



# Statement of the U.S. Chamber of Commerce

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**ON:** IMPROVING OSHA'S ENHANCED ENFORCEMENT PROGRAM

**TO:** THE HOUSE COMMITTEE ON EDUCATION AND LABOR

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The Chamber's mission is to advance human progress through an economic, political and social system based on individual freedom, incentive, initiative, opportunity and responsibility.

The U.S. Chamber of Commerce is the world's largest business federation, representing more than three million businesses and organizations of every size, sector, and region.

More than 96 percent of the Chamber's members are small businesses with 100 or fewer employees, 70 percent of which have 10 or fewer employees. Yet, virtually all of the nation's largest companies are also active members. We are particularly cognizant of the problems of smaller businesses, as well as issues facing the business community at large.

Besides representing a cross-section of the American business community in terms of number of employees, the Chamber represents a wide management spectrum by type of business and location. Each major classification of American business— manufacturing, retailing, services, construction, wholesaling, and finance—is represented. Also, the Chamber has substantial membership in all 50 states.

The Chamber's international reach is substantial as well. It believes that global interdependence provides an opportunity, not a threat. In addition to the U.S. Chamber of Commerce's 96 American Chambers of Commerce abroad, an increasing number of members are engaged in the export and import of both goods and services and have ongoing investment activities. The Chamber favors strengthened international competitiveness and opposes artificial U.S. and foreign barriers to international business.

Positions on national issues are developed by a cross-section of Chamber members serving on committees, subcommittees, and task forces. More than 1,000 business people participate in this process.

**Testimony of Jason C. Schwartz on behalf of the U.S. Chamber of Commerce**

**Before the U.S. House of Representatives  
Committee on Education and Labor  
Subcommittee on Workforce Protections**

**“Improving OSHA’s Enhanced Enforcement Program”**

**April 30, 2009**

Good morning, and thank you for the opportunity to testify today regarding OSHA’s Enhanced Enforcement Program. My name is Jason Schwartz, and I am a partner in the law firm Gibson, Dunn & Crutcher LLP. I am also a member of the U.S. Chamber of Commerce’s Labor Relations Committee. My practice includes the full range of labor and employment law, including Occupational Safety and Health Act matters.

I am pleased to appear before you today on behalf of the U.S. Chamber of Commerce, the world’s largest business federation, representing more than three million businesses and organizations of every size, sector, and region to discuss the value of OSHA’s Enhanced Enforcement Program and how it can be improved. The Chamber agrees with the Inspector General that the Enhanced Enforcement Program “has the potential for achieving [OSHA’s] purpose as it was designed to identify high-risk employers and target their worksites with increased enforcement attention.”<sup>1</sup>

In that regard, I will address (1) Enhanced Enforcement Program criteria; (2) resources committed to the Enhanced Enforcement Program; (3) the use of creative enforcement and

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<sup>1</sup> U.S. Department of Labor, Office of Inspector General—Office of Audit, “Employers With Reported Fatalities Were Not Always Properly Identified And Inspected Under OSHA’s Enhanced Enforcement Program,” Report No. 02-09-203-10-105 (Mar. 31, 2009) (“OIG Report”), Highlights.

settlement tools in the Enhanced Enforcement Program; and (4) the Inspector General's conclusions regarding workplace fatalities.

**1. Enhanced Enforcement Program Criteria**

As an initial matter, as we examine the effectiveness of OSHA's enforcement efforts, including the Enhanced Enforcement Program, we must recognize the practical realities in which OSHA operates. In particular, there are approximately 7.2 million worksites in the United States and only 2,400 OSHA inspectors.<sup>2</sup> Those inspectors conducted 38,591 inspections in fiscal year 2008.<sup>3</sup> Assuming each of those inspections occurred at a separate worksite, that would represent only about one-half of one percent of all worksites. Even doubling the number of OSHA inspectors would bring the number of worksites inspected each year to only one percent. While Congress recently appropriated \$80 million in the stimulus package targeted for more enforcement in various DOL agencies including OSHA, and expanded OSHA's FY 2008 appropriations by \$27 million for FY 2009 with explicit instructions to focus on enforcement, there will never be sufficient funds to change this ratio in a material way. Thus, the need for prioritization of enforcement efforts, coupled with education and outreach, is compelling.

