Nominations for Regulatory Reform
May 2004

Submitted by the Office of Advocacy
U.S. Small Business Administration

Name of rule, policy or guidance: Hazard Communication Standard

Regulating agency: Occupational Safety and Health Administration (OSHA)

Authority for rule, policy or guidance: 29 CFR 1910.1200

Description of what existing rule, policy or guidance does: This rule requires manufacturers of chemicals to assess the hazards of exposure those chemicals and to communicate those hazards to employers and employees through labels, material safety data sheets, and training. The rule requires employers who use these chemicals to communicate the hazards to their employees through a hazard communication program of information and training. Employers are required to keep their hazard communication program, including the Material Safety Data Sheets (MSDSs), up-to-date following any change in the information provided by the chemical manufacturers.

Affected small businesses: Any small business using a chemical for which there is an MSDS.

Regulatory burden(s) imposed: The primary burdens associated with this rule include providing the training, documenting the training, keeping the training and documentation up-to-date, and making sure the appropriate MSDS is available to the employees. The rule references information provided by standard-setting groups such as the American Conference of Governmental Industrial Hygienists (ACGIH) and requires changes to MSDSs and training documentation when these groups update their information on chemicals.

Proposed burden reduction: Removing the link between the OSHA standard and the actions of ACGIH would resolve the problem of small businesses having to keep up with changes that can occur at any time with little or no notice to the employer. Businesses large enough to employ a certified industrial hygienist might be in a position to monitor the actions of ACGIH, but most small businesses cannot. However, they are out of compliance with the HazCom regulation when they fail to notice that the MSDS in their workplace is out of date. The rule should require that OSHA publish each change in an MSDS for notice and comment.

Anticipated benefit(s) for small entities: Small employers would have some notice of what changes might be required in their HazCom programs, and would not have to spend resources monitoring the actions of ACGIH.

Name of rule, policy or guidance: Occupational Exposure to Hexavalent Chromium

Regulating agency: Occupational Safety and Health Administration (OSHA)

Authority for rule, policy or guidance: OSH Act (29 U.S.C. 651). Under court order, OSHA is preparing to issue this health standard by January 18, 2006. *Order*, Public Citizen Health Research Group, et al., v. Chao, 2003 WL 22158985 (3rd Cir., April 2, 2003). OSHA has recently concluded a panel process required by the Regulatory Flexibility Act, as amended by the Small Business Regulatory Enforcement Fairness Act, 5 U.S.C. Sec. 609. A Notice of Proposed Rulemaking is due on or before October 4, 2004.

Description of what existing rule, policy or guidance does: Reduces the permissible exposure limit (PEL) for airborne concentrations of hexavalent chromium from 100 micrograms per cubic meter, in order to reduce the incidence of lung cancer in affected workforce.

Affected small businesses: There are over thirty industries which would be affected, including chrome and chromate producers, electroplaters, pigment producers and printers, welders, painters, foundries, Portland cement producers, and some construction companies.

Regulatory burden(s) imposed: Maintaining the exposure level at worksites in the various industries requires the use of monitoring and ventilation equipment, administrative controls, training, and respirators, in some instances. Ventilation systems are designed by engineers to meet the specific PEL. Changes in the PEL require costly design changes, equipment upgrades, and additional training. In addition, OSHA is considering imposing costly medical management requirements, including post-employment physicals. The industries represented on the SBREFA panel addressing the OSHA proposal reported that most workplaces are already achieving exposures of less than 25 micrograms per cubic meter, one-quarter of the current PEL. They also told OSHA that the range of PELs under consideration by the panel, from 10 micrograms per cubic meter down to one-quarter of one microgram per cubic meter, was neither technologically nor economically feasible. Several small entity representatives to the panel said that the available data does not support a link between current exposure levels of hexavalent chromium and an increased risk of lung cancer.

Proposed burden reduction: Set the PEL at a technologically and economically feasible level. Several industries reported that costs associated with a PEL within the range under consideration by OSHA would put many companies out of business. Virtually all of the industries involved in the SBREFA panel process challenged OSHA's exposure data, as well as OSHA's technological and economic feasibility analyses. In some industries, many small businesses would fail as a result of some of the options contained in the draft proposed rule. OSHA's estimate of costs for small businesses in general industry ranged

from $142 million to $463 million. Panel members believe that these numbers represent only one-tenth of the actual costs of compliance.

