

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

January 19, 2010

OSHA Docket Office
Docket No. OSHA-2009-0023
Technical Data Center
Room N-2625
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

By electronic submission: <http://www.regulations.gov>

**Re: Comments on OSHA Docket No. 2009-0023, Combustible Dust
ANPRM; 74 Fed. Reg. 54334, (October 21, 2009)**

To the Docket:

The U.S. Chamber of Commerce (Chamber), the world's largest business federation with over three million members, represents businesses of all sizes and in every market sector and throughout the United States which will be directly affected by the Occupational Safety and Health Administration's (OSHA) promulgation of any final Combustible Dust standard. While the Chamber appreciates and supports OSHA's efforts to protect the safety and health of America's workers, the Chamber believes OSHA needs to approach this regulation carefully and recognize the many variables and complexities inherent in regulating this hazard.

Members of the U.S. Chamber of Commerce include manufacturers and industries whose operations produce or involve particles which conceivably fall within the scope of any rule OSHA promulgates, depending on how the agency defines combustible dust. Over 96 percent of the Chamber's members are small businesses employing 100 or fewer employees. For this reason, the Chamber is particularly sensitive to the difficulties faced by small businesses in their efforts to interpret and comply with OSHA standards and regulations, particularly any final rule as complex and potentially wide ranging as a Combustible Dust standard.

GENERAL COMMENTS AND CONCERNS

A. ANPRM/stakeholder input.

The Chamber commends OSHA for its efforts to obtain useful information on specific issues surrounding combustible dust and the best approach to improving worker safety. This ANPRM, along with the two stakeholder meetings held on

December 14, 2009, to discuss combustible dust hazards, are good first steps as OSHA determines how to proceed in this area. If, after evaluating the data and information from the stakeholders, OSHA decides to proceed to an NPRM, OSHA should continue to use all of the available tools to obtain the input of all stakeholders to make sure that OSHA develops the best possible rule which enhances worker safety without imposing needless cost on employers, particularly small employers. The Chamber also believes it is important for OSHA, as it appears to be doing based on some of the questions raised by the ANPRM, to consider all possible approaches to protecting against combustible dust hazards. In particular, the Chamber believes OSHA should carefully consider the success of the grain handling standard, which demonstrates that a targeted rule focused on a specific issue may have the greatest impact on worker safety. The Chamber appreciates OSHA's efforts to obtain stakeholder input through this ANPRM and stakeholder meetings, and urges OSHA to continue to look for ways to use all available tools – including already existing regulations -- to craft the best possible approach to protecting workers from the hazards of various types of combustible dusts.

B. Scope of the rulemaking.

The Chamber fully supports OSHA enforcement of safety standards to create safer workplaces for employees. Moreover, in certain instances, such as the GHS rulemaking, promulgation of new standards can be an important part of improving worker safety. However, the Chamber is concerned with how a general Combustible Dust standard would be implemented and cautions the agency to be wary of seeking an oversimplified regulatory approach.

First, for a number of combustible dusts/industries, compliance with and enforcement of existing regulations should protect workers from the hazards of combustible dust. For example, the housekeeping standards should, in many if not all instances, prevent the accumulation of hazardous levels of combustible dust.

Second, as OSHA recognizes, outreach to employers and workers on the hazards of combustible dust and how to prevent dust explosions is a critical component to protecting workers. As discussed in response to some of the questions below, OSHA could expand its outreach efforts in ways that will afford greater protection to workers than adoption of a complex general combustible dust standard. The Chamber believes that OSHA has responded in effective ways that have helped employers become more knowledgeable about these hazards. For example, initiatives such as the issuance of a Safety and Health Information Bulletin and creation of a Combustible Dust National Emphasis Program have been successful in targeting employers that may have combustible dust hazards. Before engaging in a comprehensive standard, OSHA should evaluate whether expanding these efforts will be a better way to enhance worker safety with respect to these hazards.

Third, OSHA's successful experience with targeted regulations is a model that should be carefully considered. As detailed in the ANPRM, the grain handling standard has been remarkably successful at reducing grain explosions. If OSHA determines that proceeding to a general combustible dust NPRM is the best path, it should consider

following the grain handling standard and focus on specific combustible dusts that may be successfully addressed in a rulemaking.

Fourth, the potential breadth of a general combustible dust rulemaking is worrisome. If it were to be done as a “one size fits all” standard for combustible dust, while well-intentioned, it would be wholly unworkable and would no more mitigate risk than the existing regulatory requirements addressing this hazard, as well as the existing outreach and education programs that OSHA already has in place. Such an approach would generate more citations and penalties than improvements in workplace safety.

As OSHA is aware, there are a number of variables that determine whether dust accumulation will lead to an explosion or fire. A specific level of combustible dust will not always present a hazard. Factors such as the combustibility or flammability of the dust, its density, and where it has accumulated will all factor into whether a hazard is present. Thus, defining the hazard here is no simple task. Recent tragedies unfortunately illustrate that the “perfect storm” bringing together the five elements needed for a combustible dust explosion, *see, e.g.*, ANPRM p. 54334, are not always predictable or preventable. An explosion, by way of example, at an auto parts manufacturer in Kentucky in February 2003, likely was caused by resin particles from a tempering furnace left open on that particular day because of a furnace malfunction. An explosion in North Carolina that same year occurred because fine combustible plastic dust accumulated above a suspended ceiling – a hazard fire inspectors and OSHA itself failed to identify. While there are certainly “lessons learned” from each of these incidents, the explosions occurred in each case because of a confluence of factors – avoidable and unavoidable -- that no one, including OSHA, could predict.

