



September 15, 2017

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Submitted via: Regulations.gov

Douglas J. Kalinowski, Director
Directorate of Cooperative and State Programs
U.S. Department of Labor
200 Constitution Ave. NW
Washington, DC 20210

**Re: Comments on OSHA’s Voluntary Protection Programs (VPP),
Docket No. OSHA-2017-0009**

Dear Mr. Kalinowski:

Advisory Council

Patricia Bauman
Frances Beinecke
Eula Bingham
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Sally Greenberg
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The goal of OSHA’s compliance assistance activities is to protect workers’ health and safety by helping employers understand and take requisite steps to comply with the agency’s standards and regulations. Although OSHA classifies its Voluntary Protection Programs (VPP) as “compliance assistance,” the VPP simply exempts participating companies from routine, planned inspections for doing what they are legally obligated to do. OSHA has never assessed the VPP’s performance, and thus, has no evidence that it actually benefits workers’ health and safety or the agency.

OSHA has attempted once before to expand the VPP, under the George W. Bush administration. The agency sought to increase its size to 8,000 participants, despite having no evidence the VPP improved worker health and safety. In 2004, the Government Accountability Office (GAO) reviewed OSHA’s voluntary compliance programs and found that the agency not only lacked the comprehensive data needed to assess whether its programs were effective, but that administering the programs swallowed a large share of OSHA’s limited resources.¹

By the end of the Bush administration, the VPP had grown to more than 2,000 participants. When in 2009 the GAO again reviewed the VPP program, it found that “OSHA’s efforts to assess the performance of the VPP and evaluate its effectiveness [were] not adequate. First, OSHA ha[d] not developed performance goals or measures to assess the performance of the program. Second, OSHA contracted for a

¹ GOVERNMENT ACCOUNTABILITY OFFICE, GAO-04-378, WORKPLACE SAFETY AND HEALTH: OSHA’S VOLUNTARY COMPLIANCE STRATEGIES SHOW PROMISING RESULTS, BUT SHOULD BE FULLY EVALUATED BEFORE THEY ARE EXPANDED 43 (2004), <http://www.gao.gov/new.items/d04378.pdf>.

study of the VPP to evaluate its effectiveness, but the study was flawed.”²

Resource constraints ultimately tempered OSHA’s expansion plans, but not before the agency had damaged the VPP and eroded its integrity. OSHA had failed to keep up with the VPP’s growth. Several participating worksites were no longer qualified for the program, but OSHA had not acted to remove them from participation. OSHA also faced a major backlog of VPP re-approval applications.

During the Obama administration, OSHA focused on restoring the VPP’s integrity, rather than growing its size. Yet with Congress cutting OSHA’s budget year after year, the agency struggled and failed to get the program back on course. When the DOL Inspector General conducted a performance audit of the VPP for FY 2012, it found that not much had changed.³

Given the program’s history and continuing deficiencies, we find it alarming that OSHA is once again considering an expansion of the VPP. Not only does OSHA continue to lack the necessary resources to expand the program, the agency has still has not assessed the program’s performance to determine whether it has a measurable impact on worker health and safety. Without a baseline understanding of the program’s efficacy, it is difficult to provide OSHA with input on how to improve and/or expand the VPP. Thus, our comments to the questions proposed by OSHA focus on the need to assess the VPP’s performance before considering whether to expand it.

What can the agency do to enhance and encourage the efforts of employers, workers and unions to identify and address workplace hazards through the VPP?

We recommend OSHA heed the lessons of its past and evaluate the VPP’s performance and cost-effectiveness before continuing the program or expanding it. Without a formal assessment of the program, it is hard to identify benefits the program offers to workers or to the agency.

Without OSHA conducting planned inspections, a worker or worker representative must file a complaint, or a serious injury or fatality must occur before OSHA will visit the worksite, meaning that workers must take on OSHA’s job in its absence, despite the severely limited protections OSHA can offer workers when an employer retaliates against them for speaking up.

Supporters of the VPP often claim that the program helps the agency target its limited resources on the most dangerous industries. But it is unclear why OSHA needs this program to set its enforcement priorities. And contrary to this claim, the program may actually result in OSHA spending more resources on VPP entities because of the considerable time and effort put into deciding whether to approve a company’s application and conducting routine visits every three to five years.

Thus, OSHA should evaluate the VPP’s performance and cost-effectiveness *before* devoting more taxpayer dollars to continuing or expanding the program. Specifically,

² GOVERNMENT ACCOUNTABILITY OFFICE, GAO-09-395, OSHA’S VOLUNTARY PROTECTION PROGRAMS: IMPROVED OVERSIGHT AND CONTROLS WOULD BETTER ENSURE PROGRAM QUALITY 15 (2009), <http://www.gao.gov/assets/300/290017.pdf>.

