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VIA ELECTRONIC MAIL

The Honorable Gina McCarthy  
Administrator  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, N. W.  
Mail Code: 1101A  
Washington, DC 20460

Dear Administrator McCarthy:

EPA has announced a potential Small Business Advocacy Review (“SBAR”) panel for possible rules regarding renovation, repair and painting (“RRP”) activities in public and commercial (“P&C”) buildings, in the event EPA finds such activities cause lead-based paint hazards. (See <http://www.epa.gov/rfa/lead-pncb.html>; Docket No.: EPA-HQ-OPPT-2010-0173.) Any proposed RRP rule for P&C buildings is not expected until July 2015, while a final rule may be promulgated in 2016.

On behalf of the Commercial Properties Coalition (“Coalition”),<sup>1</sup> we are concerned that this SBAR panel is premature. We do not believe – at this time, a full year before EPA even anticipates a proposed rule and in light of the recently disclosed status of EPA’s approach to this issue<sup>2</sup> – the Agency is in a position to narrow the options for what direction or form a rulemaking

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<sup>1</sup> The Commercial Properties Coalition is an informal group of trade associations (the “Coalition”) whose members are involved in almost every aspect of commercial real estate development, ownership, management, contracting, and building product supply. Its members include: Associated Builders and Contractors; Associated General Contractors of America; Building Owners and Managers Association (BOMA) International; CCIM Institute; Independent Electrical Contractors; Institute of Real Estate Management (IREM®); International Council of Shopping Centers; NAIOP, the Commercial Real Estate Development Association; NAREIT®, the National Association of Real Estate Investment Trusts®; National Apartment Association (NAA); National Association of Home Builders (NAHB); National Association of REALTORS®; National Association of the Remodeling Industry (NARI); National Federation of Independent Business (NFIB); National Multifamily Housing Council (NMHC); the Plumbing-Heating-Cooling Contractors-National Association; The Real Estate Roundtable; and Window and Door Manufacturers Association.

<sup>2</sup> See Framework for Identifying Lead-Based Paint Hazards from Renovation, Repair and Painting Activities in Public and Commercial Buildings (May 2014) (the “Framework”). Available at

might take, or provide information to fully explain the economic impacts from such nascent regulations on small businesses. We are also concerned that EPA is not presently able to describe flexibility alternatives in sufficient detail so that small entity representatives (“SERs”) can meet their charge to provide helpful recommendations to the agency.

Under these circumstances, the Coalition respectfully submits that a panel is unlikely to succeed at identifying reasonable regulatory alternatives, as required by the Regulatory Flexibility Act (“RFA”).<sup>3</sup> Without adequate information on how EPA intends to structure any RRP regulation for P&C buildings, or establish standards to address whether renovation activities in these buildings may present lead-based paint hazards, we submit that the Agency is unable to prepare a reliable initial flexibility analysis. SERs would thus lack an adequate understanding of potential regulatory impacts, and be unable to offer regulatory alternatives that “accomplish the stated objectives of [the Toxic Substances Control Act]” while “minimiz[ing] any significant economic impact of the proposed rule on small entities.”<sup>4</sup>

### **Statutory Authorities**

The RFA gives small entities a special voice in the federal rulemaking process when their interests are significantly affected. For all rules issued by covered agencies that are expected to have a “significant economic impact on a substantial number of small entities,”<sup>5</sup> the RFA calls for an SBAR panel to assess a proposed rule’s impacts on small entities,<sup>6</sup> and to consider less burdensome regulatory alternatives to the agency’s proposed approach. EPA is a “covered agency” under section 609 of the RFA and has provided guidance on its conduct of SBAR panels.<sup>7</sup>

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<http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OPPT-2010-0173-0195>. Comments on the Framework are currently due by June 30, 2014. Through a separate letter the Coalition has requested a 30-day extension to submit comments, which we reiterate here.

<sup>3</sup> 5 U.S.C. § 601, et seq., as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA), Pub. L. 104-121 (March 29, 1996), as amended by P.L. 110-28 (May 25, 2007).

<sup>4</sup> See 5 U.S.C. § 603(c).

<sup>5</sup> 5 U.S.C. § 609(a),(b).

<sup>6</sup> Under the RFA, small entities are defined as (1) a “small business” under section 3 of the Small Business Act and under size standards issued by the SBA in 13 C.F.R. § 121.201, or (2) a “small organization” that is a not-for-profit enterprise which is independently owned and operated and is not dominant in its field, or (3) a “small governmental jurisdiction” that is the government of a city, county, town, township, village, school district or special district with a population of less than 50,000 persons. 5 U.S.C. § 601.

<sup>7</sup> See Final Guidance for EPA Rulewriters: Regulatory Flexibility Act as amended by the Small Business Regulatory Enforcement Fairness Act, OPEI Regulatory Development Series, U.S. EPA, November 2006 (“EPA RFA Guidance”), available at <http://www.epa.gov/rfa/documents/Guidance-RegFlexAct.pdf>.

