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HEARING

BEFORE THE

SUBCOMMITTEE ON REGULATORY REFORM AND OVERSIGHT

OF THE

COMMITTEE ON SMALL BUSINESS
HOUSE OF REPRESENTATIVES

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DEPARTMENT OF LABOR ENFORCEMENT AGAINST SMALL BUSINESS

THURSDAY, JUNE 17, 2004

HOUSE OF REPRESENTATIVES,
COMMITTEE ON SMALL BUSINESS
SUBCOMMITTEE ON REGULATORY REFORM AND OVERSIGHT
Washington, D.C.

The Subcommittee met, pursuant to call, at 10:35 a.m. in Room 2360, Rayburn House Office Building, Hon. Edward L. Schrock, [chairman of the Subcommittee] presiding.

Present: Schrock and Bordallo

Chairman SCHROCK. Good morning everyone. The hearing will come to order.

Good morning, ladies and gentlemen. I will go ahead and begin. I know Mrs. Bordallo is on the way. I figure that by the time I finish with my opening statement, she will be here. If not, I will talk real slow at the end.

Congress has taken steps to try to make life a little easier for small businesses over the past eight years. In 1996, they passed the Small Business Regulatory Enforcement Fairness Act. In part, it said that each Agency of the government must establish a policy to provide for the reduction or waiver of civil penalties for violations of statutory or regulatory requirements by a small business.

In 2002, it continued to be the case that small business owners were seeing paperwork grow at a faster rate than their businesses' bottom line and Congress acted by passing the Small Business Paperwork Relief Act. That legislation required agencies to share enforcement statistics with this Committee. Some of the raw statistics we found were that the Department of Labor conducted enforcement actions against 143,000 businesses in the last fiscal year. Small businesses accounted for 66,000 of those actions. Over a 1,000 of those against small businesses came from the Employment Standards Administration, and over 12,000 came from the Occupational Safety and Health Administration, but these raw numbers don't alone explain anything to us and that is why we are having this hearing today.

The goals of the Department of Labor's regulatory agencies are to ensure worker safety, health and compliance with labor laws. The goal of this Committee is to make sure that the Labor Department is achieving its aims with the most efficient means, that are the least disruptive to well-intentioned small business owners. Reasonable people can disagree on over how much the Labor Depart-

ment should focus on compliance assistance versus enforcement. We will hear from the Labor Department as well as from some of the regulated community on how well that balance is being achieved.

People who own small businesses in the United States deserve fair treatment. They should be rewarded for making a good-faith effort to comply with these regulations. It is important to continue to work for more and better results for the small businesses in this country. The small business sector has been a constant source of economic growth and job creation in this recovery, and the government needs to work with, not against, America's small businesses. I have made it a personal goal to work towards creating an environment where small businesses can grow and prosper in this country. The owners of small businesses should be less worried about how to deal with government regulation than with how to grow their businesses and create jobs in America.

President Bush expressed, in his most recent State of the Union address, that our agenda for jobs and growth must help small business owners and employees with relief from needless regulation. I am confident that we can make significant headway towards the president's agenda while still insuring compliance with our nation's labor laws.

[Chairman Schrock's opening statement may be found in the appendix.]

Then let me thank those of you who are going to be testifying today. It is now my pleasure to yield the floor to the ranking member, my good friend of 30 years from Guam, the gentle lady Madeline Bordallo.

Ms. BORDALLO. Thank you very much, Mister Chairman. It is indeed an honor to be serving with you after all these many years and it is not every day that a freshman Member of Congress is able to be a Ranking Member.

This Committee has met time and time again to discuss the burdens federal agencies place on small businesses. It is a growing concern as our nation's small enterprises strive to help aid our country in sustaining a much needed economic recovery. A recent study reported that for firms employing fewer than 20 employees, the annual regulatory burden is nearly $6,975 per employee, almost 60 percent higher than that of firms with fewer than 500 employees.

This definitely is not right and something needs to be done to change it. Small businesses do not have the manpower or the extra money, as compared to their corporate counterparts, to be able to comply with the burdensome regulations imposed by many federal agencies. Most small firms simply do not have enough employees to weed through the paperwork or enough understanding of the new regulations to fully comply.

As we depend on these small enterprises to continue generating 75 percent of all new jobs, we must also recognize the challenges that they face and work to help them break down these barriers. In this hearing this morning, we are going to examine how the Department of Labor is living up to its commitment to lessen regulatory burdens facing small businesses. The Bush administration

has repeatedly expressed that reducing regulations facing small businesses is a priority. We share this goal and we are here today to assess its progress. Even with the passage of the Small Business Paperwork Relief Act, agencies are still not completely reporting their enforcement actions and the effect that they have on our nation's small firms.

The Department of Labor report, issued this past year, generated concern based on the large number of citations that had been issued to small businesses through their Agency. For example, this report stated that the Occupational Safety and Health Administration, better known as OSHA, issued 24,583 assessments of which 20,780 went to businesses with less than 250 employees. This resulted in a total of $51.7 million being assessed against small firms. In addition, the Mine Safety & Health Administration had 104,800 enforcement actions, of which 100,300 were for small penalties.

While the MSHA is not expected to necessarily reduce or abate penalties, they certainly are able to take certain factors into consideration before setting the burdensome penalties. These reports are a significant tool in this Committee's ability to assess the impact that regulations are having on our nation's small businesses. As this report indicates, the DOL needs to acknowledge the effects that these regulations are placing on small enterprises. They need to be innovative in the manner in which they communicate with small businesses and in being more resourceful in easing small firm's ability to comply with these regulations.

Our nation's small businesses need to know exactly what is expected of them. This was promised to them through the Small Business Regulatory Enforcement Fairness Act in 1996, and again in the Small Business Paperwork Relief Act in 2002. As members of the Small Business Committee, we must continue to provide oversight to insuring that government agencies are held accountable for the regulatory burdens that they place on our small businesses.

I want to thank the small business owners that are here today for taking time out of their schedules to talk with us and I look forward to hearing your testimony.

Thank you, Mister Chairman.

Chairman SCHROCK. Thanks Ms. Bordallo. During my Navy career, I was privileged to serve on the island of Guam. Jeanne and I went there in 1975 and our only child was born there. We have a picture of Randy when he was a month old and Ms. Bordallo was holding him. Never could I have imagined that we would be sitting together in Congress like this. We are truly friends from a long way back and it is really nice to have her with us this morning.

Before we begin receiving testimony from witnesses, I want to remind everyone that we would like the witnesses to stay as close to five minutes as possible. In front of you on the table, you will see a box that will let you know when your time is up. When it turns yellow, you have a minute left; and when it turns red, the trap door opens and away you go. And once that sign is on, we would ask that you try to wrap up as soon as you feel comfortable.

We have two panels today. On the first panel, we have the Honorable Robert Varnell, who is the Deputy Solicitor of the U. S. Department of Labor. We are delighted to have you here and the floor is yours.

STATEMENT OF THE HONORABLE ROBERT VARNELL, U.S. DEPARTMENT OF LABOR

Mr. VARNELL. Well, thank you, Mister Chairman. At the outset, I just wanted to say thanks for letting me represent the Department of Labor. I also wanted to just state that I have prepared a written statement, which I ask you to enter into the record.

Chairman SCHROCK. Without objection.

Mr. VARNELL. Thank you. Well, good morning and thank you again for inviting me here today to discuss how the Department of Labor is working hard to strike the appropriate balance between: on the one hand, fairly and effectively enforcing the laws with which Congress has charged us; and on the other, easing the regulatory burden on small business.

In striking this balance, we recognize that small business is the engine driving America's economy and that it must remain competitive. Our ultimate goal at the department is the protection of America's workers. We are striking this balance in three ways. First, our enforcement agencies provide high-caliber compliance assistance, specifically directed towards the small business community. I have brought a packet of compliance-assistance materials with me today, which I will share with your staff before I depart. Second, our agency is effectively and fairly enforcing their laws and regulations while taking into consideration, when appropriate, the size of the employer. Finally, our approach to rule making gives due consideration to small business needs.

Secretary Chao launched the compliance-assistance initiative in June 2002 with its primary focus on helping small business and she created the Office of Compliance Assistance Policy. Let me share a couple of examples of these efforts. The Department has developed "E-Laws Advisors," an interactive electronic tool that provides information on more than 20 DOL laws. The site receives hundreds of hits each day. We also operate a Toll-Free National Call Center, which has response capabilities in over 140 different languages and has answered more than three million calls since it was set up back in September 2001.

In addition to these department-wide efforts, our Agency has individually tailored a compliance assistance to achieve their unique missions. For instance, an FY 2003, OSHA's newly created Office of Small Business Assistance coordinated more than 31,000 nationwide on-site consultation visits to small businesses. OSHA's web site was recently named one of "Best of the Web" and receives more than 50 million hits each year.

Like OSHA, Wage Hours developed unique compliance- assistance tools aimed at helping small business. This assistance includes extensive public-awareness campaigns such as YouthRules! explaining child-labor requirements and fair pay, explaining the

Department's new white-collar overtime rules. The Wage Hour web site is visited more than 78,000 times per month and the Agency fields nearly 40,000 toll-free telephone inquiries per month.

When enforcement is required, OSHA and Wage Hour will continue to take into account the size of the business when assessing penalties. OSHA is required by the OSH Act to reduce penalties by up to 60 percent, depending on the size of the employer. Along with these reductions mandated by statute, OSHA and FY 2003 further reduced penalties in 71 percent of cases involving small businesses, totaling approximately $29 million in reductions. OSHA is also working to alleviate paperwork burdens on small business. For instance, OSHA's policy, for certain paperwork deficiencies, allows for no citations to be issued. If citations are issued to certain technical violations, no penalty, or a reduced penalty, will be assessed.

In addition, employers with ten or fewer employees, and that is 75 percent of all employers in most instances, are exempted from keeping injury and illness records. Similarly, Wage Hour takes business size into consideration as well. Reductions or waivers for assessments against small entities are, in most cases, already factored into the statutory and regulatory formulas used to compute penalties. Wage Hour field managers also can make pre-assessment and post-assessment adjustments when levying penalties against an employer. When it comes to record-keeping penalties, Wage Hour does not have statutory authority to assess penalties for record-keeping violations related to minimum wage and overtime, and it assesses only a very small penalty for child labor record-keeping violations.

In sum, when it comes to enforcement against small business, our agencies do not levy penalties simply for the sake of doing so. But make no mistake that we will pursue aggressive enforcement when it is warranted. Lastly, our approach to rule making makes sure that the interests of small business are taking into account. Our reg agenda is no longer a wish list and has been trimmed from 130 down to 79 items. OSHA, under SBREFA, provides a vehicle for small business participation at the regulatory-development stage by way of its Small Business Advocacy Review Panel.

Wage Hour says that small business, by clarifying out-dated rules, most notably and most recently, the FSLA's white-collar overtime exemption. During this rule-making process, DOL carefully weighed the concerns expressed by small business, which is disproportionaly affected by unclear overtime rules and the risks of costly litigation. The DOL published a final rule sensitive to the challenges of small business and is aggressively providing compliance assistance through its Fair Pay Outreach Program.

Thank you once again for allowing me to review how the DOL is working to strike the right balance for small business, and I would be very happy to answer any questions that you may have.

[Mr. Varnell's statement may be found in the appendix.]

Chairman SCHROCK. Thank you very much, Mr. Varnell. Let me ask a general question, which I might add to it: How does the Department of Labor and its subagencies decide to prioritize its resources as between compliance assistance and enforcement? What is the balance? And what is the procedure for first-time violators?

On Page 7, Fiscal 2003 has said that you conducted 12,366 inspections. I am led to believe, right or wrong, that of all those inspections, there were 12,366 penalties. Help me understand all that?

Mr. VARNELL. I can take the first part—

Chairman SCHROCK. Sure.

Mr. VARNELL. —of your question first, which is how we—

Chairman SCHROCK. Balance.

Mr. VARNELL. —prioritize between compliance assistance and enforcement. At the outset, I should note that the department does have to make those kind of choices as far as priorities because we have limited resources and one thing is clear. Over the last few years, really since the beginning of Secretary Chao's tenure at the Department of Labor, we have been putting increased emphasis on compliance assistance. It is much more of a priority I would submit than it used to be. The secretary launched the Compliance Assistance Initiative back in 2002; and along with that, she also established an Office of Compliance Assistance, which is devoted to coordinating these kinds of outreach efforts throughout our department, sharing best practices with our agencies, that kind of thing.

But I also want to make clear that while compliance assistance is being given a greater priority, it has not replaced enforcement. We see it really as a powerful tool that compliments enforcement, both of which are part of our arsenal, so to speak, to assist small business as well as the rest of the regulated community in ultimately not violating our workplace rules and protecting America's workers. Compliance assistance is our front-end approach, which we use to teach businesses what they need to do, so that they understand and so they don't violate laws to begin with. Enforcement we use on the back-end, if necessary.

So, again, it is a dual approach. We are trying to make them both priorities, but we really do see them as a complement to one another.

Chairman SCHROCK. If I am a small business owner and I am trying to get my business up and running, I am probably panicked that I am not going to make the bottom line at the end of the year, and the regulations are so voluminous that, at some point, something is going to slip through the cracks and he is probably going to violate something he doesn't even realize that he is doing. What would be wrong with the system that when you inspect them, if they are making mistakes and it is the first time deal. So, this is the mistake you made. You will have 60 to 90 days to correct it. We will be back again for an inspection and if they have not corrected it, then take legal action.

And I understand that incorrectly the first violation always results in a civil penalty, or some sort of penalty, financially or otherwise. Am I right or wrong, and if I am correct, why does it have to be that way? If we are truly trying to protect small business and

give them an equal share of the succeeding, it seems like the heavy hand of government does everything they can to beat them down and we just have to stop that.

Mr. VARNELL. Good point. The first thing I would like to say is that the actions we take are ultimately guided by the statutes that we enforce and we are obligated to do that; and the OSH Act mandates that we seek out and enforce the law against violations, which can include first-time violations. But I agree, and the department agrees as well, that there has to be some flexibility in acknowledging the situation on the ground, so to speak.

That being said, there is flexibility that goes into how penalties are ultimately levied. The OSH Act, itself, mandates that the size of the employer be taken into consideration. For those smallest employers, between one and 25 employees, the statute mandates that there be a reduction in penalty by 60 percent. On top of that, we can place a 10-percent reduction for first-time violations. There can also be a 15-percent reduction for good-faith efforts to comply with the law and also for quick abatement type stuff. So there really is flexibility there in how we address small businesses that are confronting regulations for the first time.

Chairman SCHROCK. As kind of a follow-up on that: What percentage of inspections result in enforcement action and what percentage of enforcement actions actually result in civil penalties?

Mr. VARNELL. I have seen some of this data and I think I can give you a snapshot view. Some of it fluctuates from agency to agency. The question, so that I can give you a complete response, I would like to follow-up in writing, if possible.

Chairman SCHROCK. All right.

Mr. VARNELL. But I do know, in the case of OSHA, something like approximately 30 percent of inspections result in the issuance of no citation because there is a finding of complete compliance, which is a significant percentage. And I know if you take that 70 percent, in which a citation is issued, there is another percentage on which no penalty is levied because the violation that is found is something other than serious.

