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U.S. Department of Labor  
Room N-2625  
200 Constitution Avenue, N.W.  
Washington, DC 20010

## **REGARDING OSHA-2007-006 CRANES AND DERRICK IN CONSTRUCTION**

### **SUMMARY**

Participants in the informal public hearing associated with this docket and proceedings were notified that the record for the proceeding would be open until 11:59PM on May 19, 2009, for submitting material for the first part of the post hearing comment period.<sup>1</sup>

Founded in 1917, the National Lumber and Building Material Dealers Association (NLBMDA) has over 6,000 members operating single or multiple lumber yards and component plants serving homebuilders, subcontractors, general contractors, and consumers in the new construction, repair and remodeling of residential and light commercial structures. The membership and Association represent the lumber and building material (LBM) industry sector as described more fully within and as described by Scope of the Lumber and Building Material Industry (NLBMDA 2009)<sup>2</sup>.

On March 17, 2009, as a participant in the informal public hearing, NLBMDA presented certain points relative to the proceeding and to the commercial truck mounted articulated boom. Pat Mossie, Safety and Fleet Manager with the Florida Gypsum division of Pro-Build, a member of NLBMDA, represented the association.<sup>3</sup>

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<sup>1</sup> See Posthearing Notice, addressed to Participants in the Informal Public Hearing on the Proposed Standard for Cranes and Derricks in Construction, found associated with this docket at Regulations.gov.

<sup>2</sup> The Scope of the Lumber and Building Material Industry (NLBMDA 2009) may be found at: <http://www.dealer.org/i4a/pages/index.cfm?pageid=3327>.

<sup>3</sup> See page 121 of the hearing transcript for March 17, 2009. See also page 1 of the NLBMDA Presentation at the Informal Public Hearing Regarding OSHA-2007-0066, Cranes and Derricks in Construction (OSHA-2007-0066-0345.14), where Mr. Mossie states that he is the safety and fleet manager for Pro-Build, that Pro-Build is a member of NLBMDA, and that he is speaking on behalf of the association.

With these clarifications, NLBMDA speaks to those points asserted at its presentation on March 17 as identified below. In a separate set of clarifications, filed on this same day, NLBMDA offers points of clarification relative to the operation of the commercial truck mounted articulated boom.

### **POINTS OF CLARIFICATION**

NLBMDA submits the following clarifications to its presentation and testimony submitted at the informal public hearing associated with this docket on March 17, 2009:

Point of Clarification 1: ASME B30.22-2005 would be an appropriate and superior means of addressing any hazards associated with the use of commercial truck-mounted articulating booms in the delivery of building materials to the construction site.

Clarification: OSHA should recognize ASME B30.22, an existing voluntary consensus standard, for purposes of addressing concerns with commercial truck-mounted articulating booms used to deliver building materials to the construction site.

1. OMB Circular A-119 directs agencies to strongly consider adoption of existing consensus-based standards rather than promulgating agency-specific regulations.
2. ASME B30.22 provides an appropriate means to address concerns relative to the use of commercial truck-mounted articulating booms in the delivery of materials to construction sites.
3. OSHA failed to consider the use of the LBM industry sector of commercial truck-mounted articulating booms.

Point of Clarification 2: NLBMDA asserted in its testimony that any regulations made applicable to the use of commercial truck-mounted articulating booms by lumber and building material dealers to deliver materials to the construction site should be tailored to the safety issues associated with this equipment and these activities.

Clarification: The proposed standard for cranes and derricks in construction was not developed to and does not appropriately address risks that may be inherent in or associated with the use of commercial truck-mounted articulating booms used to deliver building materials to the construction site.

1. The proposed standard applicable to cranes and derricks used in construction imposes significant costs, if not confusion, relative to compliance, on organizations currently relying on an existing voluntary consensus standard to meet the safety concerns identified in the proposed rulemaking.
2. OSHA failed to undertake a cost analysis of the impact of its proposed regulation on the lumber and building material industry, whose NAICS code begins with the four-digits 4441.

Point of Clarification 3: NLBMDA recommended that OSHA use a separate line of inquiry to determine the risks associated with articulating booms in the delivery of materials to the construction site.

Clarification: OSHA should consider the regulation of commercial truck-mounted articulating booms through the acknowledgement or adoption of ASME B30.22 pursuant to the Procedural and Analytical Requirements of “Principles of Regulation” and “Regulatory Planning and Review”.

1. OMB Circular A-119 outlines the procedures and protocol to be used in the consideration and adoption of a voluntary consensus standard as part of a rulemaking.
2. Executive Order 12866 provides “Principles of Regulation” that were not applied to the LBM industry or to the use of commercial truck-mounted articulated booms in the delivery of building materials to the construction site.

**POINT OF CLARIFICATION 1: NLBMDA asserted in its testimony that ASME B30.22-2005<sup>4</sup> would be an appropriate and superior means of addressing any hazards associated with the use of commercial truck-mounted articulating booms in the delivery of building materials to the construction site.<sup>5</sup>**

The stated purpose of ASME B30.22 is to “guard against and minimize injury to workers, and otherwise provide for the protection of life, limb, and property by prescribing safety requirements,” to “provide direction to owners, employers, supervisors, and others concerns with, or responsible for, its application,” and to “guide governments and other regulatory bodies in the development, promulgation, and enforcement of appropriate safety directives.”<sup>6</sup>

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<sup>4</sup> The ASME B30.22-2005 (Revision of ASME B30.22-2000), Articulating Boom Cranes (hereafter cited as “ASME B30.22” or in this footnote as “the Standard”), is an American National Standard and is copyrighted by the American Society of Mechanical Engineers. The current Standard was issued on December 15, 2005 and the next edition is scheduled for publication in 2010. The current Standard was approved by ANSI and designated as an American National Standard on September 28, 2005, and as such, the Standard was developed under procedures accredited as meeting the criteria for American National Standards, including an opportunity for public comment. The ASME B30 Standards Committee that approved the current Standard includes representatives from the U.S. Department of Labor, as well as the Army Corps of Engineers, the U.S. Department of the Army, and the U.S. Department of the Navy.