To compound that difficulty, if OSHA promulgates a proposed general comprehensive combustible dust rule, such a standard would apply to any business or industry with a combustible dust hazard, be it great or small, applying equally to, for example, pet food manufacturers, pharmaceutical companies, coal facilities, and textile mills – businesses and industries that could not be more dissimilar in nearly every regard. Just as each dust has different risk properties, each industry has different identified trigger points for combustion, different factory design, and different kinds of ideal controls to prevent or mitigate risk. This would create a nightmare scenario for employers who would be forced to comply with a variety of controls and requirements which simply would have no place or make any sense in their particular workplace setting. Not only would such a comprehensive standard be excessively burdensome and infeasible, it would cause confusion on the part of employers who, in many cases, would not be able to comply with “one size fits all” mandates, and would incur significant expenditures in legal and/or consultant fees to obtain a variance or any other available relief from these provisions.

C. Importance of SBREFA process to any rulemaking.

The Chamber also strongly urges OSHA to submit any proposed rulemaking on combustible dust to the SBREFA panel review process by which small businesses can provide input as to the actual impact of this rule. OSHA indicated in the December 7

Regulatory Agenda listing for this rulemaking that a determination on this point has not yet been made. For the reasons described throughout these comments, the Chamber unequivocally believes OSHA should engage in the full RFA/SBREFEA analyses and other provisions if it pursues this rulemaking.

As OSHA is well aware, the Small Business Regulatory Enforcement Fairness Act of 1996 (“SBREFEA”), amended the Regulatory Flexibility Act (RFA) to provide small businesses with a greater role in the development of federal regulations. Specifically, it requires OSHA to convene a Small Business Advocacy Review Panel when an OSHA proposed regulation is expected to have a “significant [economic] impact on a substantial number of small entities.”¹ In the early stages of the rulemaking process, the panel composed of representatives from OSHA, OMB, and the SBA Office of Advocacy, reviews the proposed rule and hears comments from representative small entities. The panel then submits a report to OSHA describing the impacts and offering suggestions that might reduce them. This process allows OSHA to hear directly from small businesses who will be required to comply with the requirements in any rule with “real world” information, comments and data, thereby providing invaluable insight for the agency as it proceeds forward with critically important decisions in this process.

The RFA provides an exemption from this panel process if OSHA certifies that the proposed regulation will not have a significant economic impact on a substantial number of small entities, and provides a factual basis for this certification.² Based on OSHA’s assessment of the industries where combustible dust fires and explosions have occurred, an overwhelming 78 percent of the businesses are small businesses with 41 percent of the employees in these industries. 74 Fed. Reg. 54335. Therefore the Chamber is confident that any proposed combustible dust rulemaking will indeed have a “significant economic impact” on a “substantial number of small entities.” Even if these thresholds are not met, the Chamber urges OSHA to implement the SBREFEA panel in any combustible dust rulemaking, in order for the agency to obtain critically important information and data as to the impact on small employers.

The SBREFEA panel process is one of the few ways in which America’s small businesses are able to voice concerns and provide feedback on proposed changes that impose significant regulatory burdens on them at a point where their input can actually influence the regulation. The Chamber believes OSHA should use the full opportunity for smaller employers to have the benefit of the SBREFEA process to air their views about the particular impact of OSHA’s proposed rule on their operations. To do otherwise, the agency faces the risk of producing a final rule which has not had the full benefit of the wide range of comments from the large segment of employers impacted by this rule.

¹ <http://www.osha.gov/dcsp/smallbusiness/sbrefa.html>.

² See 5 U.S.C. 605(b). OSHA’s procedures for compliance with SBREFEA specify that a proposed rule has a “significant [economic] impact” if the costs of the rule are estimated to exceed either 1 percent of revenue or 5 percent of profits. <http://www.dol.gov/dol/regs/appendix.htm>.

One other benefit from OSHA determining that this regulation would have a significant economic impact on a substantial number of small entities is that the agency will also be obligated to produce small entity compliance guides consistent with Section 212 of SBREFA. With such a high proportion of small businesses affected by this regulation, these guides will be instrumental in spurring compliance and protecting employees from these hazards. For more on our views regarding compliance assistance materials, please see our comments under Question 68.

D. OSHA Should Comply with OMB’s Peer Review Requirements in any rulemaking.

In the event that OSHA decides to proceed with any rulemaking addressing combustible dust, the Chamber urges OSHA to allow sufficient time and opportunity for stakeholders to fully participate in every step of this rulemaking process so as to ensure full transparency. In this regard, the Chamber would recommend that OSHA allow the full opportunity for stakeholders and the interested public to participate in the peer review process of any scientific information used in risk assessments and any other steps in this rulemaking, as required by the OMB’s Final Information Quality Bulletin for Peer Review, 70 Fed. Reg. 2664 (January 14, 2005).³ As OMB makes clear in this Bulletin, the peer review process “is one of the important procedures used to ensure that the quality of published information meets the standards of the scientific and technical community.” Peer Review Bulletin, 70 Fed. Reg. at 2665. Among other provisions, this Bulletin “establishes a transparent process for public disclosure of peer review planning, including a Web-accessible description of the peer review plan that the agency has developed” for “influential” scientific information. *Id.*⁴ This Bulletin further establishes more rigorous steps in the peer review process for “highly influential scientific assessments”⁵ including increased disclosure of the selection of peer reviewers, more opportunities for the public to participate in the selection process as well as the peer review comments to any such scientific study.