Similarly, with the Wage Hour Division, I don't have an exact percentage for you but I do know that it is a very small percentage of inspections that ultimately result in the department bringing an enforcement action, or initiating litigation in federal district court to secure back wages, a very small percentage.

But, again, to completely answer your question, I would like to provide you some written statement.

Chairman SCHROCK. Can you help me with this. How do you measure success in your department? Do you include the number of inspections, the number of enforcement actions, the number of penalties imposed, the numbers of callers to your 800 numbers? Are there other numbers that you can use to gauge how well you are doing in this arena?

Mr. VARNELL. The first point I want to make is that we do track that kind of data on both the enforcement side of our approach and the compliance-assistance side of our approach, which again both are ultimately geared towards preventing workplace violations from occurring and protecting America's workers.

On the enforcement side, our agencies track the number of investigations that they initiate, the number of citations that they put forth, the number of violations that they cite, amounts of penalties, and some reductions in penalties are tracked. Similar with compliance assistance, we track the number of web site hits, the number of phone calls that we answer, the number of opinion letters that we respond to. We do track all of that kind of data, which is important because it is a good metric for letting us know how we are interacting with the public.

But the more important point, the thing that we are ultimately trying to track, which we use to measure success, is really the data that shows whether the missions of our agencies are being accomplished. So, for instance, at OSHA, we are always constantly looking at injury and illness and fatality rates to make sure that those lines are trending down, which they are. On the wage-hour side of things, we are looking to measure if we are decreasing the amount of child-labor violations; we are finding the amount of back wages that we recover.

So, ultimately, that is what we try to measure. I have had some experience with the Government Performance Results Act and I know that for agencies to be accountable for what they are supposed to be doing, they have got to be looking at the outcomes that we are producing and not just the outputs, the amount of paper we issue, the number of phone calls we make, that kind of thing.

Chairman SCHROCK. Ms. Bordallo?

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

Mr. Varnell, my question is obviously, to use OSHA as an example, your inspectors need to be thoroughly familiar with the latest business processes to accurately access the danger to workers. Does the department have a program to inform itself of advances in business processes, or safety techniques and how does it pass that information out to the field? And secondly, does OSHA give the business a certain number of days to make corrections before a penalty is imposed?

Mr. VARNELL. I do know that OSHA and OSHA officials, investigators, technical experts, they have a lot of interaction with the regulated community, with industry, with small business. OSHA has several various technical Committees in which representatives from industry, from labor, from small business, come in and talk about the issues that they are dealing with, which includes a lot of technical development, that kind of thing.

So there is interaction in that respect and it is filtered down to our OSHA officials on the ground. They have to know that information in order to conduct their inspections appropriately and make sure that they understand which hazards must be abated.

I know you asked me a second follow-up.

Ms. BORDALLO. I did, a follow-up: Does OSHA give the business a certain number of days to make corrections before they impose a penalty?

Mr. VARNELL. This is a question that I may need to follow-up on in writing to make sure that I answer it appropriately. Again, I do know there is flexibility in the penalties that are ultimately levied and it is a 15-percent reduction that can be allowed for if quick abatement is done. So I know that the Agency tries to work with small business owners to abate hazards. I will have to get back to you on that.

Ms. BORDALLO. Yes, the reason I asked is I was an inspector for our government on Guam and I took an OSHA inspector with me and he always gave them 10 days to make corrections before any kind of penalty. And then they would come back to inspect again after 10 days.

The other one is: You testified that the Department of Labor changed its overtime rule to respond to an explosion of class-action lawsuits. Can you tell us how many such suits were filed last year and can you tell us how many such suits were filed in 2002?

Mr. VARNELL. I have seen that kind of data. I don't have the exact numbers for the exact time periods that you have just asked for. I know that I can get you that data. One thing that I can say is that there are now more class actions involving alleged violations of the Part 541 White Collar Rules than any other kind of workplace class-action litigation and that includes even discrimination or equal- employment lawsuits.

So there really has been an explosion in this kind of class-action litigation. That is one of the driving reasons that the department felt like it needed to take this effort to update and modernize and clarify these rules.

Ms. BORDALLO. Can you get the figures to the Committee? I would appreciate that.

Mr. VARNELL. Absolutely.

Ms. BORDALLO. All right. Just one quick question, Mister Chairman. Can you tell us in detail what efforts the department makes to go out and find new businesses to make sure that they receive the proper education in compliance assistance? I ask because we have heard from the NFIB and other small business organizations that their members are often unaware of their obligation until an inspector shows up. Most of the compliance assistance that you reference in your testimony depends on a small business owner knowing that he or she needs more information.

So can you give me some answer on that?

Mr. VARNELL. It is a fair point and I think it relates directly to this dual approach that we are trying to develop, which is compliance assistance first and enforcement on the back end, if necessary. The department is taking myriad steps to try to get the word out

on what laws and regulations require of the regulated community. We recognize that if we are going to impose regulations on small business, then we have an equal obligation on our part to explain what those regulations actually require.

A lot of it is technology based. We have very good web sites up and running that are accessed all the time. Again, the statistic that I cited in my opening statement said that our OSHA web site alone is contacted 50 million times approximately each year. We have toll-free call centers where people can call in, and there are efforts that we take. Well, we take the initiative to reach out and there are public-awareness campaigns. I know our Wage Hour Division has at least radio spots, perhaps TV as well, where they try to explain what worker protections are required under the Fair Labor Standards Act, under child labor, that kind of thing.

So we are taking many steps to try to get the word out.

Ms. BORDALLO. I feel that it is a two-way street. We must cooperate and help out small businesses. Right now, the economy is such that our entire small business base is eroding because of overseas business. So, therefore, I feel that the Agency should go out of its way to assist small business.

Chairman SCHROCK. Let me just follow-up real quick. You said 55 million hits a year.

Mr. VARNELL. Fifty million.

Chairman SCHROCK. Fifty million. Basically, what are they hitting on? What are they looking for? Just a myriad of things or is there one specific area?

Mr. VARNELL. It is a myriad of things. There are compliance-assistance tools geared specifically towards small business. There is a Small Business Handbook that OSHA has put out, which is sort of a nuts and bolts primer on what is required of small businesses as far as complying with the OSH Act; and various forms that have to be submitted are also downloadable from the web site, the statutes and regulations themselves are accessible, so it is a wide variety.

Chairman SCHROCK. Are you able to tell who the businesses are that hit you?

Mr. VARNELL. I don't think so.

Chairman SCHROCK. Good. Well, I think that is good. I don't think you need to know.

Mr. VARNELL. That is a good point. One thing that I would like to emphasize there. We have put in place what we call our confidentiality protocol.

Chairman SCHROCK. Great.

Mr. VARNELL. Recognizing the fact that there does have to be a fire wall between companies that want to learn what they need to do in order to comply with our laws, making sure that any fears they have of enforced regulations coming later on will take care of that.

Chairman SCHROCK. Nobody wants to have to approach the federal government on anything. And if they think that they are going to have a surprise inspection because they came on your web site that would not be a good thing.

Mr. VARNELL. Absolutely.

Chairman SCHROCK. Let me ask you: The issue of enforcement priority has come up several times, are OSHA and your other internal agencies focused on the biggest safety and health risks, or are they focused on all potential threats without regard to risk assessment? And one of the people who is going to speak next in her testimony talks about the big four as being: falls struck by, cut in between, which gives me the willies to think about it, and electric shock. Those seem to be what 96 or 94 percent of all the problems. How much time do you focus on the rest of that?

Mr. VARNELL. All of our agencies have to target the high risks that they are charged with addressing. Again, because our agencies have limited resources, there is one statistic that I know our department cites that says: The amount of resources we have, we can only go out and inspect each—it would take us 175 years to inspect each workplace, so we have to make priorities and decisions and what risks we want to address.

As a couple of examples: With our Wage Hour Division, they target what are referred to as high-risk industries. Those are industries that it is known that they are problems with the recidivism and continued violations with wage-hour laws. It includes things like the garment industry, retail, restaurants, hotels. Wage Hour also puts a lot of effort into trying to protect low-wage workers, vulnerable workers, workers that are less likely to try to protect their own rights on their own because they don't have the tools or the know-how on how to do that. That includes immigrants, Hispanic workers, people with limited English proficiency.

You mentioned OSHA. OSHA has to make the same types of choices and they do target what they refer to as high-hazard industries, and that does include construction because construction sites can be dangerous and there are problems there that have to be specifically targeted. Machine guarding, OSHA runs a site-specific targeting program. Again, OSHA also does reach out to certain populations that are known to have higher illness and injury rates like Hispanics and immigrant workers.

So the short answer is: We do have to make those kinds of choices in our priorities.

Chairman SCHROCK. It seems to me that in the same testimony that she was saying that OSHA investigative—I am probably reading what she is going to read. OSHA's investigative construction fa-

cilities, as reviewed, the rate has fallen from 13.5 per 100,000 in 1994 to 11.3 per 100,000 in 2002. That is darn good, but it needs to go further I guess right now.

Mr. VARNELL. I don't have that exact data in front of me but I do know that our trend lines are moving in the right direction.

Chairman SCHROCK. Okay. Ms. Bordallo was talking about overtime rules. With regard to the new overtime rules, I noticed that in the final rules, it makes note several times of vigorous enforcement. Will small businesses have a period of time when they can learn about the rules beyond August or on the day that it becomes effective, or are you going to start enforcement actions right away? And tell me more about what your planned education effort entails because it may be awhile before these folks are going to be able to understand all this; and by the time that they understand it, they are going to be hit with a penalty?

Mr. VARNELL. Yes. The new rule does go into effect on August 23rd. When that happens, it is an enforceable regulation that we have to enforce. But we published that final rule on April 23rd, giving a 120-day lead-up period between the time of final publication and the effective date, which is an unusually long period of time.

Chairman SCHROCK. Where did you publish it? How would the small business owner in Guam, for instance, know that there are such regulations?

Mr. VARNELL. Very good question and we recognize that. On April 23rd when we published the rule, the department, and specifically the Wage Hour Division launched what I would submit is the most aggressive public-outreach campaign that we have ever done, and it is right up there and it is under the sort of title: Fair Pay. It was launched the very same day. It includes a very elaborate web site, which includes fact sheets on the various occupations that are affected by the new rule; there are video seminars that can be downloaded and watched; there are several PowerPoint presentations that could be downloaded and distributed by employers and employees.

On top of that, we have several, I would say tens or dozens of our officials out there talking about the rule, both career and noncareer; folks from our Wage Hour Division from Employment Standards Administration, from my office, the Solicitor's Office, the Secretary's Office, out on the street, so to speak, letting the public know what this rule is all about, so that they can be in a good position to begin complying with the rule once it goes into effect in August.

Chairman SCHROCK. I am guessing there are some small businesses that don't have web sites and are in remote areas, as I mentioned. Are they going to get a mailing? How will they know that they need to look these regulations up?

Mr. VARNELL. I don't know if there are any mailings. I don't believe there are but I would have to confirm that.

Chairman SCHROCK. Well, how will these businesses know?

Mr. VARNELL. I agree. It is a challenge for us to get the word out there fully. We are taking aggressive steps to do that. The rule has generated a lot of buzz in the press, so I think there is sort of general recognition that this rule is out there and that people need to understand what it is. But we have to get the word out there as much as possible.

Chairman SCHROCK. Ms. Bordallo?

Ms. BORDALLO. Just a quick follow-up. That was one of the questions that I was going to ask. Just exactly how do you disseminate information from your agencies, and related agencies, to these small businesses in rural areas, mom and pop operations? I am just curious. Now we are talking about the overtime rule and I jut wonder: How effective is this? And would they then be penalized for not following the rules and regulations?

Mr. VARNELL. Yes. The nature of some of our agencies, MSHA for instance, the Agency that oversees mining, safety and health, is really set up and designed to reach those populations in geographic areas where they are most needed. So there is some sort of input into rural areas, so that small businesses can understand—

Ms. BORDALLO. Some.

Mr. VARNELL. —what the new regulations—

Ms. BORDALLO. But not enough.

Mr. VARNELL. Well, there are steps that need to be taken. You know we can use technology; we can use the press to get the word out, that kind of thing. But I don't disagree that it is a challenge for us to get the words fully out there.

Ms. BORDALLO. I feel that if the department is going to embark on a new program, new regulations, then you have to have something in place where you are going to be able to disseminate the information to everyone. It is a tremendous job. There is no question about it. But it is something that should be in place before we begin to enforce rules and regulations.

Chairman SCHROCK. I think that is something this Committee needs to watch because in a lot of the areas that you represent, they are going to be so busy that they are not going to be reading newspapers, or watching television. They are going to be trying to keep their business going and if they don't they are certainly going to get caught and we have got to be real careful on how we do that.

In Virginia, where I live everybody has got a computer. I understand that. But in some of these remote, rural areas they don't and

I am afraid that they are going to be hit hard and those are probably the exact areas where we want to try to help from an economic standpoint, so we have got to be very careful.

Thank you for coming. We have a lot to think about here and we have got to make sure that we watch out after these folks and assist you all in any way that we can and make sure that these outlying areas get information they need so that they are not going to fall into a trap sometime because I know that happens and that is one of the things that I am going to be watching to make sure that that doesn't happen. I have had a few incidences of constituents at home who have had some rather uncomfortable dealings with OSHA and we are going to keep watching that. So I thank you and we will be in touch. Thank you very much.

Mr. VARNELL. Thank you.

Chairman SCHROCK. We will take about a three-minute break until the next panel is ready.

[Recess.]

Chairman SCHROCK. I am going to call the next panel. Let me introduce them. First we have Anita Drummond. Anita is the Director of Legal and Regulatory Affairs for the ABC, the Associated Builders & Contractors, and her previous service included serving as an advocate and assistant counsel at SBA's Office of Advocacy.

Next is Perry Bennett, the HES Director for Molded Fiber Glass Companies of Ashtabula, Ohio. I am probably one of three or four people in this room who knows where that is. He is representing the American Composites Manufacturing Association.

Last is Patricia Lee, the president and CEO of the National Institute for Urban Entrepreneurship. She was previously the managing vice president and National Director of Clinical Programs for the Institute of Justice.

We are delighted to have you here. The same rules apply, except this time there are three trap doors instead of one. We will begin with Ms. Drummond. The floor is yours.

STATEMENT OF ANITA DRUMMOND, ASSOCIATED BUILDERS AND CONTRACTORS, INC.

Ms. DRUMMOND. Good morning. I am Anita Drummond. I am with Associated Builders & Contractors. It is a pleasure to be here today. I ask that my formal statement be placed in the record.

Chairman SCHROCK. Without objection.

Ms. DRUMMOND. In addition, I would like to put in the record the excerpts from the IG's report from the U.S. Department of Labor that I have given your staff.

I failed to put that in my testimony because I had not had an opportunity to thoroughly review it prior to preparing my testimony, so I will make reference to it.

Chairman SCHROCK. Great.

Ms. DRUMMOND. First of all, I would just like maybe to address for brevity's sake some of the issues that came up when you met

with the Deputy Solicitor. Specifically, you asked how do you measure success.

The entire Department, including the Occupational Safety & Health Administration, has a strategic plan through 2008. Among the things they do is they evaluate the fatality statistics and then determine what types of goals they would have for reducing fatalities, as well as reducing injuries and illnesses.