<sup>5</sup> See page 125 of the hearing transcript for March 17, 2009 where Mr. Mossie representing NLBMDA says: “Today, I want to suggest that there’s already a body of knowledge specifically and appropriately focused on articulating booms”.

<sup>6</sup> See Section III: Purpose. See also, Section IV: Use by Regulatory Agencies: “This Standard may be adopted in whole or in part for governmental or regulatory use. If adopted for governmental use, the references to other national codes and standards in the specific volumes may be changed to refer to the corresponding regulations of the governmental authorities.”

The Standard provides that “[t]he scope includes only cranes of the types [specifically described in the Standard], articulated by hydraulic cylinders, which are powered by internal combustion engines or electric motors and are mounted on a mobile chassis or stationary installation.”<sup>7</sup>

The scope also clarifies that the standard applies only to “machines when used as lifting cranes” and includes coverage of any “load hoist mechanism”, such as the “fork attachment in a locked cradle position at the end” referred to in the NLBMDA testimony.<sup>8</sup>

Within the context of the NLBMDA testimony, the Standard defines a “commercial truck-mounted” articulating boom crane as “a crane, consisting of a rotating mast, mainframe or base, boom, and one or more operator’s stations, such as ground controls, top seat controls, or remote controls, mounted on a frame attached to a commercial truck chassis, retaining a payload capability whose power source may power the crane. The function is to lift, lower, and swing loads a various radii.”<sup>9</sup>

Chapter 22-1, “Construction and Characteristics,” addresses load ratings, boom lift, boom telescoping, load hoist mechanisms, swing mechanisms, crane transport, rope and reeving accessories, controls, installation, and construction. The Chapter anticipates load ratings where stability governs lifting performance<sup>10</sup> and where structural competence governs lifting performance<sup>11</sup>. It also speaks to the load rating chart<sup>12</sup>, and addresses the boom lift<sup>13</sup>, boom telescoping<sup>14</sup>, load hoist mechanisms<sup>15</sup>, and the swing mechanism<sup>16</sup>. It speaks to controls, control forces and movements, and testing for installations. It speaks to crane transport<sup>17</sup>, rope and reeving accessories<sup>18</sup>. The Standard requires a manufacturer to furnish a crane operating manual that must include

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<sup>7</sup> See Section 22-0.1: Scope of B30-22. See Para. 22-0.2.1, for a description of the specifically covered equipment. In its comments, and these clarifications, NLBMDA has indicated that its members will use the articulated boom when “commercial truck-mounted”.

<sup>8</sup> See page 124 of the hearing transcript for March 17, 2009. See also the discussion on pages 1 and 2 of the NLBMDA Presentation at the Informal Public Hearing Regarding OSHA-2007-0066, Cranes and Derricks in Construction (OSHA-2007-0066-0345.14)

<sup>9</sup> See Para. 22-0.2.1.

<sup>10</sup> See Para. 22-1.1.1.

<sup>11</sup> See Para. 22-1.1.2.

<sup>12</sup> See Para. 22-1.1.3.

<sup>13</sup> See generally Section 22-1.2: Boom Lift, Boom Telescoping, and Load Hoist Mechanisms. See particularly Para. 22-1.2.1.

<sup>14</sup> See Para. 22-1.2.2.

<sup>15</sup> See Para. 22-1.2.3.

<sup>16</sup> See generally, Section 22-1.3: Swing Mechanism.

<sup>17</sup> See Section 22-1.4: Crane Transport, requiring “commercial truck-mounted” articulating booms to meet applicable requirements of the U.S. Department of Transportation Standards.

<sup>18</sup> See Section 22-1.5, and attention to rope design factors, ropes, reeving accessories, sheaves and sheave sizes, and load hooks, fall assemblies, and load blocks.

“operating safety guidance,” “crane operation instructions,” and “crane specifications and recommended service and maintenance information.”<sup>19</sup>

The Standard addresses inspection, testing, maintenance, as well as separately, rope inspection, replacement and maintenance.<sup>20</sup> It defines inspection classifications<sup>21</sup>, speaks to the frequency of inspections<sup>22</sup>, determines scope of periodic inspections,<sup>23</sup> addresses equipment “not in regular use”<sup>24</sup>, and requires the maintenance of inspection records<sup>25</sup>. It requires manufacturers to test new equipment<sup>26</sup>, including a load test<sup>27</sup>. Section 22-2.3: Maintenance, covers preventive maintenance<sup>28</sup>, sets out a maintenance procedure<sup>29</sup>, establishes requirements for adjustment and repairs<sup>30</sup>, and requires lubrication of all moving parts<sup>31</sup>.

The Standard also carefully addresses the operation of the articulated boom.<sup>32</sup> Chapter 22-3, “Operation,” speaks to the qualification and conduct of operators<sup>33</sup>, including limiting those individuals who may “enter the operating area”<sup>34</sup>. It also sets out mandatory “conduct of the operator”, including to “not engage in any practice that may divert his attention while actually engaged in operating” the equipment.<sup>35</sup> The Chapter also establishes operating practices to cover handling the load<sup>36</sup> and covers handling the load, and “operating near electric power lines”<sup>37</sup>. Cranes are required to be operated so that no part of the crane or load enters into the danger zone, which is established by an arc extending from the most exterior lines of a series of power lines suspended from a single pole, with the arc defined by distances from ten to 45 feet.<sup>38</sup> The Standard anticipates when and how a danger zone may be entered,<sup>39</sup> and requires a “signalperson”

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<sup>19</sup> See generally Section 22-1.9: Operating Manual.

<sup>20</sup> See generally Chapter 22-2, “Inspection, Testing, and Maintenance”.

<sup>21</sup> See Para. 22-2.1.2.

<sup>22</sup> See Para. 22-2.1.3.

<sup>23</sup> See Para. 22-2.1.4.

<sup>24</sup> See Para. 22-2.1.5.

<sup>25</sup> See Para. 22-2.1.6.

<sup>26</sup> See Para. 22-2.2.1.

<sup>27</sup> See Para. 22-2.2.2.

<sup>28</sup> See Para. 22-2.3.1.

<sup>29</sup> See Para. 22-2.3.2.

