February 7, 2014

OSHA Docket Office
Docket No. OSHA-2010-0034
U.S. Department of Labor
Room N-2625
200 Constitution Avenue NW
Washington, DC  20210

RE:  Docket no. OSHA-2010-0034 Occupational Exposure to Respirable Silica- Comments on Proposed Rule

To Whom It May Concern:

On behalf of Acme Brick Company and its subsidiaries (“Acme”), these comments are being submitted in response to the Occupational Safety and Health Administration (“OSHA”) proposed rule on “Occupational Exposure to Respirable Silica,” Docket: OSHA-2010-0034 to reduce the permissible exposure level (“PEL”) for silica and to add ancillary requirements to facilities subject to the rule. This rule, as proposed, has the potential to have a significant detrimental impact on Acme and its associates who are involved in the sale and manufacturing of clay brick, concrete block and other building materials, as well as those building materials industries, while providing no commensurate improvement to the health or wellbeing of workers employed in these industries.

In addition to the comments set forth herein, Acme would reference and incorporate the comments submitted by the Brick Industry Association (“BIA”) and its representatives and the National Concrete Masonry Association (“NCMA”) and its representatives. In addition to Acme’s comments herein, Dr. Garth Tayler, Technical Director of Acme, is also submitting comments on behalf of Acme addressing some of the more technical aspects of the proposed rule and its adverse effects on Acme (“Tayler Comments”), which are also incorporated into this comment.

I.  Background of Acme Brick and its brick, block and building material business.

Acme has been manufacturing fired clay brick for over 122 years. Acme and its predecessors have also manufactured concrete blocks, pavers, cut stone and related products for several decades. It is also involved in the sale and distribution of other building materials, such as simulated stone products, tile, wood flooring, glass blocks, grid systems, etc. Through its various subsidiaries and affiliated operations, it currently employs approximately 2,200 associates at over 100 locations in 15 states.
Acme currently owns or operates 34 production facilities. Of those facilities, 25 are directly involved in the manufacture of fired clay bricks. Due to the recession and lack of construction, only 16 of these facilities are currently operating at various levels of capacity. There are over 1,000 associates directly employed at those brick production facilities. The other nine manufacturing facilities are involved in production of concrete block, cut stone, and grid systems used in the construction and building materials industry and employ approximately 300 associates.

The brick, block and other building materials manufactured and sold by Acme are used on homes and buildings throughout most of the United States. All Acme associates rely upon the manufacture and sale of these products for their livelihoods. Over the last few years, as a result of the recession and the downturn in the construction and homebuilding industry, Acme was forced to significantly reduce its workforce. Although Acme has seen improvement in product sales in some markets and sectors, production levels have not warranted return of all associates. The industry is still fragile and sensitive to pricing concerns on all Acme products.

As Acme’s General Counsel and Risk Manager, I am directly responsible for the company’s risk control, prevention and implementation, including supervision of all workers’ compensation and liability claims against the company. Acme believes that its “Associates are our Greatest Assets,” so their safety is a priority. Therefore, Acme has a number of policies and programs to protect workers, including a “Silica Action Program” (“SAP”) which addresses OSHA’s current regulations pertaining to occupational exposures to respirable crystalline silica at its facilities.

Acme would respectfully request OSHA to consider the following comments and those referenced herein regarding the proposed changes to regulations on occupational exposure to respirable crystalline silica.

II. Silica concerns in the workplace at Acme and other building materials facilities.

Respirable crystalline silica in the workplace has been known and addressed by OSHA regulations for decades. OSHA has acknowledged that the health and safety risks arising from exposure to respirable silica are not the same among different industries. This is particularly true for many building materials industries, i.e. brick and block manufacturing. Despite the presence of crystalline silica in these industries, the actual experience of Acme and the finding by the BIA and NCMA demonstrate no significant risk of material impairment of health or functional capacity to workers in these industries from respirable crystalline silica exposures. This is particularly explained in the BIA comments and supported by the Robert Glen Report, Health Effects of Crystalline Silica in the Clay Brick Industry, 2014 (“Glen Report”), also submitted in response to OSHA’s proposed rule change. (See also Sec. III below).

