

VIA ELECTRONIC SUBMISSION

November 2, 2010

The Honorable David Michaels, PhD, MPH
Assistant Secretary
Occupational Safety and Health Administration
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

ABC's Comments in Response to OSHA's Proposed Rule

OSHA's proposal revises the provisions of its On-Site Consultation Program, a 35-year old, agency-funded service through which employers may voluntarily learn "about potential hazards at their worksites, improve their occupational safety and health management systems, and...qualify for a one-year exemption from routine OSHA inspections." Intended for small businesses in high-hazard industries, the program provides a confidential process by which participants, with the assistance of highly-trained safety and health consultants (overseen by state governments), identify workplace hazards and take corrective action. It is seen by many, including OSHA, as a highly successful program.

OSHA has encouraged participation in the program by assuring businesses that consultants will not "issue citations or propose penalties for violations of OSHA Standards," or "report possible violations to OSHA enforcement staff." To protect against abuse, OSHA reserves the right to initiate enforcement activity following fatalities, formal complaints, and in circumstances of "imminent danger."

The NPRM, however, incorporates additional enforcement elements into the On-site Consultation program. Given the aforementioned existing program, these additional elements are unnecessary. Moreover, OSHA's proposed changes could serve as a significant disincentive to employer participation—for those currently enrolled in the program and, perhaps more importantly, future prospects.

Specifically, the NPRM would limit programmed inspection deferrals to one year, and only grant one subsequent deferral for an additional year. Currently, the initial deferral is available for a year or more, depending on circumstances, with possible subsequent renewals of up to three years. Despite this obvious negative impact, OSHA offers no evidence to support its proposed change.

In addition, the NPRM would establish a category of exceptions to the programmed inspection exemption, referred to as "other critical inspections," through which an in-progress consultation could be concluded and enforcement action immediately triggered. The NPRM is unclear as to the types of situations that could justify the use of this provision by the Assistant Secretary, leaving employers uncertain about how the program would be implemented going forward. Should OSHA proceed with its proposal, additional clarification and guidance is warranted with regard to this provision.

Given that 32 percent of On-site Consultation visits occur on construction sites, ABC is especially concerned about the implications of OSHA's proposed rule. ABC believes that the proposed changes to the On-site Consultation Program would immediately discourage employers from further participation, which would artificially reduce the number of enrolled employers over time. This, in

¹ OSHA On-site Consultation Program Factsheet: http://63.234.227.130/OshDoc/directives/Factsheets/General_Facts/factsheet-consultations.pdf.

² OSHA, supra.

³ 75 Fed. Reg. at 54066. ABC does not take issue with this long-standing policy.

⁴ OSHA Consultation Policies and Procedures Manual:

http://www.osha.gov/pls/oshaweb/owadispatch.show_document?p_table=DIRECTIVES&p_id=3771.

⁵ 75 Fed. Reg. at 54065-54066.

⁶ OSHA On-site Consultation Visits by Industry Sector: http://www.osha.gov/dcsp/smallbusiness/consultchart_2.html.

turn, would present the very real possibility that program funding could be significantly reduced or eliminated in the long term, in favor of reallocating resources toward enforcement-only activities. Such action would be detrimental on OSHA's part, as it would create self-imposed barriers to communication and cooperation between the agency and employers. Instead, ABC recommends that OSHA propose ways in which programs like the On-site Consultation Program could be expanded and made more attractive to employers, in order to broaden the agency's reach to employers and, ultimately, to better ensure the safety of high-hazard workplaces.

Finally, ABC believes that OSHA's proposal itself is an inefficient and counterproductive use of the agency's limited resources. The revisions to the On-site Consultation Program will increase targeted enforcement activities on responsible actors, who by their very participation in the program have signaled a proactive willingness to come forward and work with OSHA in good faith to identify potential worksite hazards and improve their safety/health management programs. Thus, the NPRM is not in keeping with OSHA's stated commitment to focus its enforcement efforts on "recalcitrant employers who endanger workers by demonstrating indifference to their responsibilities under the law."⁹ ABC firmly believes that continued and support of practical, successful compliance assistance programs—and not reliance on enforcement alone—in OSHA's overall strategy is the key to ensuring and enhancing safety in the construction industry.

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It is for the reasons outlined above that ABC opposes the NPRM, and urges the agency to reconsider its planned revisions to the On-site Consultation Program. ABC recommends that OSHA maintain robust and sincere cooperative efforts to balance its enforcement actions, and believes that OSHA's proposal would work to undermine such an equilibrium. Furthermore, ABC shares the concerns and recommendations provided in comments filed to this docket on October 29, 2010, by the Coalition for Workplace Safety (CWS), and incorporates them into this letter by reference.

Thank you for the opportunity to submit comments on this matter.

Respectfully submitted,



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⁷ See discussion of budget cuts to the Voluntary Protection Program (VPP) in OSHA's proposed FY2011 budget. EHS Today "DOL 2011 Budget Request Includes OSHA Increase, Focus on Enforcement": <http://ehstoday.com/standards/dol-budget-request-osha-increase-focus-enforcement-2414/>.

⁸ EHS Today, supra

⁹ OSHA News Release: "US Department of Labor's OSHA takes action to protect America's workers with severe violator program and increased penalties": http://www.osha.gov/pshweb/owadispl.show_document?p_