



October 27, 2015

The Honorable David Michaels  
Assistant Secretary  
Occupational Safety and Health Administration  
U.S. Department of Labor  
200 Constitution Avenue, N.W.  
Washington, D.C. 20210

**VIA ELECTRONIC SUBMISSION:** <http://www.regulations.gov>

**Re: Comments on OSHA Docket No. OSHA-2015-0006; Clarification of Employer's Continuing Obligation to Make and Maintain an Accurate Record of Each Recordable Injury and Illness (80 Fed. Reg. 45116, July 29, 2015)**

Dear Dr. Michaels:

The Coalition for Workplace Safety ("CWS") submits the following comments on OSHA's Notice of Proposed Rulemaking ("NPRM"), *Clarification of Employer's Continuing Obligation to Make and Maintain an Accurate Record of Each Recordable Injury and Illness* (80 Fed. Reg. 45116, July 29, 2015). The CWS is comprised of a group of associations and employers who believe in improving workplace safety through cooperation, assistance, transparency, clarity, and accountability. The CWS believes that workplace safety is everyone's concern. Improving safety can only happen when all parties – employers, employees, and OSHA – have a strong working relationship.

CWS members recognize that employers have an obligation under the Occupational Safety and Health Act to record injuries and illnesses and that maintaining accurate injury and illness records serves an important purpose in ensuring safe and healthy workplaces. Injury and illness records are one of several important elements of an effective safety and health program. While CWS members acknowledge the importance of making and retaining accurate injury and illness records, the coalition strongly believes that through this rulemaking OSHA is not only disregarding a U.S. Court of Appeals decision, one which OSHA did not appeal, but also usurping Congressional authority to make new law. Should OSHA wish to address the six-month statute of limitations for issuing citations and penalties set forth in the Occupational Safety and Health Act of 1970 ("OSH Act" or "Act"), the appropriate means to do so would be to seek a Congressional amendment to the Act, not to disregard a U.S. Court of Appeals decision holding that the statute is clear and rejecting the very arguments underlying this rulemaking. *AKM LLC d/b/a Volks Constructors v. Sec'y of Labor* ("Volks"), 675 F.3d 752 (D.C. Cir. 2012). OSHA cannot circumvent the court's decision through rulemaking and the CWS strongly objects to OSHA's efforts to do so, and accordingly, for the reasons set forth below, the CWS urges OSHA to withdraw this proposed rule.

*The CWS is comprised of associations and employers who believe in improving workplace safety through cooperation, assistance, transparency, clarity, and accountability.*

## I. Congress Expressly Provided a Six Month Statute of Limitations in the OSH Act.

### A. Section 8 of the OSH Act does not grant OSHA authority for this rulemaking.

In this proposed rule, OSHA claims that the OSH Act authorizes the Agency to impose a continuing obligation on employers to make and maintain accurate records for injuries and illnesses. 80 Fed. Reg. at 45116. Specifically, OSHA states that such authority is granted in Section 8(c). According to OSHA:

The language Congress used in ... [Section 8 (c)] therefore authorizes the Secretary to require employers to have on hand and make available records that accurately reflect all of the recordable injuries and illnesses that occurred during the years for which the Agency requires the keeping of records. *Id.*

OSHA relies on Section 8(c) to assert that the making and retention of injury and illness records is an ongoing obligation “during the years for which the Agency requires the keeping of records,” in this case five years. *Id.* Nothing in Section 8(c)<sup>1</sup> or the Act’s legislative history, however, supports this interpretation. In fact, the plain language of Section 9 *directly contradicts* OSHA’s position. Section 9(c) of the OSH Act clearly states that “[n]o citation may be issued under this section after the expiration of six months following the occurrence of any violation.” 29 U.S.C. § 658(c) (emphasis added). If Congress wanted to establish a different statute of limitations for violations of recordkeeping regulations, or any other regulations, it would have done so expressly in Section 8 or otherwise carved out an exception to the six-month statute of limitations in Section 9(c). *See Whitman v. Am. Trucking Ass’ns, Inc.* 531 U.S. 457, 468 (2001). OSHA is thus trying to conflate the obligation to maintain records for five years with the time period for OSHA to cite an employer for recording an injury. Unfortunately for OSHA, and as recognized by the court in *Volks*, Congress expressly provided for a definitive time frame for the issuance of citations of both standards and regulations in Section 9, and Section 8 in no way broadens that time frame. *Volks*, 675 F.3d 752.