While crystalline silica is not a major component of the products manufactured by Acme, it is naturally found in varying degrees in its basic raw materials. Crystalline silica found in the clay and shale used in the clay brick industry is between ten and thirty percent (10% and 30%) of the overall properties in these raw materials. (See Glenn Report; Tayler Comments). It would be impractical to remove all silica from these raw materials before it is used in brick manufacturing. More importantly, the current levels of respirable crystalline silica in clay brick production at Acme’s facilities have simply not resulted in a measurable impact on workers’ health and safety.
In fact, as demonstrated in the Glen Report, exposure to respirable crystalline silica is not a significant cause of silicosis or silica-related injuries or illnesses in the clay brick industry.

Many of Acme’s locations have to deal with crystalline silica naturally present in the outside environment and ambient air. In some cases, that ambient air may already contain levels of respirable crystalline silica higher than allowed by existing OSHA regulations, particularly in more rural, arid areas. Distinguishing exposures to respirable crystalline silica found naturally in the environment at a worksite (i.e., construction sites, Acme plants) from silica generated by an employer is difficult, if not impossible.

Acme has for many years followed its SAP, which establishes standards and action levels, from measured exposure monitoring of associates. Corrective actions are taken in areas that exceeded current OSHA respirable crystalline silica PEL. By following OSHA’s current PEL and regulations and its SAP, the health and safety of Acme’s associates have not been compromised, and silicosis and other related injuries or illnesses from respirable crystalline silica exposures have been insignificant or nonexistent. (See Sec. III below). OSHA’s proposed rule change is therefore unnecessary and not justified, for Acme’s locations.

III. Acme questions the need for further regulation of silica to protect workers.

As noted, Acme operates numerous facilities and utilizes many workers in the manufacturing or fabrication of clay brick, concrete blocks and other building material products. Acme’s associates also work closely with contractors at construction worksites. Despite exposure to respirable crystalline silica at these plants, offices and worksites, Acme’s actual experience has shown no significant risk of material impairment of health or functional capacity by following current respirable crystalline silica PEL and regulations. Therefore, there is no reason to believe additional impairment of health will be eliminated by OSHA’s proposed change in the PEL and regulations. Acme’s experience is consistent with others involved in the clay brick and concrete masonry manufacturing industries. (See comments by BIA and NCMA submitted to this docket).

After review of Acme’s workers’ compensation and liability claims records for the last twenty-five (25) years (1989-2013), there were only three claims by workers alleging a possible silica-related injury or illness. (See attached Travelers Detail Loss Reports, 01/09/2014, personal info omitted). It is significant that none of those claims indicated a diagnosis of silicosis, death or even a serious illness related to silica exposure. (Id.) In fact, the total amount paid by Acme for medical and other expenses for all three claims was approximately $4,000. (Id.) Considering the total number of other claims and amount of all expenses incurred by Acme and its insurer over that same twenty-five (25) years, it is evident that silica-related claims are insignificant or non-existent.

The Glenn Report and BIA Comments clearly and convincingly outline extensive research conducted on occupational exposures of respirable crystalline silica in the clay brick industry. As confirmed by Acme’s actual experience, there is no evidence of a serious problem of silicosis or death from exposures within the clay brick industry, despite the potential levels of silica found in the manufacturing of clay brick. If there is no silicosis with current PEL of 100 µg/m³, OSHA cannot reasonably conclude that further reductions in the PEL would result in a significant decrease in deaths or in any additional benefits to a worker’s health.
Acme has managed its operations in accordance with OSHA’s current regulations, particularly the current PEL, with no serious injuries or illnesses related to respirable crystalline silica exposure in the workplace. To require a change in these regulations when no significant risk of material impairment of health or functional capacity is not only outside of the scope of OSHA’s directive by Congress, it would create unnecessary expenditures by companies that are attempting to recover from one of the most difficult economic periods in our country’s history. (See 29 U.S.C §652(8) & §655(b)(5)). Working within the parameters of rules already in place, Acme and others in its industries have been successful in preventing injuries, illnesses and more significantly, deaths, from exposures to respirable crystalline silica. Focusing on enforcement of existing regulations and providing assistance to industries that may be dealing with silica-related injuries would be a much better use of our country’s and U.S. businesses’ limited resources.

