

**COMMENTS OF THE COMMERCIAL PROPERTIES COALITION
ON EPA'S PROPOSED INFORMATION COLLECTION REQUEST
REGARDING LEAD RENOVATION, REPAIR AND PAINTING
ACTIVITIES IN PUBLIC AND COMMERCIAL BUILDINGS**

February 4, 2014

I. INTRODUCTION AND COALITION DESCRIPTION

Thank you for the opportunity to comment on EPA’s proposed information collection request (“ICR”) regarding lead-based paint renovation, repair, and painting (“RRP”) activities in public and commercial (“P&C”) buildings. These comments are submitted by the Commercial Properties Coalition (the “Coalition”), an informal group of trade associations that represent companies involved in almost every aspect of commercial real estate development, construction, ownership, management, contracting, renovation, and building product supply. Attachment 1 describes the mission and membership of each participating organization in more detail.¹

The Coalition’s member companies (many of which are small businesses) would be significantly affected by any RRP program for P&C buildings. The viability of the commercial real estate sector depends on constructing, owning, and maintaining buildings in a manner to safeguard the health and well-being of employees, workers, tenants and occupants. Above and beyond regulatory mandates, the Coalition’s member companies routinely seek voluntary certification and accreditation of their offices, apartment buildings, stores, plants, hotels and other structures to ensure that they are sustainable, efficient – and healthy. Accordingly, the Coalition has a substantial interest in the ICR, any finding under Section 403 of the Toxic Substances Control Act (“TSCA”) regarding potentially “dangerous levels of lead” in the building stock at issue, and any additional regulations that will expand federal programs covering RRP activities within and on the exterior of P&C buildings. If EPA obtains White House approval to proceed with the ICR, Coalition member firms are likely to be randomly selected to participate in telephone interviews and complete survey instruments.

The Coalition has had a longstanding interest in RRP matters. It has participated in earlier phases of public engagement regarding P&C buildings, most recently at a hearing held by EPA on June 26, 2013.² We also incorporate by reference our comments filed on April 1, 2013, in response to EPA’s request for information (hereafter, “April 1, 2013, Comments”);³ 2010 comments to EPA’s advanced notice of proposed rulemaking;⁴ and 2010 comments regarding a

¹ The Coalition’s members are: 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. See Attachment 1.

² Hearing transcript available at <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OPPT-2010-0173-0194>.

³ Available at EPA’s on-line regulatory docket at <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OPPT-2010-0173-0154>.

⁴ Available at <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OPPT-2010-0173-0074>.

proceeding before EPA's Science Advisory Board.⁵ Many of the larger themes and points we made in our earlier filings are raised again here, as they remain unaddressed by EPA and are relevant to the proposed ICR.

II. SUMMARY

For a number of reasons, it is imperative for the Coalition's member firms to own, manage and construct healthy, safe, and desirable buildings. They have earned their reputations as environmental stewards, and must be vigilant in responding to ever increasing demands of tenants and investors seeking socially and environmentally responsible leasing and investment opportunities. Our members thus take pride in the building certifications they receive from EPA in its ENERGY STAR program, and the corporate and building "labels" they obtain from a variety of organizations to signify their commitment to safeguard the environment for future generations. If toxic or hazardous conditions exist in our members' buildings, the Coalition wants to know what those hazards are, where they exist, and what should be done to address them.

The Coalition is aligned with EPA insofar as the ICR represents an effort to gather factual data to inform the agency as to whether there is need for a new program regulating the public and commercial real estate and contracting sectors of the U.S. economy. We commend EPA for recognizing that it has significant data gaps to fill before it can determine whether to regulate RRP activities in P&C buildings and, if so, what type of regulation may be warranted.⁶ We appreciate EPA's willingness to utilize the tools at its disposal, such as an ICR, to "fill some of the key data gaps."⁷ However, we believe EPA is putting the cart before the horse in seeking to issue the proposed ICR, for the reasons set forth below. We offer our comments in the spirit of assisting EPA to fulfill its responsibilities under TSCA, the Paperwork Reduction Act ("PRA"), and the Administrative Procedure Act. In particular, should EPA ultimately proceed with an ICR, we submit our comments to help ensure that EPA does all it can to satisfy its statutory obligations under the PRA to minimize the public's response burden and maximize the practical utility of collected information.

The Coalition recommends as follows:

1. In framing the ICR, EPA is asking the wrong questions at this juncture. As a threshold matter, EPA must determine whether a lead hazard exists in P&C buildings. Routine maintenance and repair, painting, and other renovations are conducted on a regular basis in the public and commercial building stock. The critical question is not whether these activities are performed, but whether they create lead hazards.
2. EPA should practicably minimize the response burden on the public by first gathering information through a plan of outreach and coordination with federal government

⁵ Attachment 3 to the Coalition's April 1, 2013, available at <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OPPT-2010-0173-0154>.

⁶ See "Supporting Statement for a Request for OMB Review Under the Paperwork Reduction Act" ("ICR Supporting Statement"), at 3.

⁷ *Id.*

building owners and managers. These entities will likely have the information EPA seeks to collect regarding RRP activities. Obtaining such information from federal sources will allow for a more refined and less burdensome ICR that may be sent to non-governmental entities.

3. Any proposal to survey owners, managers, lessors, lessees, and contractors that are engaged in RRP activities in P&C buildings should rely on improved sampling techniques and questionnaire instruments to generate data of “practical utility.”