<sup>30</sup> See Para. 22-2.3.3.

<sup>31</sup> See Para. 22-2.3.4.

<sup>32</sup> See Chapter 22-3, “Operation”.

<sup>33</sup> See Para. 22-3.1.2.

<sup>34</sup> See Para. 22-3.1.2.

<sup>35</sup> See Para. 22-3.1.3. See also, Subparagraph (a).

<sup>36</sup> See Section 22-3.2: Operating Practices.

<sup>37</sup> See Para. 22-3.3.1.

<sup>38</sup> See Subparagraph 22-3.3.1(a). See also Figure 17, “Danger Zone for Cranes and Lifted Loads Operating Near Electrical Transmission Lines” and Table 1, “Required Clearance for Normal Voltage in Operating Near High Voltage Power Lines and Operation in Transit With No Load and Boom or Mast Lowered”.

<sup>39</sup> See Clauses (1) and (2) of Subparagraph 22-3.3.1(a).

to be assigned to observe clearance and give warning before approaching the established limits.<sup>40</sup>

**OSHA SHOULD RECOGNIZE ASME B30.22, AN EXISTING VOLUNTARY CONSENSUS STANDARD, FOR PURPOSES OF ADDRESSING CONCERNS WITH COMMERCIAL TRUCK-MOUNTED ARTICULATING BOOMS USED TO DELIVER BUILDING MATERIALS TO THE CONSTRUCTION SITE.**

**1. OMB Circular A-119 directs agencies to strongly consider adoption of existing consensus-based standards rather than promulgating agency-specific regulations.**

OMB Circular A-119, Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities,<sup>41</sup> speaks to the use of voluntary consensus standards for purposes of achieving federal policy objectives. As specifically stated, the Circular intends to:

1. Encourage federal agencies to benefit from the expertise of the private sector;
2. Promote federal agency participation in such bodies to ensure creation of standards that are useable by federal agencies; and
3. Reduce reliance on government-unique standards where an existing voluntary standard would suffice.

More specifically, the Circular states<sup>42</sup>:

*Many voluntary consensus standards are appropriate or adaptable for the Government's purposes. The use of such standards, whenever practicable and appropriate, is intended to achieve the following goals:*

- a. *Eliminate the cost to the Government of developing its own standards and decrease the cost of goods procured and the burden of complying with agency regulation.*
- b. *Provide incentives and opportunities to establish standards that serve national needs.*
- c. *Encourage long-term growth for U.S. enterprises and promote efficiency and economic competition through harmonization of standards.*
- d. *Further the policy of reliance upon the private sector to supply Government needs for goods and services.*

The Circular provides clarity relative to what voluntary, consensus standards are within the scope of its policies.<sup>43</sup>

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<sup>40</sup> See Clause (2)(4) of Subparagraph 22-3.3.1.

<sup>41</sup> A copy of OMB Circular A-119 may be found on the OMB Web site at: [http://www.whitehouse.gov/omb/circulars\\_a119/](http://www.whitehouse.gov/omb/circulars_a119/). A copy of the public notice may be found on the NIST Web site at: <http://ts.nist.gov/Standards/Conformity/upload/fr-omb119.pdf>.

<sup>42</sup> See Question 2, "What Are The Goals Of The Government In Using Voluntary Consensus Standards?"

<sup>43</sup> See Question 4, "What Are Voluntary, Consensus Standards?"

*For purposes of this policy, voluntary consensus standards are standards developed or adopted by voluntary consensus standards bodies, both domestic and international. These standards include provisions requiring that owners of relevant intellectual property have agreed to make that intellectual property available on a non-discriminatory, royalty-free or reasonable royalty basis to all interested parties. For purposes of this Circular, “technical standards that are developed or adopted by voluntary consensus standard bodies” is an equivalent term.*

The Circular further provides guidance in identifying voluntary consensus standards bodies and the processes and procedures that should be found to indicate the necessary general level of agreement.<sup>44</sup>

*(1) Voluntary consensus standards bodies are domestic or international organizations which plan, develop, establish, or coordinate voluntary consensus standards using agreed-upon procedures. For purposes of this Circular, “voluntary, private sector, consensus standards bodies,” as cited in Act, is an equivalent term. The Act and the Circular encourage the participation of federal representatives in these bodies to increase the likelihood that the standards they develop will meet both public and private sector needs. A voluntary consensus standards body is defined by the following attributes:*

- i) Openness.*
- ii) Balance of interest.*
- iii) Due process.*
- iv) An appeals process.*
- v) Consensus, which is defined as general agreement, but not necessarily unanimity, and includes a process for attempting to resolve objections by interested parties, as long as all comments have been fairly considered, each objector is advised of the disposition of his or her objection(s) and the reasons why, and the consensus body members are given an opportunity to change their votes after reviewing the comments.*

The Circular applies to all agencies within the executive branch.<sup>45</sup>

*This Circular applies to all agencies and agency employees who use standards and participate in voluntary consensus standards activities, domestic and international, except for activities carried out pursuant to treaties. “Agency” means any executive department, independent commission, board, bureau, office, agency, Government-owned or controlled corporation or other establishment of the Federal Government. It also includes any regulatory commission or board, except for independent regulatory commissions insofar as they are subject to separate statutory requirements regarding the use of voluntary consensus standards. It does not include the legislative or judicial branches of the Federal Government.*

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<sup>44</sup> See Question 4 at clause (a)(1).

<sup>45</sup> See Question 5, “Who Does This Policy Apply To?”.

