Office of Advocacy

May 25, 2006

BY ELECTRONIC MAIL

The Honorable Susan B. Hazen
Acting Assistant Administrator
Office of Prevention, Pesticides and Toxics Substances
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460-0001
Electronic Address: http://www.regulations.gov/ (Docket ID number EPA-HQ-OPPT-2005-0049)

Re: Comments on EPA's *Proposed Lead; Renovation, Repair, and Painting Program Rule*

Dear Ms. Hazen:

The U.S. Small Business Administration's (SBA) Office of Advocacy (Advocacy) is pleased to submit the following comments on the U.S. Environmental Protection Agency's (*EPA) Proposed Lead; Renovation, Repair, and Painting Program Rule*.(1) The proposed rule is designed to reduce exposure to lead hazards created by renovation, repair, and painting activities that disturb lead-based paint in support of the Federal government's goal of eliminating childhood lead poisoning by 2010.(2) The proposed rule would establish requirements for training renovators and dust sampling technicians; certifying renovators, dust sampling technicians, and renovation firms; accrediting providers of renovation and dust sampling technician training; and for renovation work practices.(3)

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 RFA, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA),(4) gives small entities a voice in the rulemaking process. For all rules which will have a significant economic impact on a substantial number of small entities, EPA is required by the RFA to assess the impact of the proposed rule on small business and to consider less burdensome alternatives. Moreover, on August 13, 2002, President Bush signed Executive Order 13272,(5) which requires Federal agencies to give every appropriate consideration to any comments on a proposed or final rule submitted by Advocacy. 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

In developing its proposed rule, EPA convened a Small Business Advocacy Review Panel in accordance with the requirements of SBREFA to obtain advice and recommendations about how the proposed rule might affect small entities. The panel included representatives from EPA, Advocacy, and the Office of Information and Regulatory Affairs within the Office of Management and Budget and was assisted in its work by several small entity representatives (SERs) of the various entities that potentially would be subject to the rule. The panel met in 1999 and reviewed various regulatory options developed by EPA for each of the key elements of the proposed rule.(6) The Panel solicited comments from the SERs

and prepared a report(7) of its deliberations that included a number of recommendations on how to reduce the potential impact of the rule on small entities. The report is available in the docket and on EPA's website.(8)

EPA's proposed rule would apply in "target housing," defined in section 401 of the Toxic Substances Control Act (TSCA) as any housing constructed before 1978, except housing for the elderly or persons with disabilities (unless any child under age 6 resides or is expected to reside in such housing) or any 0-bedroom dwelling. Initially the rule would apply to all renovations for compensation performed in target housing where a child with an increased blood lead level resides, rental target housing and owner-occupied housing built before 1960, unless, with respect to owner-occupied target housing, the person performing the renovation obtains a statement signed by the owner-occupant that no child under age 6 resides there. EPA has determined that its proposed rule is expected to have "a significant economic impact on a substantial number of small entities" and has prepared an Initial Regulatory Flexibility Analysis (IRFA) for the proposed rule in accordance with the RFA.(9)

Advocacy has reviewed EPA's proposed rule, IRFA, Economic Analysis, and the SBREFA Report. In sum, Advocacy support EPA's effort to impose reasonable minimum work practice standards, including clean-up standards that will ensure protection of children's health. However, Advocacy opposes the inclusion of EPA's proposed cleaning verification procedure because we believe it is poorly supported in the record. Advocacy also recommends that EPA wait to finalize the proposed second phase of this rule (i.e., 1960-1977 housing) until new paint test kits are commercially available. Further, Advocacy believes EPA should expand the exclusions of activities that involve minimal amounts of lead dust generation (and therefore do not generate lead hazards). Finally, Advocacy believes EPA should allow the use of non-HEPA ("high efficiency particulate air") filtered vacuums because the research literature demonstrates that there is no performance difference in lead dust removal.

In addition to the foregoing, Advocacy is pleased to offer the following additional comments in response to several of the specific questions posed by EPA in the proposed rule.

EPA Question for Comment: "Do you support the conclusions of EPA's renovation studies - that renovation activities can create significant amounts of leaded dust that can pose hazards to the occupants, and that there is a link between renovation activities and an increased risk of elevated blood lead levels in children?"

Advocacy believes that while some renovation activities can generate significant amounts of lead dust that could pose a human health hazard, there is not sufficient evidence that renovation activities by private contractors or building owner personnel, *as opposed to homeowners*, contribute to an increased risk of elevated blood levels (EBL) in children. EPA's proposed rule relies on both the Phase III study(10) and two New York State Department of Health studies(11) to show a relationship between renovation activities and children's health. The Phase III study was addressed in the SBREFA panel report, but the New York State studies were not. While these studies provide some evidence that renovation by homeowners (or sloppy work by contractors) can result in EBL, they do not provide evidence that the proposed new cleaning verification procedure will enhance public health. Advocacy believes that the evidence in fact shows that private contractors (i.e., professional renovators) subject to reasonable cleanup standards, including the "no visible dust or debris" standard, do not create additional health hazards. Therefore, Advocacy believes the proposed cleaning verification procedure, which is complex and costly, is not warranted by the evidence.

Further, while EPA states that the phase III study shows that children subject to remodeling were 30% more likely to have EBLs than other children, there is not a significant correlation when the sample was limited to the persons regulated by this rule - namely apartment building owners, apartment building staff, and professional contractors. On the other hand, relatives and friends not residing in the household (i.e., those not subject to this rule) showed the most significant contribution to EBL. Based on the foregoing, Advocacy is concerned that the proposed rule could unnecessarily raise costs and drive homeowners from using professional contractors (renovators), who work more carefully, to inexperienced and untrained individuals. The rule could also encourage do-it-yourself work by untrained individuals, which could actually endanger children's health, not improve them.

Finally, EPA cites two additional references to demonstrate that EBL is associated with renovation. However, the first study by the New York State Department of Health, found that 6.9% of the children had EBL, and this was associated with renovation. Unfortunately, this study is not reliable since it did not compare the 6.9% EBL with a control group of New York households that had not undergone renovation within the two year period.**(12)** Given the large magnitude of residences studied that undergo renovation each year, Advocacy does not believe that this figure reveals a relationship with renovation activities. The follow-up study by New York State remedied the first error, and did include a control group.**(13)** While this study did find EBL associated with renovation, the increase disappeared when the study excluded the test samples that didn't follow the study protocol: clean the floor until there is no visible dust. This is consistent with our contention that a no visible dust standard is all that is needed here - there is no need for an additional cleaning verification step, as proposed by EPA (see below).

EPA Question for Comment: "Should EPA phase in the applicability of this proposal - applying it initially to rental and owner-occupied housing built before 1960 and later to homes built through 1977 - to allow time for the development of improved kits that identify lead-based paint?"

The SBREFA panel recommended that EPA consider exempting the 1960-1977 housing stock, and EPA's proposal for two-stage phase in of the rule was developed after the panel process. Advocacy believes EPA should phase in the requirements for 1960-1977 housing stock, and should issue a new proposed rule once the paint test kits meeting EPA specifications have been identified. This would allow informed comments on (1) the viability, cost, and practicality of the test kits, and (2) the appropriate timing of the requirement. Advocacy believes that the 1960-1977 housing stock is a much lower priority because the occurrence and concentration of lead-based paint is much lower. Accordingly, the likelihood of disturbing the lead-based paint surfaces in this housing stock is correspondingly lower.

EPA Question for Comment: "Should EPA wait to finalize the proposed second phase of this regulation until new paint test kits are commercially available?"

Yes, as indicated immediately above, Advocacy believes that EPA should not finalize the requirements for 1960-1977 housing stock because the test kits are not yet available and because the 1960-1977 housing stock contains far less lead-based paint.

EPA Question for Comment: "In owner-occupied housing, should EPA exclude homes where children under 6 do not reside?"

This issue was not addressed by the SBREFA panel, but Advocacy is concerned that imposing requirements on owner-occupied homes may have the unintended consequence of actually reducing lead-safe work practices and proper cleanup techniques because owner-occupiers might defer maintenance, complete the jobs themselves (and not use proper cleanup techniques), or hire disreputable contractors (who undercut legitimate prices by not following the rules). Given this concern, it might be most effective to give owner-occupiers the choice of using the EPA standard, regardless of whether children reside there. Advocacy does agree with EPA that all residents (including owner-occupiers) should receive a lead safety informational pamphlet.

EPA Question for Comment: "Should certain activities, like exterior siding projects, HVAC duct work, wallpaper removal, and exterior soil disruption, be excluded from this proposal? Are you aware of lead loading data that would support their exclusion or inclusion?"

The SBREFA panel recommended that EPA include de minimis and other exemptions for components and activities where lead hazards are unlikely to be created. Advocacy believes that EPA should defer a decision on these specific exemptions pending the results of a major study currently being undertaken by the National Association of Home Builders (NAHB). The NAHB study is being conducted to assess the creation of lead hazards during renovation activities in actual work conditions (rather

than an artificial laboratory setting). Until this data is available, Advocacy is concerned that EPA lacks sufficient information to proceed. Further, EPA may want to consider providing an exemption based on the duration of the renovation activity (e.g., sawing and sanding for 30 minutes or less) where no demolition occurs.

EPA Question for Comment: "Should EPA consider the use of vacuums other than HEPA-equipped vacuums, given that OSHA requires their use (29 CFR 1926.62(h)(4))?"

This issue was not addressed specifically by the SBREFA panel, but according to the information that Advocacy has reviewed, there does not appear to be any significant benefit from requiring HEPA over non-HEPA vacuums. For this reason, Advocacy believes that EPA should change the requirement to use HEPA vacuum cleaners during the vacuuming phase of lead dust cleanup and instead allow the use of any quality vacuum cleaner. While HEPA vacuums (or vacuums equipped with a HEPA filter) are clearly effective for cleanup, empirical research comparing HEPA vacuums to non-HEPA vacuums under similar conditions shows that there is no significant difference between the two in the resultant lead loading on any type of floor surface. HEPA vacuums are significantly more expensive than many highly effective non-HEPA vacuums. HEPA vacuums are also more costly than non-HEPA vacuums in general, and allowing the use of non-HEPA vacuums would therefore reduce the rule's impacts on the many small businesses involved in renovation, remodeling, and lead paint mitigation. In addition, we expect that the HEPA vacuum maintenance costs exceeds the maintenance costs of the non-HEPA vacuums.

The use of vacuum cleaners with HEPA filters provides no clear advantage of those without in terms of lead dust clearance on either bare or carpeted floors. Advocacy examined a number of empirical studies that compared the performance of HEPA vs. non-HEPA vacuums under similar, real world conditions.**(14)** Studies that only examined one vacuum type or the other in isolation, or that did not conduct testing under real world or appropriately simulated conditions were ignored. Two studies using residences in New Jersey identified as lead hazard sites found that there was no significant difference between HEPA and non-HEPA vacuums in efficacy at removing lead dust on either hard floor surfaces**(15)** or carpet and upholstery**(16)**. A study by the Canadian Mortgage and Housing Corporation (CMHC) with controlled lead dust levels on hard and carpeted flooring under laboratory conditions concluded that, "[t]he HEPA vacuum provided no advantage over the portable or central vacuum, either in dust pick-up or dust dispersion."**(17)** Finally, a study by the California Department of Health Services concluded that some non-HEPA vacuums performed better than the tested HEPA units.**(18)** In contrast, we found no studies that supported EPA's implicit assumption that HEPA vacuums performed better. Since the OSHA standard was promulgated without notice and comment in 1992, there is no evidence supporting EPA's proposal in the OSHA record. Further, Advocacy notes that the OSHA is conducting a formal review of its regulation under Section 610 of the RFA and may revise its requirements in the near future.

Given the lack of evidence showing that HEPA vacuums are significantly better at removing lead dust from floors, and that HEPA vacuums are significantly more costly than non-HEPA units, Advocacy believes EPA should modify its proposed rule to allow cleanup with either a HEPA or non-HEPA vacuum. Doing so would reduce the cost to small entities in the renovation and lead mitigation businesses without compromising the level of lead dust clearance achieved by the standard.

EPA Question for Comment: "Should some work practices, like open flame burning and machine sanding of painted surfaces, be prohibited? If so, should these practices be prohibited for both interior and exterior renovations?"

Advocacy concurs with EPA's proposed rule and the SBREFA panel report recommendations that the cleanup practices required by the proposed rule would eliminate lead hazards; therefore prohibiting specific work practices does not appear to be necessary or appropriate for this proposed rule. Further, Advocacy notes that OSHA's Lead Exposure in Construction standard**(19)** already includes worker protection provisions that are triggered by these types of work practices.

EPA Question for Comment: "Is cleaning verification necessary given the proposed

cleaning requirements?"

The SBREFA panel recommended that EPA take comment on options for clearance that are less costly and less burdensome, and yet still demonstrate the absence of lead hazards. Advocacy believes that the cleaning verification is unnecessary because the "no visible dust or debris" cleaning standard alone would ensure a clean surface. Advocacy is concerned that adding another verification step would be expensive and would not assure greater compliance because those who would not comply with the cleaning procedure are less likely to comply with an additional verification requirement.

EPA Question for Comment: "Do you support the conclusions of the disposable cleaning cloth study, and/or do you have comments on the study itself?"

The SBREFA panel was concerned that EPA not impose a costly or burdensome clearance test. EPA's proposed clearance procedure that would have renovators employ a dust collection cloth (DCC) protocol was developed after the SBREFA panel process. Advocacy is concerned that this procedure has not been tested in the field and may not provide a reliable indication that the jobsite has been properly cleaned. Further, Advocacy is concerned that the cleaning verification procedure is impractical, unnecessary, and scientifically unsound.

EPA's proposed would require the DCC test to all uncarpeted floors and window sills in the renovation. If the surface achieves the White Glove (WG) status, by comparing the DCC to the standard reference cloth, the cleaning verification would be achieved. This approach is opposed by every lead-safe housing group and industry association we have spoken with. Advocacy concurs with these organizations and the U.S. Housing and Urban Development (HUD) that this requirement should be eliminated.

After further research, EPA's proposed approach may eventually be validated. However, in the words of one of the lead-safe activists who testified at EPA in March, this dust collection technique is "not ready for prime time." To its credit, EPA did submit its report, entitled "Electrostatic Cloth and Wet Cloth Field Study in Residential Housing," to an external peer review process. Several of HUD's most relevant review comments are excerpted below:

The study report does not appear to provide adequate support for the use of the DCC (disposable cleaning cloth) protocol to demonstrate adequate cleanliness ("cleaning verification"). For floors, the ability to achieve WG status vs. not achieving WG did not appear to be predictive of the surface being above, at or below the clearance standard....

Passing WG using only wet DCCs appears to be protective and reasonably predictive of also passing dust wipe and laboratory clearance. However, while failing WG is not predictive of failing clearance, and may still be protective, it may also lead to unnecessary additional cleaning....

The use of this protocol on sills following renovation did not appear to be supported by the study because there was an inadequate number of sills above the standard at baseline; however, a final wipe of sills with a wet DCC might help to ensure adequate cleaning.

In addition to the general criticism of the approach, HUD pointed out the lack of window sill data demonstrating the application of the DCC to window sills. Other peer reviewers made similar comments. In sum, most of the peer reviewers concluded, for a variety of reasons, that the DCC method needs more research before being deployed in hundreds of thousands of annual renovation and maintenance projects.

There are two additional reasons for eliminating this requirement. First, there is no evidence that renovators are likely to consistently follow such a time consuming and complex procedure. The verification protocol requires that the renovator test areas no greater than 40 square feet at a time, compare the discoloration on the cloth to a verification cloth, and do so for every area in the job until either verification is obtained, or the non-passing floor area is re-cleaned at least once. Conscientious renovators would be hurt by the competing renovators who choose to evade this burdensome

procedure.

Second, and importantly, according to EPA's own economic analysis, dispensing with the cleaning verification would reduce the costs of the rule by about $45 million/year; however, the rule's benefits would be reduced by $0.1 - $20 million/year under the various modeling scenarios.**(20)** Thus, even assuming that the protocol was based on science and practical, EPA's own modeling analysis shows that the cost of verification well exceeds the benefit of performing the verification. EPA even added the following comment concerning the proposed option: "It should be noted that Alternative Estimate 14 [no cleaning verification] is based on assumptions and therefore must not be interpreted as conclusive evidence that the benefits of cleaning verification are not worth the additional cost."**(21)** Given that the entire economic analysis is based on assumptions, this is quite an unusual expression of concern. While not conclusive on this single point, this finding, in combination with all the other defects noted above, should prove fatal to this verification requirement. As discussed elsewhere, there is considerable evidence that the cleanup procedure alone, in combination with a requirement that no visible dust or debris should remain, should be more than adequate to address the lead dust hazard.

EPA Question for Comment: "Would this proposal cause homeowners to defer maintenance or perform some renovation projects themselves rather than hire a professional due to increased costs associated with the rule?"

This issue was not specifically addressed by the SBREFA panel, but it has been raised subsequently. Advocacy is concerned that imposing costly or unnecessary requirements on homeowners may have the unintended consequence of reducing lead-safe work practices and proper cleanup techniques because owner-occupiers might defer maintenance, complete the jobs themselves (and not use proper cleanup techniques), or hire disreputable contractors who undercut legitimate prices by not following the rules.

Advocacy notes that the representative for the Alliance for Safe Housing who spoke at EPA public hearing on the proposed rule in Washington, DC stated that the "incremental costs [of this rule] should be kept to the absolute minimum." Advocacy agrees that a costly rule is likely to cause homeowners to defer needed maintenance or do he projects themselves. Both outcomes would defeat the stated objective of reducing lead hazards to children.

Conclusion

Advocacy appreciates the opportunity to comment on EPA EPA's Proposed Lead; Renovation, Repair, and Painting Program Rule. Advocacy would welcome the opportunity to work with EPA in any way we can to develop a final rule that is effective while minimizing the regulatory burdens on small entities. Please feel free to contact me or Kevin Bromberg of my staff at (202) 205-6964 (or kevin.bromberg@sba.gov if you have any questions or require additional information.

Sincerely,

//signed//

Thomas M. Sullivan
Chief Counsel for Advocacy

//signed//

Kevin Bromberg
Assistant Chief Counsel for Advocacy

cc: The Honorable Steven D. Aitken
Acting Administrator, Office of Information and Regulatory Affairs
Office of Management and Budget

ENDNOTES

1. 71 Fed. Reg. 1587-1636 (January 10, 2006).

2. Id. at 1588.

3. Id.

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

5. 67 Fed. Reg. 53461 (August 16, 2002).

6. These elements included: applicability and scope; firm certification; individual training and certification; accreditation of training courses; work practice standards; prohibited practices; exterior clearance; and interior clearance. 71 Fed. Reg. 1624.

7. *Final Report of the Small Business Advocacy Review Panel on EPA's Planned Proposed Rule: Lead-Based Paint; Certification and Training; Renovation and Remodeling Requirements*, March 3, 2000.

8. http://www.epa.gov/lead/pubs/rrp-sbrefa.pdf.

9. 5 U.S.C. § 601 et seq.

10. USEPA. Lead Exposure Associated With Renovation and Remodeling Activities: Phase III, Wisconsin Childhood Blood-Lead Study (EPA 747-R-99-002, March 1999).

11. HHS, PHS, CDC. Children with Elevated Blood Lead Levels Attributed to Home Renovation and Remolding Activities--New York, 1993-1994. Morbidity and Mortality Weekly Report (45(51); 1120-1123, January 3, 1997).

12. HHS, PHS, CDC. Children with Elevated Blood Lead Levels Attributed to Home Renovation and Remolding Activities--New York, 1993-1994. Morbidity and Mortality Weekly Report (45(51); 1120-1123, January 3, 1997).

13. Reissman, Dori B., Thomas D. Matte, Karen L. Gurnite, Rachel B. Kaufmann, and Jessica Leighton. ''Is Home Renovation or Repair a Risk Factor for Exposure to Lead Among Children Residing in New York City?'' Journal of Urban Health: Bulletin of the New York Academy of Medicine. Vol. 79, No. 4, 502-511, (December 2005).

14. We reviewed every relevant study identified in the record, and two or more additional ones identified by EPA staff and others.

15. Rich, David Q., Rhoads, George G., Yiin, Lih-Ming, Zhang, Junfeng, Bai, Zhipeng, Adgate, John L., Ashley, Peter J., and Lioy, PaulJ (2002). "Comparison of Home Lead Dust Reduction Techniques on Hard Surfaces: The New Jersey Assessment of Cleaning Techniques Trial," *Environmental Health Perspectives*, 110(9), 889-93.

16. Yiin, Lih-Ming, Rhoads, George G., Rich, David Q., Zhang, Junfeng, Bai, Zhipeng, Adgate, John L., Ashley, Peter J., and Lioy, PaulJ (2002). "Comparison of Techniques to Reduce Residential Lead Dust on Carpet and Upholstery: The New Jersey Assessment of Cleaning Techniques Trial," *Environmental Health Perspectives*, 110(12), 1233-7.

17. (CMHC) Canadian Mortgage and Housing Corporation. 1992. "Effectiveness of Clean up

Techniques for Leaded Paint Dust." Ottawa, Ontario, Canada: Canadian Mortgage and Housing Corporation, Research Division.

18. California Dept. of Public Health Services , final report submitted to HUD (May 2004).

19. 29 CFR 1926.62.

20. EPA Economic Analysis, January 2006, Section 7.14.1, pp. 18-19. Costs and benefits are annualized by EPA over a 50 year period, at discount rates of 3 and 7 percent.

21. Id.