Statement of the U.S. Chamber of Commerce

ON: **HEARING ON PROTECTING AMERICA'S WORKERS ACT: MODERNIZING OSHA PENALTIES**

TO: **THE HOUSE SUBCOMMITTEE ON WORKFORCE PROTECTIONS OF THE COMMITTEE ON EDUCATION AND LABOR**

BY: **JONATHAN L. SNARE**

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The U.S. Chamber of Commerce is the world's largest business federation, representing the interests of more than 3 million businesses of all sizes, sectors, and regions, as well as state and local chambers and industry associations.

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

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

The Chamber's international reach is substantial as well. It believes that global interdependence provides an opportunity, not a threat. In addition to the U.S. Chamber of Commerce's 113 American Chambers of Commerce abroad, an increasing number of members are engaged in the export and import of both goods and services and have ongoing investment activities. The Chamber favors strengthened international competitiveness and opposes artificial U.S. and foreign barriers to international business.

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

STATEMENT OF JONATHAN L. SNARE
BEFORE THE U.S. HOUSE OF REPRESENTATIVES
COMMITTEE ON EDUCATION AND LABOR
SUBCOMMITTEE ON WORKFORCE PROTECTIONS

HEARING ON PROTECTING AMERICA'S WORKERS ACT: MODERNIZING OSHA PENALTIES

March 16, 2010

Good morning Chairwoman Woolsey, Ranking Member McMorris Rodgers and Members of the Subcommittee. My name is Jonathan Snare. I am an attorney and I am currently a partner with the DC office of Morgan Lewis & Bockius LLP law firm. I appreciate the opportunity to appear before you at this hearing to address a number of the important issues raised by the Protecting America's Workers Act legislation (HR 2067; S 1580). I am testifying today on behalf of the U.S. Chamber of Commerce, the world's largest business federation with over three million businesses of all sizes, sectors, and regions, as well as state and local chambers and industry associations. Importantly for the purposes of this hearing, over 96 percent of the Chamber's members are small businesses employing 100 or fewer employees. I am a member of the Chamber's Labor Relations Committee and serve on the OSHA Subcommittee. My testimony and comments are not intended to represent the views of Morgan Lewis & Bockius LLP or any of our clients.

BACKGROUND

At the outset, I would like to provide you and the Subcommittee with a brief overview of my background and experience to allow you to appreciate and understand the relevance of my testimony and my perspective on these very important issues.

I have been a practicing attorney for close to twenty-five years, and I am a graduate of the University of Virginia and Washington & Lee University School of Law.

As I mentioned, I am a partner with Morgan Lewis & Bockius LLP, having joined the firm in February 2009. My practice is focused on advising clients in the labor and employment field, largely in areas of workplace safety and health, as well as whistleblower matters, regulatory issues, government prevailing wage requirements, wage and hour/FLSA, and other related matters. The focus of my practice is to provide advice and counsel to a wide variety of clients in the area of workplace safety and health-- ranging from assisting clients with investigations from government agencies such as the Chemical Safety Board, to representing

clients in enforcement proceedings brought by OSHA and its state plan state partners, as well as to assisting clients with safety and health compliance issues, recordkeeping questions, workplace audits, and the like. On this compliance side of the practice, I have been working with my law firm colleagues (several of whom have over 30 years of experience in this field) to advise clients large and small with a variety of matters to assist them in complying with all applicable OSHA workplace safety and health requirements.

Prior to the time I joined the Morgan Lewis law firm last year, I had the privilege of serving for over five years in several positions at the U.S. Department of Labor. Most relevant for the purposes of this hearing, I served as the Deputy Assistant Secretary for the Occupational Safety and Health Administration (OSHA) from December 2004 through July 2006, as well as serving as the Acting Assistant Secretary for OSHA for most of that period, from January 2005 through April 2006. I then served as the Deputy Solicitor of Labor from July 2006 through January 2009 and I served as the Acting Solicitor of Labor for most of 2007. I also served as the Senior Advisor to the Solicitor in 2003 to 2004.

