



June 11, 2019

Scott Ketcham
Acting Director
Directorate of Construction
Occupational Safety and Health Administration
200 Constitution Avenue, N.W.
Washington, DC 20210

Dear Scott:

On April 3, 2019 NLBMDA met with OSHA's Directorate of Construction to raise concerns about a 2016 Letter of Interpretation¹ that addresses an aspect of the material delivery exemption to the OSHA crane rule. OSHA issued the crane rule, which includes the material delivery exemption, in 2010 after extensive consideration by the agency and input by stakeholders, including NLBMDA, representing the Lumber and Building Material (LBM) sector. The Letter of Interpretation, issued in June 2016 in response to a question posed by an equipment manufacturer in November 2010, has created confusion for dealers and contractors alike regarding the final stage of the delivery process when material is boomed to the upper level of a structure under construction.

Prior to the Letter of Interpretation, dealers followed the plain meaning of the rule's exemption for material delivery. Prior to the letter, the pathway to compliance was clear and unambiguous. The letter has served as a source of confusion and regulatory uncertainty for over three years, with its impact made significant by the November 7, 2018 final rule on operator training, evaluation and certification.

With this letter, we ask OSHA to immediately revoke the June 23, 2016 Letter of Interpretation.

As we asserted at our meeting with you and your team, and as emphasized below, the letter reverses the plain meaning of the rule's regulatory text, contradicts OSHA's previous explanations of the exemption, violates basic principles of rulemaking, nullifies the exemption for virtually the entire LBM sector, and creates an intolerable regulatory ambiguity. It also distorts the marketplace by

¹ See Standard Interpretation for 1926.1400(c)(17), "Whether unloading a pallet suspended by a crane is considered construction" (June 23, 2016).

creating a competitive advantage for businesses that deliver building material but must also comply with the crane rule because they are engaged in construction activity in other parts of their business.

The Material Delivery Exemption

The material delivery exemption was created by OSHA in direct response to the outreach of NLBMDA and others in the LBM sector who asserted that the use of the truck-mounted articulating boom to transfer common building material such as sheet goods and packaged material to upper levels of structures under construction does not create the type of hazards that OSHA set out to address in the 2010 rule.

The examples shared with OSHA at the time of the 2010 rulemaking, both in written comments and at the March 2009 public hearings, included booming sheet goods (such as drywall) and palletized material (such as joint compound) to an upper level opening where the material is removed/off-loaded from the fork or pallet, or booming roofing material up to a roof deck where the material is distributed (for example, packages of shingles moved from the pallet onto the roof deck).

The material delivery exemption, while limited to a specific type of equipment and specific categories of material, is intended to cover the core function of material delivery by the truck-mounted articulating boom. Specifically, in crafting the exemption, OSHA limited the exemption in three areas.

First, the truck-mounted boom must be equipped with a functioning overload protection device and a fork assembly fixed directly to the boom.

By imposing these equipment requirements, OSHA agreed with NLBMDA at the time of the rulemaking, saying (**emphasis added**):²

"OSHA is, to a large extent, adopting the commenter's suggestion. The overloading and subsequent collapse of cranes is one of the primary hazards this final rule seeks to address. The trade association witness's testimony shows that the potential for collapse is present when articulating/knuckle-boom cranes are used to deliver materials onto a structure. The industry has, however, addressed this hazard by equipping such cranes with automatic overload prevention devices. Therefore, OSHA is excluding articulating/knuckle-boom cranes used to deliver materials onto a structure from the final rule, but only when the cranes are equipped with properly functioning automatic overload prevention devices."

² 75 Fed. Reg. 47928 (August 9, 2010).

In addition to noting that overload protection addressed a key concern in the rulemaking, OSHA also noted that the boom loader with a fixed fork is able to safely handle the material commonly boomed to upper levels:³

"These are typical building supply materials that pose a reduced risk of falling when being lifted by the truck crane because of their configuration and/or packaging, and because the truck crane was designed to safely handle this type of material."

It is important that OSHA noted the safety features of both the overload protection and the ability of the fork assembly to safely handle the type of material commonly boomed to upper decks when crafting the exemption. These safety features have not changed since the rule and the material delivery exemption were issued.⁴

The second limitation OSHA placed on the exemption addresses the common building materials that may be boomed. OSHA recognized two key categories for the exemption – sheet goods and packaged material – providing examples, but not limiting the exemption to “sheets of sheet rock, sheets of plywood, bags of cement, sheets or packages of roofing shingles, and rolls of roofing felt.”

