

CONSTRUCTION INDUSTRY SAFETY COALITION

July 27, 2022

The Honorable Robert “Bobby” Scott
Chairman
Committee on Education and Labor
U.S. House of Representatives
2176 Rayburn House Office Building
Washington, DC 20515

The Honorable Virginia Foxx
Ranking Member
Committee on Education and Labor
U.S. House of Representatives
2176 Rayburn House Office Building
Washington, DC 20515

RE: Amendment in the Nature of a Substitute to H.R. 2193

Dear Chairman Scott and Ranking Member Foxx:

The Construction Industry Safety Coalition (“CISC”) appreciates the opportunity to submit our statement for the record for the July 27, 2022, mark-up of H.R. 2193, the Asunción Valdivia Heat Illness and Fatality Prevention Act of 2021, and the Amendment in the Nature of a Substitute to H.R. 2193 (“ANS”) offered by Ms. Adams of North Carolina. Specifically, the CISC opposes H.R. 2193 as amended by the ANS.

The CISC was formed several years ago to provide comments on Occupational Safety and Health Administration (“OSHA”) regulatory initiatives from the wide range of construction trades affected by OSHA standards. The CISC speaks for small, medium, and large contractors; general contractors; subcontractors; union contractors; etc. The CISC has submitted comments on a variety of OSHA-related rulemaking and legislative initiatives.

The CISC recognizes the potential hazards of heat exposure and strongly believes that employers should take steps to ensure that employees are protected. Many CISC member associations have published guidance material to employers to inform them of the hazards of excess heat exposure and measures that can be implemented to protect employees. Many of these measures include common-sense solutions. The construction industry has been at the forefront of efforts to protect workers from the effects of extreme heat.

The trade associations that make up the CISC and their members conduct effective safety training on a frequent and regular basis on topics ranging from fall protection to chemical safety to rigging to forklift operations to heat stress. This training provides workers with critical

information about common safety and health hazards on the job. CISC members have also developed a variety of toolkits and other materials to help construction employers target their efforts by adopting the methods that make the most sense for the type of work they do.

While CISC members will continue to take proactive steps to protect construction workers from heat illness and injury, the coalition has significant concerns with the proposed language in the ANS.

First, OSHA has already taken a number of steps to address work-related heat exposures. OSHA is currently in the process of developing a workplace heat standard for indoor and outdoor work settings and has implemented an enforcement initiative to increase inspections for heat-related hazards. Since Congress first introduced legislation in 2019,¹ OSHA has taken a number of significant steps to protect workers from heat exposure.

Currently, the agency has moved forward with an advanced notice of proposed rulemaking (“ANPRM”) to initiate a rulemaking to protect workers from indoor and outdoor heat hazards and to collect information about the extent and nature of hazardous heat in the workplace. *See* 86 Fed. Reg. 59,309 (Oct. 27, 2021); Advanced notice of proposed rulemaking extending the comment period until Jan. 26, 2022 (86 Fed. Reg. 68,594 (Dec. 3, 2021)). A number of stakeholders have submitted comments on the proposed rulemaking, including the CISC along with supplemental comments by individual coalition members. OSHA is moving forward, but these issues are complex and warrant careful consideration. Therefore, the CISC encourages the Committee to allow the agency’s process to move forward without imposing the unworkable deadlines and additional burdens contained in H.R. 2193.

Next, OSHA has issued a National Emphasis Program (NEP) on Outdoor and Indoor Heat-Related Hazards.² According to OSHA, the Heat NEP creates, for the first time, a nationwide enforcement mechanism for OSHA to proactively inspect workplaces for heat-related hazards in general industry, maritime, construction, or agriculture operations alleging hazardous exposures to heat (outdoors and/or indoors). The Heat NEP establishes heat priority days when the heat index is expected to be 80°F or higher and on heat priority days, OSHA will initiate enforcement and compliance assistance in the targeted high-risk industries. The goal of the Heat NEP is to increase the number of OSHA heat inspections by 100%. The Heat NEP also encourages employers to protect workers from heat hazards by providing employee access to water, rest, shade and adequate training, and implementing acclimatization procedures for new or returning workers.

In addition, OSHA has formed a heat work group to engage stakeholders and inform ongoing efforts. Within OSHA’s National Advisory Committee on Occupational Safety and Health (NACOSH), OSHA has formed a Heat Illness Prevention Work Group to provide a better understanding of challenges and best practices in protecting workers from heat hazards. The charge of this workgroup is two-fold: 1) To evaluate and provide input and recommendations on

¹ H.R. 3668 – Asunción Valdivia Heat Illness and Fatality Prevention Act of 2019, 116th Congress (2019-2020).

² *National Emphasis Program – Outdoor and Indoor Heat-Related Hazards*, Directive No. CPL 03-00-024, U.S. Department of Labor, Occupational Safety and Health Administration (April 8, 2022) (Heat NEP) (available at https://www.osha.gov/sites/default/files/enforcement/directives/CPL_03-00-024.pdf).

OSHA's heat illness prevention materials; and 2) To critically evaluate stakeholder input to the heat ANPRM and develop key recommendations on potential elements of heat injury and illness prevention rulemaking that OSHA should consider. OSHA has held a number of stakeholder meetings to provide an overview of and seek comments on the agency's ongoing efforts to protect workers from heat-related hazards.

