



October 28, 2005

BY ELECTRONIC MAIL

The Honorable Jonathan L. Snare
Acting Assistant Secretary
Occupational Safety and Health Administration
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210
Electronic Address: <http://ecomments.osha.gov> (Docket No. H023)

Re: Comments on OSHA's Notice of a Regulatory Flexibility Act Review of Lead in Construction standard

Dear Assistant Secretary Snare:

The U.S. Small Business Administration's (SBA) Office of Advocacy (Advocacy) is pleased to submit the following comments to the Occupational Safety and Health Administration (OSHA) on its notice of a Regulatory Flexibility Act Review of Lead in Construction standard.¹ OSHA's review of its lead in construction standard is being conducted in accordance with Section 610 of the Regulatory Flexibility Act (RFA),² which requires federal agencies to review their regulations periodically to determine whether they should be continued without change, amended, or rescinded in order to minimize any significant economic impacts of the rule on a substantial number of small entities.³ Any changes or revisions to regulations must be consistent with the objectives of the underlying statute.

Advocacy commends OSHA for undertaking a Section 610 review of its current lead in construction standard. Advocacy has a keen interest in the Section 610 review process, and hopes that OSHA will carefully consider the comments it receives from the small business community on how the lead in construction standard can be revised to make it less costly or burdensome. Advocacy also encourages other federal agencies to use the Section 610 process to update their regulations to benefit small businesses.

¹ 70 Fed. Reg. 32739 (June 6, 2005); 70 Fed. Reg. 50996 (August 29, 2005)

² 5 U.S.C. §610

³ OSHA's review is also being conducted under Section 5 of Executive Order 12866 on Regulatory Planning and Review. 70 Fed. Reg. 32739. In addition, this regulation was submitted to the Office of Management and Budget (OMB) as one of the public nominations for reform requested in OMB's 2002 Report to Congress on the Costs and Benefits of Federal regulations. See http://www.whitehouse.gov/omb/inforeg/2002_report_to_congress.pdf.

In response to OSHA's notice that it was reviewing its lead in construction standard, Advocacy hosted a small business regulatory roundtable on September 22, 2005 to discuss the impact of OSHA's current regulation on small business. The roundtable featured presentations from OSHA, the U.S. Department of Housing and Urban Development (HUD), and the U.S. Environmental Protection Agency (EPA), each of whom has regulations governing lead hazards. The overwhelming view of the small business representatives in attendance at the roundtable was that OSHA should open a formal notice and comment rulemaking process to revise its lead in construction standard to make it less costly and burdensome. For the reasons discussed below, Advocacy concurs with this view.

Office of Advocacy

Advocacy was established pursuant to Pub. L. 94-305 to represent the views of small entities before Federal agencies and Congress. Advocacy is an independent office within SBA, so the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration. The RFA, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA),⁴ gives small entities a voice in the rulemaking process. For all rules which will have a significant economic impact on a substantial number of small entities, OSHA is required by the RFA to assess the impact of the proposed rule on small business and to consider less burdensome alternatives. Moreover, on August 13, 2002, President Bush signed Executive Order 13272,⁵ which requires Federal agencies to give every appropriate consideration to any comments on a proposed or final rule submitted by Advocacy. The agency must include, in any explanation or discussion accompanying publication in the *Federal Register* of a final rule, the agency's response to any written comments submitted by Advocacy on the proposed rule.

OSHA's Interim Final Lead in Construction Standard Was Issued with No Public Participation

In October 1992, Congress passed Sections 1031 and 1032 of Title X of the Housing and Community Development Act of 1992,⁶ which required OSHA to issue an interim final lead standard for the construction industry within 180 days.⁷ OSHA's standard was to be as protective of worker protection as HUD's 1991 *Guidelines for the Identification and Abatement of Lead-Based Paint in Public and Indian Housing* and OSHA's general industry standard. The interim final standard was to apply until a final standard was promulgated. Pursuant to Congress' direction, OSHA's interim final standard was adopted with no public input or participation and did not follow the Administrative Procedure Act or Section 6 of the Occupational Safety and Health Act.⁸

⁴ Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. § 601 et seq.).

⁵ 67 Fed. Reg. 53461 (August 16, 2002).

⁶ Pub. L. 102-550, 106 Stat. 3672.

⁷ *Ibid.*, §1031.

⁸ *Ibid.* Also, see discussion at 58 Fed. Reg. 26590 (May 4, 1993).