The Circular establishes clear policy as to the use of voluntary consensus standards in lieu of “government-unique” standards.<sup>46</sup>

*All federal agencies must use voluntary consensus standards in lieu of government-unique standards in their procurement and regulatory activities, except where inconsistent with law or otherwise impractical.*

The Circular addresses when an agency must use a voluntary consensus standard and when it may decline to do so.<sup>47</sup>

*Your agency must use voluntary consensus standards, both domestic and international, in its regulatory and procurement activities in lieu of government-unique standards, unless use of such standards would be inconsistent with applicable law or otherwise impractical. In all cases, your agency has the discretion to decline to use existing voluntary consensus standards if your agency determines that such standards are inconsistent with applicable law or otherwise impractical.*

*(1) “Use” means incorporation of a standard in whole, in part, or by reference for procurement purposes, and the inclusion of a standard in whole, in part, or by reference in regulation(s).*

*(2) “Impractical” includes circumstances in which such use would fail to serve the agency’s program needs; would be infeasible; would be inadequate, ineffectual, inefficient, or inconsistent with agency mission; or would impose more burdens, or would be less useful, than the use of another standard.*

**2. ASME B30.22 provides an appropriate means to address concerns relative to the use of commercial truck-mounted articulating booms in the delivery of materials to construction sites.**

OSHA acknowledges in the “Procedural Determinations” of its notice of proposed rulemaking that “[a] safety standard is reasonably necessary or appropriate within the meaning of Section 652(8) if it substantially reduces or eliminates significant risk, is economically and technologically feasible, is cost effective, is consistent with or is a justified departure from prior Agency action, is supported by substantial evidence, and is better able to effectuate the Act’s purposes than a relevant national consensus standard.”<sup>48</sup>

However, OSHA does not in these same determinations identify and render conclusions regarding the existence of an applicable voluntary consensus standard or the applicability of Circular A-119 relative to a determination that an existing voluntary consensus standard would not be appropriate in this rulemaking proceeding relative to articulating booms.<sup>49</sup>

<sup>46</sup> See Question 6, “What Is The Policy For Federal Use Of Standards?”.

<sup>47</sup> See Question 6(a), “When must my agency use voluntary consensus standards?”.

<sup>48</sup> See Federal Register Notice of Proposed Rule (October 9, 2008), 73 FR at page 59872.

<sup>49</sup> See 73 FR at page 59913, Part G, “Applicability of Existing Consensus Standards”.

*Some of the types of equipment subject to this proposed standard are addressed by current national consensus standards in the ASME B30 series, including: ASME B30.5-2004, "Mobile and Locomotive Cranes"; ASME B30.6-2003, "Derricks"; ASME B30.8-2004, "Floating Cranes and Floating Derricks"; ASME B30.3-2004, "Construction Tower Cranes"; ASME B30.14-2004, "Side Boom Tractors"; and ASME B30.2-2001, "Overhead and Gantry Cranes." In addition, ASME B30.7-2005, "Base-Mounted Drum Hoists," addresses a type of equipment that is often a component of derricks, and ASME B30.23-2005, "Personnel Lifting Systems," addresses issues that are covered by proposed Sec. 1926.1431, Hoisting personnel.*

The particular ASME voluntary consensus standard applicable to the articulated boom, ASME B30.22-2005 (and due to be revised through the American National Standards consensus requirements in 2010) is not identified here or elsewhere in the Summary and Explanation of the proposed standard. OSHA provides no information or explanation why this particular standard was not review by the Committee during its deliberations, or why this particular standard was not identified and discussed by OSHA in its Summary and Explanation or in Part G of its Procedural Determinations.

OSHA indicates in its determinations that the C-DAC consulted these ASME standards (or the most current versions available at the time) and other resources in developing its proposal.

*In most instances, the ASME standards that the Committee consulted were entered into the docket, including: ASME B30.5-2000 (OSHA-S030-2006-0663-0334); ASME B30.5a-2002 Addenda (OSHA-S030-2006-0663-0335); ASME B30.6-2003 (OSHA-S030-2006-0663-0337); ASME B30.17-2003 (OSHA-S030-2006-0663-0338); ASME B30.3-1996 (OSHA-S030-2006-0663-0353); and ASME B30.23-1998 (OSHA-S030-2006-0663-0354).<sup>50</sup>*

Again, no mention of ASME B30.22-2005 or the suitability of it or the necessity of a government-unique standard applicable to articulating booms. The summary of the C-DAC deliberations, relative to the suitability of existing voluntary consensus standards, provides no guidance to the owners and operators of articulating booms, as for example the members of NLBMDA who own and operate commercial truck-mounted articulating booms, how it was determined or if it were even considered that ASME B30.22 may or may not be appropriate as a voluntary national standard to be referred to, adopted in whole or in part, or whether the C-DAC and OSHA determined that it did not address the risks associated with the covered equipment.

*As discussed in detail in the Summary and Explanation of the proposed standard, a number of provisions in this proposal contain concepts that are similar to those in provisions in the various ASME standards. However, the Committee determined in most instances that, for reasons of enforceability, clarity or ease of use, the wording of those concepts needed to be modified. For some issues, the ASME standards do not address issues covered by this proposal, or the Committee determined that a different approach is needed. For example, in the*

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<sup>50</sup> See 73 FR at pages 59913 and 59914.

*provisions on inspections (Sec. 1926.1412 and 1926.1413), C-DAC concluded that shift, monthly and annual inspection intervals are most appropriate, in contrast to the ASME approach, which uses “frequent” and “periodic” intervals. In the provisions addressing assembly/disassembly (Sec. 1926.1403 through 1926.1406) and the encroachment prevention provisions for power lines (Sec. 1926.1407 through 1926.1411), C-DAC adopted approaches with no comparable counterparts in the ASME standards.*

*In some instances, C-DAC determined that it was appropriate to incorporate ASME standards by reference, in whole or in part. For example, in proposed Sec. 1926.1433, Design, construction and testing, the proposed rule incorporates by reference ANSI B30.5-1968, safety code for “Crawler, Locomotive, and Truck Cranes,” “PCSA Standard No. 2,” for crawler, truck and locomotive cranes manufactured prior to [EFFECTIVE DATE OF THE FINAL RULE], and incorporates portions of ASME B30.5a-2004, “Mobile and Locomotive Cranes,” for mobile (including crawler and truck) and locomotive cranes manufactured on or after [EFFECTIVE DATE OF THE FINAL RULE].<sup>51</sup>*

### **3. OSHA failed to consider the use of the LBM industry sector of commercial truck-mounted articulating booms.**

OSHA cites authority relative to the economic feasibility of the proposed standard.

*A standard is economically feasible if industry can absorb or pass on the costs of compliance without threatening its long-term profitability or competitive structure. See ATMI, 452 U.S. at 530 n.55; AISI, 939 F.2d at 980.*

OSHA cites similar authority relative to the cost effectiveness of the proposed standard.

