March 10, 2017

Mr. Edward C. Hugler
Acting Secretary of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Dear Mr. Hugler:

On behalf of the Construction Industry Safety Coalition ("CISC" or the "Coalition"), we write to request that the Occupational Safety and Health Administration ("OSHA" or the "Agency") delay for one year (until June 23, 2018) enforcement of OSHA's respirable crystalline silica rule for construction.[1] The current compliance deadline for the rule for construction is June 23, 2017.

As set forth below, CISC member companies are experiencing significant difficulties in attempting to comply with the rule. These challenges are compounded by OSHA's failure to issue meaningful guidance on several key aspects of the standard. With the compliance deadline for construction just three months away, the delay is necessary to protect construction industry employers from citation based upon a standard that is infeasible and unworkable in the industry.

I. BACKGROUND

The CISC is comprised of 25 trade associations representing virtually every aspect of the construction industry. The CISC was an active participant in the rulemaking process undertaken by the Agency to develop the final silica rule.[2] The silica rule sets a comprehensive regulatory scheme for affected industries. For construction, the rule significantly reduces the permissible exposure limit ("PEL") for crystalline silica from 250 µg/m^3 to 50 µg/m^3. In addition, the rule imposes burdensome ancillary requirements regarding exposure assessment, respiratory protection, medical surveillance, hazard communication, recordkeeping, and housekeeping.

OSHA adopted in the final rule what it thought would be a workable compliance option for meeting the PEL in construction – "Table 1." Table 1 sets forth 18 specific construction "equipment/tasks" and describes the engineering and work practice control methods and respiratory protection required for those tasks. When employers follow the procedures exactly as they are outlined in Table 1, OSHA asserts that they do not have to comply with the PEL or follow the exposure monitoring requirements.

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[1] 81 Fed. Reg. 16,285 (Mar. 25, 2016).

[2] Please see CISC's February 11, 2014 Comments (Docket ID: OSHA-2010-0034-2319), CISC's Testimony dated February 11, 2014 (Docket ID: OSHA-2010-0034-2320), CISC's August 18, 2014 Post-Hearing Comments (Docket ID: OSHA-2010-0034-4217), CISC's Economic Analysis dated June 3, 2014 (Docket ID: OSHA-2010-0034-4023), CISC's Additional Economic Analysis dated March 25, 2015 (Docket ID: OSHA-2010-0034-4242).

Employers in the construction industry must comply with the standard by June of this year, whereas general industry employers are required to meet the standard by June 23, 2018. One of the primary reasons for giving general industry employers two years to comply with the new requirements was that laboratories are provided that same amount of time to adopt and implement the analytical procedures also required by the standard. OSHA seemed to believe – incorrectly – that all construction employers would follow Table 1 and thus would not need to perform sampling to determine overall compliance.

II. JUSTIFICATION FOR DELAYING ENFORCEMENT

There are several reasons for delaying enforcement of the rule. Construction employers across all trades are finding compliance extremely difficult if not impossible for many job tasks. The silica standard has set up construction employers for failure, by establishing requirements that are unattainable and unworkable in many instances.

As an initial matter, Table 1 is not a workable, realistic compliance option for many affected employers in the construction industry. For example, for the following tasks (stationary masonry saw, handheld power saw, walk-behind saw, drivable saw, and a rig-mounted core saw or drill), to use Table 1 employers must use an integrated water delivery system. Our association members have alerted us to numerous situations where tasks cannot be performed wet, and thus employers cannot follow Table 1. Water may not be available to a job site, weather may prevent the use of water, or clients/location (i.e., indoor work environments/interior jobs, health care environments, nuclear facilities, residential home building) may prohibit the use of water. Even OSHA has recognized that there are numerous situations where wet methods cannot be used (see, e.g., 81 Fed. Reg. at 16,718, 16,720, 16,730, 16,732, 16,735, and 16,749).

Similarly, some entries on Table 1 require the use of a commercially-available shroud with dust collection (handheld and stand-mounted drill, dowel drilling rigs for concrete, vehicle-mounted rigs for rock and concrete, jackhammers and handheld powered chipping tools, handheld grinders for mortar removal). As with wet methods, our association members have informed us of situations where shrouds cannot be used. In these situations, wet methods are also not allowable for purposes of Table 1 and the alternative exposure control methods for compliance would have to be utilized.

CISC association members are finding that tool manufacturers have not developed tools with the control measures recognized by Table 1 (or otherwise potentially applicable to controlling exposure under the alternative exposure control method), for use in the wide variety of settings in the construction environment. As just one example, one CISC association member has been researching and testing rotary hammers with vacuum-shroud attachments. The member reports that there are two brands that work somewhat effectively. However, the member reports that it uses a 5/8” rotary hammer bit to set 1/2” anchors and neither manufacturer makes a 5/8” rotary hammer bit to fit into their rotary hammers with vacuum shrouds. The tool requires a 6” long bit to work and both companies make 5/8” bits that are 8” long. Therefore, the member cannot use either tool.

