From: Lundegren, Bruce E. [mailto:Bruce.Lundegren@sba.gov]
Sent: Thursday, November 06, 2008 4:46 PM
To: zzMSHA-Standards - Comments to Fed Reg Group
Subject: RIN 1219- AB41

Please see attached letter.

<<MSHA.ProposedD&ATestingRule.Comment.110608.pdf>>

Shawne C. McGibbon
Acting Chief Counsel for Advocacy
Office of Advocacy
U.S. Small Business Administration
409 Third Street, S.W.
Washington, DC 20416
Phone (202) 205-6144
Fax (202) 205-6928
Email bruce.lundegren@sba.gov

AB41-COMM-126

November 6, 2008

BY ELECTRONIC MAIL
The Honorable Richard E. Stickler
Acting Administrator, Mine Safety and Health Administration
U.S. Department of Labor
1100 Wilson Boulevard, 21st Floor
Arlington, VA 22209
Electronic Address: http://www.regulations.gov (RIN 1219-AB41)

Re: Proposed Alcohol- and Drug-Free Mines: Policy, Prohibitions, Testing, Training, and Assistance Rule (RIN 1219-AB41)

Dear Acting Administrator Stickler:

The U.S. Small Business Administration's (SBA) Office of Advocacy (Advocacy) submits the following comments on the Mine Safety and Health Administration's (MSHA's) proposed Alcohol- and Drug-Free Mines: Policy, Prohibitions, Testing, Training, and Assistance rule ("Drug and Alcohol Testing" rule).[1]

MSHA's proposed rule would establish a uniform standard for drug and alcohol testing programs at all mines. Mine operators would be required to establish an alcohol- and drug-free mine program, including 1) a written policy, 2) employee education, 3) supervisory training, 4) alcohol- and drug-testing for miners that perform safety-sensitive job duties and their supervisors, and 5) referrals to assistance for miners who violate the policy. The proposed rule would designate substances that cannot be possessed on or around mine property or used while performing safety-sensitive job duties, except when used according to a valid prescription. The proposed rule would also require those who violate the prohibitions to be removed from the performance of safety-sensitive job duties pending completion of recommended treatment and confirmation of their alcohol- and drug-free status by a return-to-duty test.[2]

As discussed below, Advocacy recommends that MSHA reassess the cost and impact of the proposed rule on small mine operators, provide additional information on certain data, and consider feasible alternatives (such as a performance standard) that would make the rule less burdensome for small business.

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

[1] 73 Fed. Reg. 52136 (September 8, 2008).
[2] *Id.*

SBA, so the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration. The Regulatory Flexibility Act (RFA),[3] as amended by the Small Business Regulatory Enforcement Fairness Act,[4] gives small entities a voice in the rulemaking process. For all rules that are expected to have "a significant economic impact on a substantial number of small entities," federal agencies are required by the RFA to assess the impact of the proposed rule on small entities and to consider less burdensome alternatives. Moreover, on August 13, 2002, President Bush signed Executive Order 13272,[5] which requires federal agencies to notify Advocacy of any proposed rules that are expected to have a significant economic impact on a substantial number of small entities and to give every appropriate consideration to any comments on a proposed or final rule submitted by Advocacy. The Executive Order details how the agency must include, in any explanation or discussion accompanying publication in the *Federal Register* of a final rule, a response to any written comments submitted by Advocacy on the proposed rule.

Feedback From Small Entities

Following publication of the proposed Drug and Alcohol Testing rule, a number of small business representatives contacted Advocacy and expressed concerns about MSHA's proposed rule. In response, Advocacy hosted a small business roundtable on October 30, 2008 to obtain small business input on the proposed rule and to consider less burdensome alternatives. The following comments and recommendations are reflective of the discussion during the roundtable and in other conversations with small business representatives.

1. **Many small mines already have a drug and alcohol policy in place.** Generally, the small business representatives at the roundtable stated that they favor a drug and alcohol rule, but they have concerns about the rule that MSHA has proposed. In fact, many were concerned that MSHA's rule would cause disruptions to their existing drug and alcohol programs, many of which are effective and have been carefully negotiated through collective bargaining agreements with labor. Advocacy recommends that MSHA consider exempting from the rule any existing programs that meet certain performance criteria (see comment 2 below). Further, small business representatives were also concerned that the elimination of "zero tolerance" policies could actually impede safety by prohibiting a mine operator from terminating an employee who arrived at work impaired by drugs or alcohol. All of the representatives at the roundtable opposed the elimination of the "zero tolerance" provisions and recommended that MSHA provide sufficient flexibility so that operators can establish and maintain programs that are at least as stringent as an MSHA final rule.

2. **Many small mines would prefer that MSHA adopt a performance standard or use a model program approach.** As indicated above, many small business representatives at the roundtable support a drug and alcohol rule, but they have concerns about the prescriptive, one-size-fits-all approach that MSHA has proposed. These representatives stated that they would prefer that MSHA adopt a performance

[3] 5 U.S.C. § 601 et seq.
[4] Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. § 601 et seq.).
[5] Executive Order 13272, *Proper Consideration of Small Entities in Agency Rulemaking* (67 Fed. Reg. 53461) (August 16, 2002).

standard that establishes mandatory, minimum requirements for a drug and alcohol program and leaves it to the mine operator to implement. Representatives at the roundtable recommended that such a performance standard would include the five basic pillars already included in MSHA's proposed rule: 1) a written policy; 2) employee education; 3) supervisory training; 4) alcohol- and drug-testing for miners that perform safety-sensitive job duties and their supervisors; and, 5) referrals to assistance for miners who violate the policy. Advocacy believes that such an approach would be feasible and recommends that MSHA consider whether it would be appropriate in this instance – particularly for small mines. Representatives were also concerned that the proposed rule does not provide sufficient clarity to allow for consistent MSHA enforcement, and that adopting a performance standard or model program approach would alleviate concerns about inconsistent enforcement.