III. DISCUSSION

A. **Without a predicate determination from EPA as to whether RRP activities in P&C buildings cause a lead-based paint hazard in the first place, the proposed ICR cannot be relied upon to produce useful information and therefore does not comport with the PRA’s “practical utility” requirement.**

In preparing to issue the residential RRP rule, EPA and the U.S. Department of Housing and Urban Development (“HUD”) relied upon numerous studies that examined target housing for the presence of lead-based paint (“LBP”), the condition of painted “impact” surfaces, the presence of dust in window wells and floors, and chipped paint residue in the exterior perimeter of the house.⁸ These studies were conducted by federal agencies or with federal grant support, and thoroughly analyzed the nature and extent of lead in the housing stock and the relationship between lead exposure and blood lead levels in children. This body of research formed the basis for the federal regulations that guide RRP activities in privately owned and federally assisted housing built before 1978. However, *no comparable research foundation has been established for P&C buildings.*

EPA has repeatedly acknowledged, and the statute makes clear, that it has no TSCA authority to regulate renovation and remodeling activities in P&C buildings *per se*. Rather, it has regulatory authority over RRP activities only to the extent they cause a lead-based paint hazard.⁹

⁸ See, e.g., U.S. EPA, Report on the National Survey of Lead-Based Paint in Housing, Washington, DC: EPA 747-R-95-003 (1995); U.S. Department of Housing and Urban Development (“HUD”) Task Force on Lead-Based Paint Hazard Reduction and Financing, “Putting the Pieces Together: Controlling Lead Hazards in the Nation’s Housing—Final Report,” Washington, DC, HUD-1542-LBP (1995); U.S. EPA, Standards for the Identification of Dangerous Lead Levels, 40 CFR Part 745 Subpart D, 66 Fed. Reg. 1205 (2001); U.S. EPA, “Risk Analysis to Support Standards for Lead in Paint, Dust and Soil,” Appendix B – “Health Effects Associated with Exposure to Lead and Internal Lead Doses in Humans,” and Appendix C1 – “Characterizing Baseline Environmental Lead Levels in the Nation’s Housing Stock, Washington, DC, EPA 747-R-97-006 (2001); U.S. EPA, “Risk Analysis to Support Standards for Lead in Paint, Dust and Soil: Supplemental Report,” EPA 747-R-00-004 (2000); U.S. HUD, “The Relationship of Lead Contaminated House Dust and Blood Lead Levels Among Urban Children” (vols. I and II), “Final Report to HUD from the University of Rochester School of Medicine, Rochester, NY and the National Center for Lead Safe Housing, Columbia, MD (1995); Clark, CS, *et al.*, “Condition and Type of Housing as an Indicator of Potential Environmental Lead Exposure and Pediatric Blood Lead Levels,” *Environmental Research* 38:46-53 (1985); Lepow, ML, *et al.*, “Investigations into Sources of Lead in the Environment of Urban Children.” *Environmental Research* 10:415-426 (1975).

⁹ See, e.g., Amended Litigation Settlement Agreement ¶ 2 (Sept. 7, 2012) (“Unless EPA notifies Petitioners that it has concluded that renovation activities in pre-1978 [P&C] buildings do not create a lead-based paint hazard,” EPA will propose work practices standards applicable to renovation activities in those buildings) (emphasis supplied); 77 Fed. Reg. at 76,997 (Dec. 31, 2012) (EPA can regulate LRRP activities in public and commercial buildings only “to the extent such renovations create lead-based paint hazards”); 78 Fed. Reg. at 73,521 (Dec. 6,

Without first making such a “hazard” finding under TSCA section 403 with regard to P&C buildings, the ICR cannot be expected to gather useful information, a requirement under the PRA’s “practical utility” criterion.¹⁰ In fact, EPA must “certify” that information collected through the ICR “is necessary for the proper performance of the functions of the agency, including that the information has practical utility....”¹¹

One of the PRA’s enumerated purposes is to “ensure the greatest possible benefit from and maximize the utility of the information created, collected, maintained, used, shared and disseminated by or for the Federal Government.”¹² The Act intends to “improve the quality and use of Federal information to strengthen decision making,” and the OMB Director (acting through the Office of Information and Regulatory Affairs [“OIRA”]) bears the responsibility to “maximize the practical utility of and public benefit from information collected by or for the federal government....”¹³

The information gathering process that EPA is pursuing must be improved to satisfy these PRA objectives. According to the Supporting Statement: “If EPA determines that a [P&C LRRP] regulation is needed, the Agency will use [any ICR] data”¹⁴ That is, if the agency determines *no* regulation is needed, then the agency would *not* use the data – and any data thus collected through the ICR will have no practical utility. The public will have been burdened in responding to the ICR for no lawfully recognized purpose.

Accordingly, before EPA can regulate LRRP activities in P&C buildings or collect information from the public that may justify such a regulation, it must first develop a TSCA section 403 rule to identify whether “dangerous levels of lead” exist in the commercial real estate stock.¹⁵ The Coalition’s April 1, 2013, Comments explained:

2013) (“EPA has initiated a proceeding to investigate whether and what type of regulatory action might be appropriate to control exposures to lead dust resulting from [LRRP activities in P&C buildings]” (emphasis supplied); ICR Supporting Statement at 1 (“If EPA determines that a [P&C LRRP] regulation is needed, the Agency will use [any ICR] data”) (emphasis supplied); ICR Supporting Statement at 3 (“Under the terms of the amended litigation settlement agreement [dated Sept. 7, 2012] ... EPA has agreed to either sign a proposed rule covering RRP activities in [P&C buildings], or determine that these activities do not create LBP hazards”).

¹⁰ 44 U.S.C. § 3504(c)(4). “The term ‘practical utility’ means the ability of an agency to use information, particularly the capability to process such information in a timely and useful fashion” *Id.* § 3502(11).

¹¹ *Id.* § 3506(c)(3)(A).