The Chamber believes that any rulemaking OSHA undertakes with respect to combustible dust would fall within the definition of “highly influential” in the Peer Review Bulletin, and OSHA must undertake all steps to ensure that it fully complies with transparency for the peer review of the required risk assessment, as well as any other

³ According to OMB, the “purpose of the Bulletin is to enhance the quality and credibility of the government’s scientific information.” Peer Review Bulletin, 70 Fed. Reg. at 2665.

⁴ “Influential scientific information” is defined in the Bulletin as “scientific information the agency reasonably can determine will have or does have a clear and substantial impact on important public policies or private sector decisions.” Peer Review Bulletin, 70 Fed. Reg. at 2667.

⁵ The Bulletin defines a “highly influential” scientific assessment as one where the agency or the OIRA Administrator at OMB “determines that the dissemination could have a potential impact of more than \$500 million in any one year on either the public or private sector or that the dissemination is novel, controversial, or precedent-setting, or has significant interagency interest.” Peer Review Bulletin, 70 Fed. Reg. at 2671.

applicable scientific assessments_OSHA relies upon as justification for this rulemaking. Just as the current Administration has committed to “openness” and “transparency” in government,⁶ including the use of scientific information relied upon in policy making,⁷ then OSHA should make sure that stakeholders and the interested public will have sufficient time and opportunity to participate in all aspects of the peer review process, including the selection process as well as the peer review of any risk assessment and other scientific studies or information OSHA relies upon in any combustible dust rulemaking. See Presidential Memorandum on Scientific Integrity—March 9, 2009, 74 Fed. Reg. at 10671 (“If scientific and technological information is developed and used by the Federal Government, it should ordinarily be made available to the public.”).

The Chamber is concerned with recent efforts on the part of OSHA in other rulemakings which might suggest that the agency is attempting to compress some of these procedures resulting in limits on the ability of stakeholders and the interested public to have opportunity to fully participate. Specifically, the Chamber notes that in the ongoing rulemaking on silica OSHA announced that it would combine the public comment opportunity on the risk assessment with the public comment on the proposed rule itself, which the Chamber believes greatly reduces the opportunity for stakeholders to have any meaningful participation in the process. See “OSHA to Expedite Rulemaking by Accepting Comments on Risk, Rule Simultaneously” BNA Occupational Safety and Health Reporter, 39 OSHR 700 (August 23, 2009). This is a matter of concern in any OSHA rulemaking where the agency is supposed to rely on the risk assessment to develop a standard, yet in the case of the silica rulemaking, the agency appears to be already accepting the risk assessment without the opportunity for the public to express any views, since the agency is proceeding ahead at the same time with the rulemaking itself. In the event that OSHA proceeds forward with combustible dust rulemaking, the Chamber strongly urges OSHA to separate public comment opportunities to the peer review of the risk assessment from the public comment to any proposed rule, so as to ensure stakeholders ample opportunity to have meaningful participation in every stage of this process.

RESPONSES TO SPECIFIC QUESTIONS

As a trade association comprised of members from a wide cross section of America’s businesses, the Chamber is not in the position to answer certain of the specific questions posed but will offer comments on behalf of its members in response to other questions.

B. Definition of Combustible Dust

⁶ See Presidential Memorandum on Transparency and Open Government—January 21, 2009, 74 Fed. Reg. 4685 (January 26, 2009).

⁷ See Presidential Memorandum on Scientific Integrity—March 9, 2009, 74 Fed. Reg. 10671 (March 11, 2009)(“To the extent permitted by law, there should be transparency in the preparation, identification, and use of scientific and technological information in policymaking.”).

While the Chamber is not in a position to offer technical guidance on how to define combustible dust, we are pleased to see OSHA acknowledge the complexities of this issue, even to the point of admitting that “no single, universal accepted definition” exists, and that the NFPA standards, which play such a significant role in this discussion, are not consistent on this point. 74 Fed. Reg. 54341. In the discussion preceding the specific questions, OSHA enumerates the variables involved in whether a certain dust, or level of dust is combustible or explosible. This list demonstrates that a “one size fitting all” style regulation will be ill suited to this hazard, and will only create more confusion, with overbroad requirements, without appreciably increasing worker protection and workplace safety. This list also establishes the need to develop specific data and science on the characteristics of dust and the factors that contribute to the combustibility and explosibility of different dusts before OSHA moves forward with a regulation.

E. Hazard Communication and Training

18. Do the MSDSs you develop or use identify the risks associated with combustible dust hazards? Do they list mitigation measures? Are you aware of MSDSs that should identify combustible dust as a hazard and do not? If so, please explain.

The Chamber believes that if credible data exist about a combustible hazard related to a specific dust, MSDSs would be an appropriate vehicle for disseminating this information in the same way that toxicity or corrosiveness hazards are communicated. Such data could include levels of accumulation known to create combustible or explosive hazards, and types of ignition sources that are to be avoided.

By suggesting that MSDSs could be used in this manner, we are in no way endorsing OSHA’s proposed “unclassified hazards” approach recently included in the proposed regulation implementing the Global Harmonized System into the Hazard Communication Standard which used combustible dust as an example of a hazard that would be covered under that category. See 74 Fed. Reg. 50395 (Sept. 30, 2009).

