UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PUBLIC CITIZEN HEALTH RESEARCH GROUP, *et al.*,	)	
Plaintiffs,	)	Civil Action No. 18-1729-TJK
v.	)	
ALEXANDER ACOSTA, *et al.*,	)	
Defendants.	)	

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Pursuant to Federal Rule of Civil Procedure 56, plaintiffs move for summary judgment on the ground that there is no genuine dispute as to any material fact and plaintiffs are entitled to judgment as a matter of law. As explained in the accompanying memorandum, defendants violated the Administrative Procedure Act by suspending regulatory requirements without observance of notice-and-comment procedures and without a reasoned explanation. The Court should enter judgment for plaintiffs, declare defendants' suspension of the regulatory requirements unlawful, and order defendants to require and accept electronic submission of the Form 300 and 301 data that the regulation required employers to submit by July 2018.

To the extent that oral argument would help to expedite the Court's consideration of this motion, plaintiffs would be happy to appear to answer any questions from the Court.

Dated: December 17, 2018

Respectfully submitted,

/s/ Michael T. Kirkpatrick
Michael T. Kirkpatrick (D.C. Bar No. 486293)
Adina H. Rosenbaum (D.C. Bar. No. 490928)
Public Citizen Litigation Group
1600 20th Street NW
Washington, DC 20009
(202) 588-1000

Counsel for Plaintiffs

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PUBLIC CITIZEN HEALTH RESEARCH GROUP, *et al.*,	)	
Plaintiffs,	)	Civil Action No. 18-1729-TJK
v.	)	
ALEXANDER ACOSTA, *et al.*,	)	
Defendants.	)	

MEMORANDUM IN SUPPORT OF
PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Michael T. Kirkpatrick (D.C. Bar No. 486293)
Adina H. Rosenbaum (D.C. Bar No. 490928)
Public Citizen Litigation Group
1600 20th Street NW
Washington, DC 20009
(202) 588-1000

Counsel for Plaintiffs

December 17, 2018

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes and Federal Rules

Regulatory Materials

INTRODUCTION

On May 12, 2016, the Occupational Safety and Health Administration, a component of the Department of Labor under the authority of Secretary of Labor Alexander Acosta (collectively, OSHA), issued a final rule entitled "Improve Tracking of Workplace Injuries and Illnesses," 81 Fed. Reg. 29,624 (the Electronic Reporting Rule). The Rule requires covered establishments to submit electronically, by July 1, 2018, certain work-related injury and illness data recorded on OSHA Forms 300, 301, and 300A. When it promulgated the Rule, OSHA announced that it would post the data on its website to allow public health organizations to identify and analyze threats to worker health and safety and to develop solutions. OSHA explained that the data that must be submitted electronically does not include personally identifiable information and would, in any event, be subject to release under the Freedom of Information Act (FOIA). OSHA has long required the same information to be made available at the worksite to employees, former employees, and their representatives.

In May 2018, OSHA suspended much of the Rule's reporting requirements by announcing on its website that it would not require, or even accept, the submission of data from OSHA Forms 300 and 301, because it planned to issue a notice of proposed rulemaking to potentially revise the Rule. OSHA's suspension of key aspects of the Rule without observance of notice-and-comment procedures and without a reasoned explanation violates the Administrative Procedure Act (APA). Thus, the Court should enter judgment for plaintiffs, declare the suspension of the Rule unlawful, and order OSHA promptly to require and accept electronic submission of the Form 300 and 301 data that the Rule required employers to submit to OSHA by July 2018.

STATEMENT OF FACTS[1]

I. Statutory and Regulatory Background

A. The Occupational Safety and Health Act

The Occupational Safety and Health Act (OSH Act) was enacted in 1970 "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions," 29 U.S.C. § 651(b), by, among other means, "providing for appropriate reporting procedures … [that] will help achieve the objectives of this [Act] and accurately describe the nature of the occupational safety and health problem," *id.* § 651(b)(12). To accomplish this goal, the Act authorizes the Secretary of Labor to promulgate regulations requiring employers to "make, keep and preserve, and make available to the Secretary," occupational health records. *Id.* § 657(c)(1); *see id.* § 673(e). The Act further directs the Secretary to "prescribe regulations requiring employers to maintain accurate records of, and to make periodic reports on, work-related deaths, injuries and illnesses." *Id.* § 657(c)(2); *see id.* § 673(e). The Act also provides that, "[i]n order to further the purposes of this chapter, the Secretary ... shall develop and maintain an effective program of collection, compilation, and analysis of occupational safety and health statistics." *Id.* § 673(a). The Secretary has delegated these statutory responsibilities and authorities to OSHA. *See Sturm, Ruger & Co., Inc. v. Chao*, 300 F.3d 867, 868 (D.C. Cir. 2002).

