



August 19, 2010

BY ELECTRONIC MAIL

The Honorable David Michaels, PhD, MPH
Assistant Secretary of Labor for Occupational Safety and Health
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210
Electronic Address: <http://www.regulations.gov> (RIN 1218-AB80; Docket No. OSHA-2007-0072)

Re: Comments on OSHA's Proposed Walking-Working Surfaces and Personal Protective Equipment (Fall Protection Systems) Rule

Dear Assistant Secretary Michaels:

The U.S. Small Business Administration's (SBA) Office of Advocacy (Advocacy) submits the following comments on the Occupational Safety and Health Administration's (OSHA) *Proposed Walking-Working Surfaces and Personal Protective Equipment (Fall Protection Systems) Rule*.¹ OSHA's proposed rule is intended to reduce the number of fall-related employee injuries and fatalities by requiring new technology (such as personal fall protection systems) and methods, reorganizing the rule in a clearer, more logical manner, providing greater compliance flexibility, and increasing the consistency between the general industry, construction, and maritime standards.² A more detailed summary of the proposed rule is provided below.

Office of Advocacy

Advocacy was established pursuant to Pub. L. 94-305 to represent the views of small entities before federal agencies and Congress. Advocacy is an independent office within SBA, so the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration. The Regulatory Flexibility Act (RFA),³ as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA),⁴ gives small entities a voice in the rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, federal agencies are required by the RFA to assess the impact of the proposed rule on small business and to consider less burdensome alternatives. Moreover, Executive Order 13272⁵ requires federal

¹ 75 Fed. Reg. 28862 (May 24, 2010).

² *Id.*

³ 5 U.S.C. § 601 et seq.

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

⁵ Executive Order 13272, *Proper Consideration of Small Entities in Agency Rulemaking* (67 Fed. Reg. 53461) (August 16, 2002).

agencies to notify Advocacy of any proposed rules that are expected to have a significant economic impact on a substantial number of small entities and to give every appropriate consideration to any comments on a proposed or final rule submitted by Advocacy. Further, the agency must include, in any explanation or discussion accompanying publication in the *Federal Register* of a final rule, the agency's response to any written comments submitted by Advocacy on the proposed rule.

Background

As discussed in the preamble, the proposed rule is intended to protect employees from slips, trips, and falls on walking-working surfaces.⁶ Walking-working surfaces include everything from floors (where slips, trips, and falls are unlikely to result in major injuries) to ladders, scaffolds, rooftops, and towers (where slips, trips, and falls can cause serious injury or death).⁷ The existing OSHA general industry standard requires the use of guardrails and physical barriers as the primary methods of employee protection against falls. However, OSHA seeks to integrate personal fall protection systems into the standard as another effective means of employee protection.⁸

OSHA regulation of walking-working surfaces goes all the way back to the founding of the agency in 1971.⁹ Since that time, OSHA has gone through multiple rulemakings on this subject in an attempt to provide greater protections to workers and to keep pace with national consensus standards.¹⁰ OSHA's proposed rule is intended to reduce the number of fall-related employee injuries and fatalities by requiring new technology (such as personal fall protection systems) and methods, reorganizing the rule in a clearer, more logical manner, providing greater compliance flexibility, and increasing the consistency between the general industry, construction, and maritime standards.

OSHA conducted a screening analysis under the RFA and has certified that the proposed rule, if promulgated, will not have a significant economic impact on a substantial number of small entities.¹¹

Small Entities Have Expressed Some Concerns With The Proposed Rule

Following publication of the proposed rule, several small business representatives contacted Advocacy and expressed some concerns about the proposed rule. In response, Advocacy hosted a small business regulatory roundtable on August 10, 2010 for small business representatives to discuss their concerns. Representatives from OSHA and the Office of the Solicitor of Labor attended part of the roundtable to provide an overview of the proposed rule. While most participants at the roundtable supported much of the proposed rule, they did express concerns over several provisions. The following

⁶ 75 Fed. Reg. 28863.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ 75 Fed. Reg. 29050.

comments are reflective of the issues raised during the roundtable and in subsequent conversations with these small business representatives.

- 1. OSHA should not include vague, overly-broad, “general duty clause” type requirements.** Small business representatives at the roundtable were concerned that OSHA is proposing vague, overly broad, “general duty clause” type requirements on employers, such as in Section 1910.22(a)(3) of the proposed rule. That proposed section states that “Employers must ensure that all surfaces are designed, constructed, and maintained free of recognized hazards that can result in injury or death to employees.”¹² While the participants appreciated that OSHA is trying to provide flexibility to employers through the use of performance standards, they were concerned that this proposed requirement is so vague and open-ended as to be meaningless and could leave employers vulnerable to OSHA citations based on the subjective assessment of OSHA inspectors as to what is acceptable. Advocacy is also concerned that this provision duplicates the requirements of Section 5(a)(1) of the Occupational Safety and Health Act, OSHA’s “General Duty Clause,” which will lead to confusion. Small business representatives at the roundtable were also concerned that OSHA might use this “general duty clause” type requirement to try to impose a “de facto” Safety and Health Program (S&HP) or Injury and Illness Prevention Program (I2P2) requirement on employers through the enforcement of vague, open-ended provisions. Advocacy agrees and recommends that OSHA carefully consider the language in the proposed rule to be sure that hazards are well defined and that employer’s responsibilities are sufficiently clear and unambiguous that they know what they must do to be in compliance. Further, Advocacy notes that OSHA’s RFA analysis/certification for the proposed rule does not include costs for the development of S&HP or I2P2-type programs and recommends that OSHA specifically state that such programs are not required under this proposed standard.
- 2. OSHA should further synchronize the proposed general industry rule with the existing construction standard.** Small business representatives at the roundtable were concerned that OSHA’s proposed rule does not go far enough to synchronize the general industry and construction standards. For example, participants complained that OSHA has still not clearly delineated the difference between maintenance and repair (general industry) and construction activities, and that employers remain confused about which standard applies under what circumstances. Participants noted that two employees could be working side by side on similar tasks, but one could be covered by the general industry standard and the other by the construction standard. Representatives expressing these concerns included residential construction and remodeling, painting, heating and air conditioning, chimney sweeping, and others. Participants expressed general support for OSHA introducing the concept of “Designated Areas” in the proposed rule for general industry, but felt that the related requirements do not fully harmonize with the construction standard. In particular, participants expressed concern about situations where employees are working on rooftops during simple, short-duration projects and would be required to construct physical barriers as “Designated Areas” that may actually increase the risk of falls

