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BY ELECTRONIC MAIL
The Honorable David Michaels, PhD, MPH
Assistant Secretary of Labor for Occupational Safety and Health
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210
Electronic Address: http://www.regulations.gov

***Re: Comments on OHSA's Proposed Occupational Exposure to Respirable Crystalline Silica Rule* (RIN 1218-AB70; Docket No. OSHA-2010-0034)**

Dear Assistant Secretary Michaels:

The U.S. Small Business Administration's Office of Advocacy (Advocacy) submits the following comments on the Occupational Safety and Health Administration's (OSHA's) *Proposed Occupational Exposure to Respirable Crystalline Silica Rule*.[1] OSHA's proposed rule would establish a new permissible exposure limit (PEL) and action level for respirable crystalline silica and impose a host of ancillary requirements, such as exposure assessments, medical monitoring, engineering and work practice controls, personal protective equipment, respiratory protection (when engineering and work practice controls are insufficient to meet the PEL), training, and recordkeeping.[2] A more detailed discussion of the proposed rule is provided below.

Advocacy commends OSHA for making several changes to the proposed rule that would reduce the impact on small entities. Advocacy has conducted extensive outreach on the proposed rule with small business representatives through roundtables and other meetings and discussions. A summary of the comments and concerns of these small business representatives is provided below.

Office of Advocacy

Advocacy was established pursuant to Pub. L. 94-305 to represent the views of small entities before federal agencies and Congress. Advocacy is an independent office within SBA, so the views expressed by Advocacy do not necessarily reflect the views of SBA or the Administration. The Regulatory Flexibility Act (RFA),[3] as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA),[4] gives small entities a voice in the rulemaking process.

[1] 78 Fed. Reg. 56274 (September 12, 2013).
[2] *Id.*
[3] 5 U.S.C. § 601 et seq.

For all rules that are expected to have a significant economic impact on a substantial number of small entities, federal agencies are required by the RFA to assess the impact of the proposed rule on small business and to consider less burdensome alternatives. Moreover, Executive Order 13272[5] requires federal agencies to notify Advocacy of any proposed rules that are expected to have a significant economic impact on a substantial number of small entities and to give every appropriate consideration to any comments on a proposed or final rule submitted by Advocacy. Further, both Executive Order 13272 and the RFA[6] require the agency to include in any final rule the agency's response to any comments filed by Advocacy and a detailed statement of any change made to the proposed rule as a result of the comments.

Background

OSHA's proposed rule was published in the *Federal Register* on September 12, 2013. The proposed rule would change the regulatory requirements employers must meet when their employees are exposed to respirable crystalline silica above a certain level. Silica is basically sand (most commonly quartz) that comes in a variety of forms and conditions and is the second most abundant compound in the earth's crust.[7] Crystalline silica is used in a wide variety of applications across a host of industries.[8] As OSHA explains, respirable crystalline silica (unlike visible sand dust) consists of very small particles (so small they are invisible and odorless) that are able to penetrate into the gas-exchange region of the lungs.[9] Exposure to respirable crystalline silica has been linked to silicosis, lung cancer, and other diseases.

OSHA's proposed rule would establish one standard for general industry and maritime and another for construction. The proposed rule would lower the current PEL from approximately 100 $\mu g/m^3$ for general industry and 250 $\mu g/m^3$ for maritime and construction to 50 $\mu g/m^3$ with an action level of 25 $\mu g/m^3$ calculated as an eight-hour time-weighted average. Exceeding the action level would require periodic exposure assessments, while exceeding the PEL would trigger a host of administrative and regulatory controls, including initial medical monitoring, engineering and work practice controls, personal protective equipment, respiratory protection (when engineering and work practice controls are insufficient to meet the PEL), training, and recordkeeping. According to OSHA, the proposed rule would impact some 429,000 small firms in construction and 41,000 small firms in general industry and maritime. Of these, 331,000 small firms in construction and 26,000 small firms in general industry and maritime are very small businesses with less than 20 employees. OSHA estimates that the proposed rule would impose some $637 million in annual costs.[10]

OSHA's current PELs for respirable crystalline silica date to 1971, and the agency has been engaged in a number of regulatory and enforcement activities concerning silica since that time. Among those activities, OSHA convened a Small Business Advocacy Review panel under SBREFA in 2003 to consider the impact of a proposed rule on small entities. The panel, which