Since 1971, OSHA has promulgated regulations "to require employers to record and report work-related fatalities, injuries, and illnesses." 29 C.F.R. § 1904.0; *see* 81 Fed. Reg. 29,624, 29,625 (May 12, 2016) (citing 36 Fed. Reg. 12,612 (July 2, 1971)). OSHA requires

[1] Plaintiffs allege unlawful agency action in violation of the APA. Pursuant to Local Civil Rule 7(h)(2), this memorandum includes a statement of facts with specific references to the administrative record—the information that was "before the agency at the time the decision was made," *James Madison Ltd. by Hecht v. Ludwig*, 82 F.3d 1085, 1095 (D.C. Cir. 1996) (internal quotation marks and citation omitted)—as well as background information about the Electronic Reporting Rule.

employers with more than 10 employees in most industries to maintain records of occupational injuries and illnesses. *See* 29 C.F.R. § 1904; 81 Fed. Reg. at 29,624. Those establishments must record each employee injury and illness on a "Log" (the OSHA Form 300) and must prepare a supplementary "Incident Report" that provides additional details about each case recorded (the OSHA Form 301). At the end of each year, such establishments are required to prepare an "Annual Summary Form" (the OSHA Form 300A) derived from the information in the Log. *See* 29 C.F.R. § 1904.32(b); *see generally* OSHA, Injury & Illness Recordkeeping Forms – 300, 300A, 301, https://www.osha.gov/recordkeeping/RKforms.html (providing links to the three forms and instructions for their use).

Although employers have long been required to complete and maintain OSHA Forms 300, 300A, and 301, and to make them available at the worksite to employees, former employees, and their representatives, the forms were not collected by OSHA in a comprehensive or systematic way. Rather, OSHA collected injury and illness data on an *ad hoc* basis during onsite inspections. In addition, from 1996 to 2012, OSHA received such data through the OSHA Data Initiative (ODI), an annual survey through which OSHA requested Form 300A data from approximately 80,000 large establishments in high-hazard industries. To provide OSHA a more effective way of targeting its resources, as well as for research and other purposes, federal agencies and advisory groups beginning in the 1980s recommended that OSHA develop a system requiring employers to provide OSHA with injury and illness data from the forms.

B. The Electronic Reporting Rule

On May 12, 2016, OSHA issued the Electronic Reporting Rule. *See* 81 Fed. Reg. 29,624. The Rule, effective January 1, 2017, requires the electronic submission to OSHA of certain information from OSHA Forms 300, 300A, and 301 that was previously available only by

request or at the worksite. *Id.* at 29,668; *see* 29 C.F.R. § 1904.41. In a section entitled "Benefits of Electronic Data Collection," OSHA explained that "[w]ith the information obtained through this final rule, employers, employees, employee representatives, the government, and researchers may be better able to identify and mitigate workplace hazards and thereby prevent worker injuries and illnesses." 81 Fed. Reg. at 29,629.

The Rule mandates phased-in submission deadlines for certain establishments with 250 or more employees, and certain establishments in high-risk industries with 20 or more employees, to electronically submit their injury and illness records to OSHA. *See* 29 C.F.R. § 1904.41(c). In the first year, covered employers were required to submit only the summary Form 300A data for calendar-year 2016 by July 1, 2017. *Id.* § 1904.41(c)(1). In the following year, covered employers were required to submit information from Forms 300, 301, and 300A by July 1, 2018. *Id.* Beginning in 2019, the Rule requires covered establishments to submit the information from all three forms for the preceding calendar year by March 2. *Id.* § 1904.41(c)(2). After considering alternative approaches, OSHA concluded that these phased-in deadlines would "provide sufficient time to ensure comprehensive outreach and compliance assistance in advance of implementation." 81 Fed. Reg. at 29,640.

