



Statement of the U.S. Chamber of Commerce

ON: H.R. 5522, THE COMBUSTIBLE DUST EXPLOSION AND FIRE PREVENTION ACT OF 2008

TO: THE HOUSE COMMITTEE ON EDUCATION AND LABOR

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The U.S. Chamber of Commerce is the world's largest business federation, representing more than three million businesses and organizations of every size, sector, and region.

More than 96 percent of the Chamber's members are small businesses with 100 or fewer employees, 70 percent of which have 10 or fewer employees. Yet, virtually all of the nation's largest companies are also active members. We are particularly cognizant of the problems of smaller businesses, as well as issues facing the business community at large.

Besides representing a cross-section of the American business community in terms of number of employees, the Chamber represents a wide management spectrum by type of business and location. Each major classification of American business— manufacturing, retailing, services, construction, wholesaling, and finance—is represented. Also, the Chamber has substantial membership in all 50 states.

The Chamber's international reach is substantial as well. It believes that global interdependence provides an opportunity, not a threat. In addition to the U.S. Chamber of Commerce's 98 American Chambers of Commerce abroad, an increasing number of members are engaged in the export and import of both goods and services and have ongoing investment activities. The Chamber favors strengthened international competitiveness and opposes artificial U.S. and foreign barriers to international business.

Positions on national issues are developed by a cross-section of Chamber members serving on committees, subcommittees, and task forces. More than 1,000 business people participate in this process.

Statement of David G. Sarvadi, Esq.

Keller and Heckman, LLP

Before the

Committee on Education and Labor

March 12, 2008

Good morning. Mr. Chairman, Members of the Committee, and invited guests, thank you for the opportunity to participate in this important proceeding.

My name is David Sarvadi. I am an attorney with the Washington, D.C., law firm of Keller and Heckman LLP, and my purpose is to provide you with some insights on H.R. 5522 from the perspective of someone who has managed combustible dust issues in a manufacturing environment and has extensive experience with OSHA rulemaking and enforcement activities. I will also offer some suggestions on how I believe the bill could be improved.

My own training and education includes a Master's of Science Degree in Hygiene from the department of Occupational Health at the University of Pittsburgh's Graduate School of Public Health, so I started life as a budding scientist. I received a law degree from George Mason University in 1986, and have been a certified industrial hygienist since 1978. I joined Keller and Heckman LLP in 1990. Early in my career I worked at a company that actually had to deal with combustible dust hazards, and I am generally familiar with the methods of control, although by no means an expert on the topic.

I joined Keller and Heckman in 1990. At Keller and Heckman LLP, we represent and assist employers in meeting their obligations under a variety of federal and state laws, as well as international treaties and the laws of Canada, Europe, and many countries of the Far East. In particular, we help clients maintain progressive health and safety programs intended to protect

their employees in their workplaces, as well as to comply with national and international health and safety laws and standards. The Occupational Safety and Health Act is the primary focus of our compliance assistance here in the U.S.

I am appearing in this hearing on behalf of the U.S. Chamber of Commerce. Any views expressed herein should not be attributed to my firm, my partners, or any other entities, including any of our clients. I am here as a member of the Chamber's committee with responsibility for occupational safety and health matters, and as a person with a long standing interest in the topic of occupational safety and health. I have practiced industrial hygiene and occupational health and safety law now for more than 35 years.

The primary issues before us are whether the Occupational Safety and Health Administration (OSHA) should be directed to adopt a standard to address the hazards of so-called "combustible dusts," and, if so, what direction or guidance should be provided to OSHA in proceeding to develop and adopt such a rule. Recent accidents, including the tragic explosion at the Imperial Sugar plant near Savannah, re-emphasize the importance of vigilance on safety and health matters. There is no question that there are significant hazards associated with processing dry materials that have the capacity to burn. But there is also no question that both the hazards and methods for controlling them have been recognized for a long time.