F. Consensus, Industry, and Insurance Standards

Generally speaking, OSHA should not rely directly on NFPA standards for a number of reasons. As OSHA admits, the NFPA standards have conflicting definitions and many embedded references to other NFPA standards. The process by which these voluntary consensus standards are developed is completely different from the OSH Act and Administrative Procedure Act rulemaking process OSHA is obligated to use when promulgating its standards and regulations. For example, the interested public and stakeholders do not have the opportunity to review and comment on these consensus standards during the development period. Nor are these consensus standards subjected to any type of critical reviews regarding the quality of data, feasibility, and impact on small businesses that OSHA regulations must undergo. NFPA and other similar voluntary consensus standards are developed with open-ended terms, often with significant issues left vague, and these standards simply are inappropriate to be converted into a legally

binding regulatory requirement on employers. Furthermore, vendors of protective equipment who will be benefited by these consensus standards are allowed to participate in their drafting despite the obvious conflict of interest this presents. Finally, NFPA standards are only available to non-NFPA members through a fee structure making them wholly unsuitable for mass circulation—adoption by OSHA would represent a substantial and unwarranted windfall benefit. (See response to Question 54 for more on this issue.)

H. Engineering Controls

OSHA should proceed carefully before mandating retrofitting of engineering controls. Many of these types of controls are among the most expensive responses to potential hazards and mandating their retrofitting will impose extraordinary burdens on businesses, especially small businesses. Even delaying the requirement to install these controls can have a devastating impact. Mandating the use of engineering controls, and their retrofitting, should be reserved for those facilities with recognized, severe combustible dust hazards that cannot be controlled by any other method.

L. Regulatory Approach

47. OSHA recognizes that the risk from combustible dust hazards varies with the type of material involved and the conditions present, the particular processes used at a facility, and the number of workers exposed. These hazards exist in facilities ranging from a woodworking shop with one employee to a large manufacturing plant with thousands of workers. Should OSHA scale its requirements to be more or less restrictive depending on either the size of, or type of dust present in, the facility? How should this scaling be done (*i.e.*, how should the provisions of a standard be applied to different facilities)? Are there situations or conditions that should limit the provisions that apply? If so, please explain.

The Chamber feels very strongly that OSHA should tailor any NPRM and final rule to the specific size and type of dust to be regulated. As the ANPRM itself notes in different places, and this question reaffirms, potential combustible dust hazards vary greatly, particularly depending on the particle size and other properties of the dust. With all of these variables, a general standard addressing all of the possible hazards would result in a highly inefficient and ineffective standard. Accordingly, the Chamber does not support a singular standard that regulates all combustible dust hazards in all applicable industries in a “one size fits all” approach. If OSHA pursues this rulemaking effort, the Chamber recommends that OSHA conduct a comprehensive investigation of all potential dusts including seeking input from all affected parties before making any decision as to the scope of any standard. In addition, the variety of combustibility and explosibility properties of the various dusts must be determined in a way that is consistent with the Information Quality Act; merely asserting that a given dust is combustible or explosible under the proper conditions is inadequate to support such a regulation.

For dusts to be combustible or explosible, the proper conditions must be present. Accordingly, if OSHA goes forward on this effort, the agency should develop an approach that recognizes the differences in both the size of the facility and the specific conditions necessary for dust to become a hazard.

48. Given the various definitions in the consensus standards, how should OSHA define combustible dust – by minimum particle size, without regard for particle size, or should the definition vary for the type of dust? Provide the technical basis for your response.

Any rule-making must take into account all variables that contribute to – or lessen – the hazard of combustion. That determination cannot be made without taking into consideration the workplace environment where the dust is generated and/or accumulated. Fortunately, OSHA has a model on which to rely for combining the specifics of a dust hazard with a specific work setting: the grain handling standard, 29 CFR 1910.272. OSHA cites the Chemical Safety Board’s report as describing this standard as “a model for OSHA action that has proven effective in reducing catastrophic dust explosions in the grain industry.” 74 Fed. Reg. 54336.

49. Data indicates that mineral dusts (such as silicates, sulphates, nitrates, carbonates, phosphates, cement, salt, gypsum, sand, and limestone) are not explosible. Should OSHA exclude mineral dusts or any other dust from coverage? If so, which dusts? Please provide the technical data substantiating the lack of explosibility.

OSHA should, at a minimum, exclude any dust known to be not explosive. Moreover, the fact that many dusts are not explosive further supports the point that these dusts should be individually assessed to determine if a combustible dust standard for the particular dust will enhance employee safety. The agency must keep in mind that many other specific regulations, as well as OSHA’s Housekeeping regulations, give the agency ample authority to ensure the safety and health of employees working with those non-combustible dusts, and even combustible dusts.

50. Some dusts (such as wood dust) are widely understood to be combustible, and are explosible under a wide range of conditions. Should OSHA consider certain dusts explosible under any conditions, thereby precluding the need for testing? Alternatively, should OSHA permit employers to make this determination? If so, for which types of dust? Please explain your responses.

As a general matter, the Chamber opposes any attempt to create any “presumptions” of combustibility for dusts, even those such as wood dust, because their combustibility is equally a product of the conditions as it is the specific dust. Given the unique circumstances of each workplace, *i.e.*, the design of the facility, the location of the dust, the quantity of dust, the density of the dust, the amount of moisture present, the availability of an ignition source, and existing engineering and administrative controls, the Chamber urges OSHA to refrain from any blanket pronouncements of *per se*

combustibility. If OSHA moves forward with any rulemaking, the Chamber recommends that the agency consider a well tailored standard or standards applying only to the category of dusts or industries where it is established that specific levels of a certain dust in specific conditions will constitute a combustion or explosion hazard.

51. The NFPA combustible-dust-related standards have some similar provisions, but also have some provisions that vary for different types of dusts. Other NFPA standards have provisions that apply only to specific dusts. Should an OSHA standard cover different types of dusts separately, together, or in some other manner? Please explain your response.

