

Congress of the United States  
U.S. House of Representatives  
Committee on Small Business  
2501 Rayburn House Office Building  
Washington, DC 20515-0515

August 21, 2018

The Honorable R. Alexander Acosta  
Secretary  
United States Department of Labor  
200 Constitution Avenue, NW  
Washington, DC 20210

Ms. Loren Sweatt  
Deputy Assistant Secretary  
Occupational Safety and Health Administration  
200 Constitution Avenue, NW  
Washington, DC 20210

Dear Secretary Acosta and Deputy Assistant Secretary Sweatt:

Pursuant to Rules X and XI of the U.S. House of Representatives, the Committee on Small Business is conducting oversight over the Occupational Safety and Health Administration's (OSHA) Cranes and Derricks in Construction regulation.<sup>1</sup> As part of this inquiry, the Committee requests a thorough review of the scope of the regulation and proper analysis of the impact on small businesses, as required by the Regulatory Flexibility Act (RFA).<sup>2</sup>

The Committee is concerned about the potential significant burdens OSHA's Cranes and Derricks in Construction regulation could impose on small agricultural and propane businesses and the customers served by these important industries. The Committee requests that OSHA review the application of this regulation to the delivery and retrieval of propane containers and the compliance costs for small businesses before OSHA conducts any other rulemaking activity related to this regulation.

During the June 21, 2018 House Small Business Subcommittee on Agriculture, Energy, and Trade hearing titled, "*Accelerating Agriculture: How Federal Regulations Impact America's Small Farmers*," witnesses voiced concerns about the considerable impact of the regulation and questioned the justification to apply a construction industry standard to the simple, routine delivery of a propane

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<sup>1</sup> Cranes and Derricks in Construction; Final Rule, 75 Fed. Reg. 47,905 (Aug. 9, 2010) (to be codified at 29 C.F.R. pt. 1926). The compliance deadline for the rule was delayed twice by OSHA, and the current compliance deadline is November 10, 2018. On May 21, 2018, OSHA published a new proposed rule to add an ongoing duty for employers to qualify, or train, employees who operate cranes. See Cranes and Derricks in Construction: Operator Qualification, 83 Fed. Reg. 23,534 (proposed May 21, 2018) (to be codified at 29 C.F.R. pt. 1926).

<sup>2</sup> Regulatory Flexibility Act of 1980, Pub. L. No. 96-354, 94 Stat. 1164 (codified at 5 U.S.C. §§ 601-12).

tank by a truck-mounted crane.<sup>3</sup> In addition, more than 1,000 individuals submitted comments on the impact to their businesses in response to OSHA’s May 21, 2018 Notice of Proposed Rulemaking (NPRM) to amend the regulation.<sup>4</sup>

The Committee is concerned about the lack of clarity on the basis and the impact of this regulation on small businesses that deliver propane containers. In a 2016 Letter of Interpretation, OSHA indicated that the act of connecting a container to a piping system causes regulation of the tank delivery by a truck-mounted crane.<sup>5</sup> In response to a request for clarification by Members of Congress, OSHA stated that propane tank deliveries by a truck-mounted crane are subject to this regulation when placed in a specific position.<sup>6</sup> OSHA’s recent notice of proposed rulemaking did not address these different scenarios.

Despite these and other communications with OSHA by members of the propane industry, the recent notice of proposed rulemaking stated that “the Agency has preliminarily concluded that, for purposes of the Regulatory Flexibility Act, the proposed rule would not have a significant economic impact on a substantial number of small entities.”<sup>7</sup>

Congress recognized that by treating all regulated businesses, organizations, and governmental jurisdictions as equivalent in the regulatory process, small entities were being disproportionately impacted by federal regulations and a one-size-fits all approach was not always the best solution.<sup>8</sup> The Regulatory Flexibility Act (RFA) requires agencies to consider how their proposed regulations will impact small entities and applies to every federal rule, both proposed and final, for which an agency must conduct notice-and-comment rulemaking as required by section 553 of the Administrative Procedure Act or any other law.<sup>9</sup>

Under the RFA, if the agency determines that the proposed regulation will have a “significant economic impact on a substantial number of small entities,” then the agency must prepare and make available for public comment an initial regulatory flexibility analysis (IRFA).<sup>10</sup> The IRFA must contain an analysis of how the proposed rule will impact small entities and examine alternatives that will reduce the impact while still achieving statutory and regulatory objectives.<sup>11</sup> The agency must also complete a Small Business Advocacy Review Panel before the rule is proposed.<sup>12</sup> Similarly,

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<sup>3</sup> See *Accelerating Agriculture: How Federal Regulations Impact America’s Small Farmers: Hearing Before the Subcomm. on Agriculture, Energy, & Trade of the H. Comm. on Small Bus.*, 115th Cong. (2018) (statement of Craig Martins, Operations Manager, Three Rivers FS), available at [https://smallbusiness.house.gov/uploadedfiles/6-21-18\\_martins\\_testimony.pdf](https://smallbusiness.house.gov/uploadedfiles/6-21-18_martins_testimony.pdf).