Having had the privilege of running two of the Department of Labor's largest agencies, OSHA and the Solicitor's Office, I once had the responsibility of overseeing OSHA's critically important mission of assuring a safe and healthy workplace for every working American, and of the Solicitor's Office crucial role of providing legal support to OSHA to assist the agency in implementing the goals of its mission. In so doing, I believe I developed an understanding and insight on the many different strategies and tools that OSHA has available to implement these important goals.

WE SHARE THE COMMON GOALS OF THE PROTECTING AMERICA'S WORKERS ACT

I believe that the goals behind the Protecting America's Workers Act are laudable-- this legislation is intended to enhance OSHA in its mission to assure a safe and healthy workplace environment and to reduce the number of workplace injuries/illnesses and fatalities. I do believe, however, that the revisions to PAWA under consideration today as well as legislation itself may have unintended consequences and may not achieve the intent behind this bill. Penalties alone will not solve the problem—remember, penalties are imposed after the fact of an injury or fatality. The critical mission of OSHA is to assist employers to make sure these injuries and fatalities never occur in the first place. To understand my concerns, I think it would be helpful for the Subcommittee to hear about the recent activities of OSHA as well as its record in achieving its mission.

OVERVIEW OF OSHA'S RECORD OVER THE LAST DECADE

During the last Administration, I believe that OSHA demonstrated that its "balanced approach" of using enforcement, compliance assistance and cooperative programs, and outreach and training to respond to the challenge of workplace safety and health was successful in its continuing mission of improving workplace safety and health.

On the enforcement side, OSHA endeavored to focus its resources on those employers who demonstrated a complete disregard for their obligations under the OSH Act and the many standards and regulations promulgated there under. As part of that effort, OSHA conducted on average approximately 38,000 inspections every year; focused the agency's resources and enforcement on employers who had failed to value the lives and safety/health of their employees; expanded the use of procedures for the agency to seek intervention by a federal court of appeals to take action against employers when necessary; increased the number of referrals to the Department of Justice for possible criminal prosecution from an average of 6 per year in the 1990s to approximately 12 per year; utilized the available tools of egregious citations when necessary, and OSHA took steps to clarify through rulemaking the application of the egregious policy to respond to a court decision which had created confusion as the use of that policy; and issued a number of significant citation penalties including the largest citation penalty in OSHA's history up to that time.

For the vast majority of employers who understand the value of their most precious resources--their employees--and who want to do the right thing and comply with workplace safety and health requirements, OSHA offered the assistance to enable them to better understand and comply with their obligations. The agency did this through our expanded compliance assistance programs including the expansion of the VPP program which I believe had a significant positive impact on workplace safety over the past decade. OSHA also continued with outreach efforts and expanded training programs in many different and innovative ways to provide employees, employee groups, community groups and employers resources to better understand the safety requirements and to learn better ways to improve safety on the jobsite. One of the initiatives of which I am most proud were the efforts to focus on the challenge of reaching the non-English speaking and immigrant workforce through a variety of programs including projects designed to outreach to Hispanic workers through an OSHA task force a well as working with a number of governments and consulates from Mexico as well as Central America to produce materials and guidance in Spanish.

The record on workplace injuries, illnesses and fatalities over the past decade shows continued improvement. As has been reported by the Bureau of Labor Statistics (BLS), workplace injuries and illnesses declined throughout the decade and the most recent available statistics, for FY 2008 are at the lowest levels ever recorded. Nonfatal workplace injuries and illnesses among private industry employers in 2008 occurred at a rate of 3.9 cases per 100 equivalent full-time workers--a decline from 4.2 cases in 2007. Workplace fatalities have likewise declined over the past decade, and the most recent available statistics, show that fatalities are at the lowest levels ever recorded. For FY 2008, 5,071 workplace fatalities were recorded, down from a total of 5,657 fatal work injuries reported for 2007. While the 2008 results are preliminary, this figure represents the smallest annual preliminary total since the Census of Fatal Occupational Injuries (CFOI) program was first conducted in 1992. Based on these preliminary counts, the rate of fatal injury for U.S. workers in 2008 was 3.6 fatal work injuries per 100,000 full-time equivalent (FTE) workers, down from the final rate of 4.0 in 2007 While even one workplace fatality is one too many, and tragic to every family who suffers such a loss (which I can attest to since my family lost a member to a workplace accident), the facts are clear that OSHA has achieved significant success in reducing these injuries and fatalities

throughout its history including these record low numbers of fatalities and injuries in the last decade.

