U.S. SMALL BUSINESS ADMINISTRATION
OFFICE OF ADVOCACY
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August 28, 2017

VIA ELECTRONIC SUBMISSION
Mr. William Perry
Director, Directorate of Standards and Guidance
Occupational Safety and Health Administration
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210
Electronic Address: http://www.regulations.gov (Docket No. OSHA-H005C-2006-0870)

***Re: Comments on OSHA's Proposed Occupational Exposure to Beryllium and Beryllium Compounds in Construction and Shipyard Sectors Rule***

Dear Director Perry:

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's) *Proposed Occupational Exposure to Beryllium and Beryllium Compounds in Construction and Shipyard Sectors Rule* that was published on June 27, 2017.[1] The proposed rule is a deregulatory action that would remove the ancillary provisions (e.g., exposure assessment, respiratory protection, personal protective equipment, hazard communication, recordkeeping, etc.) for construction and shipyards from the final OSHA beryllium rule that was issued on January 9, 2017.[2] However, the proposed rule would retain the new lower permissible exposure limit (PEL) of 0.2 mg/m3 (measured as an eight-hour time-weighted average (TWA)) and the short term exposure limit (STEL) of 2.0 mg/m3 (over a 15-minute sampling period) for each sector.[3] OSHA does not specifically state whether it is also proposing to remove the action level (AL) of 0.1 mg/m3 TWA that triggers the ancillary provisions.

Advocacy supports OSHA's proposal to eliminate the ancillary provisions for construction and shipyards, and recommends that OSHA also consider retaining the original 0.1 percent beryllium by weight exemption from the original proposed rule and suspending the PEL and STEL for the

[1] 82 Fed. Reg. 29182 (June 27, 2017).
[2] 82 Fed. Reg. 2470 (January 9, 2017).
[3] 82 Fed. Reg. 29182 (June 27, 2017).

construction and shipyards industries pending a more complete development of the record of the health effects of naturally-occurring beryllium exposures in the construction and shipyard sectors. Advocacy also recommends that OSHA consider other significant alternatives to the proposed rule, such as a rule explicitly covering only abrasive blasting and welding operations in the construction and shipyard sectors.

## 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 SBA or the Administration. The Regulatory Flexibility Act (RFA),[4] as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA),[5] 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, the Small Business Jobs Act of 2010 requires federal agencies to give every appropriate consideration to comments provided by Advocacy.[6] Specifically, the agency must include, in any explanation or discussion of a final rule published in the Federal Register, the agency's response to comments submitted by Advocacy and a detailed statement of any changes made to the final rule as a result of those comments, unless the agency certifies that the public interest is not served by doing so.[7]

## Background

According to OSHA, beryllium is a very strong, lightweight metal with a high melting point and is an essential material in the aerospace, telecommunications, information technology, defense, medical, and nuclear industries. Beryllium is processed and used industrially in three forms: pure metal, beryllium oxide, and most commonly, as an alloy with copper, aluminum, magnesium, or nickel. However, employees in industries where beryllium is present may be exposed to beryllium by inhaling or contacting beryllium in the air or on surfaces, which can cause an immune response resulting in a sensitization to beryllium. Individuals with beryllium sensitization are at risk of developing chronic beryllium disease (CBD), a debilitating lung disease, which can lead to acute beryllium disease and lung cancer.[8]

In order to address this hazard, OSHA has been engaged in its occupational exposure to beryllium rulemaking for many years.[9] As part of this effort, on November 15, 2007, OSHA convened a Small Business Advocacy Review (SBAR) Panel (commonly known as a "SBREFA panel") under Section 609(b) of the RFA, as amended by SBREFA, to review its draft proposed standard. The final report of the SBREFA panel was issued on January 15, 2008. Nearly eight

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[4] 5 U.S.C. § 601 et seq.
[5] Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. §601 et seq.).
[6] Small Business Jobs Act of 2010 (P.L. 111-240) §1601.
[7] *Id.*, codified at 5 U.S.C. 604(a)(3).
[8] *See*, Occupational Safety and Health Administration, *Overview of Final Beryllium Standard*, available at https://www.osha.gov/SLTC/beryllium/.
[9] See discussion at 82 Fed. Reg. 2477.

years later, on August 7, 2015, OSHA issued its proposed rule for occupational exposure to beryllium, and then on January 9, 2017, issued its final beryllium rule. The final rule included three separate standards for general industry, construction, and shipyards.[10] OSHA now proposes a deregulatory action that would remove the ancillary provisions (e.g., exposure assessment, respiratory protection, personal protective equipment, hazard communication, recordkeeping, etc.) for construction and shipyards, but retain the new lower PEL and STEL for each sector.