The fact that the NFPA standards have numerous and varying provisions for various types of dust is further confirmation that dust hazards cannot be aggregated and must be treated based on their hazard profiles. If OSHA proceeds with this rulemaking, it should not adopt a single standard for all combustible dusts and must focus on each dust separately. Under this scenario, the agency should draft a rule for each dust that meets the requirements of the OSH Act, will enhance worker safety, and will not needlessly burden employers.

52. The approach suggested by the CSB and others contains many of the elements in OSHA's Process Safety Management (PSM) Standard. Should an OSHA standard take an approach similar to the PSM Standard, *e.g.*, by requiring the development and implementation of a site-specific plan tailored to the facility and hazards in question? Please provide a rationale for your response.

The Chamber recommends that OSHA consider a standard applicable only to certain industries or certain categories of dusts where the combination of dust hazard profiles and conditions are present. As a general matter, the Chamber supports provisions which provide employers with flexibility and options as to compliance, including determining compliance on a site-by-site basis. We are not prepared to determine whether any type of PSM approach would be appropriate in the context of combustible dusts. However, we believe that the PSM approach does represent an extensive, time consuming, and ultimately costly process. Accordingly, this might present serious burdens for small employers.

53. NFPA 654 contains a provision for combustible dust hazard assessment, which helps refine the actions required for adequate safety under the specific conditions present in a facility. OSHA recognizes that this approach may not be necessary for all types and sizes of facilities. For example, a small furniture shop may be able to safely operate under a fixed set of requirements for the well-understood hazards of wood dust. Should every provision of an OSHA combustible dust standard be dressed in a hazard assessment, or just

provisions involving engineering controls? Should the hazard assessment vary according to the size or type of facility? Please explain your response.

The Chamber is concerned with any combustible dust standard with applicability to a wide variety of employers and operations. However, we do not have enough understanding of how a hazard assessment would operate in this context to decide whether every provision of a combustible dust standard should hinge on one. This is a question where OSHA benefit greatly from input provided by a variety of stakeholders, especially small employers, through the SBREFA process.

54. It has been suggested that OSHA incorporate NFPA standards by reference to address combustible dust hazards. The Agency is concerned with a number of issues regarding this approach. These concerns include, but are not limited to:
- i. The scope of NFPA standards exceeding OSHA's mandate to protect only employees.
 - ii. The multitude of mandatory primary references, secondary references, and other subordinate references in each NFPA standard that could result in an unnecessary burden on employers.
 - iii. The differences between the various NFPA combustible-dust-related standards.
 - iv. The frequent updating of standards by NFPA, making the OSHA standard outdated.
 - v. The limited availability of older editions of NFPA standards.
 - vi. The difficulty involved in readily updating the consensus standards referenced in an OSHA combustible dust standard to the current or most recent edition of the consensus standards.
 - vii. The fact that OSHA cannot legally update NFPA or other consensus standards used in its rules by referring to the "current" or "most recent" edition of the consensus standards.

How do you think the Agency should make use of NFPA standards in a prospective OSHA standard? If the NFPA standards are not directly incorporated by reference into the OSHA standard, would it be appropriate for the OSHA standard to reference NFPA standards as compliance alternatives (*e.g.*, if an employer complies with the referenced NFPA standard applicable to an operation, OSHA would deem the employer to be in compliance with the applicable provision of the OSHA standard)?

The Chamber strongly opposes any combustible dust standard that adopts by reference NFPA 654 for the reasons identified in this question as well others mentioned in our response under Section F. The NFPA standard adopts “consensus” views of combustible dust hazards, that do not necessarily reflect the best or the most practical approach. OSHA itself has recognized the fundamental problems presented by adopting national “consensus” standards as regulatory standards. *See, e.g., 55 Fed. Reg. 47660, November 14, 1990* (“The organizations which produce consensus standards expect that compliance will be voluntary, based on agreement among interested parties regarding the need for particular precautions. It is implicit that the primary concern of the standard-producing organizations is to improve the overall safety of a workplace by fostering compliance with the spirit, rather than the letter, of the consensus standards. On the other hand, OSHA standards, including those adopted from consensus standards, impose mandatory burdens, because the Agency’s statutory duty to require protection of employee safety and health.”) Accordingly, to the extent that the agency pursues rulemaking, the Chamber strongly urges the agency to develop regulations by listening to and adopting the input from stakeholders, who are on the front-lines of safety and workplace management issues. Provisions of NFPA 654 might be helpful as a starting point in any rulemaking; but the Chamber would object to any use or incorporation by reference of NFPA 654, or any other similar third-party standard, that would not have been subjected to the rigorous examination and review inherent in the robust OSHA rulemaking process.

For OSHA to provide a safe harbor for compliance if an employer has fulfilled NFPA 654 would be a new policy approach. OSHA has resisted endorsing any third party compliance materials. If the agency were to recognize NFPA 654 as satisfactory to demonstrate compliance under a combustible standard, the agency would then have to begin reviewing and endorsing a wide array of private sector, association based compliance materials for a wide array of standards.

55. Outreach efforts (both public and private), employer awareness, and OSHA’s enforcement have increased in response to various combustible dust incidents over the last decade. As a result, many employers continue to upgrade their facilities and update their operating procedures to prevent and control combustible dust hazards. Would an OSHA combustible dust standard increase employee safety beyond the level already attained through current Federal efforts, State and local requirements, and voluntary standards? What approach would most effectively increase the safety of employees? Please provide a rationale for your response.