Accordingly, the Enhanced Enforcement Program concept not only makes good sense, but is a practical necessity if OSHA is to fulfill its mission. The agency must focus its enforcement resources on those workplaces where citable violations creating serious risks to worker safety are most likely to be found, and where enhanced enforcement will be most likely

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<sup>2</sup> *All About OSHA*, <http://www.osha.gov/Publications/3302-06N-2006-English.html> (last updated Jan. 23, 2009).

<sup>3</sup> <http://www.osha.gov/as/opa/2008EnforcementData120808.html> (last updated Dec. 19, 2008).

to bring about effective corrective actions. The Inspector General’s report recognized this very point, stating: “It is essential that OSHA target its limited resources to inspect workplaces with the highest risk of hazardous conditions that have greater potential to cause injuries and fatalities.”<sup>4</sup>

The U.S. Chamber agrees with OSHA that it is appropriate to focus enforcement resources on “those employers who are indifferent to their obligations under the OSHA Act.”<sup>5</sup> We support efforts to identify and properly define the employers who are subject to this program—especially those whose willful or repeated violations are linked to workplace fatalities or other serious injuries, as well as those who are indifferent to their obligation to abate prior cited violations. It is also important to recognize that certain employers who are “indifferent to their obligations under the OSHA Act” may not have been subject to prior inspections and, therefore, will not be identified through prior citation history. OSHA’s Director of Enforcement Programs noted that the “majority of these establishments [identified under the 2003 Enhanced Enforcement Program criteria] were not really ‘bad actors’ and few had any significant history with OSHA. Most companies cited were first-time offenders.”<sup>6</sup> He further noted that the revised 2008 Enhanced Enforcement Program criteria are “better in that [OSHA is] not picking up large numbers of small employers with a fatality, but [OSHA is] still not targeting the ‘bad

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<sup>4</sup> OIG Report at 15.

<sup>5</sup> OSHA Enforcement and Complaint Directive (CPL) 02-00-145, *Enhanced Enforcement Program* (effective Jan. 1, 2008).

<sup>6</sup> Memorandum for Donald G. Shalhoub, Deputy Assistant Secretary, Occupational Safety and Health Administration, from Richard E. Fairfax, Director, Directorate of Enforcement Programs (Mar. 19, 2009).

actors' the program is intended for.”<sup>7</sup> The Chamber concurs with the Inspector General’s recommendation that a task force be established to help identify appropriate criteria for the Enhanced Enforcement Program, and believes that such a task force should consider stakeholder views in refining these criteria. The Chamber looks forward to participating in that process. As a baseline, we believe the criteria should be designed to identify inspection targets where the agency’s efforts are most likely to result in the identification of “recalcitrant” employers with citable violations related to serious safety and health risks. It may be useful to implement different criteria on a trial basis as OSHA works to refine its approach.

## 2. **Resources Committed to the Enhanced Enforcement Program**

The Inspector General concludes that OSHA “has not placed the appropriate management emphasis and resources on this program to ensure indifferent employers were properly designated for this program and subject to EEP actions.”<sup>8</sup> In its response to the report, OSHA stated that inspections under EEP constitute a mere one percent of OSHA’s enforcement efforts.<sup>9</sup> We believe that the EEP could be more effective if more resources were re-directed to EEP from other, less effective enforcement programs.

For example, OSHA’s principal programmed enforcement program, Site-Specific Targeting (“SST”) inspections, represents a major commitment of agency resources, but is often misdirected. Under the SST program, wall-to-wall inspections are conducted of many employers

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<sup>7</sup> *Id.*

<sup>8</sup> OIG Report at 15.

<sup>9</sup> OIG Report, Appendix E.

whose operations do not pose significant risks to employee safety and health. Because the SST program targets employers based on reported injury and illness data, it often targets conscientious employers who report even minor workplace related injuries. It also operates on the unjustified assumption that injury and illness rates are an indicator of high-risk, noncompliant workplaces.

In many instances, this is simply not the case. Indeed, OSHA's own recordkeeping criteria require the reporting of injuries and illnesses regardless of fault as the Note to 29 C.F.R. 1904.0 expressly states, "Recording or reporting a work-related injury, illness, or fatality does not mean that the employer or employee was at fault, that an OSHA rule has been violated, or that the employee is eligible for workers' compensation or other benefits." But this is precisely the assumption upon which the SST program is based.