**Small Entities Have Expressed Concerns with OSHA's Proposed Beryllium Rule**

In order to obtain input about OSHA's proposed beryllium rule from small businesses and their representatives, Advocacy discussed OSHA's proposed rule at its regular small business labor safety roundtable on July 21, 2017 and conducted a follow-up teleconference to discuss the proposed rule on August 22, 2017. Representatives from both OSHA and the Department of Labor were present for both discussions. The following comments are reflective of the issues raised during the roundtable and teleconference and in other discussions with small businesses and their representatives. Advocacy recommends that OSHA carefully consider comments it receives from small business and incorporate those concerns into any final rule.

1. **With the exception of the abrasive blasting industry, neither the construction nor shipyard sectors were represented in the SBREFA panel process, or given adequate notice that the final beryllium rule would apply to them.** Prior to proposing a rule that, if promulgated, will have a significant economic impact on a substantial number of small entities, OSHA is required to convene a Small Business Advocacy Review (SBAR) panel (commonly known as a "SBREFA panel") for that rule.[11] The panel, made up of OSHA, Advocacy, and the Office of Information and Regulatory Affairs within the Office of Management and Budget, is assisted in its review of the rulemaking materials by affected small entity representatives (SERs) who provide their advice and recommendations about the rulemaking to the panel. While OSHA did convene a SBREFA panel for beryllium in 2007, small business representatives now complain that the focus of the panel was solely on general industry (with the exception of abrasive blasting), and there was no indication at the time that OSHA intended to include the construction and shipyard sectors in the rulemaking.[12] Advocacy notes that nearly eight years passed between the conclusion of the SBREFA panel in 2008 and the publication of the proposed rule in 2015, so there was plenty of time to convene a second panel for construction and shipyard sectors if OSHA intended to include them in the rule.

   Further, when OSHA published its original proposed beryllium rule on August 7, 2015, small business representatives from the construction and shipyard sectors said they thought the rule

[10] On March 9, 2017, the National Association of Home Builders, Mason Contractors of America, and Associated Builders and Contractors filed a lawsuit in the United States Court of Appeals for the District of Columbia Circuit seeking review of OSHA's final beryllium rule. *Civil No. 17-1073*. That litigation has been stayed pending the outcome of this rulemaking.

[11] *See*, 5 U.S.C. 609 (b).

[12] The final report of the Small Business Advocacy Review Panel on the OSHA Draft Proposed Standard for Occupational Exposure to Beryllium is available at https://www.sba.gov/sites/default/files/files/Report_review_panel_exposure_to_beryllium_01_15_2008.pdf.

would not apply to them because the proposed rule exempted materials containing less than 0.1 percent beryllium by weight. Small business representatives said they thought this exemption would cover all materials where naturally-occurring beryllium in sand, soil, rocks, block, brick, and other materials might be present on construction and shipyard sites, so many did not comment.[13] However, when the final rule was published, it revised this exemption to say that the 0.1 percent beryllium by weight exemption only applied "where the employer has objective data demonstrating that employee exposure to beryllium will remain below the action level of 0.1 mg/m3 as an 8-hour TWA under any foreseeable conditions."[14] According to small business representatives, while the 0.1 percent beryllium by weight standard would not likely be exceeded, naturally-occurring beryllium in sand, soil, rocks, block, brick, and other materials could exceed the action level and trigger the ancillary provisions of the rule bringing much of construction and shipyard sectors (whether intended or not by OSHA) under the final beryllium standard.

