U.S. SMALL BUSINESS ADMINISTRATION
OFFICE OF ADVOCACY
REGULATION • RESEARCH • OUTREACH

July 22, 2024

VIA ELECTRONIC SUBMISSION

The Honorable Douglas L. Parker
Assistant Secretary of Labor for Occupational Safety and Health
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Re: Comments on Emergency Response Standard [Docket No. OSHA-2007-0073] (RIN 1218-AC91)

Dear Assistant Secretary Parker:

On February 5, 2024, the Occupational Safety and Health Administration (OSHA) published its proposed "Emergency Response Standard" (or proposed "Emergency Response rule") in the Federal Register.[1] OSHA's proposed rule would replace OSHA existing Fire Brigades Standard[2] (which was adopted in 1980 and only applies to private sector entities) with a new, broader standard that would apply to both public and private sector entities (depending on OSHA's jurisdictional parameters) involved in emergency response activities, such as firefighting, emergency medical services, and technical search and rescue.[3]

The proposed standard would require emergency response employers to protect the safety and health of their employees by establishing and implementing emergency response plans, vulnerability assessments, risk management plans, incident action plans, pre-incident plans, training, medical exams, vehicle safety programs, standard operating procedures, post-incident plans, and other items. OSHA distinguishes between Emergency Service Organizations (ESOs), whose employees perform emergency response activities as their full-time primary function, and Workplace Emergency Response Employers (WEREs), whose employees perform emergency response activities as a collateral duty to their regular work. The proposed rule relies heavily on private consensus standards, such as National Fire Protection Association (NFPA) standards, and incorporates by reference a broad array of outside technical materials that would become binding federal regulations with the force and effect of law on all regulated entities.[4] Advocacy believes OSHA should reassess the proposed rule and make significant changes before proceeding.

[1] 89 Fed. Reg. 7774 (proposed Feb. 5, 2024).
[2] 29 CFR § 1910.156.
[3] 89 Fed. Reg. at 7,775.
[4] *Id.*

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Office of Advocacy

Congress established the Office of Advocacy under Pub. L. 94-305 to represent the views of small entities before federal agencies and Congress. Advocacy is an independent office within the U.S. Small Business Administration (SBA) that seeks to ensure small business concerns are heard in the federal regulatory process. Advocacy also works to ensure that regulations do not unduly inhibit the ability of small entities to compete, innovate, or comply with federal laws. The views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration.

The Regulatory Flexibility Act (RFA),[5] as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA),[6] 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, the RFA requires federal agencies to assess the impact of the proposed rule on small entities and to consider less burdensome alternatives.[7] Additionally, section 609 of the RFA requires the Environmental Protection Agency, the Occupational Safety and Health Administration, and the Consumer Financial Protection Bureau to conduct special outreach efforts through a review panel.[8] The panel must carefully consider the views of the impacted small entities, assess the impact of the proposed rule on small entities, and consider less burdensome alternatives for small entities.[9] If a rule will not have a significant economic impact on a substantial number of small entities, agencies may certify the rule.[10] The agency must provide a statement of factual basis that adequately supports its certification.[11]

The Small Business Jobs Act of 2010 requires agencies to give every appropriate consideration to comments provided by Advocacy.[12] The agency must include a response to these written comments in any explanation or discussion accompanying the final rule's publication in the Federal Register, unless the agency certifies that the public interest is not served by doing so.[13]

Advocacy's comments are consistent with Congressional intent underlying the RFA, that "[w]hen adopting regulations to protect the health, safety, and economic welfare of the nation, federal agencies should seek to achieve statutory goals as effectively and efficiently as possible without imposing unnecessary burdens on the public."[14]

Advocacy's Involvement

The preamble to OSHA's proposed rule includes background information leading to the proposed rule, including a discussion of OSHA's Request for Information in 2007 and the activities of the National Advisory Committee on Occupational Safety and Health's (NACOSH)