A comparison of citation rates from the SST program and inspections of participants in OSHA's Voluntary Protection Program ("VPP") illustrates the point. In connection with comments submitted to OSHA in August 2004 regarding the SST program, the U.S. Chamber of Commerce, the National Association of Manufacturers and the Retail Industry Leaders Association reviewed inspection records during 2003 and 2004 for the ten companies whose workplaces appeared most frequently on the 2003 SST inspection priority list (the "SST top ten").<sup>10</sup> Less than 45 percent of the 247 SST inspections conducted at the SST top ten yielded even one citation. In all, an average of 1.61 citations were issued per inspection, and more than

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<sup>10</sup> A fuller discussion of this review appears in the Comments submitted by these organizations by letter from my law partner Baruch A. Fellner to the OSHA Docket Office for Docket No. C-08 (August 11, 2004).

13 percent of these were withdrawn. Less than eight percent resulted in collection of the full proposed penalty, and no penalty at all was assessed for more than 40 percent of the citations.

As a point of comparison, the commenters also reviewed non-SST inspection records during the same period for the ten companies with the highest number of workplaces that have achieved VPP status (the “VPP top ten”). One of the requirements for VPP status is an injury and illness rate below the industry average.<sup>11</sup> Thus, if injury and illness rates are an appropriate predictor of OSHA violations, one would expect the VPP top ten to have far better performance during OSHA inspections than the SST top ten. The difference should be even more pronounced, in fact, because inspections at the VPP top ten are often limited in scope – complaint inspections or records-only reviews – in contrast to the wall-to-wall SST inspections to which they are being compared. OSHA inspectors actually issued citations in the VPP inspections more often than in SST inspections: more than 49 percent of the time at the VPP top ten, compared to 45 percent of the time for the SST top ten. The average number of citations at the VPP top ten is very slightly lower: 1.57 citations per inspection, compared to 1.61 at the SST top ten. Less than eight percent of the VPP top ten citations were withdrawn, however, compared to more than 13 percent of the SST top ten citations. When withdrawn violation claims are disregarded, the citation rate at the VPP top ten is actually higher: 1.45 citations per inspection, compared to 1.40 per inspection for the SST top ten. Moreover, less than 25 percent

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<sup>11</sup> See 68 Fed. Reg. 68475 (Dec. 8, 2003).



of citations at the VPP top ten resulted in no penalty, compared to more than 40 percent for the SST top ten.<sup>12</sup>

Notably, the Inspector General’s report found little overlap between EEP offenders and employers targeted under the SST system: “Only 40 sampled EEP qualifying employers were also targeted under SST.”<sup>13</sup> This further underscores the fact that the SST program is not effectively targeting high-risk employers. Given the universal recognition that OSHA has resource constraints and should focus its enforcement efforts on higher-risk worksites, we recommend that, in addition to better leveraging its resources through outreach and education efforts, the agency reallocate some of its enforcement resources from the SST program to EEP. We further recommend that the mission of the task force recommended by the Inspector General be expanded to include an examination of the agency’s enforcement priorities and the effectiveness of its various programs so that enforcement resources can be most effectively deployed.

### **3. Use of Creative Enforcement and Settlement Tools**

The U.S. Chamber supports the Enhanced Enforcement Program’s use of creative tools in the enforcement and settlement context to address likely hazards such as inspections of an employer’s other facilities when EEP efforts identify a violation that, by its nature, is likely to be occurring at the employer’s other facilities (*e.g.*, an unguarded machine to which employees are directly exposed). Relatedly, we support the re-direction of resources away from repetitive

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<sup>12</sup> This does not detract in any way from the achievements of VPP employers, which represent some of the safest and most exemplary workplaces in America. To the contrary, it shows that the employers being inspected under the SST are in many respects comparable.

<sup>13</sup> OIG Report at 7.

inspections of different worksites of the same employer where there is no basis to believe such inspections will lead to the identification of serious, citable hazards.

We also concur with the Inspector General’s recommendations designed to ensure appropriate communication within the agency so that Area and Region Offices can coordinate their Enhanced Enforcement Program efforts for national or regional employers whose operations cross jurisdictional lines, and for better reconciliation of data in the IMIS system.