When it issued the Rule, OSHA stated that "OSHA intends to post the establishment-specific injury and illness data it collects under this final rule on its public Web site at www.osha.gov." *Id.* at 29,625. OSHA explained that it would make publicly available all of the fields collected in OSHA Forms 300 and 300A, and fields from OSHA Form 301 that do not include personally identifying information. *Id.* at 29,632. OSHA stated that publicly posting the data would improve the ability of public health organizations to analyze the causes of work-

related injury and disease in the United States and to develop solutions to reduce or eliminate such injury and disease. *Id.* at 29,631.

OSHA repeatedly emphasized that the information collected would be made public "in accordance with FOIA." *Id.* at 29,658–59, 29,660–62. OSHA explained that the fields it would collect from the OSHA Form 300 and 301 forms "will not include personally-identifiable information." *Id.* at 29,663. OSHA further noted that it "has effective safeguards in place to prevent the disclosure of personal or confidential information contained in the recordkeeping forms and submitted to OSHA," *id.* at 29,661, and would only post information after the agency conducted a review using "software that will search for, and de-identify, personally identifiable information," *id.* at 29,662.

On June 28, 2017, shortly before the first deadline, OSHA issued a notice of proposed rulemaking to delay the initial deadline for electronic submission of 2016 Form 300A data from July 1, 2017, to December 1, 2017. *See* Proposed Rule, Improve Tracking of Workplace Injuries and Illnesses: Proposed Delay of Compliance Date, 82 Fed. Reg. 29,261 (June 28, 2017). On November 24, 2017, OSHA published a final rule delaying the first filing deadline until December 15, 2017. *See* Final Rule, Improve Tracking of Workplace Injuries and Illnesses: Delay of Compliance Date, 82 Fed. Reg. 55,761 (Nov. 24, 2017). The rule delaying by five months the initial compliance date for submitting 2016 Form 300A data did not alter any other deadlines. Indeed, OSHA has not engaged in notice-and-comment rulemaking to delay or suspend the July 1, 2018, deadline to submit 2017 Form 300 and 301 data.

II. OSHA's Suspension of Key Parts of the Electronic Reporting Rule

In May 2018, OSHA suspended the Rule's requirement that covered establishments "must submit the required information" from OSHA Forms 300 and 301 by the "submission

deadline" of "July 1, 2018." 29 C.F.R. § 1904.41(c)(1) (2018). OSHA did not publish a notice of the suspension of the deadline in the Federal Register and did not solicit public comment. Instead, OSHA announced the suspension on its website:

> Covered establishments with 250 or more employees are only required to provide their 2017 Form 300A summary data. ***OSHA is not accepting Form 300 and 301 information at this time.*** OSHA announced that it will issue a notice of proposed rulemaking (NPRM) to reconsider, revise, or remove provisions of the "Improve Tracking of Workplace Injuries and Illnesses" final rule, including the collection of the Forms 300/301 data. The Agency is currently drafting that NPRM and will seek comment on those provisions.

OSHA, *Final Rule Issued to Improve Tracking of Workplace Injuries and Illnesses*, https://www.osha.gov/recordkeeping/finalrule/index.html (located in section entitled "Compliance schedule") (emphasis in original). On July 25, 2018, plaintiffs filed this suit alleging that OSHA's May 2018 suspension of the Rule without observance of notice-and-comment procedures and without a reasoned explanation violates the APA.

On July 30, 2018, OSHA issued a notice of proposed rulemaking to rescind the electronic filing requirement for Form 300 and 301 data. *See* Proposed Rule, Tracking of Workplace Injuries and Illnesses, 83 Fed. Reg. 36,494 (July 30, 2018). As part of that notice, OSHA stated that although "the initial deadline for electronic submission of information from OSHA Forms 300 and 301 by covered establishments with 250 or more employees was July 1, 2018[,] … OSHA will not enforce this deadline without further notice while this rulemaking is underway." *Id.* at 36,496. OSHA further stated that it proposes to end collection of OSHA Form 300 and 301 data to eliminate any risk to worker privacy from disclosure of personally identifiable information under FOIA, *see id.* at 36,497, even though the Rule does not require the submission of such information and even though it would be exempt from disclosure in any event. Although OSHA acknowledged that personally identifiable information would be exempt from disclosure,

OSHA expressed concern that a federal court might erroneously order the release of exempt information. *Id.* Thus, OSHA proposed to stop collecting the Form 300 and 301 data altogether. The public comment period on the proposed rescission closed on September 28, 2018. *See id.* at 36,494.