Anticipated benefit(s) for small entities: Small entities in every industry are already achieving low levels of exposure to hexavalent chromium, and therefore are already avoiding any increased risk of lung cancer among their workforce. Setting the PEL at an achievable level would mean that these businesses would not suffer the enormous economic consequences of trying to achieve an unachievable PEL. Some facilities would have to spend millions to achieve the PEL, while others would simply not stay in business.

Name of rule, policy or guidance: Hours of Service of Drivers; Driver Rest and Sleep for Safe Operation

Regulating agency: Federal Motor Carrier Safety Administration (FMCSA)

Authority for rule, policy or guidance: 49 U.S.C. 113, 504, 521(b), 5113, 31136, 31144, 31148, and 31502; and 49 CFR 1.73

Description of what existing rule, policy or guidance does: Sets maximum continuous hours of on-duty time per 24-hour period and per work week for commercial truck drivers; also sets minimum number of hours between days of work and between weeks. The purpose of the rule is to avoid accidents related to tired drivers of commercial vehicles.

Affected small businesses: Trucking companies, including long- and short-haul truckers; service companies, including utility and telephone companies; construction contractors; and wholesale and retail deliveries.

Regulatory burden(s) imposed: Drivers may only work 11 hours before taking a 10 hour break; the rule allows one day per week on which drivers may be working up to 16 hours. Drivers may work up to 70 hours within an eight-day period but must take a break of at least 34 hours before beginning a new eight-day period. Some businesses will incur the cost of hiring new drivers or curtailing operations to meet the new requirements. All businesses will incur training costs.

Proposed burden reduction: Redefining on-duty hours to allow deliveries to be made beyond the 11-hour maximum will save costs for businesses whose primary business is not trucking, such as a business which delivers its products locally more frequently than the once-per-week would allow.

Anticipated benefit(s) for small entities: These companies would not have to hire new drivers, and would have reduced training costs.

Name of rule, policy or guidance: Diesel Particulate Matter, Underground Metal and Nonmetal Mines, 30 CFR Part 57 (66 Federal Register 5706; January 19, 2001)(*amended at* 67 Federal Register 9180; February 27, 2002)

Regulating agency: Mine Safety and Health Administration (MSHA)

Authority for rule, policy or guidance: Federal Mine Safety and Health Act, as amended (30 U.S.C. 801 *et seq*.); 30 CFR Part 57.

Description of what existing rule, policy or guidance does: Among other things, the rule sets the permissible exposure limit (PEL) for diesel particulate matter in mines temporarily at 400 parts per million, until January 1, 2006, when the PEL is lowered to 160 parts per million (ppm). The purpose of the rule is to avoid an increased risk of cancer associated with prolonged exposure to diesel particulate matter.

Affected small businesses: Underground mining operations.

Regulatory burden(s) imposed: The PEL, set at 160 parts per million, goes into effect on January 1, 2006. Currently the PEL is set at 400 ppm. Maintaining the atmosphere inside a mine includes the use of air shafts, ventilation equipment, training, and respirators, in some instances. Ventilation systems are designed by engineers to meet the specific PEL. Changes in the PEL require costly design changes, equipment upgrades, and additional training. MSHA estimates the cost of the rule to be $4,539 per mine per year (Preliminary Regulatory Economic Analysis, July 2003). Industry experts estimate such costs to be many times larger than the MSHA numbers. MSHA costs do not include costs for engineering and design of new systems, or costs for improved ventilation, nor do they account for increased nitrogen dioxide in mines using filtering methods required by the new rule. Costs of compliance with the PEL of 160 ppm for one mine thought to be representative of the industry were estimated to be about $1.5 million. (Testimony of National Stone, Sand, and Gravel Association, MSHA Public Meeting on Proposed Rule for Diesel Particulate Matter Exposure of Underground Miners; October 7, 2003)

Proposed burden reduction: Maintain the current PEL (400 ppm), and allow worker rotation as an administrative control to reduce exposures. Worker rotation is not allowed as an administrative control if there is exposure to a cancer-causing substance, but the scientific basis of the link between an increased risk of cancer and exposure to diesel particulate matter has been challenged. A recent study by the National Cancer Institute and the National Institute of Occupational Safety and Health has failed to find to find such a link.

