment. I am not sure that a lot of these businesses know about OSHA rules. I bought a business license for my real estate business to move to another site from my broker. I never got anything from OSHA about my employees. I got a bill for my treas-

urer saying that I had to pay business personal property tax, but nothing from OSHA.

So I don't know how that word gets out there, or especially because we're talking about small businesses being much more of a problem, than a large business that would have attorneys that know all of this. Thank you, Mr. Chairman.

Chairman NORWOOD. Thank you, Mrs. Drake. Now I'll recognize myself to ask a couple of questions.

Mr. Pressly, your particular statement interests me. Why do you suppose, or do you have any reason to know why all should take so long, you stated something like almost 6 months, to issue a citation. Why would they do that?

Mr. PRESSLY. Sir, I don't know and I'm certainly will characterize that mind-set. It's human nature. If we have to operate between these margins and we begin at this point and complete at this time, there is a tendency to complete the job here, if I could be done at this time. That's my only guess.

But, being a very pragmatic person, I want to know if my job site or my workplace is unsafe. And I want to know there, at that time so I can remedy that problem at that very moment, and not wait until after the fact and have a chance on another injury if. So I don't have the precise answer, but I can tell you that it certainly doesn't make sense to me.

Chairman NORWOOD. Well, it doesn't do me either. I will try to find out a little more detail about that as to why it should take so long. I mean, I know that there is no doubt they are undermanned, there's no question about that. But we need to know why there it consistently takes 5-months and 25 days to have those citations out. I think it would help you to know immediately too.

In reading your testimony I noticed that the Homebuilders were concerned that some of the small associations and builders will no longer be able to participate in OSHA's partnership program. I would like for you to explain that to me just a little bit.

Mr. PRESSLY. A little bit about the partnership program. Again, it is a theme and purpose to have a safe workplace. We have had a series of exceptionally favorable relationships with OSHA and the folks at OSHA. I have given you a couple of examples.

One of those aspects relate to inspections at these job sites by peers, who may see something that I wouldn't see on my site and help make my site safe. The proposed change as I understand it, is to have a compliance inspection by OSHA, which says—which we are going now from a voluntary situation. If that OSHA inspector comes to my job site, in terms of this proposed directive, and finds me a violation of some aspect, that's a fine for me right there. When in turn, if previously I could have—it could have been a voluntary thing and I could have remedied that immediately. So I think there will be many small business people will not participate in that program for that very reason.

Chairman NORWOOD. You implied or said to me in your statement or in your testimony that most homebuilders build 10 homes or less a year?

Mr. PRESSLY. Yes, sir.

Chairman NORWOOD. In that category of homebuilders, what number of employees might they have?

Mr. PRESSLY. Ten is the number we use. In my family, in my company, mine is a small family company, in fact, in my company my wife is a licensed contractor. We all wear multiple hats and my small company. I showed you my plan and my concern.

But I will tell you that they are so many things in a small company that we all have responsibilities for and safety is certainly one of the most important ones we have. But our minds are limited, our focus is limited and for various reasons that we may not be applying ourselves where we may need to be applying ourselves at various times.

Chairman NORWOOD. Well, my interest in all of this is for the small businessman and woman. You know, the large companies can well afford to hire somebody or two somebodies to be on their staff.

Mr. PRESSLY. Mm-hmm.

Chairman NORWOOD. But I knew I could never hire anybody to be in my office to be an OSHA adviser for health and safety. I thought I was pretty good about advising about health myself, but you know, you just can't afford that. Someone mentioned earlier about regulations. I think there are about 18, about that thick, the number of regulations plus all the other stuff.

I mean, it's pretty hard to anticipate that all of these small businesses can know everything that these folks up here, sitting in their ivory tower, are ordering to be done plus what is happening in your state.

The alliance program, we have heard a lot of praise about the program and a lot of criticism. How is your alliance with OSHA working for your industry. Perhaps you could give some examples of how it may have helped improve safety for your employees?

Mr. PRESSLY. Yes. We've had—as I have testified, we have had a series of exceptionally favorable relationships with your OSHA team, and we're grateful for that. As I showed you, one of the issues that is important to us as homebuilders again is the safety of these scaffolds.

We as the National Association of Home Builders wrote this book in both English and Spanish, and asked the OSHA staff to simply review it, to make sure that we were consistent their expectations. They were and we published it and printed it and distribute it to our members.

OSHA now has a web site on light residential construction. It is in both English and Spanish. So any one of our employees—not only can an employer go to that, but any employee who has online access can go to that web site now to see exactly what those requirements are.

So our alliance has benefited us as homebuilders and light construction folks in a number of ways, and we hope that we can sustain that dialog and that relationship at our expense and in our time with your OSHA's staff.

