ORAL ARGUMENT NOT YET SCHEDULED

No. 10-1183

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NATIONAL ASSOCIATION OF HOME BUILDERS, et al.,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

ON PETITION FOR REVIEW OF A FINAL RULE OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BRIEF OF RESPONDENT

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), Respondent United States Environmental Protection Agency ("EPA") provides the following information.

A. Parties, Intervenors and Amici

All parties, intervenors and amici are listed in the Petitioners' Opening Brief.

B. Rulings Under Review

Petitioners challenge a final rule entitled "*Lead; Amendment to the Opt-Out and Recordkeeping Provision in the Renovation, Repair, and Painting Program; Final Rule*," promulgated by the United States Environmental Protection Agency ("EPA"). 75 Fed. Reg. 24,802 (May 6, 2010) ("Opt-Out Amendment").

C. Related Cases

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New York City Coalition to End Lead Poisoning v. EPA, 08-1235 (D.C. Cir.)

Sierra Club v. EPA, 08-1258 (D.C. Cir.)

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LEGISLATIVE HISTORY

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GLOSSARY

APA	Administrative Procedure Act, 5 U.S.C. §§ 551-559.
EPA	The Environmental Protection Agency.
Final Analysis	Final Regulatory Flexibility Analysis, 5 U.S.C. § 604.
Initial Analysis	Initial Regulatory Flexibility Analysis, 5 U.S.C. § 603.
NAHB	National Association of Home Builders.
Opt-Out Amendment	*Lead; Amendment to the Opt-Out and Recordkeeping Provisions in the Renovation, Repair, and Painting Program*, 75 Fed. Reg. 24,802 (May 6, 2010).
Opt-Out Provision	The provision of the Renovation Rule that allowed renovators to do renovation work in owner-occupied (as opposed to rented) target housing without following the training and work practice requirements of the Renovation Rule, provided that the homeowner certified that there were no children under six or pregnant women in residence, and the home did not meet the definition of a child-occupied facility.
Renovation Rule	*Lead; Renovation, Repair, and Painting Program; Final Rule*, 73 Fed. Reg. 21,692 (Apr. 22, 2008).
Renovation Rule Panel	The panel convened under RFA section 609(b) for the Renovation Rule.
RFA	Regulatory Flexibility Act, 5 U.S.C. §§ 601-612.
Small Business Advocacy Review Panel or Panel	A panel convened under RFA section 609(b) to review a proposed rule and "collect advice and recommendations" of small entity representatives prior to publishing the

	initial analysis for public comment, 5 U.S.C. § 609(b).
TSCA	Toxic Substances Control Act, 15 U.S.C. §§ 2601-2695d.
Target Housing	"[A]ny housing constructed prior to 1978, except housing for the elderly or persons with disabilities (unless any child who is less than 6 years of age resides or is expected to reside in such housing for the elderly or persons with disabilities) or any 0-bedroom dwelling . . . ." 15 U.S.C. § 2681(17).

JURISDICTIONAL STATEMENT

Petitioners correctly state that this Court has jurisdiction over Petitioners' Administrative Procedure Act ("APA") challenge to EPA's final rule, entitled "*Lead; Amendment to the Opt-Out and Recordkeeping Provisions in the Renovation, Repair, and Painting Program*," 75 Fed. Reg. 24,802 (May 6, 2010) ("Opt-Out Amendment"), pursuant to Toxic Substances Control Act ("TSCA") section 19, 15 U.S.C. § 2618. However, this Court does not have jurisdiction to review Petitioners' Regulatory Flexibility Act ("RFA") claim because the claim challenges EPA's compliance with RFA section 609(b), not RFA section 604, and such a challenge is not reviewable under the RFA. *See* 5 U.S.C. §§ 604, 609(b), 611. Petitioners correctly state that they timely brought the instant petition for review, with the exception of their challenge to EPA's authority to regulate renovation activities in target housing without regard to occupancy, which is time-barred under TSCA section 19. *See* 15 U.S.C. § 2618(a)(1)(A).

STATUTES AND REGULATIONS

Except for 5 U.S.C. §§ 603, 604, 605, 611; 15 U.S.C. §§ 2601, 2618, 2681, 2682, 2683; and 40 C.F.R. § 745.65, which appear in an addendum to this brief, all applicable statutes and regulations are contained in the Addendum to the Opening Brief of Petitioners.

STATEMENT OF ISSUES

1. Whether Petitioners' APA claim fails because EPA provided a well-reasoned explanation for promulgating the Opt-Out Amendment consistent with its authority under TSCA?

2. Whether Petitioners' RFA claim fails because the Court lacks jurisdiction to consider it?

3. Whether, even if the Court reaches Petitioners' RFA claim, that claim nonetheless fails because EPA complied with the RFA?

STATEMENT OF FACTS

I. STATUTORY AND REGULATORY BACKGROUND.

During the 1940's paint manufacturers added lead as a primary ingredient in oil-based exterior and interior house paints. *See* 73 Fed. Reg. 21,692, 21,693 (Apr. 22, 2008). In 1992, Congress found as many as 3,000,000 children under the age of 6 were affected by low-level lead poisoning, most commonly caused by the ingestion of household dust containing lead from lead-based paint. *Id.* at 21,694. Lead poisoning causes a broad array of deleterious health effects on multiple organ systems including "heme biosynthesis and related functions; neurological development and function; reproduction and physical development; kidney function; cardiovascular function; and immune function." *Id.* at 21,693; *see also* 75 Fed. Reg. at 24,811. Young children and pregnant women are especially

vulnerable to the dangers associated with lead exposure, but older children and adults can suffer adverse health effects as well. *Id.* at 21,693-94; *see also* 75 Fed. Reg. at 24,804-05.

To address the dangers of lead-based paint hazards, Congress "develop[ed] a national strategy to build the infrastructure necessary to eliminate lead-based paint in all housing as expeditiously as possible" by enacting the Residential Lead-Based Paint Hazard Reduction Act as Title X of the Housing and Community Development Act of 1992, Pub. L. No. 102-550, 106 Stat. 3672 (now codified at 15 U.S.C. §§ 2681-92; 42 U.S.C. §§ 4851-56). 42 U.S.C. § 4851a(1). Among other things, Title X added section 402 of the Toxic Substances Control Act ("TSCA"), 15 U.S.C. § 2682, which requires EPA to "promulgate final regulations governing lead-based paint activities to ensure that individuals engaged in such activities are properly trained; that training programs are accredited; and that contractors engaged in such activities are certified." *Id.* § 2682(a)(1). Such regulations must also "contain standards for performing lead-based paint activities, taking into account reliability, effectiveness, and safety." *Id.* Importantly, TSCA section 402(c)(3) requires EPA to "revise [such] regulations . . . to apply the regulations to renovation or remodeling activities in target housing, public buildings constructed before 1978, and commercial buildings that create lead-based paint hazards." *Id.* § 2682(c)(3).

"Lead-based paint hazards" are defined in TSCA section 401(10) as "any condition that causes exposure to lead from lead-contaminated dust, lead-contaminated soil, lead-contaminated paint that is deteriorated or present in accessible surfaces . . . that would result in adverse human health effects as established by the Administrator . . . ." *Id.* § 2681(10). Most relevant here, lead-contaminated dust is defined under TSCA as "surface dust in residential dwellings that contains an area or mass concentration of lead in excess of levels determined by the Administrator . . . to pose a threat of adverse health effects in pregnant women or young children." *Id.* § 2681(11).

TSCA section 403 directs EPA to promulgate regulations that "identify . . . lead-based paint hazards, lead-contaminated dust, and lead-contaminated soil." *Id.* § 2683. Accordingly, EPA promulgated 40 C.F.R. § 745.65 in 2001, identifying standards for lead-based paint hazard levels in target housing and child-occupied facilities.[1] *See* 40 C.F.R. § 745.65. Most relevant here, EPA defined lead hazard levels for dust-lead as "a mass-per-area concentration of lead equal to or exceeding

[1] "Target housing" is defined by TSCA to mean "any housing constructed prior to 1978, except housing for the elderly or persons with disabilities (unless any child who is less than 6 years of age resides or is expected to reside in such housing for the elderly or persons with disabilities) or any 0-bedroom dwelling. . . ." 15 U.S.C. § 2681(17). By regulation, EPA defined "child-occupied facilities" as a subset of public and commercial buildings and target housing, or portions thereof, where children under six spend a significant amount of time. *See* 40 C.F.R. § 745.83.

40 µg/ft^2 on floors or 250 µg/ft^2 on interior window sills based on wipe samples." *Id.* § 745.65(b).

A. THE RENOVATION RULE.

Based on several studies, EPA concluded that renovation and remodeling activities that disturb lead-based paint create dust-lead with lead concentrations in excess of the hazard levels in 40 C.F.R. § 745.65. *See* 73 Fed. Reg. at 21,695-98. Accordingly, pursuant to TSCA section 402(c)(3), EPA promulgated the Renovation, Repair, and Painting Rule ("Renovation Rule") in 2008. *See Lead; Renovation, Repair, and Painting Program; Final Rule*, 73 Fed. Reg. 21,692 (Apr. 22, 2008).

The Renovation Rule requires, among other things, that renovators of target housing and child-occupied facilities follow certain work practices to minimize exposure to lead-based paint hazards created by renovation activities. *See* 73 Fed. Reg. at 21,703-04. For example, renovators must post warning signs outside the work area, contain the work area with plastic sheeting to prevent dust and debris from migrating from the area, and thoroughly clean the work area after the renovation has been completed. *See id.* at 21,704-05.

Under the Renovation Rule, however, EPA created a limited exemption from the scope of the Renovation Rule that allowed homeowners of target housing to "opt out" of the Rule. *Id.* at 21,709. Notwithstanding the fact that such

renovations create lead-based paint hazards, the exemption allowed renovators to do renovation work in owner-occupied (as opposed to rented) target housing without following the requirements of the Renovation Rule, provided that the homeowner certified that there were no children under six or pregnant women in residence, and the home did not meet the definition of a child-occupied facility (the "opt-out provision"). *Id.*

B. THE OPT-OUT AMENDMENT.

On April 22, 2010, EPA signed the final Opt-Out Amendment, which was subsequently published on May 6, 2010. *See Lead; Amendment to the Opt-Out and Recordkeeping Provisions in the Renovation, Repair, and Painting Program*, 75 Fed. Reg. 24,802 (May 6, 2010). Among other things, the Opt-Out Amendment removed the opt-out provision from the Renovation Rule. *Id.* at 24,803-07. In promulgating the Opt-Out Amendment, EPA acknowledged that it was revising its earlier action by "eliminating" the opt-out provision originally provided for under the Renovation Rule. *See* 74 Fed. Reg. 55,506, 55,509 (Oct. 28, 2009); 75 Fed. Reg. 24,802, 24,805. EPA concluded that elimination of the opt-out provision rendered the Renovation Rule more consistent with the statute. *See* 75 Fed. Reg. at 24,806. Thus, EPA stated that "[a]fter further consideration of the opt-out provision, the Agency believes it is in the best interest of the public to remove the provision" to require the Renovation Rule work practices, training, and

certification in all target housing without regard to the age or status of the occupants. *See* 74 Fed. Reg. at 55,509; 75 Fed. Reg. at 24,813.

Contrary to Petitioners' assertion, in promulgating the Opt-Out Amendment, EPA did not merely revisit the same considerations and simply reverse its prior decision. As discussed more fully *infra*, EPA provided several reasons for its change in position. EPA found that the Opt-Out Amendment better protects young children and pregnant women, as well as older children and adults, who move into, visit, and live adjacent to renovated target housing. *See* 75 Fed. Reg. at 24,804-06. EPA also explained that the opt-out provision made compliance with the Renovation Rule more difficult, and that the Renovation Rule would prevent lead exposure more reliably and effectively without the provision. *See id.* at 24,804-05. Finally, EPA acknowledged that eliminating the opt-out provision "promotes, to a greater extent, the statutory directive to promulgate regulations covering renovation activities in target housing," which is defined in TSCA as "'*any housing* constructed prior to 1978 . . . .'" *Id.* at 24,806 (quoting 42 U.S.C. § 2681(17)) (emphasis added). Accordingly, EPA concluded that, based upon the data available to it, the Agency could not find that the opt-out provision was safe, reliable, and effective, as required under TSCA section 402.

II. LITIGATION BACKGROUND.

Shortly after the Renovation Rule was promulgated, several entities, including the National Association of Home Builders ("NAHB"), filed petitions for review of the Renovation Rule. EPA entered into a settlement agreement with several of the petitioners, who asserted, among other things, that the opt-out provision created an impermissible exception to the statutory definition of target housing. As part of the settlement agreement, EPA agreed to propose an amendment to the Renovation Rule focused on whether to remove the opt-out provision from the Renovation Rule. The settlement agreement did not constrain the Agency's discretion to take appropriate final action on the proposal. NAHB voluntarily dismissed its petition. *See Nat'l Ass'n of Home Builders v. EPA*, No. 08-1193, October 30, 2009 Docket Entry.