[5] Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified at 5 U.S.C. §§ 601-612).
[6] Pub. L. No. 104-121, tit. II, 110 Stat. 857 (1996) (codified in scattered sections of 5 U.S.C. §§601-612).
[7] 5 U.S.C. § 603.
[8] *Id.* § 609.
[9] *Id.*
[10] *Id.* § 605(b).
[11] *Id.*
[12] Small Business Jobs Act of 2010, Pub. L. No. 111-240, §1601, 214 Stat. 2551 (codified at 5 U.S.C. § 604).
[13] *Id.*
[14] Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified at 5 U.S.C. §§ 601-612).

subcommittee that was formed in 2014. The NACOSH subcommittee was a panel of interested stakeholders who reviewed OSHA's current rule, assessed best practices and technological advances, and developed regulatory text that OSHA could adopt. While the subcommittee was billed as a "mini-negotiated rulemaking," most (but not all) of its members represented large commercial and government organizations and labor interests. For that reason, Advocacy was invited and attended nearly all of the subcommittee meetings over the course of several months to monitor the discussions. Advocacy and others expressed concerns at the time that small entities were not adequately represented in the deliberations and that the subcommittee's activities did not meet established procedural standards. That notwithstanding, the subcommittee's final report[15] included suggested regulatory text and recommended the broad incorporations by reference that OSHA now proposes.

In 2021, in accordance with the requirements of SBREFA, OSHA convened a Small Business Advocacy Review (SBAR) panel (also known as a SBREFA panel) to consider a possible OSHA rule. The panel was comprised of representatives from OSHA, Advocacy, and the Office of Information and Regulatory Affairs of the Office of Management and Budget. Small entity representatives (SERs) from the regulated community reviewed the background materials (including the subcommittee's draft regulatory text) and provided their advice and recommendations to the panel. The SERs were most concerned that OSHA provide maximum flexibility in any proposed rule and not adopt a "one-size-fits-all" approach, as many of the SERs believed OSHA's draft approach would be too complex and costly for small entities (especially small, rural fire departments and small emergency responders) to implement and was overly geared toward large, well-funded urban organizations. The panel's final report was issued on December 2, 2021.[16] Advocacy had discussed the NACOSH subcommittee's proceedings and the SBAR panel at a number of its regulatory roundtables at the time of those activities.

Advocacy Outreach and Small Entity Concerns

Following publication of the proposed rule on February 5, 2024, Advocacy has discussed the proposed rule at several of its regulatory roundtables and participated in numerous meetings, calls, and discussions with small entities and their representatives from across the country who would be impacted by the proposed rule. Advocacy's roundtable meetings were held via web on March 22, 2024 (which included an overview of the proposed rule by OSHA), May 17, 2024 (which included a panel of small entity representatives discussing the proposed rule), and July 12, 2024 (which also included a panel of small entity representatives discussing the proposed rule). The overwhelming consensus among the small entities who participated in these meetings is that while safety and health is their paramount concern, the proposed rule is too complex, costly, prescriptive, and unworkable for many small entities in its current form. Accordingly, Advocacy offers the following comments based on its conversations and discussions with small entities and their representatives.

[15] The final Report from NACOSH Subcommittee on Emergency Response and Preparedness is available in the rulemaking docket at https://www.regulations.gov/document/OSHA-2016-0001-0111.

[16] OCCUPATIONAL HEALTH & SAFETY ADMIN., REPORT OF THE SMALL BUSINESS ADVOCACY REVIEW PANEL ON OSHA'S POTENTIAL EMERGENCY RESPONSE STANDARD (Dec. 2, 2021), https://www.regulations.gov/document/OSHA-2007-0073-0115.

A. The Regulatory Flexibility Act Requires Agencies to Consider Significant Regulatory Alternatives that Achieve Their Statutory Objectives.