³ U.S. DEP’T OF LABOR, OFFICE OF INSPECTOR GENERAL, 02-14-201-10-105, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION—VOLUNTARY PROTECTION PROGRAM: CONTROLS ARE NOT SUFFICIENT TO ENSURE ONLY WORKSITES WITH EXEMPLARY SAFETY AND HEALTH SYSTEMS REMAIN IN THE PROGRAM (2013), <https://www.oig.dol.gov/public/reports/oa/2014/02-14-201-10-105.pdf>.

OSHA should first develop programmatic goals and measures and then assess the VPP to determine whether it has a positive effect on worker health and safety, has a negative effect, or has no effect at all. If the program has a negative or negligible effect, the agency should consider abandoning the VPP, or at the very least, work to improve it before considering an expansion. Alternatively, if the VPP generates benefits to workers, a formal assessment may provide OSHA with much needed support for continuing or expanding the program. Of course, OSHA would still need to compare the results relative to its other compliance assistance and enforcement programs to determine which is most effective.

How can the agency support increased participation in VPP while operating with available resources and maintaining the integrity of the program?

OSHA currently lacks the necessary resources to increase participation in the VPP program without sacrificing its integrity. With slim chance of Congress or the administration appropriating additional funds, a user fee system offers OSHA the best means to expand the VPP while maintaining its programmatic integrity. The Center for Progressive Reform (CPR), along with numerous other organizations, have written about how such a user fee system ought to be designed, so there is no shortage of information available on this topic.⁴ While it is true that Congress would need to authorize OSHA to keep the user fees it collects so that it can put them toward operation of the VPP, such an initiative would reduce taxpayer funding of a government program that is not currently proven to have any public benefit, and may actually cause more harm than good.

Alternatively, OSHA could eliminate the VPP program and focus its priorities on conducting inspections of high-hazard industries and establishments with dismal records. There is no reason OSHA cannot set priorities for targeting the most dangerous worksites just as effectively without the VPP. OSHA could also utilize proven compliance assistance measures that help employers understand what they need to do to comply with the law.

If OSHA continues the VPP program, regardless of whether it expands it, the agency should revise the criteria that applicants must meet to be part of the VPP by requiring that participants that hire contingent workers use them only in low-hazard occupations. This is a recommendation CPR has advocated the agency adopt for several years.⁵ At present, the VPP addresses contingent workers' health and safety by comparing injury rates between regular employees and temporary employees, supplemented by interviews with temporary and contract employees. VPP applicants are also asked to encourage the contractors they work with to have health and safety programs. But this approach does not allow OSHA to fully understand whether a company participating in VPP is inappropriately using contingent workers. OSHA should update its analysis to include a review of the types of jobs performed by contingent workers and an accounting of the hours worked by contingent workers as opposed to regular employees in high-hazard jobs. Disproportionate use of contingent workers in high-hazard jobs should weigh against approval of the applicant.

⁴ Martha McCluskey, Thomas McGarity, Sidney Shapiro, Rena Steinzor, and Matthew Shultz, *The Next OSHA: Progressive Reforms to Empower Workers*, Center for Progressive Reform White Paper No. 1207, at 16-17 (2012), http://www.progressivereform.org/articles/Next_Generation_OSHA_1207.pdf.

⁵ Martha McCluskey, Thomas McGarity, Sidney Shapiro, and Matthew Shultz, *At the Company's Mercy: Protecting Contingent Workers from Unsafe Working Conditions*, Center for Progressive Reform White Paper No. 1301, at 22-23 (2013), http://www.progressivereform.org/articles/Contingent_Workers_1301.pdf.

How can the agency modify VPP to enhance the efforts and engagement of long-term VPP participants? How might the agency modify Corporate VPP for greater leverage and effectiveness? How can the agency further leverage participant resources such as Special Government Employees?

Without knowing whether the VPP has any effect on the efforts of participants or whether it generates a measurable benefit to worker health and safety, we find it challenging to offer ideas on how the agency could modify the program to increase engagement, achieve greater effectiveness, or better leverage participant resources. Generally, OSHA could seek to boost program integrity by revising the eligibility criteria so that only the safest companies may participate, not just those that simply do the minimum they are legally required to do. OSHA could also kick out employers who no longer meet the criteria to make way for other companies to join the program. Nevertheless, program effectiveness must be the top priority of the agency, because if it generates no benefit for worker health and safety, OSHA should discontinue the program regardless of whether it finds it has administered the program with integrity.

Thank you for this opportunity to provide input on the future direction of OSHA's VPP. We hope the agency will consider our recommendations for improving compliance assistance and enforcement efforts as it moves forward.

Sincerely,



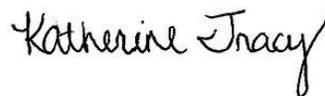
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