Finally, OSHA has updated its heat safety campaign to remind employers and workers not to ignore the dangers of working in hot environments, both indoors and outdoors. OSHA's Heat Illness Prevention campaign educates individuals of the dangers of working in the heat with a simple message: Water. Rest. Shade. The campaign includes simple steps to protect workers, including drinking cool water, taking rest breaks in the shade to cool down, and building a tolerance for working in heat.

Second, the CISC has serious concerns that the ANS ignores the rulemaking process that OSHA has currently undertaken. The ANS requires OSHA to issue an interim final rule and then a final rule shortly thereafter, which would not provide sufficient time for the Agency to complete important rulemaking steps. This includes convening a small business review panel under the Small Business Regulatory Enforcement and Fairness Act ("SBREFA") and engaging in meaningful consultation with the Advisory Committee on Construction Safety and Health ("ACCSH"), the standing advisory committee created to advise the Agency on all construction proposed rules. In addition, the ANS ignores the underlying provisions and protections set forth in the Administrative Procedure Act by truncating the process for OSHA to issue a heat standard. The proposed language requires OSHA to issue an interim final rule, *and then* accept comments from the regulated community. This turns the process completely on its head and deprives regulated entities of the ability to provide meaningful input at a critical time in the regulatory process.

The CISC believes that any federal heat exposure standard will undoubtedly have a significant impact on a substantial number of small entities, thus triggering the review procedures required by the SBREFA. Most CISC member associations are dominated by small businesses, and it is vitally important that small entities be given the opportunity to comment on any approach proposed by the Agency and that the Agency has time to meaningfully address those comments and make changes to any proposed approach, as appropriate.

Even if any standard does not exceed the triggering threshold, the CISC encourages OSHA to convene a "SBREFA-like" panel to gather small entity views on the costs and impacts of a heat exposure proposal. As OSHA can attest, small entity input at the earliest stages of a rulemaking can provide valuable insight and data to OSHA regarding how a rule should be structured, and the costs and economic impacts of such a rule. When OSHA opens channels for input from small entities that may be affected by proposed standards, OSHA is more likely to issue a final rule that will have maximum beneficial impact with minimized burden across affected industries. The CISC is very concerned that the timeframes established in the legislation will not provide for meaningful small business input.

In addition, the CISC feels strongly that any OSHA standard on heat exposure be fully vetted by

ACCSH.³ Given the significant impact that any standard would have on the construction industry, the CISC believes that OSHA should work in close consultation with ACCSH during the standard's development. This should involve more than the Agency simply presenting to ACCSH what it proposes to include, but instead should involve a true back-and-forth dialogue and consultation with the Committee. Again, as with the small business feedback, the CISC is very concerned that the timeframes for completion of a standard do not allow for this important interaction.

Third, the ANS creates significant concerns for the CISC because it changes the judicial review process by limiting the ability of aggrieved parties to have their day in court through forum selection in their home state. Indeed, the ANS allows a petition for review in only one federal circuit court, cutting out access to the other eleven circuit courts of appeal. Even more egregious, the legislation subverts the judicial process by eliminating the ability of litigants to seek injunctive relief. These provisions are a clear violation of the Separation of Powers clauses enumerated in the U.S. Constitution.

Fourth, the ANS impermissibly changes the legal standard for agency deference in contravention of the U.S. Supreme Court's holding in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The ANS creates a wholly new deference standard to require the Occupational Safety & Health Review Commission to use "substantial deference" when that is not, in fact, the legal standard. *Chevron* deference comes into play when a statute is ambiguous, and the agency whose is charged with administering the statute interprets the statute based on its expertise. But that deference is based on whether the agency's interpretation is reasonable or rational. The judiciary is tasked with interpreting the statutes and regulations, which necessarily includes applying the appropriate standard of review. Nowhere does *Chevron* mention that the level of deference is "substantial." It is not up to Congress to tell the courts how to interpret and apply the laws. Accordingly, this provision must be removed from the ANS.

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These items represent just a few of the CISC's overarching concerns with this ANS. As we have stated, the text of this proposed amendment is very troubling, particularly given its last-minute substitution raising questions over the process so far and, as a consequence, the CISC urges the Committee to correct the significant legal shortcomings in the proposed bill.

The CISC appreciates the Committee's efforts in trying to develop legislation to protect employees from heat exposure and shares the Committee's goal of ensuring employees are fully protected from the hazards of heat. However, for the reasons set forth above, the CISC has significant concerns with the Amendment in the Nature of a Substitute to H.R. 2193.

³ ACCSH is a standing advisory committee initially created by Congress pursuant to Section 107 of the Construction Safety Act (or the Contract Work Hours and Safety Standards Act). 40 U.S.C. § 3701 et seq. ACCSH advises the Agency on the promulgation of standards applicable to the construction industry. This consultation is mandatory. See 29 C.F.R. § 1911.10(a) ("The Assistant Secretary shall provide the committee with any proposal of his own ... together with all pertinent factual information available to him, including the results of research, demonstrations, and experiments.")

CISC member associations will continue to provide guidance and compliance assistance material to construction contractors regarding heat exposure and heat illness prevention. Getting the “word out” by trade associations, OSHA, NIOSH, and other stakeholders is critically important to prevention in this area.

The CISC would be happy to meet with the Committee to discuss our views on heat exposure hazards and to answer any questions the Committee may have.

Sincerely,

Construction Industry Safety Coalition