

CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA

RANDEL K. JOHNSON
SENIOR VICE PRESIDENT
LABOR, IMMIGRATION & EMPLOYEE
BENEFITS

1615 H STREET, N.W.
WASHINGTON, D.C. 20062
202/463-5448

MARC D. FREEDMAN
EXEC. DIRECTOR, LABOR LAW POLICY
LABOR, IMMIGRATION & EMPLOYEE
BENEFITS

October 9, 2015

Dr. David Michaels, Assistant Secretary
Occupational Safety and Health Administration
U.S. Department of Labor
200 Constitution Ave., N.W.
Washington, DC 20210

By electronic submission: www.regulations.gov

**RE: Chemical Management and Permissible Exposure Limits (PELs)
Request for Information, Docket Number OSHA 2012—0023, RIN
1218—AC74, 79 Fed. Reg. 61384 (October 10, 2014)**

Dear Dr. Michaels:

The U.S. Chamber of Commerce (Chamber) is the world's largest business organization representing the interests of more than 3 million businesses of all sizes, sectors, and regions. Our members range from small businesses and local chambers to leading industry associations and large corporations. The Chamber's members include business in every market sector throughout the United States. Throughout our membership managing exposure levels to hazardous substances and chemicals is a key part of maintaining an effective workplace safety program. The OSHA PELs are a central component to this strategy. The Chamber, and employers broadly, rely on OSHA to make judicious, well researched, and finely calibrated regulatory changes only when necessary, and to always adhere to the statutory and judicial requirements established for the agency in these matters.

The Chamber has a long history of involvement in the question of whether, or how, the PELs should be updated. Indeed, OSHA's RFI notes that the Chamber expressed the need for updating PELs during the Department of Labor's solicitation of suggestions for retrospective review of regulations in April 2011. (79 Fed. Reg. 61386.) In 2002 Chamber member Ed Foulke (later to be Assistant Secretary for OSHA) testified at a House hearing on how the PELs could be updated, emphasizing the need for OSHA to observe the various rulemaking requirements Congress and the courts have devised.¹ The Chamber was also deeply involved in efforts to craft a legislative package that would have led to updating some PELs in a compressed rulemaking during the early 2000s.

¹ See testimony of Edwin G. Foulke, Jr. for the U.S. Chamber of Commerce, before the Subcommittee On Workforce Protections, House Committee On Education And The Workforce, "On Issues Concerning OSHA's Permissible Exposure Limits and Possible Approaches." Attached to these comments as Appendix A.

OSHA's Request for Information on updating the Permissible Exposure Limits (PELs RFI, or RFI) presents an exhaustive analysis of the rulemaking requirements OSHA must follow to update the PELs, and the history of the agency trying to do so. The RFI poses many questions and suggestions about how the various concepts of assessing significant risk, determining economic and technological feasibility, and encouraging better compliance might be addressed. However, despite the wide ranging nature of these questions and the detailed discussions about alternative approaches to satisfying these requirements, the central themes of this RFI are: "How can OSHA issue new PELs more quickly?", and "Can OSHA use some alternatives to full rulemaking to advance the agency's desire to drive employers to using lower exposure limits?"

Fundamentally, as expressed in the Foulke testimony, the Chamber believes the requirements OSHA must follow are there because they are necessary for OSHA to produce as finely calibrated and narrowly tailored a standard as possible. Employers and the agency are not well served by standards that impose economically or technologically infeasible restrictions, or where OSHA has not adequately shown there is a significant risk.² The recent rulemaking to revise the crystalline silica standard embodies all of these concerns. As the Chamber's comments pointed out in great detail, OSHA's new standard would be neither economically nor technologically feasible as proposed. Nor has OSHA adequately demonstrated that a significant risk exists warranting this dramatic reduction in exposure level in light of the precipitous drop in silica related fatalities and the fact that OSHA has not shown these remaining cases are the result of the current PEL. Indeed, significant examples of overexposure continue to occur suggesting that if these were brought into compliance the silica related fatalities would drop even further.

