

CONSTRUCTION INDUSTRY SAFETY COALITION

May 17, 2022

The Honorable Doug Parker
Assistant Secretary
Occupational Safety and Health Administration
U.S. Department of Labor
200 Constitution Ave., NW
Washington, DC 20210

Re: Construction Industry Safety Coalition
Comments to NPRM on Powered Industrial Trucks Design Standard Update
Docket No. OSHA-2020-0008

Dear Mr. Parker:

The Construction Industry Safety Coalition (“CISC” or the “Coalition”) respectfully submits these comments in response to the Occupational Safety and Health Administration’s (“OSHA” or the “Agency”) Notice of Proposed Rulemaking (“NPRM” or the “proposed rule”) concerning the Powered Industrial Trucks Design Standard Update, 87 Fed. Reg. 8755 (February 16, 2022).

The CISC is comprised of 30 trade associations representing virtually every aspect of the construction industry. The CISC was formed several years ago to provide data and information to OSHA on regulatory, interpretive, and policy initiatives. The CISC speaks for small, medium, and large contractors, general contractors, subcontractors, and union contractors alike. The CISC represents all sectors of the construction industry, including commercial building, heavy industrial production, home building, road repair, specialty trade contractors, construction equipment manufacturers, and material suppliers.

While CISC members are not manufacturers of powered industrial trucks (“PITs” or “forklifts”), certain types of PITs are frequently used on construction worksites and, thus, CISC members are keenly interested in this NPRM. The CISC appreciates OSHA’s consideration of the information presented in these comments and applauds the agency’s efforts to keep its regulations up to date. The CISC further appreciates this opportunity to raise certain limited concerns regarding the approach taken by OSHA in this NPRM. As addressed in this comment, the CISC is concerned with OSHA’s decision to delegate its rulemaking authority to a third-party committee’s standards by reference. Although OSHA has done this in the past, there are issues that arise when delegating rulemaking authority which should be considered before the Agency proceeds. Incorporating a third-party committee’s standards by reference perpetuates existing barriers to access. For small employers in particular, the requirements of the incorporated standards are not separately stated in the proposed rule and otherwise are not readily accessible. Further, OSHA’s proposed alternative methods of compliance will create confusion and impose unintended and unpredicted compliance costs on construction employers. Finally, the CISC is concerned that OSHA has failed to account for costs that the construction industry will undoubtedly face if the proposed rule is adopted.

1. OSHA Is Inappropriately Delegating Its Rulemaking Authority by Incorporating a Third-Party Committee's Standards by Reference.

The CISC is concerned with the Agency's *de facto* delegation of its rulemaking authority to the American National Standards Institute ("ANSI") and/or other private entities. When OSHA adopted design and construction requirements for PITs applicable to general industry work (29 CFR 1910.178(a)) and construction industry work (29 CFR 1926.602(c)), it required PITs to meet the design and construction requirements of the then-current 1969 ANSI's Safety Standard for Powered Industrial Trucks, B56.1 ("ANSI B56.1-1969"). In this NPRM, OSHA seeks to update the references in 29 CFR 1910.178(a) and 29 CFR 1926.602(c) by incorporating by reference the latest design and construction requirements set forth in the ANSI B56 consensus standards for PITs.

The NPRM sets forth different design and construction compliance requirements depending on whether the PIT was manufactured prior to the effective date of the final rule or after that date. For both categories of equipment—trucks manufactured before, on, or after the effective date of the final rule—the proposed rule would incorporate by reference the most recent versions of the ANSI B56 standards applicable to PITs. Then for all powered industrial trucks manufactured on or after the effective date of the final rule, the proposed rule would require that such equipment meet the design and construction requirements established in designated ANSI B56 consensus standard that are incorporated by reference into the regulation.

While the CISC commends OSHA's efforts to keep its regulations up to date, the Agency's willingness to defer to ANSI standards (and future non-ANSI standards) is problematic in a few respects. The CISC has outlined a few of its concerns below.

