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December 9, 2016

The Honorable Shaun Donovan  
Director  
Office of Management and Budget  
Old Executive Office Building  
Washington, DC 20503

OIRA\_submissions@omb.eop.gov

RE: RIN 1218-AC84

Dear Director Donovan:

On October 14, 2016, the Department of Labor's Occupational Safety and Health Administration (OSHA) forwarded for Office of Management and Budget (OMB) review a proposed rule titled "Clarification of Employer's Continuing Obligation to Make and Maintain Accurate Records of Each Recordable Injury and Illness."<sup>1</sup> We strongly urge you to reject this rulemaking, which inappropriately expands the *Occupational Safety and Health Act's* (OSH Act) six-month statute of limitations with respect to the issuance of citations,<sup>2</sup> circumventing the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) decision in *AKM LLC dba Volks Constructors v. Secretary of Labor* ("Volks").<sup>3</sup>

On May 25, 2016, the Committee on Education and the Workforce's Subcommittee on Workforce Protections held a hearing examining OSHA's enforcement of injury and illness regulations.<sup>4</sup> At the hearing, witnesses addressed the *Volks* decision. In 2010, OSHA issued *Volks Constructors* citations for not keeping injury and illness records between 2002 and 2006. *Volks* appealed to the Occupational Safety and Health Review Commission (OSHRC or the Commission), arguing the citations were for alleged violations that had occurred more than six

<sup>1</sup> 80 Fed. Reg. 45116 (July 29, 2015).

<sup>2</sup> 29 U.S.C. § 658(c) ("No citation may be issued under this section after the expiration of six months following the occurrence of any violation").

<sup>3</sup> 675 F.3d 752 (D.C. Cir. 2012).

<sup>4</sup> See Subcommittee on Workforce Protections hearing "Promoting Safe Workplaces Through Effective and Responsible Recordkeeping Standards." May 25, 2016.

<http://edworkforce.house.gov/calendar/eventsingle.aspx?EventID=400697>

months prior to the inspection and therefore beyond the OSH Act's statute of limitations. OSHRC upheld the citations. Upon appeal, however, the D.C. Circuit subsequently overturned the Commission's decision and held the OSH Act prevented OSHA from issuing a citation for recordkeeping violations occurring more than six months prior to an inspection.<sup>5</sup>

On July 29, 2015, in response to the D.C. Circuit's decision in *Volks*, OSHA proposed a new regulation regarding employer recordkeeping requirements. Notwithstanding the D.C. Circuit's decision in *Volks*, this proposed regulation would empower OSHA to issue citations related to recordkeeping violations that occurred prior to the OSH Act's six-month statutory limit.

Among other concerns, stakeholders commenting on the proposal argue the proposal is vulnerable to further litigation:

In light of the D.C. Circuit's decision in *Volks*, OSHA is prohibited from bringing enforcement actions against employers for not recording injuries that occur more than six months and seven days prior to the date of the citation. OSHA's proposed "clarification" of Part 1904 is an unlawful attempt to circumvent the statute of limitations provision in the OSH Act and side step the D.C. Circuit's decision in *Volks*.<sup>6</sup>

Further, testimony from the Subcommittee on Workforce Protections hearing (see attached) directly addressed how this regulatory proposal violates the law:

OSHA's proposal will still violate the statute of limitations, and thus result in pointless and confused litigation. The proposed amendments will be pointless because they will, after much confused and pointless litigation, fail. The courts are very highly likely to follow the *Volks* court's holding that the language of the statute is "clear," that there must be an "occurrence" within the limitations period, and that, inasmuch as nothing would have "occurred" within the limitations period, the statute of limitations will have run.<sup>7</sup>

Further testimony asserts OSHA does not have a legal basis in which to propose this change:

Even though OSHA's proposed modification to the rule maintains that it is only "clarifying" employers' recordkeeping obligations, the proposed rule runs counter to a 2012 District of Columbia Court of Appeals decision titled *Volks II* and makes a substantive changes to the regulations. In *Volks II*, the District of Columbia Court of Appeals specifically held that a statute of limitations of six months applied to recordkeeping violations, which were a single violation, rather than a continuing violation.<sup>8</sup>

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<sup>5</sup> *Id.* at 759.

<sup>66</sup> See Comment by American Fuel & Petrochemical Manufacturers ("AFPM") and the American Petroleum Institute ("API"). Oct. 28, 2015.

<sup>7</sup> See Subcommittee on Workforce Protections hearing "Promoting Safe Workplaces Through Effective and Responsible Recordkeeping Standards." May 25, 2016. Testimony of Art Sapper, p 5-6.

<sup>8</sup> *Ibid.* Testimony of David Sarvadi, p 9.



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Rather than finalize a rulemaking in direct contravention of the law that will inevitably trigger costly litigation, we urge OMB to reject OSHA's rulemaking attempt. To assist OMB in its review of this matter we have enclosed testimony from the Subcommittee's May 2016 hearing outlining the legal failure of OSHA's regulatory proposal.

If you have any questions about this request, please contact Loren Sweatt or John Martin of the Committee staff at (202) 225-7101.

Sincerely,



JOHN KLINE  
Chairman  
Committee on Education and the Workforce



TIM WALBERG  
Chairman  
Subcommittee on Workforce Protections

Enclosure