Nabors Drilling USA, Inc.
515 West Greens Road
Suite 1000
Houston, Texas 77067-4536

Phone: 281.874.0035
Fax: 281.775.8431
www.nabors.com

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<u>Via Federal e-Rulemaking Portal</u>
OSHA Docket Office
Docket No. OSHA-2015-0006
RIN No. 1218-AC84
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210

Re: Comments of Nabors Drilling USA, Inc. on Docket No. OSHA-2015-0006, Clarification of Employer's Continuing Obligation to Make and Maintain an Accurate Record of Each Recordable Injury and Illness

Nabors Drilling USA, Inc. ("Nabors") appreciates the opportunity to submit written comments in response to the Occupational Safety and Health Administration's (OSHA) Notice of Proposed Rule on *Clarification of Employer's Continuing Obligation to Make and Maintain an Accurate Record of Each Recordable Injury and Illness*, which was published in the Federal Register on July 29, 2015 (80 Fed. Reg. 45,116).

Nabors acknowledges the importance of injury and illness records in helping maintain safe and healthful workplaces in the United States. Nabors and the vast majority of employers in the United States strive to keep accurate records. Injury and illness statistics helps Nabors track trends and improve our safety and health program. Workers compensation insurance also relies upon this data. Rates are influenced by recordable incident rates, creating strong incentives for employers to constantly improve their programs and lower recordable rates. Nevertheless, Nabors respectfully requests OSHA to withdraw the proposed rule.

Comments on OSHA's Rationales for the Proposed Rule

Nabors dedicates itself to identifying, correcting and preventing health, safety and environmental hazards which could adversely affect our employees, our customers or the general public. We encourage OSHA to meaningfully improve our nation's health and safety regulations, and to work with us to help achieve that goal. But the proposed rule deals solely with a legal issue, namely OSHA's reaction to the decision of the United States Court of Appeals for the D.C. Circuit in *AKM LLC dba Volks Constructors v. Secretary of Labor*, 675 F.3d 752 (D.C. Cir. 2012) (*Volks II*). The proposed rule does nothing to improve or modify a standard to eliminate or materially reduce a material health or safety hazard.

1. Recordkeeping Compliance Already Exceeds 99 Percent.

The proposed rule tries to solve a problem that does not exist. OSHA claims that "Incomplete or Otherwise Inaccurate Records of Work-Related Illnesses and Injuries Create an Ongoing Condition Detrimental to Full Enforcement of the Act." 80 FED. REG. 45,124. The agency, however, readily admits that the vast majority of regulated employers – over 99 percent -- fully comply with their recordkeeping obligations. The agency states that over 99 percent of employers are currently in full compliance. 80 FED. REG. 45,128. OSHA admits that even a one-percent non-compliance rate for recordkeeping is a high estimate.[1] If everyone is already keeping accurate records, the proposed rule has no substantive purpose. OSHA introduces no evidence that the proposed rule will improve the accuracy of records from the current over-99-percent compliance rate to a higher rate.

2. The OSH Act Requires No "Clarification."

OSHA claims "[t]he *Volks II* decision has led to a need for OSHA to clarify employers' obligations under its recordkeeping regulations and to elaborate on its understanding of the statutory basis for those obligations." 80 FED. REG. 45,120. But there is nothing to "clarify" in terms of an employer's purported continuing obligation under 29 C.F.R. Part 1904. The *Volks II* majority decision did not invite OSHA to clarify any part of 29 C.F.R. Part 1904. Quite the contrary – the D.C. Circuit held that the Occupational Safety and Health Act of 1970 (the "OSH Act") unambiguously does not create such a continuing obligation.