A. The ANSI B56 Standards Are Not Subject to the APA's Notice-and-Comment Rulemaking Process.

The Administrative Procedure Act ("APA") generally requires that a legislative rule go through notice-and-comment rulemaking prior to becoming an enforceable regulation. See 5 U.S.C. § 553(b), (c). The notice-and-comment period is a critical part of the rulemaking process. It requires an agency to notify the public of its plan to address a problem or accomplish a specific goal via a proposed rule. The public is provided with a period during which it can comment on the proposed rule and the agency then responds to these comments. The proposed rule and the public comments submitted on it then form the basis of the Agency's final rule. In other words, public comments play an important part in developing the content of a legislative rule.

The ANSI B56 standards are not subject to the APA's notice-and-comment requirements. When ANSI has revised its B56 consensus standards, which it has done multiple times since OSHA adopted its design and construction requirements for PITs, these revisions have not been subject to the APA's rigorous notice-and-comment rulemaking process. By simply incorporating the ANSI B.56 standards by reference, the public is not provided an opportunity to examine and comment on the ANSI B.56 standards themselves. This is a critical oversight. By itself, the ANSI B.56 standards have no legal force. However, once OSHA adopts these standards by reference, construction employers using PITs will be regulated by these standards. This means they can be subject to civil penalties for violating a standard that they were not afforded an opportunity to comment on through the APA's notice-and-comment rulemaking requirements. The CISC

understands that the notice-and-comment process may be burdensome, but it is a necessary part of the rulemaking process and should not be overlooked when OSHA attempts to incorporate by reference the ANSI B.56 standards into the proposed rule.

B. The Approval Process for American National Standards Lacks Transparency and the ANSI Has No Clear Oversight.

The ANSI does not develop American National Standards. It controls the standardization process and accredits a limited number of Standards Developing Organizations (SDOs) who are then responsible for developing voluntary consensus standards. The B56.1 standards, for example, are developed by a committee created by the Industrial Truck Standards Development Foundation (“ITSDF”), a private charitable foundation funded by the Industrial Truck Association. Membership on the B56 Committee on Powered and Non-Powered Industrial Trucks, which is responsible to the ITSDF’s Board of Trustees, is limited and requires application to and approval by existing members of the committee. This limited membership prevents a full range of stakeholders, including construction employers, from participating in the process.

Moreover, a critical part of the standards approval process lacks transparency. During the standard development process, an SDO must comply with the ANSI’s Essential Requirements, which include the designation of a “consensus body” to draft and ultimately vote on the standard. The consensus body must reach a consensus before an SDO can submit a standard for approval as an American National Standard.

Despite the influence that these standards can carry, the ANSI has not clarified what evidence an SDO must present to demonstrate a “consensus” amongst its consensus body. While the ANSI Board of Standards Review evaluates whether a proposed standard satisfies the criteria in the ANSI’s Essential Requirements, the ANSI’s Essential Requirements offer little guidance concerning the consensus requirement. Under the ANSI, a consensus does not require unanimous approval from the SDO’s consensus body. See *Am. Nat’l Standards Inst., ANSI Essential Requirements: Due Process Requirements for American National Standards*, 26 (January 2022) (https://share.ansi.org/Shared%20Documents/About%20ANSI/Current_Versions_Proc_Docs_for_Website/ER_Pro_current.pdf). In fact, it appears that something far less than unanimity can satisfy the consensus requirement. Per the ANSI:

An example of the criteria for consensus includes a requirement that a majority of the consensus body cast a vote (counting abstentions) and at least two-thirds of those voting approve (not counting abstentions).

See *Id.* at 9.

This is not the floor for what is needed to establish a consensus as SDOs can also submit “an alternative methodology for determining consensus” when seeking ANSI approval of their standard. *Id.* This potentially low bar for achieving consensus of what will become a legally enforceable standard, and the lack of transparency in the final approval process of these standards, is concerning to the CISC.