After EPA promulgated the final Opt-Out Amendment, Petitioners brought the instant petition for review on July 8, 2010, challenging the Opt-Out Amendment as arbitrary, capricious, or otherwise contrary to law under the APA and promulgated in violation of the RFA. The petition should be denied.

STANDARD OF REVIEW

This Court's review is governed by the standards set forth in the Administrative Procedure Act ("APA"). 5 U.S.C. §§ 701-06. Under the APA, agency actions may be set aside only if found to be "arbitrary, capricious, an abuse

of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). This is a narrow, deferential standard that prohibits the Court from substituting its judgment for that of the Agency. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). The Court must consider whether the Agency's decision "was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 285 (1974) (citation omitted). The Agency's determinations must be upheld if they "conform to 'certain minimal standards of rationality.'" *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 520-21 (D.C. Cir. 1983) (citation omitted). This narrow standard of review, rather than a heightened standard of review, applies when an agency revises an earlier action or changes its position, just as it does when the Agency acts in the first instance. *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1810-11 (2009).

SUMMARY OF ARGUMENT

When EPA proposed and promulgated the Opt-Out Amendment, the Agency acknowledged that it was deliberately eliminating the opt-out provision in the Renovation Rule so that homeowners could no longer opt-out of the Renovation Rule requirements and renovators would be required to comply with the Renovation Rule requirements in all target housing without regard to the age or

status of the occupants. EPA clearly articulated its reasons for eliminating the opt-out provision based on the factors required under TSCA—safety, reliability, and effectiveness, and provided a well-reasoned explanation for changing its view of considerations it cited in support of the opt-out provision when the Renovation Rule was promulgated. Additionally, EPA thoroughly considered the economic impact of the Opt-Out Amendment and, although no cost-benefit analysis is required under TSCA, determined that the low estimate of the quantifiable benefits of the Opt-Out Amendment almost triples the high estimate of its costs. Accordingly, the Agency's action was reasonable under the APA's narrow standard of review, which applies when an agency revises a prior action, just as it applies when an agency acts in the first instance. Thus, the Opt-Out Amendment is not arbitrary, capricious, or otherwise contrary to law under the APA.

Moreover, Petitioners' challenge to the Agency's authority to promulgate the Opt-Out Amendment because it regulates "potential lead-based paint hazards" or "potential exposure" to young children and pregnant women is without merit for two reasons. First, the argument is time-barred, and therefore the Court is without jurisdiction to consider it. Second, TSCA mandates that EPA regulate the renovation and remodeling activities that create lead-based paint hazards in target housing, and neither the statute nor EPA's regulations require a finding of actual exposure or high blood-lead levels, or a determination that young children or

pregnant women live in the target housing. Prior to promulgating the Renovation Rule, EPA determined that renovation activities in target housing that disturb lead-based paint cause lead-based paint hazards. Therefore, EPA had ample authority to promulgate the Opt-Out Amendment, requiring that the Renovation Rule's requirements apply to all target housing without regard to occupancy.

Finally, the Court lacks jurisdiction to review Petitioners' claim that EPA violated the RFA by promulgating the Opt-Out Amendment without convening a second small business advocacy review panel focused solely on the Opt-Out Amendment. In any event, such a claim is without merit because EPA complied with the RFA in promulgating the Opt-Out Amendment. Accordingly, the Court should deny the instant petition for review.

ARGUMENT

The Opt-Out Amendment is the product of a straightforward application of TSCA. As required by TSCA section 403, in 2001, EPA promulgated a regulation identifying lead-based paint hazards "for purposes of [TSCA subchapter IV]" (which includes TSCA section 402(c)(3), the authority for the Renovation Rule and the Opt-Out Amendment). *See* 15 U.S.C. § 2683; 40 C.F.R. § 745.65. The TSCA section 403 hazard standards apply to all target housing and child-occupied facilities. *See* 40 C.F.R. § 745.61. TSCA section 402(c)(3) in turn requires EPA to revise its lead-based paint activities regulations to apply them to "renovation or

remodeling activities in target housing . . . that create lead-based paint hazards." 15 U.S.C. § 2682(c)(3). In promulgating the Renovation Rule, EPA concluded that all renovation activities that disturb lead-based paint in target housing create dust-lead in excess of the hazard standard in 40 C.F.R. § 745.65(b), and therefore create lead-based paint hazards. *See* 73 Fed. Reg. at 21,698-99; *see also* 75 Fed. Reg. at 24,804. Target housing is "*any* housing constructed prior to 1978[,]" with certain statutory exceptions not relevant here. 15 U.S.C. § 2681(17) (emphasis added). In developing the TSCA section 402(c)(3) renovation regulations, EPA must consider "reliability, effectiveness, and safety." 15 U.S.C. § 2682(a)(1).

Thus, the central question for EPA in reconsidering the opt-out provision—which excused contractors from following *any* of the Renovation Rule's work practice requirements, save for obtaining the homeowner certification, in a subset of target housing—was whether the opt-out provision was reliable, effective, and safe. In promulgating the Opt-Out Amendment, EPA concluded that it was not. *See* 75 Fed. Reg. at 24,807. EPA further concluded that elimination of the opt-out provision rendered the Renovation Rule more consistent with the statutory provisions discussed above. *See id.* at 24,806. As explained below, the administrative record for the Opt-Out Amendment simply does not provide a basis to exempt from the Renovation Rule a subset of target housing based on occupancy.

I. EPA PROVIDED A WELL-REASONED EXPLANATION FOR PROMULGATING THE OPT-OUT AMENDMENT AND THEREFORE THE AMENDMENT IS NOT ARBITRARY, CAPRICIOUS, OR OTHERWISE CONTRARY TO LAW.

Petitioners' APA claim rests primarily on their assertion that EPA did not rely on new information, data, or experience in implementing the opt-out provision to promulgate the Opt-Out Amendment. *See* Petitioners' Opening Brief at 11, 17, 20-23. But no such heightened showing is required and thus Petitioners' APA claim must fail. *See Fox*, 129 S. Ct. at 1810-11. In *FCC v. Fox*, the Supreme Court made clear that the APA's narrow standard of review—whether an agency's action was arbitrary, capricious, or otherwise contrary to law—is the appropriate standard of review when an agency revises an earlier action or changes its position, just as it is when the agency acts in the first instance. *Id.* In so holding, the Supreme Court rejected lower court decisions that applied a heightened standard of review when an agency reversed course and required that the agency show "why the original reasons for adopting the rule or policy were no longer dispositive" and "why the new rule effectuates the statute as well as or better than the old rule." *Id.* at 1810 (internal quotations omitted). Specifically, the Supreme Court stated, "We find no basis in the Administrative Procedure Act or in our opinions for a requirement that all agency change be subjected to more searching review. . . . The statute makes no distinction . . . between initial agency action and subsequent agency action undoing or revising that action." *Id.* at 1810-11.

Thus, the Supreme Court held that when an agency revises prior action or changes its position, the agency must display awareness that it is changing its position and that there are good reasons for the new position. *Id.* at 1811. The agency "need not demonstrate to a court's satisfaction that the reasons for the new [position] are better than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency believes it to be better . . . ." *Id.* Additionally, the Court noted that an agency "need not always provide a more detailed justification than what would suffice for a new policy created on a blank slate[,]" but should provide a reasoned explanation when disregarding facts and circumstances that underlay or were engendered by the prior action. *Id.*

Petitioners cite *Ramaprakash v. Federal Aviation Administration*, 346 F.3d 1121 (D.C. Cir. 2003), and two other pre-*FCC v. Fox* D.C. Circuit cases in support of Petitioners' contention that EPA merely changed its mind and failed to meet the relevant legal standard. *See* Petitioners' Opening Brief at 20 (citing *Ramaprakash*, 346 F.3d at 1124-25; *Williams Gas Processing-Gulf Coast Co. v. FERC*, 475 F.3d 319, 326 (D.C. Cir. 2006); and *C & W Fish Co. v. Fox*, 931 F.2d 1556, 1561 (D.C. Cir. 1991). Putting aside the fact that these cases were decided before *FCC v. Fox*, these cases are distinguishable from this case. In *Ramaprakash*, the court found that the agency departed from agency precedent without explaining the reasons for

the departure. 346 F.3d at 1125-30. Similarly, in *Williams Gas Processing*, the court found that "instead of openly acknowledging its intention to reverse course[,]" the agency attempted to "gloss over" its prior holdings and failed to justify its shift in policy. 475 F.3d at 328-29. Finally, in *C & W Fish Company*, the court noted that the agency failed to explain its reassessment of two factors that supported its earlier decision, before finding that a third factor provided an adequate basis for the change in position. 931 F.2d at 1561-62.

Here, contrary to Petitioners' assertion that EPA merely changed its mind, EPA explicitly acknowledged the Agency's change in position when it proposed and promulgated the Opt-Out Amendment, provided good reasons for reevaluating the opt-out provision consistent with the factors required under TSCA, including the Agency's conclusion that the Opt-Out Amendment better effectuates the statute, and provided a reasoned explanation for changing its view of considerations that had formed the basis for including the opt-out provision in the Renovation Rule.

A. EPA ACKNOWLEDGED THE AGENCY'S CHANGE IN POSITION AND PROVIDED GOOD REASONS FOR THE OPT-OUT AMENDMENT.

As an initial matter, EPA plainly acknowledged its change in position when it proposed the Opt-Out Amendment and when it promulgated the final Opt-Out Amendment by stating that it was "proposing to eliminate" and "eliminating" the

opt-out provision. *See* 74 Fed. Reg. 55,506, 55,509; 75 Fed. Reg. 24,802, 24,804. Additionally, EPA provided good reasons for the Opt-Out Amendment, including considerations EPA had not fully taken into account when it promulgated the Renovation Rule, based on the statutory factors required by TSCA section 402—safety, reliability, and effectiveness. *See* 15 U.S.C. § 2682(a)(1).

1. EPA Considered the Safety Of The Opt-Out Amendment.

With regard to safety, EPA relied on its 2007 study of dust-lead levels after renovation, referred to as the Dust Study, which "demonstrated . . . that renovation, repair, and painting activities produce lead dust above the regulatory hazard levels[,]" 75 Fed. Reg. 24,806, and that the Renovation Rule work practices "are effective at minimizing exposure to dust hazards that could result from renovation activities." *Id.* at 24,804. EPA explained that "[u]nder the opt-out, contractors performing renovations would have no obligation to minimize or clean up any dust-lead hazards created by the renovation . . . . [and] would not be prevented from using practices that EPA has determined create hazards that cannot be adequately contained or cleaned-up . . . ." *Id.* at 24,806. Thus, EPA concluded that the opt-out provision did not adequately protect young children and pregnant women—those most vulnerable to adverse health effects from lead exposure—because young children or pregnant women may move into, live next to, or visit target housing that was renovated under the opt-out provision, and thereby be

exposed to dust-lead levels that exceed the regulatory hazard levels. *Id.* at 24,804-05.

Contrary to Petitioners' argument, EPA had ample data and rationale for concluding that the Opt-Out Amendment would provide greater protection to young children and pregnant women who move into recently renovated target housing. In EPA's Economic Analysis of the Opt-Out Amendment ("Economic Analysis"), EPA cited 2003 U.S. Census data indicating that 2.8 million owner-occupied homes are sold each year, and about 927,000 children under the age of 6, and 6.5 million older individuals move into these homes annually. Economic Analysis at 5-14 [JA __]. EPA estimated that about 85 percent of such homes would have been eligible for the opt-out provision, and assumed that a quarter of such target housing would be renovated prior to being sold. *See id.* Based on an assumption that 35 percent of the renovations would disturb lead-based paint, and 75 percent of the renovations would comply with the Renovation Rule, EPA further concluded that of the children and older individuals who move into target housing eligible for the opt-out provision each year, 52,000 children under the age of 6 and 361,000 older individuals would move into recently renovated housing

where lead-based paint was disturbed without the protections of the Renovation Rule. *See id.*[2]

Moreover, when promulgating the Renovation Rule, EPA did not adequately analyze the safety of the opt-out provision for occupants, including young children and pregnant women, living adjacent to target housing renovated under the opt-out provision and therefore not subject to the Renovation Rule requirements.[3] *See generally* 73 Fed. Reg. 21,692-757. The Renovation Rule requires that renovation firms isolate and contain work areas so that no dust or debris leaves the work areas and prohibits certain work practices because the lead-based paint hazards created by such practices cannot be contained. *See* 75 Fed. Reg. at 24,805; *see also* 40 C.F.R. § 745.85(a)(2)-(3). In promulgating the Opt-Out Amendment, EPA explained that under the opt-out provision, a renovator could perform work on the

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[2] When EPA assumed that 100 percent of homes eligible for the opt-out provision would be renovated prior to being sold, EPA concluded that 206,000 children under the age of 6 and 1.4 million older individuals would move into recently renovated housing where lead-based paint was disturbed without the protections of the Renovation Rule. Economic Analysis at 5-14 [JA __].