By every available factual and statistical measure, OSHA has been successful in its mission. Something must have been working for these results to have been achieved. In my judgment, the way to achieve these types of results is for OSHA to use the wide variety of resources available to assist employers who have the ultimate responsibility under our system for workplace safety and health, which includes motivating employers in some cases through enforcement or the risk of enforcement, as well as offering outreach and compliance assistance to employers to enable them to understand and comply with their obligations. This balanced approach to workplace safety makes sense particularly given the structure of the OSH Act and the reality of agency funding, and the nature of OSHA's responsibilities for workplace safety.

All in all, I am proud of the record of OSHA and the efforts of its dedicated employees over the past decade. I believe these efforts contributed to achieving the lowest number of workplace fatalities and injuries ever recorded.

I understand that there are those who disagree, some vigorously, with the approach of the last Administration. These types of debates concerning the best way for OSHA to achieve its mission and the varying combinations and emphasis of the available tools for OSHA given the current funding structure—whether it be enforcement, regulatory requirements, compliance assistance, cooperative programs, training and who should be the beneficiary of training programs—have been around since the passage of the OSH Act and inception of the agency, and will continue in the future. I think these types of debates are healthy—they show that stakeholders from all sides are looking for the best approach to improving workplace safety.

OSHA'S MISSION AND STRUCTURE, AND EMPLOYERS' RESPONSIBILITY FOR WORKPLACE SAFETY AND HEALTH

The OSH Act tasked OSHA with the mission to assure workplace safety and health but it has always been the responsibility of the employers, not OSHA itself, to ensure safety and health on the jobsite. OSHA has never had the resources, even when the agency had its largest number of employees, to inspect the 6 million worksites now within its jurisdiction. When you take into account that federal OSHA conducts approximately 38,000 inspections it would take the agency over 90 to 100 years to inspect every worksite. Clearly, enforcement alone will never be able to reach every workplace or serve as an effective deterrent. OSHA does not have the funds, and will never have the funds, to hire the staff large enough to reach each worksite on a regular basis through enforcement. The only way to leverage OSHA's resources to reach the greatest number of worksites and have the most positive impact on workplace safety and health is to use these other programs like compliance assistance, outreach, and training.

Underlying OSHA's enforcement efforts is the employer's responsibility to comply with all applicable workplace safety and health obligations. This system, then, depends on employers taking it upon themselves to implement the necessary steps and programs. The goal here is to prevent workplace fatalities as well as injuries and illnesses from happening in the first place. Enforcement and penalties do not prevent workplace fatalities and injuries; they are imposed

after workplace fatalities and injuries have occurred. Simply put, the best approach to workplace safety and health under this existing system and structure is a proactive approach that reaches employers before there is a problem and provides them with the support and guidance they need to protect their employees.

My experience in government service, as well as in private law practice, is that most employers want to do the right thing in terms of workplace safety and health, as most employers care about their most valuable resource, their employees. For most employers, workplace safety and health makes sense for business and economic reasons, as those with safe worksites are often the most productive and efficient, with the lowest overhead and workers' compensation rates, and it makes sense because it is the right thing to do.

OSHA ALREADY HAS SUFFICIENT AVAILABLE ENFORCEMENT TOOLS AND PENALTIES TO IMPOSE SANCTIONS AGAINST EMPLOYERS WHERE THE CIRCUMSTANCES WARRANT

I want to make clear that the U.S. Chamber of Commerce does not condone those employers who have intentionally flouted their obligations to protect their employees and fail to comply with their workplace safety and health obligations. Those employers—a small minority of employers—deserve the full range of enforcement sanctions by OSHA depending on the particular facts of the violation in question.