The member reached out to the manufacturers regarding this, and the manufacturers stated that to comply they would have to change their manufacturing processes. It is highly unlikely that this would be accomplished by June 23, 2017. And this is just one instance of the difficulties that construction employers are facing to obtain tools that are either recognized by OSHA in Table 1 or otherwise control silica in accordance with the standard.

One common construction task that OSHA suggested in the preamble to the rule would not be covered by the standard is mortar mixing, as OSHA speculated that exposures when performing this task would be under the action level in all foreseeable instances. This task is also not included in Table 1. Despite OSHA's claims about exposures when mixing mortar falling below the action level, it did not exempt the task from the standard. And, because the task is not included in Table 1, mason contractors are almost universally having to conduct exposure monitoring for this task to determine whether, and to what extent, this activity will be covered by the rule.

Many construction employers continue to be confused by the requirement in the rule that employers follow manufacturer's instructions to minimize dust emissions for certain tasks on Table 1. It is unclear how OSHA would enforce this and there are numerous examples of manufacturer's instructions for operation and maintenance that are included in manuals for reasons unrelated to worker safety and health. As just one example, we have been informed that handheld grinders with a shroud and dust collection system cannot be used flush against the work surface for many common tasks, such as finishing concrete columns. This can run afoul of manufacturer recommendations for use of the tool to minimize dust emissions and would potentially be a violation of Table 1 if that method of control were utilized.

Indeed, many construction employers have realized the limitations of Table 1 and are now having to monitor numerous tasks in different environments to start to understand how to comply with the silica rule. One member hired an industrial hygienist to conduct exposure monitoring for a particular job/task at the end of January of this year. It took 35 days for the hygienist to return the results from the sampling performed, an extraordinarily long period of time. The sampling process and expected delays are further complicating any hope of compliance with the standard.

These difficulties filter through to the other ancillary requirements of the rule, as many requirements are triggered by exposures and controls implemented. For example, the rule requires construction employers to implement a written exposure control plan for workplaces with exposure to crystalline silica. This plan must include, among other things, "[a] description of the engineering controls, work practices, and respiratory protection used to limit employee exposure to respirable crystalline silica for each task." 29 C.F.R. 1926.1153(g)(1)(ii). Construction employers are unable to develop these plans until they have certainty with respect to the controls and work practices that will be used. Given the infeasibility of the standard, this is precisely the information that construction employers do not have.

Construction employers are facing an extremely challenging compliance problem. They cannot use Table 1 for many tasks, and thus have to follow the traditional method of measuring exposure and implementing the hierarchy of controls to achieve compliance. This is almost impossible, however, considering the myriad of exposure environments involved in construction and that laboratories may not be in compliance with the analytical requirements of the standard until 2018, in addition to the uncertainty and delays described above. OSHA is in effect requiring construction employers to "guess" as to the effectiveness of controls and "hope" that they meet an unattainable PEL.

OSHA has also not developed important guidance on how it will interpret and enforce key provisions of the rule. In particular, OSHA has not indicated how it would conduct enforcement actions in construction given the significant exposure variability that is present. Numerous

commenters to the rulemaking record testified that in order to ensure a PEL of 50 µg/m^3 is met in construction activities, a construction employer would need to target 25 µg/m^3 or even significantly below that due to exposure variability. Failure to do so would open an employer to citation because on any given day exposures may be higher and that could be the day that OSHA is on site and conducts sampling.

OSHA stated that it could address exposure variability through enforcement – by re-sampling a job site or task if it chose to do so during an inspection in order to determine if its initial sampling was unrepresentative of exposure. However, OSHA has given no indication in the rule how it would enforce the standard in these situations, particularly given that in many instances a construction job site or task may not exist after the initial sampling takes place. This creates significant compliance difficulties and ambiguity for employers. As a result, construction employers are forced to find control measures that could meet a level of 25 µg/m^3 or below, something that even OSHA did not find possible in the rulemaking record.

For these, and other reasons, the CISC respectfully requests that OSHA delay for one year any enforcement of the standard in construction. The compliance deadline is fast approaching and the industry is seeking immediate relief from compliance with the rule that is – as expected – completely unworkable. As you know, OSHA has in the past granted similar delays to enforcement to allow affected stakeholders additional time to understand and implement a rule.

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The Construction Industry Safety Coaltion appreciates your consideration of this request.

Sincerely,

American Road and Transportation Builders Association
American Society of Concrete Contractors
American Subcontractors Association
Associated Builders and Contractors
Associated General Contractors
Association of the Wall and Ceiling Industry
Building Stone Institute
Concrete Sawing & Drilling Association
Construction & Demolition Recycling Association
Distribution Contractors Association
Interlocking Concrete Pavement Institute
International Council of Employers of Bricklayers and Allied Craftworkers
Leading Builders of America
Marble Institute of America
Mason Contractors Association of America
Mechanical Contractors Association of America
National Association of Home Builders
National Association of the Remodeling Industry
National Demolition Association
National Electrical Contractors Association
National Roofing Contractors Association

Natural Stone Council
The Association of Union Constructors
Tile Roofing Institute

cc: Dorothy Dougherty
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Lauren Goodman