III. The Plaintiffs

Plaintiffs are three public health organizations—Public Citizen Health Research Group, Council of State and Territorial Epidemiologists, and American Public Health Association—that rely on the type of data required to be reported and made publicly available under the Rule and FOIA to effectively track, investigate, and reduce or prevent work-related injury and disease in the United States. *See* Carome Decl. ¶¶ 3–4, ECF No. 7-2; Harrison Decl. ¶¶ 5, 7, ECF No. 7-4; Benjamin Decl. ¶¶ 3–4, ECF No. 7-3. If the requirements for electronic submission of OSHA Form 300 and 301 data remain suspended, plaintiffs and their members will lose access to an important source of timely injury and illness information, which will make it more difficult for each of them and their members to analyze the causes of workplace injuries and illnesses and develop solutions. *See* Carome Decl. ¶ 4; Harrison Decl. ¶ 7; Benjamin Decl. ¶ 4. Plaintiffs' injuries are traceable to OSHA's suspension of the Rule and could be redressed by an order compelling OSHA to require and accept electronic submission of the Form 300 and 301 data that employers should have been required to submit to OSHA by July 2018.

IV. Procedural History

Plaintiffs filed a motion for a preliminary injunction seeking an order enjoining OSHA's suspension of the Rule. *See* Pls. Mot. Prelim. Inj., ECF No. 7. OSHA subsequently moved to dismiss the complaint on two grounds. *See* Defs. Mot. Dismiss, ECF No. 13. First, OSHA argued that plaintiffs lack standing because their injury would not be redressed by a favorable decision.

OSHA asserted that, even if it collected the Form 300 and 301 data, plaintiffs would not be able to obtain useful information because the data would be withheld from disclosure under FOIA's exemptions for personal privacy information. Second, OSHA argued that its suspension of the Rule was a mere policy statement regarding prosecutorial discretion that is not subject to judicial review under the APA.

On December 12, 2018, the Court denied OSHA's motion to dismiss. Mem. Op., ECF No. 17. The Court held that plaintiffs have standing to proceed with their claims because the records that OSHA would collect are not personally identifiable; thus, plaintiffs could likely use FOIA to obtain useful workplace injury and illness data from records submitted to OSHA under the Rule. *Id.* at 12–20. The Court further found that the agency conduct at issue is not a mere policy statement about enforcement discretion, but a wholesale suspension of the Rule's reporting requirement that is "'tantamount to amending or revoking a rule.'" *Id.* at 22 (quoting *Clean Air Council v. Pruitt*, 862 F.3d 1, 6 (D.C. Cir. 2017)). The Court explained that "[t]he amendment or revocation of an agency rule amounts to substantive rulemaking subject to the APA's constraints and generally reviewable by courts." *Id.* (citing *Envtl. Def. Fund, Inc. v. Gorsuch*, 713 F.2d 802, 813 (D.C. Cir. 1983)). As such, OSHA's suspension of the Rule's reporting requirements "is subject to the APA's procedural requirements for the promulgation of rules." *Id.* at 23. With regard to the substantive requirements of the APA, the Court held that OSHA's reversal of its previous decision implementing its statutory mandate to issue regulations necessary to collect occupational safety and health data is subject to judicial review. *Id.* at 23–24.

At the same time, the Court denied plaintiffs' motion for a preliminary injunction on the ground that plaintiffs had not shown a likelihood of irreparable harm. The Court found that there is no risk of permanent harm from OSHA's current rulemaking to rescind the requirement that

establishments electronically submit their Form 300 and 301 data, because a possible rescission of the Rule in the future will not affect the harm caused to plaintiffs by OSHA's suspension of the July 2018 deadline. *Id.* at 26–27. The Court stated that, if plaintiffs prevail on the merits of their claims, "the Court may still declare the earlier suspension of the Rule unlawful, require OSHA to recognize the July 2018 submission deadline, and give Plaintiffs the relief they seek—data that employers should have been required to submit to OSHA by July 2018." *Id.* at 27.