One of the things that we are critical of is looking at fatalities, looking at fatalities as a blanket number instead of getting a little deeper and finding out what causes fatalities.

My testimony refers to what we call the Big Four. It has long been recognized by the Department as the major causes of fatalities in construction, with the exception of incidents that are not controlled by OSHA, and they do recognize that, such as automobile accidents. We would like to see OSHA focus its resources in addressing the Big Four fatality causes.

Another question that was raised was does the Department have the authority in an abatement environment not to issue a citation. The Deputy Solicitor represented that potentially 30 percent of the inspections do not receive citations. I suspect if that statistic is correct it is because the Department does have the authority not to issue citations.

Beginning under Assistant Secretary Joe Deere during the Clinton Administration, he implemented a policy that allowed paperwork violations to be waived and, therefore, no citation issued if it was abated on site. My suspicion is that continues today, and that is the reason that of their inspections there is some number that no citation is issued I just wanted to answer that question that was raised.

As to OSHA in general, OSHA has a very aggressive rulemaking agenda currently. Construction faces at least six rulemakings—beryllium, silica, hexivale and chromium, confined space, electrical transmission, and cranes and derricks. Six major rulemakings that are moving quickly through the pipeline. We would say that of those, probably cranes and derricks are the most significant because they directly go to some of the issues of fatalities.

However, as a result, I will admit that our construction industry has been sidetracked by those rulemakings and not able to fully put pressure on the agency to focus on compliance assistance measures that would better address the Big Four.

I would say that some of the things that we have experienced that are successful that should be elaborated on is training of compliance officers. In OSHA's fiscal year 2005 proposed budget, they asked for more money to help train the compliance officers—we would support that—and for compliance assistance.

The reason is construction is such a unique industry. It is not a set, steady workplace. You have to have different ways of going about protecting employees and training employees, so we would support actually a larger OSHA budget to train their compliance officers in construction.

Another thing that is critically identified by OSHA in its strategic plan and we agree is the growing community of non-English speaking workers, particularly in construction. We think that something like a public service announcement system where you

are actually educating workers directly on the major four fatalities in construction, or you could focus in other industries' major hazards, would be another effective way to increase employees' education, not just employers'. It would work both ways.

You can look to the 1970s when we did a major PSA campaign for litter in the United States. It raised a high level of awareness of the general public. It is a similar environment. Those kinds of efforts take money, but they do get to the heart of the issue, which is worker safety.

We are very pleased that ABC received a Susan Harwood grant wherein which we developed programs and did training for Hispanic workers. We do believe this is a critical area, and for our industry, as you can tell from my written testimony, workforce development is a critical issue.

On enforcement in general, I do make reference in my testimony to two cases that are moving through the judicial pipeline. One critical one is OSHA's effort to expand its authority to enforcement citations outside of what we believe is their statutory authority, and the Occupational Safety and Health Review Commission agrees.

O.S.H.A. has taken upon itself that if there is a single violation such as a fall—let us say you have a railing that is missing. Instead of having a single citation employer, any employers that may be also on the worksite could be cited per employee for that citation, so it is a multiplier effect, which makes it more costly for the business, but it also makes it more unpredictable.

You as an employer may have a fellow employer that does not have a handrail placed, and you are being cited for all your employees that are potentially affected by that. That is the type of cases that are moving through the court system, and the Secretary has appealed that to the Fifth Circuit trying to proceed with that enforcement authority.

On other Department of Labor issues I would like to focus on the Davis-Bacon Act enforcement. First I would like to point to the Inspector General's report, which I mentioned at the beginning of my oral testimony. The Inspector General has found the Department has spent $22 million over six years trying to fix the Davis-Bacon wage survey process.

Davis-Bacon is a law that establishes the rates of prevailing wages that will be paid on federal construction projects. It is a system where the Department sends out surveys asking employers to fill out the paperwork to determine what the prevailing wage should be in their area. No matter what comes back, whether it is statistically viable or not, the Department will establish those wages.

Those wages will not be published for 18 months, and in some cases you can view the Inspector General's report much longer. Those wages will be published, so they already become stale. They are not necessarily statistically viable. The Department spent $22 million in six years to have a system that is just about as bad as it has always been.

One of the things the Department looked at was relying on the Bureau of Labor Statistics, which already has a system in place to evaluate wages that are actually paid, and it is statistically viable.

The Department failed to adopt that system or a system that was like it. We recognize it is an expensive system to adopt, so why are we duplicating systems when we have another division in the Department of Labor that is already doing the surveys?

This investigation started because Congress brought it to the attention of the GAO in 1995. The Inspector General, in his latest report, was the most critical of that aspect of the Department of Labor than any other thing going on in the Department of Labor.

Finally, on Davis-Bacon, and it is more extensively described in my testimony. Under the Davis-Bacon Act, it is against federal policy for an employer to collect or to pay wages to a worker on federal work and then in turn that federal worker rebate any portion of their wages to an employer. That activity goes on on a daily basis in the United States.

Union workers pay into what is called a job targeting fund. It is a large pot of money, and you can run a union LM-2 form that are published on the Department of Labor's website. Union dollars, employees' money, are going back to employers to help union contractors underbid particularly small businesses that are bidding on federal work.

Even though it may be unattractive that they are underbidding small businesses, the more important issue is it is a violation of the statute of the Davis-Bacon Act for employees' wages to be cut in order to rebate employers.

The Department of Labor refuses to enforce this policy. It determined that it was against public policy and against the law during the first Bush Administration. The Court, the D.C. Circuit and the Ninth Circuit, have upheld against the Davis-Bacon Act, and yet the Department of Labor failed to enforce it.

Those are my three points. I will be glad to take questions.

[Ms. Drummond's statement may be found in the appendix.]

Chairman SCHROCK. Thank you very much.

Let me ask you. Is there anyone that remains here from DOL?

[No response.]

Chairman SCHROCK. They are all gone, right? That is too bad.

Mr. Bennett?

STATEMENT OF PERRY A. BENNETT, JR., MOLDED FIBER GLASS COMPANIES

Mr. BENNETT. Mr. Chairman and honorable Member, I appreciate the opportunity to talk to you this morning on behalf of the American Composite Manufacturers Association. My name is Perry Bennett, and I am the Health Safety & Environmental Director from Molded Fiber Glass Companies in Ashtabula.

A.C.M.A., just to familiarize you all, is a trade association serving the composite and cast polymer industry. We represent over 1,100 companies nationwide and more than 80 percent of which are small and medium sized businesses. Our members manufacture many familiar products such as tubs and showers, boats, farm equipment, underground storage tanks, parts for automobiles,

trucks, airplanes, power poles. It goes on and on. We make a lot of important products.

Our company was established in 1948 in Ashtabula, Ohio. In 1953, we began making the first Corvette made entirely of fiberglass. We have grown since then, but we are still a family-owned business.

We understand and appreciate the importance of workplace safety and the overall health of workers. We take the health and welfare of our workers very seriously. Protecting workers is not just good for business. It is the right thing to do.

We appreciate the role OSHA has played over the years in reducing workplace injuries. However, we do have some problems with the way OSHA conducts enforcement. In the words of the late President Reagan, "There is nothing wrong with America that Americans cannot fix." I believe in that, and I hope that this testimony today can help.

Our industry has some specific problems with OSHA enforcement, which include aggressive enforcement of antiquated regulations.

I would also at this time ask if I could submit my written statement for the record. I also have for the record something I am going to be referring to. This is a consensus standard from the National Fire Protection Association. I submit this for the record, too. I will give it to a staff member when I am done.

Chairman SCHROCK. Thank you. Without objection. So ordered.

Mr. BENNETT. Thank you.

Some of the specific problems we have is the enforcement of the antiquated regulations, some of which are 35 years old. The best example of this is Rule 1910-107, which deals with spray finishing using flammable, combustible liquids.

When OSHA rules were first published in 1969, they incorporated standards issued by the National Fire Protection Association, and this is NFPA-33. Since then they update them about every two years. This is the latest version in 2003.

However, OSHA continues to enforce 107, which is a 35-year-old rule. They continue to do that, even though, as I say, the standards on which the rule was originally promulgated was based on this, which has changed many times.

Similarly, Regulation 1910-106, which is based on NFPA-30, a similar standard. That is for the handling and storage of flammable liquid and combustible liquid. On several occasions, OSHA aggressively cited some of our facilities for violations of various sections of 106. In these cases, even the old OSHA standard did not apply to the lower hazards seen in our industry.

With a sizeable effort from our plant and our corporate staff, we were able to get these non-applicable citations dropped by OSHA by going to the OSHA area director. However, this effort involved over 40 hours of preparation at the plant safety level, 20 hours of preparation at the corporate level, overnight travel and a full day of the plant manager's time in order to dispute a rule that should not be enforced, and so we have taken quite a bit of our time.

Had we not prevailed at this level, we certainly would have had to hesitate taking it to court or going to a higher level because of the inability to recover legal costs and the costs of litigation.

Another member company was recently cited for violating 1910-107. I am referring to specific cases. Even though at one point OSHA back in 1996 wrote a directive, an interpretation of the compliance section saying if we comply with the consensus standard such as this rather than an OSHA standard in effect at the time of the inspection that clearly provides equal or greater employee protection, they will not be cited.

The fact is, though, that OSHA inspectors are citing members of our industry for not complying with the outdated standard. These citations may be overturned on appeal, but fighting OSHA citations is a burdensome process. Most small companies simply do not have the resources, the knowledge or the courage to take on a federal agency. Therein lies the problem of not updating these rules.

Another member company was recently cited for violating Section 107. The OSHA inspector was apparently not aware of the more specific consensus standard for composites manufacturing in NFPA-33 or the OSHA interpretation letter that I referred to earlier. The inspectors were not aware of the other standards, nor were they aware of the letter from OSHA.

We feel that better communications between the OSHA office—

Chairman SCHROCK. The OSHA inspector was not aware?

Mr. BENNETT. The OSHA inspector was not aware.

Chairman SCHROCK. Was not aware. Okay.

Mr. BENNETT. That was the problem. He cited them based on the rule that was not associated with our industry. It was the old rule, not the section that allows for a different standard. Again, these are processes, as was mentioned earlier, that have changed in the last 35 years and so they are citing based on some very old rules.

Better communications between the OSHA office and the field inspectors is important, and open communications between the inspector and the company being inspected is important. Very often we may know of something that they do not ask. Often times employers do not know what citations are issued until several week after the inspection when they receive them in the mail.

I know the OSHA field manual requires OSHA to notify us when they see a problem. Naturally you would want to know, especially if it is a very serious issue, a safety issue. We would want to know right away. Very often we do not know all of the citations we get until several weeks afterwards.

I think I could describe the mood or the tone of most OSHA inspections that I have witnessed as intimidating, especially to a small business. Intimidating is the word rather than communication.

Mr. Lowell Miles, a small business owner from Portland, Oregon, could not be here today. He wanted to come and testify. He is the former president of the ACMA and has worked for 20 years to reform OSHA and EPA and the NFCA Code. He has asked me to

relay to you his experience with the OSHA department last year when the NFPA-33 Committee formally asked the OSHA Director to update Rule 107.

The response from OSHA was that they see no reason to change the existing rule. Mr. Miles replied that OSHA is the only one remaining with that opinion since the Uniform Fire Code and the International Fire Codes have both been updated to include the new language in NFPA-33. All the other code setting folks believed that it was important to update their code, but OSHA said no.

Complying with OSHA standards would be much easier for the composites industry if the agency had in place regulations that reflected up-to-date practices and if OSHA field inspectors were better trained. Outdated OSHA standards also create confusion in the state labor administrations that adopt and enforce federal standards.

What happens there is the state offices do a lot of the enforcing in some of the states, but they are enforcing federal rules so there is more of a disconnect at the state level between the inspectors and the OSHA office who makes interpretations of rules, so I think there is a greater disconnect there in those states. They are even further removed from the OSHA interpretations than the federal inspector.

A.C.M.A. stands ready to work with OSHA and update their standards. Specifically, we will continue our efforts to convince OSHA to adopt the update version of this, and I think this is only one example. This is an example that we know about in our industry.

I think training is important for the field inspectors. Referring to some of the statements earlier, once an inspector comes in they are bound to issue a citation if they see something wrong. I do not ever remember getting 10 days. I wish we could get 10 days to fix something, but I do not ever remember getting any leeway in that manner.

Thank you for allowing me to make these statements today.

[Mr. Bennett's statement may be found in the appendix.]

Chairman SCHROCK. What I hear you saying, and correct me if I am wrong, but what I think I heard you say was that sometimes the business owner who is being inspected by OSHA understands the regulations, the up-to-date regulations, better than the OSHA person doing the inspecting?

Mr. BENNETT. Unfortunately that happens, and I think probably more so in the larger companies where you have experts on board.

Chairman SCHROCK. And it sounds like each OSHA person is allowed to interpret their regulations as he or she sees fit?

Mr. BENNETT. Yes, I think until you go to the higher level. Very many times we have been very successful at going to the area director. We are a little bit larger business. We have people on staff like myself that are aware of these issues. You can go to the area director.

He talked about getting these reductions. The only way you get reductions is to ask within 15 days for a meeting with the area director. I think many small businesses are unaware of that. They are unaware of the possible reductions, and they are afraid to do anything except pay their fine.

What can happen is you could spend at least $50,000, one of our industries, putting a sprinkler system in that is beyond the amount of sprinkler system they need to put out fires from our processes. In so doing, you could spend $50,000 or $100,000 just because you are doing what OSHA has told you you have to do.

Now, again the larger businesses are aware of this and have the expertise to go in there and say look, NFPA-33 applies. There is a letter that you guys put out in 1996. We are aware of that. A lot of the smaller businesses just do not know that, and they are unaware. They get hurt the most.

Chairman SCHROCK. Thank you.

Ms. Lee? Thanks for being here.

STATEMENT OF PATRICIA H. LEE, NATIONAL INSTITUTE FOR URBAN ENTREPRENEURSHIP

Ms. LEE. Good morning. My name is Patricia Lee, and I am the president and CEO of the National Institute for Urban Entrepreneurship, a non-profit, Washington, D.C. based, public interest organization. Thank you, Mr. Chairman, Ranking Member and other congressional staff for inviting me to testify before this Subcommittee today. It is truly an honor.

I ask that my written statements also be included in the record.

My comments about the Department of Labor's enforcement actions and their impact on small business are derived from my own personal observations and experiences over 20 years as an attorney advocate for entrepreneurs, small and large businesses, and as a third generation entrepreneur.

I started with my grandfather's craft and jewelry business in Chicago and my mother's After Five cosmetics and smaller businesses and my own serial businesses from book vending to carpet cleaning to a thriving law practice in Illinois.

The entrepreneurs that I have represented and converse with on a daily basis would be considered micro entrepreneurs—the smallest of the small business by SBA standards. Generally they hire fewer than five employees, are entry level entrepreneurs in urban communities, are people of color and typically have gross receipts well under $500,000 annually.

Although they may understand the intricacies of their own business, they rely heavily on pro bono attorneys because they lack access to capital to pay private attorneys or to hire in-house legal counsel. Although these entrepreneurs typically will be outside of the jurisdictional threshold of the U.S. Department of Labor's enforcement actions, the regulatory thresholds do not provide the greatest of comfort.