I want to commend OSHA for one thing. I have reviewed its safety and health bulletin on combustible dust and it is excellent. It covers in understandable terms the kinds of considerations that come into play when combustible dusts are present, and highlights both OSHA and voluntary standards that are applicable in various circumstances. Importantly, it lists not only voluntary National Fire Protection Association (NFPA) standards that apply, but also OSHA standards as well. It is important to remember that the general housekeeping standard, the electrical standard, and others have specific requirements that apply to workplaces where combustible dusts are present.

OSHA has also initiated a National Emphasis Program (NEP) of inspections designed to ensure that employers are following the applicable OSHA standards and generally recognized practices in this area. Actions are being taken to raise the level of awareness to issues of combustible dust, led by OSHA, and there are existing solutions that are being used right now.

It is also important to remember that the primary external oversight of combustible dust hazards is provided by the loss control representatives of the employer's insurance carrier, the local building inspectors and the local fire department, all of which are likely to visit sites with combustible dust issues far more often than OSHA compliance personnel.

Employers and employees have a mutual interest in safe operations. When a tragedy occurs, it is the family, friends, and neighbors of the people in the workplace who are injured and affected. Even if no injuries occur, an accident disrupts lives and the livelihood of all employees of the organizations in which they occur. So there is a substantial and continuing incentive to take all reasonable steps to mitigate hazards.

For most employers, OSHA standards provide a floor for their compliance programs. Employers prefer certainty as to their obligations, and clear and unambiguous standards, reasonably interpreted and enforced, are welcome. Indeed, in the great tradition of the American way, citizens have joined together since our country's earliest beginnings to work together to improve our common good.

Standards are an important lubricant of commerce in the U.S. The earliest days of the industrial revolution in the U.S. highlighted the difficulty encountered when competing organizations used different designs for things like railroads. Only when standard gauge track and equipment came into common use did the railroads really begin to prosper. Thus, the use of consensus standards to facilitate commerce is not only generally acceptable, but history shows the importance of sharing information and approaches to problems.

As organizations grow, bureaucracies develop, and the implementation of standards depends more and more on the development of paper trails. To the extent that such bureaucratic activities detract from the primary activity, it will be damaging rather than enhancing to the objectives being sought. In that regard, broad recordkeeping requirements that do not have a direct relationship to safety and health should be minimized. As one of my clients says, when looking at all the recordkeeping requirements they have compared to what they actually find useful, "not everything we count counts." Adoption of OSHA standards should take this balancing of interests into account.

The Proposed Bill

Given the recent publication of the OSHA bulletin, the recently initiated OSHA NEP inspections, the prominent role of insurance carriers, building inspectors and local fire department officials, and the invigorating impact of these developments on their collective efforts, some would suggest waiting to assess the impact of those collective efforts whether there is a need for an OSHA standard in this area. For others, that approach may not be satisfactory.

In no way do I mean to make light of the tragic dust explosions that have occurred. Dust explosions have occurred in industry for many years, and what we do not know is whether these recent cases reflect random events as the rate declines because of improvements in equipment and technology, or whether the number of events is occurring at an increasing rate, or at least is not declining. This is a question that should be answered, because it may tell us that what we believe works in fact is not as effective as we would like.

A properly developed standard may be appropriate. However, as tragic as these events have been, the situation is not one that calls for the rushed adoption of an emergency temporary standard. Such a rush to judgment fails to provide the time needed to determine what measures should be required.

OSHA has explicitly recognized the fundamental problems presented by adopting national “consensus” standards as regulatory standards (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 of the Agency’s statutory duty to require protection of employee safety and health.

For example, NFPA 654 uses the word “should” 113 times, and would have to determine whether to change the “should” to a “shall” or delete the associated provision from any proposed rule.

Furthermore, the latest edition of NFPA 654 was adopted in 2006. The introduction notes that new explosion technologies were adopted in the 1994 and 1997 editions of that standard. They cannot simply be applied, without grandfathering provisions, to every building that was constructed or modified over the last century. Some accommodation needs to be made for facilities or processes that were built or modified in accordance with local approvals issued under the then applicable building codes. NFPA 654-2006 specifically addresses the issue of prospective v. retroactive application and provides as follows:

1.5 Retroactivity.

The provisions of this standard reflect a consensus of what is necessary to provide an acceptable degree of protection from the hazards addressed in this standard at the time the standard was issued.