[3] EPA did, however, respond to comments that raised this issue. EPA stated that it believed disclosure of information through EPA's Disclosure Rule would help address risk to those living in adjacent housing. Renovation Rule Response to Comments at 102-103 (Mar. 2008) [JA __]. As discussed in Part I.B. *infra*, upon reconsideration, EPA concluded that the Disclosure Rule does little, if anything, to protect people from the hazards created by renovation activities, and therefore is an inadequate substitute for the Renovation Rule work practices and training requirements.

exterior of target housing using the otherwise prohibited or restricted practices and without following any containment practices even if a child or pregnant woman lives in an adjacent home. *See* 75 Fed. Reg. at 24,805. EPA concluded that exterior renovations to such homes not subject to Renovation Rule requirements would "likely [] contaminate neighboring yards and porches." *Id.*

Again contrary to Petitioners' assertion, EPA had ample data to support its conclusion that the opt-out provision does not adequately protect children and pregnant women living adjacent to target housing renovated under the opt-out provision. In the Economic Analysis, EPA explained that about 1.6 million attached homes, a subset of adjacent homes that has a particularly heightened risk of contamination from renovations to neighboring properties, were eligible for the opt-out provision, and estimated that each year, 3.2 percent of all renovations to single-family housing would be to the exterior of attached homes. Economic Analysis at 5-12 [JA __]. EPA explained that such renovations to target housing would disturb lead-based paint, and without the protections of the Renovation Rule, could contaminate contiguous properties. *Id.* at 5-11 to 5-12 [JA __]. Based on 2003 U.S. Census data, EPA determined that each year, 23,000 children under age 6 and 238,000 older individuals living in homes attached to renovated target housing would be protected by the Opt-Out Amendment. *Id.* at 5-12.

Petitioners argue that EPA overlooked comments submitted by NAHB discussing studies on the association between professional renovation activities and elevated blood-lead levels in young children. *See* Petitioners' Opening Brief at 22-23. EPA responded to a similar comment when it promulgated the Renovation Rule and in its Response to Comments for the Opt-Out Amendment. First, EPA stated that it disagreed with NAHB's assertion that the studies failed to demonstrate an association between renovation activities and lead poisoning; EPA stated that they merely demonstrated that renovation activities performed by professional contractors were "no more or less hazardous than renovation activities performed by most of the other categories" of persons studied. *See* 73 Fed. Reg. at 21,700. Second, EPA pointed out that EPA is obligated under TSCA to regulate renovation activities that create lead-based paint hazards, not such activities that result in elevated blood-lead levels. *Id.* at 21,699. Finally, EPA pointed out that the Dust Study demonstrated that renovation activities "produce large quantities of lead dust that create dust-lead hazards." Response to Comments to the Opt-Out Amendment ("Response to Comments") at 3 (Apr. 2010) [JA __]; *see also* 73 Fed. Reg. 21,698-99. In sum, EPA reasonably determined that the opt-out provision did not adequately protect young children and pregnant women who may move into, live next to, or visit target housing renovated under the opt-out provision.

Also with regard to safety, EPA explained that contamination was also a concern for detached homes in urban areas, where homes are built close together, and predicted that low-income, minority populations living in such areas would be disproportionately affected by lead contamination. *See* 75 Fed. Reg. at 24,805. Petitioners argue that EPA unreasonably considered the effects of the opt-out provision on minority populations and cite EPA's conclusion that the Renovation Rule would not have "'disproportionately high and adverse human health or environmental effects on minority or low-income populations.'" *See* Petitioners' Opening Brief at 29-30 (quoting 73 Fed. Reg. 21,758). EPA made that conclusion based on the fact that the Renovation Rule as a whole increases protection for all people affected by the Renovation Rule; the Agency made no conclusions with respect to the opt-out provision specifically. 73 Fed. Reg. at 21,758. However, in promulgating the Opt-Out Amendment, EPA cited an analysis by the National Health and Nutrition Examination Survey that found that minority children have higher percentages of blood-lead levels than white children in the same age group and that "residence in older housing, poverty, age, and being non-Hispanic black are still major risk factors for higher lead levels." 75 Fed. Reg. at 24,804-05 (quotations omitted). Accordingly, EPA had ample reason to consider the opt-out provision's safety for minority populations when it promulgated the Opt-Out Amendment.

Lastly with regard to the Opt-Out Amendment's safety, EPA determined that the opt-out provision did not sufficiently protect older children and adults because the Dust Study showed that when the Renovation Rule work practices are not followed, "renovation activities result in dust lead levels that can be orders of magnitude above the hazard standard and . . . orders of magnitude higher than if the [Renovation Rule] requirements are followed." *Id.* at 24,806. Although in the Renovation Rule, EPA considered only hand-to-mouth exposure to toddlers, EPA noted in the preamble to the Opt-Out Amendment that a 2007 meta-analysis of studies of children's hand-to-mouth behavior showed that even children between the ages of 6 and 11 average more than 6 hand-to-mouth contacts per hour.[4] *See id.* The significance of this meta-analysis is not, as Petitioners would have the Court believe, that it confirmed that young children have the highest occurrence of hand-to-mouth activity, but that older children also frequently engage in hand-to-mouth behavior. *See id.* Moreover, in the Economic Analysis for the proposed Renovation Rule, EPA noted that adults ingest an average of 50 mg/day of indoor dust and outdoor soil, some of which is presumed to contain lead. Economic Analysis for Proposed Renovation Rule at 5-24 (Feb. 2006) [JA __]. Furthermore, EPA explained that the concern over elevated blood-lead levels is not limited to

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[4] Children between 3 and 6 months old demonstrated the highest hand to mouth behavior, 28 contacts per hour. *Id.*

young children, and that there are extensive adverse health effects from lead exposure to older children and adults, including increased blood pressure and incidence of hypertension. *See* 75 Fed. Reg. 24,805-06; *see also* Economic Analysis at 5-6 to 5-7 [JA __].

Petitioners argue that EPA's conclusions regarding the safety of the opt-out provision for older children and adults are not reasonable because, according to Petitioners, EPA has not evaluated the relationship between renovation activities creating lead-based paint hazards and adults or older children. *See* Petitioners' Opening Brief at 27-29. In support of their argument, Petitioners quote, out of context, statements from the Renovation Rule preamble. *Id.* at 27. EPA made those statements in the context of explaining why the Renovation Rule does not apply to public buildings constructed before 1978 or commercial buildings (other than child-occupied facilities), and only applies to target housing and child-occupied facilities. *See* 73 Fed. Reg. 21,707. While it is true that EPA has not yet identified a dust-lead hazard level for other types of buildings, it has done so for target housing and child-occupied facilities based on the most vulnerable population—young children—but applicable nonetheless to all target housing and child-occupied facilities without regard to occupancy. *See* 40 C.F.R. § 745.65. Accordingly, it was reasonable for EPA to use the hazard levels set forth in 40 C.F.R. § 745.65 for the purposes of evaluating the safety of regulations covering

target housing and child-occupied facilities for adults and older children. *See* 73 Fed. Reg. at 21,700 (specifically addressing the use of the hazard levels in 40 C.F.R. § 745.65 to evaluate the safety of the Renovation Rule). As explained *supra*, EPA found that when the Renovation Rule work practices are not followed, renovation activities result in dust-lead levels many times higher than the hazard standard. 75 Fed. Reg. at 24,806. Accordingly, given the deleterious health effects of lead exposure to older children and adults, EPA reasonably concluded that the opt-out provision should be eliminated and the Renovation Rule's work practices "should be followed in target housing without regard to the age of the occupants." *Id.*

2. EPA Considered The Reliability And Effectiveness Of The Opt-Out Amendment.

With regard to reliability and effectiveness, EPA specifically reevaluated the opt-out provision in light of considerations that the Agency had not previously weighed; namely, that the opt-out provision "is a relatively complicated overlay to the applicability provisions of the [R]ule," making the Renovation Rule more difficult for consumers to understand, for renovators to apply, and for EPA to explain in its outreach and education efforts. *Id.* at 24,805. In promulgating the Renovation Rule, EPA provided the following explanation of how the opt-out provision would work:

> [U]nless the target housing meets the definition of a child-occupied facility, if an owner-occupant signed a statement that no child under 6 and no pregnant woman reside there and an acknowledgement that the renovation firm will not be required to use the lead-safe work practices contained in EPA's renovation, repair, and painting rule, the renovation activity is exempt from the training, certification, and work practice requirements of the rule. Conversely, if the owner-occupant does not sign the certification and acknowledgment (even if no children under 6 or pregnant women reside there), or if the owner-occupant chooses not to take advantage of the exception for other reasons, the exception does not apply and the renovation is subject to the requirements of this final rule.

73 Fed. Reg. at 21,709.

In reevaluating the opt-out provision in the context of the Opt-Out Amendment, EPA explained that such a complicated exception assumes that homeowners are literate and have a working knowledge of what the Renovation Rule would require in absence of the certification, and that homeowners are capable of providing informed consent. 75 Fed. Reg. at 24,805. EPA considered for the first time the concern that those in low-income, minority populations, those EPA had already found to be most at risk for lead exposure, would also be disproportionately adversely affected by the complexity of the opt-out provision because of lower literacy and education levels associated with such populations. *Id.* at 24,804. EPA also explained that contractors that have a single set of work practices are more likely to apply them consistently and correctly. *Id.* Thus, EPA concluded that eliminating the opt-out provision would lead to a more uniform application of the Renovation Rule requirements and therefore the Renovation

Rule would be more effective and reliable in minimizing exposure to lead hazards in all target housing. *Id.* Accordingly, EPA's decision to eliminate the opt-out provision reflected careful consideration of safety, reliability, and effectiveness in accordance with TSCA section 402's mandate.

B. EPA PROVIDED A WELL-REASONED EXPLANATION FOR CHANGING ITS VIEWS OF CONSIDERATIONS THAT SUPPORTED THE OPT-OUT PROVISION.

Furthermore, EPA provided a well-reasoned explanation for changing its view regarding several considerations that it cited in support of the opt-out provision in the first place. When EPA promulgated the Renovation Rule with the opt-out provision, EPA intended to focus the regulation on the housing that presents the greatest risk to young children. *See* 73 Fed. Reg. at 21,710. At the time, EPA believed that the opt-out provision would do so. *Id.* EPA answered commenters' concerns about the safety of the opt-out provision for young children and pregnant women who move into target housing recently renovated under the opt-out provision by pointing to EPA's Disclosure Rule. *Id.*; *see also* 40 C.F.R. § 745.107. The Disclosure Rule "requires sellers of target housing to disclose known lead-based paint or lead-based paint hazard information to purchasers and provide them with a copy of the lead hazard information pamphlet . . . ." 73 Fed. Reg. at 21,710. EPA suggested that the receipt of such information would prompt families to inquire about lead hazards in the home, particularly if the home had

been recently renovated, and recommended that all purchasers have a lead-based paint inspection or risk assessment done while in the process of purchasing target housing. *See id.*

Upon reconsideration, EPA determined that the Disclosure Rule would not sufficiently protect young children and pregnant women who move into target housing recently renovated under the opt-out provision, in part because the Disclosure Rule does not require that homeowners provide renovation-specific lead hazard information. *See* 75 Fed. Reg. at 24,804. EPA further explained that even if the Disclosure Rule required that purchasers provide renovation-specific information, such information alone does not provide protection from the hazards created by renovation activities and therefore would be an inadequate substitute for the training and work practices required by the Renovation Rule. *See id.*

Furthermore, when EPA promulgated the Renovation Rule with the opt-out provision, EPA failed to take into consideration that reliance on the Disclosure Rule was unwarranted with respect to those with the highest risk of exposure—children in low-income minority populations—because the recipient of the Disclosure Rule information may not have the education necessary to understand the significance of the disclosure or have the means and ability to act on the information. *Id.* at 24,804-05. Needless to say, the Disclosure Rule would provide no conceivable benefits to families with young children or pregnant women who

visit or live near target housing recently renovated under the opt-out provision because the Disclosure Rule does not require disclosure of any kind to such people—an issue that EPA did not adequately address in promulgating the Renovation Rule. *See* 40 C.F.R. §§ 745.100-745.119. Thus, upon reconsideration, EPA reasonably concluded that "there is little evidence to suggest that the provisions of the Disclosure Rule are effective or reliable at minimizing exposure to lead-based paint hazards created by renovation activities in target housing." *Id.* at 24,804.