<sup>4</sup> See *Safety Standards for Cranes and Derricks in Construction*, REGULATIONS.GOV, <https://www.regulations.gov/docket?D=OSHA-2007-0066> (last visited Aug. 10, 2018).

<sup>5</sup> Letter of Interpretation from Jeffrey A. Erskine, Acting Director, Directorate of Construction, Occupational Safety & Health Admin., to Robert F. Helminiak, Director, Regulatory Affairs, Nat’l Propane Gas Ass’n. (June 27, 2016) (available at <https://www.osha.gov/laws-regs/standardinterpretations/2016-06-27>).

<sup>6</sup> Letter from Loren Sweatt, Deputy Assistant Secretary, Occupational Safety & Health Admin., to the Honorable Robert E. Latta, U.S. House of Representatives (Oct. 19, 2017) (on file with Committee).

<sup>7</sup> *Cranes and Derricks in Construction: Operator Qualification*, 83 Fed. Reg. 23,534, 23,535 (proposed May 21, 2018) (to be codified at 29 C.F.R. pt. 1926).

<sup>8</sup> Regulatory Flexibility Act of 1980, Pub. L. No. 96-354, § 2, 94 Stat. 1164, 1164–65 (codified at 5 U.S.C. §§ 601–12).

<sup>9</sup> 5 U.S.C. § 601(2).

<sup>10</sup> 5 U.S.C. § 603(a).

<sup>11</sup> *Id.* § 603(b).

<sup>12</sup> *Id.* § 609.

when the agency issues a final rule that will have a significant impact on a substantial number of small entities, it must publish a final regulatory flexibility analysis (FRFA), which includes a similar analysis to the IRFA while revising it to reflect any comments received during the comment period.<sup>13</sup>

Alternatively, if the agency determines that the rule will not have a significant impact on a substantial number of small entities, the head of the agency may “certify” the rule and bypass the IRFA and FRFA requirements (commonly referred to as the “certification”).<sup>14</sup> The certification must be published and available for public comment, along with “a statement providing the factual basis for such certification.”<sup>15</sup>

The recent testimony before the House Small Business Subcommittee and the more than 1,000 comments by propane industry representatives demonstrate that small entities are significantly affected by the regulation. The propane industry estimates that compliance with the regulation will cost more than \$3,000 per employee. With approximately 40,000 employees currently in the industry, the regulation would impose more than \$151 million in compliance costs every five years,<sup>16</sup> money that could instead be used by small business owners to expand and grow their businesses.

Therefore, the Committee asks for a thorough review of the scope of the Cranes and Derricks in Construction regulation and the simple activity of propane tank delivery and retrieval. Additionally, the impact on small businesses should be assessed properly, as required by the RFA.

If you have any questions about this request, please contact Stephanie Fekete, Counsel for the Committee, at (202) 225-5821. Thank you for your attention to this matter.

Sincerely,



Steve Chabot  
Chairman  
Committee on Small Business



Rod Blum  
Chairman  
Subcommittee on Agriculture,  
Energy, and Trade



Trent Kelly  
Chairman  
Subcommittee on Investigations,  
Oversight, and Regulations

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<sup>13</sup> *Id.* § 604(a).

<sup>14</sup> *Id.* § 605(b).

<sup>15</sup> *Id.*

<sup>16</sup> Nat'l Propane Gas Ass'n., *Comment to Occupational Safety & Health Administration on Cranes and Derricks in Construction: Operator Qualification* {Docket No. OSHA-2007-0066}, 3 (July 5, 2018), [http://www.npga.org/wp-content/uploads/2018/07/NPGA-Comment\\_2018\\_OSHA-NPRM.pdf](http://www.npga.org/wp-content/uploads/2018/07/NPGA-Comment_2018_OSHA-NPRM.pdf).