3. **MSHA has understated the cost of developing and implementing a drug and alcohol program.** In its Preliminary Regulatory Impact Analysis, MSHA only includes one hour of time for the development and implementation of a drug and alcohol program, which representatives at the roundtable said understates the time and complexity of establishing or altering such a program. These representatives felt that the development and implementation of a program would be a senior management function (not one performed by supervisory-level employees as MSHA asserts) and that programs would have to undergo formal review by human resource, legal, and safety staff (and possibly labor representatives). Further, these representatives noted that even if one were to use MSHA's model template, one would still have to read and fully understand that program (which would take a considerable amount of time). Finally, representatives noted that MSHA's proposed rule would also incorporate by reference over 100 pages of U.S. Department of Transportation regulations for drug and alcohol testing procedures,[6] the cost of which is not included in MSHA's analysis. Advocacy recommends that MSHA re-assess whether it has fully accounted for the time and expense of developing and implementing a drug and alcohol program and the level of effort involved with its operation.

4. **MSHA has omitted or understated other costs associated with the proposed rule.** Small business representatives at the roundtable also stated that there are other areas where they believe MSHA has failed to account for, or has understated, the cost of the rule. These include the following: 1) the costs for instructors; 2) the costs for development of training materials; 3) the costs for offsite training; 4) the costs for hiring and training substitute workers for employees suspended during rehabilitation; 5) the costs to provide escorts for workers who are required to take offsite tests following a reasonable suspicion or post-accident test; and, 6) the higher medical review officer costs associated with determining whether prescription drug levels are acceptable. Representatives were also concerned that there are only a limited number of certified laboratories that perform drug and alcohol services and that all of the new MSHA-mandated testing would drive up costs.

5. **MSHA improperly correlates drug and alcohol use in society with drug and alcohol use at mines.** Small business representatives at the roundtable were concerned that MSHA has improperly used anecdotal information about drug and alcohol use in

[6] *See*, 49 CFR Part 40.

society in general to justify its proposed rule for mines. Several representatives stated that they thought this approach was arbitrary and capricious and that the agency had no basis to infer a problem in mines based on general societal use of drugs and alcohol. Advocacy agrees with this point and recommends that MSHA identify specific data on drug and alcohol use in mines to serve as the basis for the rule.

6. **MSHA fails to identify the source of fatality and injury data used to justify the proposed rule.** MSHA states that a certain number of fatalities and injuries have occurred in mines over various periods of years and concludes that a certain number of these accidents either involved or "possibly" involved drugs or alcohol. However, MSHA does not cite any references for this data and the statistics lack transparency. Advocacy recommends that the agency cite to references for all fatality and injury data used to justify the rule.

7. **The proposed rule conflicts with the Mine Act's "open records" provisions.** Small business representatives at the roundtable stated that the proposed rule would treat drug and alcohol medical records as confidential, but this would conflict with the Mine Act's mandate that records be open.[7] While the Mine Act does not require any medical records, it states that all records involving accidents and other items must be open to the public. Advocacy recommends that MSHA review this point to ensure that the medical records confidentiality provisions of the proposed rule do not conflict with the open records mandates of the Mine Act.

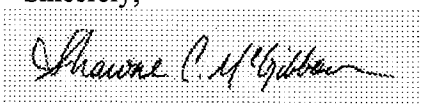
8. **MSHA's Regulatory Flexibility Analysis should consider the impact of the proposed rule on small firms rather than using an average cost approach.** MSHA measures the impact of the proposed rule by dividing total compliance costs by the number of operators to establish an average compliance cost. However, this approach is not appropriate because it fails to measure the impact of the rule on various small firms within the industry (such as firms that do not have an existing drug and alcohol program in place). MSHA states that 85 percent of large firms (those with 501 or more employees) have a drug and alcohol program in place, whereas only 30 percent of firms with 20 – 500 employees and 15 percent of firms with less than 20 employees have such a program. This means that the smaller the firm the more likely it is that they will have to establish a new drug and alcohol program – even if they use MSHA's model template as the basis. It is likely that these smaller firms will incur disproportionately greater compliance costs than larger firms, so the use of an average cost model is not appropriate. Firm costs should be assessed along a distribution from high to low costs depending on firm type; capturing average costs masks the variations of impacts. Advocacy recommends that MSHA increase the granularity of its analysis so that it can determine whether its certification under the RFA is justified.

[7] *See*, 30 U.S.C. § 813 (d) and (h).

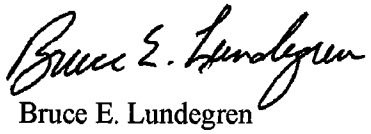
Conclusion

Advocacy appreciated the opportunity to comment on this proposed rule. Please feel free to contact me or Bruce Lundegren at (202) 205-6144 (or bruce.lundegren@sba.gov) if you have any questions or require additional information.

Sincerely,



Shawne C. McGibbon
Acting Chief Counsel for Advocacy



Bruce E. Lundegren
Assistant Chief Counsel for Advocacy

cc: The Honorable Susan E. Dudley
Administrator, Office of Information and Regulatory Affairs
Office of Management and Budget