OSHA fails to reconcile Sections 8(c) and 9(c) in the proposed rule—OSHA attempts to overcome the statute of limitations in Section 9(c) by arguing that it speaks only to when OSHA can cite a violation, not what constitutes a violation or when a violation occurs. OSHA states:

Section 9(c) cannot be read as prohibiting the Secretary from imposing continuing recordkeeping obligations on employers covered by the OSH Act, when the text and legislative history of the Act show section 8(c) authorizes the Secretary to create such obligations. 80 Fed. Reg. at 45122.

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<sup>1</sup> Section 8(c) reads in relevant part:

(c) (1) Each employer shall make, keep and preserve, and make available to the Secretary... such records regarding his activities relating to this Act as the Secretary... may prescribe by regulation as necessary or appropriate for the enforcement of this Act or for developing information regarding the causes and prevention of occupational accidents and illnesses....

(2) The Secretary... shall prescribe regulations requiring employers to maintain accurate records of, and to make periodic reports on, work-related deaths, injuries and illnesses other than minor injuries requiring only first aid treatment and which do not involve medical treatment, loss of consciousness, restriction of work or motion, or transfer to another job.

Adopting OSHA's position would effectively mean there would be no statute of limitations for violations of any recordkeeping regulations. Nor would there be any statute of limitations for any records required to be made under any other rules, since Section 8(c) does not apply solely to injury and illness recordkeeping records. It applies to any records that the Secretary would require an employer to make regarding safety and health in the workplace through promulgation of a rule.<sup>2</sup> 29 U.S.C. § 657(c). In short, according to OSHA's legal theory, any regulation it promulgates that requires an employer to make a record of any sort constitutes a "continuing" obligation. In OSHA's view, the word "make" "signif[ies] a continuing course of conduct," that is unaffected by Section 9(c). 80 Fed. Reg. at 45121. This simply goes against the plain language of the statute.

During oral argument in *Volks*, Counsel for the Secretary acknowledged that if the court were to accept the Agency's position, then effectively there would be no statute of limitations. 675 F.3d at 762. In an attempt to justify why this would be permissible, Counsel pointed to the broader purpose of the Act – to assure safe and healthful working conditions for working men and women. According to OSHA, "The OSH Act simply would not achieve Congress' fundamental objectives if basic employer obligations were not continuing." 80 Fed. Reg. at 45122.

OSHA further claims, without any supporting evidence, that adhering to a six-month statute of limitations for recordkeeping violations "... would cripple the Agency's ability to gather complete information and to improve understanding of safety and health issues." Even if this were true – which the CWS does not believe – OSHA's argument provides *no* basis to by-pass the clear and express intent of Congress. OSHA can, in fact, require employers to "make, keep and preserve records" for five years. What the agency *cannot do is cite an employer beyond six months from the date it was required to first make that record*. As the court in *Volks* held:

Despite the cloud of dust the Secretary kicks up in an effort to lead us to her interpretation, the text and the structure of the Act reveal quite a different and quite a clear congressional intent that requires none of the strained inferences she urges .... 675 F.3d at 755.

OSHA seems to believe that the issuance of a citation is the only mechanism to ensure employers maintain accurate records. The legislative history makes clear that the OSH Act was not premised solely on punishment and penalties. "The philosophy underlying H.R. 16785 is not based on the assumption that American industry can be made safe and healthful by simply enacting a Federal law which emphasizes penalties ...." H.R. Rep. No. 16785, 91st Cong., 2d Sess. (1970), reprinted in Subcommittee on Labor and Public Welfare, Legislative History of the Occupational Safety and Health Act of 1970 (Committee Print 1971) at 853. Furthermore, not every duty under the OSH Act is enforceable by a citation. For example, employees<sup>3</sup> have a duty to comply with the requirements of the Act and promulgated standards. However, no citations are issued by OSHA for employees' failure to comply with these duties.

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<sup>2</sup> In the preamble to the final rule for *Access to Employee Exposure and Medical Records*, OSHA relied on Section 8(c) as legal authority for the retention of employee exposure and medical records. "The phrase 'relating to this Act' must be liberally interpreted in light of the broad remedial purposes of the Act to extend to all employer records which are determined to be 'necessary or appropriate for the enforcement of this Act ....' 45 Fed. Reg. 35212, 35245 (May 23, 1980).