Through SBAR panels, SERs have an opportunity to understand a covered agency's anticipated regulatory approach and provide meaningful recommendations to aid in the agency's RFA compliance. The process starts with the covered agency notifying U.S. Small Business Administration's Office of Advocacy ("Advocacy")<sup>8</sup> with "information on the potential impacts of the proposed rule on small entities and the type of small entities that might be affected[.]"<sup>9</sup> An SBAR panel "shall review any material the Agency has prepared in connection with this chapter, including any draft proposed rule, collect advice and recommendations of each individual small entity representative identified by the agency after consultation with the Chief Counsel, on issues related to subsections 603(b), paragraphs (3), (4) and (5) and 603(c)[.]"<sup>10</sup> Here, these statutory requirements require EPA to provide sufficient information for appointed SERs to understand the likely form of any RRP rule for P&C buildings, evaluate its potential economic impacts, and recommend alternative regulatory options to minimize adverse economic effects while preserving the Agency's TSCA responsibilities.

EPA's own RFA Guidance acknowledges that, while the RFA may not require a full blown economic analysis, the Agency "must provide some information – either quantitative or qualitative – on the potential impacts..." of a proposed regulation.<sup>11</sup> The Guidance directs EPA staff to provide "sufficient detail" at the draft analysis stage that includes assessment "of the impact on small entities and environmental benefits [for] each significant regulatory alternative

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<sup>8</sup> EPA must give every appropriate consideration to comments on a proposed or final rule submitted by Advocacy and must include, in any explanation or discussion accompanying publication in the Federal Register of a final rule, a response to Advocacy's written comments. 5 U.S.C. § 604, as amended by the Small Business Jobs Act of 2010, Pub. Law No. 111-240, Sec. 1601.

<sup>9</sup> 5 U.S.C. § 609(b)(1).

<sup>10</sup> 5 U.S.C. § 609(b)(4). In turn, Section 603(b)(3), (4), and (5) read:

"(3) a description of and, where feasible, an estimate of the number of small entities to which the proposed rule will apply;

"(4) a description of the projected reporting, recordkeeping and other compliance requirements of the proposed rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record;

"(5) an identification, to the extent practicable, of all relevant Federal rules which may duplicate, overlap or conflict with the proposed rule."

5 U.S.C. § 603(c) reads:

"(c) Each initial regulatory flexibility analysis shall also contain a description of 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. Consistent with the stated objectives of applicable statutes, the analysis shall discuss significant alternatives such as –

"(1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities;

"(2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities;

"(3) the use of performance rather than design standards; and

"(4) an exemption from coverage of the rule, or any part thereof, for such small entities."

<sup>11</sup> EPA RFA Guidance, *supra* note 6, at p. 65.

... identified that accomplishes the statutory mandate....”<sup>12</sup> The Guidance adds that “as a matter of policy, EPA typically provides information beyond the statutory minimum” – and that in previous panels, the agency has “made it a practice to provide requested information” and “honored requests for materials not already prepared” as long as the requests were reasonable and did not delay the rulemaking schedule.<sup>13</sup>

**An SBAR Panel on Hypothetical RRP Rules for P&C Buildings is Premature at this Point.**

At this juncture, it is not clear to the Coalition how EPA intends to provide the types of information that it routinely provides for other SBAR panels. With respect, the Coalition has seen no information from EPA (to date) that would allow SERs to meaningfully assess the economic impacts of a P&C RRP rule, or allow such entities to recommend regulatory alternatives.

Before it may promulgate a P&C RRP rule, the Toxic Substances Control Act (TSCA) requires EPA to determine whether “dangerous levels of lead” even exist in those buildings. EPA has repeatedly recognized that it can address renovations in public and commercial buildings through rulemaking only “to the extent such renovations create lead-based paint hazards.”<sup>14</sup> However, in its recently released Framework, EPA acknowledges it has not yet determined what human health risks (if any at all) are caused by RRP activities in P&C buildings, the necessary first step in the process.<sup>15</sup>

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<sup>12</sup> *Id.*

<sup>13</sup> For example, the following types of information have been provided to SERs prior to convening recent SBAR panels:

- Fact sheets about the RFA and panel process
- Power points about the rulemaking and outreach
- Descriptions of the regulatory standards
- Economic analysis of the potential costs to small businesses
- Comparison charts for the rule
- White and issue-specific papers on the rule
- Six-year review information
- Memo summarizing the initial draft rule revisions
- Analysis of pollution measures
- Information on the technologies and their costs
- Tables showing numbers of facilities (and number owned by small entities) affected by rule alternatives
- Information about the compliance alternatives
- Description of previous and comparable rules
- Examples of estimated costs of technologies to small businesses
- What regulatory alternatives might be considered by the panel
- Questions and request for comments by SERs.

<sup>14</sup> *See, e.g.*, 77 Fed. Reg. at 76,997 (Dec. 31, 2012).