IV. OSHA’s proposed rule changes would significantly increase Acme’s costs.

With the absence of significant workplace risks from respirable silica exposure in the building materials industries, the amount required to meet the proposed PEL is an unwarranted increase in the costs of capital improvements and annual operating expenses for Acme and others in its industries. The evidence shown in this comment, BIA and NCMA comments, and other related reports all indicate the actual costs are far in excess of the amounts relied on by OSHA in its recommendation. (See 78 Fed. Reg. 56274, et seq.). Even the significantly understated amounts relied upon by OSHA are excessively burdensome on the building materials industries, which are trying to return to pre-recession levels of employment, production and profitability. The reduction of the PEL to 50 µg/m³ and the establishment of an action level at 25 µg/m³ are not warranted, as it would have no commensurate reduction in silicosis cases. Therefore, Acme believes OSHA should reconsider this proposal to raise the PEL for Respirable silica exposures and add unnecessary and expensive regulations to meet this PEL.

A. OSHA’s cost estimations are significantly understated

In the preamble to its proposal (78 Fed. Reg. 56372-56380), OSHA acknowledges use of data from the years 2000 through 2006 to represent “normal year variation” in profits and prices. This data was used in estimating the percentage of profits and revenues that would be consumed by estimated costs for implementing the proposed respirable crystalline silica rule, particularly meeting the PEL in the years following promulgation of the final standard (i.e., 2015 and beyond). The use of data that is both dated and ignores the adverse impact of the economic recession of recent years must be reconsidered, and OSHA should acknowledge the figures do not accurately reflect the cost and effect on industry. Home building and brick sales during 2006 and 2007 were at their historically highest levels. These years in OSHA’s analyses were among the most productive seen by the brick and building material industries in recent decades and far above the levels seen since 2006 or expected in the near future.

Acme and other brick industry companies participated in an economic study sponsored by the American Chemistry Council’s Crystalline Silica Panel (ACC Silica Panel). The results of that study demonstrated significantly underestimated costs of this rule to the brick and other industries by OSHA. (See ACC Silica Panel report, submitted separately to this docket). OSHA estimates the average annual cost of the proposed rule change for a clay brick plant to be $38,422. (See 78
Fed. Reg. 56368). Even if accurate, this cost-benefit assessment would be unacceptable given the current state of most companies. A vastly increased cost to the clay brick industry with no additional benefit to the employees of the industry does not justify the cost of that reduction in the PEL. As recognized by OSHA, the annual cost for clay brick manufacturing in 2009 was significantly higher than the general industry cost of $2,571. (See 78 Fed. Reg. 56368). Although not as significant, the general industry cost also exceeds the concrete block estimated costs. (See below).

Acme’s review of its own costs and economic impact on the company shows an even more substantial understatement of the costs of these changes by OSHA. As noted in Dr. Tayler’s comments, a substantial expenditure of capital investment and annual operating costs would be necessary to try to achieve the proposed PEL and related regulations. (See Tayler Comments, p. 3). Even with these expenditures, there would be no assurance of compliance, given the technical issues in detecting and acting on an action level of 25µg/m³. (Id.). After reviewing information on the 16 clay brick plants that are currently operating, Acme’s engineering department estimated a total capital expenditure of $5,565,000, necessitated by OSHA’s proposed PEL and regulations. (Id.). On average, the capital cost per plant would be approximately $347,812. In addition to these capital costs, there would be the added annual operating costs totaling $2,025,500; an average of $126,593 per plant per year. Acme’s annual cost per plant is calculated to be over three times the $38,422 determined by OSHA. (See 78 Fed. Reg. 56368). These estimates do not include expenditures already made by Acme under its current SAP or included in newer plants. Furthermore, it should be noted that any idle plants brought back on line (currently nine (9) brick plants), would require additional capital investments and operating expenses.

Dr. Tayler provided a specific breakdown of the capital and operating costs for one of the plants, which would be more difficult to meet the proposed rule (shale plant). The capital cost on just that plant was estimated to be $885,000, without regard to depreciation or interest charges. (See Tayler Comments, p. 3). The annual operating expenditures for that plant would be $412,000. (Id. p. 4). This estimate demonstrates the potential of even higher average costs per plant in the event Acme encounters difficulties in achieving the lower PEL.