<sup>3</sup> See, 29 U.S.C. § 654(b): Each employee shall comply with occupational safety and health standards and all rules, regulations, and orders issued pursuant to this Act which are applicable to his own actions and conduct.

*B. The underlying purposes of the OSH Act are met with the retention and updating requirements.*

Current regulations require employers to update their OSHA 300 Logs within five years from the calendar year an entry was recorded. This is an employer's obligation and one that employers take very seriously. This proposed rule serves as nothing more than an enforcement tool to expand OSHA's ability to issue citations – the stated objectives in the proposed rule are already met by the five-year retention period and the requirement to update when new information comes to light.

In the 2001 final rule to the revisions for the recordkeeping regulations, OSHA believed seven calendar days was ample time for an employer to determine if an injury was work-related. 66 Fed. Reg. 6050. Additionally, under that final rule, employers are obligated to update their OSHA 300 Logs if new information is discovered that would impact the initial recordkeeping determination. There is nothing to suggest that the current requirements do not capture accurate injury and illness information. In the 2001 final rule, OSHA stated, "The Agency concludes that updating the OSHA Form 300 or its equivalent for a period of five years will provide a sufficient amount of accurate information for recordkeeping purposes." *Id.*

Further, OSHA now proposes to require employers to update the OSHA Form 301 (Incident Form) because it is a "continuing obligation." This is in direct conflict with the 2001 revisions in which OSHA clearly rejected a requirement to update this form. "OSHA does not believe that updating the OSHA Form 301 will enhance the information available to employers, employees, and others sufficiently to warrant including such a requirement in the final rule." *Id.*

There is no data, research, or other evidence to suggest that employers are intentionally not recording work-related injuries within the seven day time frame to avoid recording the incident all together. The current requirements adequately ensure that OSHA, employees, and others have access to accurate work-related injury and illness information.

*C. OSHA has never before expressed a continuing obligation for recording injuries and illnesses.*

Similar to its argument before the *Volks* court, OSHA argues that employers have always had a continuing obligation to record injuries and illnesses and that the seven day timeframe is only a "grace" period. 80 Fed. Reg. at 45126. "OSHA's longstanding position is that an employer's duty to record an injury or illness continues for the full duration of the record-retention-and-access period, *i.e.*, for five years after the end of the calendar year in which the injury or illness became recordable." *Id.* at 45119.

However, in the 14 years since the revision to the recordkeeping requirements, there is not one letter of interpretation or guidance document that explains what OSHA now alleges is a longstanding Agency position. In fact, in 2005, OSHA issued a handbook, *OSHA Recordkeeping Handbook: The Regulation and Related Interpretations for Recording and Reporting Occupational Injuries and Illnesses*, which failed to mention the seven-day "grace period." *Id.* at 45126. The only reference to any continuing obligation is the requirement to update the OSHA 300 Log when new information is discovered. In discussing the retention period and an employer's requirements the handbook states:

The final rule requires Log updates to be made on a continuing basis, i.e., as new information is discovered. For example, if a new case is discovered during the retention period, it must be recorded within 7 calendar days of discovery, the same interval required for the recording of any new case. If new information about an existing case is discovered, it should be entered within 7 days of receiving the new information. OSHA has also decided to require updating over the entire five-year retention period... See [https://www.osha.gov/Publications/recordkeeping/OSHA\\_3245\\_REVISED.pdf](https://www.osha.gov/Publications/recordkeeping/OSHA_3245_REVISED.pdf) (last visited September 10, 2015).

More importantly, the preamble to the final rule for the recordkeeping revisions in 2001 contradicts OSHA's current position. In that rulemaking, under the heading "Deadline for Entering a Case," OSHA stated:

[T]he Agency believes that the 7 calendar-day rule will provide employers sufficient time to receive information and record the case. In addition, a simple "within a week" rule will be easy for employers to remember and apply, and is consistent with OSHA's decision, in this rule, to move from workdays to calendar days whenever possible. The Agency believes that 7 calendar days is ample time for recording, particularly since the final rule, like the former rule, allows employers to revise an entry simply by lining it out or amending it if further information justifying the revision becomes available. The final rule does contain one exception for the 7 day recording period: if an employee experiences a recordable hearing loss, and the employer elects to retest the employee's hearing within 30 days, the employer can wait for the results of the retest before recording. 66 Fed. Reg. 5916, 6023 (January 19, 2001).