1.5.1 Unless otherwise specified, the provisions of this standard shall not apply to facilities, equipment, structures, or installations that existed or were approved for construction or installation prior to the effective date of the standard. Where specified, the provisions of this standard shall be retroactive.

1.5.2 In those cases where the authority having jurisdiction determines that the existing situation presents an unacceptable degree of risk, the authority having jurisdiction shall be permitted to apply retroactively any portions of this standard deemed appropriate.

1.5.3 The retroactive requirements of this standard shall be permitted to be modified if their application clearly would be impractical in the judgment of the authority having jurisdiction, and only where it is clearly evident that a reasonable degree of safety is provided.

It is important to note that the proposed legislation does not really address combustible dust hazards, but would have OSHA adopt general principles similar to the other process based standards. This approach, which was derived from standards developed by the military during World War II and through the decades since, take a systematic approach to evaluation of processes, hazards, and consequences of failure. No one doubts that some form of this kind of analysis is important in many circumstances, but it is the level of detail that is applied in any individual case that is the detail in this case where the devil is lurking. The proposed language would apply “in any . . . industry in which combustible dust presents a hazard. . . .” This phrase is preceded by a list of processes, industries, and products that presumably would be covered. Unfortunately, the language used fails because of the ambiguity inherent in such broad terminology. In the way it is phrased, it is circular. A facility using combustible dust is covered if the combustible dust is a hazard. As a lawyer, such language is encouraging because it inevitably leads to litigation over what it actually means.

I take issue with the proposed language that somehow Material Safety Data Sheets (MSDS) “often” do not adequately address combustible dust hazards. I am not sure what is meant by this statement. It appears to have been based on a statement in Combustible Dust Report issued by the Chemical Safety Board to the effect that the MSDS for combustible dusts were “inadequate.” The intent of the OSHA Hazard Communication Standard was to require chemical manufacturers and suppliers to communicate the inherent health hazards and physical hazards, such as the hazard of a dust explosion, to downstream customers. Its purpose was not to require chemical manufacturers and suppliers to determine how each ultimate user would use the product and to specify the design of the user’s equipment, processes, and facilities, and other measures that might be needed to control that hazard.

It is important to remember that the MSDS conveys information about the chemical it covers, and that it is the responsibility under the Hazard Communication Standard (HCS) of the employer whose employees use the chemical to take that information and apply it to their workplace. It is not the job of the MSDS, nor in my humble opinion can it be, to educate the employer-customer about the panoply of requirements that may be attendant to adequately controlling hazards presented by chemicals. Stated differently, if we believe employees or employers are not reading current MSDSs what makes any of us here think they will read longer

more comprehensive ones. Part of the job of a safety program in the context of the HCS is to consolidate requirements and knowledge into usable and memorable information for managers and employees. In this sense, the CSB report misinterprets the intention and purpose of the MSDS in the HCS scheme.

These Hazards Are Well Known

Combustible dust explosion and fire hazards have long been recognized. The US Bureau of Mines has long conducted research on explosive and combustible dusts, and NFPA standards and industry safety guidelines go back to the same period, but continue to evolve. There are 21 from NFPA alone listed by OSHA in its bulletin. A textbook I have on the subject of industrial hygiene has an entire 30-page chapter on the topic, published in 1963.

The fact that there is so much information on the topic suggests that it is not a lack of information that is important, but a lack of knowledge about the information, even about its existence. Getting information into a form that is easily accessible and usable is a critical and perhaps missing step. With the Internet, we can access huge amounts of data, but we get no usable information until a person applies intelligence and organizes it. Perhaps the appropriate approach should be to provide some money for educating employers and employees about the hazards of combustible dusts, particularly unusual situations like some of the ones described in the CSB report, and developing some of these consolidated information sources. See OSHA's bulletin.