Both OSHA and FSLA have incomer threshold tests with FSLA further requiring a volume test, $500,000 gross receipts, to qualify for enterprise coverage. It is conceivable that a fledgling entre-

preneur could unknowingly meet the incomer's test and, if the business is in a high cost district, such as New York, Chicago or Los Angeles, could exceed the $500,000 in gross receipts, but still yet not be profitable and lack an appreciation or basic understanding of the federal laws of which they must comply.

My first recommendation would be for this Committee to evaluate the federal jurisdictional threshold and consider exempting small businesses by increasing the volume test to in excess of say $300 million in gross receipts.

Second, I am aware of the regulatory burden on small businesses and have reviewed a report authored by Drs. Mark Crane and Thomas Hopkins for the SBA's Office of Advocacy. The authors' $7,000 regulatory burden per employee does not surprise me, and it may even be too low for the smallest of the small entrepreneurs that do not operate at the same efficiency levels as larger corporations.

Further, with respect to the regulatory cost, one can only wonder where these costs will come from, especially when profit margins are razor thin or non-existent. Unfortunately, it may reduce employment, wages, a critical capital expenditure or investment, such as health care benefits, or create a future problem for the non-compliant business.

Mr. Chairman, my father, who learned frugality from serving in the Navy as yourself, but in World War II, reminded me from time to time—

Chairman SCHROCK. Thanks for reminding me I was not in World War II. That is very nice.

Ms. LEE. —money does not grow on trees.

Chairman SCHROCK. Money does not grow on trees. If I heard that once when I was growing up, I heard it a million times.

Ms. LEE. And that estimated $7,000 presents a lost opportunity cost for the business, the worker and the owner.

Third, enforcement actions appear to be driven by crisis rather than proactive education, outreach and collaboration. The wisdom of enforcement directed at a business after an alleged problem has occurred might make the consuming public feel better, but it does not protest the workers' health and safety, nor does it save the business.

More likely than not, it stigmatizes and traumatizes the business owner, whose quest for the American dream quickly turns into an American nightmare. For this reason, I recommend that the Department of Labor exhaust proactive educational remedies, collaborate with the state and local agencies and undertake appropriate outreach in lieu of crisis oriented enforcement action.

Fourth, my skepticism about burdensome federal labor regulations enforced vigorously is that, with all due respect, the regulatory enforcement is generally not as effective as it should be. Why create and then enforce countless regulations that are too complex for the ordinary person, unreasonable under basic standards of common sense and too costly for entry level enterprise?

Aside from the well-meaning objective of worker protection, is not the real impact business failure?

Mr. Chairman, it is time to reevaluate the purpose and the rationale behind the regulations and these vigorous enforcement actions. If the stated purpose does not fit the end, then consider repealing or changing the regulation, as well as altering the approach.

Fifth, it is my opinion that both House Bill 2728, concerning the allowance for small business to obtain compliance extensions, and House Bill 1583, which relates to the allowance of attorney's fees when a small business prevails, are both excellent ideas and would be beneficial.

There is nothing better than a well-run, safe and profitable business, one that motivates and inspires its workers. Individuals who have the privilege and honor of working for a great company such as this truly appreciate it and are better for it. These good businesses are responsible to their consumer, to their workers and to their investors.

Unless small businesses are allowed some flexibility to grow and are assisted with relevant education and appropriate outreach, consumers, workers and investors may miss out on the next amazing business enterprise.

Thank you.

[Ms. Lee's statement may be found in the appendix.]

Chairman SCHROCK. Thank you very much. You are dead right. Our fathers must have grown up together.

Ms. LEE. Possibly so.

Chairman SCHROCK. We will compare notes.

As you can see, we are going to have votes here, but what I am going to try to do is just ask some rudimentary questions so we do not have to hold you all because I have a feeling, based on the number of bells—she does not have votes?

Let me ask all three of you. I am going to ask all three. Ms. Drummond kind of alluded to it. Any comments on the testimony of Mr. Varnell? I did not mean to put you on the spot.

Mr. BENNETT. I think I did make a comment.

Chairman SCHROCK. Please.

Mr. BENNETT. My question that I had for him, and I did not have the opportunity to question him, was he was asked the question, and I think he sort of dodged it, regarding how much emphasis is put on outreach or compliance assistance—

Chairman SCHROCK. Yes.

Mr. BENNETT. —versus enforcement. I do not think he answered that. I wondered how many dollars they spend on enforcement and how much of their staff or efforts goes towards enforcement versus outreach.

I think it is true. They do have a great website. They have a wonderful website, but many of the businesses, like you said a little earlier, do not have access to the website, nor do they have time to sit there and cull through it during the day. They have other things to do.

An outreach program I think is a very important thing, and I think—

Chairman SCHROCK. Yes. I think when I asked that there was a gray area there. That is the area where I think businesses are in trouble, and I think that is a problem.

Ms. Lee?

Ms. LEE. I heard an admission from you that there is a problem.

Chairman SCHROCK. Yes.

Ms. DRUMMOND. I can give you some insight into that. Fiscal year 2005 budget, which is not that much over prior years, they have 358 FTEs dedicated to compliance outreach, $71 million. On the enforcement side you are looking at $171 million and FTEs of 1,581. Full-time employees. Sorry.

You have 1,500 full-time employees on enforcement and 358 on what they call the federal compliance assistance activities.

Chairman SCHROCK. That does not bode well for small business.

Ms. Lee?

Ms. LEE. We are very happy about many of the changes that are occurring within the Department of Labor, but also we thought that outreach definitely needed to be improved not only in the rural communities, but also in urban areas.

Chairman SCHROCK. Let me ask Ms. Drummond. In your written testimony you state that OSHA is not giving adequate attention to educating businesses about major hazards that exist. That struck me when I saw that last night. How should those priorities be changed to fix that?

Ms. DRUMMOND. Respectfully, I only address construction.

Chairman SCHROCK. Right.

Ms. DRUMMOND. We are spending a great deal of time on newly identified hazards by OSHA, and instead of going back and looking at the fact that 94 percent of the investigated fatalities in construction, and you can also look at their citation lists which fall in line that we have the Big Four. We would prefer that the agency spent more time on that.

It is very true that they are increasing the number of people they are training, especially train the trainer. I often say something that the business community does not like. OSHA needs more money. Their budget has not stayed current with the number of employers doing different systems. They rely very heavily on the website. It is because it is inexpensive. I respect that.

Chairman SCHROCK. I do, too.

Ms. DRUMMOND. They are doing the best they can with their resources.

Chairman SCHROCK. But there are still businesses that do not have access to that.

Ms. DRUMMOND. Right. Getting to the point, they really need more money for that.

I would like to take a page out of the Employment Training Administration. They are doing outreach to high school counselors on training and availability of training to students. They are writing letters to every high school counselor.

If you use that as they are taking a whole different approach, OSHA could do something, and there are plenty of associations out there of business license county administrators and so forth. When someone gets a new business license, there may be passages that the Department could put together and give to them to send.

Those are costly endeavors, but endeavors that may be valuable just the same.

Chairman SCHROCK. Let me ask one thing. In what capacity do ABC's members feel OSHA inspectors are not sufficiently knowledgeable about their industry, and what can we do about that?

It sounds like they are all interpreting things differently, and obviously they do not understand. You might have 10 inspectors, and they all come in with different solutions.

Ms. DRUMMOND. ABC recognizes that the compliance officers are under the gun because they have to inspect all types of sites. We would really like to see them specialized. We would really like to see them trained when there is a new regulation out on how it would apply to construction.

I point to steel erections. When steel erection standards were finished they invited the industry folks, union employers alike, to come in and train the compliance officers. We bore the cost as well as them. We shared the cost.

I think that that should be a requirement that compliance officers understand the application of regulations as they apply to an industry.

Chairman SCHROCK. There have been a few who feel OSHA is more concerned with helping businesses comply with the letter of the law or achieving better worker safety and health outcomes.

Mr. BENNETT. I think in fairness, inspectors that I have encountered, and I speak from my own experience, really do want—I mean, they are trying to help.

I think most inspectors I have encountered are very conscientious. They are really trying to do the job right. I think the problem is the policies and the rules under which they have to operate.

Chairman SCHROCK. They are operating under regulations that tie their hands. Yes.

Mr. BENNETT. They may be more focused on every dot and tiddle here in the rule rather than focusing on major issues at the work-

site. That is probably because of the procedures and policies that are in place.

Chairman SCHROCK. Right. Ms. Lee, in your work with urban entrepreneurs, do you find that these businesses are fully aware of the regulations that affect their business? When they are aware, how do they find out about them?

Ms. LEE. No, typically they are not fully aware of the regulations.

Chairman SCHROCK. How do they find out about them?

Ms. LEE. Really, the only way they do find out—there are two ways. Some are connected to the Internet, but most are not. Others attend various outreach—for example, legal services attorneys or public interest attorneys that are business oriented will provide some training and some help, but typically they are not aware.

Chairman SCHROCK. Folks, I am going to have to leave. I am going to turn this over to Ms. Bordallo. I am sure she has a lot of questions from the Guam perspective. I would like to be here to hear them since I love Guam, but let me thank you all.

Believe me, what you are saying is not falling on deaf ears because we do not hold these hearings just to kill time during the day. We have these hearings because we want to hear from you all so we can fix these problems. I hear it every day from the constituents I represent.

Slowly, but surely, we will keep chipping away at it and chipping away at it. The further we can chip away at the bureaucracy who does this, the better for everybody. Rest assured, action will be taken on the things you have spoken about. I really appreciate it.

I am going to turn this over to Ms. Bordallo. I have to go do my duty and vote. Thanks.

Ms. BORDALLO. [Presiding] Thank you very much, Mr. Chairman.

Before he leaves, I just want to say that I thought he asked a very, very important question earlier, and that was is there anybody here from the Department of Labor. It is unfortunate that the Deputy Solicitor is not here because I think these are the concerns they should listen to and certainly try to rectify some of the problems within the agencies.

Be that as it may, I do want to comment to you, Mr. Bennett. You mentioned about the 10 day period that our OSHA inspectors give our people. Well, I represent a very compassionate community.

Mr. BENNETT. Great.

Ms. BORDALLO. They feel for small business. In Guam, about 95 to 97 percent of our businesses come under the category of small business.

My first question is to you, Anita. OSHA's use of per employee citations for a single violation is very interesting. I presume what

they are doing is leveraging the statutory penalty to make it as high as possible to deter violators.

Could you explain how that worked in the case you mentioned and whether in your opinion that bends the authority granted to OSHA by Congress? If the court upholds this technique, what do you see as the worst case scenario?

Ms. DRUMMOND. In all due respect to the Secretary of Labor, she was confronted with a very difficult situation. She had what she represented was a very bad actor who engaged in egregious behavior. It was a contractor that exposed its workers to asbestos. In that situation, he was subjected to both local and federal citations.

In an effort to punish the worst actor, the Department of Labor cited the employer for violations. Instead of saying you have a single violation, let us say personal protection equipment—let me use a better example. Maybe there was a protection to seal off an area. Instead of just having a single citation for failure to seal off an area, it was multiplied by every employee that was exposed to it.

The Occupational Safety and Health Review Commission held that she had exceeded her statutory authority. You may only give citations for an incident of a violation, not an incident of a violation for every employee exposed.

The concern is that while it was an admirable effort on her part to try to protect workers, it was beyond her statutory authority. When the Occupational Safety and Health Review Commission rejected their interpretation that they could expand their authority, the Department of Labor has now appealed that to the Fifth Circuit.

Importantly, the Department had interpreted its authority differently in an earlier Administration. I believe it was a different Administration. Earlier the Department had interpreted its authority differently.

This arbitrary and capricious interpretation directly reflects the fact that the system should be predictable. It is an example of how it has become unpredictable as the Department tries to stretch its authority beyond the statutory mandate from Congress.

The worst case scenario is, and it does happen. This particular behavior does occur, but, just as stated before, most employers negotiate down their fines and move on. You cannot afford to challenge a citation, even if you do not always believe it is legitimate.

Worst case scenario for construction sites. You have an employer that would have a violation. Maybe it is a lock out/tag out violation. You must lock down and tag a particular type of equipment. You could conceivably get a citation for every worker on the site, whether it was the employer who controlled that or not.

I am Employer B. Employer A has a piece of equipment that is not in compliance and has not been labeled properly. That citation could go for every worker that is around that equipment of that employer plus any other employers on the site.

You asked for worst case scenario. I am not suggesting the Department would take it as far as that, but I do believe they would take it that far if they thought the violation was something they thought was a significant hazard. While that may be a respectable position to take for worker safety, it is probably outside of her statutory authority.

Did you have a second question?

Ms. BORDALLO. No. I think you covered it.
Ms. DRUMMOND. Okay.

Ms. BORDALLO. Thank you very much for the explanation.
The next one, I have a question for Perry Bennett. I found your testimony very interesting, and it makes me wonder why bother to have standards or have an agency like OSHA if they cannot be bothered to modernize their standards.
Am I correct in assuming, and I think you said that to comply with the law, they want you to go back and use an outdated 35-year-old standard. Is that correct?

Mr. BENNETT. Yes. They are citing people for violations of a 35-year-old standard.

Ms. BORDALLO. And they are perfectly acceptable with that?

Mr. BENNETT. Yes. It was kind of shocking to me to hear that the OSHA director, who is not any longer—

Ms. BORDALLO. Do you feel they are embarrassed over it?

Mr. BENNETT. There did not seem to be any embarrassment, no. I do not think so. I do not understand why, but that is what has kind of got us puzzled over this.

Ms. BORDALLO. That is right. If they are not embarrassed, I guess they are not thinking of changing anything.

Mr. BENNETT. No. I think it is much easier for them to try and regulate based on interpretation, but interpretation does not go to due process of law, which is what this country is all about.
Interpretation is easier because you know you have to go through the Federal Register and public comment and so on, so it takes time and effort to do that.

Ms. BORDALLO. I cannot imagine any agency or any organization functioning with standards that are 35 years old and have not made any updates. I mean, that is incredible. The whole world has changed in 35 years. Certainly you would have to add or amend the regulations.
Perhaps this is something the Committee should—

Mr. BENNETT. The worst case here too is where a small business would invest a lot of money to put in a sprinkler system beyond the protection that he needed. Even the interpretation says it has to be equal to or greater than the coverage that is in the existing rule.
If you are going the other way where it is determined your processes are safer than previously thought or safer than they previously were, that interpretation would not help you any.

I guess the point I am trying to make is that a larger business with more wherewithal is going to fight this and perhaps win. The small businessman is more likely to say well, I have to do what they say, and I have to pay up and go on with business. I mean, that is why they probably would suffer more.

Ms. BORDALLO. Tell me this. Would the safety standards include ADA requirements? I mean, this only occurred when was it? ADA requirements were in the 1990s, right? Yes.

Mr. BENNETT. Yes. I think they have updated many of their statutes.

Ms. BORDALLO. In other words, they have updated?

Mr. BENNETT. Certainly, but this particular one is—

Ms. BORDALLO. Is 35 years old. I was just curious.

Mr. BENNETT. They do not see any reason to update it. Not only have we asked them, but even the NFPA-33 Committee has asked them to update their code. They see no reason not to.

Ms. BORDALLO. But this particular one. Yes. All right. Thank you, Mr. Bennett.

