Statement of the U.S. Chamber of Commerce

ON: **A More Effective and Collaborative OSHA**

TO: **U.S. House of Representatives Committee on Education and the Workforce, Subcommittee on Workforce Protections**

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STATEMENT OF ERIC HOBBS
SHAREHOLDER, OGLETREE, DEAKINS
BEFORE THE SUBCOMMITTEE ON WORKFORCE PROTECTIONS
HOUSE COMMITTEE ON EDUCATION AND THE WORKFORCE

A More Effective and Collaborative OSHA: A View from Stakeholders

February 27, 2018

Chairman Byrne, Ranking Member Takano:

Good morning, I am Eric Hobbs, a shareholder in the law firm of Ogletree, Deakins in our Milwaukee office. We have a Workplace Safety and Health Practice Group of 50 lawyers who regularly handle Occupational Safety and Health Administration (OSHA) and Mine Safety and Health Administration (MSHA) matters; the largest such practice group in the country. My practice focuses on OSHA and workplace safety related matters.

I have been practicing OSHA law for about 33 years. During this time I have been involved in hundreds of workplace safety cases, both litigated and not; I have been called upon by the Solicitor of Labor's Office to speak to its OSHA lawyers; I have been asked by the Chairs and Chief Judges of the Occupational Safety and Health Review Commission to address the Commission's Commissioners and Judges; and I am a past Employer Co-Chair of the American Bar Association's OSH Law Committee. Today I am appearing on behalf of the U.S. Chamber of Commerce. Ogletree, Deakins is a longstanding member of the Chamber, and I am a member of its Labor Relations Committee and OSHA Subcommittee.

I am honored to be part of this hearing. Improving workplace safety is a goal that I share with many colleagues on all sides of occupational safety and health. The debate among us generally centers on what role OSHA should play, and, therefore, on what would make OSHA most effective. Throughout my years of practice, I have seen first-hand the role the agency can play. I have seen OSHA be helpful, and I have seen OSHA be unhelpful.

In any workplace, three parties determine how safe the workplace is, and each has its roles and obligations. The employer is obligated to instill a culture of safety and to provide the necessary training and equipment. The employee is obligated, in the words of the OSH Act, to "comply with occupational safety and health standards and all rules, regulations and orders issued…which are applicable to his own actions and conduct."[1]

And OSHA's role is to provide employers, as well as employees, with guidance – through regulations and other actions – and to enforce the OSH Act fairly, with the goal of improving workplace safety. Thus, OSHA must be driven by the question of how it can best help employers in their quest to make their workplaces as safe as possible.

[1] 29 U.S.C. 654 (b).

OSHA should be guided more by the question, "How can we help employers keep employees safe?" than by the question, "How can we make sure we are making examples of bad employers, or catching as many bad employers as possible?"

Ultimately, how to measure OSHA's effectiveness in improving workplace safety is rather straightforward: what are the rates of injuries, illnesses, and fatalities? How have they changed, and how does that change compare with historic trends? During the previous administration, injury and fatality levels did not decline consistent with historic trends; indeed, fatalities reached their highest level since 2008. So the challenge is as clear: how can OSHA be more effective at helping employers improve workplace safety?

I'd like to highlight three important areas where the new administration can improve in furthering OSHA's mission: attitude and relationships with stakeholders; strategy for improving workplace safety; and substantive policy and procedures.

Attitude and Relationships with Stakeholders

OSHA needs to welcome input from all sectors and stakeholders. As the title of this hearing implies, a more collaborative OSHA should be the goal. The relationship between employers and OSHA in recent years can be described only as adversarial. Throughout its rulemakings, the agency openly dismissed legitimate concerns raised by the employer community about practical issues, statutory authority questions, and assessments of impact. The result was regulations that were driven by ideological views and that will be impractical, if not impossible, to comply with.

Employers also bore the brunt of OSHA's public remarks as part of its "regulation by shaming" tactic, which I will describe in more detail below. Cooperative programs designed to foster opportunities for the agency and employers to work together lost support as employers and their representatives decided the agency was not interested in developing collaboration. OSHA ratcheted up the requirements for participation in the Voluntary Protection Program (providing relief from scheduled inspections for employers with exemplary safety records) and the Alliance Program (collaboration with associations) in ways that made the programs no longer attractive or worth the effort to pursue. The agency even tried to promulgate a regulation that would have made small businesses who voluntarily entered the consultation program vulnerable to enforcement – the firewall between voluntary consultation and inspection is one of the main selling points used to attract small businesses to the program.