¹² 75 Fed. Reg. 29132.

and introduce other safety hazards. Advocacy recommends that OSHA's Directorate of Standards and Guidance work closely with OSHA's Directorate of Construction to synchronize any final rule to the maximum extent feasible, while maintaining flexibility where compliance with the standard would be infeasible or would create a greater risk to the employee.

- 3. OSHA should not expand its reading of Section 1910.22 to regulate combustible dust.** Small business representatives at the roundtable expressed opposition to OSHA inserting a reference into Section 1910.22(a)(1) stating that the provision regulates combustible dust.¹³ Section 1910.22(a)(1) states that "All places of employment, passageways, storerooms, and service rooms shall be kept clean and orderly, and in a sanitary condition."¹⁴ Participants raised several specific concerns about this provision. First, participants stated that Section 1910.22 comes from a national consensus standard for sanitation that was never intended to regulate combustibility of dust and that small amounts of dust are not a "sanitary" issue. Participants were concerned that including combustible dust might subject employers to citations for very small quantities of combustible dust in areas far away from any potential ignition source. Second, participants stated that the proposed rule and Section 1910.22 should properly be limited to walking-working surfaces rather than all surfaces (e.g., ducts, rails, HVAC units, etc.) that may be found in a workplace. Finally, participants stated that it was premature for OSHA to issue any rules addressing combustible dust given the complexities of the issues posed by that hazard.¹⁵ Participants noted that OSHA has been working on a combustible standard for several years, and that OSHA issued an ANPRM on combustible dust and held stakeholders meetings because of the complexity of addressing the hazard. Further, because Section 1910.22(a) is so vague, it would undo any specificity in any forthcoming combustible dust standard. Advocacy recommends that OSHA clarify whether combustible dust is intended to be included under this proposed rule, and how this standard would interact with any specific combustible dust standard in the future.
- 4. OSHA should not regulate commercial motor vehicles (trucks) under the proposed rule.**¹⁶ Small business representatives at the roundtable were opposed to OSHA including commercial motor vehicles in the proposed rule. The participants

¹³ In the preamble, OSHA states that it seeks comment on whether it should include an explicit reference to combustible dust or other hazardous materials in the regulatory language of the proposed rule. 75 Fed. Reg. 28874.

¹⁴ 75 Fed. Reg. 29132.

¹⁵ One participant stated that there is no accepted definition of combustible dust, no agreement on the threshold amount of combustible dust that poses a hazard, and no agreement on the thickness of a layer that poses a hazard. Another participant, representing the grain handling industry, noted that if OSHA regulates combustible dust under the Walking-Working Surfaces rule, the grain handling industry will be subject to three separate combustible dust rules: the Walking-Working Surfaces rule, the grain handling combustible dust standard, and the General Duty Clause.

¹⁶ While OSHA discusses fall protection for commercial motor vehicles and rolling stock (railroad cars), the agency states that it "is not soliciting information relating to personal fall protection equipment used on rolling stock involved in railroad operations [because] the Federal Railroad Administration's policy statement sets out the respective areas of jurisdiction between FRA and OSHA." 75 Fed. Reg. 28867.

stated that commercial vehicle operations are already regulated by the Federal Motor Carrier Safety Administration and recommended that OSHA allow FMCSA to regulate these operations as the Federal Railroad Administration regulates rolling stock. Participants at the roundtable represented employers utilizing work trucks (e.g., concrete mixing trucks), flatbeds, and trailers. With respect to work trucks (e.g., concrete mixing trucks), participants noted that most work trucks that employees climb onto already have ladders and fall protection rails on their working platforms, and that requiring personal fall protection devices would be infeasible and could create a greater risk to employees (such as entanglement with moving parts). Further, the participants stated that employees are already trained in safe climbing techniques. With respect to flatbeds and trailers, participants stated that employees working on flatbeds are already trained in safe climbing techniques and that additional fall protection would be infeasible. Further, they stated that employers working in trailers do not generally climb onto the trailer (because they are loaded/unload through the rear door) and that mechanics working on them use specially designed stairs to reach the top of the trailer. Finally, several participants at the roundtable requested that OSHA clarify the status of delivery trucks located at construction sites, while either still hooked up to the tractor/cab or not. Advocacy recommends that OSHA carefully consider any comments it receives on the commercial motor vehicle issue and resolve both jurisdictional and technical feasibility concerns before proceeding.

Conclusion

Advocacy appreciates the opportunity to comment on OSHA's *Proposed Walking-Working Surfaces and Personal Protective Equipment Rule*, and we hope these comments are helpful and constructive. Please feel free contact me or Bruce Lundegren (at (202) 205-6144 or bruce.lundegren@sba.gov) if you have any questions or require additional information.

Sincerely,

//signed//

Susan M. Walthall
Acting Chief Counsel for Advocacy

//signed//

Bruce E. Lundegren
Assistant Chief Counsel for Advocacy

Copy to: The Honorable Cass R. Sunstein, Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget