



November 2, 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-AC32; Docket No. OSHA-2010-0010)

Re: Comments on OSHA’s Proposed Consultation Agreements: Proposed Changes to Consultation Procedures Rule

Dear Assistant Secretary Michaels:

The U.S. Small Business Administration's Office of Advocacy (Advocacy) submits the following comments on the Occupational Safety and Health Administration’s (OSHA’s) *Proposed Consultation Agreements: Proposed Changes to Consultation Procedures Rule*.¹ OSHA’s proposed rule would change the criteria under which participants in OSHA’s “On-site Consultation” program could be subject to enforcement inspections by OSHA and could discourage small business participation in the program. 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),² as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA),³ 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 13272⁴ 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.

¹ 75 Fed. Reg. 54064 (September 3, 2010).

² 5 U.S.C. § 601 et seq.

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

⁴ Executive Order 13272, *Proper Consideration of Small Entities in Agency Rulemaking* (67 Fed. Reg. 53461) (August 16, 2002).

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

OSHA's proposed rule would change the criteria under which participants in OSHA's On-site Consultation program could be subject to enforcement inspections by OSHA inspectors. On-site Consultation is a voluntary, OSHA-funded program that offers free and confidential advice from safety consultants to small businesses to identify workplace hazards, provide advice on compliance with OSHA standards, and assist in establishing safety and health management systems. The consultant inspects the site and works with the employer to abate any safety hazards identified during the inspection in a timely manner.⁵

One of the hallmarks of OSHA's On-site Consultation program has always been a "wall of separation" between the voluntary consultation process and OSHA enforcement personnel.⁶ In fact, employers who abate any hazards identified during the consultation are guaranteed confidentiality from the enforcement side of OSHA. Further, successful participants in the On-site Consultation program become eligible for recognition under OSHA's Safety and Health Achievement Recognition Program (SHARP) program, which recognize businesses that complete the On-site Consultation program and maintain an exemplary safety and health program. Participants in SHARP (and pre-SHARP) are granted an exemption from programmed OSHA inspections for one year (with an opportunity to extend that exemption up to three years). According to OSHA, some 14,411 visits were conducted at small businesses under the On-site Consultation program in fiscal year 2010.⁷

Currently, OSHA rules governing the On-site Consultation program require the consultant to terminate an inspection in progress in the event of imminent danger, fatality/catastrophe, and formal complaints, allows OSHA to grant a one-year deferral from programmed inspections to SHARP (and pre-SHARP) participants, and provides for a renewal of the deferment for up to three years. The proposed rule would make three significant changes to the current rules: 1) adds "Referral inspections as determined necessary by the [Regional Administrator]" to the list of reasons that a consultant must terminate an inspection in progress; 2) adds "Other critical inspections as determined by the Assistant Secretary" to the list of reasons that SHARP (and pre-SHARP) participants can still be subject to programmed inspections; and 3) reduces the exemption period for SHARP (and pre-SHARP) participants from three years to one.⁸

⁵ See, <http://www.osha.gov/dcsp/smallbusiness/consult.html>.

⁶ The statutory authority for OSHA's On-site Consultation program currently provides that "[a]ctivities under this subsection shall be conducted independently of any enforcement activity. If an employer fails to take immediate action to eliminate employee exposure to an imminent danger identified in a consultation or fails to correct a serious hazard so identified within a reasonable time, a report shall be made to the appropriate enforcement authority for such action as is appropriate. 29 U.S.C. 670.

⁷ See, http://www.osha.gov/dcsp/smallbusiness/consultchart_1.html.

⁸ 75 Fed. Reg. 54065.

Small Entities Have Expressed Concern With The Proposed Rule

Following publication of the proposed rule, a number of small business representatives contacted Advocacy and expressed concern about the potential impacts of the proposed rule. Further, Advocacy discussed the proposed rule at its regular small business labor safety roundtable on September 24, 2010. The following comments are reflective of the issues raised during the roundtable and in subsequent conversations with these small business representatives.

- 1. OSHA should maintain the “wall of separation” between the On-site Consultation program and its enforcement program.** Small business representatives have stated that many small businesses are reluctant to participate in the On-site Consultation program because they fear that they will be referred to OSHA’s enforcement staff for any violations identified during the visit. While this may be contrary to OSHA’s intent, Advocacy has heard similar concerns from small businesses who are fearful of even contacting OSHA, let alone inviting OSHA’s representatives onto their sites to conduct safety inspections. By all accounts (including OSHA’s),⁹ the On-site Consultation program has been a resounding success in not only making individual businesses safer, but also in promoting a culture of safety within the small business community. Any changes (real or perceived) to the On-site Consultation program that heighten small business anxiety about the program will reduce the program’s effectiveness and inhibit this avenue to increased safety. Accordingly, Advocacy recommends that OSHA carefully consider how the proposed changes might be viewed as diminishing the separation between the On-site Consultation program and its enforcement program and what impact this will have on small business participation in the program.
- 2. OSHA should better explain why the proposed rule is needed.** Small business representatives have expressed strong support for OSHA’s On-site Consultation program. As such, OSHA should provide a better explanation of why the proposed rule is necessary. Have there been problems with the existing program that necessitate the proposed changes? If so, OSHA should discuss them and provide examples. Presumably, small businesses that have participated in the On-site Consultation program have demonstrated a commitment to safety that has been acceptable to OSHA until now. OSHA should also explain whether the proposed rule represents a change in OSHA policy away from cooperative programs. Advocacy recommends that OSHA carefully explain why the proposed changes are needed and how they will impact the effectiveness of the On-site Consultation program.
- 3. OSHA should clarify the types of instances that would trigger inspections under the proposed rule.** OSHA’s proposed rule would add “Referral inspections as determined necessary by the [Regional Administrator]” to the list of reasons that a consultant must terminate an inspection in progress and “Other critical inspections as determined by the Assistant Secretary” to the list of reasons that SHARP (and pre-SHARP) participants can still be subject to programmed inspections. However,

⁹ See, <http://www.osha.gov/dcsp/smallbusiness/successes.html>.

OSHA does not explain the types of situations these provisions are intended to cover. In fact, the provisions appear to be so broad that they vest unlimited discretion with the Regional Administrator and Assistant Secretary, respectively. Advocacy is concerned that these provisions are overly broad and will inhibit small business participation in the program. Accordingly, Advocacy recommends that OSHA provide specific examples or guidance on how the proposed rule will be implemented.

- 4. OSHA would have benefited from small business input on the proposed rule.** OSHA does not report conducting any small business outreach on the proposed rule in order to determine how small businesses would likely react to the proposed changes. Because the proposed changes could have a significant impact on the willingness of small businesses to participate in the On-site Consultation program, Advocacy believes OSHA would have benefited from small business input on the proposed rule. Accordingly, Advocacy recommends that OSHA carefully consider any small business comments it receives on the proposed rule and consider conducting additional outreach before proceeding. Advocacy would be happy to assist OSHA in any way we can to obtain additional small business input on the proposed rule.

Conclusion

Advocacy appreciates the opportunity to comment on OSHA's *Proposed Consultation Agreements: Proposed Changes to Consultation Procedures Rule*, and hopes these comments are helpful and constructive. Before proceeding to implement the rule as proposed, OSHA should conduct outreach to small businesses to determine the impact on small business, and consider alternatives that will increase safety and health through voluntary programs. 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//

Winslow Sargeant, PhD
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