Instead of acting like the business community is the opposition, OSHA needs to regard employers as partners and treat them as such. Employers are the ones held accountable for compliance with regulations and interpretations, and their views therefore deserve respect. Instead of OSHA operating under the theory that employers can absorb whatever burden or ill-conceived regulation the agency creates, OSHA should listen and look for a more collaborative approach.

While regulations are important, what is most important is that they have credibility. OSHA's rulemaking in the previous administration was characterized by weak or non-existent data support; dismissive responses to employer concerns about practical compliance issues; questionable interpretations of statutory authority; and was driven by requests from outside interests that were not consistent with helping employers improve their safety programs. Any new regulations must meet legitimate demonstrated needs, be driven by data, and be tailored as narrowly possible.

To provide the best opportunity for input into the process, OSHA should make maximum use of the Small Business Regulatory Enforcement Fairness Act (SBREFA) Panel Review process conducted in conjunction with the Small Business Administration's Office of Advocacy and the Office of Information and Regulatory Affairs within the Office of Management and Budget. SBREFA Panel Reviews are triggered when the agency determines that the proposed regulation would have "a significant economic impact on a substantial number of small entities." The previous administration consistently defined these terms in ways that would allow it to avoid having to conduct these reviews, even when the proposed regulation explicitly applied to small businesses, such as the proposal to "clarify" when small businesses in the consultation program would be subject to enforcement.

Under the panel review process, small businesses who would be affected by a proposed regulation are allowed to review the draft proposal as well as OSHA's draft impact assessment and provide direct comments on them. This happens at a stage in the process when there is still time to make adjustments – unlike when, by contrast, a proposed regulation has been issued and there is very little chance to make significant changes. One former Chief Counsel for Advocacy during a Democratic administration noted that OSHA having to reveal its economic assessments was perhaps the most valuable aspect of the process. OSHA's assessments of impact typically overlook significant details and costs, and the SBREFA process can help identify these so that the agency's final impact assessments have more credibility. OSHA would be well served by adopting a position that conducting these reviews is the default, rather than the exception.

Rulemakings under the previous administration often suffered from a lack of supporting data, or relied on assumptions as justifications. For instance, the rulemaking to establish the electronic injury and illness reporting requirement, perhaps the most significant rulemaking of the previous administration, was justified with speculative and conclusory statements such as, "OSHA *believes* that the data submission requirements of the proposed rule will improve the quality of the information and lead employers to increase workplace safety," and "many accident prevention measures will have some costs, but even if these costs are 75 percent of the benefits, the proposed rule would have benefits exceeding costs if it prevented 4.8 fatalities or 0.8% fewer injuries per year. OSHA *expects* the rule's beneficial effects to exceed these values." (78 Fed. Reg. 67277-78, November 8, 2013, emphasis added.)

In another rulemaking that resulted in employers having to report the hospitalization of any employee, instead of only when three or more are hospitalized,

OSHA justified the expanded reporting requirements by speculating that, "if such improvements in information and enforcement save even one life every three to four years as a result of this proposed rule, they will more than pay for the costs associated with such notifications." (76 Fed. Reg. 36426, June 22, 2011.) OSHA was just guessing that this new approach might have some benefits. And why just one life over three to four years? Why not save some higher number of lives every year?

Not only did OSHA's rulemakings in the last administration often lack solid supporting data, but some also clearly lacked statutory authority. One of the best examples is the "supplemental" rulemaking to the injury and illness reporting regulation that implemented OSHA's belief that employers regularly retaliate against employees for reporting injuries and safety violations. This proposal directly contradicted statutory language in Section 11(c), which specifies the procedures Congress established for protecting whistleblowers. OSHA's version would allow for the citation of an employer for alleged whistleblower violations without any employee coming forward, *i.e*., without a whistleblower. Another clear example of OSHA ignoring the statute was its rulemaking to "reverse" the ruling in the *"Volks"* case, in which the court had been explicit that the statute only permits OSHA to issue a citation for recordkeeping violations within six months of the violation occurring—not five years, as OSHA had maintained.