<sup>15</sup> Framework, at pp. 5-6 (“The determination of *whether or not* a health effect is adverse *would be informed* by a variety of considerations including available scientific literature, measurability, frequency of occurrence, biological significance, etc.”) (emphasis supplied).

To our knowledge, EPA has not performed the preliminary tasks necessary to convene a meaningful SBAR panel. The Coalition remains unaware of any data or study showing that a single renovation project in a commercial building has exposed children or other sensitive populations to lead paint dust. There appear to be no data or evidence presented at this point in the rulemaking – peer reviewed or otherwise – that RRP activities in P&C buildings create lead-based paint hazards. Because any lead-based paint hazards that may result from commercial renovation and remodeling activities are still unknown (if they exist at all), EPA is not sufficiently positioned to develop proposed alternatives for SERs to assess how the Agency may regulate those activities.

With only generalized statements and hypotheticals of possible means by which EPA may determine the presence of lead-based paint hazards in P&C buildings<sup>16</sup> – and then craft RRP rules thereafter – the Coalition respectfully believes that the Agency is not ready to convene an SBAR panel this summer. We are not confident that SERs will be provided with a factual basis upon which they could assess potential impacts of any new RRP rule, even if they had the time and resources to conduct such an analysis and could successfully predict EPA’s preferred regulatory approach.<sup>17</sup> Nothing in the proposed Framework satisfies the RFA in describing or estimating the number of small entities that would be affected by a proposed RRP rule for commercial buildings; recordkeeping or other compliance requirements; the type of professional

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<sup>16</sup> The Framework’s “Hazard Evaluation” section is replete with “woulds,” “coulds,” and “predictions” based on unexplained “modeling” approaches that EPA acknowledges are still under development and have not been independently peer-reviewed, to determine whether RRP activities in P&C buildings cause a prerequisite “hazard” that must underpin any ultimate rules:

Under this approach, EPA *would* evaluate whether or not exposure to leaded dust from specific renovation scenarios in P&CBs *would* result in the health effects identified as adverse. For those that do, EPA *would* determine that lead-based paint hazards are created. To perform this analysis, EPA *would* assess elevations in lead exposure resulting from a broad range of scenarios, ... which are designed to be reflective of actual P&CB settings. EPA *could* evaluate those exposures to both children and adults ... . For those scenarios where our *modeling predicts* that the magnitude of the health effect change due to the renovation activity is significant enough to be adverse, EPA *would* make the finding that lead-based paint hazards are created. EPA *would* consider how to generalize the results of the analysis and craft any regulatory requirements to apply only to those renovation activities and P&CB categories where exposure is reflective of the modeled scenarios in which a hazard was found.

Framework, § 3.2 at p. 6 (emphasis supplied).

<sup>17</sup> As the Coalition explained in comments filed on April 1, 2013, several “studies” cited by EPA as potentially relevant to lead-based paint hazards from renovation activities expressly state they have *no* relevance to P&C buildings. (Comments at 21-24). These inadequate studies were also raised at EPA’s June 26, 2013 public meeting. (See meeting transcript at 128-135, available at <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OPPT-2010-0173-0194>.) Based on the Coalition’s review, the only non-residential buildings considered across the many studies offered by EPA to the Senate were a 1967 school building, and a 150-year old business. Certainly, these studies could not form the basis for SER review for an SBAR panel on the topic of possible RRP rules in public and commercial buildings.

skills that would be required for regulatory compliance; or any possible exemptions from a rule's coverage.<sup>18</sup>

### Conclusion

The Coalition believes that input from small entities will be valuable in this important rulemaking. We want to ensure SERs are able to contribute effectively to the process that may result in RRP rules for public and commercial buildings. However, we are concerned that representatives will not receive enough information from EPA to project how the agency will structure any ultimate regulation. As a result, SERs will be unable to understand potential impacts of the rulemaking or make useful recommendations about regulatory alternatives that would minimize the impacts on small entities while fulfilling EPA's goals.

In the absence of information sufficient for SERs to appreciate the impact of the proposed rule and to identify regulatory options that would fulfill EPA's statutory objectives, the Coalition believes that convening this panel is premature. EPA should delay this panel until it has a clearer set of available regulatory options and potential impacts available for discussion and analysis.

Sincerely,

CLARK HILL PLC



Jane C. Luxton

Counsel to the Commercial Properties Coalition

cc: Hon. Howard Shelanski  
Hon. Winslow Sargeant  
Mr. Hans Scheifele  
EPA Docket EPA – HQ – OPPT – 2010 – 0173

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<sup>18</sup> *Supra* note 9. The Coalition is mindful that EPA perhaps feels compelled to move forward with an SBAR panel in 2014 based on commitments it has made in a court settlement agreement. However, deadlines agreed to by litigants cannot relieve the Agency of its statutory RFA obligations to ensure a robust SBAR panel or provide sufficient information to ensure meaningful SER representation. If EPA is not yet at the point to satisfy the RFA and gather useful SER input, then it may decide to renegotiate prior lawsuit deadlines – rather than stick to a pre-set schedule for an SBAR process for which it is not ready.