Finally, Advocacy notes that OSHA should have provided more specific notification to affected small entities in the construction and shipyard sectors pursuant to Section 609(a) of the RFA. That statutory mandate requires all federal agencies to provide specific notification to small entities, beyond publication in the Federal Register, through the use of techniques such as advanced notices of proposed rulemakings, publication of proposed rules in publications likely to be obtained by small entities, direct notification of affected small entities, the conduct of open conference or public hearings concerning the rule on small entities, and the adoption or modification of agency procedures to reduce the cost and complexity of participation in the rulemaking process.[15]

In order to correct these deficiencies and perceived lack of notice, Advocacy recommends that, in addition to the eliminating of the ancillary provisions for construction and shipyards, OSHA consider retaining the original 0.1 percent beryllium by weight exemption from the original proposed rule, consider suspending the PEL and STEL for the construction and shipyards sectors pending a more complete development of the record of the health effects of exposures to naturally-occurring beryllium in the construction and shipyard sectors, and convene a new SBREFA panel for the construction and shipyard sectors prior to including them in any new beryllium standard. Advocacy pledges its full support to insure that the SBREFA panel can be convened and concluded in an expedient manner.

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[13] OSHA acknowledges this lack of response to the proposed rule, stating that "despite the notice, other interested parties in the construction industry did not comment… Without robust participation from the construction and shipyard industry, [OSHA] had limited data on which to proceed." 82 Fed. Reg. 29223.

[14] 82 Fed. Reg. 2751.

[15] 5 U.S.C. § 609 (a) provides in full — **§ 609. Procedures for gathering comments provides in full** — (a) When any rule is promulgated which will have a significant economic impact on a substantial number of small entities, the head of the agency promulgating the rule or the official of the agency with statutory responsibility for the promulgation of the rule shall assure that small entities have been given an opportunity to participate in the rulemaking for the rule through the reasonable use of techniques such as — (1) the inclusion in an advance notice of proposed rulemaking, if issued, of a statement that the proposed rule may have a significant economic effect on a substantial number of small entities; (2) the publication of general notice of proposed rulemaking in publications likely to be obtained by small entities; (3) the direct notification of interested small entities; (4) the conduct of open conferences or public hearings concerning the rule for small entities including soliciting and receiving comments over computer networks; and (5) the adoption or modification of agency procedural rules to reduce the cost or complexity of participation in the rulemaking by small entities.

2. **OSHA lacks sufficient information about the health risks from naturally-occurring beryllium exposures in the construction and shipyard sectors.** While OSHA developed a health risk assessment for beryllium for general industry that looked at pure beryllium, copper beryllium/beryllium alloys, and other beryllium compounds,[16] small business representatives have complained that OSHA lacks data or studies about whether naturally-occurring beryllium in sand, soil, rocks, block, brick, and other materials regularly encountered in the construction and shipyard sectors pose the same human health risks as manufactured beryllium products. According to small business representatives, such data or studies do not exist and they stated that it is incumbent on OSHA to assess the significance of this risk prior to including construction and shipyards in a beryllium standard. Further, because of potential exposures to naturally-occurring beryllium, small business representatives contest OSHA's assertion that beryllium exposure in the construction and shipyard sectors is limited to abrasive blasting in construction and shipyards, and welding in shipyards.[17] Small business representatives stated that geological or chemical property variations could significantly affect exposure levels from naturally-occurring beryllium, and that they are unaware of any cases of beryllium-related illness in their industries.

   Based on the foregoing, Advocacy recommends that OSHA develop a more complete record of the health effects of naturally-occurring beryllium exposures in the construction and shipyard sectors prior to including those sectors in a final beryllium standard. Also, with respect to the three specific questions OSHA poses in the preamble to the proposed rule,[18] Advocacy notes that it is impossible to answer these questions without a fuller understanding of the health effects of beryllium exposures in the construction and shipyard sectors – including naturally-occurring beryllium, which is present at worksites in the construction and shipyard sectors. Construction in particular is problematic given the generation of dust from construction activities and the constantly changing physical environments of construction sites.

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[16] See discussion at 82 Fed. Reg. 2480.

[17] See discussion at 82 Fed. Reg. 29183.