With these two limitations, OSHA addressed its primary concern of a crane collapsing during operation and the additional concern that material might fall during a delivery. OSHA could have placed further restrictions on equipment requirements or on these common building materials (for instance, limiting how these enumerated materials must be boomed or handled during the process of transferring onto the structure), but it did not. Instead, OSHA addresses the handling and placement of material with its third limitation to the exemption.

The exemption’s third limitation is that the loader may not be used to “hold, support or stabilize material to facilitate a construction activity,” such as holding material in place to aid in its attachment to the structure. Specific to this limitation, the material delivery exemption does not allow booming prefabricated building components, such as trusses, or steel structures. The line drawn by OSHA

³ *Id.* at 47929.

⁴ With the Letter of Interpretation, OSHA seems to reverse its position (as explained with the issuance of the 2010 rule) that the equipment required by the exemption adequately addresses the primary hazard the rule sought to address. In the scenario described in the letter, OSHA finds “hazards typical to cranes and the roofs, upper decks, and balconies of structures that are undergoing construction” to conclude that the delivery activity falls outside the exemption.

in 2010 is between the delivery activities NLBMDA and others described during the 2010 rulemaking and use of the same equipment in a way that clearly aids the construction process, such as placing material in its final position or assisting the construction crew while attaching material to the structure.⁵

It is significant that OSHA did not further limit the handling of material during the delivery process. In particular, OSHA placed no restrictions on the off-loading of boomed material from forks or pallets. It is also important to note that the material delivery exemption was itself required as part of the 2010 rule because OSHA has long considered bringing material onto structures as part of the construction process.⁶ OSHA was well aware of the hazards it was attempting to address and with the material delivery exemption the agency carefully crafted limitations to address those hazards.

All three limitations are stated clearly and unambiguously in the rule and described by OSHA in its explanation of the rule when issued in 2010. OSHA even issued a consistent explanation of the exemption in its *Small Entity Compliance Guide For Final Rule For Cranes and Derricks in Construction* in 2011 (later updated in 2014).⁷ Furthermore, given the careful consideration OSHA gave in crafting the exemption and these specific limitations, it is clear that OSHA did not intend to place additional limitations on the exemption. Specifically, OSHA could have, but did not, fashion a “fourth” limitation regarding off-loading material boomed to an upper level.

Here is the applicable regulatory text that includes a clear articulation of the first two limitations:⁸

⁵ OSHA did exclude from the exemption the handling of HVACR units and precast concrete that it distinguished from the handling of the common building material included in the exemption. See 75 FR 47929 for OSHA’s distinction between handling HVACR units and precast concrete from the sheet and packaged goods included in the material delivery exemption at 1296.1400(c)(17)(ii).

⁶ See OSHA’s reference to the Letter of Interpretation to Mr. Jeff Reynolds regarding material delivery: “Moving building materials onto a structure for subsequent use is an integral part of the construction process. This is the case whether the materials are brought onto the structure by hand, with the aid of a crane after the materials had been previously delivered to the ground, or by the same equipment that brought them to the site.” 75 Fed. Reg. 47928, footnote 7.

⁷ In particular, see Question and Answer 8 on page 11 of OSHA’s Small Entity Compliance Guide for the Final Rule for Cranes and Derricks in Construction (OSHA 3433-10R 2014). We conclude this letter with the Question and Answer.

⁸ 1926.1400(c)(17)(ii).

"Articulating/knuckle-boom truck cranes that deliver material to a construction site when the crane is used to transfer building supply sheet goods or building supply packaged materials from the truck crane onto a structure, using a fork/cradle at the end of the boom, but only when the truck crane is equipped with a properly functioning automatic overload prevention device. Such sheet goods or packaged materials include, but are not limited to: Sheets of sheet rock, sheets of plywood, bags of cement, sheets or packages of roofing shingles, and rolls of roofing felt."

