NAIMA
NORTH AMERICAN INSULATION MANUFACTURERS ASSOCIATION

VIA E-MAIL

October 28, 2015

OSHA Docket Office
Technical Data Center
Occupational Safety and Health Administration
U.S. Department of Labor
Room N-2625
200 Constitution Avenue, N.W.
Washington, D.C. 20210

RE: NAIMA's Comments on OSHA's Proposed Rule on "Clarification of Employer's Continuing Obligation To Make and Maintain an Accurate Record of Each Recordable Injury and Illness" – Docket No. OSHA-2015-0006

To Whom It May Concern:

INTRODUCTION

The North American Insulation Manufacturers Association ("NAIMA") appreciates this opportunity to submit comments on the Occupational Safety and Health Administration's ("OSHA") Proposed Rulemaking on "Clarification of Employer's Continuing Obligation To Make and Maintain an Accurate Record of Each Recordable Injury and Illness" (80 Fed. Reg. 45,116 (July 29, 2015)). NAIMA is the trade association for North American manufacturers of fiber glass, rock wool, and slag wool insulation products. As established in OSHA's previous proposed rules addressing reporting and tracking workplace injuries and illnesses, "Other Nonmetallic Mineral Production Manufacturing" (NAICS 3279) is an industry subject to these types of rules. The Proposed Rule addressed herein is also applicable to NAICS Code 3279. Mineral Wool Manufacturing is a subset of NAICS Code 3279. Therefore, OSHA's Proposed Rule on "Clarification of Employer's Continuing Obligation To Make and Maintain an Accurate Record of Each Recordable Injury and Illness" is immediately relevant to NAIMA's members.

NAIMA objects to OSHA's Proposed Rule because it conflicts with the plain language of the Occupational Safety and Health Act ("OSH Act") of 1970 that provides, unambiguously, a six-month statute of limitations. In other words, the OSH Act prohibits a citation to be issued by OSHA for a failure to properly record a recordable incident if OSHA discovered that omission more than six months after the date the employer was obligated to record the incident. Under OSHA's Proposed Rule, however, a failure to properly record an incident that occurred more than six months ago, even years ago, would be grounds for a violation today should OSHA discover the omission during an inspection.

As set forth in more detail herein, NAIMA objects to OSHA's attempt to rewrite the OSH Act's statute of limitations and overturn a federal court decision interpreting this provision. The purpose and benefit of a statute of limitations – as well as Congress' intent – would be compromised by this Proposed Rule. Indeed, the purpose of a statute of limitations is to require diligent prosecution of known claims, thereby providing finality and predictability in legal affairs and ensuring that claims will be resolved while evidence is reasonably available and fresh. This protection provided by the OSH Act promotes justice and prevents surprises through the revival of claims that "have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared."[1]

OSHA SHOULD NOT ATTEMPT TO REPEAL THE SIX-MONTH STATUTE OF LIMITATIONS

The U.S. Court of Appeals for the D.C. Circuit addressed OSHA's earlier attempt to require employers to keep accurate recordkeeping logs for the entire five-year retention period imposed by OSHA's regulations. At the time, OSHA contended that if it found a violation that occurred years previously, that long ago violation would be grounds for a violation. In *AKM, LLC, dba Volks Constructors v. Secretary of Labor*, 675 F.3d 752 (D.C. Cir. 2012), a three-judge panel vacated OSHA's citations by applying the OSH Act's statute of limitations. The Court viewed the unambiguous language of 29 U.S.C. § 658(c)[2] as a plain and straightforward six-month statute of limitations that prohibited OSHA's issuance of citations for record-making failures that occurred outside the limitations period.

The D.C. Circuit stated: "We simply conclude that the statutory language in section 657(c) which deals with record-keeping is not authorization for OSHA to cite the employer for a record-making violation more than six months after the recording failure."[3]

The Court described the disastrous consequences of allowing OSHA's interpretation to stand:

> "Indeed, the Secretary's interpretation has **absurd consequences** in the context of the discrete record-making failure in this case. Under her interpretation, **the statute of limitations Congress included in the Act could be expanded *ad infinitum* if, for example, the Secretary promulgated a regulation requiring that a record be kept of every violation for as long as the Secretary would like to be able to bring an action based on that violation. There is truly no end to such madness. If the record retention regulation in this case instead required, say, a thirty-year retention period, the Secretary's theory would allow her to cite Volks for the original failure to record an injury thirty years after it happened.** Counsel for the Secretary readily conceded as much at oral argument. Oral Arg. Recording at 23:22-25:30. We cannot believe Congress

[1] *Order of R.R. Telegraphers v. Railway Express Agency*, 321 U.S. 342, 348-49 (1944).
[2] The OSH Act's statute of limitations states: "No 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).
[3] *Volks*, 675 F.3d at 758.