[18] The three specific questions that OSHA requests comment on are: 1. OSHA has proposed revoking the ancillary provisions for the construction and shipyard sectors while retaining the new (lower) PEL of 0.2 mg/m3 and STEL of 2.0 mg/m3 for those sectors. Does this provide adequate protection to the workers in construction and shipyard sectors considering the other standards that apply? Should OSHA keep any or all of the ancillary provisions of the January 9, 2017 final rule for construction and shipyards? If so, which ones? 2. In particular, what is the incremental benefit if OSHA keeps the medical surveillance requirements for construction and shipyards described in the January 9, 2017 final rule, but revokes the other ancillary provisions? Alternatively, should OSHA keep some of the medical surveillance requirements for construction and shipyards but not others? Which medical surveillance requirements are most appropriate for beryllium-exposed workers in these sectors, if any? For more information, see Regulatory Alternative #21a, PELs plus medical surveillance (lowering the PEL and requiring medical surveillance when exposed above the PEL for operations outside the scope of the proposed rule), in the 2015 NPRM (80 FR 47565 (8/7/15)). OSHA's estimates of the medical surveillance costs changed between the NPRM and final rule because of a change of the medical surveillance trigger from the action level to the PEL; updated exposure data and hire rates; and revised unit costs in response to comments and conversion from 2010 to 2015 dollars. 3. In addition to the proposal in this notice, OSHA is considering extending the compliance dates in the January 9, 2017 final rule by a year for the construction and shipyard standards. This would give affected employers additional time to come into compliance with its requirements, which could be warranted by the uncertainty created by this proposal.

3. **OSHA should consider significant alternatives to the proposed rule that achieve its statutory objectives while minimizing costs to small businesses.** Under the RFA, for any rule expected to have a significant economic impact on a significant number of small entities, federal agencies are required to consider " 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."[19] While OSHA's proposed rule is deregulatory in nature (i.e., it proposes to remove the ancillary provisions for construction and shipyards from the final beryllium rule), it still retains the PEL and STEL from the final beryllium rule. Small business representatives have complained that this could significantly impact the construction and shipyard sectors – principally by including the stipulation that the employer must have objective data demonstrating that employee exposure to beryllium will remain below the action level in order to qualify for the 0.1 percent beryllium by weight exemption, and by the unknown impact of exposures to naturally-occurring beryllium in sand, soil, rocks, block, brick, and other materials regularly encountered in these sectors.

   Accordingly, Advocacy recommends that OSHA consider additional significant alternatives to the proposed rule, such as retaining the original 0.1 percent beryllium by weight exemption from the original proposed rule, suspending the PEL and STEL for the construction and shipyards industries pending a more complete development of the record of the health effects of naturally occurring beryllium exposures in the construction and shipyard sectors, including dermal (skin) exposures, or promulgating a rule that applies only to abrasive blasting and welding and specifically excludes all other aspects of the construction and shipyard sectors.

   Advocacy commends OSHA for considering whether current regulatory protections for abrasive blasting and welding are sufficiently protective, and recommends that OSHA carefully consider comments on their effectiveness from small businesses that provide those controls. It is Advocacy's understanding that employees performing abrasive blasting and welding in these sectors are already protected by OSHA standards and industry practices that provide for ventilation, personal protective equipment, and respiratory protection.

## Conclusion

Thank you for the opportunity to comment on OSHA's proposed *Occupational Exposure to Beryllium and Beryllium Compounds in Construction and Shipyard Sectors* rule. Advocacy supports OSHA's proposal to eliminate the ancillary provisions for construction and shipyards, and recommends OSHA consider other alternatives to achieve its statutory objectives while minimizing costs to small businesses. One of the primary functions of the Office of Advocacy is to assist federal agencies in understanding the impact of their regulatory programs on small

[19] *See*, 5 U.S.C. 603(c).

entities. To that end, Advocacy hopes these comments are helpful and constructive. Please feel free to contact me or Bruce Lundegren (at (202) 205-6144 or bruce.lundegren@sba.gov) if you have any questions or require additional information.

Sincerely,

Major L. Clark, III
Acting Chief Counsel for Advocacy

Bruce E. Lundegren
Assistant Chief Counsel for Advocacy

Copy to: The Honorable Neomi Rao, Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget