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**DEPARTMENT OF LABOR**

**Mine Safety and Health Administration**

**30 CFR Parts 56 and 57**

**[Docket No. MSHA-2014-0030]**

**RIN 1219-AB87**

**Examinations of Working Places in Metal and Nonmetal Mines**

**AGENCY:** Mine Safety and Health Administration, Labor.

**ACTION:** Proposed Rule, limited reopening of the rulemaking record; notice of public hearings; close of comment period.

**SUMMARY:** The Mine Safety and Health Administration (MSHA) proposes to amend the Agency's final rule on examinations of working places in metal and nonmetal mines that was published in January 2017. The proposed changes would require that an examination of the working place be conducted before work begins or as miners begin work in that place, and that the examination record include descriptions of adverse conditions that are not corrected promptly and the dates of corrective action for these conditions. The proposed rule would provide mine operators additional flexibility in managing their safety and health programs and reduce regulatory burdens without reducing the protections afforded miners.

**DATES:** MSHA is reopening the comment period to solicit comments on limited changes to the final rule published on January 23, 2017 (82 FR 7695), effective May 23, 2017, and delayed on May 22, 2017 (82 FR 23139), until October 2, 2017 (82 FR 23139).

*Comment date:* Comments must be received or postmarked by midnight Eastern Standard Time (EST) on [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

*Hearing dates:* October 24, 2017, October 26, 2017, October 31, 2017, and November 2, 2017. The locations are listed in the Public Hearings section in the SUPPLEMENTARY INFORMATION section of this document.

**ADDRESSES:** Submit comments and informational materials, identified by RIN 1219-AB87 or Docket No. MSHA-2014-0030, by one of the following methods:

- *Federal E-Rulemaking Portal:*  
<https://www.regulations.gov>. Follow the on-line instructions for submitting comments.
- *E-Mail:* [zzMSHA-comments@dol.gov](mailto:zzMSHA-comments@dol.gov).
- *Mail:* MSHA, Office of Standards, Regulations, and Variances, 201 12th Street South, Suite 4E401, Arlington, Virginia 22202-5452.
- *Hand Delivery or Courier:* 201 12th Street South, Suite 4E401, Arlington, Virginia, between 9 a.m. and 5

p.m. Monday through Friday, except Federal holidays.  
Sign in at the receptionist's desk on the 4th floor  
East, Suite 4E401.

- *Fax:* 202-693-9441.

*Information Collection Requirements:* Comments concerning the information collection requirements of this proposed rule must be clearly identified with RIN 1219-AB87 or Docket No. MSHA-2014-0030, and sent to both MSHA and the Office of Management and Budget (OMB). Comments to MSHA may be sent by one of the methods in the ADDRESSES section above. Comments to OMB may be sent by mail addressed to the Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, 725 17th Street, NW, Washington, DC 20503, Attn: Desk Officer for MSHA, or via email [oir\\_submissions@omb.eop.gov](mailto:oir_submissions@omb.eop.gov).

*Instructions:* All submissions must include RIN 1219-AB87 or Docket No. MSHA-2014-0030. Do not include personal information that you do not want publicly disclosed; MSHA will post all comments without change, including any personal information provided.

*Docket:* For access to the docket to read comments received, go to <https://www.regulations.gov> or <https://www.msha.gov/currentcomments.asp>. To read background documents, go to <https://www.regulations.gov>.

Review the docket in person at MSHA, Office of Standards, Regulations, and Variances, 201 12th Street South, Arlington, Virginia, between 9 a.m. and 5 p.m. Monday through Friday, except Federal holidays. Sign in at the receptionist's desk on the 4th floor East, Suite 4E401.

*E-Mail Notification:* To subscribe to receive e-mail notification when MSHA publishes rulemaking documents in the Federal Register, go to <https://www.msha.gov/subscriptions>.

**FOR FURTHER INFORMATION CONTACT:** Sheila A. McConnell, Director, Office of Standards, Regulations, and Variances, MSHA, at [mcconnell.sheila.a@dol.gov](mailto:mcconnell.sheila.a@dol.gov) (email), 202-693-9440 (voice), or 202-693-9441 (fax). These are not toll-free numbers.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

*A. Public Hearings*

MSHA will hold four public hearings on the proposed rule to provide the public with an opportunity to present oral statements, written comments, and other information on this rulemaking. The public hearings will begin at 9 a.m. and end after the last presenter speaks, and in any event not later than 5 p.m., on the following dates at the locations indicated:

Date/Time	Location	Contact Number
October 24, 2017 9 a.m.	Mine Safety and Health Administration Headquarters 201 12 <sup>th</sup> Street South 7 West Conference Rooms Arlington, VA	(202) 693-9440
October 26, 2017 9 a.m.	75 South West Temple Salt Lake City, UT 84101	(801) 531-0800
October 31, 2017 9 a.m.	Sheraton Birmingham Hotel 2101 Richard Arrington Jr. Boulevard North Birmingham, AL 35203	(205) 324-5000
November 2, 2017 9 a.m.	Wyndham Pittsburgh University Center 100 Lytton Ave Pittsburgh, PA 15213	(412) 682-6200

The hearings will begin with an opening statement from MSHA, followed by an opportunity for members of the public to make oral presentations. Speakers and other attendees may present information to MSHA for inclusion in the rulemaking record. The hearings will be conducted in an informal manner. Formal rules of evidence or cross examination will not apply.

A verbatim transcript of the proceedings will be prepared and made a part of the rulemaking record. Copies of the transcript will be available to the public. The transcript may also be viewed on MSHA's web site at

<https://arlweb.msha.gov/currentcomments.asp>, under Comments on Public Rule Making.

### *B. Regulatory History*

On January 23, 2017, MSHA published a final rule, Examinations of Working Places in Metal and Nonmetal Mines ("2017 rule") in the Federal Register (FR) amending the Agency's standards for the examination of working places in metal and nonmetal mines. 82 FR 7680. The 2017 rule was scheduled to become effective on May 23, 2017. On March 27, 2017, MSHA published a proposed rule to delay the effective date of the 2017 rule to July 24, 2017. 82 FR 15173. On May 22, 2017, MSHA published a final rule delaying the effective date of the 2017 rule until October 2, 2017. 82 FR 23139. Elsewhere in this issue of the Federal Register, MSHA is publishing a document taking comments on delaying the effective date of the final rule.

## **II. Discussion of Issues**

### *A. Introduction*

Effective working place examinations are a fundamental accident prevention tool used by operators of metal and nonmetal (MNM) mines; they allow operators to find and fix adverse conditions and violations of health and safety standards before they cause injury or death to miners.

After further review of the rulemaking record, MSHA is considering limited changes to the 2017 rule to address: 1) when working place examinations must begin, and 2) the adverse conditions and related corrective actions that must be included in the working place examinations record. Specifically, MSHA is proposing to amend the introductory text of §§ 56.18002(a) and 57.18002(a) in the 2017 rule on when examinations must begin, and the record requirements in paragraphs (b) and (c); MSHA is not proposing to modify paragraphs (a)(1) and (2) regarding miner notification and corrective action requirements. Further, MSHA is not proposing to change the record retention requirements or the record availability requirements included in the 2017 rule.

The Agency believes that the proposed changes would be as protective as the existing rules. Also, the proposal would reduce the regulatory burden on mine operators compared to requirements in the 2017 rule and would be consistent with the Administration's initiatives to reduce and control regulatory costs.

*B. Before work begins or as miners begin work*

The standards for examinations of working places in MNM mines at 30 CFR 56.18002 and 57.18002 were promulgated in 1979 and are the standards currently in effect. The

currently effective standards permit the examination to be made at any time during the shift. Sections 56.18002(a) and 57.18002(a) require a competent person designated by the mine operator to examine each working place at least once each shift for conditions that may adversely affect safety or health. In addition, §§ 56.18002(a) and 57.18002(a) require the operator to promptly initiate appropriate action to correct such conditions.

On January 23, 2017, MSHA published a final rule (82 FR 7680) that amended §§ 56.18002(a) and 57.18002(a) to require that the examination be conducted before miners begin work in that place so that conditions that may adversely affect miners' safety and health are identified before miners are exposed to those conditions and corrective action is promptly initiated

MSHA is now proposing to modify the introductory text of §§ 56.18002(a) and 57.18002(a) in the 2017 rule to require the competent person to examine each working place at least once each shift before work begins or as miners begin work in that place for conditions that may adversely affect safety or health. This proposed change to §§ 56.18002(a) and 57.18002(a) would allow the competent person to conduct the examination before work begins or as miners begin their work in a place. To provide mine



operators flexibility on scheduling working place examinations, MSHA's proposed change would allow miners to enter a working place at the same time that the competent person conducts the examination. As in the 2017 rule, MSHA's proposal would not require a specific time frame for the examination to be conducted. However, MSHA intends that the examination should be conducted in a time frame sufficient to assure any adverse conditions would be identified before miners are exposed. Under the proposal, the competent person would identify adverse conditions that can be corrected promptly, and promptly notify miners of those that cannot be corrected before miners are exposed. In that way, miners could avoid and not be exposed to those adverse conditions. The operator would still be responsible for correcting those conditions that can be corrected promptly. MSHA recognizes that mining is dynamic, conditions are always changing, and adverse conditions need to be identified and addressed throughout the shift, not just at the beginning. If adverse conditions are identified, miners should be notified before being exposed, or as soon as possible after work begins if the condition is discovered while they are working in an area.

MSHA believes this proposed change would be more protective than the standards in effect, which allow the examination to be made at any time during the shift. Also, under this proposal, since MSHA expects adverse conditions would be identified before miners are potentially exposed to them, the proposal is as protective as the 2017 rule.

Furthermore, in the 2017 rule, MSHA acknowledged that for mines with consecutive shifts or those that operate on a 24-hour, 365-day basis, it may be appropriate to conduct the examination for the next shift at the end of the previous shift. 82 FR 7683. The proposed change would continue to permit mine operators to conduct an examination on the previous shift. However, as MSHA stated in the 2017 rule, because conditions at mines can change, operators should examine at a time sufficiently close to the start of the next shift to minimize potential exposure to conditions that may adversely affect miners' safety or health.

*C. Record of adverse conditions*

The currently effective standards at §§ 56.18002(b) and 57.18002(b) require, in part, that mine operators make a record that the working place examinations were conducted.

Under the 2017 rule, §§ 56.18002(b) and 57.18002(b) require operators to make a record of the working place

examination and include, among other information, a description of each condition found that may adversely affect the safety or health of miners. In the preamble to the 2017 rule, MSHA noted that the record must include a description of adverse conditions that are corrected immediately. 82 FR 7686. The preamble explained that recording all adverse conditions, even those that are corrected immediately, would be useful in identifying trends and areas that could benefit from an increased safety emphasis.

However, MSHA recognizes that it is the mine operator who is responsible for design of the mine's safety program and that having a recording exception for conditions that are corrected promptly would provide operators with increased incentives to correct these conditions promptly, which may improve miner safety and health. For this reason, MSHA is considering modifying §§ 56.18002(b) and 57.18002(b) to require that the examination record include only those adverse conditions that are not corrected promptly.

MSHA also is considering a conforming change to modify §§ 56.18002(c) and 57.18002(c) of the 2017 rule, which requires the examination record to include, or be supplemented to include, the date of corrective action when

any condition that may adversely affect safety or health is corrected. To be consistent with MSHA's proposed change to §§ 56.18002(b) and 57.18002(b), MSHA would require in §§ 56.18002(c) and 57.18002(c) that the record include, or be supplemented to include, the date of corrective action for an adverse condition that is not promptly corrected.

MSHA's proposal is based on the recognition that, consistent with industry best practices, prudent operators routinely correct many adverse conditions as the competent person is making the examination or as soon as possible after the completion of the examination, and that the corrective action may be taken either by the competent person or someone else. The Agency believes that the primary concern should be with respect to those adverse conditions that are not corrected promptly because they may expose miners to conditions that may potentially cause an accident, injury, or fatality. Consistent with the explanation in the preamble to the 2017 rule, MSHA interprets "promptly" to mean before miners are potentially exposed to adverse conditions.

Also, the proposed change to §§ 56.18002(b) and 57.18002(b) would be consistent with MSHA's miner notification provisions under the 2017 rule at §§ 56.18002(a)(1) and 57.18002(a)(1). Those provisions

require mine operators to promptly notify miners in affected areas of any conditions found that may adversely affect their safety or health. In the preamble to the 2017 rule, MSHA reiterated that, if an adverse condition is corrected before miners begin work, notification to miners in affected areas is not required because there are no miners that would be affected by the adverse condition. Similarly, under proposed paragraph (b), adverse conditions that are corrected promptly no longer present a danger to miners and a description of the adverse condition would not be required as part of the examination record under this proposed rule. MSHA believes that this change to §§ 56.18002(b) and 57.18002(b) may improve safety over the existing standards by encouraging mine operators to correct adverse conditions as they are found before they potentially cause an accident, injury, or fatality.

Overall, MSHA believes that the proposed rule would be more protective of miners than the existing standards under §§ 56.18002 and 57.18002. The proposed rule encourages early identification and prompt correction of adverse conditions to protect miners. If corrected promptly, adverse conditions would not be required to be documented in the record. However, adverse conditions that are not corrected promptly would be required to be documented in

the record. An examination record with a description of these uncorrected adverse conditions and their dates of correction would permit mine operators to focus on conditions that need the most attention and on best practices to correct these conditions.