2. The Proposed Rule Creates Barriers to Access Given That ANSI Standards Are Not Reasonably Available.

In addition to OSHA's improper delegation of its rulemaking authority, CISC members have further concerns as the ANSI B56 standards are not reasonably available. When a regulation incorporates a private standard by reference, the referenced standard is not set forth in the regulation itself and is therefore not publicly available. OSHA's approach in this NPRM is no different. The Freedom of Information Act ("FOIA") dictates, however, that the private standard must be "reasonably available" to those affected by the regulation. See 5 U.S.C. § 552(a)(1) (2016). The Office of Management and Budget ("OMB") lists four factors that an agency should consider when evaluating whether a private standard is "reasonably available." These factors include:

1. Whether the standards developer is willing to make read-only access to the standard available for free on its website during the comment period to facilitate more effective access, because access may be necessary during rulemaking to make public participation in the rulemaking process effective;
2. The cost to regulated and other interested parties to access a copy of the material, including the cumulative cost to obtain incorporated materials, and their ability to bear the costs of accessing such materials in a particular context;
3. The extent particular access is needed to achieve agency policy or to subject the effectiveness of agency programs to public scrutiny; and
4. Whether the standards developer can provide a summary that explains the content of the standard in a way that meets agency needs and is understandable to a member of the public who lacks relevant technical expertise.

See *OMB Circular A-119: Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities*, Section 5(f), Revised January 27, 2016 (https://www.whitehouse.gov/wp-content/uploads/2020/07/revised_circular_a-119_as_of_1_22.pdf).

OSHA proposes two means by which it believes the ANSI B56 standards will be "reasonably available" to those impacted by the new regulation. Neither of these proposals appear to satisfy the "reasonably available" requirement, and instead create barriers to access for those affected by the regulation, particularly small employers.

OSHA notes that the ANSI B56 standards are available *for purchase* online. In other words, those individuals and employers impacted by the final rule will need to pay to access the ANSI B56 standards, which have the potential to carry the force of law. These standards have been revised numerous times over the years, and these revisions will undoubtedly continue in the future. Each time a future B56 standard revised, an employer will need to pay for the revised version otherwise it will risk falling out of the compliance with the final rule and thus exposing itself to citations and penalties. This is inherently unfair to require employers, particularly small employers who may find the cost overly burdensome, to pay for access to a private standard promulgated by a public agency.

In the event the NPRM is adopted, OSHA's alternative proposal is that it will make each standard available for *review*, likely in national and regional OSHA offices. Like its proposal to make employers pay for a copy of the law, this is not a practical solution for those who desire to review

the standard. OSHA's proposal suggests that, for an individual to obtain a copy of the standard, the individual will need to travel to an OSHA office, which are only open during normal business hours, and transcribe the standard by hand while simultaneously reviewing the standard. This is not only illogical, but also an antiquated approach to the distribution of information. If the proposed rule is adopted, OSHA must ensure that the ANSI B56 standards that are incorporated by reference are readily available to download in .pdf format *at no cost* to the public at large, including employers and employees.

3. OSHA's Proposed Alternative Methods of Compliance Create Confusion and Impose Unintended Compliance Costs on Construction Employers.

The proposed rule sets forth alternative methods of compliance. For PITs manufactured prior to the effective date of the final rule but do not meet the design and construction requirements of the ANSI B56.1-1969 standard or the most recent version of an applicable ANSI B56 standard, these PITs will be in compliance with the proposed rule so as long as the employer can demonstrate that the design and construction of the truck is at least as protective as those designed and constructed in accordance with ANSI B56.1-1969 or the applicable ANSI standard incorporated by the proposed rule. Likewise, for PITs manufactured on or after the effective date of the final rule that do not meet the requirements of the current applicable B56 standard, the PITs will still comply with the proposed rule so long as the employer can demonstrate that the design and construction of the truck are at least as protective as a truck designed and constructed in accordance with the applicable ANSI B56 standard. These alternative methods both raise challenges, as discussed below.