¹² *Id.* § 3501(2).

¹³ *Id.* § 3506(c)(3)(A).

¹⁴ ICR Supporting Statement, at 1 (emphasis supplied).

¹⁵ TSCA § 402 (c)(3), 15 U.S.C § 2682(c)(3). The statute defines a “lead based paint hazard” as a “condition that causes exposure to lead... that would result in adverse human health effects as established by the EPA under this subchapter,” TSCA § 401(10). And to the extent that EPA may now be seeking to base a lead-based paint hazard for P&C buildings on adult, rather than child-targeted exposures, it has made no determination of what levels of exposure would constitute such a hazard or whether it exists in P&C buildings.

Further delimiting the scope of EPA’s regulatory authority, a conjunctive reading of TSCA sections 402 and 403 reflects an expected sequence for agency action – requiring EPA first to promulgate regulations that “identify ... lead-based paint hazards,” the results of which are then to be used in determining whether “to apply the regulations to renovations...” in public and commercial buildings, or, alternatively, to determine that certain categories of renovation do not require regulation.¹⁶

The thrust of the ICR should be modified to ensure that it does not leapfrog over the predicate 403 “hazard” determination. EPA proposes to collect information on RRP activities that it may ultimately regulate – as if the “hazard” finding is a foregone conclusion. The Supporting Statement acknowledges: “The primary purposes of this survey include estimating the baseline usage of particular work practices, and how this usage varies with the type of RRP job; determining the number of firms that perform RRP activities in [P&C buildings]; and determining the types and numbers of RRP activities that are performed.”¹⁷ The secondary purpose of the ICR is to “collect information on how the proportion of jobs that use particular practices differs between different types of firms.”¹⁸ Beyond such “baseline work practice data, the survey will collect information on the number of contractors that are already trained and certified under the existing [residential] RRP Program.”¹⁹ For paperwork reduction purposes, however, there is no practical utility to collect “baseline data” on work practices and trained residential contractors if no lead-based paint hazard in P&C buildings is found to exist – because no work practice regulations will be necessary (or lawful) in the absence of a TSCA section 403 hazard determination.

The Supporting Statement and questionnaire instruments themselves evidence that EPA would collect data on RRP activities disconnected from any possible lead-based paint hazard. The Supporting Statement sets forth 14 “key” pieces of information that the ICR would collect.²⁰ The 11th listed “variable” is “LBP Testing,” where “Respondents will be asked about whether they tested for LBP and if so, whether or not the test indicated the presence of LBP.”²¹ Similarly, Question 10 (second to last) of the “Manager/Lessor Survey Questionnaire” asks the respondent: “To your knowledge, has the building we’ve been discussing ever been tested for the presence of lead-based paint?”²² If a building tested positive for the presence of lead paint,

¹⁶ April 1, 2013, Comments at 53-54.

¹⁷ ICR Supporting Statement, at 3.

¹⁸ *Id.*

¹⁹ *Id.* None of EPA’s stated “primary” or “secondary” objectives of the questionnaires are to support a possible 403 hazard determination as the predicate to justify regulation of P&C LRRP activities. *Id.* at 17.

²⁰ ICR Supporting Statement, at 17-20. These include “Respondent Identification,” “Firm Type and Size,” “Recent Job” descriptions about a “single RRP activity type,” “Paint Removal Techniques,” “Contaminant” practices related to dust, “Cleanup,” and “Baseline RRP Certification,” among others.

²¹ *Id.* at 20.

²² Manager/Lessor Survey Questionnaire, ICR Attachment 4, at 6. Likewise, the second-to-last question of the “Building Occupant Survey Questionnaire,” (ICR Attachment 5, at 8) asks, “To your knowledge, has the building we’ve been discussing ever been tested for the presence of lead-based paint?” Similarly, the 12th question of the

or if a respondent otherwise believes or knows that lead-based paint exists in the building, it would be useful to gather information on RRP practices. However, if a respondent states that lead-based paint does not exist in the commercial structure or is otherwise unsure of its presence, then any interview or questionnaire response should stop there. Subsequent questioning would gather information on RRP activities that lack practical utility – because EPA lacks authority to regulate such activities without a section 403 showing that they create lead-based paint hazards.

The PRA’s spirit and objectives more clearly require a decision-making sequence that first requires EPA to determine if additional regulation of RRP activities is indeed necessary – and then gather information on those activities to specify the type, breadth, and specifications for any renovation, repair and painting work practices in P&C buildings. Without pursuing this logical path, any OMB approval here runs the risk of failing to “maximize” the utility of ICR-gathered data. And EPA would collect information that is not “necessary for the proper performance”²³ of its limited regulatory role within TSCA’s structure to regulate only RRP activities that are found to create a lead-based paint hazard.

Finally, EPA may not rely on the lead-based paint hazard finding it has already made for residential RRP purposes, and somehow bootstrap that determination to conclude that commercial RRP activities are hazardous. The TSCA 403 residential rule states: “[I]t is important to emphasize that this rule only applies to pre-1978 target housing and certain child-occupied facilities, and that *these standards were not intended to identify potential hazards in other settings.*”²⁴ Likewise, a panel of EPA’s Science Advisory Board (“SAB”) has recognized that there is “insufficient data concerning lead dust exposures in commercial or public buildings to support a reliable standard.”²⁵ The Coalition strongly cautions against a reductive approach that relies upon studies conducted in residential settings to somehow buttress any P&C RRP program.

Should EPA first develop a 403 hazard rule for the P&C stock, it might then administer an ICR of practical utility to gather information on RRP activities in those buildings. But the agency is not at that critical juncture.²⁶ The Coalition accordingly believes that the proposed

“Contractor Survey Questionnaire” (ICR Attachment 3, at 22) is a two-part question that asks, “[D]id the test indicate there was lead-based paint?”