Anticipated benefit(s) for small entities: Reducing the PEL to 160 ppm would eliminate some of the burden of compliance with the new PEL. Mines have already been incurring costs for compliance with the current PEL of 400 ppm. There is a significant possibility that currently available engineering, equipment and training may not achieve compliance with the rule under any circumstances.

Name of rule, policy or guidance: Toxics Release Inventory (TRI) Reporting

Regulating agency: U.S. Environmental Protection Agency

Authority for rule, policy or guidance: Section 313 of the Emergency Planning and Community Right-to-Know Act (EPCRA), 42 U.S.C. §11023.

Description of what existing rule, policy or guidance does: This rule requires the reporting of information on the releases and other waste management of EPCRA section 313 chemicals to the public from facilities in their communities.

Affected small businesses: Approximately 25,000 small businesses that process, manufacture or use more than a threshold amount of section 313 chemicals.

Regulatory burden(s) imposed: The rule requires the annual reporting of chemical release and waste management information at a cost in excess of several hundred million dollars per year.

Proposed burden reduction: EPA can reduce the cost of reporting in a variety of ways: (1) expanding the number of filers eligible to use a "short-form" annual form (Form A), (2) enhancing Form A to include reporting of a range of amounts of section 313 chemicals, rather than a specific number, (3) introducing a new Form NS, for facilities with no significant changes from previous baseline years, and (4) allowing reporting of a range of amounts of Section 313 on the long-form (Form R) report.

Anticipated benefit(s) for small entities: More than 20,000 small businesses will have substantially reduced reporting costs under these options.

Name of rule, policy or guidance: Integrated Urban Air Toxics Strategy

Regulating agency: U.S. Environmental Protection Agency

Authority for rule, policy or guidance: Section 112(d) of the Clean Air Act, 42 U.S.C. § 7412(d).

Description of what existing rule, policy or guidance does: Under the Urban Air Toxics Strategy, EPA plans to develop standards to control toxic air pollutants from area sources. *See* 64 Fed. Reg. 38706 (July 19, 1999). Area sources are those sources that emit less than 10 tons per year of a single hazardous air pollutant (HAP) or less than 25 tons of a combination of HAPs. EPA has identified 55 area source categories that may be regulated in the near term. EPA may require these area sources to install hazardous air pollutant controls that EPA deems to be Maximum Achievable Control Technology (MACT) or Generally Available Control Technology (GACT).

Affected small businesses: Dry cleaners, wood treating facilities, automobile painting shops, and paint stripping operations, among other industries in 55 area source categories.

Regulatory burden(s) imposed: Area sources subject to control may be required to install and operate MACT/GACT control technology, with associated monitoring and recordkeeping requirements. Depending upon whether MACT or GACT requirements are imposed, the cost to each business may range from several thousand dollars per year to hundreds of thousands of dollars per year.

Proposed burden reduction: Because a significant number of area sources are small businesses (e.g., dry cleaners), EPA should commit to conducting small business review Panels with Advocacy and OMB prior to developing any MACT/GACT standards for area sources. The Small Business Regulatory Enforcement Fairness Act (SBREFA) provides for the convening of a small business review panel whenever a planned EPA rule is expected to have a significant economic impact upon a substantial number of small entities.[1]

Anticipated benefit(s) for small entities: Developing MACT/GACT standards through the SBREFA Panel process will lead to standards that achieve the emission reduction objectives of the Urban Air Toxics Strategy without unduly burdening small businesses.

[1] The Regulatory Flexibility Act, as amended by the Small Business Regulatory Enforcement Fairness Act, Pub. L. 104-121, section 609(b).

Name of rule, policy or guidance: Spill Prevention, Control and Countermeasure (SPCC) Plans

Regulating agency: U.S. Environmental Protection Agency

Authority for rule, policy or guidance: Oil Pollution Act of 1990, 33 USC §§ 2701-2761

Description of what existing rule, policy or guidance does: EPA promulgated a rule in July 2002 requiring facilities that store "oil" (including vegetable oil and asphalt) above certain threshold levels and that are located near waterways to prepare and implement spill prevention, control, and countermeasure (SPCC) plans. These SPCC plans are required to be certified by a professional engineer.