A. OSHA's Attempt to Incorporate Future National Consensus Standards by Reference Will Inevitably Result in Confusion.

As discussed *supra*, the NPRM contains an alternative method of compliance for employers that use PITs manufactured on or after the effective date of the final rule. Per the NPRM, an employer may use a PIT that is manufactured on or after the effective date of the final rule so long as the employer can demonstrate that the design and construction of the truck is at least as protective as the requirements of an applicable ANSI B56 standard. While the CISC understands that OSHA has included this alternative method of compliance in an effort to keep the final rule current with evolving ANSI standards,¹ such an approach must be within the confines of the law. A regulation

¹ As OSHA stated in the NPRM:

ANSI continues to update its B56 standards regularly and it is difficult for OSHA to provide timely corresponding updates in its standards through notice and comment rulemaking. Consequently, there is likely to be a period of years during which OSHA's standards require compliance with an outdated ANSI standard while industrial truck manufacturers are designing and constructing equipment in accordance with the newest ANSI standard or, possibly, other new non-ANSI consensus standards. To address this likely lag in OSHA regulatory updates, this proposal incorporates by references the most current editions of the applicable ANSI B56 standards as shown in table 1, but also would allow employers additional flexibility to use trucks that are manufactured in accordance with future editions of applicable consensus standards, including ANSI B56 standards, if the employers can demonstrate that the design and construction of the truck provides employee protection equal to or greater than the design and construction requirements of the applicable ANSI standard in table 1.

cannot incorporate a private standard by reference if the regulation attempts to include future amendments or revisions of the private standard. *See* 1 CFR § 51.1(f). OSHA appears to be doing just that by including an alternative method of compliance tied to future editions of applicable consensus standards, so long as the employer can carry its burden. This approach is concerning for a number of reasons. First, it amplifies the CISC concerns expressed earlier in this Comment in that OSHA is improperly delegating its rulemaking authority. With this alternative method, OSHA has completely circumvented the APA's notice-and-comment requirement. The text of these future private standards has yet to be written. Yet, these future private standards could serve to modify automatically the requirements of the final rule, which deprives individuals and employers equally from their ability to participate in each subsequent modification of the regulation.

In addition, OSHA's proposed alternative method of compliance creates confusion for both OSHA and regulated employers. By tying compliance with the final rule to unknown future national consensus standards, employers will not know whether a truck manufactured in accordance with a future standard complies with the regulation. OSHA inspectors will be just as confused when determining whether a PIT manufactured in accordance with a future national consensus standard is in compliance with the regulation. This will lead to uneven enforcement and no clear guidance for those impacted by the final rule.

The NPRM recognizes the confusion that will inevitably result from its proposed alternative method of compliance. Unfortunately, it has not adequately addressed it. OSHA has stated that it "may *consider* periodically issuing guidance" confirming whether a future national consensus standard will suffice to meet the regulation's requirements for protectiveness. However, OSHA has not firmly committed to issuing this guidance. Moreover, OSHA guidance is not mandatory. This will lead to enforcement problems. Moreover, those employers regulated by the final rule will have no say as to whether a future national consensus standard should be included in this guidance. Instead, it will be the agency's determination as to which future national consensus standards are included in its guidance. While OSHA seemingly attempts to avoid these concerns by stating that any confusion created by its proposed alternative method of compliance will likely only result in *de minimis* violative conditions, this does not assuage the CISC's concerns. Employers do not want to be subject to any type of violation of a regulation, even if it is considered *de minimis*. Accordingly, if OSHA includes an alternative method of compliance in the final rule, OSHA must include a mechanism to specifically identify future standards that it intends to rely upon for enforcement purposes that allows for input by those subject to the rule's regulation. Otherwise, the regulation will be rendered vague and unenforceable by the mere passage of time as new national consensus standards are published.

B. OSHA Must Clarify What Must Be Proven to Demonstrate Compliance with an Alternative Method of Compliance and The Agency Should Bear the Burden of Proving Non-Compliance with an Alternative Method.

