

October 21, 2013

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-AB70; Docket No. OSHA-2010-0034)

***Re: Extension of Comment Period for OSHA's Proposed Occupational Exposure to Respirable Crystalline Silica Rule***

Dear Assistant Secretary Michaels:

The U.S. Small Business Administration's Office of Advocacy (Advocacy) recommends that the Occupational Safety and Health Administration (OSHA) consider extending the public comment period and other deadlines for its proposed *Occupational Exposure to Respirable Crystalline Silica* (silica) rule<sup>1</sup> by an additional 90 days to allow small businesses and their representatives adequate time to evaluate and assess the impact of this important rulemaking.

**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),<sup>2</sup> as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA),<sup>3</sup> 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 (EO) 13272<sup>4</sup> requires federal agencies to notify Advocacy of any proposed rules that are expected to have a significant economic impact on a substantial number of small entities and to give every appropriate consideration to any comments on a proposed or final rule submitted by Advocacy. Further, both EO 13272 and a recent amendment to the RFA, codified at 5 U.S.C. 604(a)(3), require the agency to include in any final rule the agency's response to any comments

<sup>1</sup> 78 Fed. Reg. 56274 (September 12, 2013).

<sup>2</sup> 5 U.S.C. § 601 et seq.

<sup>3</sup> Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. §601 et seq.).

<sup>4</sup> EO 13272, *Proper Consideration of Small Entities in Agency Rulemaking* (67 Fed. Reg. 53461) (August 16, 2002).

filed by Advocacy and a detailed statement of any change made to the proposed rule as a result of the comments.

## **Background**

OSHA's proposed silica rule was published in the *Federal Register* on September 12, 2013. The proposed rule would establish one standard for general industry and maritime and another for construction. The proposed rule would establish a new permissible exposure limit (PEL) of 50  $\mu\text{g}/\text{m}^3$  with an action level 25  $\mu\text{g}/\text{m}^3$  (both calculated as an eight-hour time-weighted average). Exceeding these limits would trigger a host of administrative and regulatory controls, including initial medical monitoring and periodic exposure assessments, engineering and work practice controls, personal protective equipment, respiratory protection (when engineering and work practice controls are insufficient to meet the PEL), training, and recordkeeping.

OSHA's current PELs for respirable crystalline silica date to 1971, and the agency has been engaged in a host of regulatory and enforcement activities concerning silica since that time. Among those activities, OSHA convened a Small Business Advocacy Review panel under SBREFA in 2003 to consider the impact of a proposed rule on small entities. The panel, which consisted of representatives from OSHA, Advocacy, and the Office of Information and Regulatory Affairs with the Office of Management and Budget, was assisted in its work by a number of small entity representatives (SERs) from regulated industries who provided advice and recommendations to the panel. The panel report was presented to OSHA on December 19, 2003.<sup>5</sup>

## **Small Entities Have Expressed Concern With The Comment Period Provided in the Proposed Rule**

Since publication of the proposed rule, a number of small business representatives have contacted Advocacy and expressed concern about the length of the public comment period and other deadlines provided in the proposed rule. Advocacy also discussed the proposed rule at its regular small business labor safety roundtable on September 20, 2013. Professional staff from OSHA attended the roundtable meeting and provided a background briefing on the proposed rule. Small business representatives at the meeting uniformly indicated that an extension of the public comment period and other deadlines provided in the proposed rule would be desirable in order for them to fully evaluate and assess the impact of the proposed rule on small businesses and other regulated entities.

Based on these comments and discussions, Advocacy recommends that OSHA consider extending the comment period, as well as the deadline for submitting notices of intention to appear at the public hearing and the public hearing dates, by an additional 90 days. Advocacy believes this request is justified by the length and complexity of the proposed rule and the enormity of the rulemaking docket.<sup>6</sup> Further, Advocacy recommends that OSHA clarify what information and evidence is required (and when it is required) of those "[i]nterested persons who request more than ten minutes to present testimony, or who intend to submit documentary

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<sup>5</sup> See, <http://www.sba.gov/advocacy/9631/550691>.

<sup>6</sup> See, <http://www.regulations.gov/#!docketBrowser:rpp=25;po=0:D=OSHA-2010-0034>.

evidence, at the hearing.”<sup>7</sup> This issue was raised at Advocacy’s roundtable and there was some confusion as to whether “the full text” and “all documentary evidence” is required to be submitted (as stated in the Federal Register notice<sup>8</sup>) or only a summary or outline thereof. Small business representatives noted that it would be nearly impossible to provide “the full text” and “all documentary evidence” in the timeframe provided, as they would likely not have prepared their public comments in that timeframe. Accordingly, Advocacy recommends that OSHA clarify what information is required, and also consider extending the deadline for providing this testimony and/or documentary evidence to coincide with the new (extended) deadline for submitting public comments. This will provide interested persons with sufficient time to prepare testimony and/or documentary evidence they plan to present.

Finally, Advocacy is concerned that the two-day hearing schedule provided in the proposed rule may not be sufficient to ensure that all stakeholders (particularly small businesses and their representatives) have an opportunity to participate. Accordingly, Advocacy recommends that OSHA consider scheduling additional time for the public hearings. Advocacy also recommends that OSHA consider dividing the hearing into two separate segments: one for general industry and maritime and another for construction, as separate standards are proposed for these industries, respectively. Advocacy also recommends that OSHA consider hosting additional public hearings around the country to ensure that actual small businesses are able to participate. Advocacy realizes that this would impose a burden on agency resources, but believes that small businesses may not be adequately represented in a single public hearing held in Washington, DC.

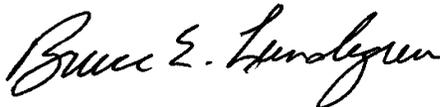
### **Conclusion**

Thank you for considering Advocacy’s recommendations on these important topics. Please feel free to contact me or Bruce Lundegren (at (202) 205-6144 or [bruce.lundegren@sba.gov](mailto:bruce.lundegren@sba.gov)) if you have any questions or require additional information.

Sincerely,



Winslow Sargeant, Ph.D.  
Chief Counsel for Advocacy



Bruce E. Lundegren  
Assistant Chief Counsel for Advocacy

Copy to: The Honorable Howard Shelanski, Administrator  
Office of Information and Regulatory Affairs  
Office of Management and Budget

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<sup>7</sup> See, 78 Fed. Reg. 56274.

<sup>8</sup> *Id.*