



February 10, 2012

The Honorable Cass Sunstein
Administrator, Office of Information and Regulatory Affairs
Office of Management and Budget
Eisenhower Executive Office Building
1650 Pennsylvania Avenue, N.W., Room 262
Washington, DC 20503

RE: OSHA Globally Harmonized System for Classification and Labeling of Chemicals (GHS)/Hazard Communication Standard (HCS) (RIN: 1218-AC20)

Dear Administrator Sunstein:

The OSHA GHS/HCS regulation has been at OIRA undergoing review under Executive Order 12866 since October 25, 2011. On January 24, 2012 your office indicated that the review for this rule has been extended. During the review period, various employer groups have met with your office to emphasize concerns with OSHA's proposed rule. We are writing to reiterate those concerns and demonstrate broader support for them.

The CWS supports the goals of this rule and agrees that creating a unified system of labels and hazard warnings will be beneficial to producers and manufacturers who sell their products into countries covered by the U.N.'s GHS. Indeed, this rule was initiated in the last administration and has enjoyed bipartisan support in Congress because of the efficiencies it is seen as creating. These efficiencies would ultimately lead to better workplace safety practices thus benefiting employees as well. However, unless the problems in the proposal identified below are corrected, the benefits of this rule will be outweighed by the burdens, complications, and uncertainties that will flow from these provisions.

The chief problem we see in OSHA's proposal is the creation of the "unclassified hazard" category. The principle underlying both the existing HCS and the GHS is that every category of covered hazard is explicitly identified and defined with objective criteria and all physical hazards are defined by test methods and results. This new category is undefined and open-ended, and therefore subject to entirely too broad and discretionary an interpretation, making it unworkable. As such, it is inconsistent with the intent of the GHS, and would leave both suppliers and employers with no certainty about whether they have met the requirements of this rule, potentially exposing them to inappropriate OSHA enforcement when the agency unilaterally identifies a new unclassified hazard. The undersigned groups believe this provision must be removed from the rule to maximize its effectiveness and meet the objective of the HCS and GHS.

The CWS is comprised of associations and employers who believe in improving workplace safety through cooperation, assistance, transparency, clarity, and accountability.

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Compounding the complications associated with the unclassified hazard category, OSHA included in the preamble to the proposed rule, commentary that combustible dust would be an example of an unclassified hazard. In so doing, OSHA has signaled that this rule will become a *de facto* combustible dust rule imposing requirements for a hazard that is not defined or covered in either OSHA's current HCS or the U.N. GHS. (See, 74 Fed. Reg. 50395). Combustible dusts generally do not meet the test for the "flammable solid" category under the HCS and they are not "explosives" as demonstrated by their exclusion from coverage under GHS. Combustible dust is not an intrinsic hazard—i.e. it only exists as a byproduct of other factors beyond the specific substance in question; it is site specific and highly complex. Any attempt to regulate combustible dusts must be done through a separate rulemaking. Indeed, OSHA has such a rulemaking underway (RIN: 1218-AC41) and that is where any discussion of combustible dust should occur.

OSHA using preamble commentary to tie combustible dust to the unclassified hazard category is the equivalent of using guidance to achieve an outcome that ought to be addressed only through a rule developed through full notice and comment rulemaking. Maintaining the appropriate notice and comment procedures, data, analysis, and transparency requirements, as well as legal due process that would accompany the rulemaking is imperative for such a complicated hazard. Agencies attempting to regulate through guidance are contrary to OMB's Bulletin for Agency Good Guidance Practices. This problem was recently noted as an undesirable practice in the report from the President's Council on Jobs and Competitiveness.¹ (See pages 43-44.) Indeed, because the combustible dust issue was only discussed in the preamble to the proposed rule, many groups were not aware of OSHA's expressed intentions regarding combustible dust and the ramifications. Had they seen this more clearly, these groups would have raised strong objections in their comments.

Finally, the HCS speaks specifically of chemicals and their hazards while OSHA's concept of combustible dusts includes many substances not contemplated by the HCS as made clear by an OSHA workplace poster on combustible dust hazards.² Many are agricultural or other non-chemical materials. Combining OSHA's broad description of combustible dusts with the open ended unclassified hazard category in the new rule creates a troubling image of how OSHA would use this rule to impose a combustible dust requirement where it otherwise would not exist and to skirt the rulemaking already under way.

We are encouraged that the review for this rule has been extended. We hope this indicates that these concerns are being taken seriously and appropriate revisions are being pursued.

Sincerely,

American Bakers Association
American Chemistry Council
American Coke & Coal Chemicals Institute
American Composites Manufacturers Association

¹ During your appearance at the U.S. Chamber's Labor Relations Committee meeting on November 30, 2011, you also expressed concern about this trend in response to a question. Part of your response was to encourage anyone with examples to bring them to the attention of your office.

² See, Combustible Dust Explosions Poster, available at: <http://www.osha.gov/Publications/combustibledustposter.pdf>.

American Feed Industry Association
American Forest and Paper Association
American Foundry Society
American Hotel & Lodging Association
American Iron and Steel Institute
American Trucking Associations
Associated Builders and Contractors
Associated General Contractors
Associated Wire Rope Fabricators
California Cotton Ginners and Growers Associations
Composite Panel Association
Corn Refiners Association
Food Marketing Institute
Institute of Makers of Explosives
Kansas Cotton Association
Kitchen Cabinet Manufacturers Association
Messenger Courier Association of America
Motor & Equipment Manufacturers Association
National Association of Manufacturers
National Association of Wholesaler-Distributors
National Cotton Ginners Association
National Federation of Independent Business
National Grain and Feed Association
National Maritime Safety Association
National Oilseed Processors Association
National Retail Federation
Non-Ferrous Founders' Society
North American Die Casting Association
Retail Industry Leaders Association
Shipbuilders Council of America
SPI: The Plastics Industry Trade Association
Texas Cotton Ginners' Association
Textile Rental Services Association
U.S. Chamber of Commerce
United States Beet Sugar Association
Western Agricultural Processors Association

cc: Presidential Chief of Staff Jacob Lew
Director of the National Economic Council Gene B. Sperling
Director of the Office of Management and Budget (Acting) Jeffrey D. Zients
Director of the Domestic Policy Council Cecilia Muñoz
Assistant Secretary of Labor for Occupational Safety and Health David Michaels