While an evaluation of the costs and economic impact on Acme’s concrete block plants was not completed within the time provided for this comment, NCMA has provided in its comments findings that also indicate annual costs of at least $25,000 for an average plant to comply with the reduced PEL for respirable crystalline silica under the new rule. For plants that manufacture various types of products (i.e. split face, polished, etc.) with various additives, the costs would be more. Considering only this average plant cost results in at least five times the amount stated by OSHA. (See OSHA’s Preliminary Economic Analysis, 2013 [“OSHA PEA”]). For Acme’s six concrete block plants, that means a minimum of an additional $150,000 in costs per year.

In addition to the underestimation of the actual costs incurred by Acme and the building materials industries, OSHA failed to consider the past and ongoing results of the economic recession in its conclusions. Assessing the economic impact of any rulemaking by ignoring data pertaining to the economic recession beginning in 2008 cannot be justified. OSHA’s use of 2000 to 2006 data to establish the “normal” does not provide a realistic analysis of the costs when these
rules become effective. The building materials industries have suffered through enormous economic hardship during these past years, with many companies operating at less than forty percent (40%) of capacity. (See BIA Comment). Even with recent improvements in the U.S. economy, Acme is still only operating at approximately forty percent (40%) of its capacity. (See Tayler Comments). The actual cost of implementing the proposed rule is simply not economically affordable, particularly in the building manufacturing industries. Considering the continued weakness in the construction and housing markets, there is simply not enough demand to support price increases necessary to pay the costs of these proposed changes and remain profitable. The erosion of profitability that will inevitably occur should the proposed rule be enacted would surely result in additional business failures in our industry.

B. Unconsidered costs of increased regulation of Silica rule change

Another detrimental effect of the proposed rule change that does not appear in OSHA’s consideration is the increased cost of insurance or even its lack of availability. Acme has seen a decrease in the number of insurance companies willing to write Acme’s causality insurance coverage. Although a number of companies market Acme’s insurance business, many insist on excluding “silica” liability from the coverage they provide.

The limited competition for Acme’s insurance coverage negatively influences the cost for that insurance, despite almost no silica-related claims. As already noted, Acme had only three silica-related claims with less than $4,000 in total incurred costs. Obviously, workers’ compensation insurance is critical and, in some states, a required cost of doing business. The exclusion of any potential risk would be problematic to not only Acme, but for its workers who may be left uncovered.

Furthermore, Acme is concerned about the costs and abuse of frivolous litigation. Although legitimate litigation costs arising from a claim is regularly faced by all businesses, silica-related claims have similarities with abuses seen in certain tort litigation, such as asbestos claims. Serious consideration should be given to the effects of the proposed rule on a proliferation of frivolous silica-related litigation, either within the workers’ compensation arena or direct legal actions against companies. A boutique practice has arisen in these personal injury suits, particularly in a few “friendly” courts where hundreds of companies are sued based on little to no evidence of cause for arising from alleged asbestos exposure. These companies are sued by plaintiffs because of their employment, purchase of a product, or working with a product. Acme has experienced this abuse with asbestos litigation, primarily in the state courts of Missouri and Illinois near St. Louis. Acme has spent thousands of dollars in attorneys’ fees and/or nominal “cost of defense” settlements in these cases, without any evidence of asbestos in its products or a causal connection to the injuries. The causes of lung-related diseases, like asbestosis and silicosis, are difficult to differentiate between those found naturally or from smoking and other self-inflicted activities. Decreasing the PEL and other requirements of the proposed silica rule can open the door to this type of litigation abuse in silica-related claims.

V. OSHA must consider clay brick operations separately.

Even if OSHA could establish the need for a change in the PEL and regulations to protect workers in other industries from injuries due to respirable crystalline silica exposures, OSHA
should exempt the clay brick industry from the proposed rule changes. As noted in a comment to this docket by Hunton & Williams, counsel for the BIA (“Hunton Comments”), OSHA has not only the statutory authority, but the obligation to maintain the current PEL and regulations over certain industries, even if OSHA chooses to reduce that PEL for industry in general. See also 29 U.S.C. §655(g); United Steelworkers of Am., AFL-CIO-CLC v. Auchter, 763 F.2d 728, 738-39 (3d Cir. 1985). Considering the lack of silica-related injuries with the excessive economic burden of compliance, exemption of the clay brick industry and the workers dealing with clay brick from the proposed rule is particularly appropriate.