There is no discussion in the regulatory history about a continuing duty or even an inference that the seven calendar-day rule is a "grace" period. OSHA established a deadline, one that it believed provided time for employers to accurately record work-related injuries or illnesses. The only reference to a continuing obligation in the 2001 recordkeeping revisions was to update the OSHA 300 Log. The failure to record a work-related event within seven days of knowing it is a recordable work-related injury or illness or becoming aware of new information which makes it recordable is a violation of the regulation and is consistent with the statute of limitations in Section 9(c).

D. *The continuing violation doctrine is the exception not the rule.*

In an effort to undo the holding in *Volks*, OSHA now proposes to add language to the existing recordkeeping regulations to "clarify that the duty to make and maintain accurate records of work-related injuries and illnesses is an ongoing obligation." 80 Fed. Reg. at 45116.

OSHA proposes to add language to several Part 1904 regulations to impose the continuing obligation concept. Most significantly, OSHA proposes to add language to §1904.29 to state:

A failure to meet this deadline does not extinguish your *continuing obligation* to make a record of the injury or illness and to maintain accurate records of all recordable injuries and illnesses in accordance with the requirements of this part.

OSHA proposes to amend § 1904.33 to include the following language:

... you are under a *continuing obligation* to record the case on the Log and/or Incident Report during the five-year retention period for that Log and/or Incident Report.

*Id.* at 45131 (emphasis added).

The CWS understands why OSHA is adding this language to attempt to undo the *Volks* decision. However, the addition of this language is inconsistent with the discrete event that is triggered by the regulation and there is no other “occurrence” within the limitations period. In §1904.29, that discrete event is the injury and the duty to record (or make a record) within seven calendar days.

In *National Railroad Passenger Corp. v. Morgan*, the Supreme Court held that to “occur” requires a happening or event within the limitations period. 536 U.S. 101, 109-110 (2002). As applied to OSHA’s recordkeeping rule, “the word ‘occurrence’ clearly refers to a discrete antecedent event - something that ‘happened’ or ‘came to pass’ ‘in the past.’” *Volks*, 675 F.3d at 755. (citation omitted). As the *Volks* court explained: “every single violation for which *Volks* was cited – failures to make and review records – and every workplace injury which gave rise to those unmet recording obligations were ‘incidents’ and ‘events’ which ‘occurred’ more than six months before the issuance of the citations.” *Id.*

OSHA’s position in this proposed rule is that “occurrence” as used in Section 9(c) “is not necessarily a discrete event; it can encompass actions or events that continue over time.” 80 Fed. Reg. 45122. OSHA seems to be arguing that a continuing violation necessarily becomes an “occurrence” or obviates the need for an “occurrence.” This position is entirely at odds with Supreme Court case law and the holding in *Volks*. There is nothing in the statute or its legislative history that is in line with OSHA’s interpretation. As the *Volks* court said, “the application of the continuing violations doctrine should be the exception, rather than the rule.” *Volks*, 675 F.3d. at 757. OSHA’s theory is attempting to turn the exception *into* the rule, something that Congress never intended.

## **II. *Volks*’ Judicial Construction of the Statute Trumps this Proposed Rule.**

OSHA sets out its legal authority for this rulemaking in Section III of the Federal Register notice. The entire argument mirrors the Secretary’s appellate brief in *Volks*, as explained above. Not only has OSHA misread the OSH Act expanding the window for issuing a citation, but OSHA’s attempt here to reverse the *Volks* decision through rulemaking is fundamentally improper.

Under *National Cable & Telecommunications Ass’n v. Brand X Internet Services* (“*Brand X*”), the Supreme Court examined whether an Agency can undo a court decision through rulemaking when the decision is based on the plain language of the underlying statute. 545 U.S. 967 (2005). In a 6-3 decision, the Supreme Court in *Brand X* answered that question with an emphatic “no.” *Id.*

Under *Brand X*, a prior court ruling controls where the court’s “construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion.” *Id.* at 982.

This principle follows from *Chevron* itself. *Chevron* established a ‘presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency, rather than the courts to possess whatever degree of discretion the ambiguity allows.’