The proposed rule is premised on the notion that section 8(c) (29 U.S.C. §657(c)) imposes a continuing obligation to correct recordkeeping notations. 80 FED. REG. 45,121. The D.C. Circuit expressly rejected this premise:

> Despite the cloud of dust the Secretary kicks up in an effort to lead us to her interpretation, the text and structure of the Act reveal a quite different and quite clear congressional intent that requires none of the strained inferences she urges upon us. To the extent Congress delegated authority to the Secretary to require employers to "make, keep and preserve," records in Section 657(c), it did so only within the ambit set by the statutory scheme, including the limitations period in Section 658(c)--which expressly applies to "any regulations prescribed pursuant to this chapter," such as those promulgated pursuant to Section 657(c). 29 U.S.C. §658(a). On the one hand, employers must make records of workplace injuries in whatever form the Secretary requires within the time period established by the Secretary--here, seven days after the injury. If they fail to do so, that is a violation. Pursuant to Section 658(c), OSHA may cite employers for violations within six months of the violation's occurrence. If an injury is reported on May 1, OSHA can cite an employer for the failure to create a record beginning on May 8, and a citation

[1] OSHA provides no analysis or data showing these figures are accurate. We believe the 99% compliance rate may be even higher, as OSHA concedes.

> issued within the following six months, and only the following six months, would be valid. On the other hand, once an employer has made such a record, it must also retain it for as long as the Secretary demands and in the forms the Secretary requires--here, for five years. If it loses or destroys a record before the end of that time period, that too is a violation.

Volks II, 675 F.3d at 755-56.

OSHA asserts that "Section 9(c) (29 U.S.C. §658(c)) cannot be read as prohibiting the Secretary from imposing continuing obligations on employers covered by the OSH Act, when the text and legislative history of the Act show that Section 8(c) authorizes the Secretary to create such obligations." 80 FED. REG. 45,122. The D.C. Circuit rebuffed this position, too:

> The Secretary's interpretation . . . leaves little room for Section 658(c) . . . . At best, the Secretary's approach diminishes Section 658(c) to a mere six-month addition to whatever retention/limitations period she desires. We do not believe Congress expressly established a statute of limitations only to implicitly encourage the Secretary to ignore it. *See Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468, 121 S. Ct. 903, 149 L. Ed. 2d 1 (2001) ("Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions--it does not, one might say, hide elephants in mouseholes.").

Volks II, 675 F.3d at 755-56.

OSHA "does not believe that Section 8(c) authorizes two and only two discrete duties: A duty to create a record that can arise at only one moment in time, and a duty to preserve that record, if it should be created," But according to *Volks II*, OSHA's belief is wrong:

> [T]he Secretary's interpretation incorrectly assumes that the obligation to maintain an existing record expands the scope of an otherwise discrete obligation to make that record in the first place. But the two obligations are distinct: one cannot keep what never existed; a company cannot retain a record it never created.

Volks II, 675 F.3d at 756. The Court explained in detail why OSHA's position was the wrong result in *Volks II*, and the wrong result for future cases:

> 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 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. *Cf. Mohasco Corp. v. Silver*, 447 U.S. 807, 825, 100 S. Ct. 2486, 65 L. Ed. 2d 532 (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, 46 S. Ct. 405, 70 L. Ed. 835 (1926). It is not for us or the Secretary to unsettle Congress's chosen means of ensuring that outcome.

Volks II, 675 F.3d at 758-59.

3. Discovery Rule and Equitable Tolling Does Not Apply to Governmental Agencies Bringing Enforcement Actions for Civil Penalties.

OSHA suggests that a discovery rule or equitable tolling allows the agency to cite employers for six months following the discovery of any recordkeeping violations. *See* 80 FED. REG. 45,121, 45,122. OSHA should be aware of a 2013 Supreme Court decision which recently rejected the application of a discovery rule in SEC civil enforcement actions:

> This Court has held that where a plaintiff has been injured by fraud and remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered. And we have explained that fraud is deemed to be discovered when, in the exercise of reasonable diligence, it could have been discovered.
>
> But we have never applied the discovery rule in this context, where the plaintiff is not a defrauded victim seeking recompense, but is instead the Government bringing an enforcement action for civil penalties. . . .
>
> There are good reasons why the fraud discovery rule has not been extended to Government enforcement actions for civil penalties. The discovery rule exists in part to preserve the claims of victims who do not know they are injured and who reasonably do not inquire as to any injury. Usually when a private party is injured,

he is immediately aware of that injury and put on notice that his time to sue is running. But when the injury is self-concealing, private parties may be unaware that they have been harmed. Most of us do not live in a state of constant investigation; absent any reason to think we have been injured, we do not typically spend our days looking for evidence that we were lied to or defrauded. And the law does not require that we do so. Instead, courts have developed the discovery rule, providing that the statute of limitations in fraud cases should typically begin to run only when the injury is or reasonably could have been discovered.