²³ 44 U.S.C. § 3506(c)(3)(A).

²⁴ *Lead; Identification of Dangerous Levels of Lead*, 66 Fed. Reg. 1,206, 1,211 (Jan. 5, 2001) (emphasis supplied).

²⁵ *EPA Science Advisers Urge Tough Lead Dust Cleanup Requirements*, Inside EPA.com (July 13, 2010), (used with permission), Attachment 4 April 1, 2013, Comments, available at <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OPPT-2010-0173-0154>.

²⁶ The Coalition believes EPA has yet to develop a record to justify a section 403 hazard finding for LRRP activities in P&C buildings. Our April 1, 2013, Comments set forth a detailed examination of “studies” cited by EPA, in response to questions for a Senate hearing record, as potentially relevant to lead-based paint hazard issues in P&C buildings (Comments at 21-24). These 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>.) Several of EPA’s cited studies expressly state that they provide no basis to draw conclusions about LBP issues in public and commercial buildings. Further, 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.

ICR does not meet the “practical utility” standard under the PRA. At a minimum, EPA should restructure the survey to begin with a question on whether a property is known to contain lead paint; if the response indicates the answer is no, the survey should be terminated.

B. Federal agencies maintain P&C buildings of varying purposes, sizes, ages, and geographic distribution and thus form a reliable cohort to provide a comprehensive catalogue of the RRP activities conducted in a range of P&C buildings. Before sending an ICR to the public (including many small businesses), EPA should collect renovation and remodeling information from readily accessible federal government sources and thereby minimize the public’s response burden.

The PRA’s overriding objective is to ensure that the public’s burden when responding to a federal ICR must be kept to a minimum. The first purpose of the PRA is to “minimize the paperwork burden” for individuals, businesses, contractors, non-federal government bodies, and other entities “from the collection of information by or for the Federal Government.”²⁷

To meet this objective, Congress charged the OMB Director (acting through OIRA) to coordinate review of ICRs “with a particular emphasis . . . to reduce information collection burdens on the public . . .”²⁸ Like all federal agencies, EPA must “ensur[e]” satisfaction of the PRA’s goals – including the paramount aim to minimize the public’s ICR burdens.²⁹ When collecting information, EPA must also “develop a plan” that furthers paperwork reduction objectives such as public burden minimization.³⁰ Moreover, the OMB Director, in consultation with the EPA Administrator and other department heads, is obliged to set annual goals that “represent the maximum practicable opportunity” to reduce the data collection burdens borne by the public.³¹

Respectfully, the Coalition believes that EPA must go further to minimize the burden it would impose on the public in responding to the ICR at issue. The RRP program that EPA contemplates would regulate commercial buildings owned, managed and occupied *by the federal government*, as well as non-federal and private sector structures. However, EPA has yet to explain what, if any, steps it has taken to collect information sought by the ICR from the federal buildings community. As the U.S. government *owns* the most buildings in the country, and *leases* the most commercial space across the nation, federal agencies are the most logical and efficient first stop for EPA to gather lead paint and work practices information before the public is screened, surveyed, and questioned. Considering the breadth and diversity of the federal

²⁷ 44 U.S.C. § 3501(1). PRA regulations define “burden” to mean the “total time, effort or financial resources expended by persons to generate, maintain, retain or disclose or provide information to or for a Federal agency . . .” 5 C.F.R. § 1320.3(b).

²⁸ *Id.*, § 3503; § 3504(c)(2).

²⁹ *Id.*, § 3506(a)(3).

³⁰ *Id.*, § 3506(c)(1)(A)(iii).

³¹ *Id.*, § 3505(a)(1)(A)(i).

government's commercial real estate stock, gathering lead-based paint information from federal owners and occupants would minimize the public's burden to provide the same information.

Surprisingly, EPA's Supporting Statement does not mention any efforts whatsoever to obtain RRP information from federal departments. The Coalition has repeatedly offered to assist EPA in coordinating with its sister agencies and to follow-up on our own outreach that we have started with federal facilities staff.³² Indeed, our April 1, 2013, Comments strongly urged EPA to coordinate with federal facilities owners and managers to study their buildings for any lead-based paint hazards, identify actual renovation projects in these structures, and assess the effectiveness of associated work practices. The Coalition's earlier comments cited a letter from Senators Vitter, Inhofe, Crapo and Fischer to EPA, which explained that "[t]he massive stock of federal buildings can serve as a laboratory to develop any Public & Commercial LRRP rule and help assure a sound, scientific, and fact-based record," and further recognized:

[T]he General Services Administration ("GSA") is the nation's largest public real estate organization and provides workspace in commercial buildings for more than 1 million federal workers through its Public Buildings Services ("PBS"). PBS's commercial real estate portfolio covers over 8,100 leases in excess of 171 million square feet, and 1,500 government-owned buildings, across the nation. Likewise, the infrastructure of the Department of Defense ("DoD") encompasses several hundred thousand buildings at more than 5,000 different locations or sites. The footprint of the Veterans Administration ("VA") is marked by 5,500 buildings and 1600 leases totaling approximately 142 million square feet, with an average age approaching 60 years. And, the Architect of the Capitol ("AoC") is responsible to the U.S. Congress and Supreme Court to maintain and operate 17.4 million square feet of buildings on Capitol Hill.³³

Among other suggestions, the Coalition recommended that EPA contact the Architect of the Capitol with regard to solicit information regarding the rehabilitation of the Capitol Dome and the imminent "top-to-bottom renewal of the [U.S. House] Cannon Building."³⁴ Certainly, these renovation, repair, and painting projects on Capitol Hill can provide EPA with work practices information sought by the ICR – without burdening the public. The Coalition is not

³² To raise awareness regarding EPA's efforts to collect information regarding a potential RRP rule for P&C buildings, Coalition members have met with and conducted outreach to the General Services Administration, Office of the Secretary of Defense, the Naval Facilities Engineering Command, the Department of Veterans Affairs, and the multiple federal agencies that participate in the Whole Building Design Guide program administered by the National Institute of Building Sciences, among others. See Coalition's April 1, 2013, Comments, at 24-25.