\* \* \*

Only a judicial precedent holding that the statute unambiguously forecloses the agency’s interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction. *Id.*

In addressing the very argument OSHA uses to support these regulations, the *Volks* court ruled in unequivocal terms that the statute is clear. 675 F.3d at 754. Under *Volks*, Congress has spoken to the precise question, and it has resolved the issue in a manner incompatible with the proposed regulations. The court found that “the text and structure of the Act reveal a quite different and *quite clear* congressional intent that requires none of the strained inferences [the Secretary] urges upon us.” *Id.* at 755 (emphasis added). This is a statutory issue, not a regulatory one.

Here, OSHA tries to twist the entire premise of the court’s holding that the statute is clear and no amount of rewriting the regulation can unring that bell by labeling this rulemaking a mere “clarification.” “We do not believe Congress expressly established a statute of limitations only to implicitly encourage the Secretary to ignore it.” *Volks*, 675 F.3d at 756. There is nothing for OSHA to interpret, nothing for the Agency to “gap fill,” nothing that requires the Agency’s discretion in rulemaking. If OSHA promulgates this proposed rule, it cannot change *Volks*’ interpretation of the statute. The statute is clear – the statute of limitations applies to the initial occurrence of a violation of OSHA’s recordkeeping rule. OSHA cannot regulate away that fact, nor the *Volks* court’s decision.

### **III. Statutes of Limitations are Fundamental to American Jurisprudence.**

CWS recognizes the importance of injury and illness records; however, there are solid and fundamental reasons for statutes of limitations as well, which have long been recognized by courts.

Statutes of limitation, like the equitable doctrine of laches, in their conclusive effects are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that, even if one has a just claim, it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them. *Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 348-349 (1944).

Astonishingly, in the proposed rule OSHA states that “concerns about stale claims have little bearing on OSHA recordkeeping cases.” 80 Fed. Reg. at 45123. As OSHA acknowledges in the preamble, “claims generally are considered stale when so much time has passed that relevant evidence has been lost and witnesses are no longer available or do not have reliable memories of the relevant occurrence.” *Id.* (citation omitted). This proposed rule would allow OSHA to issue citations for failing

to record an injury or illness five years and seven days from the date of the actual injury. Within those five years the injured employee or the individuals who ultimately make the determination not to record an injury or illness may no longer be at an employer's establishment, as was the case in *Volks*. Or it is quite conceivable that during a five year period nurses notes or other related documents pertaining to that injury may be lost or misplaced.

OSHA further argues that “[i]n the vast majority of OSHA cases stemming from an employer’s failure to record an injury or illness, the issues will be very straightforward.” *Id.* at 45124. OSHA cites to no data or specific cases as evidence of this proposition. Further, the fact that OSHA had to issue an extensive 185-page Recordkeeping Handbook containing hundreds of frequently asked questions about the recordkeeping regulations illustrates that the issues regarding the recordability of injuries and illnesses are anything but straightforward.

OSHA claims that “the only evidence the parties and the court will need are the employer’s OSHA Log and Incident Report Forms, which existing regulations require employers to maintain for five years. *Id.* This statement is simply without merit and contrary to many contested citations where employers engage medical experts or rely on in-house physicians and nurses to provide factual testimony. For example, in *Caterpillar Logistics, Inc.*, 674 F.3d 705 (7th Cir. 2012), one of Caterpillar’s employees developed epicondylitis (tennis elbow). In order to determine whether the injury was work-related and therefore required to be recorded on the OSHA 300 Log, Caterpillar’s internal physician concluded that the employee’s work activities did not contribute to her injury. *Id.* As an additional level of review, Caterpillar convened a review panel, consisting of five members, three of which were board-certified in musculoskeletal disorders. *Id.* This panel agreed that the injury was not work-related. *Id.* Despite this extensive evaluation and internal determination regarding work-relatedness, OSHA substituted its own judgment and cited Caterpillar for failing to record a work-related injury. The U.S. Court of Appeals for the Seventh Circuit vacated the citation. *Id.* Clearly, this case did not rest on evidence of only the employer’s OSHA Log and Incident Report Forms as OSHA claims.

Congress recognized the need for a statute of limitations for violations of standards and regulations. The policy reasons for such a limitations period apply equally to OSHA cases as they do to criminal and civil cases, and OSHA is obligated to accept those reasons and Congressional decisions.