Affected small businesses: Tens of thousands of small businesses, including farms, construction sites, and small manufacturers.

Regulatory burden(s) imposed: The costs, including the cost of the professional engineer's certification of the SPCC plans, cost in excess of hundreds of millions of dollars in one time costs.

Proposed burden reduction: EPA can eliminate the applicability of the professional engineer requirements for small facilities, and reduce the stringency of some of the technical requirements that are part of the SPCC plans, such as the replacing the requirement to perform costly integrity tests of tanks that can be characterized as "low risk" tanks with a visual inspection requirement. This would still achieve the overall objectives of the SPCC requirement while achieving substantial cost savings.

Anticipated benefit(s) for small entities: The cost savings could exceed tens of millions of dollars per year to tens of thousands of small businesses.

Name of rule, policy or guidance: Brick Manufacturing Air Toxics Rule

Regulating agency: U.S. Environmental Protection Agency

Authority for rule, policy or guidance: Section 112(d), Clean Air Act, 42 U.S.C. § 7412(b).

Description of what existing rule, policy or guidance does: This rule requires hazardous air pollutant controls for hydrogen chloride (HCl) and particulate matter (PM) from brick manufacturing plants in excess of a production-based threshold. The controls must meet the standard that EPA deems as Maximum Achievable Control Technology (MACT), with associated monitoring and recordkeeping requirements.

Affected small businesses: The rule affects approximately 80 small businesses in an industry of about 100 firms.

Regulatory burden(s) imposed: Existing brick kilns are required to retrofit their facilities with MACT controls, whereas the regulated emissions are typically below the level of regulatory concern.

Proposed burden reduction: EPA can consider a variety of risk-based and technical approaches to reduce the stringency of the rule, or exempt some of the 80 small facilities from the rule.

Anticipated benefit(s) for small entities: Facilities would not be required to install and operate MACT controls on their facilities, yielding substantial cost savings with little or no effect on the environment. Similar risk-based approaches have been used by EPA for industrial boilers and the plywood industry.

Name of rule, policy or guidance: Definition of “Solid Waste”

Regulating agency: U.S. Environmental Protection Agency

Authority for rule, policy or guidance: Resource Conservation and Recovery Act (RCRA), 42 U.S.C. 6901 *et seq*., 40 C.F.R. §§ 260-261.

Description of what existing rule, policy or guidance does: EPA currently includes spent materials, sludges, by-products and scrap metal as hazardous wastes under RCRA, which are subject to costly hazardous waste management requirements. The RCRA “solid waste” definition includes recycled materials that are not immediately returned to an industrial process as substitutes for raw material feedstock.

Affected small businesses: The rule affects tens of thousands of small businesses who recycle chemicals and metals.

Regulatory burden(s) imposed: The rule subjects legitimate recycling, which poses little environmental risk, to complex and costly RCRA regulations, at a cost of hundreds of millions of dollars annually.

Proposed burden reduction: EPA can exclude legitimate reuse, recovery and recycling from RCRA.

Anticipated benefit(s) for small entities: Facilities will not be required to meet the costly and complicated RCRA hazardous waste management requirements. This action would yield significant cost savings, with very little commensurate risk to the environment.

Name of rule, policy or guidance: Reclamation of F006 Sludge

Regulating agency: U.S. Environmental Protection Agency

Authority for rule, policy or guidance: Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6901 *et seq*., 40 C.F.R. § 261.

Description of what existing rule, policy or guidance does: This rule subjects etching, finishing, and electroplating sludges containing cadmium, hexavalent chromium, nickel, or cyanide as a hazardous waste subject to RCRA hazardous waste management requirements.

Affected small businesses: The rule affects tens of thousands of small businesses that generate etching, finishing, or electroplating sludges.

Regulatory burden(s) imposed: This rule subjects these sludges to the full RCRA hazardous management regulations, despite the fact that F006 sludge is reclaimed for its metal content, and does not pose an environmental risk.

Proposed burden reduction: EPA can exempt these sludges from treatment as a hazardous waste under RCRA, so long as the facility properly reclaims the metals content of the F006 sludge.

Anticipated benefit(s) for small entities: Facilities would not be required to meet the costly and complex RCRA requirements.