There are already sufficient penalties and enforcement tools to take action against those employers. Under the OSH Act, there are currently five general categories of civil penalties available to OSHA to impose on employers: Willful; Repeat; Failure to Abate; Serious; and Other than Serious. Under the current structure, penalties for willful violations can be imposed up to $70,000 for each willful violation of an OSHA standard or the General Duty Clause. While not defined in the statute, a willful violation has come to mean one where the employer is established to have been aware of and intentionally violated these requirements or acted with reckless disregard or plain indifference to workplace safety. OSHA can also impose a civil penalty of up to $70,000 for each repeat violation which is a violation of the same or substantially similar requirement by the same employer at the same or different facility. Additionally, OSHA has the ability to impose instance by instance penalties (the egregious policy) under certain circumstances so that the agency could impose willful violations for each instance of conduct, for example it could impose a willful penalty for each employee affected. In other words, the agency already has the prosecutorial authority to impose penalties in large amounts (sometimes in the multiple of millions of dollars) in these cases, as we have seen.

For those violations which are serious, the agency can impose a civil penalty of $7000. The agency can also impose a civil penalty of $7000 per day for a failure to abate violation for each day beyond the required abatement date that the particular condition or hazard remains unabated.

As to potential and available criminal sanctions, the OSH Act provides that an employer can be subject to a criminal fine of up to $250,000 and six months in jail for the first willful violation resulting in the death of an employee, and a criminal fine of up to $500,000 and twelve

months in jail for the second willful violation resulting in an employee fatality. And as I already noted in my testimony, OSHA did not hesitate during the previous administration to refer cases that met this criteria to the Department of Justice for review and consideration for criminal prosecution.

PROBLEMS WITH THE PROTECTING AMERICA'S WORKERS ACT AND THE REVISIONS UNDER CONSIDERATION

The proposed changes to the OSH Act by the PAWA legislation and the revisions to PAWA under discussion at today's hearing will simply not achieve the desired results in terms of improving workplace safety and health. Further, many provisions of this legislation and these revisions will result in adverse consequences to OSHA in terms of the administration of its enforcement, and to the Solicitor's Office which is charged with the responsibility of litigating contested cases. The revisions to PAWA under consideration at today's hearing (I reviewed the summary available late last week and the legislative language which I received only yesterday) will also not improve this bill's ability to improve workplace safety. I have not had the chance to conduct a thorough review of the legislative language under consideration, and I would like to reserve the right to offer the Subcommittee any further comments after I have had the full opportunity to conduct a more careful review of that language.

In general, the proposals to increase civil and criminal penalties; dramatically revise the whistleblower structure under the OSH Act; require immediate abatement; and expand victim's rights, will cause delays in the ultimate resolution of contested enforcement cases, and unduly strain the resources of OSHA and the Solicitor's Office. Data on MSHA and the increase in penalties over the last few years, and other increases in sanctions to employers, which resulted in huge increases in contested cases, delays in resolving cases, as well as challenging burdens on the Solicitor's Office and which were the subject of a hearing in this committee earlier this year demonstrated the unintended and negative consequences of these approaches.

At its core, PAWA can be described under the old adage "bad facts make bad law." This effort to change the OSH Act with enforcement-only sanctions appears to be driven by the conduct of the few outlier employers who fail in their workplace safety and health obligations. These proposed penalty increases and other sanctions will do nothing to assist employers to understand their obligations for workplace safety and health, such as the small business owner who is trying to understand how to comply with applicable requirements. How will increasing penalties help her design a more effective workplace safety program when she knows she is unlikely to see an inspection unless there is an accident or fatality? This employer is obviously better served with more outreach and compliance assistance materials than increased penalties. Again, the goal here is compliance and prevention, not sanction. This approach benefits employers but more importantly it benefits employees.

Specifically, we have the following concerns with these provisions of PAWA and the revisions under consideration at today's hearing:

Abatements of hazards pending contests of citations: This provision will reduce or eliminate the ability of an employer to challenge a citation through the OSHRC administrative

process by requiring immediate abatement. Immediate abatement is already available through the emergency shutdown mechanism when OSHA identifies an imminent hazard. This provision will also eliminate one source of leverage that OSHA and the Solicitor's Office can use to resolve cases by settling appropriate cases with the requirement of immediate abatement imposed.