OSHA’s increased outreach and education efforts have demonstrated the value of non-regulatory approaches in improving employers’ awareness and protection from combustible dusts and their hazards. More can certainly be done in this direction with respect to synthesizing the vast amount of information in the public domain about combustible dust hazards for employers and the Chamber believes that the risks associated with combustible dust will be best mitigated and managed through education and outreach. The Chamber suggests that the best approach for OSHA to increase

employer awareness and compliance would be to initiate a national campaign and develop suitable guidance materials, including but not limited to, a new SHIB or other detailed guidance documents detailing this issue, and describing the existing rules in this area, and promote this effort through the wide variety of existing resources currently available to the agency. Any additional mandatory standards must be well crafted and tailored to the specific hazard and environment if they are to contribute appreciably to improved workplace safety rather than merely serve as a source of confusion, citations, and penalties.

56. In 2003, OSHA concluded in its regulatory review that no significant changes were needed to OSHA's standard on Grain handling facilities at that time. Are any revisions needed to the portions of this standard that address fires and explosions? Are revisions to this standard necessary to harmonize it with the treatment of other dusts? Should the existing provisions of the standard that address fires and explosions be covered under a combustible dust rule? If OSHA retained the standard and issued a combustible dust standard that applied to other facilities and processes, would portions of your plant be covered by both standards? If so, would this present a problem? Please explain your response.

The Chamber believes that OSHA's own Section 610 regulatory review process supports our position as articulated in these comments that OSHA should address and/or regulate every different dust with a different and specific approach. Based on this regulatory review, there appears to be no basis to make any changes to the current grain handling standard. Any revisions to this successful narrowly tailored rule would be counterproductive, unnecessary and most likely burdensome without any corresponding benefits for workplace safety and health.

57. OSHA anticipates that administrative and work practice controls would be included in a combustible dust standard. For instance, several OSHA standards already address the accumulation of fugitive combustible dust, but do not address the escape of dust. Some ignition sources are covered under current OSHA standards (such as electrical and powered industrial trucks), but other, easily controlled ignition sources, would likely be addressed in a prospective OSHA combustible dust standard (such as open flames, sparks, hot surfaces, static electricity, tools, and smoking). Engineering controls can be more costly and take longer to implement than administrative controls. Should an OSHA combustible dust standard have requirements for engineering controls to control fugitive combustible dust? Which engineering controls should or should not be required, and under what circumstances? Should OSHA require retrofitting of engineering controls, and if so, which controls? What time period should OSHA allow for retrofitting? What are the costs associated with retrofitting these controls?

As we noted in our response under Section H, the Chamber urges OSHA to proceed carefully and deliberately before adopting any standard that would require specific engineering controls. Such controls may not always be the best or most efficient means to combat combustion hazards especially, for example, in small business settings where risk mitigation may be properly achieved through administrative controls, or greater attention to housekeeping standards. Likewise, the Chamber does not support mandating any specific engineering controls, especially those that require retrofitting, as each employer would typically be in the best position to determine the best controls on a site-by-site basis, especially where some employers may have engineering controls that *exceed* those that OSHA may mandate. Again, as the Chamber has noted in this comment, different dusts have differing properties and potentials for combustion, depending on the setting, and the controls suitable for one workplace would be inappropriate for another, even in the same type of industry. OSHA imposing any sort of preliminary determination as to the applicability or suitability of engineering controls would be presumptuous. The Chamber recommends that OSHA solicit more input from stakeholders, such as in the one stakeholder forum held in December 2009, and implement the SBREFA panel review process to obtain the input from smaller employers before making preliminary decisions of this nature. The Chamber hopes that OSHA has not already prejudged this issue and has not already made decisions in this regard, without the benefit of the rulemaking process and direct input from affected stakeholders.

58. Workers are often in the best position to understand how processes work and the characteristics of the materials involved. Workers also may be in the best position to see how variations in procedures or equipment can affect their safety. Should operational employees participate in the development of engineering and administrative controls? Will this participation improve their safety? Please explain your response.

Operational employees may not have the requisite engineering and technical background to be able to participate in the development of engineering and administrative controls in most cases. While their participation in these decisions may be possible in some cases, under no circumstances should this be a mandatory requirement. The employer should be able to decide, given the particular operation and circumstances, whether such employees can assist in this process. OSHA regulations and requirements are imposed on the employer and accordingly, the employer must ultimately be responsible for satisfying them and understanding their impact and benefits. While employees and their safety are always paramount, it does not follow they are in the best position to decide what level of engineering or administrative controls are appropriate.

59. Facilities, processes, and materials are subject to change over time. These changes can affect potential hazards, and, thereby, the means used to mitigate those hazards. If these changes are not examined to determine if corresponding changes in protection or prevention are necessary, worker safety could be decreased. Should change management be a component of an OSHA standard. Why or why not?

The Chamber recommends that OSHA defer any decisions as to the applicability of change management until the agency has obtained sufficient information to be able to adequately assess the nature of the potential standard, the particular dust to be regulated, and whether change management would make sense in the covered operations. Inquiring at this stage how to incorporate change management into a standard that has not been developed is premature. To the extent that OSHA is concerned about this question, reliance on various non-regulatory approaches such as the Safety and Health Information Bulletin appear to provide useful channels to communicate necessary information. Such concern also argues for a performance orientation in the standard so that new technologies or data can be accommodated without new rulemaking, as opposed to a standard that would mandate specific controls which might later be deemed less effective, or obsolete.

60. A fire, explosion, or near-miss, could indicate that improvements are necessary to provide an adequate level of employee safety. Improvements may depend on the incident's severity or consequences. Should investigations of fires or explosions be a part of an OSHA combustible dust standard? Should a fire or explosion be classified for reporting purposes in terms of its severity, effect, size, or duration? If so, provide details. Should investigations and reporting of near-misses be a part of an OSHA standard? Please explain your response.