*A standard is cost effective if the protective measures it requires are the least costly of the available alternatives that achieve the same level of protection. ATMI, 453 U.S. at 514 n.32; International Union, UAW v. OSHA, 37 F.3d 665, 668 (D.C. Cir. 1994) (“LOTO III”).*

However, in both cases of its analysis, OSHA does not include the North American Industry Classification System (NAICS)<sup>52</sup> code or codes, or the Standard Industry Classification (SIC) code or codes associated with the owners and operators of commercial truck-mounted articulated booms used for the sole purpose of delivering building materials to the construction site.

The Scope of the Lumber and Building Material Industry (NLBMDA 2009) provides a detailed analysis of the industry sector.

By any measure, the lumber and building materials (LBM) distribution channel is a mature industry. Stud frame construction as it is practiced today is not dramatically different than it was in the 1830s when the Industrial Revolution first enabled mass production of

<sup>51</sup> 73 FR at page 59914.

<sup>52</sup> Go to the U.S. Census Bureau Web page:  
<http://www.census.gov/eos/www/naics/index.html>.

cut lumber and nails. Distribution channels are organized around the industries they serve, and this one is not exception.

LBM dealers are typically divided into two general categories:

Construction suppliers whose primary target market is professional contractors: single- or multifamily builders, remodelers, specialty trade contractors, and commercial builders and remodelers. These dealers often sell to consumers, but as a rule, do not actively solicit their business.

Home improvement retailers whose mix of products and services, merchandising strategies, and marketing efforts are primarily aimed at consumer customers. Companies in this category may derive a significant portion of their sales from professional contractors, but are typically perceived by contractors as “convenience stores” rather than primary suppliers.

The construction supply segment of the channel can be further divided into three general categories: lumberyards, specialty distributors, and component manufacturers (called fabricators).<sup>53</sup> The home improvement retailing segment of the channel may also be divided into three general categories: home center warehouses, home centers, and specialty retailers.<sup>54</sup>

The size and scope of the LBM industry is captured in the NAICS system. For purposes of general reference and discussion only, the retail trade is encompassed in the two-digit codes 44 and 45. Building material and garden supply dealers are in the three-digit code 444. NAICS 4441 covers building material dealers only<sup>55</sup>; dealers are further segmented by five to seven-digit codes into home centers, lumberyards, hardware stores, paint and wallpaper stores, lawn and garden stores, and outdoor power equipment stores.<sup>56</sup>

The economic impact of new and unfamiliar standards on a specific type of equipment in such a sector cannot be assumed or minimized. Given the slim margins and strong competition of providing lumber and building materials to construction projects, it cannot be assumed that an appropriate portion of the industry would be able to absorb or pass on the costs of compliance without being long-term profitability or competitiveness being threatened. Likewise, given the neglect in acknowledging and considering the role of an existing voluntary consensus standard, one in this instance widely accepted by the

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<sup>53</sup> For a more in-depth discussion of these three categories of the construction supply segment of the LBM channel, see pages 2 through 8 of Scope of the Lumber and Building Material Industry as cited above.

<sup>54</sup> For a more in-depth discussion of these three categories of the home improvement retailers segment of the LBM channel, see pages 8 through 10 of Scope of the Lumber and Building Material Industry.

<sup>55</sup> See the 2007 NAICS definition for Sector 44-45, Retail Trade: 4441, Building Material and Supplies Dealers: “This industry group comprises establishments primarily engaged in retailing new building materials and supplies.”

<sup>56</sup> For further and more detailed discussion of the NAICS and its applicability in defining the LBM industry, see Chapter 2 of Scope of the Lumber and Building Material Industry.

effected sector, OSHA cannot conclude that the proposed protective measures are the least costly alternatives to achieve the same level of protection.

Nowhere in the notice of the proposed standard does OSHA reference the relevant NAICS or assess the impact that its proposal may have on the LBM industry.

Finally, NLBMDA, by its assertion that ASME B30.22 is widely accepted by the sector as a voluntary consensus standard and used to develop operator training programs towards the safe use of equipment in the delivery of building materials to the construction site, must take exception to the proposition that this sector has participated in this instance in a market failure by transferring the costs of job safety to other parties.

Specifically OSHA states, in summary, that “the market failure in job safety is that employers commonly transfer the costs of job safety to other parties, and a combination of informational and institutional constraints prevents the costs of the transfer from actually reflecting the risk to the individual employer—instead employers pay to transfer the risk at a cost closer to the average costs for the occupation rather than their own costs reflecting their own risks. As result, employers do not pay the full costs if they have above average risks or poor safety practices. Under these circumstances, the need for regulation is established by the significant risk presented by crane and derrick operations”.

Nevertheless, NLBMDA has acknowledged the importance of having regimes and training in place to ensure the safe operation of articulating booms.<sup>57</sup>

NLBMDA has also asserted that requirements should create clarity and certainty for purposes of compliance and training appropriate to the identified risks.<sup>58</sup>

*We believe that articulating boom operators who deliver building materials to construction sites should be trained and need only be trained in the safe operation of the equipment for that purpose.*

**POINT OF CLARIFICATION 2: NLBMDA asserted in its testimony that any regulations made applicable to the use of commercial truck-mounted articulating booms by lumber and building material dealers to deliver materials to the construction site should be tailored to the safety issues associated with this equipment and these activities.**<sup>59</sup>

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<sup>57</sup> See page 125 of the hearing transcript of March 17, 2009 where Mr. Mossie, representing NLBMDA, states: “We consider the delivery of building materials to construction sites to begin in our yards and end when the material is placed where required by the builder. We want our operators to know every aspect of this function and be the best at this function.”

<sup>58</sup> See page 4 of the NLBMDA Presentation at the Informal Public Hearing Regarding OSHA-2007-0066, Cranes and Derricks in Construction (OSHA-2007-0066-0345.14).

<sup>59</sup> See page 128 of the hearing transcript of March 17, 2009 where Mr. Mossie, representing NLBMDA, states: “Any regulations, voluntary or otherwise, should reflect the reality of what we do and the engineered equipment we use”.