³³ *Id.* at 4. The letter from Senators Inhofe, Vitter, Crapo and Fischer is Attachment 6 to the Coalition's April 1, 2013 Comments, available at: <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OPPT-2010-0173-0154>.

³⁴ April 1, 2013, Comments, at 52-53.

persuaded that information on commercial LLRP activities “is not available from any readily accessible source.”³⁵ The federal government is such a source.

Our April 1, 2013, Comments also urged EPA to coordinate with the National Institute of Building Sciences (“NIBS”), which manages the federal “Whole Building Design Guide (“WBDG”), and develop a plan to gather information regarding work practices used in commercial building renovations and remodels. A board of federal agencies – which includes EPA itself, the General Services Administration, the Department of Defense, and other agencies – guides the WBDG’s development to provide “government and industry practitioners one-stop access to up-to-date information on a wide range of building-related guidance, criteria, and technology from a whole-building perspective.”³⁶ Senators King, Manchin, and Begich wrote to NIBS urging it to assist EPA in providing lead-based paint information,³⁷ and NIBS itself provided comments expressing its willingness to assist EPA in collecting lead-based paint information from federal facilities owners and managers.³⁸ As stated in the Coalition’s April 1, 2013, Comments: “If the WBDG and collaboration among its participating agencies cannot provide [relevant lead-based paint] information ... then the Coalition wonders whether *any* group or organization could practicably or feasibly supply the information sought by EPA.”³⁹ Certainly, the public’s response burden would be minimized if EPA coordinates with NIBS and the WBDG’s participating federal agencies to collect lead paint and work practices data.

The Coalition encourages EPA to leverage the wealth of experience and depth of knowledge of federal entities as a fair and practicable step to minimize the public’s burdens from an ICR that would duplicate the information that could be obtained from the federal building community. Indeed, the federal buildings community is an ideal source for the data EPA seeks to provide “specificity and level of detail ... in order to estimate the potential risks, the industry baseline, and the costs and benefits of potential regulatory requirements.”⁴⁰

C. Any proposal to survey owners, managers, lessors, lessees, and contractors that are engaged in activities in P&C buildings, as a basis for establishing new regulatory requirements, should rely on a rigorous statistical analysis, including improved sampling techniques and questionnaire instruments.

³⁵ ICR Supporting Statement, at 2.

³⁶ *Id.* at 41-43.

³⁷ *Id.* at 4. The letter from Senators King, Manchin and Begich is Attachment 7 to the Coalition’s Comments, available at: <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OPPT-2010-0173-0154>.

³⁸ NIBS’s comment letter states: “As the entity charged by Congress to engage both the public and private sector in the development and dissemination of technical criteria for buildings, the Institute welcomes the opportunity to facilitate the identification and subsequent conduct of research to inform development of lead-based paint regulations for public and commercial buildings.” Available at <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OPPT-2010-0173-0153>.

³⁹ *Id.* at 43.

⁴⁰ ICR Supporting Statement, at 4.

The Coalition submits that the sampling methodologies and questionnaire instruments proposed in the ICR do not appear likely to yield data of “practical utility.” Moreover, the design of the survey is not sufficiently detailed to determine whether the information obtained will be statistically relevant.

EPA intends to pose brief screening questions to 10,650 entities including: “(A) establishments that perform RRP activities in [P&C buildings] for compensation on a contract basis; hereinafter referred to as contractors; (B) lessors and managers of [P&C buildings]; and (C) building occupants of [P&C buildings] (both owners and tenants) who may use their own staff to perform RRP activities.”⁴¹ In addition to screening contractors, lessors, managers, and occupants, EPA “plans to have 402 respondents complete a questionnaire.”⁴² This randomly sampled universe of respondents is said to “provide a basis for estimating the population of establishments engaged in RRP activities in [P&C buildings].”⁴³ Without additional information on the methodology to be used in such a survey, we are concerned that the respondent pool of 402 surveys will be insufficient to reflect the diversity of the public and commercial building stock.

A similar type of survey, the Commercial Buildings Energy Consumption Survey (CBECS), is “conducted quadrennially by the Energy Information Administration (EIA) to provide basic statistical information about [energy consumption, expenditures, and related characteristics] in U.S. commercial buildings. The survey is based upon a sample of commercial buildings selected according to the sample design requirements.”⁴⁴ One of CBECS’s data collection phases is a “Building Characteristics Survey” which “collects information about selected commercial buildings through voluntary interviews with the buildings’ owners, managers, or tenants.”⁴⁵

To collect information in 2003⁴⁶ on the estimated 4.9 million commercial buildings in the U.S., the CBECS relied upon an initial screening sample size of 6,955 buildings of which 5,215 completed surveys (a response rate of 82%) formed the basis of the final report. Given the similarities between the ICR and the CBECS survey populations (*i.e.*, the U.S. commercial building stock) it is unclear whether 402 completed lead ICR surveys reflecting the experiences of three categories of survey respondents (*i.e.*, contractor, owner, and occupant) will be sufficient for the task of predicting a reliable “baseline for the incidence of different types of RRP activities that disturb lead-based paint in [P&C buildings], the methods that are used to conduct these

⁴¹ ICR Supporting Statement, at 1.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ <http://www.eia.gov/consumption/commercial/data/2003/index.cfm?view=methodology#sampledesign>.