Similarly, when promulgating the Renovation Rule, EPA stated its belief that the opt-out provision did not present a significant risk to older children and adults because older children and adults "do not ingest dust at the same high rate that a toddler does" given that older children and adults do not engage in hand-to-mouth behavior as frequently as young children do, and therefore the presence of lead dust does not present as great a hazard to older children and adults. *See* 73 Fed. Reg. at 21,710. When promulgating the Opt-Out Amendment, EPA acknowledged that its previous assessment was still accurate—older children and adults are not as susceptible to lead poisoning as young children because they engage in hand-to-mouth behavior less frequently. *See* 75 Fed. Reg. at 24,805-06. However, as discussed *supra*, hand-to-mouth behavior is still frequent for children between the ages of 6 and 11, and therefore hand-to-mouth behavior is a concern

for older children as well. *Id.* at 24,806. Also, as discussed *supra*, EPA further explained that "it is well known that older children and adults can also suffer adverse effects from lead exposure[,]" such as enhanced risk of increased blood pressure and incidence of hypertension in adults and neurotoxic effects in children. *Id.* at 24,805. Thus, EPA concluded that, upon reconsideration, "the opt-out provision does not sufficiently account for the importance of the health effects of lead exposure to adults and children age 6 and older . . . ." *Id.* at 24,805-06.

Finally, when EPA promulgated the Renovation Rule, EPA stated that it believed the opt-out provision was consistent with TSCA's requirement that all target housing be regulated because the Renovation Rule covered all target housing, and only carved out an exception for renovations that do "not significantly compromise the safety and effectiveness of [the Renovation Rule] . . . ." *See* 73 Fed. Reg. at 21,711. Upon reconsideration of the safety and effectiveness, or lack thereof, of the Renovation Rule with the opt-opt provision, and upon concluding that renovations of all target housing present a risk not only to young children and pregnant women but also to older children and adults, EPA concluded that removing the opt-out provision was more consistent with TSCA's mandate that EPA establish safe, effective, and reliable work practices covering renovation activities that create lead-based paint hazards in "*any* housing constructed prior to 1978 . . . ." 15 U.S.C. § 2681(17) (emphasis added); *see also*

15 U.S.C. § 2682(c)(3), 75 Fed. Reg. at 24,806. Accordingly, EPA concluded that by covering all target housing regardless of the age or status of the occupants of such housing, the Opt-Out Amendment better effectuates the statute than the Renovation Rule with the opt-out provision did. *See id.*

In summary, consistent with the Supreme Court's holding in *FCC v. Fox*, EPA deliberately changed the Renovation Rule, provided a well-reasoned explanation for doing so, including reasons it had not fully analyzed when it promulgated the Renovation Rule, and adequately explained why its prior view of certain considerations had changed. Thus, the Opt-Out Amendment was not arbitrary, capricious, or otherwise contrary to law.

C. PETITIONERS' ARGUMENT REGARDING EPA'S AUTHORITY TO PROMULGATE THE OPT-OUT AMENDMENT IS WITHOUT MERIT.

1. The Court Lacks Jurisdiction To Consider Petitioners' Argument.

Petitioners argue that the Opt-Out Amendment is arbitrary and capricious because one of EPA's reasons for the Opt-Out Amendment—the opt-out provision's failure to sufficiently protect children and pregnant women who move into or visit target housing recently renovated under the opt-out provision—attempts to regulate "potential lead-based paint hazards" or "potential exposure," and EPA has no authority to do so under the Act. *See* Petitioners' Opening Brief at 24-27. Not only are Petitioners incorrect in their assertions, but the Court lacks

jurisdiction to consider this argument because it is untimely under TSCA section 19, which bars challenges to regulations promulgated under TSCA Subchapter IV brought beyond sixty days after the regulation is promulgated. *See* 15 U.S.C. § 2618(a)(1)(A).

TSCA's statute of limitations is jurisdictional. *See Cellular Telecomms. & Internet Ass'n v. FCC*, 330 F.3d 502, 508 (D.C. Cir. 2003). Like similar provisions found in other environmental statutes that narrowly limit the time within which regulations can be challenged, the purpose of TSCA section 19(a)(1)(A)'s limitation is to "bring[] finality to the administrative process and reflects 'a deliberate congressional choice to impose statutory finality on agency [action], a choice [the courts] may not second-guess.'" *W. Neb. Res. Council v. EPA*, 793 F.2d 194, 198 (8th Cir. 1986) (quoting *Eagle-Picher Indus., Inc. v. EPA*, 759 F.2d 905, 911 (D.C. Cir. 1985), and citing *Cerro Copper Prods. Co. v. Ruckelshaus*, 766 F.2d 1060, 1069 (7th Cir. 1985) (Clean Water Act); *Eagle-Picher Indus.*, 759 F.2d at 911 (Comprehensive Environmental Response, Compensation and Liability Act); *Selco Supply Co.v. EPA*, 632 F.2d 863, 865 (10th Cir. 1980) (Federal Insecticide, Fungicide and Rodenticide Act), *cert. denied*, 450 U.S. 1030 (1981); *Lloyd A. Fry Roofing Co. v. EPA*, 554 F.2d 885, 892 (8th Cir. 1977) (Clean Air Act)).

Here, Petitioners' challenge to the scope of the Renovation Rule, as amended by the Opt-Out Amendment, is time-barred. Specifically, EPA has been regulating renovation activities in target housing without regard to occupancy since at least 2008 when EPA promulgated the Renovation Rule. In promulgating the Renovation Rule, EPA explicitly explained that the Renovation Rule's requirements applied to all target housing, even target housing where no children under six were present, unless the homeowner provided the renovator with a certification that the housing qualified for the opt-out provision. *See* 73 Fed. Reg. at 21,711 ("This regulation covers all target housing."). In other words, the opt-out provision was not an automatic exclusion. *Id.* at 21,709. The requirements of the Renovation Rule applied to target housing even if the housing qualified for the opt-out provision; it was only possible for homeowners to "opt out" of the Renovation Rule because the housing was already covered by the Renovation Rule. *Id.* Moreover, the opt-out provision only applied to owner-occupants; it did not apply to rental housing. *See id.* (discussing "owner-occupied" target housing). Thus, the issue of whether EPA had the authority to regulate housing where no young children or pregnant women currently reside was squarely presented at the time EPA issued the Renovation Rule. Petitioners' challenge to EPA's authority to regulate renovation activities in target housing where no young children or pregnant women currently reside should have been made as a challenge to the

Renovation Rule. NAHB timely petitioned this Court for review of the Renovation Rule but later voluntarily dismissed its petition. NAHB cannot resurrect a challenge to the Renovation Rule through a challenge to the Opt-Out Amendment because such a challenge is time-barred under TSCA.

Furthermore, to the extent Petitioners are challenging the applicability of EPA's hazard standard in 40 C.F.R. § 745.65 to all target housing by arguing that a lead-based paint hazard exists only where there is actual exposure, this challenge is also time-barred. TSCA section 403 directed EPA to "identify . . . lead-based paint hazards, lead-contaminated dust, and lead-contaminated soil[,]" and EPA did so by promulgating 40 C.F.R. § 745.65 in 2001. EPA defined dust-lead hazard levels as "surface dust in a residential dwelling or child-occupied facility that contains a mass-per-area concentration of lead equal to or exceeding 40 $\mu g/ft^2$ on floors or 250 $\mu g/ft^2$ on interior window sills based on wipe samples." *Id.* § 745.65(b). By its terms, this definition establishes the dust-lead levels at which lead-based paint hazards exist in residential dwellings and child-occupied facilities without regard to individualized considerations of actual exposure, elevated blood-lead levels, or the presence of a young child or pregnant woman. Thus, Petitioners should have challenged EPA's authority to define dust-lead hazards without regard to occupancy or a determination of actual exposure when EPA promulgated 40 C.F.R. § 745.65. Because several years have passed since the statute of limitations

to challenge the Renovation Rule or 40 C.F.R. § 745.65 expired, Petitioners' challenge to EPA's authority to regulate renovation activities in all target housing is untimely under TSCA section 19.

2. *TSCA Provides EPA Ample Authority To Regulate Renovation Activities That Create Lead-Based Paint Hazards In Target Housing Without Regard To Occupancy.*

In any event, EPA's authority to regulate renovation activities that create lead-based paint hazards in all target housing stems from a straightforward application of TSCA and is not dependent upon occupancy. Specifically, as discussed *supra*, TSCA section 402(c)(3) requires EPA to regulate renovation and remodeling activities that create lead-based paint hazards in target housing, public buildings constructed before 1978, and commercial buildings. *See* 15 U.S.C. § 2682(c)(3). "Lead-based paint hazard" is defined by TSCA as "*any condition* that causes exposure to lead from lead-contaminated dust . . . that *would result* in adverse human health effects as established by the Administrator under this subchapter." *Id.* § 2681(10) (emphasis added). TSCA in turn defines "[l]ead-contaminated dust" as "surface dust in residential dwellings that contains an area or mass concentration of lead in excess of levels determined by the Administrator . . . to *pose a threat* of adverse health effects in pregnant women or young children." *Id.* § 2681(11) (emphasis added).

Furthermore, TSCA section 403 requires that EPA identify lead-based paint hazards, lead-contaminated dust, and lead-contaminated soil, which prompted EPA to promulgate 40 C.F.R. § 745.65. Nowhere do these TSCA provisions require that EPA regulate renovation activities or identify lead-based paint hazards and lead-contaminated dust only in properties where young children or pregnant women actually reside.[5]

Moreover, contrary to Petitioners' assertion, EPA's interpretation of its authority is consistent with Congress's stated purpose for the Residential Lead-Based Paint Hazard Reduction Act to address all of the nation's housing rather than only the housing where children and pregnant women currently live and are actually exposed to lead. *See* 42 U.S.C. § 4851a(1) (stating Congress's purpose to "develop a national strategy to build the infrastructure necessary to eliminate lead-based paint hazards in *all housing* as expeditiously as possible") (emphasis added).

[5] In fact, it is standard practice for EPA to base generally applicable rules on the most significant exposures, regardless of whether such exposures actually exist. For example, in addressing the risk remaining after the imposition of National Emission Standards for Hazardous Air Pollutants under the Clean Air Act, EPA evaluates the risk to the most exposed individual by assuming a person is exposed to the maximum modeled annual concentration for 24 hours per day, 365 days per year, for 70 continuous years. The standards apply nationally and are not dependent on the actual existence of the assumed exposure scenario. *See* 54 Fed. Reg. 38,044, 38,045 (Sept. 14, 1989).

Through several studies, EPA found that renovation and remodeling activities that disturb lead-based paint in target housing and child-occupied facilities create dust-lead in excess of the level set forth in 40 C.F.R. § 745.65, thereby creating conditions that cause exposure that would result in adverse human health effects—*i.e.*, creating a lead-based paint hazard. *See* 75 Fed. Reg. 24,804, 24,806. In light of this finding, TSCA section 402 plainly provides EPA the authority to regulate such renovation activities in target housing without regard to occupancy. Accordingly, Petitioners' challenge to EPA's authority to regulate renovation activities in target housing without regard to occupancy is without merit.

D. EPA ADEQUATELY CONSIDERED THE ECONOMIC IMPACT OF THE OPT-OUT AMENDMENT.

Petitioners argue that the Opt-Out Amendment is arbitrary and capricious because the costs of the Opt-Out Amendment outweigh its benefits. *See* Petitioners' Opening Brief at 32-35. Petitioners are wrong on both the law and the facts of this point. First, TSCA section 402 does not require EPA to conduct a cost-benefit analysis. Second, despite the absence of a duty to do so, EPA in fact determined that even the low estimate of the quantifiable benefits of the Opt-Out Amendment is almost *triple* the high estimate of its costs. Accordingly, Petitioners' argument regarding the economic impact of the Opt-Out Amendment is without merit.

1. TSCA Does Not Require EPA To Determine That The Benefits Of The Opt-Out Amendment Outweigh The Costs.

As an initial matter, EPA is not required to demonstrate that the benefits of the Opt-Out Amendment outweigh the costs in order to show that the Opt-Out Amendment is reasonable under the APA. *See* 15 U.S.C. § 2682(a)(1). TSCA section 402 only requires that EPA consider the safety, effectiveness, and reliability of rules promulgated under TSCA section 402, and does not require that EPA weigh the costs and benefits of such rules. *See id.* Nor does TSCA section 2 impose such a requirement as Petitioners suggest. *See id.* § 2601(c). TSCA section 2 provides a general directive that EPA "carry out [TSCA] in a reasonable and prudent manner, and that the Administrator [] consider the environmental, economic, and social impact of any action the Administrator takes or proposes to take under [TSCA]." *Id.* TSCA section 2 is prefatory, and is not an operative section of TSCA. *See* S. Rep. No. 94-698 (1976), *reprinted in* 1976 U.S.C.C.A.N. 4491, 4504.

The two cases cited by Petitioners in support of their claim that a cost-benefit analysis was required are inapposite. *See* Petitioners' Opening Brief at 32. Both involve rules promulgated under the Resource Conservation and Recovery Act for which the Court found EPA to have wholly failed to provide a rational explanation for its decision. *See Am. Petroleum Inst. v. EPA*, 216 F.3d 50, 57 (D.C. Cir. 2000) (noting EPA's unsupported conclusion was not "clear" merely

because EPA said so); *Chem. Mfrs. Ass'n v. EPA*, 217 F.3d 861, 865 (D.C. Cir. 2000) (characterizing EPA's failure to explain the benefits of the rule after stating that they were numerous as a "classic case of arbitrary and capricious rulemaking"). In neither case did the court find that EPA acted arbitrarily and capriciously because EPA failed to find that the benefits outweighed the costs.