The Chamber is not convinced that the burden to businesses associated with reporting fires will have any demonstrable impact on identifying or preventing combustible dust hazards. In the aftermath of a fire, or similar incident, which would otherwise not be reportable, requiring employers to submit a report to OSHA merely adds another burden when there are much more pressing matters needing attention. Defining near miss incidents is nearly impossible for dust, and this requirement would vastly overburden employers. Employers will naturally investigate the causes for such an incident to determine what could be done differently to prevent a recurrence. Adding this as a requirement will only create another compliance item, and one which could generate citations if not conducted to OSHA's satisfaction. If OSHA were to conduct the investigation, this would only serve to introduce OSHA's enforcement agenda rather than help the employer understand the cause of the incident and make necessary changes.

M. Economic Impacts and Benefits

62. What are the potential economic impacts associated with the promulgation of a standard specific to the hazards of combustible dust? Describe these impacts in terms of benefits from the reduction of incidents and injuries; effects on revenue and profit; and any other relevant impact measure. If you have any examples of estimates of the costs of controlling combustible dust hazards, please provide them.

The Chamber has no doubt employers – especially small businesses, as detailed below – will bear a heavy financial burden should OSHA pursue rulemaking for combustible dust. OSHA already has at its disposal a wide variety of guidance, outreach

and educational materials describing the existing standards addressing combustible dust, and the agency should undertake further efforts to ensure compliance by employers through non-regulatory approaches before taking steps to develop a comprehensive regulation which will have a significant adverse economic impact on employers. The Chamber believes that a general comprehensive combustible dust standard would have to take into account myriad variables of workplace circumstances to avoid simply adding to the confusion that the agency has cited as the justification for implementing this rulemaking in the first place.

63. What changes, if any, in market conditions would reasonably be expected to result from issuing a standard on combustible dust? Describe any changes in market structure or concentration, and any effects on services, that would reasonably be expected from issuing such a standard.

Much of the impact or potential market changes would be a product of the details of any actual regulation issued. Regardless, we believe that the cost of complying with a comprehensive combustible dust regulation would be significant, and would likely be passed to consumers. For example, the Chamber could easily see a situation where flour or sugar dust is regulated in a general standard, with specified requirements to address the hazard such as engineering controls. Such a standard could impose significant costs, particularly if the engineering controls are mandated to be retrofitted. Businesses covered by these requirements will have no choice but to recoup these costs through their pricing structure. In turn, this could put small businesses at distinct competitive disadvantages to larger operations who would have greater ability to absorb these costs.

64. Would a comprehensive OSHA standard on combustible dust reduce fire and explosion hazards? How would an OSHA standard address any noncompliance problem (such as, noncompliance with the housekeeping standard or the GDC)?

For the reasons that the Chamber has cited previously in this comment, we have doubts that a comprehensive combustible dust standard would be effective in reducing fires and explosions. Such a standard would likely be overbroad, most likely ambiguous and difficult to comply with, and likely result in more confusion about this potential hazard. The Chamber recommends that OSHA utilize its existing set of resources, including already existing regulations, as well as develop any new guidance materials or SHIBs, and develop a comprehensive outreach effort, possibly combined with another National Emphasis program on combustible dust or certain types of the most hazardous combustible dusts to further educate and inform employers on these hazards and appropriate protective measures. If there are particular dusts and hazardous conditions that are not adequately accounted for under the current regulations, and OSHA determines that a regulation is warranted, then OSHA should only pursue a regulation that is narrowly tailored to the specific hazard profiles of the various dusts, and the conditions in the workplaces that would create a hazard.

N. Impacts on Small Entities

65. How many, and what type of small firms, or other small entities, have combustible dust hazards, and what percentage of their industry (NAICS code) do these entities comprise?

The Chamber believes that any potential combustible dust rulemaking would have a significant direct impact on millions of small businesses across all types of operations. Combustible dusts may be found in such a wide array of products, including wood, food, metal, chemicals, pharmaceuticals, rubber, plastic, paper, furniture, electric services, transportation equipment, durable goods, and textile mills, many in small business settings. In any rulemaking effort OSHA must obtain the necessary input from those employers who will be obligated to comply with any final rule. The Chamber recommends that OSHA implement the SBREFA process and convene a SBREFA panel to hear directly from small businesses as to the costs and other potential impacts of the proposed rule. The potentially broad and wide ranging impact of any potential combustible dust standard on smaller employers makes this rulemaking exactly the type for which the SBREFA process was designed.

66. How, and to what extent, would small entities in your industry be affected by an OSHA standard regulating combustible dust? Do special circumstances exist that make controlling combustible dust more difficult or more costly for small entities than for large entities? Describe these circumstances.

Because small businesses have fewer resources and are less able to efficiently absorb compliance costs than large businesses, small businesses will bear a disproportionately large share of regulatory compliance costs.⁸ In fact, economic research shows that small businesses “shoulder a forty-five percent greater regulatory burden per employee than their large business competitors.”⁹ The imposition of an entirely new system of regulating combustible dust represents huge burdens on small employers.

In order to properly assess the impact of the proposed rulemaking on small businesses, the Chamber strongly urges OSHA to engage the SBREFA panel review process. The proposed rulemaking is sure to have a “significant economic impact” on a “substantial number of small entities,” thereby triggering the convening of the SBREFA panel review process.