Perhaps even more troubling than OSHA's fast-and-loose rulemaking was its skirting of the rulemaking process to make substantive changes in regulations through interpretations and other sub-regulatory action. The best examples of this were the proposed interpretation of "feasible", under OSHA's Hearing Conservation Standard, as being anything that did not put the company out of business (withdrawn as the result of objections by OIRA) and the letter of interpretation allowing union representatives to participate in walk-around inspections even where they do not represent the workforce (withdrawn by the current administration as part of a settlement to a legal challenge because the interpretation contradicted an existing regulation). OSHA also used incorporation by reference to adopt outside standards as *de facto* regulations, such as when it referenced the National Fire Protection Association (NFPA)'s Standard 654 in the direction to field personnel on how to enforce the new combustible dust hazard under the Globally Harmonized Standard system of labels of safety data sheets – thereby effectively adopting NFPA 654 with no rulemaking – or any regulatory process.

Similarly, OSHA expanded its use of the General Duty Clause (GDC) as a substitute for rulemaking. The courts have interpreted the OSH Act's General Duty Clause[2] to mean that an employer has a legal obligation to provide a workplace free of conditions or activities that either the employer or industry recognizes as hazardous and that cause, or are likely to cause, death or serious physical harm to employees when there is a feasible method to abate the hazard. OSHA relied on the GDC to develop an

[2] "Each employer -- (1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." 29 U.S.C. 654

enforcement strategy targeting workplace violence and another targeting ergonomics, where the Agency has promulgated a standard for neither problem. The General Duty Clause is an important and powerful tool for OSHA, but OSHA therefore must employ it judiciously where hazards are truly identifiable and known by the regulated communities, and remedies are available and feasible. Issuing directives on how to issue citations for certain perceived hazards is the equivalent of regulating without rulemaking.

Strategy for Improving Workplace Safety

OSHA's overall strategy for improving workplace safety needs to change as well. Enforcement always will be, and must be, a critical part of OSHA's agenda, but it cannot serve as OSHA's only, or even primary, method for encouraging employers to improve workplace safety.

The agency's "regulating by shaming" strategy that characterized the previous administration has proven to have failed – as the latest Bureau of Labor Statistics (BLS) data above show. That strategy relied on publicizing strong enforcement actions and trying to "scare employers straight"; to make them fear strong enforcement enough that they would work towards compliance and, thus, safer workplaces. The key component to this strategy was putting out press releases at the time citations were issued that typically included conclusory statements that the company had committed egregious violations – as if the employer had already been judged guilty – rather than focusing on the mere issuance of a citation, which is nothing more than an allegation until it's proven – the beginning of due process, not the end.

As the cases proceeded, some to settlements or resolutions with lower levels of severity and penalties, OSHA issued no follow-up releases, nor did it correct the original releases. Thus, the permanent digital record includes OSHA's initial allegations, not the final result. OSHA should adjust the style and tone of its press releases to be less conclusory and accusatory and, as cases resolve, amend the releases accordingly – or withdraw them altogether.

Another component of OSHA's shaming strategy was the agency's belief that citations should be as severe as possible and penalties as high as possible. Early in the previous administration, OSHA modified its penalty calculation formula to maximize amounts and minimize mitigating factors like good faith and clean OSHA citation histories. The result was that many employers felt compelled to challenge citations they otherwise would have accepted or settled.

OSHA, the employer, and the employees involved would be far better served were OSHA to approach its inspections and closing conferences with the goal of finding solutions, instead of citing and fining employers as much as possible. In many cases, an employer is prepared to fix a violation OSHA has identified but OSHA has not been willing to give such an employer any slack or credit for doing so.

Finding ways to help employers improve the safety of their workplaces in these contexts would provide several benefits: first and foremost, it would result in prompt correction of hazards or violations OSHA believes exist, since, under the Occupational Safety and Health (OSH) Act, abatement is not required until the employer has exhausted its challenges or the case is settled. Focusing on the fix and not the fine would promote the quicker abatement of hazards OSHA has identified and, therefore, employee safety. Second, by reducing the level of penalty, OSHA would give the employer less reason to challenge the citation and drag out the proceedings, saving both the employer and the Department of Labor significant resources.