#### **IV. OSHA’s Economic Analysis Does Not Contemplate an Employer’s Continuing Obligation to Record an Injury or Illness and the Proposal Should Have Been Reviewed Under E.O. 12866.**

The Secretary relies on the characterization of this rulemaking as merely “reiterat[ing] and clarify[ing] employers’ existing obligations to record work-related injuries and illness” to claim that this rulemaking will trigger no new economic impacts. 80 Fed. Reg. 45128. As stated above, and contrary to OSHA’s claim, there has never been a “longstanding” position that employers had an ongoing continuing obligation to record an injury or illness for as long as an employer must keep the record. Nothing in the 2001 recordkeeping revisions final rule, or its economic analysis contemplated an ongoing obligation. 66 Fed. Reg. 5916. In fact, OSHA estimated the costs of recording an entry using a one-time cost. *Id.* If OSHA envisioned the 2001 rule as requiring this continuing obligation,



OSHA would have at least included some costs for updating at least some of the initially recorded cases.

Even assuming, *arguendo*, OSHA has the authority to promulgate this regulation; it has not truly analyzed the additional costs associated with it, summarily concluding that this “clarification” requires no additional actions by employers. Contrary to OSHA’s assertion, the proposed revisions do impose new cost burdens because there was never a continuing obligation to record an injury or illness for the length of the retention period.

Additionally, there is nothing in the record to support that the increased burden on employers is justified by this rule. Inspections involving potential recordkeeping issues will now be expanded requiring employers to provide several years’ worth of personnel and medical files, restricted work duty documentation, workers compensation records, or other related documents. And despite conducting an extensive National Emphasis Program in two iterations related specifically to recordkeeping and under-reporting, i.e. the legal requirement to record and the failure to do so, OSHA was unable to confirm its assertion that employers are intentionally failing to record injuries or illnesses. During the course of the NEP programs, OSHA conducted roughly 550 federal and state recordkeeping inspections. *Report on the findings of the Occupational Safety and Health Administration’s National Emphasis Program on Recordkeeping and Other Department of Labor Activities Related to the Accuracy of Employer Reporting of Injury and Illness Data* (“OSHA NEP Report to Congress”), May 7, 2012. Out of roughly 550 inspections, only six establishments were cited for willful and repeat violations. *Id.* at 5. There simply is no evidence of widespread recordkeeping abuse that would warrant placing these new obligations on employers. CWS members strive for accurate recordkeeping records and will continue to do so; however, OSHA has not justified this rule from a safety and health perspective.

Furthermore, OSHA certifies that this proposal “does not constitute an economically significant regulatory action under Executive Order 12866” because “neither the benefits nor the costs of the proposal equal to or exceed \$100 million.” 80 Fed. Reg. 45128. Under Executive Order 12866, agencies are required to conduct a Regulatory Impact Analysis on significant regulatory actions. 58 Fed. Reg. 51735 (Sept. 30, 1993). “Significant regulatory action” as defined by the Executive Order is not simply a threshold dollar amount in excess of \$100 million in economic impact, but also includes “any regulatory action that is likely to result in a rule that may... [r]aise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive order.” E.O. 12866, Sec. 3(f)(4), 58 Fed. Reg. 51738.

Here, OSHA’s use of a rule to overturn a U.S. Court of Appeals decision holding the OSH Act is clear and unambiguous certainly presents a novel legal issue. OSHA’s approach in this rulemaking amounts to revising statutory language, which as discussed above is prohibited based on the U.S. Supreme Court’s decision in *Brand X*. However, if this approach prevails, court decisions would be rendered meaningless, or at the most—as OSHA seems to consider them—merely advisory. Given *Brand X* and the *Volks* decisions, this rulemaking raises a novel legal issue about rulemaking in response to court decisions and therefore requires the agency to conduct a Regulatory Impact Analysis. More importantly, under Executive Order 12866 this proposed rule requires OSHA to submit this regulatory action to the President’s Office of Management and Budget (“OMB”) for a review by the

Office of Information and Regulatory Affairs (“OIRA”) which did not happen prior to the NPRM being issued.

## **V. Any Final Rule Will Violate the Administrative Procedure Act.**

Under the Administrative Procedure Act (“APA”), reviewing courts must “hold unlawful and set aside” agency actions if they are found to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law” or “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.” 5 U.S.C. § 706(2).