O. Compliance Assistance

67. Are you familiar with any of the following guidance and outreach products OSHA has produced? Which of these products have you

⁸ Holman, Keith. “The Regulatory Flexibility Act at 25: Is the Law Achieving its Goal?” 33 Fordham Urb. L.J. 1119, 1123 (2005).

⁹ Id.

used as an aid in determining what to do about combustible dust in your facility?

Generally speaking, the Chamber fully supports any guidance and outreach products produced by OSHA that would enhance the level of available education and outreach with respect to dealing with combustible dust hazards. An additional benefit to OSHA finding that a combustible dust regulation would have a significant economic impact on a substantial number of small entities is that this would trigger the requirement for the agency to produce small entity compliance guides in accordance with Section 212 of the Small Business Regulatory Enforcement Fairness Act.

The Chamber is familiar with each of these compliance assistance materials, and is confident that they have been instrumental in helping employers become more knowledgeable about hazards related to combustible dust. They are effective in targeting employers that may have combustible dust hazards and educating them as to the best means of minimizing those hazards.

- a. Safety and Health Information Bulletin – *Combustible Combustible Dust in Industry: Preventing and Mitigating the Effects of Fire and Explosions*.

See answer above.

- b. Web site Safety and Health Topics Page – *Combustible Dust*.

See answer above.

- c. Hazard Alert Fact Sheet – *Combustible Dust Explosions*.

See answer above.

- d. Poster – *Combustible Dust – Does your company or firm process any of these products or materials in powdered form?*

See answer above.

68. What types of materials, products, or outreach would assist you and employees in addressing combustible dust hazards? Do small businesses have special needs with respect to the form or content of such materials? Would dust-specific or industry-specific materials be useful?

Because the proposed Combustible Dust rulemaking is so wide-ranging, the Chamber urges OSHA to emphasize research, educational, and outreach programs so that employers and employees have a better understanding of the hazards and implications of combustible dust. OSHA needs to engage in an interactive process with employers so that they understand their obligations with respect to the proposed rulemaking. In addition to providing detailed compliance assistance, OSHA should also consider funding programs that ensure that the necessary compliance assistance materials will be available

to affected employers, especially small businesses. The Chamber would again urge OSHA to convene the SBREFA process to obtain information from small businesses as to what types of compliance assistance materials would benefit their types of facilities and operations. Generally speaking, the Chamber would suggest that small business would need specific information, materials and resources devoted to their particular needs and challenges, and would urge OSHA to make sure it is aware of those particular requirements. As internet technology advances, OSHA should make as much use of it as possible, including demonstrating compliance techniques via internet based video as the agency has recently done with regard to the differences between respirators and surgical masks and how workers can conduct seal checks to ensure respirators are being worn properly. Making these types of materials available on the internet will greatly facilitate their use by employers and employees who may need to access them during odd hours.

69. Do you prefer paper publications such as booklets, fact sheets, and quick cards, or electronic tools such as OSHA safety and health topics pages and eTools?

The Chamber believes that publications in both paper and electronic form are effective means of educating and reaching out to employers, both large and small, who may be faced with issues related to combustible dust hazards. Again, this is yet another reason why the Chamber recommends that OSHA take steps to implement the SBREFA process to obtain information to better answer this question.

CONCLUSION

The Chamber remains greatly concerned about OSHA's intentions to develop a comprehensive combustible dust standard. Combustible dust is not a single hazard easily reducible to a single standard, like other hazards which OSHA regulates. The hazard profiles of different dusts vary widely, and must be coupled with specific conditions and ignition sources to constitute a fire or explosion hazard. For OSHA to promulgate an effective regulation in this area, the agency must take into account these many variables so that such a regulation is well tailored to specific dusts and conditions which constitute a hazard.

Furthermore, recent non-regulatory efforts by OSHA have demonstrated the value of providing information and guidance to help employers understand and appreciate the seriousness of combustible dust hazards. Accordingly, OSHA would be well served to devote resources to develop a comprehensive outreach program to address any potential combustible dust hazard by using the tools and authority it currently has at its disposal, such as existing standards addressing this hazard (such as OSHA housekeeping requirements), as well as a properly implemented compliance campaign with the wide variety of guidance materials such as SHIBS, guidance documents, and other similar materials, to ensure that employers are aware of any such issue present on their worksite and have enough information to take appropriate measures.

Should OSHA move forward with its rulemaking efforts on combustible dust, in addition to promulgating a well tailored regulation, the Chamber urges OSHA to provide sufficient opportunities for stakeholders and potentially affected parties to provide input and information to the agency, including at a minimum, implementation of the SBREFA process including a SBREFA panel to review any such proposed rule. Input from the actual employers who will be required to comply with any such rule will enable the agency to make better informed decisions and tailor such a regulation to the hazard profile of specific dusts and the conditions necessary to create a hazard. Proceeding this way will likely reduce the confusion, complications, and burdens of such a regulation, although any regulation will present difficulties for many of the Chamber's members, particularly small businesses, to comply with. The Chamber is happy to assist in this effort.

The Chamber is continuing its review of this ANPRM, as well as discussing this ANPRM with its members, and may file supplemental comments to this ANPRM in the future.

Respectfully submitted,



Randel K. Johnson
Senior Vice President
Labor, Immigration and Employee Benefits



Marc Freedman
Executive Director of
Labor Law Policy

Of Counsel:

Dennis J. Morikawa
Morgan, Lewis & Bockius, LLP
1111 Pennsylvania Avenue, NW
Washington, DC 20004

Morgan, Lewis & Bockius, LLP
1701 Market Street
Philadelphia, PA 19103