STANDARD OF REVIEW

Summary judgment is appropriate when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Where, as here, review is based entirely on publicly-available documents and the questions are purely legal in nature, a court can resolve a challenge to a federal agency's action on a motion for summary judgment. Judicial review of agency action is governed by section 706 of the APA. The Court "shall hold unlawful and set aside agency action" that is "found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," or "without observance of procedure required by law." 5 U.S.C. §706(2)(A), (D).

ARGUMENT

OSHA's action is unlawful for two reasons: OSHA violated the procedural rulemaking requirements of the APA by failing to provide notice and an opportunity to comment before it suspended the Rule's requirement that covered establishments submit data from OSHA Forms 300 and 301 by July 1, 2018. In addition, OSHA violated the substantive requirements of the APA by failing to provide a reasoned explanation to justify reversing course on an already promulgated rule.

I. OSHA Failed to Comply with the APA's Notice and Comment Requirements.

The APA generally requires agencies to give interested individuals notice and the opportunity to comment before promulgating rules, *see* 5 U.S.C. § 553, and empowers courts to hold unlawful and set aside agency action taken "without observance of procedure required by law," *id.* § 706(2)(D). OSHA's May 2018 website announcement suspending the Rule's requirement that covered establishments submit data from OSHA Forms 300 and 301 by July 1, 2018, is a substantive rule that required notice-and-comment rulemaking.

As this Court has stated, "[t]he amendment or revocation of an agency rule amounts to substantive rulemaking subject to the APA's constraints." Mem. Op. 22. Thus, although "agencies have broad discretion to reconsider a regulation … [t]o do so … they must comply with the [APA], including its requirements for notice and comment." *Clean Air Council*, 862 F.3d at 9 (citing 5 U.S.C. § 553 and *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199 (2015)); *see also FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) ("The [APA] makes no distinction … between initial agency action and subsequent agency action undoing or revising that action."). Thus, once a rule is finalized, an agency "'may not alter such a rule without notice and comment.'" *Id.* (quoting *Nat'l Family Planning and Reproductive Health Ass'n, Inc. v. Sullivan*, 979 F.2d 227, 234 (D.C. Cir. 1992)). An agency lacks the inherent authority "not to enforce a lawfully issued final rule while it reconsiders it." *Id.* (punctuation omitted). Accordingly, "[s]uspension or delayed implementation of a final regulation normally constitutes substantive rulemaking" that requires agency compliance with the APA's notice-and-comment procedures. *Envtl. Def. Fund, Inc. v. EPA*, 716 F.2d 915, 920 (D.C. Cir. 1983); *see also Nat. Res. Def. Council v. Nat'l Highway Traffic Safety Admin.*, 894 F.3d 95, 113 (2d Cir. 2018) (concluding that an agency's suspension of a rule without first undertaking notice and comment

rulemaking violated the APA, noting that "[a] significant body of authority reinforces this proposition," and collecting cases); *Pineros y Campesinos Unidos del Noroeste v. Pruitt*, 293 F. Supp. 3d 1062, 1066 (N.D. Cal. 2018) ("EPA violated the [APA] by failing to provide notice and opportunity to comment before delaying the Pesticide Rule's effective date"); *Open Cmtys. All. v. Carson*, 286 F. Supp. 3d 148, 162–63 (D.D.C. 2017) (explaining that because the agency "did not delay the Rule's implementation through notice and comment," the delay "was lawful only if another source of authority empowered [the agency] to delay the Rule's implementation without notice or comment," and concluding that no such authority existed).