Here, unlike in *American Petroleum* and *Chemical Manufacturers*, EPA did not fail to provide a rational explanation for the Opt-Out Amendment. As detailed in Part I.A. *supra*, EPA had good reasons for revising the Renovation Rule to remove the opt-out provision. Moreover, as explained below, EPA not only adequately considered the economic impacts of the Opt-Out Amendment, but also in fact determined that the low estimate of the quantifiable benefits of the Opt-Out Amendment was almost triple the high estimate of its costs.

2. *EPA Considered The Opt-Out Amendment's Economic Impacts And Determined That Its Benefits Outweigh Its Costs.*

With regard to economic impact, EPA evaluated the number of renovation firms that would be affected by the Opt-Out Amendment and the size of the impact. *See* 75 Fed. Reg. at 24,814. In order to calculate the size of the impact, EPA compared compliance costs to revenues as a fair measure of the regulatory burden on renovators relative to their economic activity. *See id.* EPA estimated that 289,000 small entities would incur costs due to the Opt-Out Amendment. *See id.* EPA further found that the average annual compliance cost to a small

renovation contractor would range from $1,100 to $6,400, which would represent 0.8 to 1.7% of revenues. *See id.* EPA noted, however, that to the extent renovators have already become certified under the Renovation Rule because they work in housing not covered by the opt-out provision, or to the extent eligible homeowners would have declined to opt out, the average impacts of the Opt-Out Amendment would be lower than EPA estimated. *See id.* Specifically, EPA estimated that the additional cost of the Opt-Out Amendment, beyond what renovators are already doing, would range from $8 to $167 per renovation job. *See* EPA's April 2010 Response to Comments at 23 [JA __].

With regard to benefits, contrary to Petitioners' assertion, EPA did not simply restate its reasons for the Opt-Out Amendment as benefits and opine that they outweigh the costs of the Opt-Out Amendment. *See* Petitioners' Opening Brief at 34. Certainly, EPA noted unquantifiable benefits of the Opt-Out Amendment, such as the protection of pets from lead-based paint hazards. *See* 75 Fed. Reg. 24,804. However, EPA also quantified "the prevention of adverse health effects attributable to lead exposure from renovations in pre-1978 buildings . . . includ[ing] impaired cognitive function in children and several illnesses in children and adults . . . ." *Id.* at 24,811. Specifically, EPA quantified the total benefits of the Opt-Out Amendment as ranging from $870 million to $3.2 billion annually. *See id.*

Furthermore, in EPA's Economic Analysis, EPA estimated benefits by population segment as $656.5 to $2,626 million/year for adults residing in housing renovated under the opt-out provision; $15.4 million/year for children living contiguous to attached housing renovated under the opt-out provision; $119 million/year for adults living contiguous to attached housing renovated under the opt-out provision; $68.2 to $272.7 million/year for children moving into housing renovated under the opt-out provision; $45 to $722 million/year for adults moving into housing renovated under the opt-out provision; and $6.9 to $27.5 million/year for children receiving childcare in housing renovated under the opt-out provision. *See* Economic Analysis at ES-9 [JA __].

With regard to costs, EPA acknowledged that the Opt-Out Amendment will require firms to comply with the Renovation Rule requirements for renovations to target housing that previously may have qualified for the opt-out provision, which "may result in additional costs for [such] firms." 75 Fed. Reg. at 24,812. EPA estimated that such additional costs could total as much as $500 million in the first year and $300 million in subsequent years. *See id.* However, EPA noted that its cost analysis assumed that the renovation firms covered by the Opt-Out Amendment would be specialized to work only in housing eligible for the opt-out provision, and that if "firms are less specialized than the analysis assumed, there may be little to no incremental training and certification costs due to [the Opt-Out

Amendment]." *Id.*[6] Because EPA found that the low estimate of the total quantifiable benefits of the Opt-Out Amendment—$870 million annually—is almost triple the high estimate of the costs of the Amendment—$300 million annually after the first year, Petitioners' assertions are patently wrong. EPA did conduct a cost-benefit analysis and found that the benefits of the Opt-Out Amendment far outweigh the costs.

3. EPA Explained Why Industry Cost Estimates Were Not Accurate Or Appropriate For Use In A National Assessment Of Cost.

Petitioners argue that EPA did not use new cost information provided by industry members during the public comment period on the proposed Opt-Out Amendment, and "arbitrarily chose[] to ignore it." Petitioners' Opening Brief at 33. Far from ignoring comments on the Opt-Out Amendment, including the comments from industry members regarding the costs of compliance with the Opt-Out Amendment, EPA dedicated 40 pages of its 62-page Response to Comments to this issue. *See generally* Response to Comments at 19-59 [JA __]. First, EPA explained that the Agency's cost estimates were prepared in reliance on data from the Bureau of Labor Statistics and a commercial data source designed to help

---

[6] Additionally, EPA's cost analysis also assumed that owners of housing eligible for the opt-out provision would always choose to exercise that provision. *See id.* at 24,811. To the extent some eligible homeowners would decline to opt out, the cost estimate would be even lower. *Id.*

contractors estimate the cost of projects. *See id.* at 20. Next, EPA explained that, as a general matter, many of the commenters included costs in their estimates for practices, training, and equipment not required by the Renovation Rule, but only recommended by EPA. *See id.* at 20-21.

Additionally, EPA provided more detailed explanations why the specific commenters cited by Petitioners did not provide cost estimates appropriate for use in determining the costs attributable to the requirements of the Renovation Rule. For example, EPA noted that the Ohio contractor, Thompson Building Associates, was among several contractors that likely overestimated the training costs, *see id.* at 30; overestimated the number of on-the-job training hours the Renovation Rule would require, *see id.* at 30-32; overestimated the cost of obtaining firm certification, *see id.* at 35; and may have included costs of equipment not required by the Renovation Rule, *see id.* at 38. EPA provided similar responses to comments submitted by the Illinois contractor, Sutton Siding and Remodeling, *see id.* at 27-28, 39-43; the Tennessee contractor, Rollins Contracting, *see id.* at 46; the Texas contractor, Legal Eagle Contractors, Co., *see id.* at 40; and the Connecticut contractor, Robert Hanbury of Hanbury Builders, *see id.* at 27, 38, 52-57.

In sum, EPA provided a reasonable explanation for relying on the cost information provided in the preamble to the proposed Opt-Out Amendment instead of relying on the cost information submitted by industry members. Thus, EPA

analyzed the economic impact of the Opt-Out Amendment, determined that the quantifiable benefits significantly outweigh the costs, and fully considered comments from industry related to EPA's cost estimates. Accordingly, Petitioners' arguments to the contrary are belied by the record and are wholly without merit.

II. PETITIONERS' CLAIM THAT EPA VIOLATED THE REGULATORY FLEXIBILITY ACT IS WITHOUT MERIT.

A. STATUTORY BACKGROUND.

The RFA requires an agency to take a number of steps in order to analyze the impact of proposed and final rules on small entities. *See* 5 U.S.C. §§ 603-609. Specifically, the agency must first determine whether to prepare an initial regulatory flexibility analysis ("initial analysis") under RFA section 603. *See id.* § 605(b)-(c) (exempting rules from section 603 under certain circumstances). Pursuant to RFA section 609(b), if an initial analysis is required, the agency must convene a panel, called a small business advocacy review panel ("panel"), to review the proposed rule and "collect advice and recommendations" of small entity representatives prior to publishing the initial analysis for public comment. *See id.* § 609(b)(4). The panel must prepare a report on the comments of small entity representatives and make recommendations regarding certain elements that RFA section 603 requires to be included in the initial analysis. *See id.* The panel's report is preliminary, and "provides the Panel and the Agency with an opportunity to identify and explore potential ways of shaping the proposed rule to minimize the

burden of the rule on small entities while achieving the rule's purposes." Report of the Small Business Advocacy Review Panel on the Renovation Rule ("Panel Report") at 2 [JA __]. After receiving the panel's report, the agency may make changes to the proposed rule and the initial analysis. *See id.* Next, under RFA section 604, the agency must prepare and make available to the public a final regulatory flexibility analysis ("final analysis") when the agency promulgates a final rule. *See* 5 U.S.C. § 604.

The requirements of RFA sections 603 and 604 do not apply when the agency certifies that there will be no significant economic impact on a substantial number of small entities. *Id.* § 605(b). Moreover, the Act permits the agency to treat "closely related" rules as one rule for purposes of compliance with RFA sections 603 and 604 in order to "avoid duplicative action." *Id.* § 605(c).[7]

B. THE COURT LACKS JURISDICTION OVER PETITIONERS' CLAIM.

As an initial matter, Petitioners' claim that EPA's alleged "refus[al] to convene a small business advocacy review panel violated the [RFA,]" Petitioners' Opening Brief at 36, is not reviewable because the claim arises out of RFA section

[7] Petitioners cite EPA's internal guidance on compliance with the Regulatory Flexibility Act in their brief. The guidance is not part of the administrative record in this case and therefore should not be considered by the Court. *See, e.g., Am. Farm Bureau Fed'n v. EPA*, 559 F.3d 512, 521 n.* (D.C. Cir. 2009). It is the RFA, not the guidance, that that sets forth the legal requirements that EPA must follow.

609(b). *See* 5 U.S.C. § 609(b). The RFA's judicial review provision allows challenges to agency compliance with only certain sections of the RFA. *See* 5 U.S.C. § 611(a); *see also id.* § 611(c) ("Compliance or noncompliance by an agency with the provisions of [the RFA] shall be subject to judicial review only in accordance with [section 611]"). RFA section 609(b) is not one of them.

Although Petitioners construe their claim as one brought under RFA section 604, *see* Petitioners' Reply In Support of Their Motion to Hold Case In Abeyance at 8; Petitioners' Opening Brief at 1, under the plain language of the statute, their claim clearly falls under section 609(b).[8] It is section 609(b) that requires the agency to convene a panel when an initial analysis is required. *See* 5 U.S.C. § 609(b). Under section 609(b), the panel's recommendations and findings are preliminary and affect the proposed rule and the initial analysis, and are not directly discussed in the final rule and final analysis. *See id.* § 609; Panel Report at 2 [JA __]. In contrast, RFA section 604 requires an agency to prepare a final analysis and describes the required content of the analysis, but says nothing about the agency's duty to convene a panel, or even that the final analysis must incorporate the recommendations of a panel. *See* 5 U.S.C. § 604.

[8] Indeed, Petitioners included only RFA section 609, not section 604, in their addendum of pertinent statutory provisions. *See* Petitioners' Statutory Addendum.

In fact, in *Allied Local & Regional Manufacturers Caucus v. EPA*, 215 F.3d 61 (D.C. Cir. 2000), this Court construed an identical claim that the agency failed to "convene a review panel prior to issuing the initial regulatory flexibility analysis" as a "charge[] that the agency failed to comply with the requirement of section 609(b)," and concluded that the Court did not have jurisdiction to review the claim. *Allied*, 215 F.3d at 80 n.21. Because Petitioners' section 609(b) claim is not judicially reviewable under RFA section 611, Petitioners' RFA claim must be denied.[9]

C. EPA COMPLIED WITH THE REGULATORY FLEXIBILITY ACT.

To the extent the Court considers EPA's compliance with the RFA when considering the validity of the Opt-Out Amendment under the APA, the claim must also be denied because EPA fully complied with the RFA. *See Allied*, 215 F.3d at 79 (noting that the court may consider compliance with RFA sections not

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[9] Moreover, Petitioners have not demonstrated that their members qualify as "small entit[ies] that [are] adversely affected or aggrieved by final agency action" as required under RFA section 611. *See* 5 U.S.C. § 611(a)(1). NAHB describes 14,000 of its members as conducting remodeling as a primary or secondary activity, but fails to show that any of its members qualifies as a "small entity" under the RFA. *See* Petitioners' Opening Brief at 13. Likewise, the members of the Hearth, Patio and Barbecue Association and the Window & Door Manufactures Association are described as having similar interests in remodeling activities, but Petitioners fail to explain how they qualify as "small entities" under the RFA. *See id.* at 14. Absent such a showing, Petitioners' RFA claim must be denied for lack of standing.

otherwise judicially reviewable in determining whether EPA acted arbitrarily and capriciously). Specifically, EPA was not required to prepare an initial analysis, and therefore was not required to convene a panel, because the Opt-Out Amendment is "closely related" to the Renovation Rule, for which the Agency already prepared an initial analysis and convened a panel ("the Renovation Rule Panel"). *See* 5 U.S.C. §§ 609(b) (stating that the agency "shall convene" a panel when an initial analysis "is required"), 605(c) (providing that no initial analysis is required when a rule is "closely related" to a prior rule for which an initial analysis was prepared); *see also* 73 Fed. Reg. 21,752-53 (describing the work of the Renovation Rule Panel), 75 Fed. Reg. at 24,815 (describing EPA's decision to rely on the Renovation Rule Panel rather than convening a second panel focused solely on the Opt-Out Amendment).