Name of rule, policy or guidance: Pretreatment Streamlining Rule

Regulating agency: U.S. Environmental Protection Agency

Authority for rule, policy or guidance: Clean Water Act, 33 U.S.C. 1251 *et seq*.

Description of what existing rule, policy or guidance does: EPA requires companies that discharge small amounts of water pollutants to publicly-owned treatment works (POTWs) to treat their discharges before they are sent to the POTWs and meet monitoring and recordkeeping requirements. The POTWs, in turn, are required to maintain records and perform other administrative duties with respect to the small-volume dischargers.

Affected small businesses: EPA's small discharger pretreatment requirement affects approximately hundreds of thousands of small businesses that are industrial users and thousands of small POTWs.

Regulatory burden(s) imposed: The rule imposes reporting and pollution control requirements on industrial users and POTWs.

Proposed burden reduction: EPA can reduce the costs on small industrial users and POTWs by exempting smaller industrial discharges below an agreed-upon threshold from reporting or additional controls.

Anticipated benefit(s) for small entities: Small entities (small businesses and small communities) would have reduced reporting and pollution control costs.

Name of rule, policy or guidance: Control of Listeria Monocytogenes in Ready-to-Eat Meat and Poultry Products. The final rule was published on June 6, 2003, in the *Federal Register* at 68 Fed.Reg. 34207.

Regulating agency: Department of Agriculture, Food Safety and Inspection Service (FSIS).

Authority for rule, policy or guidance: 9 C.F.R. 430, *et seq.* and FSIS Directives 5000.1, 5400.5, 8080.1, 10,200.1 and 10,240.4.

Description of what existing rule, policy or guidance does: The rule amends current regulations to require that official establishments that produce certain ready-to-eat meat and poultry products take measures, including creation of hazard analysis and critical point (HAACP) plans, to prevent product adulteration by the pathogenic environmental contaminant Listeria Monocytogenes, especially after the product has been exposed to the environment after lethality treatments.

Affected small businesses: Meat processors.

Regulatory burden(s) imposed: Industry representatives believe that the rule was not adequately analyzed economically and scientifically because the rule asserts that the impact on small and very small businesses will be minimal. Industry believes that FSIS' estimated cost of compliance of approximately $1,600 per year for each of the 10,000 plants is grossly underestimated. In contrast, industry representatives estimate the cost per small and very small meat processor of approximately $12,000 for each year of the ten-year period used in the study. Industry representatives used cost estimates of new equipment and/or plant reconfiguration plus interest over the ten years of $80,000 per plant and a very reasonable cost of outside expert technical assistance for compliance and periodic testing of $4,000 per year for ten years. Based on the above, industry believes that the total cost per plant is $120,000 over a ten-year period. This may very well be a low figure for many smaller plants.

The costs are over 7.5 times those projected by FSIS and for many very small processors may dictate the economic decision to cease business. And those are likely to be average costs for all plants, not taking into account the likely higher costs of compliance for small and very small processors. It may well be that the costs per plant approach closer to $200,000 rather than $120,000 over the ten years of the study. FSIS figures led OMB to estimate a regulatory cost to industry of $16,600,000 per year or $166,000,000 over ten years (see OMB Draft 2004 Report to Congress on the Costs and Benefits of Federal Regulations, noticed at 69 FR 7987). Industry believes that the true costs are closer to $120,000,000 per year and over $1.2 billion over the ten years.

Proposed burden reduction: Industry is requesting a return to a pre-HACCP regulatory regime in which FSIS inspectors actually inspected the operations of the plants rather than paperwork compliance, in which uniform guidebooks for plant safety and hygiene compliance were issued, and in which plant operators could access a point of written or oral contact for compliance advice. Industry believes that this would be far more likely to result in safe products reaching the consuming public that the current HACCP/Listeria Rule.

Anticipated benefit(s) for small entities: The proposed burden reduction will result in a significant cost saving for small meat processors.

Name of rule, policy or guidance: Food labeling: Use of the Term "Fresh" for Foods Processed with Alternative Non-Thermal Technologies. (65 Fed. Reg. 41029, July 3, 2000).