OSHA's issuance of this RFI, at this late stage of the administration, also raises concerns. Given how much effort would be required to pursue a full rulemaking, how little time is left before this administration departs, and OSHA's recent reliance on guidance and other non-regulatory approaches to create new requirements or expand current requirements, the Chamber is wary that the byproduct of this RFI will be some form of compliance directive or other initiative that will not be subject to public comment or input and will seek to impose lower exposure limits without rulemaking such as expanding the application of the general duty clause. OSHA regulations are explicit that OSHA may not use the general duty clause when a specific standard already exists, no matter how much OSHA believes that standard is out of date. (29 CFR 1910.5(c)(1).)

This concern is heightened as a result of OSHA maintaining a webpage of "annotated" PELs that lists other sets of exposure limits against OSHA's PELs.³ OSHA essentially instructs employers to ignore OSHA's PELs and instead follow the other tables of limits such as ACGIH's Threshold Limit Values (TLVs) and those developed by California for their state plan on the page:

² See testimony of David Sarvadi for the U.S. Chamber of Commerce, April 29, 2012 before the Senate Health, Education, Labor and Pensions Committee, on "Time Takes Its Toll: Delays in OSHA's Standard-Setting Process and the Impact on Worker Safety" discussing why the various requirements are necessary and describing flaws in several rulemakings and how OSHA can be more effective in their rulemakings. Attached as Appendix B.

³ Available at: <https://www.osha.gov/dsg/annotated-pels/index.html> (last visited October 9, 2015.)

To provide employers, workers, and other interested parties with a list of alternate occupational exposure limits that may serve to better protect workers, OSHA has annotated the existing Z-Tables with other selected occupational exposure limits. OSHA has chosen to present a side-by-side table with the Cal/OSHA PELs, the NIOSH Recommended Exposure Limits (RELs) and the ACGIH® TLVs®s. The tables list air concentration limits, but do not include notations for skin absorption or sensitization.

OSHA's mandatory PELs in the Z-Tables remain in effect. *However, OSHA recommends that employers consider using the alternative occupational exposure limits* because the Agency believes that exposures above some of these alternative occupational exposure limits may be hazardous to workers, even when the exposure levels are in compliance with the relevant PELs.⁴

Posting these tables could be seen as providing employers with the notice of a recognized hazard required for enforcement under the general duty clause.

Throughout the RFI, the decision of the 11th Circuit Court in *AFL-CIO v. OSHA*, 965 F. 2d 962 (11th Cir. 1992) (the *Air Contaminants* case) looms large. That decision struck down OSHA's previous effort in 1989 to make sweeping changes to the PELs through adoption of ACGIH TLVs using a streamlined approach to rulemaking. While the court invalidated OSHA's regulation, it did so because of OSHA's use of apparently random safety factors applied to similar chemicals that in the end appeared only to match the final number for a particular chemical with the then existing Threshold Limit Value (TLV). What OSHA had failed to do, said the Court, is articulate a rational basis for the safety factors applied. Instead of being a reason OSHA cannot proceed to update the PELs in any manner other than a substance by substance rulemaking, the Chamber believes the Court gave OSHA clear direction as to how it could proceed in updating the PELs, notwithstanding that it would still result in very substantial commitment of resources to do so. OSHA even discusses subsequent efforts to update several PELs in a combined rulemaking that was abandoned by the agency due to reevaluating the necessity. (See 79 Fed. Reg. 61389.)

Much of the RFI is devoted to detailed discussions about ways OSHA could satisfy the various rulemaking requirements through more streamlined or expedited analyses or relying on alternative sources for data. The Chamber commends to OSHA's attention comments submitted by the Construction Industry Safety Coalition for specific responses to some of these issues. While presented in the context of the construction industry's concerns, the points made in the comments are applicable across many industry settings.