In responding to comments regarding EPA's decision not to convene a second panel focused solely on the Opt-Out Amendment, EPA explained that the Opt-Out Amendment was closely related to the Renovation Rule because the Opt-Out Amendment involves the very provisions of the Renovation Rule—work practices, training, and certification for renovation, repair, and painting activities in target housing—that were considered by the Renovation Rule Panel. *See* Response to Comments at 11-12 [JA __]. EPA pointed out that the Renovation Rule Panel examined the effect on small entities of regulating renovation and remodeling

activities in target housing, and thus "expressly addressed the applicability" of the Renovation Rule's requirements, and therefore the Opt-Out Amendment's requirements on small entities. *Id.* at 12.

Furthermore, contrary to Petitioners' suggestion that the Panel did not consider the effects of the removal of the opt-out provision from the Renovation Rule on small entities, *see* Petitioners' Opening Brief at 38-39, at the time the Renovation Rule Panel considered the Renovation Rule, the idea of including an opt-out provision in the Renovation Rule had not yet been developed and was not presented to the Renovation Rule Panel. Specifically, with regard to the scope of the Renovation Rule, the Renovation Rule Panel considered four options presented by the Agency: all pre-1978 housing, all pre-1978 rental housing, all pre-1960 housing, and all pre-1960 rental housing. *See* 71 Fed. Reg. 155, 1624 (Jan. 10, 2006). The Renovation Rule Panel also considered two potential exemptions, neither of which included the opt-out provision. *See id.* Therefore, both the applicability of the Renovation Rule requirements and the scope of the Renovation Rule were closely related to the Opt-Out Amendment such that EPA could reasonably conclude that "the primary issue considered in [the Amendment] is wholly within the scope of the issues EPA considered as part of the [Renovation Rule]. . . ." Response to Comments at 11 [JA __].

Additionally, the Renovation Rule Panel's recommendations were relevant to the Opt-Out Amendment. The Renovation Rule Panel's recommendations focused on reducing the cost and burden of compliance while protecting public health. *See* 71 Fed. Reg. at 1624-25. The Renovation Rule Panel made several recommendations consistent with this theme. *Id.* For example, the Renovation Rule Panel recommended that the Agency take public comment on the cost, benefit, and feasibility of prohibiting certain work practices including open-flame burning or torching, machine sanding or grinding, abrasive blasting or sandblasting, dry scraping, and operating a heat gun in excess of 1100 degrees Fahrenheit. *Id.* at 1625. EPA followed the Renovation Rule Panel's recommendation when it proposed the Renovation Rule, and when it proposed the Opt-Out Amendment. *See id.*; *see also* 74 Fed. Reg. at 55,510 (requesting public comment on prohibiting such practices in homes that would qualify for the opt-out provision as an alternative to removing the opt-out provision completely). Similarly, and consistent with the Panel's theme, EPA also requested comment on other options for the Opt-Out Amendment that would "reduce the cost and burden of compliance." 74 Fed. Reg. at 55,510. Thus, EPA reasonably concluded that the Renovation Rule Panel's recommendations were equally applicable to the closely related amendment to the Renovation Rule and convening a second panel would have been duplicative. *See* 75 Fed. Reg. 24,815.

Petitioners inaccurately suggest that because the Panel was convened and made its recommendations in 1999, EPA used out-of-date, stale data and information to inform the final analysis for the Opt-Out Amendment. *See* Petitioners' Opening Brief at 38. The data in EPA's final analysis was not taken from the Renovation Rule Panel; rather, it was taken from EPA's 2010 Economic Analysis, which was prepared specifically for the Opt-Out Amendment and updated to reflect current economic conditions. *Compare, e.g.*, Panel Report at 21 [JA __] (using a 1997 American Housing Survey) *with* Economic Analysis at 4-7 [JA __] (using a 2003 American Housing Survey); Panel Report at 48 [JA __] (citing EPA's 1995 "Report on the National Survey of Lead-Based Paint in Housing" for its discussion of the prevalence of lead-based paint by age of housing) *with* Economic Analysis at 4-10 and 4-16 [JA __] (citing HUD's 2001 "National Survey of Dust Lead Hazards and Allergens in Housing" for the same topic).

EPA's use of updated information for the final rule and analysis, rather than data the Renovation Rule Panel reviewed, is consistent with how a panel's recommendations should be used under the RFA. *See* Panel Report at page 2 (noting that "the Panel's findings and discussion are based on the information available at the time the final Panel report is drafted" and that "EPA will continue to conduct analyses relevant to the proposed rule, and additional information may

be developed or obtained during the remainder of the rule development process”). Likewise, because the final analysis prepared for the Opt-Out Amendment uses updated data available during the period that the Opt-Out Amendment was being drafted, EPA’s analysis is consistent with this Court’s holding in *United States Air Tour Association v. Federal Aviation Administration*, 298 F.3d 997, 1010-11 (D.C. Cir. 2002), and therefore does not violate the RFA.[10]

In sum, the applicability and scope of the Renovation Rule that was considered by the Renovation Rule Panel was substantially similar to the applicability and scope of the Renovation Rule after the Opt-Out Amendment, EPA incorporated the Panel’s recommendations to the extent relevant to the Opt-Out Amendment, and EPA updated the data utilized in its final analysis for the Opt-Out Amendment to reflect current data available while the Opt-Out Amendment was being drafted. Accordingly, EPA reasonably concluded that “reconvening the [Renovation Rule] Panel would be procedurally duplicative and

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[10] Given the similarities between the Opt-Out Amendment and the Renovation Rule, and the fact that EPA prepared an initial analysis and final analysis for the Opt-Out Amendment, to the extent the Court determines that EPA should have convened a panel under RFA section 609(b), surely not doing so was merely harmless error and not arbitrary and capricious under the APA. *See generally* Draft Initial Analysis for Opt-Out Amendment [JA __]; Final Analysis for Opt-Out Amendment [JA __].

[] unnecessary . . . ." 75 Fed. Reg. at 24,815. Thus, EPA fully complied with the RFA.

CONCLUSION

For the foregoing reasons, EPA respectfully requests that the Court deny the instant petition for review.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE WITH WORD LIMITATIONS

Pursuant to Fed. R. App. P. 32(a)(7)(C), and exclusive of the components of the brief excluded from the word limit pursuant to Fed. R. App. P. 32(a)(7)(B)(iii), I hereby certify that the foregoing brief contains 12,273 words, in 14 point Times New Roman typeface, as counted by the word count feature of Microsoft Word, which is in compliance with Court's rules.

Dated: June 8, 2011

/s/ Stephanie J. Talbert
STEPHANIE J. TALBERT
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CERTIFICATE OF SERVICE

I hereby certify that I served a copy of RESPONDENT'S OPENING BRIEF via Notice of Docket Activity by the Court's CM/ECF system, on June 8, 2011, on counsel of record.

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ADDENDUM

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United States Code Annotated Currentness
Title 5. Government Organization and Employees (Refs & Annos)
Part I. The Agencies Generally
Chapter 6. The Analysis of Regulatory Functions (Refs & Annos)
➡ **§ 603. Initial regulatory flexibility analysis**

(a) Whenever an agency is required by section 553 of this title, or any other law, to publish general notice of proposed rulemaking for any proposed rule, or publishes a notice of proposed rulemaking for an interpretative rule involving the internal revenue laws of the United States, the agency shall prepare and make available for public comment an initial regulatory flexibility analysis. Such analysis shall describe the impact of the proposed rule on small entities. The initial regulatory flexibility analysis or a summary shall be published in the Federal Register at the time of the publication of general notice of proposed rulemaking for the rule. The agency shall transmit a copy of the initial regulatory flexibility analysis to the Chief Counsel for Advocacy of the Small Business Administration. In the case of an interpretative rule involving the internal revenue laws of the United States, this chapter applies to interpretative rules published in the Federal Register for codification in the Code of Federal Regulations, but only to the extent that such interpretative rules impose on small entities a collection of information requirement.

(b) Each initial regulatory flexibility analysis required under this section shall contain--

(1) a description of the reasons why action by the agency is being considered;

(2) a succinct statement of the objectives of, and legal basis for, the proposed rule;

(3) a description of and, where feasible, an estimate of the number of small entities to which the proposed rule will apply;

(4) a description of the projected reporting, recordkeeping and other compliance requirements of the proposed rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record;

(5) an identification, to the extent practicable, of all relevant Federal rules which may duplicate, overlap or conflict with the proposed rule.

(c) Each initial regulatory flexibility analysis shall also contain a description of any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities. Consistent with the stated objectives of applicable statutes, the analysis shall discuss significant alternatives such as--

(1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities;

(2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities;

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(3) the use of performance rather than design standards; and

(4) an exemption from coverage of the rule, or any part thereof, for such small entities.

CREDIT(S)

(Added Pub.L. 96-354, § 3(a), Sept. 19, 1980, 94 Stat. 1166, and amended Pub.L. 104-121, Title II, § 241(a)(1), Mar. 29, 1996, 110 Stat. 864.)

ENACTMENT OF SUBSEC. (D)

<Pub.L. 111-203, Title X, §§ 1100G(b), 1100H, July 21, 2010, 124 Stat. 2112, 2113, provided that effective on the designated transfer date [see 12 U.S.C.A. § 5582 for definition of "designated transfer date"], subsec. (d) is enacted to read as follows:>

<**(d)(1)** For a covered agency, as defined in section 609(d)(2), each initial regulatory flexibility analysis shall include a description of-->

<**(A)** any projected increase in the cost of credit for small entities;>

<**(B)** any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any increase in the cost of credit for small entities; and>

<**(C)** advice and recommendations of representatives of small entities relating to issues described in subparagraphs (A) and (B) and subsection (b).>

<**(2)** A covered agency, as defined in section 609(d)(2), shall, for purposes of complying with paragraph (1)(C)-->

<**(A)** identify representatives of small entities in consultation with the Chief Counsel for Advocacy of the Small Business Administration; and>

<**(B)** collect advice and recommendations from the representatives identified under subparagraph (A) relating to issues described in subparagraphs (A) and (B) of paragraph (1) and subsection (b).>

2010 Acts. Amendments by Pub.L. 111-203, Title X, subtitle H, § 1081 et seq., shall become effective on the designated transfer date [see 12 U.S.C.A. § 5582 for definition of "designated transfer date"], see Pub.L. 111-203, § 1100H, set out as a note under 5 U.S.C.A. § 552a.

1996 Acts. Amendment by Pub.L. 104-121 effective on expiration of 90 days after Mar. 29, 1996, except as otherwise provided, see section 245 of Pub.L. 104-121, set out as a note under section 601 of this title.

Current through P.L. 112-13 approved 5-12-11

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Effective: September 27, 2010

United States Code Annotated Currentness
Title 5. Government Organization and Employees (Refs & Annos)
Part I. The Agencies Generally
Chapter 6. The Analysis of Regulatory Functions (Refs & Annos)
→ § 604. Final regulatory flexibility analysis

(a) When an agency promulgates a final rule under section 553 of this title, after being required by that section or any other law to publish a general notice of proposed rulemaking, or promulgates a final interpretative rule involving the internal revenue laws of the United States as described in section 603(a), the agency shall prepare a final regulatory flexibility analysis. Each final regulatory flexibility analysis shall contain--

(1) a statement of the need for, and objectives of, the rule;

(2) a statement of the significant issues raised by the public comments in response to the initial regulatory flexibility analysis, a statement of the assessment of the agency of such issues, and a statement of any changes made in the proposed rule as a result of such comments;

(3) the response of the agency to any comments filed by the Chief Counsel for Advocacy of the Small Business Administration in response to the proposed rule, and a detailed statement of any change made to the proposed rule in the final rule as a result of the comments;

(4) a description of and an estimate of the number of small entities to which the rule will apply or an explanation of why no such estimate is available;

(5) a description of the projected reporting, recordkeeping and other compliance requirements of the rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record; and

(6) a description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected.

(b) The agency shall make copies of the final regulatory flexibility analysis available to members of the public and shall publish in the Federal Register such analysis or a summary thereof.

CREDIT(S)

(Added Pub.L. 96-354, § 3(a), Sept. 19, 1980, 94 Stat. 1167, and amended Pub.L. 104-121, Title II, § 241(b), Mar. 29, 1996, 110 Stat. 864; Pub.L. 111-240, Title I, § 1601, Sept. 27, 2010, 124 Stat. 2551.)

ENACTMENT OF SUBSEC. (A)(6)

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<Pub.L. 111-203, Title X, §§ 1100G(c), 1100H, July 21, 2010, 124 Stat. 2113, provided that effective on the designated transfer date [see 12 U.S.C.A. § 5582 for definition of "designated transfer date"], subsec. (a) is amended in par. (4), by striking "and" at the end; in par. (5), by striking the period at the end and inserting "; and"; and enacting a new par. (6) to read as follows:>

<**(6)** for a covered agency, as defined in section 609(d)(2), a description of the steps the agency has taken to minimize any additional cost of credit for small entities.>

2010 Acts. Amendments by Pub.L. 111-203, Title X, subtitle H, § 1081 et seq., shall become effective on the designated transfer date [see 12 U.S.C.A. § 5582 for definition of "designated transfer date"], see Pub.L. 111-203, § 1100H, set out as a note under 5 U.S.C.A. § 552a.