Regulating agency: U. S. Food and Drug Administration (FDA)

Authority for rule, policy or guidance: 21 C.F.R. § 101.95

Description of what existing rule, policy or guidance does: In this regulatory action the FDA sought to restrict the term "fresh" in food labeling. The statutory provision in question, 21 C.F.R. § 101.95, applies to foods and provides the definition for the term "fresh" in connection with food labeling. Producers may not claim that a product is "fresh" if it has been frozen, thermally processed or preserved, unless said product is impliedly known by the public to be processed or preserved, like pasteurized milk.

Affected small businesses: FDA's action is expected to affected small bakeries and bakery suppliers.

Regulatory burden(s) imposed: The American Bakers Association (ABA) has attempted to get the FDA to amend 21 C.F.R. §101.95 to allow the use of the term "fresh" for bakery products. If the FDA does not amend the regulation it will result in limiting the bakers' ability to properly label and sell their product. Also, this will result in confusion on the part of the consumer.

Proposed burden reduction: The ABA submits that bakery products are consistent with the FDA's approach which expressly permits "fresh" claims for pasteurized milk and other foods that do not mislead consumers. The ABA asserts that the bakery industry takes a number of steps to assure that its products are fresh (e.g. shelf rotation of product and sell-by dates) and that the consumer knows that bakery products contain preservatives. Therefore, the ABA believes that if the FDA amends the regulation a significant barrier will be removed allowing bakers to properly label and sell their product.

Anticipated benefit(s) for small entities: If the FDA does not amend the regulation it will result in limiting the bakers' ability to properly label and sell their product. Also, this will result in confusion on the part of the consumer.

Name of rule, policy or guidance: Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 (CG Dkt. No. 02-278, FCC 03-153)

Regulating agency: Federal Communications Commission (FCC)

Authority for rule, policy or guidance: 47 U.S.C. § 227; 47 C.F.R. Parts 64 & 68

Description of what existing rule, policy or guidance does: On July 25, 2003, the FCC issued a final rule revising the FCC's implementation of the Telephone Consumer Protection Act of 1991 to govern commercial facsimile communications between associations and their members as well as businesses and preexisting customers. The revised rule would require the sender of a "commercial fax" to have written authorization from the recipient. This requirement places a substantial burden on manufacturers and other businesses by compelling them to obtain the signed written consent of each recipient before any commercial fax may be sent. This would severely impede the ability of associations and businesses to communicate with their customers or make them aware of events and products that would be of interest to them.

Affected small businesses: Any manufacturer or other small business that uses a fax machine as part of doing business.

Regulatory burden(s) imposed: The rule would require any manufacturer or small business that uses the fax machine in the course of doing business to have written permission from the recipient of any commercial facsimile communication before a facsimile can be sent.

In February 2004, the U.S. Chamber of Commerce conducted a fax-based survey of its small business members in order to evaluate the economic impact of the FCC's revised rule. The U.S. Chamber's "2004 No Fax Survey" was sent to 20,000 members and more than 1,700 responded. Manufacturing, trade association/chambers of commerce, construction, and retail industries together comprise nearly two-thirds of all respondents. Of the respondents, 99 percent said that they used fax communications in the course of doing business.

The results of the survey showed that the cost to the average small business would be at least $5,000 in the first year, and more than $3,000 each year thereafter. Small business respondents indicated that it would take, on average, more than 27 hours of staff time to obtain the initial written consent from their customers and an additional 20 hours each year to keep the forms current.

The National Association of Wholesaler-Distributors (NAW) conducted an Internet-based survey of small business members of NAW. The survey was sent out to 550 individuals (representing about 265 companies) in November 2003 and NAW received 212 responses. The responses estimated the median initial cost at $5,500, and the average annual cost of compliance at $10,000.

Proposed burden reduction: The FCC should withdraw the rule or modify the rule to continue the established business relationship exemption. Both can be done through a response to the petitions for reconsideration filed with the FCC.

Anticipated benefit(s) for small entities: Small businesses would no longer be required to get written permission of the recipients of commercial faxes if there is an established business relationship. This would save small businesses the costs of obtaining, storing, and accessing these written permissions.

Name of rule, policy or guidance: Sec. 179; Election to expense certain depreciable business assets

Regulating agency: Department of Treasury/Internal Revenue Service (IRS)

Authority for rule, policy or guidance: 26 U.S.C. § 179

Description of what existing rule, policy or guidance does: Businesses can currently "expense" up to $100,000 in equipment in any given tax year under section 179 of the Internal Revenue Code. This is indexed for inflation for 2004 and 2005, but this limit is scheduled under current law to revert to $25,000 for 2006 and thereafter.