### **III. Request for Comments**

MSHA is soliciting comments only on the limited changes being proposed: 1) working place examinations may begin as miners begin work, and 2) adverse conditions that are not corrected promptly and dates of their corrective action must be included in the working place examinations record. The Agency requests that commenters be as specific as possible and include any alternatives, existing practices and experiences, detailed rationales, supporting documentation, and benefits to miners. Comments will assist the Agency in considering changes to the 2017 rule and whether changes would reduce regulatory burdens on mine operators without reducing the protections afforded miners.

### **IV. Executive Order 12866: Regulatory Planning and Review; Executive Order 13563: Improving Regulation and Regulatory Review; and Executive Order 13771: Reducing Regulation and Controlling Regulatory Costs.**

Executive Orders (E.O.) 13563 and 12866 direct agencies to assess all costs and benefits of available

regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. E.O. 13771 directs agencies to reduce regulation and control regulatory costs by eliminating at least two existing regulations for each new regulation, and that the cost of planned regulations be prudently managed and controlled through a budgeting process. This proposed rule is expected to be an EO 13771 deregulatory action. As discussed in this section, MSHA estimates that this proposed rule would result in annual cost savings of \$27.6 million<sup>1</sup>.

Under E.O. 12866, it must be determined whether a regulatory action is "significant" and subject to review by OMB. Section 3(f) of E.O. 12866 defines a "significant regulatory action" as an action that is likely to result in a rule: (1) having an annual effect on the economy of \$100 million or more, or adversely and materially affecting a sector of the economy, productivity, competition, jobs, the

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<sup>1</sup> Except where noted, the analysis presents all dollar values using 2016 dollars.

environment, public health or safety, or state, local, or tribal governments or communities (also referred to as “economically significant”); (2) creating serious inconsistency or otherwise interfering with an action taken or planned by another agency; (3) materially altering the budgetary impacts of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raising novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in this E.O.

Based on its assessment of the costs and benefits, MSHA has determined that this proposed rule would not have an annual effect of \$100 million or more on the economy and, therefore, would not be an economically significant regulatory action pursuant to section 3(f) of E.O. 12866. MSHA requests comments on all cost and benefit estimates presented in this preamble and on the data and assumptions the Agency used to develop estimates. This proposed rule would make changes to provisions that created costs in the 2017 rule, as described in the following sections.

#### *A. Compliance Cost Baseline*

MSHA estimated that the 2017 rule will result in \$34.5 million in annual costs for the MNM industry. The Agency estimated that the total undiscounted cost of the final



rule over 10 years will be \$345.1 million; at a 3 percent discount rate, \$294.4 million; and at a 7 percent discount rate, \$242.4 million. In the final rule, MSHA estimated costs associated with conducting an examination before work begins, the additional time to make a record, and providing miners' representatives a copy of the record.

In this proposed rule, MSHA estimates the costs of changes to the 2017 rule that include: 1) an examination of a working place as miners begin work in that place, and 2) the time used to make a record only of adverse conditions that are not corrected promptly and the dates of corrective action for these conditions. For purposes of calculating the costs attributable to this proposed rule, MSHA updated the number of mines and used calendar year 2016 wage and employment data. MSHA also applied 2016 wage and employment data to the 2017 rule to establish a baseline to calculate cost savings.

#### *B. Affected Employees and Revenue Estimates*

The proposed rule would apply to all MNM mines in the United States. The baseline for costs and net benefits include costs identified in the preamble to the 2017 rule. The changes include updates to the 2016 data on wages, number of mines, and employment. Changes to the baseline that would exist without this proposed rule are not

attributable to this proposal. The updates are included for purposes of calculating the cost savings attributable to this proposed rule.

In 2016, there were approximately 11,624 MNM mines employing 140,631 miners, excluding office workers, and 69,004 contractors working at MNM mines. Table 1 presents the number of MNM mines and employment by mine size.

Table 1: MNM Mines and Employment in 2016

Mine Size	No. of Mines	Total Employment at Mines, Excluding Office Workers
1-19 Employees	10,428	52,703
20-500 Employees	1,174	71,257
501+ Employees	22	16,671
Contractors	--	69,004
Total	11,624	209,635

Source: MSHA MSIS Data (reported on MSHA Form 7000-2) June 6, 2017.

The U.S. Department of the Interior (DOI) estimated the value of the U.S. mining industry's MNM output in 2016 to be \$74.6 billion.<sup>2</sup> Table 2 presents the hours worked and revenue produced at MNM mines by mine size.

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<sup>2</sup> Revenue estimates are from DOI, U.S. Geological Survey (USGS), Mineral Commodity Summaries 2017, January 2017, page 9.