Chairman NORWOOD. My time is up and I am going to conclude this hearing with a few comments just for the record to make sure that it is straight as it can be.

My friend and colleague earlier stated that an employee is killed every 96 minutes because of "corporate homicide," I quote, or an employer's willful behavior. Now that's just not right in the record shouldn't reflect that. We all agree that even one preventable death

in the workplace is one too many. That said, I think it is important that we get this record to reflect the correct data.

For the latest year for which we have information, there were 5,559 deaths in the workplace due to occupational injury that were reported. But what we failed to point out is that the 5,559 number includes every occupational injury death in the workplace for whatever the cause. That includes homicide, that includes suicide, that includes auto accidents, and other instances which falls nowhere inside the OSHA jurisdiction. In fact, of the 5,559 deaths in the workplace, almost 60 percent, 3,258 were traffic or highway incidents, or suicides, or homicides or assaults, but nothing related to corporate homicide.

In short, if you want to say that on average throughout the work force of the entire United States of America, one employee dies every 96 minutes, that may be correct. But you shouldn't claim that that is caused by corporate homicide or employer wrongdoing causing these deaths.

Another interesting thing, what we are really after here is to point out that we're not going to make it a healthier or safer workplace by hiring more inspectors.

Based on the current numbers that we have, and this is an estimate and it is rough, and we will get it tightened up but it is basically about right, we would have to have 108,000 new OSHA inspectors to inspect every workplace every 2 years. Now if you could do that, if you could inspect every workplace every 2 years, I bet you would make some improvements. But that's not going to happen. Let's try to be realistic about that.

We currently have 1200. Adding a thousand isn't going to help much. We've got to think outside the box here and find another way to make this a safe and healthy workplace other than saying, oh gosh, we've got to have more inspectors. If anybody has got a clue to how to hire 50,000 more, I would like to hear from them.

This would cause us to increase the number of inspectors by a hundredfold. Now everybody knows that is not going to happen in this town. So let's find another way to get this job done.

I want to thank the American Industrial Hygiene Association and recognize that they have submitted testimony for the record that is very important and recommend that all of our colleagues read that.

[The material to be provided follows:]

**Statement of the American Industrial Hygiene Association, Fairfax, VA,
Submitted for the Record**

Chairman Norwood and Members of the Committee:

The American Industrial Hygiene Association (AIHA) is pleased to submit the following comments to the House Education and the Workforce Committee—Subcommittee on Workforce Protections on today's hearing titled "Examining Voluntary Employer Compliance Programs that Improve Occupational Safety and Health".

Founded in 1939, AIHA is the premier association of occupational and environmental health and safety professionals. AIHA's 12,000 members play a crucial role on the front line of worker health and safety every day. AIHA is the most diverse professional association dedicated solely to the prevention of workplace fatalities, injuries, and illnesses with members representing a cross-section of industry, private business, labor, academia, and government. One of AIHA's goals is to bring "good science" and the benefits of our workplace experience to the public policy process directed at worker health and safety.

As the professionals entrusted to assist employees and employers in making the workplace healthier and safer, AIHA is particularly pleased to submit comments on the issue of looking at voluntary programs that would improve occupational health and safety.

AIHA would also like to thank the Chairman and members of the Subcommittee on behalf of the millions of Americans, both employees and employers who desire a healthy and safe workplace, for your involvement in addressing this issue. Your leadership is critical to improving this country's record of workplace-related injury and illness impacting workers, their families, and our communities.

Over the course of the last several years, there have been numerous legislative proposals to amend the Occupational Safety and Health Act and/or take a closer look at the way the Occupational Safety and Health Administration (OSHA) has addressed the issue of enforcement and compliance assistance to employers. While few of these proposals have made their way into law, it goes without saying that the sponsors of these measures all had the same goal—to assure the health and safety of every worker. AIHA shares this goal.

Prior to offering our comments on some of the approaches that may be put in place to assist employers, AIHA believes it is important for you to understand AIHA's view of OSHA. We have reviewed our position statement on "AIHA's Global View of OSHA" and find that while not all of this position statement addresses the issue of "voluntary programs", we feel it is important for the subcommittee to be aware of what we feel is necessary for OSHA to be an effective agency for worker health and safety.