The signaled modification to this mandatory abatement provision which would substitute an employer's ability to suspend abatement while contesting the citation with a higher burden of proof akin to what is required for securing a temporary injunction is simply unjustified and an outrageous trampling of due process rights. Abatement is more than just protecting against a hazard; it is part of accepting responsibility for the violation. Mandating abatement before allowing the employer to exhaust their adjudicative process would be like asking a criminal or civil defendant to pay a fine or serve a sentence before the trial is held.

In addition, this provision will eliminate OSHA and the Solicitor's Office prosecutorial discretion in handling these contested cases. This provision strikes me as unduly punitive and makes it much more difficult for employers, particularly smaller employers who lack resources, to challenge certain citations which they may believe in good faith are incorrect or improperly imposed by the agency in the first place. By making it harder to settle cases this will increase the rate of contest cases.

Expanding Victims' Rights: The signaled modification to this provision of PAWA would allow an employee who has sustained a work-related injury or a family member if that employee was killed or unable to exercise their rights, to make a statement before an Administrative Law Judge at OSHRC for those cases which have been contested. Under PAWA these employees or their family members are permitted to make a presentation to the meet with the Secretary or the designated representative and to be kept informed of the investigation and any citations that may be issued. Further, PAWA also provides these employees, or their representatives, the opportunity to learn of any modifications to the citations or settlement negotiations, and to object to such modifications or settlements. Given the legal nature of these proceedings, there does not appear to be much value to this presentation other than to sensationalize presumably already emotional and sensitive matters.

Civil Penalties: The signaled change to PAWA's expansion of civil penalties, the elimination of the $50,000 penalty for fatalities under "other than serious" violations is appropriate, not because it reduces the penalty amount, but because of the lower level of violation involved. Similarly the signaled elimination of the penalty for failure to abate sounds sensible.

However, the remaining increases in civil penalties under PAWA raise the issues already mentioned about the impact of increasing penalties, the unintended consequences, and the flaw in thinking that merely increasing penalties will result in improved workplace safety.

Criminal Penalties: The signaled modifications to PAWA's increase in criminal penalties would change the level of intent necessary for criminal penalties from the current "willful" to "knowing." Such a change would upend decades of OSHA law—dating to the

passage of the act in 1970 and introduce tremendous uncertainty, further guaranteeing substantial increases in contested cases. While the "knowing" standard is used in EPA law, it has not been the standard for OSHA criminal culpability. As there is no further definition in the bill of this standard, employers (and OSHA inspectors) will be left to guess what this means and when it should apply. This is a prescription for utter confusion and legal challenges that will be costly to both the employer and the agency.

Changing "any responsible corporate officer" to "an officer or director" will result in a witch hunt to hold officers or directors responsible. Even the original "any responsible corporate officer" term in PAWA would be problematic, but expanding this to any officer or director will make corporate personnel unduly subject to prosecution when they generally have no involvement in day to day operations. All of these definitions are vague and ambiguous as to who would fall within these categories. These definitions are also vague as to how they would be applied in the legal process; do they apply only to the corporate entity or other legal entities such as partnerships? Does this mean that any limited partner or director would now be subject to potential criminal prosecution? None of these changes will improve workplace safety and health, and actually, this new requirement, if adopted, could result in adverse impact as corporate employees would now fear that any decision they could make on the jobsite could subject them to prosecution. Imagine that a safety director or E, H & S employee—they would be faced with the reality that every one of their decisions would be micromanaged, potentially by employees who have little or no expertise in safety and health. This would result in a chilling effect on these employees in trying to simply do their job. This could create uncertainty on the jobsite with a net reduction of workplace safety and health.