Neither Acme nor the clay brick industry as a whole has faced “significant risks” of material health impairments to its workers from exposure to respirable crystalline silica. (See Tayler Comments & BIA Comments). The BIA, in conjunction with its members, associates and consultants, has gathered a significant body of data which is being submitted to this docket. (See BIA Comments & Glenn Report). This information clearly demonstrates little-to-no silicosis in the clay brick industry, despite historical exposures well above the current PEL. (Id.). As noted above, this analysis is consistent with Acme’s experience and historical data. (See Sec. III above). If there is little-to-no silicosis under the current PEL, there can be no improvement to workers’ health by lowering the PEL or adding unnecessary costs. OSHA has acknowledged “studies of clay and brick industries that have reported finding a lower prevalence of silicosis compared to that experienced in other industry sectors … [and] a lower silicosis risk per unit of cumulative exposure.” (See 78 Fed. Reg. 56333). Given its understanding of this available credible data, OSHA was obligated to develop a separate determination on whether a reduction in the PEL was justified for the clay brick industry. (See Hunton Comments). Acme and members of BIA believe such a determination will demonstrate no reduction in the PEL or added regulations are appropriate in the clay brick industry.

The lack of significant health risks must be weighed against the economic impact of OSHA’s recommendations on the clay brick industry. In its own economic feasibility discussion, OSHA acknowledged that the clay brick industry would be among the hardest hit on a cost per establishment basis to comply with the proposed requirements (i.e., average annual costs 15 times higher than the industry average of $2,571). (See 78 Fed. Reg. 56368). As shown above the economic impact on Acme and likely other clay brick manufactures would substantially exceed the costs estimated by OSHA. (See §IV.A).

Issues with “technological” and “economical” feasibility of the new PEL and regulations, as well as the significant underestimation of costs to meet the proposed standards by companies in the clay brick industry, appear not to have been fully appreciated by OSHA. Acme has operated its clay brick manufacturing plants and other facilities and locations dealing with clay brick during the last twenty-five years without a single case of silicosis or even a significant silica-related illness or injury. The estimated costs to comply with a new rule to the brick industry would be oppressive, without a measurable improvement to their workers’ health and safety.

Acme’s own experience and findings concur with those set forth in the information provided by the BIA on behalf of the brick industry. OSHA should consider and follow the recommendations of the BIA and exclude the clay brick industry from any proposed rule changes for exposure to respirable crystalline silica, even if it determines the changes are necessary in other industries.
Conclusion.

As noted above, Acme believes that current OSHA standards, rules and PEL adequately protect workers faced with respirable crystalline silica exposures, and there is no justification for the changes being proposed by OSHA. Acme certainly concurs with the BIA, NCMA and other building manufacturing trade groups which believe that OSHA’s current regulations and PEL for respirable crystalline silica are sufficient to protect workers’ health and safety. The impact of the proposed silica rule would produce a crippling economic impact on Acme and these industries without providing a correspondent benefit to workers. There simply is not a “significant risk” of harm to workers in these industries as demonstrated by the comments of Acme, BIA, NCMA and their building materials industries.

Based on Acme’s experiences in manufacturing, specifically the brick and block sectors, there is significant discrepancy between OSHA’s costs/benefits analysis and Acme’s estimates. Simply stated, the insignificant number and cost of worker injuries from respirable silica related matters over the past twenty-five years is far outweighed by the cost to be incurred by businesses attempting to comply with OSHA’s new rules and levels.

For the reasons stated in this comment, as well as those comments, reports and documentation cited, Acme requests OSHA to reconsider the proposed reduction of the PEL and associated measures. In the alternative, Acme Brick would urge OSHA to exclude the clay brick industry from the proposed changes to these regulations.

Thank you for the opportunity to provide Acme’s concerns and comments regarding OSHA’s proposed changes to these rules. If you have any questions, please do not hesitate to contact the undersigned at blatham@brick.com; P.O. Box 425, Fort Worth, Texas 76101; or (817)390-1528.

Very truly yours,

William L. Latham
Acme Brick Company
General Counsel & Risk Manager
### Detail Loss Report

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ACME BRICK COMPANY

**Travelers Losses as of:** 1/7/2014

**Run Date:** 01/09/2014

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