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[4] Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. §601 et seq.).
[5] 67 Fed. Reg. 53461, *Proper Consideration of Small Entities in Agency Rulemaking* (August 16, 2002).
[6] See, 5 U.S.C. 604(a)(3)
[7] 78 Fed. Reg. 56295.
[8] 78 Fed. Reg. 56296.
[9] 78 Fed. Reg. 56445.
[10] 78 Fed. Reg. 56277.

consisted of representatives from OSHA, Advocacy, and the Office of Information and Regulatory Affairs with the Office of Management and Budget, was assisted in its work by a number of small entity representatives (SERs) from regulated industries (including general industry, maritime, and construction) who provided advice and recommendations to the panel. The panel report was presented to OSHA on December 19, 2003 (over ten years ago).[11] The SERs generally opposed lowering the silica PEL because they see little benefit in a lower PEL and stated they have not seen any incidences of silica-related illness in their industries in many years or even decades.[12] The SERs recommended that OSHA enforce the current PEL because of significant noncompliance[13] and conduct compliance assistance to better educate employers and employees on silica exposure and safe work practices.

Small Entities Have Expressed Concern With The Proposed Rule

Prior to and following publication of the proposed rule, a number of small business representatives contacted Advocacy and expressed concern about the potential impacts of the proposed rule. Further, Advocacy discussed the proposed rule at three of its regular small business labor safety roundtables on September 20, 2013, November 15, 2013, and January 24, 2014, respectively. Professional staff from OSHA attended the September 20, 2013 meeting and provided an overview of the proposed rule. The following comments are reflective of the issues raised during the SBREFA panel process, the roundtable meetings, and additional meetings and discussions Advocacy has had with SERs and small business representatives.

1. Risk Assessment

The SERs and small business representatives remain highly skeptical of OSHA's risk assessment and determination of significant risk. During the SBREFA panel process, nearly all of the SERs stated that they have not seen any incidences of silica-related illness in their industries in many years or even decades. For this reason, the SERs recommended that OSHA enforce the current PEL and conduct compliance assistance to better educate employers and employees on silica exposure and safe work practices. The SERs noted that many employers do not meet the existing PEL - a contention that OSHA data supports[14] - and that OSHA should address these noncompliant employers rather than lowering the PEL because any residual illness could be linked to noncompliance, not the existing PEL. Small business representatives continue to express skepticism with OSHA's risk assessment and agree with the SERs that OSHA should focus its efforts on enforcing the current PEL and conducting better compliance assistance.

The SERs and small business representatives have noted that the silica exposure data upon which OSHA relies are in many cases twenty or more years old and taken largely from mining operations in the United States and elsewhere.[15] However, as the SERs and small business representatives have noted, modern industrial hygiene practices have improved dramatically in

[11] *Report of the Small Business Advocacy Review Panel on the Draft OSHA Standard for Silca*, December 19, 2003 (available at http://www.regulations.gov/#!documentDetail;D=OSHA-2010-0034-0937).
[12] *Id*, p. 6-7, 32-33,
[13] *Id*. *See also*, 78 Fed. Reg. 56293. ("In 2003, OSHA's examined enforcement data for the years between 1997 and 2002 and identified high rates of noncompliance with the OSHA respirable silica PEL, particularly in construction.")
[14] *Id.*
[15] 78 Fed. Reg. 56311 (Summary of OSHA's Preliminary Quantitative Risk Assessment).

recent decades and many industries with high silica exposures have either gone out of business or changed significantly. In addition, small business representatives have stated that the sampling methodologies used to obtain data and the laboratory protocols used to analyze them are obsolete and unreliable. OSHA also acknowledges that "there may be certain physical factors that may affect the toxicological potency of crystalline silica," and that "[t]hese factors may vary among different workplace settings, suggesting that the risk to workers exposed to a given level of respirable crystalline silica may not be equivalent in different work environments."[16] For this reason, Advocacy recommends that OSHA continue to evaluate whether older exposure data is reliable and whether physical factors in the form and condition of silica can significantly affect risk.

Small business representatives also stated that OSHA's risk assessment shows a substantial reduction in silica-related illness and fatality over the past several decades, but that this decline suddenly stopped and leveled off in recent years. Small business representatives stated that this seems unlikely given that industrial hygiene practices have improved dramatically in recent decades and the many industries with high silica exposures have either gone out of business or changed significantly. Small business representatives have stated that if the trend of declining silica-related disease has continued - even at a slower rate – the purported benefits of the proposed rule could be lower or nonexistent.