Here is the specific language addressing the third limitation on facilitating construction and prefabricate components:⁹

"This exclusion does not apply when:

(A) The articulating/knuckle-boom crane is used to hold, support or stabilize the material to facilitate a construction activity, such as holding material in place while it is attached to the structure;

(B) The material being handled by the articulating/knuckle-boom crane is a prefabricated component. Such prefabricated components include, but are not limited to: Precast concrete members or panels, roof trusses (wooden, cold-formed metal, steel, or other material), prefabricated building sections such as, but not limited to: Floor panels, wall panels, roof panels, roof structures, or similar items;

(C) The material being handled by the crane is a structural steel member (for example, steel joists, beams, columns, steel decking (bundled or unbundled) or a component of a systems-engineered metal building."

The June 23, 2016 Letter of Interpretation

With the 2016 Letter of Interpretation, OSHA seems to say that when material is boomed onto a structure, the delivery falls outside the material delivery exemption if anyone handles the material before the boom places the material onto the surface of the structure. The example given in the letter involves a truck-mounted articulating boom, equipped with a functioning overload protection device and fixed fork, lifting pallets of building material.

OSHA restates the question:

"I use an articulating knuckle-boom truck crane equipped with an automatic overload prevention device to hoist packaged building materials from the bed of a

⁹ 1926.1400(c)(17)(iii).

truck. The building materials are hoisted on pallets supported underneath by forks/a cradle that is attached to the boom of the truck crane. If I hold pallets of building materials, such as 2 X 4's, plywood, shingles, or drywall, to be unloaded at elevations, like a floor (through an open window or doorway) or the roof of a structure under construction, is this activity covered by the cranes standard?"

The key part of OSHA's answer states:

"Under this scenario, any workers who unpack/unload the pallets are doing so to facilitate the performance of a construction activity and are likely to be subjected to hazards typical to cranes and the roofs, upper decks, and balconies of structures that are undergoing construction. Subsequently, the workers must be protected from those hazards by the employer's compliance with construction standards. Therefore, regardless of whether the construction employer operates an articulating knuckle-boom truck crane to hoist and hold the pallets, or that employer gets another employer (such as a delivery company) to do so, the use of the crane for this purpose is considered construction and covered by the cranes standard."

The letter is effectively creating a new limitation to the exemption by stating that handling the material at this last step in the delivery process constitutes "facilitating a construction activity"¹⁰, thus drawing an artificial line where none previously existed. This is in direct contradiction to OSHA's own description of the material delivery exemption, down to the very example of booming packages of shingles up to a roof deck. In 2010 OSHA said (when describing what it means by "facilitating a construction activity"):¹¹

"For example, while placing a package of shingles onto the roof of a structure would fall within the exemption, suspending the shingles in the air and moving them to follow the progress of the roofer would not. When the crane is being used to facilitate the construction activity, it has exceeded the "delivery" of goods and is therefore engaged in a process that is more complex than the scenarios addressed by the commenters who supported an exclusion for materials delivery."

We note in particular OSHA's use of the example "following the progress of the roofer" to distinguish between removing the roofing material from the suspended pallet to distribute the load on the roofing deck *versus* moving the suspended pallet of roofing material while the roofer attaches the roofing material – as the roofer opens individual packages of roofing and attaches the individual roofing

¹⁰ The regulatory text uses the term "to facilitate a construction activity." See the prohibition in 1926.1400(c)(17)(iii)(A).

¹¹ 75 Fed. Reg. 47929.

sheets to the deck (“following the progress of the roofer”). We also note that in the regulatory text OSHA sheds light on what it means by “facilitating a construction activity” in the example, “such as holding material in place while it is attached to the structure.”¹²

We also note the distinction OSHA makes by not exempting the handling of HVACR units (emphasis added):¹³

“In particular, OSHA declines to exclude the handling of HVACR units, as some commenters urged. Using a crane to deliver HVACR equipment is an example of using a crane to hoist and position a component of the building’s mechanical systems, which is an integral part of the construction process. According to one industry commenter, during a typical installation of a large commercial rooftop HVACR unit, a mobile crane delivers the equipment to its intended location on the roof, where an HVACR technician connects the equipment to the ventilation system. Thus, unlike sheet goods and packaged materials, which are not placed in their location of final use by the delivery vehicle, delivery of HVACR equipment may be integral to its installation. Like the hoisting and movement of other building components, use of cranes and derricks to move HVACR equipment falls squarely within this rule.”