We disagree, however, that the evidence presented in the Inspector General’s report supports the conclusion that “OSHA generally did not utilize enhanced settlement provisions effectively.”<sup>14</sup> As an initial matter, the metric used to justify this finding was that enhanced settlement provisions were not included in 153 of 188 “EEP *qualifying cases*”—which includes not only cases that OSHA properly designated as EEP, but also cases that the Inspector General believed should have been designated as EEP but were not.<sup>15</sup> The report already contains a finding that OSHA did not properly designate certain cases that qualified for the EEP,<sup>16</sup> so it should not include a separate finding that OSHA did not use enhanced settlement provisions in cases that OSHA did not believe were EEP—it naturally follows that OSHA would not include enhanced settlement provisions in such cases.

More substantively, this finding is inappropriate because neither the 2003 nor the 2008 EEP programs require OSHA to include any of the listed enhanced settlement provisions. The 2003 EEP memorandum states that “OSHA will *consider* including some or all of the following

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<sup>14</sup> OIG Report at 9-10.

<sup>15</sup> *Id.* (emphasis added).

<sup>16</sup> OIG Report at 4.

within the terms of the settlement agreement,”<sup>17</sup> and the 2008 Directive states that “OSHA shall include some or all of the following, *or other appropriate settlement provisions*, in the settlement agreement.”<sup>18</sup> The fact that such provisions were not included in any particular settlement agreement may, of course, reflect the discretion of OSHA and Solicitor’s Office personnel weighing each case on its merits—a one-size-fits-all approach to settlement provisions is not appropriate in light of the varying facts of each situation. While we concur with the report’s recommendation that enhanced settlement provisions should be listed in the informal settlement “template” as a reminder to enforcement and legal personnel, we caution against making any particular settlement provision mandatory and recommend that the region and area offices maintain their ability to exercise discretion given the individual nature of each worksite and each citation.

#### **4. The Inspector General’s Conclusions Regarding Workplace Fatalities**

Finally, I would like to address the implication of the Inspector General’s report that subsequent fatalities at employers enrolled in the EEP or that, in the view of the Inspector General should have been enrolled in the EEP, were the result of lax enforcement.<sup>19</sup> As OSHA indicated in its response, with which we concur, it is “an inappropriate and unsupported assumption to suggest that a fatality did or did not occur because a given workplace did not

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<sup>17</sup> *Interim Implementation of OSHA’s Enhanced Enforcement Program (EEP)* (Sept. 30, 2003), [http://www.osha.gov/pls/oshaweb/owadisp.show\\_document?p\\_table=INTERPRETATIONS&p\\_id=24649](http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=24649) (emphasis added).

<sup>18</sup> OSHA Enforcement and Complaint Directive (CPL) 02-00-145, *Enhanced Enforcement Program* (effective Jan. 1, 2008) (emphasis added).

<sup>19</sup> OIG Report at 3, 15; OIG Ex. 1.

receive an inspection.”<sup>20</sup> Indeed, the Inspector General’s report itself concedes, in its introduction, that “we cannot conclude that enhanced enforcement would prevent subsequent fatalities[.]”<sup>21</sup>

The report nonetheless repeatedly cites examples where there was a subsequent fatality at a worksite in the EEP or a worksite the Inspector General believed should have been in the EEP—but fails to state whether the subsequent fatality was caused by a similar violation, or for that matter, any OSHA violation at all.<sup>22</sup> Without this information, it is improper to conclude that the subsequent fatality could have been prevented by additional OSHA activity—because the fatality could have been caused by an unforeseeable hazard, employee misconduct, natural causes, or something else beyond the control of the employer and beyond the enforcement authority of OSHA or ability of OSHA to prevent. We believe that the suggested task force could further examine issues like this in the context of evaluating and designing the most effective criteria for the EEP in the future.

Thank you again for the opportunity to testify. I would be happy to respond to any questions you may have.

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<sup>20</sup> OIG Report, App. E.

<sup>21</sup> OIG Report, Highlights.

<sup>22</sup> OIG Report at 5, 7-8, 9-10, 14-15; OIG Report, Ex. 1.