Ms. Lee, your point about more proactive outreach is an interesting one. You listened to Mr. Varnell's testimony about all the compliance assistance programs they have at the Department of Labor.

Did they strike you as being passive in any way? By that I mean that a business has to know it has an obligation before it can go to DOL and find out about it. If they do seem passive to you, how would you suggest that the Department of Labor do a better job of finding businesses before disaster strikes?

Ms. LEE. Yes, I agree. Passive, but also insensitive. That is what I took because typically the way I see most small businesses, especially when it is urban or rural communities, they want to do the right thing there. They want to do the business to the best of their abilities.

I was very skeptical about how much outreach is actually occurring. In my written statement I talked about a New York case where a worker died and then OSHA appeared. That particular community was a Chinese community. I questioned how much outreach had occurred in that community with that particular builder and his workers.

I think that much more could be done in terms of outreach in addition to the whole website development, and much more can be done in terms of educating those small businesses.

Ms. BORDALLO. You brought up something about a Chinese worker. Does the Department of Labor make any effort to use the different languages in trying to educate the small business community?

Ms. DRUMMOND. The Department of Labor currently has planned July 22, I believe, the Hispanic Summit, and they are trying to identify ways to reach at least the Hispanic community. That is a very big focus for them currently.

I can say I know that in the construction industry our sectors, all the various sectors, National Association of Home Builders, I know we have done Spanish language materials. Again, this would be research intensive, but as an attorney I am always concerned about us translating regulations into a different language because we may change the definitions unintentionally.

Of course, it would be wonderful if we could get some guidance—more guidance—in different languages. I think there has been different outreach, but it has been on a very limited basis.

Ms. BORDALLO. Speaking of different languages also brings to mind the fact that I do not know what the percentages are. The representative from the Department of Labor did not have a lot of the statistics with him. I do not know what the percentage of foreign owned—not so much foreign, but American nationals, you know, other ethnic groups.

What is the percentage of small business owners? There must be many. Do you have any idea?

Ms. DRUMMOND. The Office of Advocacy keeps a lot of those statistics. I know some of the women-owned business statistics a little bit, but not—

Ms. BORDALLO. What are those?

Ms. DRUMMOND. Women-owned businesses are primarily self-employed individuals, so they will make up something like 10 to 20 percent, depending on how you calculate it.

I do not know what the minority numbers are. This is something that businesses always complain about, paperwork, but one of the most valuable tools that we have to answer questions like yours is the business census that is conducted I believe every four years by the Bureau of the Census. The last was done in 2000.

That is a great opportunity to collect critical information from business owners. It is statistically viable. It is done on a broad basis, and it can help Congress, as well as agencies, guide policies that are directed to these very communities.

Ms. BORDALLO. Absolutely. I agree. I think these statistics should be sought after. We need to have them. I know just from my small territory, we have many minority groups that have their own small businesses. It must be the case here in the United States as well.

Ms. DRUMMOND. There are many groups, such as the U.S. Black Chamber of Commerce that would have all that.

Ms. BORDALLO. They would have those numbers.

Ms. DRUMMOND. They are very good with outreach to those communities, as well as Ms. Lee's organization, but the Small Business Administration keeps those statistics based on census data.

Ms. BORDALLO. Are there any other comments that any of you wish to make?

I would like to thank you for coming here this morning to testify. There being no further business, the meeting on small business, the Subcommittee, now comes to closure. The meeting is adjourned.

[Whereupon, at 12:15 p.m. the Subcommittee was concluded.]

Statement of Ed Schrock
Chairman
Subcommittee on Regulatory Reform and Oversight
Committee on Small Business
United States House of Representatives
Washington, DC
June 17, 2004

Good morning, ladies and gentlemen. Congress has taken steps to make life a little easier for small businesses over the past 8 years. In 1996, we passed the Small Business Regulatory Enforcement Fairness Act. In part it said that each agency of government must establish a policy to provide for the reduction, or waiver of civil penalties for violations of statutory or regulatory requirements by a small business. In 2002, it continued to be the case that small business owners were seeing paperwork grow at a faster clip than their businesses' bottom lines and Congress acted by passing the Small Business Paperwork Relief Act. It required agencies to share enforcement statistics with this Committee. Some of the raw statistics we found were that the Department of Labor conducted enforcement actions against 143,000 businesses, in the last fiscal year. Small businesses accounted for almost 66,000 of those actions. Over a thousand of those against small businesses came from the Employment Standards Administration and over 12,000 of them came from the Occupational Safety and Health Administration.

But these raw numbers alone don't explain anything to us. That's why we have convened today's hearing. The goals of the Department of Labor's regulatory agencies are to ensure worker safety, health, and compliance with labor laws. The goal of this committee is to make sure that the Department is achieving its aims with the most

efficient means that is the least disruptive to well intentioned small business owners. Reasonable people can disagree over how much the Department should focus on compliance assistance versus enforcement. We'll hear from the Department as well as from the regulated community on how well that balance is being achieved.

Small businesswomen and men in the United States deserve fair treatment. They should be rewarded for making a good faith effort to comply with regulations. It is important to continue to work for more and better results for the small businesswomen and men in this nation. The small business sector has been a constant source of economic growth and job creation in this recovery and the government needs to work with, not against America's small businesses.

I have made it a personal mission to work towards creating an environment where small businesses can grow and prosper in this country. Small businesswomen and men should be less worried about how to deal with government regulation, than with how to grow their businesses and create jobs for Americans. President Bush expressed in his last State of the Union how, "our agenda for jobs and growth must help small business owners and employees with relief from needless federal regulation." I am confident that we can make significant headway toward the President's agenda while still ensuring compliance with our nation's labor laws.

I thank our witnesses for being here today. Next, we'll have any additional opening statements.

Opening Statement
Congressman Steve King
Department Of Labor Enforcement Against Small Business
Thursday, June 17, 2004 at 10:30 am
2360 Rayburn Building

Thank you, Chairman Schrock, for holding this hearing today. As a small business owner myself I recognize the burdens of federal regulations on small business and I commend you, Chairman Schrock in your tireless effort to make small businesses more competitive by lightening the burden of federal regulations.

My personal business experience of 28 years mirrors that of many in our nation. When I was first starting my business, I naively thought that producing a quality product at a competitive price was all that I needed to succeed. I borrowed 100 percent and bought an old bulldozer and went to work. I quickly learned that I'd rather be lucky than good. I came to realize that 43 separate agencies regulated my business. There was absolutely no way anyone could operate in compliance with all of their regulations at any given time. Our government has produced a punishing series of

roadblocks to entrepreneurship. I favor reforms that will permanently improve the legal, regulatory, health care and retirement systems, while lowering the anti-growth and costly job-destroying burdens the government currently imposes.

The time for Congress to intervene and stop the foolishness of over regulation that oppresses the entrepreneurial spirit of Americans is long overdue. Congress must not be complacent and we must be proactive in order to save our small businesses.

I look forward to today's hearing and listening to the testimonies of our witness panels. As I look through the list and see the companies and industries that you are here to represent, I know that we are all working to make America as productive as possible and I applaud you for your dedication.

I thank you, Mr. Chairman.

STATEMENT OF ROBERT C. VARNELL
DEPUTY SOLICITOR
U.S. DEPARTMENT OF LABOR
BEFORE THE
SUBCOMMITTEE ON REGULATORY REFORM AND OVERSIGHT
COMMITTEE ON SMALL BUSINESS
U.S. HOUSE OF REPRESENTATIVES

June 17, 2004

Good morning, Chairman Schrock and members of the Subcommittee. Thank you for inviting me here today. I would like to begin by discussing how the Department of Labor (DOL) has successfully implemented compliance assistance programs to achieve higher levels of regulatory compliance by small businesses while reducing regulatory burdens. Secretary Chao underscored the importance of these programs when she stated at DOL's Compliance Assistance Summit last year:

> We start from the fundamental proposition that our mission is to protect workers. At the end of the day, that is always our most basic responsibility. The reason we care about compliance assistance is that it is a powerful additional tool to help us protect workers.

In particular, I welcome the opportunity to review how the Occupational Safety and Health Administration (OSHA) and the Employment Standards Administration's (ESA) Wage and Hour Division (WHD) provide high-caliber compliance assistance specifically directed toward the small business community and effectively and fairly enforce their laws and regulations while taking into consideration, when appropriate, the size of the employer. In all these efforts, DOL takes very seriously its obligations under the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

At the outset, let me emphasize that the Department recognizes the important contribution of small businesses to the economy.[1] We also recognize that complying with our regulations requires businesses, especially small businesses, to use resources they might prefer to apply to other aspects of their operations. The Department's ultimate objective is to assure compliance with our laws and regulations and the protection of America's workers, not to punish companies or small businesses. At the same time, the Department is committed to enforcing the workplace statutes that Congress has charged us with enforcing. Accordingly, the Department strives to balance the need to enforce its regulations fairly and appropriately with its concurrent obligation to help small businesses achieve compliance while remaining economically competitive.

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[1] For instance, the Department recently estimated that 5,216,843 establishments employing 38,721,918 employees are covered by both the Fair Labor Standards Act and SBREFA. Such establishments have estimated annual payrolls of $939.7 billion and annual sales revenues of $5.7 trillion. See Table 5-2 of the Final "White-Collar" Overtime Exemption Rule, 69 Fed. Reg. at 22221 (April 23, 2004).

BACKGROUND

DOL recognizes that most employers, large and small – be they businesses, nonprofit organizations, or unions – care about their workers and genuinely want to protect them. Large employers are more likely to have in-house attorneys, human resources specialists, and accountants to track and ensure compliance with laws and regulations. On the other hand, small business owners often cannot afford such expertise and are left with the daunting responsibility of trying on their own to know and comply with literally thousands of pages of regulations. Recognizing the unique regulatory challenges facing small businesses, Secretary Chao launched a major policy directive, the Compliance Assistance Initiative, in June 2002 with its primary focus on helping small businesses. As part of this initiative, Secretary Chao created the Office of Compliance Assistance Policy, which spearheads a variety of Department-wide compliance assistance efforts and helps coordinate activities with many of DOL's internal agencies, including OSHA and WHD. All of these activities are designed to help businesses, large and small, comply with our laws and thus to protect the wages, benefits, retirement security, and safety and health of America's workforce.

In addition to providing small businesses with compliance assistance, the Department routinely takes into account the size of a business when developing new regulations, carrying out its enforcement obligations, and reaching out to the public. Within the bounds of the statutes that we are charged with enforcing, such as the Occupational Safety and Health Act of 1970 (OSH Act) and the Fair Labor Standards Act (FLSA), the Department will continue to take into account the size of a small business when making enforcement decisions. Likewise, during the development of regulations, DOL will continue to take input from small businesses into account at every available opportunity.

DEPARTMENT-WIDE COMPLIANCE ASSISTANCE EFFORTS AND REGULATORY INITIATIVES

Under Secretary Chao's leadership, DOL has developed many approaches to maximize compliance with our labor and employment laws and advance the goals of SBREFA. For instance, DOL recently revised the so-called Part 541 "white collar" exemption to provide clarity in determining who is exempted from the FLSA's overtime requirements as an executive, administrative, professional, computer, or outside sales employee. This will help businesses, especially small businesses, to comply with easier-to-understand and updated overtime requirements.

We have also simplified our semi-annual regulatory agenda to ensure that it reflects realistic priorities and timetables. We have stopped publishing a lengthy "wish list" of regulations and have begun focusing on regulations that are sensible and achievable. In January 2001, DOL's agenda contained 130 items pending action. In contrast, the Department's most recent agenda, published on December 22, 2003, contained 79 items. Of these, 19 were considered "high priority." Four of these were listed by OSHA and ESA, respectively.

In addition to a simplified regulatory agenda, the Department has worked closely with the Small Business Administration's (SBA) Office of the National Ombudsman (ONO) to enhance our coordination with the small business community. For example, the Department regularly attends ONO's Regulatory Fairness Hearings to ensure that small business perspectives and concerns regarding our regulations are heard. In addition, SBREFA requires ONO to evaluate and rate federal agencies on their regulatory enforcement activities. The Department's SBREFA Program is coordinated by the Office of Small Business Programs (OSBP). The Director of OSBP serves as the liaison between the ONO and the Department's enforcement agencies. WHD and OSHA have SBREFA contacts that work directly with the OSBP to ensure that they meet SBREFA requirements. The ONO report for FY 2002 gave DOL and OSHA an "A" rating for Compliance Assistance and OSHA an overall rating of "B+" for responsiveness to small business concerns. The FY 2002 report did not separately rate WHD. In view of our efforts to improve compliance assistance and outreach to small businesses, DOL is confident that its FY 2003 ratings, which we anticipate will also include WHD, will continue to be high.

Once the regulations are issued, the Department utilizes compliance assistance as a powerful complement to enforcement. Our compliance assistance resources and services are available in a variety of mediums and formats, including interactive web sites, pamphlets and other printed materials, workshops, telephone help lines, and on-site visits. DOL has further encouraged compliance assistance inquiries by implementing a Confidentiality Protocol. This is designed to alleviate concerns that callers may become the targets of enforcement action as a result of the information provided during a compliance assistance request. Specifically, our compliance assistance tools include the following:

- Department of Labor Web Site (www.dol.gov/compliance). This web site features a centralized location to access compliance assistance information.

- "elaws Advisors" (Employment Laws Assistance for Workers and Small Businesses) (www.dol.gov/elaws). These are interactive e-tools that provide information on more than 20 DOL employment laws that duplicate the interaction an individual would have with a DOL employment law expert by generating answers based on the user's responses to a set of questions. Our "elaws Advisors" web site receives hundreds of hits each day.

- FirstStep Employment Law Advisor. This is one of the newest "elaws Advisors." It helps employers to determine simply and quickly which of DOL's major employment laws apply to their business or organization and provides easy-to-access information about how to comply with each law's requirements.

- DOL's Toll-Free National Call Center (1-866-4-USA-DOL). The help line provides timely and accurate responses to customer inquiries (including print and publication requests) with live operator assistance in English and Spanish.

Additional service is available in more than 140 languages. DOL has answered more than three million calls since we started the help line in September 2001.

- *Employment Law Guide.* The Guide describes DOL's major statutes and regulations in plain language. It is available for free in print and online, in both English and Spanish, and has been distributed to thousands of small businesses. It is geared toward employers who need introductory information to develop wage, benefit, safety and health, and nondiscrimination policies for their businesses.

- E-Mail Response Service. DOL's coordinated e-mail response service allows employers and employees to ask questions and receive answers about employment and regulatory issues electronically.

- Compliance Assistance Information Inventory (www.dol.gov/compliance). Available later this month, this is an online gateway for the public to access over 300 publications and compliance assistance resources, including OSHA and WHD information.

- SBREFA Toll-Free Help Line (1-888-9-SBREFA). DOL has made this help line available to permit small businesses to contact DOL's Office of Small Business Programs (OSBP) directly with their inquiries or complaints about regulatory fairness. OSBP is the Department's central contact and referral point for small businesses seeking information regarding the Department's SBREFA programs.

The Department, its agencies, and several other Federal and State agencies are jointly developing a web portal that will enable the small business owner to find, understand, and comply with regulations. The final product will be an on-line gateway to enable businesses to register or file with a government entity, obtain necessary permits or licenses, and learn which laws and regulations are pertinent and how to obtain compliance guidance for those regulations.