As an initial matter, it must be stated that small entity representatives have emphasized that the safety and health of their emergency response employees and the public is their highest priority. Indeed, many have stated that they agree with and support much of what the proposed rule attempts to accomplish. Their concerns, however, much like those the SERs expressed to the SBAR panel, stem mainly with the cost and complexity of implementing the proposed rule. Many stated that the resulting disruptions from the proposed rule would interfere with operations and create a greater hazard to employees and general public.

Advocacy notes that under the RFA, federal agencies like OSHA must consider "significant regulatory alternatives," which are defined as those that (1) achieve the agency's statutory objectives, (2) are feasible, and (3) minimize the impacts on small entities. As such, meeting OSHA's safety and health concerns are always the top priority under the RFA. However, a more flexible approach is needed. Advocacy recommends that OSHA reassess the proposed rule and consider alternative approaches that will achieve its statutory objectives while minimizing the impact on small entities.

In its current form, OSHA suggests four alternatives to the proposed rule. However, three of the four alternatives show higher costs to regulated entities (from cost increases of $7.7 million up to $164 million), which do not meet the RFA definition of significant alternatives. Further, OSHA did not adequately explain its reasoning for not adopting the rejected alternatives. Finally, it is a basic principle of RFA analysis that agencies do not use average costs (as OSHA has done) because average costs tends to shield and understate the impacts on small and very small entities. Advocacy is concerned that significant alternatives to the subcommittee framework were not properly considered for small entities. Given the high costs of the rule (up to 20 percent of profit for some emergency services according to Table VII-E-5), OSHA should revise and reconsider the alternatives to the proposed rule. Advocacy notes that following the SBAR panel, OSHA separated ESOs from WEREs and removed skilled support employers from the proposed rule.

B. OSHA Should Only Regulate Significant Risks.

OSHA's workplace safety and health standards must address significant risks of material harm that exists in the workplace.[17] While small business representatives acknowledge that emergency response is, by its very nature, a dangerous occupation with a multitude of safety and health concerns, many assert that some of the provisions in the proposed rule regulate matters that exceed significant risk and address concerns they believe are beyond OSHA's authority. These concerns include the burdensome planning and paperwork requirements included in the rule, which they assert are not safety or health related, but are geared toward managerial process. Specifically, small entities say that OSHA has included "gold standard" or "nice to have" provisions that would be acceptable if regulated entities had unlimited resources, which they do not. Many small entities also stated that OSHA's attempt to regulate matters that do not rise to the level of significant risk is arbitrary because they exceed safety and health related risks. Some of the most common concerns involve the training, medical, equipment, and vehicle provisions,

[17] 89 Fed. Reg. at 7,798.

as well as the broad incorporation of private consensus standards, which they say go well beyond what is necessary to address significant risk. Accordingly, Advocacy recommends that OSHA reassess the proposed rule and remove those elements that exceed the statutory standard of significant risk.

C. The Proposed Rule Is Not Technically Feasible for Many Small Entities.

In addition to significant risk, OSHA must consider the technological feasibility of the rule. OSHA defines technological feasibility as "whether the protective measures already exist, can be brought into existence with available technology, or can be created with technology that can reasonably be expected to be developed."[18] OSHA explains that federal courts have interpreted technological feasibility to mean that "a typical firm in (the) affected industry or application group will reasonably be able to implement the requirements of the standard in most operations most of the time," and that it is "capable of being done." For this proposed rule, OSHA says it evaluated each proposed provision to identify those that require facility and equipment aspects, as opposed to those that establish programs, processes, or procedures.[19]

While no one doubts that the equipment and technology needed to implement the proposed rule technically exists (even if at high costs), it is the required establishment of the programs, processes, and procedures that small entities find challenging. In fact, representatives from small entities said the planning and paperwork requirements in the proposed rule will overwhelm them. Several small fire chiefs said they would spend all their time preparing the various plans and reports required. Others noted that they don't have anyone else who can do the work and that there are not enough qualified consultants with the requisite knowledge and expertise to assist them, even if they had the resources to pay them. Further, many small entities have told Advocacy that the training infrastructure needed to comply with the rule is inadequate, and that it would take several years to develop it. According to a national training organization that Advocacy spoke to, it would take several years to develop and implement the training programs and infrastructure required. The same has been said for medical screening and examinations.