One of the questions OSHA poses is "Should OSHA consider greater use of specification standards or guidance as an approach to developing health standards?" 79 Fed. Reg. 61417, Question V.B.14. The most significant part of this question is the suggestion of OSHA using guidance to develop health standards. Health standards, as expressed above, must be developed consistent with the rulemaking requirements as described by the OSH Act and other relevant statutes, and interpreted by the courts. Any suggestion of using guidance as a substitute or alternative should be abandoned. Guidance is generally understood to be an array of agency

⁴ *Id.* (emphasis added)

actions and disseminations short of rulemakings such as compliance directives to field staff, letters of interpretation, and other communications. These actions almost always are produced with *no* input from those affected by them. Nor is there any requirements for economic impact analyses, or any discussions of feasibility such as would accompany rulemakings.

Unfortunately, OSHA has been expanding the use of guidance and has done through guidance what should have been done through rulemakings in several instances.⁵ While there is a legitimate role for guidance, the key is that guidance cannot create new obligations or expand the coverage of regulations to those who were previously not covered. To do otherwise is to undermine the role of rulemaking with all its protections and opportunities for input. An administration that values transparency should be concerned with issuing guidance documents that go too far and function like rulemakings without any of the same features.

Another point made by OSHA, under the discussion on technological feasibility analyses, is its reliance on the longstanding “hierarchy of controls.” (79 Fed. Reg. 61397.) This hierarchy places the most emphasis on the most costly and complicated protection methods such as engineering controls, work practice controls, and substitution of substances. It devalues the use of personal protective equipment as the least favorable alternative. This is unfortunate, and the hierarchy of controls is long overdue for a reevaluation. Just as technology has made great strides in so many areas, personal protective equipment has also been improved. The ability to provide employees with effective, less costly, comfortable, easy to use PPE has made this option a much more viable and reliable way to protect employees than when the hierarchy was first conceived. Indeed, a significant reason why silica related fatalities have declined so dramatically is because of the use of PPE in the field.

Finally, another issue OSHA raises, although not specific to the RFI, the request that the results of scientific research be identified as to funding source and financial relationships with sponsors. (79 Fed. Reg. 61384.) Such a request detracts from what should be a consideration of the comments and information on the basis of its inherent scientific merit and not on the “pedigree” of the person(s) submitting the information. No comments should be awarded greater credibility or denigrated on the basis of who submitted the information. The scientific and regulatory process is robust enough to reach a fair and just conclusion if OSHA does not taint or disparage the credibility of a work because of its provenance. The quality of the data and the rigor of the analysis should determine the value of the submitted study.

Conclusion

Updating the PELs has been a longstanding area of concern of OSHA, through several administrations. The Chamber has in fact supported this cause, but only if the rulemaking requirements established by Congress and the courts are followed. We do not believe the *Air Contaminants* decision means OSHA cannot pursue a rulemaking with multiple substances, only that if it does the agency, the must actually make clear what level of safety risk is present and how the revised PEL will correct for that. If OSHA wishes to pursue an expedited rulemaking

⁵ See testimony of Brad Hammock for the U.S. Chamber of Commerce, February 4, 2014 before the Subcommittee on Workforce Protections of the House Education and Workforce Committee, on “OSHA’s Regulatory Agenda: Changing Long-Standing Policies Outside the Public Rulemaking Process.” Attached as Appendix C.

process, new legislation would be required. The Chamber is prepared to work with OSHA to develop such a proposal, we did previously.

Sincerely,

A handwritten signature in black ink, appearing to read "Randel K. Johnson". The signature is fluid and cursive, with a large, sweeping flourish at the end.

Randel K. Johnson
Sr. Vice President
Labor Immigration & Employee Benefits

A handwritten signature in black ink, appearing to read "Marc Freedman". The signature is cursive and somewhat stylized, with a long, horizontal flourish at the end.

Marc Freedman
Executive Director, Labor Law Policy
Labor Immigration & Employee Benefits