United States House of Representatives
Education and Workforce Committee
Subcommittee on Worker Protection
Examining OSHA's New Silica Regulation
Testimony of Henry Chajet, Esq. Jackson Lewis P.C.
On Behalf of the United States Chamber of Commerce
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Good Morning and thank you for the opportunity to address the new OSHA silica rules. Everyone wants OSHA to succeed in its mission of working with industry and employees in protecting the safety and health of the nation's workforce. The Chamber shares this goal and supports logical, rational and feasible efforts to reduce employee injuries, illnesses and deaths.

Unfortunately, the new OSHA silica regulations are not consistent with OSHA's statutory requirements for regulations to be data driven, feasible, and performance oriented. The regulations address one of the most common materials on earth, sand, and millions of employees in a wide range of industries, most of them small businesses that make or use building materials (e.g. concrete, brick[1], and coatings), consumer products (glass, counter tops, and foundry products for automobiles, factories and homes), oil and gas (drilling), and an endless array of other agriculture, construction, consumer, industrial, communication, transportation, high tech, and national defense products.

While many industries use or encounter sand by the truck load, OSHA limited employee exposure to an infinitesimal and invisible amount of 50 micrograms of "respirable silica dust" (RSD) per cubic meter of air as a time weighted average over eight hours (PEL = 50 $\mu g/m^3$), roughly equal to an eye drop in the center of a teaspoon, dispersed in the air of a 12x10 room. In addition OSHA's new rule mandates massive new employer duties for silica, similar to the OSHA asbestos rule (air sampling, engineering controls, medical exams, respirators, restricted work areas, training, control plans, and extensive recordkeeping) many of which trigger on at one half the PEL limit, called an "action level" set at 25 micrograms per cubic meter of air ($25\mu g/m^3$).

OSHA estimates that the new silica rule will cost only about $1billion. However, the estimate is wildly speculative and inaccurate, using low implementation cost forecasts, that in reality will add up to multiple billions of dollars.

For OSHA to issue a new health standard, it must first demonstrate there is a significant risk present in the workplace. In the famous Supreme Court decision striking down OSHA's benzene standard, Justice Stevens noted that "before he can promulgate any permanent health or safety standard, the Secretary is required to make a threshold finding that a place of employment is unsafe -- in the sense that significant risks are present and can be eliminated or lessened by a change in practices." [2] While we do not challenge whether exposure to respirable crystalline

[1] Attached to this testimony is a report from the U.S. Chamber of Commerce on impacts the OSHA silica regulations will have on the brick manufacturing industry.
[2] 448 U.S. 642

silica (RSP) presents a hazard, current data undermine OSHA's conclusion that a significant risk is present in contemporary workplaces.[3]

Thus, the first question Congress should examine is why OSHA believes such a sweeping revision to the PEL for RSP is warranted in light of the success of existing limits, and what accounts for this success

According to the Center for Disease Control, silica related disease mortality in the United States is on a steep, downward trend towards vanishing, under the current rules, even with OSHA documenting about a 30% non-compliance rate, e.g. 30 % of employees exposed to RSP are exposed above the current limits, most two to three times the current limits (81 FR at 16296)