AIHA believes that:

- There must be a strong and well-funded OSHA. Continuing federal oversight is necessary to achieve "safe and healthful" workplaces.
- OSHA should have primary authority for health and safety in the workplace. Overlap and duplication among different government agencies makes compliance difficult, creating confusion and increased cost for employers.
- OSHA should receive adequate resources to provide coverage and enforcement. OSHA resources should be increased and coverage extended to the millions of public employees not currently covered by the OSH Act. OSHA penalties, including criminal penalties, should be at least as stringent as penalties for environmental laws.
- OSHA should set and enforce a set of generic performance standards. Addressing every hazard with a highly specific standard is an impossible task. A small number of generic performance regulations are needed. Generic standards should not replace, but complement, existing standards.
- OSHA should promote occupational health and safety programs for employers. We encourage the use of innovative incentives, particularly for small businesses.
- OSHA should have a mechanism to encourage employers to obtain third party assistance. Collaborate with employees and labor. Assistance should be provided by a competent Health and Safety professional having credentials recognized by national accrediting bodies (e.g., a CIH, CSP, ROH, or equivalent).
- There must be a mechanism for employee complaints.
- OSHA should collect and disseminate health and safety data.
- OSHA should provide education, training and guidance to employers and employee groups.
- OSHA should enhance technical support and research.
- There should be a general duty clause.
- OSHA should increase incentives for employers and labor to voluntarily achieve excellence in occupational health and safety.
- OSHA should enhance opportunities for employee participation. Facilitate "partnering" among all workplace stakeholders.

As to some specific programs that might be implemented to improve occupational health and safety, AIHA suggests:

THIRD PARTY CONSULTATION SERVICES PROGRAM

In a report published in March 2004, the General Accounting Office (GAO) cited the use of third party consultants among a list of recommendations by researchers, safety and health practitioners, and specialists, to achieve voluntary OSHA compliance. According to the GAO report: "Using consultants could leverage existing OSHA resources by helping workplaces that might never otherwise see an OSHA inspector, especially small employers, and possibly also by enabling employers to address additional safety and health issues that might not be covered under an OSHA inspection for compliance standards".

AIHA agrees and strongly supports creation of a voluntary third party consultation services program.

To assist in creation of such a program, AIHA has worked with several others to draft a stand-alone legislative measure that would introduce a pilot program to put a limited third party program in place. We are hopeful this measure will be introduced in this session of Congress.

This legislative measure incorporates the best of the legislative language that was previously introduced regarding this program, yet addresses many of the concerns that were raised during hearings on the proposal.

The draft bill would encourage small employers to conduct voluntary safety and health audits using the expertise of qualified safety and health consultants. A pilot program would be established in 3 States and would be limited to assisting small businesses as defined in the proposal. Consultants would be required to meet specific educational and experience qualifications in order to be certified to assist small business with the consultation. A special advisory committee would be established to carry out the duties of the program, with employers, employees and safety and health professionals serving as members of the advisory committee. Once a consultation has been completed and all health and safety questions resolved, the employer would be exempt from the assessment of any civil penalty from OSHA for a period of 1 year. It should also be noted that AIHA's support of a voluntary third party consultation services program in no way diminishes the need for companies to have internal audit programs.

AIHA is convinced that of all the voluntary programs being discussed to assist small business, this third party consultation program offers the most assistance with the least cost.

CONTINUING EDUCATION AND PROFESSIONAL CERTIFICATION FOR CERTAIN OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION PERSONNEL

AIHA supports efforts to assure employees and employers that OSHA personnel are qualified to provide expert advice and assistance. In the past four years, AIHA is aware of the substantial increase in the number of OSHA personnel attaining nationally recognized health and safety certifications, such as the certified industrial hygienist and the certified safety professional designations. Continuation of this program should continue. AIHA has heard from many individuals that such certification indeed lends additional credibility to OSHA personnel.

VOLUNTARY PROTECTION PROGRAMS

AIHA supports codification of the Voluntary Protection Program. The number of participants in this program continues to grow and all parties can be proud of the results of the program. Additional efforts need to be made to increase the number of participants, to include developing and implementing efforts that encourage participation of more small employers interested in the program. OSHA has made great strides in the past four years to create new programs for small employers to enter the program. Legislative confirmation of these efforts should be a priority.

TECHNICAL ASSISTANCE FOR SMALL BUSINESS

AIHA strongly supports an increase in assistance to small business through increased funding for consultation programs. In addition to increased compliance assistance through OSHA, AIHA is also supportive of legislative efforts to assist small business through other compliance initiatives. Most notable among these is House Bill 230, the National Small Business Regulatory Assistance Act of 2005, introduced by Rep. John Sweeney of New York. This bill would provide an avenue for small business to attend compliance assistance seminars where they could be provided help in complying with federal regulations. Qualified third parties with expertise in the related areas would conduct the seminars.

CONCLUSION

AIHA is aware that there may be many additional voluntary compliance programs that have been, or will be, discussed when addressing the issue of employer programs that improve occupational health and safety. Our thoughts on the proposals within these comments should not mean that we may not be supportive of others. AIHA is supportive of any and all programs that positively address occupational health and safety in the workplace.