All of these compliance assistance efforts underscore DOL's commitment to help small business owners achieve compliance with statutes and regulations that protect the American worker. In addition to Department-wide efforts to reach out to the small business community, OSHA and WHD provide targeted compliance assistance tailored to their distinct missions. Both agencies also take into consideration a small business' size as allowed by the statutes that they enforce and by SBREFA when pursuing compliance with our laws and regulations.

Let me briefly review some of OSHA's and WHD's specific activities in this area.

OSHA'S COMPLIANCE ASSISTANCE, ENFORCEMENT, AND REGULATORY EFFORTS

Consistent with Secretary Chao's mandate to provide effective compliance assistance to the regulated public, OSHA has a large number of programs to help small businesses comply with its regulations and standards. For instance, OSHA's on-site consultation program, which is administered by the States, assists small businesses by offering free advice and assistance in identifying and eliminating hazards at worksites. OSHA's newly created Office of Small Business Assistance not only helps coordinate OSHA's nationwide on-site consultation program, but also serves as liaison and a point of contact within the agency for small businesses. In FY 2003, OSHA's on-site State-consultation programs conducted more than 31,000 consultation visits, and assisted employers in recognizing and removing over 123,000 serious workplace hazards. These consultants provide additional assistance to small business such as training and education for employees at the workplace and, in some cases, away from the worksite, and by helping small businesses develop safety and health management systems specifically for their workplaces.

OSHA's training programs provide valuable assistance to small businesses and their employees. In 2003, OSHA's training programs reached more than 300,000 employers and workers. The OSHA Training Institute (OTI) near Chicago, whose primary mission is to train Federal and State compliance officers, also offers training to employers and employee representatives. The OSHA Education Centers, located throughout the country, focus on training primarily employers and employee representatives, who work to ensure that their worksites are in compliance with OSHA requirements and train their employees. Because some OSHA training programs use a Train-the-Trainer model, the programs create a multiplier effect, which allows a significantly larger number of employees to be trained. OSHA also provides training resources through its web site and its Audiovisual Loan Program to assist outreach trainers in presenting safety and health information to their employees. Participation in this program has increased steadily each year.

Through its Strategic Partnership Program, OSHA provides help to small businesses to improve their worksite safety and health. In a partnership, OSHA enters into an extended, cooperative relationship with groups of employers, employees, and employee representatives. Working together, they identify safety and health problems and craft an agreement to accomplish tasks such as training employees and developing site-specific safety and health management systems. OSHA serves mainly as a technical resource and facilitator. There are currently 215 active partnerships, 102 of which directly involve small businesses, or almost 50 percent of the total current partnerships. One of the more successful relationships has been achieved through the Build Safe Partnership with the Wichita, Kansas Area Office. Signed in December 2002, the partnership now has fifteen participating employers and covers approximately 2,600 employees. Twelve of the fifteen participants have either maintained or reduced their lost-time injury cases.

OSHA's Voluntary Protection Program (VPP) also promotes effective worksite-based safety and health to businesses. In the VPP, management, labor, and OSHA establish cooperative relationships at workplaces that have implemented a comprehensive safety and health management system. The VPP currently has 771 participants (Federal jurisdiction), 209 of which have 100 or fewer employees. In addition, 366 VPP sites (47 percent) have 200 or fewer employees. VPP Worksites (Federal) with 250 employees or less – as of December 31, 2002 – experience 61 percent fewer injuries and illnesses than their industry averages, proof that such relationships are having a positive result. OSHA continually takes steps to increase opportunities to make VPP more attractive to small businesses in both general industry and construction. For example, some program requirements such as documentation and written procedures can be waived to help small businesses.

OSHA is working with SBA's Small Business Development Centers (SBDC) to make information on OSHA and its many programs available to small business owners. SBDCs provide up-to-date counseling, training, and technical assistance in all aspects of small business management.

The OSHA Small Business Handbook is one of OSHA's most requested publications. It helps small business employers meet the legal requirements imposed by the OSH Act and in create and maintain effective safety and health management systems. The handbook has been recently revised to incorporate the comments and suggestions of small business employers and small business trade organizations from across the country.

OSHA's web site, which was named one of the "Best of the Web" in 2003 by *Business Insurance* magazine for its usefulness and innovation, is one of the main avenues for providing compliance assistance to the public, including computer-based training for small businesses through the agency's *Expert Advisors* and *E-Tools*, and is contacted more than 50 million times each year. This software contains information on topics such as hazard communication, asbestos, cadmium, confined spaces, fire safety and lead in construction. *E-Tools* allow small businesses to receive reliable advice on OSHA regulations that apply to their worksites.

Finally, in March 2002, OSHA created the Alliance Program, which helps to promote and deliver compliance assistance information and materials to small businesses. This cooperative program enables organizations committed to safety and health to work with OSHA to prevent injuries, illnesses and fatalities in the workplace. Compliance assistance resources are produced by various Alliances to benefit small businesses. For example, OSHA's Alliance with the Society of Plastics Industry, Inc., has developed training courses that address machine guarding issues and has presented the courses to numerous attendees, including representatives from small plastics manufacturers. Small businesses can also download the training programs from OSHA's web site.

In addition to OSHA's numerous compliance assistance programs specifically geared for small business needs, OSHA is also committed to taking into account, within

statutory limits, the size of the business and other factors when pursuing enforcement actions under the OSH Act. The OSH Act provides for enforcement through assessment of civil money penalties when circumstances warrant. OSHA recognizes, however, that in some situations, violations of certain standards, which require the employer to have a written program to address a hazard, or to make a written certification, may merely be "paperwork deficiencies," rather than a safety or health hazard. In other circumstances, violations of such standards have a significant adverse impact on employee safety and health. OSHA's policy for paperwork and written program requirement violations allows for no citations to be issued in certain circumstances. If citations are issued, its policy allows for no penalty or a reduced penalty where technical violations involve employer obligations for posting, record-keeping, and documentation of performance, and have no adverse impact on worker safety and health.

As another example, employers with ten or fewer employees – 75 percent of all employers – are exempted from keeping injury and illness records unless they are chosen for the annual injury/illness survey. Other small business employers are exempt from recordkeeping requirements because they are in low-hazard industries such as retail and service. OSHA also does not conduct inspections on farms with 10 or fewer employees unless they maintain a temporary labor camp. Further, the agency does not conduct routine safety inspections of employers of 10 or fewer employees if they are in an industry with a lost workday case rate less than the national average.

OSHA is required to take the employer's business size into consideration in proposing any civil penalty, as required by Section 17 of the OSH Act. The agency has detailed procedures in place to implement this requirement, which are found in its Field Inspection Reference Manual (FIRM). OSHA considers the size of the employer's business, among other factors, when determining the monetary penalty following an inspection in which violations are discovered. A penalty reduction of up to 60 percent is normally applied if an employer has 25 or fewer employees; a 40 percent reduction is applied if the employer has 26-100 employees; and a 20 percent reduction is granted for employers with up to 250 employees. In addition to reductions required by the OSH Act for size, OSHA may also reduce penalties for less serious violations by 15 percent when employers immediately abate hazards found during the inspection. Along with the reductions mandated by the OSH Act, 14,738 of these establishments received additional penalty reductions in FY 2003 totaling more than $29 million as a result of OSHA's policies. For businesses of 25 or fewer employees, OSHA conducted 12,366 inspections in FY 2003 that resulted in the issuance of $22.7 million in penalties. Along with reductions mandated by the OSH Act, 8,270 of these establishments received additional reductions totaling $12 million as a result of OSHA's policies.

OSHA also provides a vehicle for small business participation in the regulatory development stage as required by SBREFA by way of OSHA's Small Business Advocacy Review Panel. When OSHA's regulatory actions are expected to have a significant impact on a substantial number of small entities, the agency notifies the SBA's Office of Advocacy, which then recommends small-entity representatives to be consulted on the proposed rule and its effects. OSHA then convenes the Panel, consisting

of officials from the agency, the SBA's Chief Counsel for Advocacy, and the Office of Management and Budget's (OMB) Office of Information and Regulatory Affairs. The Panel hears comments from small entity representatives and reviews the draft proposed rule and related analyses prepared by OSHA. The Panel submits a written report to OSHA within 60 days. OSHA reviews the report, makes any appropriate revisions to the rule and publishes the proposed rule with the panel report in the Federal Register.

WHD'S COMPLIANCE ASSISTANCE, ENFORCEMENT, AND REGULATORY EFFORTS

WHD has developed extensive materials consistent with the Secretary's mandate regarding effective compliance assistance, much of which is aimed specifically at assisting small businesses. WHD understands that providing compliance assistance to help employers comply voluntarily will preserve its enforcement resources to target the most egregious employers and to protect the most vulnerable workers. In FY 2002, the Secretary launched the Department's *YouthRules!* public awareness campaign to educate employers, parents, teens, and educators about the laws governing youth employment. In FY 2003, WHD created new materials for the *YouthRules!* public awareness campaign, including an Employer Pocket Guide describing the child labor requirements, stickers that employers may place on equipment to warn minors away from prohibited machinery (in both English and Spanish) for both agriculture and non-agriculture employment, and bookmarks that summarize the child labor rules. The new *YouthRules!* web site also provides extensive information about the child labor rules. Some of the partners in the *YouthRules!* campaign include the National Restaurant Association, the National Council of Chain Restaurants, the National Association of Home Builders, the National Council of Agricultural Employers, the Club Managers Association of America, as well as various State governments and other advocacy groups. This past year, WHD also developed specific industry fact sheets for hotel/motel establishments and day care centers, and these efforts are continuing.

WHD continues to spend significant time making presentations at conferences, forums, and panels, including seminars for new and small businesses. For example, in FY 2003 WHD provided compliance assistance to many construction-related organizations, including local Associated General Contractors chapters, and highway, drywall, and electrical contractors associations. Similarly, WHD has been active with agricultural associations such as the American Farm Bureau, local commodity related associations (fruit and vegetable), and the Nisei Farmers League.

WHD has successfully used technology to reach a large number of employers and employees. For example, in FY 2003 WHD completed development of approved educational materials and publications that are available to the public through a new, centralized publication distribution center in the National Office. These publications can be ordered through the agency's toll-free call center or the newly implemented on-line publication ordering system. The agency also has translated many of its publications, focusing on Spanish and Asian languages. In addition, the WHD web site is visited more than 78,000 times per month, including between 21,000 and 27,000 hits to the Fair Labor

Standards Act and Family Medical Leave Act elaws Advisors. The *YouthRules!* web site receives almost 80,000 hits per month. The agency also responds to an average of 680 e-mails per week that are received from the public through our E-mail Response System. Moreover, WHD receives nearly 40,000 calls per month to the agency's toll-free call center, which now is capable of assisting customers in any language.

WHD also collaborates with other agencies to leverage compliance assistance resources. For example, WHD has worked with SBA, IRS, and other regulatory agencies to produce *The Small Business Resource Guide*, a compact disk (CD) designed to inform small businesses about taxes, employment standards, and other topics. Small businesses may obtain the CD free of charge by calling the IRS at 1-800-TAX-FORM. WHD is also a regular participant at fairs and seminars produced by other governmental agencies.

Additionally, WHD has expanded its strategic partnerships with both employer associations and employee advocacy groups with access to vulnerable, low-wage workers as a means of expanding the scope of its compliance assistance efforts. For example, the National Council of Agricultural Employers recently agreed to become a *YouthRules!* partner, to publish information about child labor in its newsletter, and to distribute WHD's new agriculture employer's guide to all its members. WHD worked with the American Health Care Association to develop fact sheets for the nursing home and assisted living industries. The Korean Manufacturers Association in California agreed to host compliance assistance seminars for its members, with training provided by WHD staff in Korean. Similarly, the Illinois Restaurant Association is working with WHD to provide training and materials to its members. Further, WHD is a founding partner in TIGAR (The Information Group for Asian American Rights), a collaboration between government agencies and the Asian American community designed to educate Asian business owners and employees. WHD also participates in similar partnerships with community based and ethnic organizations, including the Justice and Equality in the Workplace partnership in Houston aimed at the Hispanic community, and Operation COACH (Compliance Outreach to the Asian Community and Hispanics) in New Jersey.

WHD uses Targeted Intervention Programs as a means of providing compliance assistance, prior to investigating employers, as part of all targeted initiatives that are focused on industries with a history of violations. For example, in the health care industry, WHD engaged in face-to-face visits with residential living facilities and nursing homes, and provided compliance checklists and other self-assessment tools, prior to commencing investigations. Similarly, WHD sent compliance assistance information to every grocery store and full-service restaurant that was found to have child labor violations in FY 2002, prior to reinvestigating 25 percent of the employers to assess recidivism problems.

WHD also seeks to improve the ability of the business community, especially small businesses, to comply with its regulations by revising outdated rules and clarifying their requirements. For example, in one of its most significant rulemaking actions in recent years, DOL revised the FLSA's so-called "white collar" exemption. As noted above, this rule sets forth the criteria for determining who is exempted from the FLSA's

overtime requirements as an executive, administrative, professional, computer or outside sales employee. The new regulations appear in Title 29 of the Code of Federal Regulations at Part 541. The old regulations were very difficult for employment lawyers and human resources professionals to understand, and much more so for the average worker or small business owner.

The new rule, while expanding overtime eligibility, will clarify and end much of the confusion about this exemption, which has led to an explosion of class action litigation, failed sufficiently to protect workers' rights, and left small business owners unsure of their regulatory obligations. During the rulemaking process, DOL carefully weighed the concerns expressed by small businesses, which, because of their size, are disproportionately impacted by unclear overtime rules and the concomitant risks of costly litigation. DOL has published a final rule sensitive to the unique challenges of the small business environment and has planned an aggressive compliance assistance program to help small enterprises understand and comply with the new rule. The same day the final rule was published, WHD launched a web site called "FairPay" devoted to the rule for which we revised all pertinent compliance assistance materials for small entities' use. The web site includes a series of more than 15 fact sheets that explain in detail various aspects of the rule, and other fact sheets that explain how the rule applies to particular occupations. The FairPay site also has several 15-20 minute video seminars explaining the rule. WHD also is distributing printed versions of the materials for employers that do not have access to the Internet. Finally, DOL will continue to work with the SBA to educate small business owners and employees about the rule.

When WHD does find an employer that has violated the law, it has the authority to assess a civil money penalty in certain circumstances, such as for repeat or willful violations of the minimum wage and overtime provisions of the FLSA. In general, the WHD considers the size of the establishment and the seriousness or gravity of the violation before a civil money penalty is assessed. The assessment, and any subsequent reduction or waiver of a civil money penalty, must be determined in light of the individual circumstances of each case – including the statute violated, the size of the business, the seriousness of the violations, their impact workers' safety and health, the employer's commitment to future compliance, and whether the violations were repeat or willful. WHD does not have statutory authority to assess penalties for recordkeeping violations related to minimum wage or overtime violations, and it assesses only a very small penalty for child labor recordkeeping violations.Criteria for waiving or reducing civil money penalties are largely dependent on the statutory and regulatory civil money penalty provisions of each statute that WHD enforces. Since before the enactment of the Small Business Paperwork Relief Act (SBPRA) or SBREFA, WHD policies have taken business size into consideration, when appropriate. It should be noted that reductions or waivers for assessments against small entities are in most cases already factored into the formulas used to compute penalties. Further, WHD field managers also can make pre-assessment adjustments before assessing civil money penalties against an employer.