Thus, OSHA revealed its intent to distinguish between delivery and construction activity with easily understood concepts such as “holding material in place while it is attached to the structure” and “[materials] placed in their location of final use.” The Letter of Interpretation ignores these distinctions and creates an entirely new one. Evidenced by OSHA’s own words in 2010, it is not the handling/off-loading of the material that is determinative; rather, it is the positioning of the material to its final location, or the assisting in the attachment of the material onto the structure. Furthermore, in the material delivery exemption, OSHA did not define “delivery” or determine when the process of delivery ends and when construction begins, an exercise the agency seems to be undertaking with the Letter of Interpretation.

The Letter of Interpretation wrongly attempts to add a new limitation to the exemption. It effectively amends the rule to say that material may not be removed/off-loaded from the fork (as in the case of sheet goods) or pallet (as in the case of palletized packaged material) – that the material described in 1926.1400(c)(17)(ii) must be dropped onto the structure by the boom without being physically handled/off-loaded by dealer or contractor employees. Thus, delivery within the exemption as amended by the Letter of Interpretation would

¹² 1926.1400(c)(17)(iii)(A).

¹³ 75 Fed. Reg. 47929.

require the sheet rock to be released from the fork assembly to fall onto the upper level deck and the pallet to be placed on the upper level as if by a forklift with the forks neatly sliding out from under the pallet – processes that we demonstrated to you are impossible if not hazardous to accomplish in the most common scenarios found at the construction site. To demonstrate this we shared illustrations, including illustrations used in our presentation at the March 2009 public hearings.¹⁴

The Letter of Interpretation is flawed on at least three key points.

First, as a practical matter, this new limitation would eviscerate the material delivery exemption since material boomed to an upper level opening cannot simply be dropped by the fork assembly, or in the case of a pallet, the boom cannot drop the pallet onto an upper level or roof deck – both because of the fact that fork assembly is positioned directly below the boom tip and will not fit into many of the openings through which material is boomed and because of weight distribution constraints.

Second, this new limitation creates an arbitrary and unrealistic line between the process of delivering material and the construction process. It is as if OSHA wants to apply the concept of dropping material on the ground to booming material to an upper level. At no time during the rulemaking process or the rule’s promulgation in 2010 did OSHA raise this issue or attempt to address it. NLBMDA made clear with its testimony at the March 2009 public hearings that booming material to upper levels involves handling material in the final step of the delivery process.¹⁵

Third, OSHA cannot use a Letter of Interpretation to rewrite/amend a rule that has undergone the normal rulemaking process, including notice and comment opportunities and other well-developed policy development requirements, such as cost–benefit analyses. In the case of the material delivery exemption, OSHA went to extensive lengths back in 2010 to limit the exemption as outlined above and did not then or in subsequent rulemakings establish this “drop and go” requirement.

¹⁴ See the testimony of Pat Mossie, United States Department of Labor Public Hearing: Cranes and Derricks in Construction (March 17, 2009), starting on page 119.

¹⁵ In addition to NLBMDA, the Specialty Building Material Distributors Safety Coalition also provided testimony at the public hearings touching on the nature of material delivery. See United States Department of Labor Public Hearing: Cranes and Derricks in Construction (March 19, 2009), starting on page 116.

At our meeting, your team verbally limited or suggested a limitation to the Letter of Interpretation. Without explaining what unique hazards exist when booming palletized material *versus* sheet goods,¹⁶ it was suggested that the Letter of Interpretation only applies to booming palletized material. (True, the letter only addresses the question of hoisting a pallet supported underneath by a fork.) Even restricting the letter in this manner, it is still flawed in its assumption of how material is boomed to upper levels, it still contradicts the regulatory text and the very language OSHA used to describe the exemption when issued in 2010, and it still violates core principles of rulemaking.

In addition to these flaws, this limited application of the letter would also violate a key principle made a part of OSHA's rationale for the exemption. In its 2010 explanation of the material delivery exemption, OSHA explained that the application of the exemption is intended to avoid as much as possible instances where a dealer would "move in and out" of the exemption based on how the equipment is used to deliver common building materials to construction sites.

OSHA stated in its initial explanation of the exemption:¹⁷

"Cranes are ... commonly used to hoist building materials onto a structure for subsequent use. Although this is also a construction activity, OSHA determines that a limited exclusion for articulating/knuckle-boom truck cranes used for such work is appropriate to minimize having this equipment move in and out of coverage of this rule."