1996 Acts. Amendment by Pub.L. 104-121 effective on expiration of 90 days after Mar. 29, 1996, except as otherwise provided, see section 245 of Pub.L. 104-121, set out as a note under section 601 of this title.

Current through P.L. 112-13 approved 5-12-11

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Effective:[See Notes]

United States Code Annotated Currentness
Title 5. Government Organization and Employees (Refs & Annos)
Part I. The Agencies Generally
Chapter 6. The Analysis of Regulatory Functions (Refs & Annos)
➡ **§ 605. Avoidance of duplicative or unnecessary analyses**

(a) Any Federal agency may perform the analyses required by sections 602, 603, and 604 of this title in conjunction with or as a part of any other agenda or analysis required by any other law if such other analysis satisfies the provisions of such sections.

(b) Sections 603 and 604 of this title shall not apply to any proposed or final rule if the head of the agency certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities. If the head of the agency makes a certification under the preceding sentence, the agency shall publish such certification in the Federal Register at the time of publication of general notice of proposed rulemaking for the rule or at the time of publication of the final rule, along with a statement providing the factual basis for such certification. The agency shall provide such certification and statement to the Chief Counsel for Advocacy of the Small Business Administration.

(c) In order to avoid duplicative action, an agency may consider a series of closely related rules as one rule for the purposes of sections 602, 603, 604 and 610 of this title.

CREDIT(S)

(Added Pub.L. 96-354, § 3(a), Sept. 19, 1980, 94 Stat. 1167, and amended Pub.L. 104-121, Title II, § 243(a), Mar. 29, 1996, 110 Stat. 866.)

1996 Acts. Amendment by Pub.L. 104-121 effective on expiration of 90 days after Mar. 29, 1996, except as otherwise provided, see section 245 of Pub.L. 104-121, set out as a note under section 601 of this title.

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United States Code Annotated Currentness
Title 5. Government Organization and Employees (Refs & Annos)
Part I. The Agencies Generally
Chapter 6. The Analysis of Regulatory Functions (Refs & Annos)
➡ **§ 611. Judicial review**

(a)(1) For any rule subject to this chapter, a small entity that is adversely affected or aggrieved by final agency action is entitled to judicial review of agency compliance with the requirements of sections 601, 604, 605(b), 608(b), and 610 in accordance with chapter 7. Agency compliance with sections 607 and 609(a) shall be judicially reviewable in connection with judicial review of section 604.

(2) Each court having jurisdiction to review such rule for compliance with section 553, or under any other provision of law, shall have jurisdiction to review any claims of noncompliance with sections 601, 604, 605(b), 608(b), and 610 in accordance with chapter 7. Agency compliance with sections 607 and 609(a) shall be judicially reviewable in connection with judicial review of section 604.

(3)(A) A small entity may seek such review during the period beginning on the date of final agency action and ending one year later, except that where a provision of law requires that an action challenging a final agency action be commenced before the expiration of one year, such lesser period shall apply to an action for judicial review under this section.

(B) In the case where an agency delays the issuance of a final regulatory flexibility analysis pursuant to section 608(b) of this chapter, an action for judicial review under this section shall be filed not later than--

(i) one year after the date the analysis is made available to the public, or

(ii) where a provision of law requires that an action challenging a final agency regulation be commenced before the expiration of the 1-year period, the number of days specified in such provision of law that is after the date the analysis is made available to the public.

(4) In granting any relief in an action under this section, the court shall order the agency to take corrective action consistent with this chapter and chapter 7, including, but not limited to--

(A) remanding the rule to the agency, and

(B) deferring the enforcement of the rule against small entities unless the court finds that continued enforcement of the rule is in the public interest.

(5) Nothing in this subsection shall be construed to limit the authority of any court to stay the effective date of any rule or provision thereof under any other provision of law or to grant any other relief in addition to the requirements of this section.

(b) In an action for the judicial review of a rule, the regulatory flexibility analysis for such rule, including an analysis

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prepared or corrected pursuant to paragraph (a)(4), shall constitute part of the entire record of agency action in connection with such review.

(c) Compliance or noncompliance by an agency with the provisions of this chapter shall be subject to judicial review only in accordance with this section.

(d) Nothing in this section bars judicial review of any other impact statement or similar analysis required by any other law if judicial review of such statement or analysis is otherwise permitted by law.

CREDIT(S)

(Added Pub.L. 96-354, § 3(a), Sept. 19, 1980, 94 Stat. 1169, and amended Pub.L. 104-121, Title II, § 242, Mar. 29, 1996, 110 Stat. 865.)

1996 Acts. Amendment by Pub.L. 104-121 effective on expiration of 90 days after Mar. 29, 1996, except as otherwise provided, see section 245 of Pub.L. 104-121, set out as a note under section 601 of this title.

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United States Code Annotated Currentness
Title 15. Commerce and Trade
Chapter 53. Toxic Substances Control (Refs & Annos)
Subchapter I. Control of Toxic Substances (Refs & Annos)
➡ **§ 2601. Findings, policy, and intent**

(a) Findings

The Congress finds that--

(1) human beings and the environment are being exposed each year to a large number of chemical substances and mixtures;

(2) among the many chemical substances and mixtures which are constantly being developed and produced, there are some whose manufacture, processing, distribution in commerce, use, or disposal may present an unreasonable risk of injury to health or the environment; and

(3) the effective regulation of interstate commerce in such chemical substances and mixtures also necessitates the regulation of intrastate commerce in such chemical substances and mixtures.

(b) Policy

It is the policy of the United States that--

(1) adequate data should be developed with respect to the effect of chemical substances and mixtures on health and the environment and that the development of such data should be the responsibility of those who manufacture and those who process such chemical substances and mixtures;

(2) adequate authority should exist to regulate chemical substances and mixtures which present an unreasonable risk of injury to health or the environment, and to take action with respect to chemical substances and mixtures which are imminent hazards; and

(3) authority over chemical substances and mixtures should be exercised in such a manner as not to impede unduly or create unnecessary economic barriers to technological innovation while fulfilling the primary purpose of this chapter to assure that such innovation and commerce in such chemical substances and mixtures do not present an unreasonable risk of injury to health or the environment.

(c) Intent of Congress

It is the intent of Congress that the Administrator shall carry out this chapter in a reasonable and prudent manner, and that the Administrator shall consider the environmental, economic, and social impact of any action the Administrator takes or proposes to take under this chapter.

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CREDIT(S)

(Pub.L. 94-469, Title I, § 2, Oct. 11, 1976, 90 Stat. 2003; renumbered Title I, Pub.L. 99-519, § 3(c)(1), Oct. 22, 1986, 100 Stat. 2989.)

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Title 15. Commerce and Trade
Chapter 53. Toxic Substances Control (Refs & Annos)
Subchapter I. Control of Toxic Substances (Refs & Annos)
→ **§ 2618. Judicial review**

(a) In general

(1)(A) Not later than 60 days after the date of the promulgation of a rule under section 2603(a), 2604(a)(2), 2604(b)(4), 2605(a), 2605(e), or 2607 of this title, or under subchapter II or IV of this chapter, any person may file a petition for judicial review of such rule with the United States Court of Appeals for the District of Columbia Circuit or for the circuit in which such person resides or in which such person's principal place of business is located. Courts of appeals of the United States shall have exclusive jurisdiction of any action to obtain judicial review (other than in an enforcement proceeding) of such a rule if any district court of the United States would have had jurisdiction of such action but for this subparagraph.

(B) Courts of appeals of the United States shall have exclusive jurisdiction of any action to obtain judicial review (other than in an enforcement proceeding) of an order issued under subparagraph (A) or (B) of section 2605(b)(1) of this title if any district court of the United States would have had jurisdiction of such action but for this subparagraph.

(2) Copies of any petition filed under paragraph (1)(A) shall be transmitted forthwith to the Administrator and to the Attorney General by the clerk of the court with which such petition was filed. The provisions of section 2112 of Title 28 shall apply to the filing of the rulemaking record of proceedings on which the Administrator based the rule being reviewed under this section and to the transfer of proceedings between United States courts of appeals.

(3) For purposes of this section, the term "rulemaking record" means--

(A) the rule being reviewed under this section;

(B) in the case of a rule under section 2603(a) of this title, the finding required by such section, in the case of a rule under section 2604(b)(4) of this title, the finding required by such section, in the case of a rule under section 2605(a) of this title the finding required by section 2604(f) or 2605(a) of this title, as the case may be, in the case of a rule under section 2605(a) of this title, the statement required by section 2605(c)(1) of this title, and in the case of a rule under section 2605(e) of this title, the findings required by paragraph (2)(B) or (3)(B) of such section, as the case may be [FN1] and in the case of a rule under subchapter IV of this chapter, the finding required for the issuance of such a rule;

(C) any transcript required to be made of oral presentations made in proceedings for the promulgation of such rule;

(D) any written submission of interested parties respecting the promulgation of such rule; and

(E) any other information which the Administrator considers to be relevant to such rule and which the Administrator identified, on or before the date of the promulgation of such rule, in a notice published in the Federal Register.

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(b) Additional submissions and presentations; modifications

If in an action under this section to review a rule the petitioner or the Administrator applies to the court for leave to make additional oral submissions or written presentations respecting such rule and shows to the satisfaction of the court that such submissions and presentations would be material and that there were reasonable grounds for the submissions and failure to make such submissions and presentations in the proceeding before the Administrator, the court may order the Administrator to provide additional opportunity to make such submissions and presentations. The Administrator may modify or set aside the rule being reviewed or make a new rule by reason of the additional submissions and presentations and shall file such modified or new rule with the return of such submissions and presentations. The court shall thereafter review such new or modified rule.

(c) Standard of review

(1)(A) Upon the filing of a petition under subsection (a)(1) of this section for judicial review of a rule, the court shall have jurisdiction (i) to grant appropriate relief, including interim relief, as provided in chapter 7 of Title 5 and (ii) except as otherwise provided in subparagraph (B), to review such rule in accordance with chapter 7 of Title 5.

(B) Section 706 of Title 5 shall apply to review of a rule under this section, except that--

(i) in the case of review of a rule under section 2603(a), 2604(b)(4), 2605(a), or 2605(e) of this title, the standard for review prescribed by paragraph (2)(E) of such section 706 shall not apply and the court shall hold unlawful and set aside such rule if the court finds that the rule is not supported by substantial evidence in the rulemaking record (as defined in subsection (a)(3) of this section) taken as a whole;

(ii) in the case of review of a rule under section 2605(a) of this title, the court shall hold unlawful and set aside such rule if it finds that--

(I) a determination by the Administrator under section 2605(c)(3) of this title that the petitioner seeking review of such rule is not entitled to conduct (or have conducted) cross-examination or to present rebuttal submissions, or

(II) a rule of, or ruling by, the Administrator under section 2605(c)(3) of this title limiting such petitioner's cross-examination or oral presentations,

has precluded disclosure of disputed material facts which was necessary to a fair determination by the Administrator of the rulemaking proceeding taken as a whole; and section 706(2)(D) shall not apply with respect to a determination, rule, or ruling referred to in subclause (I) or (II); and

(iii) the court may not review the contents and adequacy of--

(I) any statement required to be made pursuant to section 2605(c)(1) of this title, or

(II) any statement of basis and purpose required by section 553(c) of Title 5, to be incorporated in the rule

except as part of a review of the rulemaking record taken as a whole.

The term "evidence" as used in clause (i) means any matter in the rulemaking record.

(C) A determination, rule, or ruling of the Administrator described in subparagraph (B)(ii) may be reviewed only in an

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action under this section and only in accordance with such subparagraph.

(2) The judgment of the court affirming or setting aside, in whole or in part, any rule reviewed in accordance with this section shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification, as provided in section 1254 of Title 28.

(d) Fees and costs

The decision of the court in an action commenced under subsection (a) of this section, or of the Supreme Court of the United States on review of such a decision, may include an award of costs of suit and reasonable fees for attorneys and expert witnesses if the court determines that such an award is appropriate.

(e) Other remedies

The remedies as provided in this section shall be in addition to and not in lieu of any other remedies provided by law.

CREDIT(S)

(Pub.L. 94-469, Title I, § 19, Oct. 11, 1976, 90 Stat. 2039; renumbered Title I and amended Pub.L. 99-519, § 3(b)(2), (c)(1), Oct. 22, 1986, 100 Stat. 2989; Pub.L. 102-550, Title X, § 1021(b)(8), Oct. 28, 1992, 106 Stat. 3923.)

[FN1] So in original. Probably should be followed by a comma.