This mirrors the statement submitted as part of the public hearing record.<sup>60</sup>

*Typically our crews deliver building materials to a construction site, using a truck-mounted, hydraulic-powered, articulating boom equipped with a fork attachment (in a locked cradle position) at the end. We use these to offload materials or pallets of materials similar to a powered industrial lift truck.*

*These hydraulic-powered articulating booms do not require assembly or disassembly, and are not designed to have any cable devices, cable-winding drums, nor do they require any rigging devices to safely place the load. The materials we deliver are very stable and not prone to shift or fall when moved.*

*For example, the fork attachment locked in a cradle position secures a typical lift of drywall consisting of 26 sheets (or a maximum of 34 sheets), or a lift of other material. None of these loads will weigh more than 6,000 pounds. The articulating booms available today have a maximum rated weight capacity of 7,500 pounds.*

*The lifts are offloaded and placed on the ground or through an elevated opening inside the structure under construction that can range anywhere from one foot to ninety feet as a maximum height.*

*Upon completing the delivery to the site, our crews have nothing whatsoever to do with the unpacking, setup, or installation of the materials, and are not required to remain on the construction site to assist construction employees with their duties.*

**THE PROPOSED RULE FOR CRANES AND DERRICKS IN CONSTRUCTION WAS NOT DEVELOPED TO AND DOES NOT APPROPRIATELY ADDRESS RISKS THAT MAY BE INHERENT IN OR ASSOCIATED WITH THE USE OF COMMERCIAL TRUCK-MOUNTED ARTICULATING BOOMS USED TO DELIVER BUILDING MATERIALS TO THE CONSTRUCTION SITE.**

**1. The proposed standard applicable to cranes and derricks used in construction imposes significant costs, if not confusion, relative to compliance, on organizations currently relying of an existing voluntary consensus standard to meet the safety concerns identified in the proposed rulemaking.**<sup>61</sup>

<sup>60</sup> See page 1 of the NLBMDA Presentation at the Informal Public Hearing Regarding OSHA-2007-0066, Cranes and Derricks in Construction (OSHA-2007-0066-0345.14).

<sup>61</sup> As asserted, members of the LBM industry, the lumber and building material industry, use a commercial truck-mounted articulated boom to deliver building materials to the construction site as a functional part of both their business model and their competencies. It is further asserted that this competency, developed through training based on ASME B30.22, represents significant investments by the industry, not only for the protection of its own employees and equipment and as considerations of prudent expense management relative to insurance costs, but also to the benefit of the construction industry, which relative to the delivery of materials to the construction site, does not have to invest in these specialized competencies or equipment, and can

OSHA acknowledges that the proposed rules represent an “economically significant action” under Executive Order 12866 and a “major rule” under the Small Business Regulatory Enforcement Fairness Act (SBREFA). As required, OSHA has attempted to assess the potential impacts of the proposal on small entities and prepared an Initial Regulatory Flexibility Analysis. OSHA undertook an analysis to identify the establishments and industries affected by the rule, evaluate its costs, benefits, and economic impacts, assess the technological and economic feasibility of the proposal for affected industries, and evaluate the appropriateness of alternatives to the rule.

In all of these cases, OSHA neglected to consider the sector of lumber and building material dealers and their use of commercial truck-mounted articulating booms for the delivery of building materials to the construction site.

**2. OSHA failed to undertake a cost analysis of the impact of its proposed regulation on the lumber and building material industry, whose NAICS code begins with the four-digits 4441 and whose SIC code is 5211.**

As indicated in the initial comments filed by NLBMDA in these proceedings, the cost analysis of the proposed rule on cranes and derricks used in construction does not include an analysis on the impact on lumber and building material dealers, and North American Industry Classification System (NAICS) code 4441<sup>62</sup> and Standard Industry Classification (SIC) code 5211<sup>63</sup> are not cited in OSHA’s discussion and analysis.

*Establishments engaged in selling primarily lumber, or lumber and a general line of building materials, to the general public. While these establishments may sell primarily to construction contractors, they are known as retail in the trade. The lumber which they sell may include rough and dressed lumber, flooring, molding, doors, sashes, frames, and other millwork. The building materials may include roofing, siding, shingles, wallboard, paint, brick, tile, cement, sand, gravel, and other building materials and supplies. Hardware is often an important line sold by retail lumber and building materials dealers. Establishments which do not sell to the general public and those which are known in the trade as wholesale are classified in Wholesale Trade, Industry Group 503.*<sup>64</sup>

Furthermore, the negotiated rulemaking preceding these proceedings did not capture or engage this particular stakeholder group. Likewise, there is no indication that the C-

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therefore train and protect against risks and hazards associated with their construction activities.

<sup>62</sup> See the NAICS Definition for 4441 Building Material and Supplies Dealers: “This industry group comprises establishments primarily engaged in retailing new building materials and supplies.”

<sup>63</sup> See the SIC “Description for 5211: Lumber and Other Building Materials Dealers (a part of Division G: Retail Trade; Major Group 52: Building Materials, Hardware, Garden Supply, And Mobile Home Dealers; and Industry Group 521: Lumber And Other Building Materials Dealers, at the OSHA Web site:

[http://www.osha.gov/pls/imis/sic\\_manual.display?id=13&tab=description](http://www.osha.gov/pls/imis/sic_manual.display?id=13&tab=description).

<sup>64</sup> Description for 5211: Lumber and Other Building Materials Dealers (emphasis added).

DAC reviewed or considered the applicability of ASME B30.22 to articulating booms, there is no reference to the summary and explanations provided by OSHA in its notice of the proposed rule, and there is no justification, discussion, acknowledgement that an existing voluntary consensus standard exists and could be appropriate to the goals of the agency if adopted in whole or in part relative to the use of commercial truck-mounted articulating booms used to deliver building materials to the construction site.

To acknowledge the agency's efforts, OSHA has cast a very wide net to anticipate the sectors that would be affected by the proposed standard.