Voluntary Standards and Rulemaking

Some will suggest that OSHA should simply adopt the voluntary standards that exist. To the extent that the standards reflect actual consensus about a particular topic, those sections that are mandatory can be useful in preparing regulatory provisions. Nevertheless, they need to be reviewed in an open process by OSHA because they are not always free of bias and may not represent true consensus among affected parties. I previously testified in 2006 at a subcommittee hearing on this issue. Congress assumed that consensus standards were the process of an open and transparent process. When they are, the standards do represent the best practices of the affected parties. But when the standards are contentious, it is more often the case that one or

another group has managed to impose its will, with the result that the process in which the standard was adopted is not the equivalent of the mandatory notice and comment proceeding that is typically required for government standards.

Following normal rulemaking procedures is important from another perspective. To the extent that people feel they have been fairly heard, and the decision is made on the basis of objective technical criteria, they are more likely to accept it. We need such acceptance because we need voluntary compliance with these requirements to ensure true safety in the workplace. It will do no good to impose standards that in the end lead to more disputes and contention because, again, it will distract from the principal objective.

Thus, we believe that it is imperative to recognize that a process longer than 90 days will be needed for OSHA to even adopt an interim standard. The process is inherently longer the more complicated the issue. Our experience of late is replete with unintended consequences of well-meaning but misguided action, particularly on the part of government. Short-circuiting the process by mandating changes within such short time frames will lead to more unintended consequences.

An example will help. Suppose such a standard is adopted, and that it is determined that one of the NFPA standards should become mandatory. Normally, standards are forward-looking, and one critical aspect that is fleshed out in the rulemaking process is what to do about existing installations. Should they be upgraded? How long will employers be allowed to bring facilities into compliance? Should existing designs be grandfathered? How far back should such a grandfather period go? I would suggest that these questions need to be answered before a comprehensive standard is imposed on a broad and ambiguous group of employers and employees.

It is simply wrong to suggest that OSHA can reasonably adopt the NFPA standards within 90 days. The NFPA standard 654, for example, is complex, on the one hand containing detailed technical specifications for the performance of critical process equipment and components, and on the other hand, including programmatic requirements such as those contemplated in the proposed legislation. Adopting this kind of standard without the normal

array of feasibility and other analyses through an accelerated process is a recipe for difficulty if not disaster.

The complexity of the NFPA standards also suggests that having standards adopted through the legislative process is not a good idea. NFPA standards, including NFPA 654, are staffed with experts with many years of experience, most of whom are engineers. Engineers are trained in assessing the competing demands that are inherent in any design process, making decisions and trade-offs that are informed by engineering judgment to achieve what are hopefully optimum results. The expedited standard adoption process contemplated by the bill would deprive interested and affected parties the opportunity to be heard, and would result in the imposition of a standard likely to be less effective.

The CSB Reports

The CSB summary report contains a chart showing an increasing number of events since 1980. CSB suggests that the data are unclear as to their real implication because they may be incomplete. Is this not an important question to answer before embarking on a wholesale regulatory change that has the potential to impact a very large segment of our economy? I believe it is.

I also believe that the lack of a recommendation on training and education in light of conclusions that management as well as employees were unaware of combustible dust hazards in most of the cases described is striking. A national emphasis program incorporating an education and outreach element would seem to be in order. OSHA has had considerable success in its efforts to work with employer groups to get information and training in the hands of those who need it. Given the scope that CSB suggests exists, it would seem more urgent to provide training and education than to impose an untested standard on the economy.

Education plays an important role in enforcement as well. Compliance with voluntary standards often enforced by local officials, but the uneven skill set possessed by not only local officials but also by OSHA inspectors suggests that training for inspectors and enforcement agencies is also important.

Conclusion

Combustible dust hazards are real and well recognized. With the extensive knowledge base and existing OSHA standards, it is not yet clear that a combustible dust-specific standard would improve overall safety performance with respect to this hazard or even employer safety practices. If such a standard is to be issued, it must be done as part of traditional rulemaking with full opportunity for those affected by it to participate in its development and with all appropriate analyses and reviews included.