⁴⁵ *Id.*

⁴⁶ A current CBECS survey and sampling effort has been underway since 2011. The Coalition strongly encourages EPA to contact EIA to gain a better understanding of the methodologies and statistical analyses used by CBECS in its survey of commercial buildings, and we offer to facilitate and arrange meetings on this topic.

activities, the work practices that are used to contain and clean the resulting dust, and the characteristics of the buildings.”⁴⁷

As outlined in the ICR, if each surveyed entity is considered a “building,”⁴⁸ then 402 responses – *representing only 0.008% of the commercial building stock* – will form the basis of EPA’s understanding of RRP activities across the broad and diverse spectrum of U.S. P&C structures. By comparison, the CBECS survey of roughly the same building stock sought information on a narrower question (energy consumption) and relied upon a sample size of 5,215 buildings or 0.1% of the building stock. As noted above, the comparison between survey rates of the ICR and CBECS likely overstates the percentage of commercial buildings that will be sampled in the ICR because not all of the 402 completed surveys will actually represent individual buildings. Nonetheless, EPA states that the ICR will “use a probability sample to calculate nationally representative parameter estimates” and will “produce statistically valid estimates” of RRP jobs in commercial buildings.⁴⁹ EPA provides no information or background materials to explain whether the “screening” sample or the “survey” sample will produce statistically valid estimates on lead-based paint and work practices information to justify an expansive new regulatory program.

With regard to the universe of contractors that might be surveyed, the United States had approximately 740,000 construction firms in 2012, of which 92% employed fewer than 20 workers (according to the latest U.S. census bureau data). As the chart below shows, even if *all* of the responses EPA ultimately collects were to come from the building and specialty trade segments of the contractor community (which will not be the case given that some of the surveys are intended to be completed by building owners and tenants), the agency would have reached out to merely 0.05% of those construction firms to solicit information on the types of painting activities that disturb lead-based paint in P&C buildings, and the work practices that are being used to contain and collect paint dust. This is not likely to produce “statistically valid” data or data that is representative of standard industry practices.

Construction Company Type Statistics	Number of Companies
Construction of Buildings	211,956
Heavy and Civil Engineering Construction	39,439
Specialty Trade Contractors	477,950

Moreover, the likelihood that the exceedingly low number of sampled buildings and contractors will not result in data of “practical utility” is exacerbated by the diversity of the U.S. commercial building stock in terms of size, age, geography, uses, and occupancy types. The “practical utility” of any information gathered from the 10,650 “screened”/402 “fully surveyed” respondents is thus further diminished, because the number of surveyed jobs will be so low as to

⁴⁷ ICR Supporting Statement, at 1

⁴⁸ Indeed, considering the inclusion of “contractors” as a category of respondents, it is not clear that each surveyed entity represents a “building” for purposes of the lead paint ICR.

⁴⁹ ICR Supporting Statement, at 2.

preclude reasonable estimates regarding lead-based paint presence, RRP practices, and dust exposure across the widely diverse U.S. stock of commercial buildings. The April 1, 2013, Comments explain that, among other building variables assessed by CBECS⁵⁰:

- “There are nearly 4.9 million commercial buildings in the U.S. spanning a broad spectrum of types and uses, and comprising more than 71.6 billion square feet of floorspace.”
- “Buildings constructed from 1970 to 2003 comprise 58 percent of buildings and 63 percent of floorspace.”
- “Since the first CBECS in 1979, the commercial buildings sector has increased in size. From 1979 to 2003, the number of commercial buildings increased from 3.8 million to 4.9 million. And, the amount of commercial floorspace increased from 51 billion to 72 billion square feet.”
- “The South Census Region, the most populous of the four regions, accounts for more than one-third of both commercial buildings and floorspace. The fewest commercial buildings are found in the Northeast Census Region, while the smallest amount of commercial floor space is found in the West Census Region.”
- “Key occupancy information such as numbers of workers, median square feet per worker, and median hours per week of operation, significantly vary across all building types and sub-types.”
- “The most recent CBECS survey identified more than 100 specific activities, aggregated into fourteen “principal building activities” which are then broken down into numerous sub-types based on the primary business, commerce or function conducted within each structure”

The Coalition understands that there must be limits to the number of buildings and RRP jobs that EPA may feasibly survey. But insofar as the ICR request comes from the agency, *EPA bears the burden* to fully explain how the universe of randomly sampled respondents is sufficient in scope and number to yield data of “practical utility” that will enable reasonable estimates, assumptions, and conclusions that may have a regulatory impact under TSCA. That “[t]his ICR will allow EPA to produce statistically valid estimates” is stated as a bald conclusion⁵¹ – with no articulated reasons, justifications, or back-up documentation. For that matter, neither the Supporting Statement nor any other document provides an explanation as to why EPA believes

⁵⁰ April 1, 2013, Comments, at 8-23.

⁵¹ ICR Supporting Statement, at 3.

the ICR meets the Office of Management and Budget's "Standards and Guidelines for Statistical Surveys" (September 2006).⁵²

With the General Services Administration's portfolio totaling 1,500 government-owned buildings,⁵³ EPA would obtain a far better statistical sample if it just focused on federal government buildings and facilities.⁵⁴ But as the ICR is presently conceived, it will not likely result in useful data for potential regulatory purposes and, therefore, does not demonstrate that it will satisfy the PRA's "practical utility" criterion.