Each of the current proposed rule's alternative methods of compliance place the burden on employers to establish compliance. This is concerning for CISC members. The ultimate goal of the NPRM is to improve the safety of PITs by updating the regulations concerning the design and construction of these trucks. Construction industry employers are not involved in either the design or the construction of PITs. They are the end users. Yet, construction industry employers are the

ones responsible for demonstrating compliance with the proposed rule. This is an unwarranted burden-shifting as construction industry employers have no involvement in the processes for which they may be cited. Instead, OSHA should bear the burden of proving that a PIT is not compliant with the regulation.

Assuming that OSHA will not take on this burden, it must recognize that the NPRM places a significant responsibility on construction industry employers. They will be the ones subject to citations and penalties for violations of the regulation. As such, OSHA must provide appropriate guidance to these employers explaining how they can demonstrate that PITs are designed and constructed in accordance with the regulation. Currently, the proposed rule provides no such guidance. That representation may take the form of a data plate or marking on the equipment, or another form of certification from the manufacturer. In fact, OSHA seemed in favor of such an approach when discussing the NRPM at the July 1, 2020 Advisory Committee on Construction Safety and Health (“ACCSH”) meeting.² Therefore, OSHA must make clear in the proposed rule that upon purchase, an employer may rely on a manufacturer’s representation that a PIT was designed and constructed in compliance with an appropriate national consensus standard. Moreover, so long as the PIT is properly maintained and is not modified, OSHA should further clarify that the PIT will continue to be deemed designed and constructed in compliance with the regulation.

4. OSHA’s Economic Impact Analysis Must Recognize Costs to Construction Employers.

OSHA’s Preliminary Economic Analysis and Initial Regulatory Flexibility Act Certification grossly underestimates the proposed rule’s true economic impact and costs of compliance on the construction industry and construction employers. In fact, OSHA’s preliminary determination concluded that “the proposed rule will impose no new costs on employers.” *See* NRPM Section III.B. It is incorrect to assume, as OSHA does here, that the proposed rule would impose no new costs on the construction industry and construction employers. First and foremost, costs must necessarily be incurred by employers to access the ANSI standard. OSHA has already acknowledged that the current applicable ANSI standards are available *for purchase* online. Likewise, as the proposed rule also attempts to incorporate by reference future ANSI standards and/or other national consensus standards, there will be costs required to purchase these standards that OSHA has not considered. Costs will also be incurred by construction employers to ensure that their PITs remain “at least as protective” on an ongoing basis. Simply because a PIT was “at least as protective” as a national consensus standard at a point in time does not necessarily mean

² The following exchange occurred between Kevin Cannon, the ACCSH chair, and Ken Stevanus, who is with the Directorate of Standards and Guidance in the Office of Engineering Safety, at the July 1, 2020 ACCSH meeting:

MR. CANNON: Okay. So when -- you know, being an end user, you know, we have contractors. Our employers have no role in the design and construction of a standard. But we would still be responsible for demonstrating compliance.

MR. STEVANUS: Well, as long as your -- **if your truck was manufactured in accordance with one of those standards which they are usually labeled with, you’re fine.**

(emphasis added). https://www.osha.gov/sites/default/files/2020-10/accsh_20200701_transcript.pdf, at p. 99.

that the PIT retains this status indefinitely. Construction employers will need to ensure their PITs remain in compliance with the proposed rule's alternative methods of compliance, which will result in additional expenses. Finally, there are additional potential one-time familiarization costs and costs related to implementation and training that OSHA has not considered. It is important that OSHA recognize the full impact of the proposed rule, including its costs on construction industry and construction employers.

While CISC appreciates OSHA's efforts to keep its regulations up to date, the CISC is concerned with OSHA's decision to delegate its rulemaking authority to a third-party committee's standards by reference, the confusion that will result from the proposed rule's alternative methods of compliance, and that OSHA has failed to account for certain costs that the construction industry will incur if the proposed rule is adopted.

The CISC appreciates the opportunity to comment on this proposal.

Sincerely,

The Construction Industry Safety Coalition

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