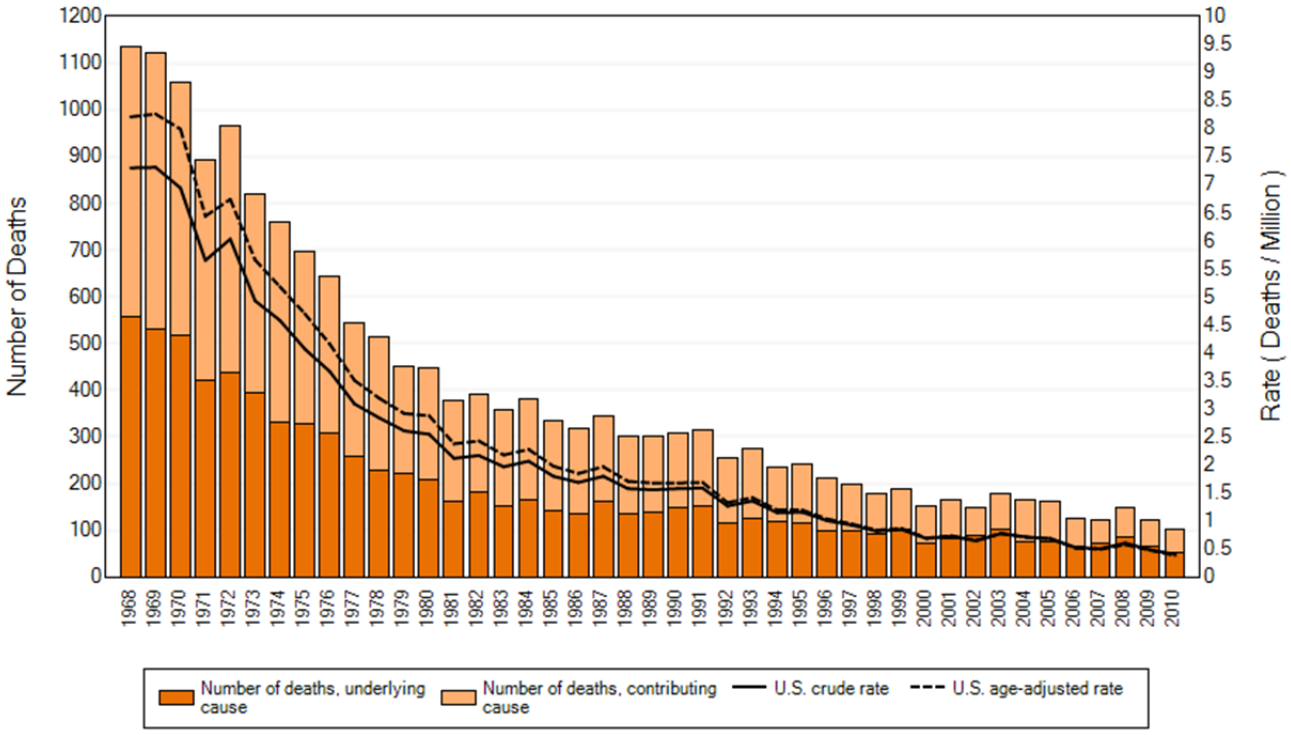
Table III-2 Time-Weighted Average (TWA) Exposures to Respirable Crystalline Silica Samples for Construction and General Industry (January 1, 2003 –December 31, 2009)

Exposure (severity relative to the PEL)	Construction		Other than construction	
	No. of samples	Percent	No. of samples	Percent
<1 PEL	548	75%	948	70%
1 x PEL to < 2 x PEL	49	7%	107	8%
2 x PEL to < 3 x PEL	32	4%	46	3%
≥ 3 x PEL and higher(3+)	103	14%	254	19%
Total # of samples	732		1355	

Source: OSHA Integrated Management Information System

[3] Attached to this testimony is an article from the Society for Risk Analysis, "Will the Occupational Safety and Health Administration's Proposed Standards for Occupational Exposure to Respirable Crystalline Silica Reduce Workplace Risk?" by Susan E. Dudley and Andrew P. Morriss, Vol. 00, No. 00, 2015.

Silicosis: Number of Deaths, crude and age-adjusted death rates, U.S. residents age 15 and over, 1968-2010



Source:
Mortality multiple cause-of-death data from National Center for Health Statistics, National Vital Statistics System. Population estimates from U.S. Census Bureau. **Reference Number:** 2014-768
Date Posted: September 2014

OSHA itself describes this data as a documented success: "Unlike most occupational diseases, surveillance statistics are available on silicosis mortality and morbidity in the U.S. ***Silicosis-related mortality has declined in the U.S. over the time period for which these data have been collected. From 1968 to 2005, the annual number of silicosis deaths decreased from 1,157 to 161*** (NIOSH, 2008c, Document ID 1308; *http://wwwn.cdc.gov/eworld*). The more current CDC data above, not used by OSHA, describes even greater success in conquering respirable silica related hazards. (81 FR 16296)

While one silica related death or illness is one too many and must be prevented, the CDC data calls into question what level of risk is present in contemporary workplaces where exposure to silica remains. OSHA dismissed this data, and accordingly did not attempt to determine why such a dramatic decline in silica related fatalities has occurred under the current limits.[4] The developer and author of the original silica PEL explained its success in a published article – as at least twice as effective for prevention than anticipated.[5]

[4] 81 Fed. Reg. 16591.
[5] Ayer, H. Appl. Occup. Environment. Hyg. 10(12), Dec. 1995.

Unfortunately, the new rule is an example of an agency that lost its focus. Faced with multiple workplace safety challenges, OSHA spent twenty years and millions of taxpayer dollars in this rulemaking on silica, but did not keep up with scientific and technological developments, and failed to grasp that silica was one of the nation's great public health victories, and crucial to both our historical economy and new millennium technologies, like fracking. In fact, OSHA failed to even analyze fracking in its now more than a decade old small business review, causing OMB to hold the rule for more than two and a half years, while OSHA tried but failed to understand the impact and feasibility of its rule on that industry.

Not only does OSHA ignore the clear CDC data showing a vanishing risk, it also hides from its own failure in attaining compliance with the current rules. OSHA consistently demonstrates through its own sampling that 30% of sampled exposures are higher, mostly two to three times higher than the current PE. In other words, current limits are far more protective than OSHA predicted as shown by the steep CDC documented decline in silica mortality even with massive over-exposure to current PELs.

To justify the new rule OSHA relies on speculation for its own analysis, and uses the fantasy to show that its new rule is feasible, and will address so called "significant risks" at the current PEL, and provide modeled significant benefits, without real world evidence. Yet, under the new rule and reduced limits, OSHA will document far more than the current 1/3 of the samples as out of compliance, without doing anything to solve its compliance problem. More troubling is that OSHA will penalize responsible companies, which produced the documented CDC success, by mandating massive and costly new duties that are not needed, nor beneficial to preventing silica related disease in the United States.

The Assistant Secretary and his team prejudged the silica rule making and pronounced the result several years ago, despite extensive scientific evidence to the contrary. That evidence was presented by world class experts on behalf of the Chamber and others. The new regulation was based on stale and dated data as evidenced by the 2003 SBREFA review used for the 2016 regulation. Moreover, OSHA did not study or analyze the CDC data in the above graph posted on the web and published in 2014.

The CDC data for actual cases of silica related mortality shows less than one sixth the cases predicted by OSHA speculation modeling that it states would be prevented by the new rule. The CDC data shows the success of the current rules and PEL, moving aggressively towards disease elimination. By contrast, OSHA's speculation on how many lives will be saved by the rule is based on their assumption that the CDC data is wrong. We disagree. There simply is no silica related disease epidemic caused by a significant risk from exposure to sand, even at levels twice the current PEL.

What is clear is that the new rules will not solve OSHA's compliance failures. Instead of leading to compliance for non-compliant employers, the new regulation will place thousands of workplaces out of compliance, even though there is no demonstrated risk of disease. OSHA has never established that eliminating overexposure to the current PEL would not be a solution to the low number of remaining cases of disease.

OSHA's new regulation will place massive new burdens on responsible employers already preventing risks and do nothing to gain full compliance.

The flaws of the OSHA rule were identified by the 2003 small business review panel conducted under the Small Business Regulatory Enforcement Fairness Act. However, OSHA

dismissed the key finding of the 2003 report: that OSHA should not proceed with this rulemaking because the agency had not proven the need for a new standard in light of existing levels of overexposure at the current PEL. Instead, OSHA cherry picked isolated comments from that report to create the impression it was following its recommendations. Even though the 2003 review did not include the fracking industry, OSHA refused to conduct a SBREFA review panel contemporaneously with this proposal. The result was that the impact on the fracking industry—one of the industries hardest hit by the rule and which has strong small business participation—was never analyzed as required by law. Instead, OSHA was forced to conduct a rushed and, ultimately inadequate analysis of the impact on fracking by OIRA when the proposed regulation was undergoing review. This was no substitute for OSHA actually soliciting input from members of that industry directly as would have happened under a SBREFA panel review process.

The rulemaking was further flawed by OSHA's administrative hearings when OSHA cut off questioning by industry counsel, while permitting all questions posed from government and labor witnesses. In addition, the hearings revealed that OSHA had data it created and relied upon, but kept secret and out of the public record. The secret data was cited by OSHA at the hearing to contradict sampling and analysis feasibility criticisms by expert witnesses.