Affected small businesses: All small businesses putting into service depreciable property over $25,000 after 2005.

Regulatory burden(s) imposed: Depreciable property over $25,000 placed in service after 2005 will be subject to the recordkeeping and computational requirements of IRS' standard depreciation schedules. These requirements are complex, with numerous different "class lives" applicable to different categories of property.

Proposed burden reduction: As part of the ongoing effort to simplify tax compliance for small businesses, and, where possible, simply to reduce tax costs for small businesses (particularly where those tax costs also spur economic investment), SBA's Office of Advocacy recommends that OMB continue to support legislation to have section 179 "expensing" limits enacted in 2003 be made permanent.

Anticipated benefit(s) for small entities: Section 179 expensing allows many small businesses to eliminate recordkeeping for depreciable property entirely. In addition, accelerating depreciation entirely in the year property is placed in service, represents significant capital cost recovery benefits and cash flow assistance.

Name of rule, policy or guidance: Notice of Proposed Rulemaking: Excise Taxes; Communications Distance Sensitivity; REG-141097-02

Regulating agency: Department of Treasury/Internal Revenue Service (IRS).

Authority for rule, policy or guidance: 26 U.S.C. § 4252.

Description of what existing rule, policy or guidance does: IRS proposes to eliminate the statutory requirement of distance sensitivity in determining whether certain services are "toll telephone services" and thus subject to the federal excise tax. This statutory requirement has been in place since 1965. At least one court opinion (Office Max, Inc. v. United States, No. 1:03CV961 (N.D.Oh. 2/13/04)) has ruled against the Internal Revenue Service's interpretation of this provision.

Affected small businesses: All small businesses using toll telephone service.

Regulatory burden(s) imposed: Taxation (at 3%) where before there was no taxation.

Proposed burden reduction: Withdraw proposed regulations. SBA's Office of Advocacy suggested this last year, along with numerous other groups. The regulations have not been issued in final form.

Anticipated benefit(s) for small entities: Small businesses will no longer be required to file refund claims for excise taxes improperly collected on their toll telephone services.

Name of rule, policy or guidance: "Statutory Employees" – Bakery Drivers

Regulating agency: Department of Treasury/Internal Revenue Service (IRS).

Authority for rule, policy or guidance: 26 U.S.C. § 3121(d)(3)(A).

Description of what existing rule, policy or guidance does: Classifies commissioned delivery drivers for bakeries as "employees" (as opposed to "independent contractors"), despite the fact that they operate independently (pick their own paths, determine what speeds they will drive, etc.) and usually have a substantial investment in the tools of their trade (truck, often have to purchase or license a route from a baker). According to industry representatives, this happens even when a baker is dealing with a corporate distributor – the driver/employees of the corporate distributor are treated as the bakery's employees for employment tax purposes. This represents a purposeful divergence from the common law determination of employee vs. contractor status.

Affected small businesses: All bakers using commissioned delivery drivers. North American Industry Classification System definitions 311811 (retail), 311812 (commercial). Retail bakers are predominantly small businesses (99.7% under 500 employees), as are commercial bakers (95.6% under 500 employees).

Regulatory burden(s) imposed: Requires withholding of taxes, accounting for such, and quarterly and annual reporting of such withholdings.

Proposed burden reduction: Enact a small bakery exception, defined as bakeries with less than 100 production employees (this is from several state VOC standards, modified to specify "production" employees to avoid circularity) or less than 120,000 pounds total production per day averaged over all operating days in any one month (BAAQMD definition, increased by 20%).

Anticipated benefit(s) for small entities: Reduced recordkeeping costs.

Name of rule, policy or guidance: Section 168(k); Bonus Depreciation

Regulating agency: Department of Treasury/Internal Revenue Service (IRS).

Authority for rule, policy or guidance: 26 U.S.C. §168(k).

Description of what existing rule, policy or guidance does: Certain depreciable property placed in service before 2005 qualifies for additional depreciation (50%) in its first year of use. This was an increase from the "bonus depreciation" of 30% provided by prior law (the increase to 50% was made by 2003's Jobs and Growth Tax Relief Reconciliation Act). Bonus depreciation is scheduled to sunset for all years after 2004.