While Congress gave OSHA considerable procedural leeway to issue an interim final standard, there was a clear expectation that OSHA would adopt a final standard in the not-too-distant future that would include public participation and notice and comment rulemaking.⁹ However, it has now been nearly thirteen years since OSHA's interim final rule was adopted and there has been no follow-up rulemaking or opportunity for public input on this rule. Accordingly, Advocacy recommends that OSHA commence a formal notice and comment rulemaking process to develop a final lead in construction standard.

OSHA Should Conduct a Regulatory Flexibility Analysis

As indicated above, OSHA issued its interim final standard with no public input pursuant to Congress' direction.¹⁰ However, that also meant that OSHA did not have to comply with the RFA or prepare an Initial Regulatory Flexibility Analysis (IRFA) to assess the economic impact of the interim final standard on small business and consider less burdensome alternatives. Advocacy believes that such an analysis would be beneficial at this time. While OSHA's interim final standard seems most appropriate for large-scale construction projects (such as bridge work or commercial demolition), it appears to be unduly expensive and burdensome for small businesses in other areas (most notably residential renovation and remodeling). Preparing an IRFA and considering alternative approaches to the current rule would likely yield a more flexible and less burdensome final rule for small business.

OSHA Should Consider the Impact of EPA's Renovation and Remodeling Rule

In assessing whether a less costly and burdensome lead in construction standard can be developed, OSHA should be mindful that EPA is scheduled to propose its residential renovation and remodeling rule in the very near future.¹¹ EPA's rule is likely to rely on lead-safe work practices to minimize exposures to lead hazards. Such an approach may be feasible for OSHA as well. Further, OSHA might consider whether other approaches would be practicable in light of EPA's forthcoming rule, such as de minimus exemptions for time-limited tasks, specialty contractor exemptions (e.g., for plumbers or electricians), simplified medical surveillance and recordkeeping requirements, and reliance on lead-safe work practices where data shows that such work practices are unlikely to exceed permissible exposure limit.

OSHA Should Evaluate Data Quality and Other Technical Issues

In evaluating whether alternative, less burdensome approaches to the current interim final standard are feasible, OSHA should carefully evaluate the quality of data and other technical information that underpins its current rule. The Occupational Safety and Health Act requires that OSHA promulgate standards based on the "best available evidence,"

⁹ Ibid.

¹⁰ Ibid.

¹¹ See Unified Agenda of Regulatory and Deregulatory Actions, Spring 2005 (http://ciir.cs.umass.edu/cgi-bin/ua/web_fetch_doc?dataset=ua&db=agendaSpring2005&query=and&doc_id=3169)

and that OSHA consider the “latest available scientific data in the field,” as well as feasibility and past experience.¹² Because OSHA’s current interim final standard was developed without public input and has remained in interim status for nearly thirteen years, there is concern over whether the underlying data meets this standard. Subjecting the standard to the scrutiny of a rulemaking process will temper these concerns. Further, OMB’s new requirements for data quality and peer review of influential regulatory science¹³ should ensure that any revised standard is properly tailored to the construction industry and the unique work environments where these hazards occur.

Conclusion

Advocacy appreciates the opportunity to comment on OSHA’s Regulatory Flexibility Act Review of Lead in Construction standard. Based on the foregoing, Advocacy recommends that OSHA open a formal notice and comment rulemaking process and conduct an Initial Regulatory Flexibility Analysis to determine how the current interim final standard impacts small business and how it could be made less costly and burdensome (while still protecting worker health). Advocacy believes that this is an excellent opportunity to show that Section 610 of the RFA can be an effective tool in making existing rules less burdensome to small business. Advocacy would welcome the opportunity to work with OSHA to help in this process in any way we can.

Thank you for your consideration of these comments. Please feel free to contact me or Bruce Lundegren of my staff at (202) 205-6144 (or bruce.lundegren@sba.gov) if you have any questions or require additional information.

Sincerely,



Thomas M. Sullivan
Chief Counsel for Advocacy



Bruce E. Lundegren
Assistant Chief Counsel for Advocacy

cc: The Honorable John D. Graham
Administrator, Office of Information and Regulatory Affairs
Office of Management and Budget

¹² 29 U.S.C 655(5)

¹³ 67 Fed. Reg. 8452 (February 22, 2003); 70 Fed. Reg. 2664 (January 14, 2005).