Because a regulation's compliance date is a substantive aspect of a rule, that date can be altered only through notice-and-comment rulemaking. *See Clean Air Council*, 862 F.3d at 6 (concluding that an agency action that "suspended [a] rule's compliance deadlines … [is] tantamount to amending or revoking a rule," and collecting cases); *Open Cmtys. All.*, 286 F. Supp. 3d at 163 (holding that an agency's suspension of a compliance deadline established by regulation required notice and comment rulemaking); *see also Bauer v. DeVos*, 325 F. Supp. 3d 74, 97–101 (D.D.C. 2018) (finding procedural requirement of Higher Education Act, which applies in same circumstances as notice and comment under APA, applies to suspension of effective date of final regulation). Indeed, if suspension of a compliance deadline were not subject to the rulemaking provisions of the APA, "an agency could guide a future rule through the rulemaking process, promulgate a final rule, and then effectively repeal it, simply by indefinitely postponing its operative date." *Nat. Res. Def. Council v. EPA*, 683 F.2d 752, 762 (3d Cir. 1982); *see also Nat. Res. Def. Council v. Nat'l Highway Traffic Safety Admin.*, 894 F.3d at 115 ("An agency may not promulgate a rule suspending a final rule and then claim that post-

promulgation notice and comment procedures cure the failure to follow, in the first instance, the procedures required by the APA.").

The same reasoning applies here: OSHA's suspension of the requirement that covered establishments submit their 2017 OSHA Form 300 and 301 data by July 1, 2018, effectively repeals a key provision of the Rule. As this Court has explained, its action was "tantamount to amending or revoking" the rule. Mem. Op. 22 (quoting *Clean Air Council*, 862 F.3d at 6). That OSHA is pursuing a rulemaking to possibly rescind the requirement that establishments submit Forms 300 and 301 in the future does not excuse the agency's unlawful suspension of the Electronic Reporting Rule's July 1, 2018, submission deadline. An intent to revise a rule in the future does not excuse compliance with procedural requirements applicable today. *See Bauer v. DeVos*, 325 F. Supp. 3d at 99. Thus, OSHA violated the APA by suspending the compliance date without notice-and-comment. The Court should therefore declare OSHA's action unlawful, reinstate the submission deadlines, and order OSHA promptly to collect from employers the data that the Rule required employers to submit to OSHA by July 2018.

II. OSHA's Suspension of the Rule's Reporting Requirement is Arbitrary and Capricious.

A reviewing court should set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Agency action is "arbitrary and capricious" if the action was not based on a "reasoned analysis" that indicates the agency "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made," *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 57 (1983) (internal quotation marks omitted), and if the record indicates that the agency "relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the

problem, offered an explanation for its decision that runs counter to the evidence before the agency, or [made a decision that] is so implausible that it could not be ascribed to a difference in view or the product of agency expertise," *id*. at 43; *see Open Cmtys. All.*, 286 F. Supp. 3d at 174 (concluding that HUD's two-year suspension of rule was arbitrary and capricious based on *State Farm* factors). A court cannot "supply a reasoned basis for the agency's action that the agency itself has not given." *Id.* (internal quotation marks omitted). "It is well-established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself." *Id.* at 50 (citations omitted); *accord S. Co. Servs., Inc. v. Fed. Energy Regulatory Comm'n*, 416 F.3d 39, 47 (D.C. Cir. 2015). This well-established law applies fully to agency actions revising regulatory deadlines. *See, e.g.*, *Air All. Houston v. EPA*, 906 F.3d 1049, 1066 (D.C. Cir. 2018) (concluding EPA's promulgation of twenty-month delay rule was arbitrary and capricious).

As an initial matter, OSHA's decision to suspend the Rule's requirement that covered establishments submit data from OSHA Forms 300 and 301 by July 1, 2018, was arbitrary and capricious based on what OSHA did *not* consider. OSHA failed to acknowledge the benefits of the requirement that covered establishments submit their 2017 OSHA Forms 300 and 301—that is, the reasons why it thought the Rule appropriate in the first place—let alone explain why it now assigned those interests less weight. Put simply, OSHA "entirely failed to consider an important aspect of the problem," *State Farm*, 463 U.S. at 43.