DOL's Regulatory Enforcement Report for FY 2003 reflected that WHD reduced or waived penalties in 26 percent of its enforcement actions against small entities,

totaling approximately $650,000. These figures account for only those reductions that were made as post-assessment adjustments to the assessed civil money penalty amount. The figures do not include reductions or waivers built into the calculation of civil money penalties at the assessment stage pursuant to regulatory criteria such as that set forth in 29 C.F.R. §§ 578.4 and 579.5. These provisions are based on the statute and state that the agency will consider the size of the employer's business and the seriousness or gravity of the violations in determining the amount of the penalty to be assessed. The figures also do not include pre-assessment adjustments, which are made at the discretion of WHD field managers before a civil money penalty is assessed against an employer. The reduced or waived amounts also do not include any reductions or waivers that may occur in open cases after the date of the report, such as those that may result when pending litigation or negotiations are finalized.

CONCLUSION

DOL is proud of its efforts to provide compliance assistance to small businesses, which we believe has helped create healthier and safer workplaces. Moreover, we believe that our compliance assistance tools are an innovative and effective complement to enforcement. The Department will continue to reach out to small businesses to maximize compliance with our laws and regulations consistent with the goals of our Compliance Assistance Initiative and SBREFA. When pursuing traditional enforcement, including penalty assessments, OSHA and WHD will continue to give due consideration, within the bounds permitted by statute, to the size of businesses and the circumstances surrounding the violation. Finally, the Department will continue its improved approach to the rulemaking process, which includes taking into consideration small business views at every opportunity to ensure that final rules reflect the input and concerns of this essential segment of our economy.

Thank you for allowing me to review the many efforts underway at DOL to help small businesses understand and comply with our laws and regulations. I would be happy to answer questions that you may have.

Statement of Associated Builders and Contractors

U.S. House of Representatives
Committee on Small Business

Subcommittee on Regulatory Reform and Oversight
Chairman Edward L. Schrock & Ranking Member Charles A. Gonzalez

June 17, 2004

"Department of Labor Enforcement Against Small Businesses"

by

Anita Drummond
Director of Legal and Regulatory Affairs
Associated Builders and Contractors, Inc.

The Voice of the Merit Shop

4250 North Fairfax Drive
9th Floor
Arlington, VA 22203
(703) 812-2000
www.abc.org

Associated Builders and Contractors (ABC) would like to thank to Chairman Schrock, Ranking Member Gonzalez, and the members of the Subcommittee on Regulatory Reform and Oversight for the opportunity to submit ABC's views regarding the Department of Labor's enforcement against small business.

ABC is a national trade association representing 23,000 merit shop construction contractors, subcontractors, material suppliers and construction-related firms in 80 chapters throughout the United States and Guam. The association was started in 1950 when contractors gathered to form an association built on the shared belief that construction projects should be awarded based on merit, to the most qualified and responsible bidder. Their dedication to the merit shop philosophy spread rapidly; in 1970 only 30 percent of the nation's construction was performed by merit shop contractors, yet today merit shop contractors account for more than 75 percent of all construction across the country.

Construction firms necessarily are vitally interested in the Department of Labor's support for the workforce. We strongly believe that worker training and education is the lynchpin for advancing Americans in the economy. By example, safety is significantly advanced with worker training.

Construction is under a pressing demand for more workers and that stress creates an even greater need for better resources for small businesses and their workers from the Department. Construction has made and will continue to make overwhelming contributions to the employment rolls in the United States. In 2002, the industry put-in-place projects were worth $860.9 billion.[i] In less than 10 years, construction projects' put-in-place value has grown 75 percent.[ii] An industry of this size demands significant people resources.

Of the 5.6 million employer-firms in the United States, more than 12 percent are construction firms, and these companies employ 5.5 percent of the U.S. private workforce.[iii] In addition to the 6.5 million employed construction workers, another 2 million people are self-employed in construction.[iv] Given the size of the industry and the bright prospects for growth, the needs for a trained and ready workforce are critical.

According to the Bureau of Labor Statistics, construction employment grew 46 percent over a decade, and employment trends are expected to continue if at a slower pace. According to the Bureau of Labor Statistics, construction is the only goods-producing sector expected to create jobs through 2012. From 2002 to 2012, the industry is expected to create over one million jobs.[v] However, the industry's demands on the workforce have exhausted much of the available skilled craftspersons and laborers. As a result, merit shop construction, including Associated Builders and Contractors, is investing in the workforce to meet the long-term needs of the industry.

Department of Labor and ABC Partnership

ABC interacts with the Department of Labor in a large number of ways. We are extensively devoted to the Department's workforce training and outreach efforts. We are recipients of Occupational Safety and Health Administration's Susan Harwood Grants and leaders in OSHA's Partnership Program and Voluntary Protection Program-Challenge pilot. Most of ABC's 80 chapters offer craft training for registered apprenticeship programs through the Department of Labor's Apprenticeship Training, Employer and Labor Services Office and state partners. ABC has done extensive outreach to construction firms to educate them on the wage determination survey currently being issued by the Department's Wage and Hour Division in an effort to bring prevailing wages into line with today's market. We recently partnered with the Department to promote educational materials on Youth Rules, and we are working with the Department on its High Growth Job Training Initiative. While ABC has concerns about the Department's enforcement policies and practices, it appreciates the role the Department plays in advancing the wellbeing of workers and assisting employers in attracting, training and keeping a quality workforce.

Department of Labor Enforcement and Compliance Assistance

Two issues are the focus of this testimony. First, ABC will comment on the Occupational Safety and Health Administration's efforts, and second, ABC will address the Department's failure to bring enforcement actions against entities collecting illegal job targeting funds from workers on public work projects.

Occupational Safety and Health Administration

OSHA has taken an enhanced approach under Assistant Secretary John Henshaw to partner with industry groups and individual companies in a number of ways. These include alliances, partnerships, and VPP among others. The outcome of these initiatives for small construction business are still in the early stages. ABC's own partnership has been successful to date but small firms are always suspect of giving information to OSHA. The larger companies already have the staffing and other resources to understand the regulations and keep abreast of new agency directives. Their participation is easier because the resources are already dedicated. However, these initiatives, which require additional paperwork, do not easily fit small firms.

Has OSHA misdirected its compliance assistance program and enforcement tools for construction as a result? Maybe. OSHA's 2003-2008 Strategic Management Plan relies on a misleading statistic. Specifically, the Plan indicates that the construction's fatality rate remained virtually unchanged from 1992 to 1999 and dropped in 2000. However, the agency only made a slight reference to the fact that workplace violence and automobile accidents were primary culprits and were not under OSHA's jurisdiction as a general rule. In fact, when OSHA's investigated construction fatalities are reviewed, the rate has fallen from 13.5 per 100,000 workers in 1994 to 11.3 per 100,000 in 2002. (Auto accidents and workplace violence are not investigated by OSHA.) The cause of these fatalities are overwhelmingly falls, struck by, caught in/between, and electrical shock (the so-called "big four"). Only 6 percent of the investigated fatalities from 1994 to 2002 were from other causes.

OSHA has set a goal of a 3 percent reduction in construction fatalities in FY 2003-2004. However, it is unclear what resources are being used to help small and other businesses address the major causes of fatalities that are covered under OSHA rules. The Strategic Plan emphasizes hazards such as lead, silica, amputations and ergonomics. Assistant Secretary Henshaw's February 26, 2004, testimony to the U.S. House of Representatives's Committee on Appropriations emphasizes plans to focus on the most dangerous workplaces. How construction will benefit from the establishment-targeted approach is unclear. Unfortunately, the agency has abandoned in practical terms the one enforcement policy adopted to increase the number of inspections and focus on the leading hazards in construction. In 1994, OSHA adopted the Focused Inspections Initiatives that was a significant departure from the way previous inspections were conducted. Under focused inspections, a compliance officer would determine if a safety and health program was established and a competent person was implementing the program. If these criteria were met, an abbreviated walk-around inspection was conducted focusing on "the big four." More companies inspected and more serious hazards identified seems a better approach to enforcement. OSHA is currently relying on site-specific targeting, which is the subject of a public notice for comment. However, construction has not been brought into the program to date. Importantly, construction already had a program that worked but is not utilized today.

Today's OSHA has become obsessed other priorities and construction's major hazards—easily identified by the statistics—are being overlooked. Instead, OSHA strategy measures success by hazards abated such as silica and ergonomics. In fact, Assistant Secretary Henshaw's testimony to the Appropriations Committee continued to emphasize the importance of ergonomics, citing 1,500 inspections conducted since January 2002 focused on ergonomics. While these inspections were not necessarily construction sites, it is important to note that we are concerned that the agency is not following the ball of documented, regulated hazards. Additionally, the agency has put efforts to advance

rulemakings for silica and hearing conservation for construction, and drafting guidance from compliance with the long-existing Hazard Communication Standard. While admirable endeavors, the underlying need for the products is unclear. Instead, the agency's effort to provide educational materials on major hazards, such as the agency's outreach on power-line hazards, should be duplicated.

ABC would recommend a number of initiative to improve the compliance and enforcement environment for construction. First, OSHA inspectors should be trained in the major construction hazards. ABC was among those, including unions, to train compliance officers following the adoption of steel erection standards. This joint effort demonstrated the value of sharing information. ABC would support OSHA's request for more training for its employees. Additionally, compliance assistance should only be provided when the OSHA officials have an in-depth knowledge of the industry.

Finally, ABC wants to comment that the agency's enforcement efforts have gone astray of the statutory authority expressed in the Occupational Safety and Health Act. Specifically, the Occupational Safety and Health Review Commission ruled that the Department had no statutory authority to issue citations on a per-employee basis for a single violation. While the matter case involved an employer that was likely a bad actor, the enforcement tactics represent the Department's attempts to expand its authority on a case-by-case basis, resulting in arbitrary enforcement policies. *Secretary of Labor v. Ho*, OSHRC Docket Nos. 98-1645 & 98-1646. The Department has appealed the Commission's ruling to the U.S. Court of Appeals for the Fifth Circuit. In a second series of matters, the agency continues to stretch its authority by attempting to place civil penalties on individual stockholders of the "employer" corporations, while making no attempt to meet the common law requirements to pierce the corporate veil. *Secretary of Labor v. Avcon, Secretary of Labor v. Altor, Inc., Secretary of Labor v. Sharon and Walter Construction, Inc.*, OSHRC Docket Nos. 98-0755, 98-1168, 99-0958, and 00-1402. The Department continues, as it has in other cases, the practice of ignoring the corporate form. These major issues in the judicial forums represent the incremental expansion of enforcement that continues to make compliance and enforcement more arbitrary for employers.

Job Targeting

The Department of Labor has the authority to enforce violations of the Davis-Bacon Act which harm workers by allowing their wages to be rebated to employers and discriminate against small businesses competing for public construction projects. Specifically, the Department and the courts have confirmed that job targeting funds are not an exempt deduction from wages on public construction

projects which require prevailing wage in accordance with the federal and state prevailing wage laws. ABC is disappointed that the Department has not enforced such violations against the Davis-Bacon Act.

Job targeting funds are collected from union employees (or workers covered by unions under a Project Labor Agreement or similar contract) for the purposes of reimbursing or rewarding contractors that use union labor. The unions pay employers in order to compensate them for the costs associated with underbidding contractors, including small businesses, which do not use union labor. For instance, if a union contractor underbids a merit shop contractor on a public project, the union under agreement with the contractor will reimburse the contractor for costs above the published bid price. Funds collected from any particular employee on a specific project are not necessarily returned to the contractor on that project. These fees go into a larger fund that are used as a grant fund for employers.

Most recently, in *National Labor Relations Board v. International Brotherhood of Electrical Workers*, the U.S. Court of Appeals for the Ninth Circuit upheld an earlier National Labor Relations Board (NLRB) ruling prohibiting the collection of such fees because the practice is "inimical to public policy." (9th Cir. 2003)

The collection of job targeting funds, according to the court, is a violation of the prevailing wage laws which mandate that wages shall be paid to workers without rebate to employers. Both the federal government, in the form of the Davis-Bacon Act, and more than 30 states have enacted laws requiring construction contractors on public construction projects to pay minimum wages known as 'prevailing wage rates' to employees performing work on such project. All of these laws prohibit rebates of any kind. Various judiciary bodies, including the U.S. Courts of Appeal for the D.C. Circuit and Ninth Circuit, have found that the collection of job targeting funds from workers was illegal. Union dues assessed for job targeting are not exempt membership dues under the prevailing wage laws and, therefore, could not lawfully be deducted or rebated from wages paid to union employees on public work.. *National Labor Relations Board v. Int'l Brotherhood of Electrical Workers* (9th Cir. 2003); *Building and Construction Trades Dept. v. Reich* (D.C. Cir. 1994); and *Can-Am Plumbing, Inc. v. NLRB* (D.C. Cir. 2003).

To effectively regulate these funds, the Department of Labor should audit unions' financial report forms (so-called LM2 Forms) to determine if these funds are being segregated on prevailing wage payments or deducted illegally on Davis Bacon projects and audit payrolls of union workers at Davis-Bacon projects to determine if job targeting funds are being collected.

In October 2003, the Department of Labor finalized a rule to increase the financial reporting of unions. In particular, the agency emphasized in the preamble that receipts and disbursements over $10,000, including those of job targeting funds, must be reported on the LM2 forms. This rule goes into effect in 2004 when the agency has software available for unions to require full reporting of receipts and

expenditures for job targeting but no sooner than July 1. ABC hopes this new information will help the Department enforce policies that are undermining workers and small businesses alike.

Conclusion

Again, we appreciate the opportunity to present the views of Associated Builders and Contractors on these essential issues.

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[i] U.S. Department of Commerce.
[ii] In 1993, the dollar value of construction put-in-place projects was $491 billion. U.S. Department of Commerce.
[iii] Major Industries by NAICs Codes: Private Employer Firms, Establishments, Employment, and Annual Payroll by Firm Size, 1998-2001, U.S. Department of Commerce, Census Bureau.
[iv] Firms and Employment in the United States by Industry and Firm Size, 2000, U.S. Small Business Administration and U.S. Department of Commerce, Census Bureau.
[v] Construction is expected to add 1,014,00 new jobs between 2002 and 2012. Employment by major industry division, 1992, 2002, and projected 2012, U.S. Department of Labor, Bureau of Labor Statistics.

Testimony of

Perry A. Bennett, Jr. REM, CEA

Health Safety and Environmental Director
Molded Fiber Glass Companies

On behalf of the
American Composites Manufacturers Association

Before the

Subcommittee on Regulatory Reform and Oversight of the
Small Business Committee, U.S. House of Representatives

On

The Department of Labor's Enforcement Against Small Business:
The Enforcement Policies and Compliance Assistance Programs
Of the Department of Labor

June 17, 2004

American Composites Manufacturers Association
1010 N. Glebe Road ~ Suite 450 Arlington, VA 22201 Phone: 703-525-0511 Fax: 703-525-0743
www.acmanet.org

Mr. Chairman, members of the U.S. House of Representatives Subcommittee on Regulatory Reform and Oversight of the Small Business Committee, thank you for the opportunity to testify this morning on behalf of the American Composites Manufacturers Association (ACMA) on enforcement issues with the Occupational Safety and Health Administration of the U.S. Department of Labor.