Finally, the SERs and small business representatives have noted the uncertainty of assessing silica-related risk because of confounding factors, such as smoking or exposure to other chemicals, and the long latency period for silica-related illness to appear. They also stated that OSHA's assumption that silica exposure occurs over a working life of eight hours per day for 45 years does not reflect modern working conditions. Advocacy recommends that OSHA pay careful attention to the comments it receives from small businesses and their representatives concerning silica exposure risk and ensure that its conclusions concerning significant risk are accurate before proceeding with this rule.

2. Technological Feasibility

The SERs and small business representatives have expressed concern that compliance with the proposed rule would not be technologically feasible. OSHA concludes that achieving a level of 50 $\mu g/m^3$ (the PEL) is technologically feasible, but achieving a level of 25 $\mu g/m^3$ (the action level) is not.[17] However, OSHA sets the action level at 25 $\mu g/m^3$ and expects employers to try to achieve it.[18] The SERs and small business representatives noted the difficulty of correctly measuring exposure at the action level, and stated that affordable measuring equipment that can accurately assess exposures is not available. Others have told Advocacy that many of OSHA's assumptions about worksites and work practices do not reflect actual workplace conditions. For example, small business representatives stated that OSHA's expected dust control methods, such as wet cutting and drilling, dust collectors, and enclosed cabs on equipment are infeasible and do not meet the manufacturers' intended uses of the equipment, that water and electricity may not be available at some worksites (especially in construction), that prohibiting activities such as dry

[16] 78 Fed. Reg. 56446.
[17] 78 Fed. Reg. 56281.
[18] *Id.*

sweeping is infeasible in some workplaces, and that OSHA's normal hierarchy of controls may not be appropriate for silica since respirators could reduce the risk to zero.

The SERs and small business representatives raised other concerns about technological feasibility. For example, one representative noted that increasing the volume of air needed for additional ventilation could result in a violation of a facility's air permit. Another noted that creating regulated areas is not feasible in many open-design facilities. Finally, representatives from the construction industry have stated that Table 1 is unworkable in its current manifestation (see comment below).

For these reasons, Advocacy recommends that OSHA carefully consider the comments it receives from small businesses and their representatives about technological feasibility and ensure that its assumptions are correct before proceeding with this rule.

3. Economic Feasibility

The SERs and small business representatives have expressed concern that compliance with the proposed rule would not be economically feasible. In particular, they have complained that OSHA's economic analysis understates the costs and exaggerates the benefits of the proposed rule through the use of several unfounded assumptions. For example, small business representatives objected to OSHA calculating compliance costs on a "per over-exposed employee" basis rather than on a per-firm basis because, they say, it understates costs. They also stated that OSHA's assumptions that each control would benefit multiple employees was unfounded and that many firms do not operate two shifts per day as OSHA assumes. Small business representatives also stated that OSHA was understating costs by assuming that all employers already meet the existing PEL,[19] when OSHA itself recognizes that many employers do not meet the current PEL. This was a significant concern to the SERs as well. Small business representatives also objected to OSHA calculating control costs from the existing to the proposed the PEL, rather than from current (actual) exposures to the proposed PEL, because it fails to account for existing noncompliance. Finally, small business representatives stated that OSHA was using older economic data that does not reflect current economic conditions, and that OSHA's cost pass-through assumptions are unrealistic.

In light of these concerns, Advocacy recommends that OSHA carefully consider the comments it receives from small businesses and their representatives concerning economic feasibility and ensure that its assumptions are realistic before proceeding with this rule.

4. Special Concerns for the Construction Industry

The construction SERs and small business representatives from the construction industry have stressed the technological and economic difficulty of complying with OSHA's proposed rule in the construction industry for a variety of reasons. These include the ubiquitous nature of airborne silica on and around construction sites, the geographic size and variability of construction sites, constantly changing environmental and wind conditions, the widespread presence of silica in building materials, the varying nature of construction tasks and the transient

[19] 78 Fed. Reg. 56277.

nature of the construction workforce, and the common presence of multiple employers on construction sites. These factors have led many of the construction SERs and small business representatives from the construction industry to tell Advocacy that OSHA's proposed "Option 1" (i.e., the general industry standard) is completely unworkable for the construction industry.