*The proposed standard would affect establishments across a variety of different construction industries with work involving cranes and derricks.*<sup>65</sup>

Table B-2 presents data on the numbers of affected firms, establishments, employees, and average establishment revenues and profits. The Agency sorted establishments, by industry, into five sectors according to their crane or equipment activities, as follows:

- Crane Rental with Operators,
- Crane Rental without Operators,
- Own and Rent Cranes with Operators,
- Own but Do Not Rent, and
- Crane Lessees in the Construction Industry (or just "Crane Lessees").

Table B-3 shows the adjustments OSHA made to estimate the number of establishments renting cranes in each industry and its rationale. Table B-4 shows the estimated number of construction small entities that meet the SBA criteria for each sector. OSHA notes that given the SBA revenue criteria and the size of typical construction entities, that virtually all entities in the industries fall within the SBA definition of small entities. Almost 99 percent of all construction establishments are small entities, following the SBA criteria. Table B-5 shows the industrial profile for those establishments that would be considered very small, having less than 20 employees.

Nevertheless, OSHA's exercise and analysis did not capture the LBM industry sector and did not consider the impact of subjecting the proposed regulations on equipment used in the delivery of building materials to the construction site. If a similar exercise were made relative to the sectors that use the commercial truck-mounted articulating boom for purposes of delivering building materials to the construction site, considering the current investment being made to train operators to an existing voluntary consensus standard, and acknowledging that the body of knowledge that has been focused on developing equipment-specific standards to this type of equipment, NLBMDA believes that OSHA would conclude that the existing voluntary consensus standard should remain as the applicable rules governing the use and operation of this equipment.

**POINT OF CLARIFICATION 3: NLBMDA recommended that OSHA use a separate line of inquiry to determine the risks associated with articulating booms in the delivery of materials to the construction site.**<sup>66</sup>

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<sup>65</sup> See the tables and discussion associated with the Industry Profile in the Federal Register Notice beginning on page 59875.

This mirrors the statement submitted as part of the public hearing record.<sup>67</sup>

*In a separate line of inquiry we would invite OSHA to determine the risks associated with articulating booms in the delivery of materials to the construction site. We believe, that once the specific risks associated with the our equipment are analyzed, that OSHA will conclude not only that its current proposal is inappropriate, but that our industry follows practices and procedures already recognized and in place today.*

**OSHA SHOULD CONSIDER THE REGULATION OF COMMERCIAL TRUCK-MOUNTED ARTICULATING BOOMS THROUGH THE ACKNOWLEDGEMENT OR ADOPTION OF ASME/ANSI B30.22 PURSUANT TO THE PROCEDURAL AND ANALYTICAL REQUIREMENTS OF “PRINCIPLES OF REGULATION” AND “REGULATORY PLANNING AND REVIEW”**

**1. OMB Circular A-119 outlines the procedures and protocol to be used in the consideration and adoption of a voluntary consensus standard as part of a rulemaking.**<sup>68</sup>

When considering using a standard, your agency should take full account of the effect of using the standard on the economy, and of applicable federal laws and policies, including laws and regulations relating to antitrust, national security, small business, product safety, environment, metrication, technology development, and conflicts of interest. Your agency should also recognize that use of standards, if improperly conducted, can suppress free and fair competition; impede innovation and technical progress; exclude safer or less expensive products; or otherwise adversely affect trade, commerce, health, or safety. If your agency is proposing to incorporate a standard into a proposed or final rulemaking, your agency must comply with the “Principles of Regulation” (enumerated in Section 1(b)) and with the other analytical requirements of Executive Order 12866, “Regulatory Planning and Review.”

OMB Circular A-119, as well as the testimony provided by NLBMDA regarding the use of an existing voluntary consensus standard for purposes of addressing any safety issues associated with the delivery of building materials to the construction site, is consistent with Executive Order 12866 and its articulation of a Regulatory Philosophy.<sup>69</sup>

**2. Executive Order 12866 provides “Principles of Regulation” that were not applied to the LBM industry or to the use of commercial truck-mounted articulated booms in the delivery of building materials to the construction site.**

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<sup>66</sup> See page 135 of the hearing transcript for March 17, 2009 where Mr. Mossie, representing NLBMDA stated: “In a separate line of inquiry, we would invite OSHA to determine the risk associated with the articulating boom in the delivery of building materials to construction sites”.

<sup>67</sup> See page 4 of the NLBMDA Presentation at the Informal Public Hearing Regarding OSHA-2007-0066, Cranes and Derricks in Construction (OSHA-2007-006-0345.14).

<sup>68</sup> See Question 6(f), “What considerations should my agency make when it is considering using a standard?”.

<sup>69</sup> See Executive Order 12866, Section 1(a).

Federal agencies should promulgate only such regulations as are required by law, are necessary to interpret the law, or are made necessary by compelling public need, such as material failures of private markets to protect or improve the health and safety of the public, the environment, or the well-being of the American people. In deciding whether and how to regulate, agencies should assess all costs and benefits of available regulatory alternatives, including the alternative of not regulating. Costs and benefits shall be understood to include both quantifiable measures (to the fullest extent that these can be usefully estimated) and qualitative measures of costs and benefits that are difficult to quantify, but nevertheless essential to consider. Further, in choosing among alternative regulatory approaches, agencies should select those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity), unless a statute requires another regulatory approach.

Those Principles of Regulation are intended to ensure that an agency's regulatory programs are consistent with the philosophy stated above.<sup>70</sup>

***(Principle 1)** Each agency shall identify the problem that it intends to address (including, where applicable, the failures of private markets or public institutions that warrant new agency action) as well as assess the significance of that problem.*

As suggested in these clarifications, OSHA has not identified the problem relative to the delivery of building materials to the construction site by the LBM industry, an industry sector well defined by the NAICS and SIC but not identified in OSHA's regulatory process to date relative to this proceeding, and OSHA has not articulated if or how an existing voluntary consensus standard, widely adopted and accepted by the LBM industry, would not serve to meet any problems so identified.

***(Principle 2)** Each agency shall examine whether existing regulations (or other law) have created, or contributed to, the problem that a new regulation is intended to correct and whether those regulations (or other law) should be modified to achieve the intended goal of regulation more effectively.*

As suggested in these clarifications, OSHA's proposed regulation threatens to add complexity and confusion as it would apply a broad standard, developed to address the construction industry, to a specific type of equipment, used by the LBM industry and operated throughout the industry pursuant to ASME B30.22.