The same conclusion does not follow for the Government in the context of enforcement actions for civil penalties. The SEC, for example, is not like an individual victim who relies on apparent injury to learn of a wrong. Rather, a central mission of the Commission is to investigate potential violations of the federal securities laws. Unlike the private party who has no reason to suspect fraud, the SEC's very purpose is to root it out, and it has many legal tools at hand to aid in that pursuit. It can demand that securities brokers and dealers submit detailed trading information. It can require investment advisers to turn over their comprehensive books and records at any time. And even without filing suit, it can subpoena any documents and witnesses it deems relevant or material to an investigation.

. . .

Determining when the Government, as opposed to an individual, knew or reasonably should have known of a fraud presents particular challenges for the courts. Agencies often have hundreds of employees, dozens of offices, and several levels of leadership. In such a case, when does "the Government" know of a violation? Who is the relevant actor? Different agencies often have overlapping responsibilities; is the knowledge of one attributed to all?

In determining what a plaintiff should have known, we ask what facts a reasonably diligent plaintiff would have discovered. It is unclear whether and how courts should consider agency priorities and resource constraints in applying that test to Government enforcement actions. And in the midst of any inquiry as to what it knew when, the Government can be expected to assert various privileges, such as law enforcement, attorney-client, work product, or deliberative process, further complicating judicial attempts to apply the discovery rule.

. . .

As we held long ago, the cases in which a statute of limitation may be suspended by causes not mentioned in the statute itself . . . are very limited in character, and are to be admitted with great caution; otherwise the court would make the law instead of administering it. Given the lack of textual, historical, or equitable

> reasons to graft a discovery rule onto the statute of limitations of §2462, we decline to do so.

Gabelli v. SEC, 133 S. Ct. 1216, 1223-1224 (2013) (quotations and citations omitted). *Gabelli*'s reasoning applies to any other federal agency that conducts civil enforcement actions, which includes OSHA.

We apologize if this comment reads like a legal brief. But we concur with the National Roofing Contractors Association and others that noted the proposed rule "reads like an appellate brief submitted to a court to influence a ruling." Perhaps this is because the bulk of the proposed rule lifts arguments from the Brief for the Secretary of Labor filed in *Volks II*. OSHA's rationale in Sections II and III of the proposes rule are paraphrased primarily from pages 23-41 from the Secretary's brief submitted to the D.C. Circuit. As indicated above, the D.C. Circuit already rejected these positions.

4. Rulemaking is Not a Lawful Method to Overturn a Federal Court Decision.

OSHA clearly has nothing but disdain for the *Volks II* decision. The agency had several means, however, to challenge the D.C. Circuit's decision as allowed by law:

(1) timely file a petition for panel rehearing under Fed. R. App. P. 40;

(2) timely file a petition for rehearing en banc with the D.C. Circuit, under Fed. R. App. P. 35(b);

(3) timely file a petition for writ of certiorari with the Supreme Court of the United States, under 28 U.S.C. §2101 and S. Ct. R. 12 and 13; or

(4) persuade Congress to amend the OSH Act to change the statute of limitations at 29 U.S.C. §658(c).

OSHA took none of these actions. Federal agency attempts to circumvent federal court rulings through rulemaking rarely end well. See, e.g., *Emily's List v. FEC*, 581 F.3d 1, 4 (D.C. Cir. 2009) (striking down FEC's 2004 NPRM to limit holding of *McConnell v. FEC)*. A proposed rule that seeks only to circumvent a recent court decision is an arbitrary and capricious agency action and an abuse of agency discretion.