New whistleblower requirements: The signaled changes to PAWA's whistleblower expansions are described as "align[ing] OSHA whistleblower provisions with other modern whistleblower laws" which is ironic since most whistleblower provisions in other laws are modeled after OSHA's provision, and there is no evidence that expansion of whistleblower protections is appropriate. Although I have not had the opportunity to give these revisions under consideration a thorough review, as I just received the legislative language yesterday, the original PAWA language expanding whistleblower protections raises some difficulties.

The initial language in PAWA concerning the underlying justification for whistleblower status—that the employee has a "reasonable apprehension" that a particular job duty would result in a serious injury—and protect that employee who then refuses to perform that job function is itself a significant departure from other whistleblower statutes and would potentially create significant confusion and disruption in the workplace. While we understand the need for employees to avoid putting themselves at risk, we are concerned by the potential for disruption and the absence of any objective criteria governing this decision. This language is simply too vague and ambiguous to apply in a practical workplace context.

We also note that the new whistleblower provisions being discussed today allow employees to recover, against the employer, their attorneys' fees and costs if they are successful in getting an order for relief from either the Secretary or a court. Similarly, allowing small businesses that successfully defend themselves against an OSHA citation to recover their attorneys' fees has long been one of our key goals. Bills to permit this have passed the House

with bipartisan support in previous Congresses. While inclusion of this idea would not cure the problems we see with these whistleblower provisions, we believe allowing small businesses the same opportunity as employees to recover attorney's fees is only fair.

ADVERSE IMPACT OF OSHA CONTESTED CASELOADS AND ADVERSE IMPACT ON ADMINISTRATION OF OSHA LITIGATION: "JUSTICE DELAYED IS JUSTICE DENIED"

The net result of the proposed increase in penalties and sanctions is that employers will contest cases at a higher rate, which will impose an adverse impact on OSHA and the Solicitor's Office resources and will greatly delay the administrative litigation process and delay the resolution of OSHA contested cases.

We do not need to look any further than the recent example of MSHA to see the difficulties and challenges. Indeed, the full Education and Labor held a hearing on this subject on February 23. In the case of MSHA, the increased penalties under the Miner Act, combined with the aggressive use of existing tools, such as the Pattern of Violation mechanism, resulted in a dramatic increase in contest cases. For example, the percentage of contest MSHA violations went from just over 5 percent in 2005 (the year prior to the Miner Act), jumping to over 20 percent by 2007, and over 25 percent in 2008 and 2009.

From personal experience I can attest to the challenges these increases posed for the Solicitor's Office and MSHA. During this same period, I was the Acting Solicitor and Deputy Solicitor and we devoted significant time and effort to manage the impact of these higher contest rates. We had to shift resources within the Solicitor's Office, and take other often difficult steps, to assist with this dramatic increase in the workload. Due to the risk of the Pattern of Violations and the significantly higher penalties, it was much more difficult to settle cases, further adding to the problem. The MSHRC also faced problems in that they simply did not have enough ALJs to hear all of the cases. Funding increases partially solved this problem but it still remains a huge problem and the resolution of many cases has been delayed for months, if not years. The current backlog of cases is 16,000 and the caseload docket increased from 2,700 cases in FY 2006 to more than 14,000 cases in FY 2009.

I think it is important for this Subcommittee to carefully consider the practical real world impact of any of these proposed changes to the penalty structure which will have a significant impact on the administration of the OSHA contested caseload.

CONCLUSION

The Protecting America's Workers Act would radically restructure the OSHA civil and criminal penalty regime, as well as make other significant changes to how OSHA proceeds with its enforcement functions. Unfortunately, nothing in this bill, nor the revisions under consideration today, will do anything to actually help employers, and most importantly small businesses, improve safety in their workplaces. The goal is to prevent workplace fatalities and injuries from occurring, not merely punishing the employer after they occur. As recent data makes clear, the best way to achieve continuous improvements in workplace safety and health is

to utilize a proactive approach with enforcement when appropriate, and offer outreach, training, and compliance assistance to that vast majority of employers who want to do the right thing and comply with their workplace safety and health obligations.

Thank you for this opportunity to speak to you on these important issues, and I would now be happy to respond to any questions that you may have.