According to small entities, medical screenings and examinations are far more expensive than OSHA estimates and the medical infrastructure to comply is insufficient. Small employers have stated that, like with training, they would have to send their employees to distant locations or bring in medical professionals, which they do not have the resources to do. Others cited similar concerns with the lack of trained and certified automotive mechanics. For these reasons, Advocacy is concerned that the rule may be technically infeasible for many small emergency responders and is more suitable for large, urban, and well-funded organizations.

Based on these concerns, Advocacy recommends that OSHA reconsider the proposed rule and develop a standard that is truly flexible and scalable to the needs of regulated small entities and avoids unwarranted disruptions to their operations.

[18] *Id.* at 7,842.
[19] *Id.*

D. The Proposed Rule Is Not Economically Feasible for Many Small Entities.

Like significant risk and technological feasibility, OSHA is also required to demonstrate that its standards are economically feasible. OSHA explains that economic feasibility is met where "costs will not threaten the existence or competitive structure of an industry."[20] OSHA notes that "the cost of compliance is measured in relation to financial health . . . and likely effect," and that costs are economically feasible "even if they impose significant costs on regulated industries so long as they do not cause massive economic dislocations within a particular industry or imperil the very existence of the industry."[21] Advocacy is concerns that this standard of economic feasibility (i.e., causing massive dislocations or imperiling the existence of the sector) is wholly unacceptable for a regulated community that provides essential public safety and health services, and that any significant disruptions would be intolerable.

Advocacy is also concerned that the cost estimates for small entities are understated in the proposed rule. For example, the cost table VII-F-1 estimates it costs $11 - $15 for small entities to become familiar with the rule. However, it takes several hours for a regulatory professional to read and analyze the rule. Therefore, it would take substantially longer for a small entity unfamiliar with the regulatory process to become familiar with the rule. Additionally, the category of rule familiarization should not be limited to the time necessary to just read the rule, but also to understand how it impacts them. Rule familiarization should include the time a small entity spends discussing and consulting with legal and technical personnel internally and externally. Advocacy recommends that OSHA update its estimates for rule familiarization and include the costs of time spent discussing internally and with external consultants.

Advocacy also recommends a re-structuring of the initial regulatory flexibility analysis (IRFA) to improve its readability for small entities, including that all relevant analysis to the arguments made are contained within the IRFA. Presently, there are several cross-references to other sections within the IRFA, and once the reader finds those sections, there are even more cross-references needed to find the data necessary to understand and read the analysis. Additionally, the RFA tables are hard to read and time consuming to understand in the current format. Advocacy notes the limited time and resources small entities have and asks that OSHA keep all relevant small entity information and analysis within the RFA section.

As many of the SERs stated during the SBAR panel and during Advocacy's roundtables, small emergency responders lack adequate funding and many in the public sector are funded by donations and charity drives. Others noted that many states impose property tax caps that make raising property taxes impossible. Still others noted that existing federal emergency grant programs are insufficient to fund OSHA's proposed rule. Given the financial limitations of many small entities and the high costs of compliance, Advocacy recommends that OSHA revise the rule to ensure that small emergency responders can comply based on existing and realistic revenue assumptions going forward.

[20] 89 Fed. Reg. at 7,798.
[21] *Id.*

E. OSHA Should Reconsider Incorporating the NFPA Standards by Reference.

Incorporation by reference is the process through which agencies may adopt private standards in their regulations. The Office of Federal Regulations (OFR) has issued rules determining the process through which standards may be incorporated by reference. As described in 1 CFR Section 51.1, an agency's authority to incorporate by reference is derived from 5 U.S.C. Section 552(a). 1 CFR Section 51.1(a) further provides that incorporation by reference must meet two core requirements for an agency to publish a rule which incorporates by reference in the Federal Register. The matter incorporated by reference in the rule must be (1) reasonably available to the class of persons affected and (2) be approved by the Director of the Federal Register. In addition, 1 CFR Section 51.7 states that a matter itself is eligible for incorporation by reference if it is reasonably available to and usable by the class of persons affected.