Beyond modifying press releases and enforcement tactics, OSHA needs an overall new approach. Even as enforcement must remain a core function of OSHA, the agency must develop and utilize other tools. It should be seen by its stakeholders as a resource for answers, not just a hammer that sees every problem as a nail. The obvious alternative is to build out the compliance assistance function further. One possible model would be that of the Internal Revenue Service (IRS), from which taxpayers can pose tax questions and get answers directly. The same should be true for employers and small businesses in the OSH context. People who really need help should be able to get answers to their safety questions directly from OSHA in real time, so that they can correct problems in their workplaces and protect their employees.

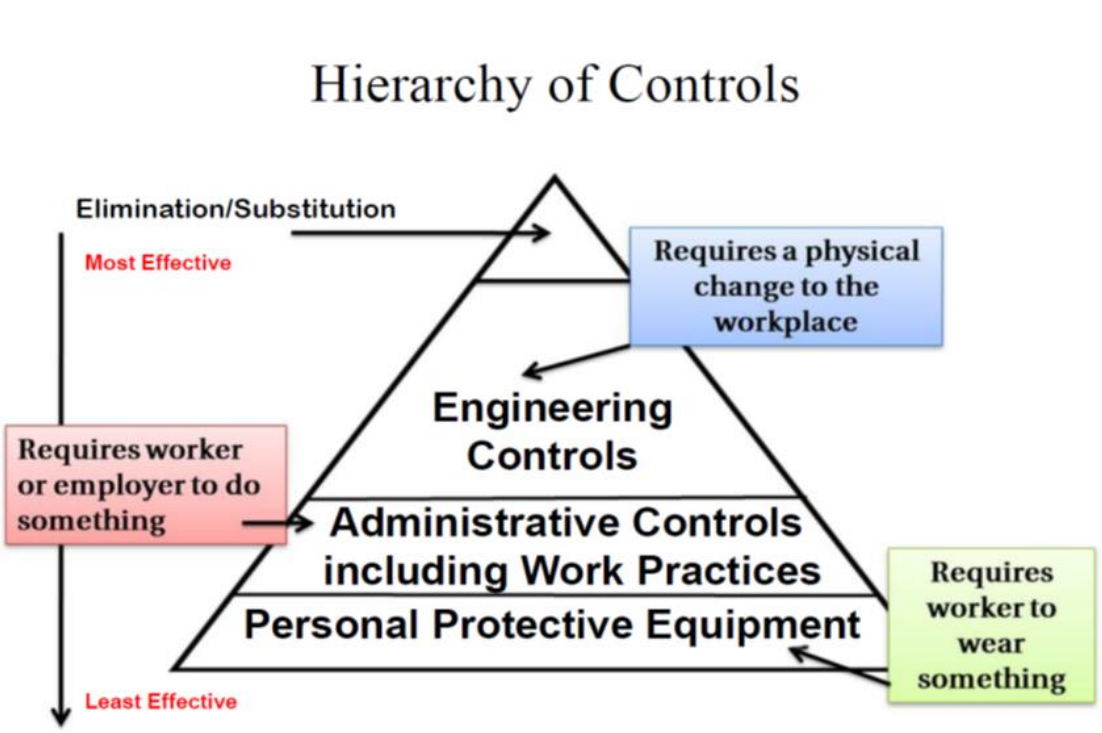
While OSHA has posted information on its website to guide employers and small businesses through high-level safety issues, the agency has not done an adequate job of promoting the availability of those resources. Nor has it adequately promoted the overall cause of improving workplace safety. If, as OSHA has suggested, the provision of such resources is a priority, it should promote them like other agencies promote other social or public health causes, to audiences who are unaware. OSHA has relied too heavily on "preaching to the choir" – making presentations to audiences already invested in workplace safety. To make a real difference, OSHA needs to reach new audiences, of both employers and employees, not yet engaged and committed to the cause.

Substantive Policies and Procedures

There are several steps OSHA should take that would yield direct results in helping employers improve workplace safety.