IV. CONCLUSION

The Coalition supports EPA's efforts to gather information to determine whether there is a need for a new RRP regulatory program for P&C buildings and, if so, what type of regulation may be warranted. We appreciate EPA's willingness to use available tools like the ICR to fill some of the key data gaps that exist, as the agency itself recognizes.

However, EPA must significantly improve the ICR if it is to satisfy the PRA's statutory requirements. The agency must maximize the practical utility of collecting information as necessary for the proper exercise of its authority to regulate only those RRP activities that create a lead-based paint hazard. Also, the agency must minimize the response burden on the public (including small businesses) in collecting data, such as by coordinating with the federal buildings community to provide information sought by the ICR. The Coalition reiterates its previous offer to work with EPA in coordinating efforts with relevant federal building owners and managers to obtain information that might ultimately inform any RRP rule for P&C buildings.

⁵² Available at:

http://www.whitehouse.gov/sites/default/files/omb/inforeg/statpolicy/standards_stat_surveys.pdf. Among other things, OMB's guidelines states that agencies must "select[] samples using generally accepted statistical methods," such that "[t]he size and design of the sample must reflect the level of detail needed in tabulations and other data products, and the precision required of key estimates." *Id.* at i. Further, agencies must "ensure that survey results are representative of the target population so that they can be used with confidence to inform decisions." *Id.* It is not apparent to the Coalition that EPA has taken such steps to assure the statistical reliability of any information that may be gathered through the ICR at issue.

⁵³ *Supra* n. 33.

⁵⁴ In this regard, EPA plans to send surveys to only nine – and no more – respondents for each questionnaire "in order to identify potential changes to improve the survey instrument." ICR Supporting Statement, at 4. *See also id.* at 28 ("The agency will pre-test each draft questionnaire with 9 or fewer respondents."). However, "[t]he agency does not anticipate that a pilot test will be possible given time and budget constraints." *Id.* at 28. Given the scope of any RRP regulations will cover federal buildings, why aren't GSA personnel, federal facilities managers, and federal building construction contractors participating in any pre-test and pilot? The Coalition believes that testing the survey instruments with federal personnel can only help achieve the PRA's purposes to gather potentially useful data and minimize public response burdens.

ATTACHMENT 1

LIST OF ORGANIZATIONS IN COMMERCIAL PROPERTIES COALITION

Associated Builders and Contractors (ABC) is a national construction industry trade association with 22,000 chapter members. Founded on the merit shop philosophy, ABC and its 70 chapters help members develop people, win work and deliver that work safely, ethically and profitably for the betterment of the communities in which they work. ABC member contractors employ workers, whose training and experience span all of the 20-plus skilled trades that comprise the construction industry. Moreover, the vast majority of our contractor members are classified as small businesses. Our diverse membership is bound by a shared commitment to the merit shop philosophy in the construction industry. The philosophy is based on the principles of nondiscrimination due to labor affiliation and the awarding of construction contracts through open, competitive bidding based on safety, quality and value. This process assures that taxpayers and consumers will receive the most for their construction dollar.

Associated General Contractors of America (AGC) is the leading trade association in the construction industry. It dates back to 1918, and it currently represents 33,000 firms in nearly 100 chapters across the United States. AGC's members include 7,500 of the nation's leading general contractors, nearly 12,500 specialty contractors and more than 13,000 material suppliers and service providers to the construction industry. These members engage in the construction of commercial buildings, hospitals and laboratories, schools, shopping centers, factories, warehouses, highways, bridges, tunnels, airports, levees, water works facilities and multi-family housing units, and they prepare sites and install the utilities necessary for housing development. AGC Building Contractors represent large and small contractors, from those that offer a wide variety of pre-construction and post-construction services to those that offer only traditional construction services. In 2012 nonresidential construction spending in the U.S. totaled \$570 billion (\$273 billion public, \$298 billion private). In December 2013, nonresidential building and specialty trade contractors accounted for 2.8 million of the industry's 5.8 million employees.

Building Owners and Managers Association (BOMA) International is a federation of 93 BOMA U.S. associations, BOMA Canada and its 11 regional associations and 13 BOMA international affiliates. Founded in 1907, BOMA represents the owners and managers of all commercial property types including nearly 10 billion square feet of U.S. office space that supports 3.7 million jobs and contributes \$205 billion to the U.S. GDP. Its mission is to advance the interests of the entire commercial real estate industry through advocacy, education, research, standards and information. BOMA International is a primary source of information on building management and operations, development, leasing, building operating costs, energy consumption patterns, local and national building codes, legislation, occupancy statistics, technological developments and other industry trends.

CCIM Institute is an affiliate of the NATIONAL ASSOCIATION OF REALTORS® (NAR). The Institute confers the Certified Commercial Investment Member (CCIM) designation through an extensive curriculum and experiential requirements. The CCIM designation was established in 1969 and is recognized as the mark of professionalism and knowledge in commercial investment real estate. Membership includes qualified professionals in all disciplines of commercial investment real estate, including brokers, leasing professionals, investment

counselors, asset managers, appraisers, corporate real estate executives, property managers, developers, institutional investors, commercial lenders, attorneys, bankers, and **other** allied professionals. Of the approximately 125,000 commercial real estate practitioners nationwide, 9,000 currently hold the CCIM designation, with an additional 6,000 candidates pursuing the designation. Founded upon the principles of education, networking, and ethical practice, the CCIM Institute, as an affiliate of the 1.2 million-member NATIONAL ASSOCIATION OF REALTORS®, helps shape policy and legislation affecting the industry and safeguards the interests of commercial investment real estate practitioners.