AIHA believes that the view of OSHA over the last several years is one that does not necessarily focus on enforcement/compliance, but an OSHA that attempts to build a partnership with business. AIHA is pleased to be one of over 300 organizations with an Alliance/Partnership with OSHA that strives to bring forth the best

solutions to workplace health and safety problems and share them with others. This is the type of cooperation that should continue.

AIHA applauds your efforts and sincerely hopes you will be successful in your endeavor to advance the cause of worker health and safety. AIHA stands ready to assist you and Congress in every possible way in developing solutions that will best protect workers.

Thank you.

Mr. OWENS. Excuse me. May I have one closing comment?

Chairman NORWOOD. Yes, you may. Certainly. Mr. Owens, you're recognized.

Mr. OWENS. Yes, just to clarify one point that you're making. We have not used the word "homicide." You chose to use that word. We would like to have the record kept open for us to submit an explanation as to exactly how we arrived at the figure of 96 deaths.

We would also like to note the fact that no one is proposing that we hire enough inspectors to inspect every business, every year, or every 2 years. We're just proposing that we maintain a level of accountability through enough inspectors to make people take the law seriously.

No one has ever proposed that every taxpayer have his income tax audited, but it would be ridiculous to propose that we eliminate all auditing of income taxes as a remedy to the situation. We are talking about a situation where there is a small percentage of corruption or failure to comply and that can be deadly. The percentage is too great and the amount of suffering that accumulates as a result of that is too great. Thank you.

Chairman NORWOOD. I think the Ranking Member, and I wish to thank our witnesses for your valuable time, and I know it is, and your testimony.

I thank all of our Members today that were here participating in this. If there is no further business, the Subcommittee stands adjourned.

[Whereupon at 11:56 a.m., the Subcommittee was adjourned.]

[Additional material submitted for the record follows:]

Response of David Pressly, Incoming President, National Association of Homebuilders, Washington, DC, to Questions Submitted for the Record

The Honorable Charlie Norwood (R-GA)
Chairman, Subcommittee on Workforce Protections
Committee on Education and the Workforce
2181 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Norwood:

On behalf of the 220,000 members of the National Association of Home Builders (NAHB), I would like to express my thanks for the opportunity to testify before your subcommittee on May 12. NAHB's members are deeply concerned with the continued safety and well-being of their employees, and appreciate the opportunity to share their concerns about the Occupational Safety and Health Administration's (OSHA) enforcement and citation practices and policies with Congress. I also appreciate the written questions you forwarded to my attention following the hearing. I have included my response to your questions below:

1. Can we build into any recommendations that a written list be given at inspection with the understanding that a written report will follow?

One of the recurring problems in the home building industry is the lack of information provided to employers at the conclusion of the inspection. While we understand that OSHA needs time to formulate and issue citations following an inspection, we believe that OSHA should be required to notify employers at the conclusion of the inspection about the possible violations noticed during the inspection. Since

it takes approximately 3 months to build an average sized home, and OSHA has up to 6 months to issue citations, it does no good to alert an employer to jobsite hazards on a jobsite that no longer exists. In order to be able to correct hazards in a timely manner and re-train employees who may be involved in a violation, an employer must have prompt notification of potential problems.

Additionally, OSHA needs to take time at the end of inspections to explain in plain English how employers can contest citations, and provide a list of who at the local or regional OSHA office an employer can call with questions about their inspection or citations. These reforms, though small, can go a long way towards helping employers in the building industry mitigate and respond to jobsite hazards, and provide for enhanced protection for workers.

2. Don't you think 15 days is too short? Maybe 15 with an extension of 15 upon request?

Many NAHB members have been concerned for some time about the amount of time given to businesses to contest citations. The majority of NAHB members are classified as "small businesses," many with 10 or fewer employees. Most business owners wear many hats, managing day to day operations, handling safety concerns, and swinging a hammer next to their employees on the jobsite. When a small company receives an OSHA citation, it often can go overlooked for several days while an employer is occupied with another aspect of the company, and by the time they have reviewed it, and talked to the employees involved in the citation, it is too late to contest the citation.

NAHB believes that, especially given OSHA's ability to issue citations up to 6 months following an inspection, it is unfair to only allow businesses 15 days to respond to a citation. We have strongly supported Chairman Norwood's legislation, H.R. 739, and any legislation that would provide flexibility on the 15-day contest period if the missed deadline was the result of a mistake, inadvertence, surprise, or excusable neglect. We would support any opportunity to give businesses the flexibility to request an extension of the 15 day deadline.

I hope these answers provide the subcommittee with further clarification of NAHB's positions on OSHA policies and practices. If I can be of any further assistance, or provide any additional information, please do not hesitate to contact me.

Sincerely,

David L. Pressly, Jr.
NAHB First Vice President