Since the U.S. Court of Appeals for the District of Columbia in *Volks* held that the OSH Act is clear and that section 8(c) does not permit a continuing violation for recordkeeping regulations, should OSHA promulgate this proposed rule as a final rule, it will certainly have exceeded its statutory authority. Therefore, any final rule will violate the APA. *Id.* “[T]he judiciary, not the agency, ‘is the final authority on issues of statutory construction’” and where there is clear congressional intent, the reviewing court must “reject any ‘administrative constructions ... contrary to [this] clear congressional intent.’” *Massachusetts v. United States DOT*, 93 F.3d 890, 893 (D.C. Cir. 1996).

An agency has no power to “tailor” legislation to bureaucratic policy goals by rewriting unambiguous statutory terms. Agencies exercise discretion only in the interstices created by statutory silence or ambiguity; they must always “‘give effect to the unambiguously expressed intent of Congress.’” *Util. Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2445 (2014) (internal citations omitted).

Any agency action regarding the continuing duty of recordkeeping requirements is “in excess of statutory authority” and will violate Section 706(2) of the APA. See also, *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000) (stating “an administrative agency's power to regulate in the public interest must always be grounded in a valid grant of authority from Congress.”); *Brown v. Gardner*, 513 U.S. 115, 120 (1994) (vacating a regulation promulgated by the Department of Veteran Affairs finding that the regulation was not consistent with the controlling statute).

## **VI. OSHA Must Withdraw This Proposed Regulation.**

In the face of clear, unambiguous statutory language demonstrating Congressional intent, echoed by the U.S. Court of Appeals for the District of Columbia in *Volks*, any argument by OSHA that it has legal authority to promulgate a regulation overriding the six month statute of limitation is simply without merit. Accordingly, any effort to finalize this proposed rule may likely return the Secretary to a U.S. Court of Appeals to justify OSHA’s “clarification” in light of such clear and controlling legislative language and consistent judicial decisions and doctrines.

CWS strongly believes OSHA lacks statutory authority to issue this rule and urges OSHA to withdraw the proposal.

ACCA-The Indoor Environment & Energy Efficiency Association  
Airlines for America  
American Bakers Association  
American Coatings Association  
American Coke and Coal Chemicals Institute  
American Feed Industry Association  
American Foundry Society  
American Health Care Association  
American Iron and Steel Institute  
American Road and Transportation Builders Association  
American Subcontractors Association, Inc.  
American Supply Association  
American Trucking Associations  
Associated Builders and Contractors  
Associated General Contractors of America  
Associated Wire Rope Fabricators  
Corn Refiners Association  
Flexible Packaging Association  
Food Marketing Institute  
Global Cold Chain Alliance  
Healthcare Distribution Management Association  
Heating, Air-Conditioning & Refrigeration Distributors International  
Independent Electrical Contractors, Inc.  
IPC - Association Connecting Electronics Industries  
Industrial Minerals Association - North America  
Institute of Makers of Explosives  
International Association of Amusement Parks and Attractions  
International Dairy Foods Association  
International Warehouse Logistics Association  
Mason Contractors Association of America  
Mechanical Contractors Association of America  
Motor & Equipment Manufacturers Association  
National Association for Surface Finishing  
National Association of Home Builders  
National Association of Landscape Professionals  
National Association of Manufacturers  
National Association of Wholesaler-Distributors  
National Automobile Dealers Association  
National Center for Assisted Living  
National Cotton Ginners' Association  
National Federation of Independent Business  
National Grain and Feed Association  
National Grocers Association  
National Lumber and Building Material Dealers Association  
National Mining Association  
National Oilseed Processors Association

National Retail Federation  
National Roofing Contractors Association  
National School Transportation Association  
National Tooling and Machining Association  
National Turkey Federation  
National Utility Contractors Association  
Non-Ferrous Founders' Society  
North American Die Casting Association  
North American Meat Institute  
Precision Machined Products Association  
Precision Metalforming Association  
Printing Industries of America  
Retail Industry Leaders Association  
Safety and Compliance Management  
Sheet Metal and Air Conditioning Contractors National Association  
Shipbuilders Council of America  
SPI: The Plastics Industry Trade Association  
Textile Rental Services Association  
Tree Care Industry Association  
U.S. Chamber of Commerce  
U.S. Poultry & Egg Association

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