My name is Perry Bennett, and I am the Health Safety and Environmental Director for ACMA member Molded Fiber Glass Companies of Ashtabula, Ohio. I am also a long-standing member of ACMA's Government Affairs Committee. I will first give you a little background on the ACMA and then my own company, followed by some concerns our industry has with regard to OSHA enforcement.

The ACMA is the trade association serving the composites and cast polymer industry. ACMA represents over 1100 companies nationwide, more than eighty percent of which are small and medium sized businesses. Our members use combinations of fiber reinforcements, resins and other raw materials to manufacture many products that are familiar to everyone including tubs and showers, boats, farm equipment, underground storage tanks, parts for cars, trucks and airplanes, power poles, playground equipment, furniture and more.

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Robert Morrison established Molded Fiber Glass Company in 1948 in Ashtabula, Ohio and is still a family owned company. In 1953, our company was selected by Chevrolet to construct the chassis for the first Corvette made entirely of fiber-reinforced plastics, and we still make parts for today's Corvette using new carbon fiber technology. We have operations in California, Nevada, North Carolina, Pennsylvania, Texas and Washington. We produce truck parts, automobile parts, wind turbine blades, corrosion resistant bridge beams, water treatment equipment, concrete forms, and architectural products.

I'm here today representing the composites industry to explain our concerns regarding enforcement actions of the Occupational Safety and Health Administration. In the words of the late President Ronald Reagan who once said, "there is nothing wrong with America that Americans cannot fix," it is my sincere hope that my testimony will help fix a problem that affects many manufacturers all across America.

We take the health and welfare of our workers very seriously. Protecting workers is not just good for business; it is the right thing to do. However, we are distressed with some of OSHA's aggressive enforcement tactics, which include the enforcement of antiquated regulations. The best example of this involves OSHA rule 1910.107, which deals with spray finishing using flammable and combustible liquids. When the rules

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were first published in the Code of Federal Regulations, they incorporated standards issued by the National Fire Prevention Association (NFPA) in 1969.

Since then, NFPA has updated their standards to reflect the improved practices for minimizing the risk of fire, including in composites manufacturing operations. These standards are published in NFPA 33, which was updated most recently in 2003. Yet, thirty-five years later, the original OSHA standards remain in the Code of Federal Regulations despite repeated attempts by ACMA and other trade groups to have them updated. The updated NFPA 33 standard requires those in the composites industry to provide adequate fire protection for the particular hazards of our manufacturing processes, while the 1910.107 standard requires fire protection systems and practices that far exceed the hazards.

There are other examples where consensus standards were used to develop OSHA standards but have not been updated, in spite of numerous updates in the consensus standards. Federal Regulation 29 CFR 1910.106 is one example. This OSHA standard was based on NFPA 30, Flammable and Combustible Liquids (Storage and Handling). On several occasions OSHA aggressively cited some of our facilities for various sections of 106. However, in these cases even the old OSHA standard did not apply to the lower hazard seen in our industry (areas with less flammable vapors than 25% of the flammable limit).

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With a sizeable effort from our plant and corporate staff, we were able to get these frivolous citations dropped by the OSHA Area Director. This effort involved over 40 hours of research and documentation by the plant safety manager, 20 hours of research and preparation, an overnight trip by the Corporate HSE Director, and a full day of the plant manager's time. If we had not encountered a reasonable area director and prevailed at this level, our company would have hesitated to go to court due to the high cost of taking on OSHA.

Intimidation best describes the tone of the OSHA inspections that I have witnessed, even as the agency fails to update its own standards. What would the OSHA inspectors do to an employer if their Material Safety Data Sheets were not kept up to date? It's an interesting question given how the agency cites some in the industry for outdated fire standards. Even more remarkable is OSHA's continued citation of employers for failing to comply with outdated standards, despite OSHA's own statements that such actions are in consistent with OSHA policy.

Indeed, OSHA's Standards Interpretation and Compliance Section website contains a 1996 letter from the Director of Compliance Programs for OSHA that states:

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1010 N. Glebe Road – Suite 450 Arlington, VA 22201 Phone: 703-525-0511 Fax: 703-525-0743
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"An employer who complies with a consensus standard such as NFPA 33, rather than an OSHA standard in effect at the time of inspection and clearly provides equal or greater employee protection will not be cited."

Yet OSHA inspectors are citing members of our industry for not complying with the 1969 standards. It's true these citations can be overturned on appeal, but fighting OSHA citations is a burdensome process. Most small companies simply don't have the resources, knowledge, or frankly the courage to take on a regulatory agency that has a reputation for always making things difficult for employers no matter how hard they try to do the right thing.

Another ACMA member was recently cited for violating 1910.107, regarding cured resin buildup on mold structures. Use of the outdated standard, combined with poor communication between the OSHA office and the field inspector resulted in the issuance of the citation. The company had to prove that the OSHA inspector was not aware of the more specific standard for composites manufacturing in NFPA 33.

OSHA eventually dropped the citation, but the situation resulted in an unfair burden placed on the company. Open communications between the inspectors and the companies being inspected could help the situation. Employers often do not know what

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1010 N. Glebe Road – Suite 450 Arlington, VA 22201 Phone: 703-525-0511 Fax: 703-525-0743
www.acmanet.org

citations are being issued until weeks after the inspection. This is not in the best interest of the workers or the companies that employ those workers.

Mr. Lowell Miles, a small business owner in Portland, Oregon and former President of the ACMA has worked for 20 years to reform NFPA codes. Last year the NFPA 33 Committee formally asked an OSHA Director to update the OSHA rule 1910.107. The reply from OSHA was that there is no reason to change the existing rule – despite the fact that the Uniform Fire Code and the International Fire Code have both been updated to include the language in NFPA 33. The federal agency charged with enforcing the code continues its refusal to change the regulation to reflect modern times.

Complying with OSHA standards would be much easier for the composites industry if the agency had in place regulations that reflected up to date practices, and if OSHA inspectors were better trained. ACMA stands ready to work with OSHA on revising consensus standards and other rules to ensure improvement in compliance. Specifically, we will continue our efforts to have OSHA adopt the up-to-date version of the NFPA 33. OSHA needs to take responsibility for updating its standards. Where there are national consensus standards, like the NFPA standards, OSHA should automatically adopt them as they are updated.

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Thank you, Mr. Chairman and members of the Subcommittee for the opportunity to appear before you today and I'd be happy to answer any questions you may have.

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Patricia H. Lee
President and CEO
National Institute for Urban Entrepreneurship
Washington, DC

Hearing before

The Subcommittee on Regulatory Reform and Oversight of the Committee on Small Business of the United States House of Representatives

June 17, 2004

"Easing Regulatory Burdens on Entrepreneurs and Small Business"

My name is Patricia H. Lee and I am the President and CEO of the National Institute for Urban Entrepreneurship, a non-profit Washington, DC based public interest organization. I would like to extend my appreciation to Chairman Schrock, Ranking Member Gonzalez and Congressman King and their congressional staff for inviting me to testify before this subcommittee today. Thank you for this honor. Let me point out that neither the National Institute for Urban Entrepreneurship nor I receive any federal, state or local governmental grants, contracts or subcontracts, of any kind, at any time.

My comments are derived from my personal observations and experiences over the years as an advocate/attorney for entrepreneurs and small business; as a previous owner of three small businesses; and as the beneficiary of numerous conversations with colleagues who represent business and employees. I am also an attorney licensed in both Illinois and the District of Columbia, who has: practiced law with The Institute for Justice for five years; taught at various law schools, including The University of Chicago Law School; directed the Institute for Justice Clinic on Entrepreneurship in Chicago; and previously served ten

years with McDonald's Corporation in it's Corporate Legal Department.

These comments reference the federal compliance assistance and enforcement programs in the Occupational Safety and Health Administration and in the Employment Standard Administration's Wage and Hour Division and their impact on small business. I commend this subcommittee for focusing on and discussing these important topics. It is my opinion that measures that ease the burden on small business are worthy of our consideration, advocacy and implementation.

To familiarize you with the entrepreneurs that I have represented and converse with on a daily basis, let me share with you that most would be considered microentrepreneurs, the smallest of the small businesses by Small Business Administration standards.[1] Generally, they hire fewer than five employees, are entry-level entrepreneurs in urban communities, are people of color and typically have gross receipts well under $ 500,000 annually. Although they understand the intricacies of their business, they tend to rely heavily on pro-bono attorneys, because they lack excess capital to pay private attorneys or to hire in-house legal counsel.

Although these entry-level entrepreneurs typically will be outside of the jurisdictional thresholds of the U.S. Department of Labor's enforcement actions, the regulatory thresholds don't provide the greatest comfort for small business. Both OSHA[2] and FSLA[3] have "in commerce" threshold tests and FSLA further requires a "volume test" of $ 500,000 gross receipts to qualify for enterprise coverage. [4]

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[1] The Small Business Act states that a small business concern is "one that is independently owned and operated and which is not dominant in its field of operation." The law also states that in determining what constitutes a small business, the definition will vary from industry to industry to reflect industry differences accurately. SBA has established a table of size standards, matched to North American Industry Classification System (NAICS) industries. 13 C.F.R. 121.201

[2] Occupational Safety and Health Act of 1970, 29 U.S.C.A. 652(5).
[3] Fair Labor Standards Act, Section 3(a)(1)(A)(ii), 29 U.S.C.A. Section 203(s)(1)(A)(i).
[4] FLSA, Section 3(s)(1)(A)(ii), 29U.S.C.A. Section 203(s)(1)(B), (C).

It is conceivable that a fledgling entrepreneur could unknowingly meet the in commerce test and if the business is in a high cost district, such as New York, Chicago or Los Angeles could potentially experience gross receipts in excess of $ 500,000, at any given time, not yet be profitable, and lack an appreciation or basic understanding of the federal laws for which they must comply. In light of these concerns, my first recommendation would be for this Committee to evaluate the threshold amount for which federal jurisdiction applies and consider the feasibility of exempting small businesses with a volume test at higher threshold amounts, possibly at gross receipts in excess of $ 3,000,000.

Secondly, I am aware of the regulatory burden on small businesses and have reviewed a summary of the report authored by Drs. Crain and Hopkins for the Small Business Administration's Office of Advocacy.[5] As an attorney, who has first hand knowledge of regulatory filings, the authors $ 7,000 estimated regulatory burden does not surprise me. It may even be too low for small businesses that don't operate at the same efficiency levels as larger global corporations.

Further, with respect to the regulatory cost, one can only wonder where these costs will come from, especially when profit margins are razor thin or non-existent. Unfortunately, it may reduce employment, jobs and wages; reduce a future capital investment or expenditure; or create a future problem for the non-compliant business. As my father, (who learned frugality from serving in the Navy during World War II) reminded me from time to time, "Money doesn't grow on trees." That estimated $ 7,000 presents a lost opportunity cost in that small business. It is $ 7,000 that may have provided health benefits to a worker or the owner of the business. It is money that could be spent growing the business.

[5] Drs. Crain and Hopkins report for the Small Business Administration's Office of Advocacy calculated the cost of regulations to our economy at $ 843 billion per year or $ 8,164 for every household. The authors estimated that the average small business is burdened with almost $ 7,000 per employee in regulatory compliance costs.

Third, it is my opinion that H.R. 2728 is an excellent idea, because it makes exceptions when a small business misses the 15-day deadline for filing a response to OSHA citations.[6]
One common complaint is that OSHA will cite a small business for record-keeping violations when the company has an excellent health and safety record. The reason the violation may occur is because the business simply does not have the manpower to keep up with the record keeping. Larger corporations have excess capital to pay in-house counsel and private law firms to complete the paperwork. Small businesses do not have that luxury. Some flexibility with deadlines would ease the burden on small business.

Also, H.R. 1583 allows attorney fees and costs a means to seek redress if they prevail on the merits.[7] Attorney's fees may potentially influence a private attorney to represent a small business. I have first hand witnessed the frustration of small business men and women who want legal representation, but either can't get afford it or having searched for an attorney, are placed on long waiting lists for a public interest attorney with knowledge of business law.

Fourth, my concern, or maybe a better word is my skepticism, about burdensome federal labor regulations which are enforced vigorously, is that, with all due respect, the regulatory enforcement is generally not as effective as it should be. Why create and then enforce countless regulations that are too complex for the ordinary person, unreasonable under basic standards of common sense, and too costly for the entry-level enterprise? Aside from the well-meaning objective of worker protection, is not the real impact business failure? The folly of vigorously enforcing record keeping violations against companies with excellent safety and health records, makes me question how our tax dollars are being spent? Does the end of worker protection fit the means of such vigorous enforcement actions?

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[6] H.R. 2728
[7] H.R. 1583

Fifth, enforcement actions appear to be driven by crisis, rather than proactive vision and education. The wisdom of enforcement directed at a business after an alleged problem has occurred, might make the consuming public feel better, but it doesn't protect the worker's health and safety, nor does it save the business.[8] More likely than not, it stigmatizes and traumatizes the business owner. For this reason, I recommend that the Department of Labor exhaust pro-active educational remedies in lieu of crisis oriented enforcement actions. Take for example the recently reported the horrific New York case of Mr. Yong Fa Cai, whose two-story construction project ended in disaster for a day laborer whose name he didn't know. OSHA and the Department of Buildings are apparently investigating, but unfortunately, their actions will not bring back the life of the laborer. It will definitely have an impact on the owner of the business. If instead there had been more coordination between the local Department of Buildings and OSHA about standards and then a healthy dose of public outreach with appropriate[9] education on the risks and the benefits of health, safety and employment, the owner could run his or her business more effectively and the worker may be alive today.

There is nothing better than a well run, safe and profitable business; one that exercises good solid business management on a daily basis, motivating and inspiring its workers. Workers who have the privilege and honor of working for a great company such as this, truly appreciate it and are better for it. These good businesses are responsible to their consumers, to their workers and to their investors. Unfortunately, the public doesn't hear enough about these great companies and excellent examples. I consider them the leaders in the industry. Yet, unless small businesses are allowed some flexibility to grow and are assisted with relevant education and appropriate outreach, consumers, workers and investors may miss out on the next amazing business enterprise.

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[8] "Chinese Builder's Death Reveals Anonymous Web of Risky Labor" by David W. Chen and Corey Kilgannon (New York Times, June 9, 2004).

[9] I use the term "appropriate" here, because I recognize there were language barriers in this particular case and that an outreach program designed for the particular community is critical.

In summary, my recommendations are as follows:

- Increase the jurisdictional thresholds so that jurisdiction does not apply to small businesses under $ 3,000,000 gross receipts;

- Provide flexibility for small business to obtain extensions and retrieve attorneys fees if they prevail on the merits;

- Recognize that opportunity cost of regulations is real and may cost jobs and other critical capital expenditures and investment;

- Re-evaluate the purpose and rationale of vigorous enforcement actions; and

- Collaborate with local and state agencies; exhaust pro-active educational remedies; and increase the level of outreach; in lieu of enforcement actions.

Respectfully submitted,

Patricia H. Lee
President and CEO
National Institute for Urban Entrepreneurship
Email: niue@comcast.net
Website: www.ni-ue.org