5. The Proposed Rule Creates New Compliance Obligations.

OSHA claims that "[t]he proposed amendments add no new compliance obligations" 80 FED. REG. 45,117, 45,120. But the proposed rule creates a continuing obligation that the D.C. Circuit has held does not exist and is not authorized under the OSH Act. It now creates a never-ending duty to verify that OSHA logs are accurate 24 hours a day, seven days a week, for which the agency can cite employers at will, something Congress did not intend or contemplate. *See Volks II*, 675 F.3d at 758-59. It rewrites section 9(c) to essentially state, "No citation may be issued under this section after the expiration of six months following the occurrence of any violation, or five years and six months following the occurrence of any violation of 29 C.F.R. Part 1904." The proposed rule acts contrary to law and should be withdrawn.

6. OSHA Underestimates the Costs of Implementation of the Proposed Rule.

OSHA underestimates the cost of the proposed rule. Nabors believes it, like over 99 percent of employers, fully complies with its recordkeeping obligations under Part 1904. We do not believe the proposed rule will compel Nabors to record injuries or illnesses not already accounted for. But Nabors maintains OSHA 300, 300A, and 301 logs at each drilling rig. Maintaining this mountain of data is no small task. In any data set, there is a possibility of inaccuracies, through plain, unintentional human error. The larger the data set, the more possibility there will be errors.

OSHA's recordkeeping system is supposed to be a "no fault" system, meaning that recording an illness or injury does not mean an employer or employee was at fault, that an OSHA rule has been violated, or that an employee is eligible for workers' compensation or other benefits. 29 C.F.R. §1904.0. But the preamble of the proposed rule suggests otherwise, as OSHA indicates the need to improve recordkeeping compliance from over 99% to 100% to ensure "[f]ull [e]nforcement of the Act." We fear the proposed rule will punish employers for good faith or innocent mistakes in recordkeeping logs. The new rule will likely require us to hire one or more individuals whose sole job will be to police our volumes of OSHA 300, 300A, and 301 logs for accuracy one-hundred percent of the time.

The proposed rule neglects to include cost of reviewing logs to find omissions or inaccuracies. The actual act of recording only represents a small fraction of the actual cost. Think, for instance, of correcting a tax return. It takes much more time to review the return and the supporting materials to locate and correct the error, than to actually type the correction on the form.

7. Other Comments

We would like to specifically point out a conflict between section 1904.34 and section 1904.33. When a business changes ownership, the new owner must save all records of the establishment kept by the prior owner, "but need not update or correct the records of the prior owner." The proposed section 1904.33(b), however, creates a constant obligation to verify the accuracy of all OSHA 300 and 301 logs throughout the current five-year retention period. This creates a contradiction between the regulations as to whether a new owner must verify the accuracy of the prior owner's OSHA logs.

It is unclear if the change to section 1904.35 now creates a private right of action by employees, former employers, and personal representatives to pursue claims over recordkeeping. If so, the proposed change runs afoul of Section 4(b)(4) of the OSH Act, which states in relevant part that "[n]othing in this Act shall be construed to . . . enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment."

Finally, OSHA should revisit the utility of the four-business-hour window to provide records to government representatives under section 1904.40. Compliance officers rarely enforce this impractical time frame, and instead typically request that employers provide logs anywhere within two days to one week. When a fatality occurs, the employer has eight hours to report the incident to OSHA; in-patient hospitalizations, amputations, and loss of an eye trigger a 24-hour reporting requirement. See 29 C.F.R. §1904.39. It is unclear why the agency desires recordkeeping logs faster than fatality reports. The "four business hour" window itself is confusing whether "business hours" means the local area offices' business hours, the employer's business hours, some of whom operate 24 hours per day, or some "nine-to-five" unwritten custom. Any period of 24 hours or more would be more practical than the present rule.

Conclusion

The proposed rule by OSHA displays a lack of respect for the United States Court of Appeals for the D.C. Circuit and disregard for the rule of law. We urge OSHA to withdraw this proposed rule.

Respectfully submitted,

Richard Grayson

Richard Grayson
Health, Safety, and Environmental Manager
On behalf of Nabors Drilling USA, Inc.

Of counsel:

John F. Martin
Ogletree Deakins Nash Smoak and Stewart, P.C.
1909 K Street N.W., Suite 1000
Washington, D.C. 20006
202-887-0855