OSHA economic and technological feasibility conclusions were not supported by industry specific evidence. Instead, they were based on conclusory speculation, including the application of third world country production techniques as applicable to U.S. industry. Most if not all of OSHA's flawed feasibility and cost analysis was produced by a contractor, without revealing the identity and background of the individuals who performed the work. The resulting cost calculations by OSHA were wildly out of synch with industry estimates. OSHA feasibility conclusions were built on an assumption that if most of industry was in compliance with current limits they could feasibly comply with reduced limits. The Chamber's substantial submission from an array of engineering, medical, and economic experts demonstrated that OSHA's feasibility conclusions were not supported by adequate data or analysis.

We have many specific concerns related to the record OSHA used to justify and write the new rules. Set forth below are some of the OSHA improprieties revealed by our intial review of the massive document released on March 25, 2016.

- OSHA defines "employee exposure" to *mean "the exposure to airborne respirable crystalline silica that would occur if the employee were not using a respirator."*

In other words, OSHA will use exposures that are not actual employee exposures to determine compliance.

- Given the technological advances and new, comfortable and effective personal protective gear, why would OSHA penalize an employer for investing in protection by not "counting" its impact in preventing real "exposure?

OSHA continues to insist on costly engineering controls when comfortable and effective personal protection can be used successfully as a primary control.[6] This antiquated approach must change to further health gains and permit US industry to be competitive.

- OSHA creates and mandates "regulated areas" for sand, one of the most ubiquitous materials on the planet.

[6] 81 Fed. Reg. 16781.

These restricted work areas will interfere with schedules and efficient procedures, again making U.S. businesses less competitive. OSHA needs a new focus that values our jobs and industrial capacity while recognizing that industry can and has protected employees without antiquated quarantined workplaces. Indeed, one reason for the precipitous drop in silica related disease and mortality rates is the widespread use of respirators and other types of personal protective equipment.

- "Respirable crystalline silica" is redefined by OSHA as "airborne particles *that are determined to be respirable by a sampling device* designed to meet the characteristics…" (81 FR 16712**,** emphasis added)

Regardless of their design, the samplers also capture non-hazardous, non-respirable dust. OSHA solved its accurate measurement inadequacies and feasibility problems, identified by experts, by redefining "respirable" simply as that dust captured by the sampler. In other words, OSHA's rule no longer regulates a hazardous material — respirable dust of defined particle size— but instead regulates non-respirable dust as well.

- OSHA's massive and expensive new air monitoring and lab analysis mandates — for sand dust— are far beyond the capabilities of small and mid-sized businesses. Moreover, the Chamber submitted evidence of the inherent inaccuracies of silica analysis at the new low regulated levels. Expensive but inaccurate sampling results will mandate new regulatory duties and additional sampling and analysis, and will mean employers will not be able to tell when they are in compliance.

- "Observation of monitoring" mandates permit employees to spend entire shifts "observing" the operation of a sampling pump worn by another employee.
OSHA's takeover of the management of the workforce to observe sampling is both unnecessary and unjustified.

- The rule mandates vast new record keeping burdens but the new records will not reduce risk or provide benefit.

Among the millions of pages of new records required will be: respiratory protection programs, compliance plans, air monitoring records, lab records, new medical exam records, and extensive training records.

- The new rule creates a massive new medical surveillance program, *paid for by employers, including* (i) i*nitial medical examination*s with chest X-ray… interpreted and classified… by a NIOSH-certified B Reader; a pulmonary function test administered by a spirometry technician with a current certificate from a NIOSH-approved spirometry course; tests for latent tuberculosis infection; and any other tests deemed appropriate by the provider. Periodic examinations and referrals to specialists will be employer funded and mandated. Records mandated for this health care program are massive and too many to list.

This Silica Care, Obama Care supplement is mandated for employer payment without an adequate analysis of its benefits, impact and cost for an OSHA estimated 2 million exposed employees.

- While OSHA attempted to mitigate some of the impacts of the final rule through extended implementation periods they do not legitimize the rule. Giving more time to comply with a flawed regulation will not cure the problems with the standard; a delayed bad rule is still a bad rule.

There are many other provisions of the rule that are neither justified nor beneficial. We would be pleased to provide further information or answer any questions. We thank you again for the opportunity to share the concerns of the US Chamber of Commerce.

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