Instead, OSHA stated that it was suspending the deadline and declining to accept submissions because it anticipated reconsidering the Rule's requirement that covered establishments electronically submit OSHA Form 300 and 301 data. As the D.C. Circuit recently explained, "[a]gencies regularly reconsider rules that are already in effect," but "'a decision to reconsider a rule does not simultaneously convey authority to indefinitely delay the existing rule

pending that reconsideration.'" *Air All. Houston*, 906 F.3d at 1607 (quoting *Nat. Res. Def. Council v. Nat'l Highway Traffic Safety Admin.*, 894 F.3d at 111–12). "Thus, the mere fact of reconsideration, alone, is not a sufficient basis to delay promulgated effective dates specifically chosen by [the agency] on the basis of public input and reasoned explanation." *Id.* In *Air Alliance Houston*, the D.C. Circuit rejected EPA's argument that delaying the effective date of the Chemical Disaster Rule was necessary to provide the agency additional time to consider revising the rule. The court found that the agency had not explained "how the effectiveness of the rule would prevent EPA from undertaking notice and comment or other tasks for reconsideration, why a delay is necessary to EPA's process, or how the Chemical Disaster Rule becoming effective on schedule would otherwise impede its ability to reconsider that rule." *Id.* The same is true here: OSHA has not explained how requiring submission of 2017 Form 300 and 301 data in accordance with the Electronic Reporting Rule's July 1, 2018, deadline would have any effect on OSHA's ability to reconsider or revise the Rule.

In addition, when an agency changes position, it must at the very least demonstrate "awareness that it is changing position." *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2127 (2016) (quoting *Fox*, 556 U.S. at 515). It must explain either how circumstances have changed such that the new position is consistent with its original reasoning, *Fox*, 556 U.S. at 515, or why it is now choosing to "disregard[] facts and circumstances that underlay or were engendered by the prior policy," *id.* at 516; *see Air All. Houston*, 906 F.3d at 1067 (rejecting agency change in position on effective and compliance dates as "inadequate under *Fox* and *State Farm*" because "nothing in the Delay Rule explains [the agency's] departure from its stated reasoning in setting the original effective date and compliance dates"); *California v. United States Bureau of Land Mgmt*., 277 F. Supp. 3d 1106, 1123 (N.D. Cal. 2017) ("New presidential

administrations are entitled to change policy positions, but to meet the requirements of the APA they must give reasoned explanations for those changes and 'address [the] prior factual findings' underpinning a prior regulatory regime.").

Here, OSHA suspended the Rule's reporting requirements without acknowledging that it was changing its position. When it promulgated the Electronic Reporting Rule, OSHA considered comments about alternative compliance schedules and ultimately concluded that the July 1, 2018, deadline was appropriate for submission of Forms 300 and 301. *See* 81 Fed. Reg. at 29,633–29,640. In suspending the compliance deadline, OSHA "failed to rationally explain its departure from its previous conclusions about appropriate compliance periods that it reached after specifically soliciting and considering comments on the subject." *Air All. Houston*, 906 F.3d at 1068.

Because OSHA suspended key aspects of the Electronic Reporting Rule without providing a reasoned explanation to justify reversing course, the Court should declare OSHA's action unlawful, reinstate the submission deadlines, and order OSHA to collect the data that employers should have been required to submit to OSHA by July 2018.

CONCLUSION

The Court should enter summary judgment for plaintiffs, declare defendants' suspension of the Rule's submission deadline unlawful, and order defendants promptly to notify covered employers that they must electronically submit OSHA Form 300 and 301 data that the regulation required the employers to submit by July 2018.

Dated: December 17, 2018

Respectfully submitted,

/s/ Michael T. Kirkpatrick
Michael T. Kirkpatrick (D.C. Bar No. 486293)
Adina H. Rosenbaum (D.C. Bar. No. 490928)
Public Citizen Litigation Group
1600 20th Street NW
Washington, DC 20009
(202) 588-1000

Counsel for Plaintiffs

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PUBLIC CITIZEN HEALTH RESEARCH GROUP, *et al.*,	)	
Plaintiffs,	)	Civil Action No. 18-1729-TJK
v.	)	
ALEXANDER ACOSTA, *et al.*,	)	
Defendants.	)	

[PROPOSED] ORDER

Upon consideration of plaintiffs' motion for summary judgment, the memoranda in support and in opposition, and the entire record in this case, it is hereby

ORDERED that the motion is GRANTED; and it is further

ORDERED that judgment is entered for plaintiffs;

defendants' suspension of the Rule's submission deadline is DECLARED unlawful; and

defendants are ORDERED to promptly notify covered employers that they must electronically submit the calendar year 2017 OSHA Form 300 and 301 data that the regulation required the employers to submit by July 2018.

SO ORDERED.

Dated: _____, 2019

_____
TIMOTHY J. KELLY
United States District Judge