Advocacy understands that the federal standard for incorporating outside materials by reference leaves broad discretion to agencies to declare what materials are "reasonably available" to the affected public regardless of price or real accessibility. However, small entities have expressed concern with OSHA's plan to incorporate some 22 NFPA standards by reference, essentially turning voluntary standards into binding federal regulation. Small entities believe the incorporation is unwarranted because the materials are too expensive (i.e., they must be purchased for a subscription) and are beyond the financial reach of many small entities (and that library access or free, single screen internet access is not adequate). Further, the materials are lengthy and highly complex, contain thousands of mandatory provisions, and reference other outside materials (such as manufacturers' manuals) that also become incorporated as binding federal regulation.

Advocacy shares these concerns. While the materials do reflect "consensus," that consensus is only among those who participated in the standard development process, which were generally large, well-funded organizations (who are able to voluntarily follow them) and others with an interest in the outcome. They do not reflect what most small entities can do, and most small entities were not included in the process. Further, these materials have not been subject to any public notice and comment process nor substantively vetted by outside entities. These concerns were voiced during the SBAR panel and Advocacy's roundtables. Small entities noted that the NFPA standards represent the "gold standard" and exceed significant risk and feasibility. Accordingly, Advocacy recommends that OSHA reconsider the proposed incorporations by reference and include all necessary provisions in the regulatory text.

F. Volunteer Fire and Emergency Response Organizations Will Be Significantly Impacted.

The issue of volunteers is and has been at the forefront of this rulemaking from the onset because small volunteer responders would be most impacted by the rule. While OSHA's jurisdiction is generally limited to the employees of employers, volunteers would subject to conforming regulation in a subset of states who treat volunteers as employees. Thus, many small entities challenge OSHA's conclusion that volunteers are not covered by the rule. They have stated that

regardless of whether volunteers are technically covered by the rule, insurance carriers and liability concerns will compel these entities to comply. Further, small entities noted that all of the planning, response, and other activities required by the rule will be carried out by volunteers in all volunteer and mixed organizations. For this reason, Advocacy recommends that OSHA presume that volunteer emergency responders will be compelled (one way or the other) to comply with the rule and develop any final standard based on this assumption.

G. Advocacy Recommends That OSHA Reassess the Proposed Rule and Further Engage Small Entities Before Proceeding.

Based on the input from small entities, Advocacy is concerned that the proposed rule is overly broad and infeasible for many small entities. The proposed rule seems designed for large, well-funded organizations and would disproportionately burden small entities. Small entities raised these concerns during the NACOSH subcommittee and SBAR panel and remain concerned that they will have difficulty complying with the rule as proposed. Accordingly, Advocacy recommends that OSHA re-engage with affected small entities before proceeding. This could be done through a formal negotiated rulemaking process or through broad outreach and small entity engagement. While many small entities have recommended that OSHA withdraw the proposed and reassess the entire rulemaking, others have suggested that OSHA pilot test the rule or implement it in pieces (to validate its need and feasibility) over an extended period of time. Advocacy would welcome the opportunity to participate in any effort to further engage small entities and obtain their input before OSHA proceeds.

Conclusion

Thank you for the opportunity to comment on OSHA's proposed "Emergency Response" rule. 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 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,

//signed//

Major L. Clark, III
Deputy Chief Counsel
Office of Advocacy
U.S. Small Business Administration

//signed//

Bruce E. Lundegren
Assistant Chief Counsel
Office of Advocacy
U.S. Small Business Administration

Copy to: The Honorable Richard L. Revesz, Administrator
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Office of Management and Budget