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United States Code Annotated Currentness
Title 15. Commerce and Trade
Chapter 53. Toxic Substances Control (Refs & Annos)
Subchapter IV. Lead Exposure Reduction (Refs & Annos)
→ **§ 2681. Definitions**

For the purposes of this subchapter:

(1) Abatement

The term "abatement" means any set of measures designed to permanently eliminate lead-based paint hazards in accordance with standards established by the Administrator under this subchapter. Such term includes--

(A) the removal of lead-based paint and lead-contaminated dust, the permanent containment or encapsulation of lead-based paint, the replacement of lead-painted surfaces or fixtures, and the removal or covering of lead-contaminated soil; and

(B) all preparation, cleanup, disposal, and postabatement clearance testing activities associated with such measures.

(2) Accessible surface

The term "accessible surface" means an interior or exterior surface painted with lead-based paint that is accessible for a young child to mouth or chew.

(3) Deteriorated paint

The term "deteriorated paint" means any interior or exterior paint that is peeling, chipping, chalking or cracking or any paint located on an interior or exterior surface or fixture that is damaged or deteriorated.

(4) Evaluation

The term "evaluation" means risk assessment, inspection, or risk assessment and inspection.

(5) Friction surface

The term "friction surface" means an interior or exterior surface that is subject to abrasion or friction, including certain window, floor, and stair surfaces.

(6) Impact surface

The term "impact surface" means an interior or exterior surface that is subject to damage by repeated impacts, for

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example, certain parts of door frames.

(7) Inspection

The term "inspection" means (A) a surface-by-surface investigation to determine the presence of lead-based paint, as provided in section 4822(c) of Title 42, and (B) the provision of a report explaining the results of the investigation.

(8) Interim controls

The term "interim controls" means a set of measures designed to reduce temporarily human exposure or likely exposure to lead-based paint hazards, including specialized cleaning, repairs, maintenance, painting, temporary containment, ongoing monitoring of lead-based paint hazards or potential hazards, and the establishment and operation of management and resident education programs.

(9) Lead-based paint

The term "lead-based paint" means paint or other surface coatings that contain lead in excess of 1.0 milligrams per centimeter squared or 0.5 percent by weight or (A) in the case of paint or other surface coatings on target housing, such lower level as may be established by the Secretary of Housing and Urban Development, as defined in section 4822(c) of Title 42, or (B) in the case of any other paint or surface coatings, such other level as may be established by the Administrator.

(10) Lead-based paint hazard

The term "lead-based paint hazard" means any condition that causes exposure to lead from lead-contaminated dust, lead-contaminated soil, lead-contaminated paint that is deteriorated or present in accessible surfaces, friction surfaces, or impact surfaces that would result in adverse human health effects as established by the Administrator under this subchapter.

(11) Lead-contaminated dust

The term "lead-contaminated dust" means surface dust in residential dwellings that contains an area or mass concentration of lead in excess of levels determined by the Administrator under this subchapter to pose a threat of adverse health effects in pregnant women or young children.

(12) Lead-contaminated soil

The term "lead-contaminated soil" means bare soil on residential real property that contains lead at or in excess of the levels determined to be hazardous to human health by the Administrator under this subchapter.

(13) Reduction

The term "reduction" means measures designed to reduce or eliminate human exposure to lead-based paint hazards through methods including interim controls and abatement.

(14) Residential dwelling

The term "residential dwelling" means--

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(A) a single-family dwelling, including attached structures such as porches and stoops; or

(B) a single-family dwelling unit in a structure that contains more than 1 separate residential dwelling unit, and in which each such unit is used or occupied, or intended to be used or occupied, in whole or in part, as the home or residence of 1 or more persons.

(15) Residential real property

The term "residential real property" means real property on which there is situated 1 or more residential dwellings used or occupied, or intended to be used or occupied, in whole or in part, as the home or residence of 1 or more persons.

(16) Risk assessment

The term "risk assessment" means an on-site investigation to determine and report the existence, nature, severity and location of lead-based paint hazards in residential dwellings, including--

(A) information gathering regarding the age and history of the housing and occupancy by children under age 6;

(B) visual inspection;

(C) limited wipe sampling or other environmental sampling techniques;

(D) other activity as may be appropriate; and

(E) provision of a report explaining the results of the investigation.

(17) Target housing

The term "target housing" means any housing constructed prior to 1978, except housing for the elderly or persons with disabilities (unless any child who is less than 6 years of age resides or is expected to reside in such housing for the elderly or persons with disabilities) or any 0-bedroom dwelling. In the case of jurisdictions which banned the sale or use of lead-based paint prior to 1978, the Secretary of Housing and Urban Development, at the Secretary's discretion, may designate an earlier date.

CREDIT(S)

(Pub.L. 94-469, Title IV, § 401, as added Pub.L. 102-550, Title X, § 1021(a), Oct. 28, 1992, 106 Stat. 3912.)

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Title 15. Commerce and Trade
Chapter 53. Toxic Substances Control (Refs & Annos)
Subchapter IV. Lead Exposure Reduction (Refs & Annos)
➡ **§ 2682. Lead-based paint activities training and certification**

(a) Regulations

(1) In general

Not later than 18 months after October 28, 1992, the Administrator shall, in consultation with the Secretary of Labor, the Secretary of Housing and Urban Development, and the Secretary of Health and Human Services (acting through the Director of the National Institute for Occupational Safety and Health), promulgate final regulations governing lead-based paint activities to ensure that individuals engaged in such activities are properly trained; that training programs are accredited; and that contractors engaged in such activities are certified. Such regulations shall contain standards for performing lead-based paint activities, taking into account reliability, effectiveness, and safety. Such regulations shall require that all risk assessment, inspection, and abatement activities performed in target housing shall be performed by certified contractors, as such term is defined in section 4851b of Title 42. The provisions of this section shall supersede the provisions set forth under the heading "Lead Abatement Training and Certification" and under the heading "Training Grants" in title III of the Act entitled "An Act making appropriations for the Departments of Veterans Affairs and Housing and Urban Development, and for sundry independent agencies, commissions, corporations, and offices for the fiscal year ending September 30, 1992, and for other purposes", Public Law 102-139 [105 Stat. 765, 42 U.S.C.A. 4822 note], and upon October 28, 1992, the provisions set forth in such public law under such headings shall cease to have any force and effect.

(2) Accreditation of training programs

Final regulations promulgated under paragraph (1) shall contain specific requirements for the accreditation of lead-based paint activities training programs for workers, supervisors, inspectors and planners, and other individuals involved in lead-based paint activities, including, but not limited to, each of the following:

(A) Minimum requirements for the accreditation of training providers.

(B) Minimum training curriculum requirements.

(C) Minimum training hour requirements.

(D) Minimum hands-on training requirements.

(E) Minimum trainee competency and proficiency requirements.

(F) Minimum requirements for training program quality control.

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(3) Accreditation and certification fees

The Administrator (or the State in the case of an authorized State program) shall impose a fee on--

(A) persons operating training programs accredited under this subchapter; and

(B) lead-based paint activities contractors certified in accordance with paragraph (1).

The fees shall be established at such level as is necessary to cover the costs of administering and enforcing the standards and regulations under this section which are applicable to such programs and contractors. The fee shall not be imposed on any State, local government, or nonprofit training program. The Administrator (or the State in the case of an authorized State program) may waive the fee for lead-based paint activities contractors under subparagraph (A) for the purpose of training their own employees.

(b) Lead-based paint activities

For purposes of this subchapter, the term "lead-based paint activities" means--

(1) in the case of target housing, risk assessment, inspection, and abatement; and

(2) in the case of any public building constructed before 1978, commercial building, bridge, or other structure or superstructure, identification of lead-based paint and materials containing lead-based paint, deleading, removal of lead from bridges, and demolition.

For purposes of paragraph (2), the term "deleading" means activities conducted by a person who offers to eliminate lead-based paint or lead-based paint hazards or to plan such activities.

(c) Renovation and remodeling

(1) Guidelines

In order to reduce the risk of exposure to lead in connection with renovation and remodeling of target housing, public buildings constructed before 1978, and commercial buildings, the Administrator shall, within 18 months after October 28, 1992, promulgate guidelines for the conduct of such renovation and remodeling activities which may create a risk of exposure to dangerous levels of lead. The Administrator shall disseminate such guidelines to persons engaged in such renovation and remodeling through hardware and paint stores, employee organizations, trade groups, State and local agencies, and through other appropriate means.

(2) Study of certification

The Administrator shall conduct a study of the extent to which persons engaged in various types of renovation and remodeling activities in target housing, public buildings constructed before 1978, and commercial buildings are exposed to lead in the conduct of such activities or disturb lead and create a lead-based paint hazard on a regular or occasional basis. The Administrator shall complete such study and publish the results thereof within 30 months after October 28, 1992.

(3) Certification determination

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Within 4 years after October 28, 1992, the Administrator shall revise the regulations under subsection (a) of this section to apply the regulations to renovation or remodeling activities in target housing, public buildings constructed before 1978, and commercial buildings that create lead-based paint hazards. In determining which contractors are engaged in such activities, the Administrator shall utilize the results of the study under paragraph (2) and consult with the representatives of labor organizations, lead-based paint activities contractors, persons engaged in remodeling and renovation, experts in lead health effects, and others. If the Administrator determines that any category of contractors engaged in renovation or remodeling does not require certification, the Administrator shall publish an explanation of the basis for that determination.

CREDIT(S)

(Pub.L. 94-469, Title IV, § 402, as added Pub.L. 102-550, Title X, § 1021(a), Oct. 28, 1992, 106 Stat. 3914.)

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Title 15. Commerce and Trade
Chapter 53. Toxic Substances Control (Refs & Annos)
Subchapter IV. Lead Exposure Reduction (Refs & Annos)
→ **§ 2683. Identification of dangerous levels of lead**

Within 18 months after October 28, 1992, the Administrator shall promulgate regulations which shall identify, for purposes of this subchapter and the Residential Lead-Based Paint Hazard Reduction Act of 1992 [42 U.S.C.A. § 4851 et seq.], lead-based paint hazards, lead-contaminated dust, and lead-contaminated soil.

CREDIT(S)

(Pub.L. 94-469, Title IV, § 403, as added Pub.L. 102-550, Title X, § 1021(a), Oct. 28, 1992, 106 Stat. 3916.)

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Code of Federal Regulations Currentness
Title 40. --Protection of Environment
Chapter I. Environmental Protection Agency (Refs & Annos)
Subchapter R. Toxic Substances Control Act
Part 745. Lead-Based Paint Poisoning Prevention in Certain Residential Structures (Refs & Annos)
Subpart D. Lead-Based Paint Hazards (Refs & Annos)
→ **§ 745.65 Lead-based paint hazards.**

(a) Paint-lead hazard. A paint-lead hazard is any of the following:

(1) Any lead-based paint on a friction surface that is subject to abrasion and where the lead dust levels on the nearest horizontal surface underneath the friction surface (e.g., the window sill, or floor) are equal to or greater than the dust-lead hazard levels identified in paragraph (b) of this section.

(2) Any damaged or otherwise deteriorated lead-based paint on an impact surface that is caused by impact from a related building component (such as a door knob that knocks into a wall or a door that knocks against its door frame.

(3) Any chewable lead-based painted surface on which there is evidence of teeth marks.

(4) Any other deteriorated lead-based paint in any residential building or child-occupied facility or on the exterior of any residential building or child-occupied facility.

(b) Dust-lead hazard. A dust-lead hazard is surface dust in a residential dwelling or child-occupied facility that contains a mass-per-area concentration of lead equal to or exceeding 40 <<mu>>g/ft^2 on floors or 250 <<mu>>g/ft^2 on interior window sills based on wipe samples.

(c) Soil-lead hazard. A soil-lead hazard is bare soil on residential real property or on the property of a child-occupied facility that contains total lead equal to or exceeding 400 parts per million (<<mu>>g/g) in a play area or average of 1,200 parts per million of bare soil in the rest of the yard based on soil samples.

(d) Work practice requirements. Applicable certification, occupant protection, and clearance requirements and work practice standards are found in regulations issued by EPA at 40 CFR part 745, subpart L and in regulations issued by the Department of Housing and Urban Development (HUD) at 24 CFR part 35, subpart R. The work practice standards in those regulations do not apply when treating paint-lead hazards of less than:

(1) Two square feet of deteriorated lead-based paint per room or equivalent,

(2) Twenty square feet of deteriorated paint on the exterior building, or

(3) Ten percent of the total surface area of deteriorated paint on an interior or exterior type of component with a small surface area.

SOURCE: 61 FR 9085, March 6, 1996; 61 FR 45813, Aug. 29, 1996; 62 FR 35041, June 27, 1997; 63 FR 29919, June 1, 1998; 66 FR 1237, Jan. 5, 2001, unless otherwise noted.

AUTHORITY: 15 U.S.C. 2605, 2607, 2681-2692 and 42 U.S.C. 4852d.

40 C. F. R. § 745.65, 40 CFR § 745.65

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