In explaining why it was limiting the exclusion to certain types of material, OSHA referenced this same principle:¹⁸

"OSHA is limiting this exclusion to the delivery of sheet goods and packaged materials including, but not limited to: sheets of sheet rock, sheets of plywood, bags of cement, sheets or packages of roofing shingles, and rolls of roofing felt. The placement of other materials on a structure under construction is the type of core construction activity this rule seeks to address, and excluding the hoisting and movement of other types of materials, such as precast concrete members, prefabricated building sections, or structural steel members, would severely reduce the rule's effectiveness. Moreover, equipment used to lift these types of materials on construction sites is rarely, if ever, used for non-construction activities"

¹⁶ In fact, OSHA acknowledges that the equipment used to boom these materials is uniquely positioned to do so safely, with no distinction made between booming palletized and sheet goods.

¹⁷ 75 Fed. Reg. 47928.

¹⁸ *Id.* at 47928-29.

on those sites and does not often present the problem of equipment moving in and out of coverage when used for different activities."

Any attempt to verbally or otherwise limit the letter to palletized material violates this principle. Even if OSHA limits the Letter of Interpretation only to booming palletized material, dealers will be in the very position OSHA sought to avoid – complying with the exemption in one instance (when booming drywall or plywood), but violating the exemption in another (when booming palletized material, including roofing material), thus making the exemption out of reach for virtually all dealers.

OSHA clearly understood the nature of material delivery when boomed to an upper level.

During the March 2009 public hearings we verbally described the delivery process and shared numerous visual aids showing sheet goods and palletized material boomed onto structures under construction. OSHA clearly understood that delivery with the truck-mounted articulating boom involved off-loading. As an example, consider the following testimony of Pat Mossie for NLBMDA from the hearing transcript:¹⁹

Mr. Mossie: "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."

Mr. Mossie had previously stated:²⁰

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

Furthermore, regarding the use of a portable remote control system:²¹

¹⁹ Public Hearing (March 17, 2009), page 125.

²⁰ *Id.* at page 124.

²¹ *Id.* at pages 127-128. See also the testimony of Ted Gill, describing the delivery of dry wall: "If you've been around drywall, it's something you don't want to carry. He's going to slide it, and he's going to slide it onto an awaiting cart, and he moves it from spot to spot to spot." Public Hearing (March 19, 2009), pages 126-127. Regarding the booming of palletized material, such as roofing material, see the testimony of Bob Garrone, speaking to the use of the remote so that the operator may assist in off-loading material. Public Hearing (March 19, 2009), pages 138-140.

Mr. Mossie: "The operator is physically located at the same location as the remote control and is therefore able to perform controlled operations as quickly as an operator who is seated at the top seat controls. The operator can also be positioned to ensure that there's no obstructed view. Finally, the operator using a remote control device can be directly involved in the off-loading of materials, ensuring that the operator and other members of the off-loading crew are insulated from the risk of unintended boom movement by other persons."

This is followed by an exchange between Mr. Mossie and Judge Vittone regarding an illustration showing an operator using the remote control at the elevated level where material is being off-loaded:²²

Judge Vittone: "He's standing on the balcony. Instead of standing on the ground, you're saying if he stood up here on the balcony."

Mr. Mossie: "Yes. Yes, he can be up here on the balcony. That's a common use of this. He can be right at the point of where the load is."

The role of the delivery crew in off-loading material was also touched on in an exchange between Mr. Mossie and Mr. Connell:²³

Mr. Connell: "... What I'm getting at is, it doesn't sound like, in your example, he's doing anything that's diverting his attention ..."

Mr. Mossie: "... But in most cases, he's up there helping offload that material off the fork assembly into the building."

Mr. Connell (after clarifications from Judge Vittone and Mr. Ewell): "Okay. But you're saying that in some instances, the operator might be up on the structure, for example."

Mr. Mossie: "Yes."

²² *Id.* at page 130.

²³ *Id.* at pages 154-157. See also an exchange between Mr. Connell and Mr. Garrone where Mr. Connell summarizes: "So, again, in terms of the parameters of the exemption that you're asking for, it would include whatever the operator was going to assist, actually assist in off-loading. The machine would be locked out." Public Hearing (March 19, 2009), page 157. Mr. Connell further summarized delivery of material: "In terms of delivery, the concept of delivery is what you have in mind where materials are [brought] either to the ground or up to the structure itself, and they are off-loaded from the machine ...". *Id.*

Mr. Connell: "And would that operator physically help move material off of the machine?"