Affected small businesses: All small businesses putting into service depreciable property after 2004.

Regulatory burden(s) imposed: Very little paperwork is reduced by bonus depreciation since the unbonused portion of property is still depreciated over the normal "class life" applicable to that property. The burden is increased taxation in the first year of use (this evens out over the following years since there is less basis in the property to provide deductions in subsequent years).

Proposed burden reduction: Advocacy recommends that OMB support legislation to make the 50% bonus depreciation permanent.

Anticipated benefit(s) for small entities: Earlier cash flow benefits from increased short term depreciation. It has been pointed out by some practicing commentators on this provision that it only helps profitable businesses, since, for unprofitable businesses it will only increase their net operating losses, which are of limited tax use, particularly in strained economic times. However, "bonus deprecation" is not mandatory, and any unprofitable taxpayer can still elected out its provisions.

This reform would provide no paperwork or computational burden reduction. The entire benefit is earlier cash-flow from accelerated depreciation.

Name of rule, policy or guidance: Mobile Machinery Exemption – Federal Excise Taxes

Regulating agency: Department of Treasury/Internal Revenue Service (IRS).

Authority for rule, policy or guidance: 26 U.S.C. §4051, 26 C.F.R. § 48.4051-1(a)(2).

Description of what existing rule, policy or guidance does: To quote the Association of Equipment Manufacturers ("AEM"), "Under the proposed rule, which would revise 26 C.F.R. Part 48, IRS would effectively eliminate an excise tax exemption that has been in place since 1956, when the Highway Trust Fund began. IRS would now decide that "mobile machinery vehicles" are taxable "highway vehicles," for purposes of the 12% federal excise tax on the sale of new trucks imposed under Internal Revenue Code (IRC) §4051, the federal tax on fuels consumed in highway vehicles imposed by IRC §§ 4041 and 4081, the fuel tax credits and refunds allowed under IRC §§ 6421 and 6427, the federal tax on the use of heavy highway vehicles imposed by IRC §4481, and, in some instances, the federal excise tax on heavy tires imposed by IRC §4071. This action, which eliminates a tax exemption which has been in effect for nearly half a century, amounts to the administrative imposition of three and perhaps four new federal taxes at a time when economic conditions are the hardest they have been in a decade."[2]

Affected small businesses: The mining industry, consisting of over 7,600 firms, 98 percent of which are small businesses. Other small-business-dominated industries that are adversely affected are: oil drilling, water drilling, utilities, commercial construction, timber harvesting and pruning, tower erectors, and equipment leasing. Countless other firms, small and large, will also be adversely impacted by newly non-exempt heavy vehicles being subjected to four new excises, as well as being newly required to file excise tax forms.

Regulatory burden(s) imposed: Increased paperwork and tax burdens. AEM and the Specialized Carriers and Rigging Association state the following: "SC&RA reports that 78% of its membership that operates cranes and other mobile machinery vehicles have gross annual earnings of under $5 million. Only 10% of its members have annual earnings in excess of $12.5 million. The new taxes that IRS proposes will thus fall disproportionately on small businesses, most of them already strained by the poor economic conditions."[3]

Proposed burden reduction: Leave the "mobile machinery exemption" in place. It is the Office of Advocacy's understanding that Congress desires to reinforce its support for this exemption by including specific mobile machinery language in both versions of the currently-pending highway bills, H.R. 3550 section 9301 and S. 1072 section 5301).[4]

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[2] http://www.aem.org/Govt/Contrib.asp?A=151

[3] Id.

[4] However, note that the current version of the JOBS Act, in sec. 896 of that legislation, explicitly provides that mobile machinery will be treated as a highway vehicle. It may well be that where JOBS sec. 898 states

Anticipated benefit(s) for small entities: Maintaining the "mobile equipment exemption" will mean that numerous small businesses will not be required to familiarize themselves with the intricacies of several federal excise taxes at all, simply because they own and operate heavy equipment making little use of the public roadways.

"(A) IN GENERAL. -- A vehicle described in subparagraph (B) shall be treated as a highway vehicle …" it should read "shall not be treated as a highway vehicle."