> intended or contemplated such a result. Congress's aim in creating OSHA was to improve the safety of America's workplaces. *See* 29 U.S.C. § 651(b). Congress evidently thought this goal would be served by mandating that OSHA enforce record-making violations swiftly or else forfeit the chance to do so, as reflected in its requirement that citations not issue later than six months after a violation.[5] *Cf. Mohasco Corp. v. Silver*, 447 U.S. 807, 825 (1980) ("By choosing what are obviously quite short deadlines, Congress clearly intended to encourage the prompt [pursuit] of all charges . . . ."). Nothing in the statute suggests Congress sought to endow this bureaucracy with the power to hold a discrete record-making violation over employers for years, and then cite the employer long after the opportunity to actually improve the workplace has passed. "An interpretation of a statute purporting to set a definite limitation upon the time of bringing action, without saving clauses, which would, nevertheless, leave defendants subject indefinitely to actions for the wrong done, would, we think, defeat its obvious purpose." *Reading Co. v. Koons*, 271 U.S. 58, 65 (1926). It is not for us or the Secretary to unsettle Congress's chosen means of ensuring that outcome.[4]
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> [5] If the Secretary feels this limitations period is too short to allow for the discovery of unsafe conditions or health effects which may not become apparent for months or years into the future, she could argue the statute should be read to incorporate a discovery rule, as she had before the OSHA ALJ. But she did not press that argument before the Commission, *Commission Decision*, at *6, or here.

The plain language of the OSH Act, the Court's interpretation of this language, and the intent of Congress could not be more straightforward.

As noted above, there is an unambiguous, Congressionally-mandated statute of limitations applicable to OSHA citations. OSHA has no authority to change this, as this recent D.C. Circuit opinion so clearly states. Yet OSHA once again has issued a Proposed Rule with the specific intent of ignoring both a federal court decision and a Congressionally-mandated statute of limitations.

THE COURT INDICATED RECORDING INJURIES IS NOT A CONTINUING VIOLATION

In its Proposed Rule, OSHA cites the concurring opinion of Judge Garland for the prospect that while its current regulations do not make recordkeeping violations continuing, "the OSH Act allows for continuing violations of recordkeeping requirements."[5] OSHA then continues to state that "[n]o other appellate court has ruled on these issues."[6] However, OSHA completely ignores the majority opinion in the *Volks* case. There, Judge Brown clearly states for the Court that recordkeeping violations under the OSH Act are NOT continuing violations.

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[4] *Volks*, 675 F.3d at 758-59 (emphasis added).
[5] 80 Fed. Reg. at 45,119.
[6] *Id*.

> But the Secretary's argument here is instead grounded on the faulty logic that the mere existence of a statutory provision authorizing her to require employers to make and keep records, 29 U.S.C. § 657(c), creates a continuing obligation that expands the statute of limitations.
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> [W]e simply conclude that the statutory language in Section 657(c) which deals with record-keeping is not authorization for OSHA to cite the employer for a record-making violation more than six months after the recording failure.[7]

The Court made clear that OSHA's offered interpretation that "*record-making* requirements . . . be treated as continuing violations"[8] was neither the "sort of conduct we generally view as giving rise to a continuing violation" nor consistent with prior precedent, as the "mere failure to right a wrong . . . cannot be a continuing wrong which tolls the statute of limitations."[9] The Court held clearly that, "The mere requirement to save a record cannot possibly impose a continuing affirmative duty to correct past failures to make the record in the first place."[10]

OSHA cannot attempt to prop its Proposed Rule to make recording violations a continuing obligation on a concurring opinion when the majority opinion chopped that prop out in the majority opinion of the same case. The Court made clear that such violations cannot be continuing absent a clear statement to that effect in the OSH Act, a statement that does not exist. OSHA's Proposed Rule requires Congress to change the Act, not a rulemaking activity.

OSHA FAILED TO SEEK REVIEW OF THE *VOLKS* DECISION

Here are the facts. After the D.C. Circuit issued the Volks decision, OSHA did <u>not</u> file a petition for *en banc* rehearing with the D.C. Circuit. OSHA did not file a petition for writ of certiorari with the Supreme Court of the United States to have the D.C. Circuit's Volks decision reviewed.

Instead, OSHA seeks to circumvent the judicial system and Congressionally-mandated statutory language with an administrative rule to "clarify" its position.

NAIMA objects to OSHA's strategy. NAIMA objects to OSHA's objective. NAIMA's members wish to retain the protection and predictability afforded by the OSH Act's six-month statute of limitations.

Therefore, NAIMA strongly urges OSHA to abandon the Proposed Rule and adopt no clarification, but, instead, follow the plain language of the OSH Act and the interpretation set forth in the *Volks* decision.

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[7] *Volks*, 675 F.3d at 758.
[8] *Volks*, 675 F.3d at 756.
[9] *Volks*, 675 F.3d at 757 (quoting *Fitzgerald v. Seamans*, 553 F.2d 20,230 (D.C. Cir. 1977)).
[10] *Volks*, 675 F.3d at 757.

FAILURE TO RECORD A REPORTABLE INCIDENT DOES NOT PRESENT A HAZARD

OSHA's Proposed Rule seeks to establish a "continuing violation" doctrine that would apply to recordkeeping or record-making violations. The Occupational Safety and Health Review Commission and several federal courts have recognized that the Agency can cite employers for "continuing violations" where an employer leaves a hazardous condition unabated for years, but the failure to record a recordable incident is not a hazard. Employees are not exposed to any risk of injury by an employer's failure to record an incident; it is an exercise in paperwork.

Moreover, the *Volks* decision specifically rejected the contention that a recordkeeping violation can be a continuing violation. In other words, a failure to record is an inaction – it only happens once. It is not a continuing action that constitutes a continuing violation.

CONCLUSION

NAIMA strongly urges OSHA to abandon the Proposed Rule and not adopt a so-called "clarification," but instead follow the plain language of the OSH Act and the prohibition set forth in the *Volks* decision.

Sincerely,

Angus E. Crane
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