Mr. Mossie: "Correct."

Mr. Connell: "When they do that, is the machine locked out in any way?"

Mr. Mossie: "It's emergency stop. It's off, but it's still around his shoulder... He has the remote control with him at all times."

Mr. Connell: "Okay. So in that instance, the machine can't move ... would the operator ever attempt to simultaneously move the articulating boom and do something else like help offload or is it one or the other?"

Mr. Mossie: "One or the other – not at the same time. He would put it up, lock out the remote, and then help offload it ..."

OSHA's touches on this exchange regarding the use of the remote in its explanation of section 1926.1417.²⁴ Here OSHA notes the fact that an operator with a remote is able to – and as describe by NLBMDA, customarily will – assist in the "off-loading of the materials" boomed to the upper level (emphasis added)²⁵:

During the hearing, a witness from a lumber trade association described the practice in which the operator controls an articulating boom crane with a forklift attachment via remote controls and then assists with the off-loading of the materials. He expressed concern that the operator's participation in the off-loading of the crane would violate §1926.1417(d)'s prohibition on "any practice that diverts his/her attention while actually engaged in operating the crane." As a result, his company would need to use an additional person for the delivery, raising costs. Section 1926.1417(d) would not necessarily prohibit the activity that the witness described. If the operator uses the remote controls to position the articulating crane and lock it into position before off-loading the materials, and does not simultaneously operate the controls and offload the materials, the operator would not be "actually engaged in operating the crane" at the same time as he is off-loading the crane. The operator would also not be considered to "leave the equipment unattended" so long as the operator has immediate access to the remote controls.

²⁴ See Section 1926.1417, Operation addresses hazards associated with general operation of equipment covered by the crane standard. Paragraph (d) requires that operators refrain from engaging in any practice that would divert their attention while operating the crane.

²⁵ 75 Fed. Reg. 47989.

While 1926.1417 does not apply to the material delivery exemption, OSHA was clearly aware that off-loading not only will take place when material is boomed onto a structure, but that it is an integral part of the delivery process. If OSHA had had concerns with off-loading as part of the delivery process, it would have further limited the material delivery exemption, and it would have articulated its rationale as it did with the limitations included in the exemption. OSHA did not do so. In fact, in 2010, well informed how dealers off-loaded material, OSHA neither limited nor prohibited this activity in the regulatory text as it attempts to do with the Letter of Interpretation.

The Letter of Interpretation has created unintended consequences that would have been properly vetted under normal rulemaking and stakeholder engagement.

As we shared with you at our meeting, the Letter of Interpretation has created confusion in the marketplace, in large part because it contradicts the plain meaning of the exemption, establishing a limitation that essentially makes the exemption unavailable to dealers. The letter has also given certain market participants an opportunity to claim that all dealers must now employ certified crane operators. We reported that some companies that certify their crane operators because they are covered by the crane rule in other lines of business have attempted to position themselves as the “safe” or “required” alternative for material delivery. While we understand anyone may market themselves as experts or safe alternatives, we do not believe a Letter of Interpretation should be allowed to serve as a marketing tool when it is so patently flawed. We also note that OSHA has not cited injury data that would reveal a reason to be concerned with material delivery and clearly did not do so when issuing the letter in 2016.

Furthermore, during our meeting it was suggested that dealers could avoid the new limitation created by the letter by simply dropping the material onto the ground – a function clearly not covered by the crane rule – and leaving it up to the builder to get the material onto the structure. This displays a fundamental misunderstanding of basic market forces and expectations involved in material delivery. Material that is commonly dropped to the ground will be delivered with different and more appropriate equipment – typically a flatbed truck with a rear-mounted forklift. As an example, dimensional and structural lumber will be placed on the ground before or during the framing process. The truck-mounted articulating boom is rarely used in this capacity, in part because it is expensive, specialized equipment operated by trained employees for booming material onto structures. It is also important to note that material delivery is a specialized service that has filled an important niche for the construction sector. Just as construction involves specialized activities that others choose not to engage in,

the same is true for material delivery. Other participants in the construction process and building trades will not be able to safely or adequately fill this niche, nor would they want to do so. Placing building material where needed is a highly valued aspect of material delivery and one with a strong track record of safety. To suggest that the builder/contractor could adjust its business model to boom material commonly done by dealers is an inadequate solution to the confusion and problems created by the letter.