OSHA has long ascribed to the hierarchy of controls doctrine to describe how employers should respond to safety hazards. While reference to the hierarchy of controls is not wrong *per se*, myopic adherence to it results in the imposition of unnecessary and sometimes counterproductive compliance burdens and costs. Merely because a response to a safety hazard falls in the Personal Protective Equipment (PPE) category, for example, does not mean that it is inadequate or even less effective in protecting employees than engineering or work practice controls. Indeed, some PPE is highly

engineered and can provide superior protection, more quickly and at lower cost than some more elaborate control measures.



Source, OSHA Website: https://www.osha.gov/dte/grant_materials/fy10/sh-20839-10/hierarchy_of_controls.pdf (last viewed December 4, 2017). See also the hierarchy of controls as enshrined in OSHA recommendations for Safety and Health programs: https://www.osha.gov/shpguidelines/hazard-prevention.html (last viewed December 4, 2017).

A good example of such advanced and effective PPE protection is respirators available to protect employees from exposure to respirable crystalline silica. Some respirator systems are more like portable engineering controls with supplied air systems that provide fresh air to the breathing zone under protective helmets and face masks – and they cool the employee to boot. Yet, under OSHA's recently-revised Silica Standard, employers are explicitly prohibited from turning to the use of such systems unless and until they have demonstrated that engineering controls (primarily large containment and ventilation systems) and work practice controls (primarily wetting methods) are insufficient to reduce exposure levels adequately.

Set aside the significant difficulty of proving the negative, having to do so will cost millions of dollars and take months, if not years, before employers can use respirators already in use and already proven to be effective. By insisting too rigidly on the hierarchy of controls, OSHA has made compliance with its new standard enormously more complicated, time consuming and expensive than necessary. OSHA should reexamine its blind adherence to the hierarchy of controls and the distinctions between

different control measures to allow for more flexible, prompt, and cost effective responses to various workplace hazards.

One of the most frustrating aspects of dealing with OSHA has been the inconsistencies between the different OSHA field offices. One former Deputy Assistant Secretary used to be fond of saying that there are 64 OSHAs (the number of OSHA area offices at the time, which has grown since then), each its own mini-agency. Each area director has his or her own understanding of what OSHA's standards mean, what OSHA's enforcement authority is, etc. This has been a problem dating back multiple administrations, and it must be addressed. The status quo means that employers with facilities in multiple geographic areas, can – and do – get conflicting advice from OSHA on the requirements of the same standards and are subjected to different enforcement approaches to identical alleged violations.

In addition, over the years of the last administration, the attitudes of and approaches taken by an increasing number of OSHA compliance safety and health officers (CSHOs, OSHA's inspectors) became antagonistic and not focused on workplace safety. The CSHOs are more intent on merely issuing citations and on enforcement than advancing safety and health and adding value to the employer's interaction with the agency.

Closing conferences have become check-the-box exercises for many CSHOs. Rather than using them to tell employers what the CSHOs are going to 'recommend' in the way of citations, the CSHOs either are not holding them at all or are holding them and saying nothing. A CSHO late last year conceded to me that closing conferences now are essentially nothing more than a hoop for him to jump through. So where is the promotion of workplace safety and health in not telling employers what their alleged safety and health hazards are until the citations issue, sometimes months later?

CSHOs from certain area offices also have begun telling employers, in cases of complaint-based inspections, that the employers have no right even to know what the complaints allege, never mind a right to copies of the complaints, prior to inspection. A client whom I represent recently experienced such a refusal. Most employers, particularly smaller ones or those without experienced counsel to guide them, do not know better when told such a thing. What ought to be narrowly-scoped inspections are broadened because the employers do not know what the appropriate limits to the scope are, and some CSHOs deliberately take full advantage of the employers' ignorance.

Similarly, CSHOs in multiple areas have become very aggressive in expanding inspections without justification, just because employers often are not sophisticated enough to understand what the limits to the scope are or to say no to expansion. Again, it is deliberate opportunism on the part of the CSHOs to avoid having to play by the rules.

Conclusion

OSHA lost the trust of employers during the previous administration. For OSHA to lead the effort at improving workplace safety effectively, it must rebuild that trust. No single step or statement by the agency will do so. It will take a sustained, consistent effort. Employers will welcome having a partner in the agency and being able to turn to it as a resource, rather than just to suffer under it as a disciplinarian.

Thank you for this opportunity to discuss making OSHA more effective and collaborative. I'm happy to respond to any questions.