The Independent Electrical Contractors (IEC) is a national trade association for merit shop electrical and systems contractors representing over 3,000 member companies and 56 chapters nation-wide. Over 50 percent of IEC members are small business owners. With over \$14 billion in annual sales, our members are a driving force in the electrical and systems contracting industry. IEC serves as the voice of the industry on policies affecting our membership and attempts to further our economy through skilled manpower and the principle of free enterprise. IEC has more than 50 chapter training centers nationwide that provide training to approximately 10,000 apprentices each year. IEC's training program offers participants the knowledge, technical skills, and practical experience necessary to succeed in today's electrical trade.

Institute of Real Estate Management (IREM®) is an international community of real estate managers dedicated to ethical business practices, maximizing the value of investment real estate, and promoting superior management through education and information sharing. An affiliate of the National Association of REALTORS®, IREM is the home for all industry professionals connected to real estate management – and the only organization serving both the multi-family and commercial sectors. We believe that good management matters, and that well-managed properties pay dividends in terms of value and in the quality of life for residents, tenants and customers. We believe in professional ethics. We believe in the power of knowledge and the importance of sharing it. IREM offers a variety of membership types for professionals of every experience level, from on-site managers to high-level executives. Our credentials, earned by meeting high standards of education, experience, and ethical business practices, include: CERTIFIED PROPERTY MANAGER® (CPM®), ACCREDITED RESIDENTIAL MANAGER® (ARM®), ACCREDITED COMMERCIAL MANAGER (ACoM), or ACCREDITED MANAGEMENT ORGANIZATION® (AMO®). Since 1933, IREM has set the standard for best practices in real estate management. Today, IREM® membership includes more than 18,000 individuals and 560 corporate members.

Founded in 1957, the **International Council of Shopping Centers (ICSC)** is the premier global trade association of the shopping center industry. Its more than 60,000 members in over 90 countries include shopping center owners, developers, managers, marketing specialists, investors, retailers and brokers, as well as academics and public officials. As the global industry trade association, ICSC links with more than 25 national and regional shopping center councils throughout the world.

NAIOP, the Commercial Real Estate Development Association, is the leading organization for developers, owners and related professionals in office, industrial and mixed-use real estate. NAIOP comprises 15,000 members in North America, with over 50 local chapters. NAIOP

advances responsible commercial real estate development and advocates for effective public policy.

NAREIT®, the National Association of Real Estate Investment Trusts®, is the worldwide representative voice for REITs and publicly traded real estate companies with an interest in U.S. real estate and capital markets. NAREIT's members are REITs and other businesses throughout the world that own, operate, and finance income-producing real estate, as well as those firms and individuals who advise, study, and service those businesses.

For more than 20 years, the **National Apartment Association (NAA) and the National Multifamily Housing Council (NMHC)** have partnered on behalf of America's apartment industry. Drawing on the knowledge and policy expertise of staff in Washington, D.C., as well as the advocacy power of 170 NAA state and local affiliated associations, NAA and NMHC provide a single voice for developers, owners and operators of multifamily rental housing. Apartments and their 35 million residents support more than 25 million jobs and contribute \$1.1 trillion to the economy.

The National Association of Home Builders (NAHB) is a trade association organized for the purpose of promoting the general commercial, professional, and legislative interests of its membership. NAHB consists of more than 140,000 builder and associate members organized into approximately 800 affiliated state and local associations in all 50 states, the District of Columbia, and Puerto Rico. These members are involved in home building, remodeling, multifamily construction, property management, subcontracting, design, housing finance, building product manufacturing and other aspects of residential and light commercial construction. Founded in 1982, NAHB Remodelers of the National Association of Home Builders represents and serves the interests of more than 24,000 remodeling industry members.

The National Association of REALTORS®, The Voice for Real Estate®, is America's largest trade association, representing over 1 million members involved in the residential and commercial real estate industries. NAR is strategically poised to work on behalf of America's property owners providing a facility for professional development, research and exchange of information among its members and to the public and government for the purpose of preserving the free enterprise system, and the right to own, use, and transfer real property.

The National Association of the Remodeling Industry (NARI) is structured as a federation with almost 60 independent chapters located in most major metro areas throughout the country and with headquarters located in Des Plaines, IL (Northwest Chicago suburbs). NARI is a trade association whose 6,500 company members voluntarily subscribe to a Code of Ethics and Standards of Practice. Membership is comprised of general and specialty remodeling companies and local and national suppliers to the industry. NARI is the only national organization dedicated exclusively to the remodeling industry. With aging of the country's housing stock and double digit growth in home improvement spending expected through mid-2014, NARI members perform a vital public purpose.

The National Federation of Independent Business (NFIB) is the nation's leading small business advocacy association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB

represents about 350,000 independent-business owners who are located throughout the United States.

The Plumbing-Heating-Cooling Contractors—National Association is America's premier trade group for the p-h-c professional. PHCC has more than 3,500 open and union shop contractor members who successfully manage businesses in residential service and new construction, commercial and industrial markets.

The Real Estate Roundtable (www.rer.org) brings together leaders of the nation's top publicly-held and privately-owned real estate ownership, development, lending and management firms with the leaders of major [national real estate trade associations](#) to jointly address key national policy issues relating to real estate and the overall economy. Collectively, Roundtable members' portfolios contain over 5 billion square feet of office, retail and industrial properties valued at more than \$1 trillion; over 1.5 million apartment units; and in excess of 1.3 million hotel rooms. Participating trade associations represent more than 1.5 million people involved in virtually every aspect of the real estate business.

Window and Door Manufacturers Association (WDMA) defines the standards of excellence in the residential and commercial window, door and skylight industry and advances these standards among industry members while providing resources, education and professional programs designed to advance industry businesses and provide greater value for their customers.