***(Principle 3)** Each agency shall identify and assess available alternatives to direct regulation, including providing economic incentives to encourage the desired behavior, such as user fees or marketable permits, or providing information upon which choices can be made by the public.*

As suggested in these clarifications, OSHA has failed to identify the existence, the current acceptance of, or the potential applicability of ASME B30.22 to the use of

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<sup>70</sup> See Executive Order 12866, Section 1(b).

commercial truck-mounted articulating booms for the delivery of building materials to the construction site. Further, in its economic analysis of its proposal, OSHA failed to include the potential impact that a new set of standards relative to equipment currently covered by a well-understood voluntary consensus standard would have on the LBM industry, or on the that sector's investment in competencies that upon analysis create a safer work environment for workers in the construction industry.

*(5) When an agency determines that a regulation is the best available method of achieving the regulatory objective, it shall design its regulations in the most cost-effective manner to achieve the regulatory objective. In doing so, each agency shall consider incentives for innovation, consistency, predictability, the costs of enforcement and compliance (to the government, regulated entities, and the public), flexibility, distributive impacts, and equity.*

As suggested in these clarifications, OSHA's proposed standard for cranes and derricks used in construction is too broad as it would be applied to the use of the commercial truck-mounted articulated boom used by the LBM industry. As such, if it was the intention of OSHA to propose a regulation to cover the use of this particular type of equipment by this particular industry sector, its proposal does not represent the best available method, it is not designed in the most cost-effective manner to achieve the regulatory objective, its regulatory objective relative to this particular type of equipment as used by this particular industry sector has not been articulated or defined, and OSHA has failed to consider incentives for innovation relative to investments in equipment, and consistency relative to training programs already developed and competencies invested in.

*(Principle 6) Each agency shall assess both the costs and the benefits of the intended regulation and, recognizing that some costs and benefits are difficult to quantify, propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs.*

As suggested in these clarifications, OSHA has failed to assess the costs of the intended regulation as it would apply to the use of the commercial truck-mounted articulated boom as used by the LBM industry sector, and OSHA has failed to articulate the benefits, relative to any specific risks that may currently exist and not currently be addressed by ASME B30.22, and therefore, OSHA has failed to propose a regulation upon a reasoned determination that the benefits of the intended regulation justify its costs.

*(Principle 11) Each agency shall tailor its regulations to impose the least burden on society, including individuals, businesses of differing sizes, and other entities (including small communities and governmental entities), consistent with obtaining the regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations.*

As suggested in these clarifications, OSHA has failed to tailor its proposed regulation in a way that it would impose the least burden on businesses in the LBM industry sector, when there exists a regime established by a widely accepted voluntary consensus standard, and OSHA has failed to make an assessment if that voluntary consensus standard would or would not meet its regulatory objectives, and as further suggested,

OSHA has failed to articulate its regulatory objectives relative to the use of the specific type of equipment used by the LBM industry sector to delivery building materials to the construction site.

*(Principle 12) Each agency shall draft its regulations to be simple and easy to understand, with the goal of minimizing the potential for uncertainty and litigation arising from such uncertainty.*

As suggested by these clarifications, OSHA has failed to create a regime relative to the use of the commercial truck-mounted articulated boom that would be simple and easy to understand, and OSHA has not considered the impact that a new and complex regulation would have on a sector that has trained to and invested in a widely accepted voluntary consensus standard, or to what extent uncertainty and litigation may result where there would be two sets of regimes that both manufacturers and users of the articulated boom would be subject to.

## **CONCLUSION**

For purposes of clarification –

OSHA should recognize ASME B30.22, an existing voluntary consensus standard, for purposes of addressing any concerns that may exist with commercial truck-mounted articulating booms used to deliver building materials to the construction site. OMB Circular A-119 directs agencies to strongly consider adoption of existing consensus-based standards rather than promulgating agency-specific regulations. ASME B30.22 provides an appropriate means to address concerns relative to the use of commercial truck-mounted articulating booms in the delivery of materials to construction sites. OSHA failed to consider the use of the LBM industry sector of commercial truck-mounted articulating booms.

The proposed standard for cranes and derricks in construction was not developed to and does not appropriately address risks that may be inherent in or associated with the use of commercial truck-mounted articulating booms used to deliver building materials to the construction site. The proposed standard applicable to cranes and derricks used in construction imposes significant costs, if not confusion, relative to compliance, on organizations currently relying of an existing voluntary consensus standard to meet the safety concerns identified in the proposed rulemaking. OSHA has failed to undertake a cost analysis of the impact of its proposed regulation on the lumber and building material industry, whose NAICS code begins with the four-digits 4441.

OSHA should consider the regulation of commercial truck-mounted articulating booms through the acknowledgement or adoption of ASME B30.22 pursuant to the Procedural and Analytical Requirements of “Principles of Regulation” and “Regulatory Planning and Review”. OMB Circular A-119 outlines the procedures and protocol to be used in the consideration and adoption of a voluntary consensus standard as part of a rulemaking. Executive Order 12866 provides “Principles of Regulation” that were not applied to the LBM industry or to the use of commercial truck-mounted articulated booms in the delivery of building materials to the construction site.

NLBMDA believes that a complete consideration of the LBM industry and its use of the commercial truck-mounted articulating boom in the delivery of building materials to the construction site, and an assessment of risks inherent and real, and a review of the industry-wide acceptance and investment in training against ASME B30.22, would demonstrate that ASME B30.22 is an appropriate voluntary consensus standard to apply to the articulating boom and its use by the LBM industry, that it addresses all risks associated with the use of the articulating boom, that significant investments have been made in the development of competencies that would be part of any economic impact relative to risks reduced, and that these competencies and investments have benefited other sectors that need not develop such competencies or invest in such specialized equipment.

Thank you for the opportunity to comment.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael P. O'Brien". The signature is fluid and cursive, with a large initial "M" and a long, sweeping underline.

Michael P. O'Brien, CAE  
President & CEO  
National Lumber & Building Material Dealers Association