Time is of the essence.

OSHA issued the Letter of Interpretation without any attempt to dialogue or seek input from known stakeholders, primarily NLBMDA and the Safety Coalition,²⁶ both having provided extensive information to OSHA during the rulemaking process. NLBMDA discovered the letter posted online in 2017 and immediately attempted to dialogue with OSHA. We indicated our concerns in 2017 with an initial phone call and follow-up email, requesting an immediate meeting, and made multiple subsequent requests in 2018. Renewing our request in 2019, OSHA finally responded and granted our request. The distortions created by the letter continue unabated. Time is of the essence. OSHA must act promptly to address this issue.

OSHA must immediately rescind the Letter of Interpretation.

For the above-stated reasons, OSHA must immediately rescind the Letter of Interpretation. The letter contradicts the regulatory text and clear meaning of the material delivery exemption. While the letter attempts to create a new limitation to the exemption, the 2010 rule makes no such distinction between booming sheet goods and palletized material, nor does it prohibit the necessary step of unloading/off-loading material. Placing material for subsequent use is a clear part of the delivery process, one that OSHA understood when it crafted the 2010 rule, and a part of the delivery process that is easily distinguished from engaging in activity such as holding, supporting or stabilizing material that clearly facilitates construction (and therefore exceeds the exemption). The plain meaning of the exemption makes clear that dealers must be able to complete the delivery of material to upper levels of structures and this cannot be done without off-loading the material from the fork or pallet. A letter of Interpretation cannot be used to amend or alter a duly promulgated rule and it should not be allowed to remain in the marketplace creating confusion and unfair competitive advantages.

²⁶ The Specialty Building Material Distributors Safety Coalition (“Safety Coalition”) submitted comments during the rulemaking and participated in the March 2009 public hearings. See footnote 15 above.

Rescinding the letter will not increase the risk of or exposure to injuries. OSHA has not cited any data to suggest suspending a pallet of material otherwise allowed by the exemption creates any risk or exposure not addressed in 2010.²⁷ Because dealers are covered by numerous applicable OSHA standards that address safety during the material delivery process, including the general duty to train their operators to safely operate equipment and to otherwise create a safe work environment for their employees, there are adequate safety requirements and enforcement mechanisms in place. As a practical matter, removing the delivery of palletized material from the exemption and subjecting it to full coverage of the crane rule, will mean operators will have to be third party certified – meeting the certification requirement that OSHA itself has described as a “learners permit” and inadequate for operator qualification.

Finally, NLBMDA and its members are proud of the safety record and compliance efforts of the LBM sector. We look forward to working with OSHA and the Construction Directorate should any additional issues of safety and compliance arise. We also encourage dialogue in the future to avoid the problems and unintended consequences outlined above.

We conclude with OSHA guidance for small businesses referenced and cited above:²⁸

“Question 8: I operate a lumberyard and deliver sheet goods (such as drywall or plywood) or packaged goods (such as roofing shingles, bags of cement, or rolls of roofing felt) to a construction site using a flatbed truck equipped with an articulating crane. At the site, I use the crane to place the material either onto the ground or onto the structure being erected. Must I comply with the standard?”

Answer 8: If you only place materials on the ground without arranging the materials in a particular order for hoisting, you are not engaged in construction work and have no duties under the standard. If you place materials onto the structure, you are engaged in construction work, and the standard applies to your work. However, if you deliver only building supply sheet goods or building supply packaged materials onto the structure and your articulating/ knuckleboom truck crane is equipped with a properly functioning automatic overload prevention device, you have no further duties under the standard. Otherwise, you must

²⁷ We have previously noted that OSHA had ample opportunity to address additional hazards during the development of the exemption as part of the 2010 rule. We also noted above that OSHA has not explained the hazards associated with off-loading palletized material supported by the fork assembly versus the activity of off-loading sheet goods from the fork assembly.

²⁸ See footnote 7 above.

comply with the entire standard when using the crane to place material onto the structure.”

Respectfully requested,

A handwritten signature in black ink that reads "Jonathan Paine". The signature is written in a cursive style with a large, prominent initial 'J'.

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