However, many of the construction SERs and small business representatives from the construction industry have endorsed the "concept" of Table 1 (Option 2), but not in its current manifestation. Under Option 2, construction employers choosing to follow Table 1 (OSHA's proposed control methods) would be considered to be in compliance with the engineering and work practice control requirements of the proposed standard, and would not be required to conduct exposure monitoring.[20] However, small business representatives noted several significant problems with Table 1 in its current form. First, they stated that some of the language in Table 1 is vague, uses non-regulatory terms, and does not accurately characterize many actual construction practices. Second, they stated that some of the equipment required to follow Table 1 either does not exist or cannot be used in the manner described. Finally, and most importantly, they said that Table 1 is not useful because it does not provide a method of achieving compliance with the PEL and still triggers all of the ancillary provisions (besides exposure monitoring). The construction small business representatives stated that since Table 1 is supposed to reflect silica-safe work practices, following it should be deemed to result in compliance with the PEL (and not a presumption of non-compliance).

Based on these concerns, Advocacy recommends that OSHA work with the construction industry and employee representatives to develop exposure data and refine Table 1 into a means of achieving compliance with the PEL (i.e., a safe harbor).

Significant Alternatives for Small Business

Advocacy understands that OSHA's statutory charge is to establish a permissible exposure limit for respirable crystalline silica that reduces significant risk and is technologically and economically feasible. Advocacy also understands that OSHA has the technical expertise and legal authority to evaluate the totality of information in the record and that OSHA's judgment will receive considerable deference. However, the RFA also requires OSHA "to consider 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."[21] Since it is the business community - and thousands of small businesses in particular - who will have to implement any new requirements, Advocacy recommends that OSHA carefully consider the views and experiences of small businesses and their representatives before proceeding.

Again, Advocacy commends OSHA for heeding the advice and recommendations of the SERs in several respects, most notably in proposing the Table 1 option for construction, eliminating the ancillary provisions at the action level (except exposure assessments), and removing the hygiene facility requirements (except in regulated and access-controlled areas). These changes have resulted in considerable cost savings for small business. However, with respect to lowering the

[20] 78 Fed. Reg. 56284.
[21] *See*, 5 U.S.C. 603(b).

current PEL and proposing an action level at one-half the PEL, OSHA did not follow the advice and recommendations of the SERs, who clearly recommended that OSHA enforce the current PEL and conduct better compliance assistance.

Small Business Participation in the Rulemaking Process

Finally, following publication of the proposed rule, a number of small business representatives contacted Advocacy and expressed concern about the length of the public comment period and other deadlines in the proposed rule. For this reason, Advocacy wrote to OSHA on October 21, 2013 and recommended that OSHA consider extending the comment period and other deadlines for 90 days to allow small businesses and their representatives more time to fully evaluate and assess the impact of the proposed rule. While OSHA did grant an additional 47-day extension of the comment period (and then another 15-day extension because of problems with the electronic docket), numerous small business representatives have complained that they have not had adequate time to effectively review and comment on the proposed rule. In particular, they have noted that nearly ten years has passed since the conclusion of the Small Business Advocacy Review panel in 2003, that the proposed rule and associated analyses comprise thousands of pages of material, and that the comment period was interrupted by the federal government shutdown and the Thanksgiving, Christmas, and New Year's federal holidays.

For these reasons, Advocacy remains concerned that small businesses and their representatives have not had adequate opportunity to fully participate in this rulemaking process, and recommends that OSHA consider providing additional opportunities for small entity participation, such as extending the comment period further, allowing any interested party to testify or comment through the post-hearing comment period, hosting regional hearings targeted specifically at small entities, or convening a new Small Business Advocacy Review panel to consider all of the data and information that has been included in the docket over the past decade. Finally, Advocacy notes that the hydraulic fracturing ("fracking") industry, which has become a significant consumer of silica, was not represented during the Small Business Advocacy Review panel process and OSHA has not made any determination about whether the proposed rule, if promulgated, would have a significant economic impact on a substantial number of small entities in that industry.

Conclusion

Advocacy appreciates the opportunity to comment on OSHA's *Proposed Occupational Exposure to Respirable Crystalline Silica Rule*, and hopes these comments are helpful and constructive. Advocacy commends OSHA for making several changes to the proposed rule that would reduce the impact on small entities, and hopes that OSHA will continue to carefully consider the views of small entities before proceeding with this rule. Advocacy plans to attend and participate in OSHA's upcoming public hearing on this proposed rule and may file additional comments

during the post-hearing comment period. 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,

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Copy to: The Honorable Howard Shelanski, Administrator
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