Table 2: MNM Total Hours and Revenues in 2016

Mine Size	Total Hours Reported for Year	Revenue (In Millions of Dollars)
1-19 Employees	89,901,269	\$22,294
20-500 Employees	153,459,578	\$40,920
501+ Employees	35,396,747	\$11,390
Total	278,757,594	\$74,604

Source: MSHA MSIS Data (total hours worked at MNM mines reported on MSHA Form 7000-2) and estimated DOI reported mine revenues for 2016. MSHA distributed the totals to mine size using employment and hours data.

*C. Benefits*

The proposed rule would modify the 2017 rule's requirements in §§ 56.18002(a) and 57.18002(a) that require the examination be conducted before miners begin work in that place. MSHA is proposing to modify these provisions to require the examination be conducted before work begins or as miners begin work in that place. This proposed change would reduce the cost of the 2017 rule. MSHA is also proposing to modify the 2017 rule's requirements in §§ 56.18001(b) and 57.18002(b) that the examination record include each adverse condition found. MSHA is proposing to modify these provisions to require that the examination record include only those adverse conditions that are not corrected promptly.

MSHA believes these changes to the 2017 rule would not reduce the protections afforded miners; therefore, benefits would remain unchanged, which were unquantified in the 2017

rule, since MSHA was unable to separate the benefits of the new requirements under the 2017 rule from those benefits attributable to conducting a workplace examination under the existing standard. Thus, net benefits for this proposed rule would be positive due to the cost savings.

#### *D. Compliance Costs*

The costs of this proposed rule are associated with conducting examinations of a working place as miners begin work in that place. In the preamble to the 2017 rule, MSHA concluded that MNM mine operators will use a variety of scheduling methods to conduct an examination of a working place before miners begin work (82 FR 7690). For the 2017 rule, MSHA estimated that it will cost approximately \$26.9 million for mine operators examine each working place before miners begin work.

For the 2017 rule estimate, MSHA assumed that operators might use overtime, use different people to backfill for the time shifted to the examination, or experience rescheduling costs to comply with the final rule. The examination was already required prior to the 2017 rule and therefore not an additional cost for either the 2017 rule or this proposed rule. Under this proposed rule, mine operators would not be required to make the 2017 rule changes to the examination timing that were estimated

to add \$26.9 million for overtime, backfill, and rescheduling. The proposed change in the examination timing would allow mine operators to avoid the additional \$26.9 million and therefore create a cost savings. MSHA requests comment on this estimate. MSHA updated the cost estimate for the number of mines and labor costs which results in an estimated annual cost savings of \$27.6 million.

The 2017 rule also amended the standards currently in effect by specifying the contents of the examination record, which included a requirement that a record include a description of each adverse condition found. Under this proposed rule, MSHA would modify the required contents of the examination record by requiring a description of each adverse condition that is not corrected promptly. MSHA assumes that the cost related to the proposed change to the recordkeeping requirements would be de minimis. MSHA seeks comment on the Agency's assumption and solicits information and data on the number of instances adverse conditions are promptly corrected and on average how much time would be saved by not requiring these corrected conditions to be included in the record.

MSHA updated the number of mines and applied 2016 wage and employment data to the 2017 rule to establish a

baseline to calculate cost savings. MSHA estimates that the competent person making the record of the examination of working places would earn \$35.28 per hour (including benefits). In addition, the estimated wage rate of a clerical worker who makes a copy of the record is \$24.44 per hour (including benefits). The wage rates are from the Bureau of Labor Statistics (BLS), Occupation Employment Statistics (OES) May 2016 survey<sup>3,4</sup>. Updating the 2017

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<sup>3</sup> OES data are available at <http://www.bls.gov/oes/tables.htm> or at [http://www.bls.gov/oes/oes\\_ques.htm](http://www.bls.gov/oes/oes_ques.htm). The employment-weighted mean wage rates are for Extraction Workers (Standard Occupational Classification code, SOC, 47-500) and General Office Clerks (Standard Occupational Classification code, SOC, 43-9061) for Metal Ore Mining (NAICS 212200) and Nonmetallic Mineral Mining and Quarrying (NAICS 212300). The OES wages represent the average for the entire industry and are used nationally for many federal estimates and programs. As with any average, there are always examples of higher and lower values, but the national average is the appropriate value for a rule that regulates an entire industry.

<sup>4</sup> The wage rate without benefits was increased for a benefit-scalar of 1.48. The benefit-scalar comes from BLS Employer Costs for Employee Compensation access by menu <http://www.bls.gov/data/> or directly with <http://data.bls.gov/timeseries/CIU2010000405000I>. The data series CIU2010000405000I, Private Industry Total benefits for Construction, extraction, farming, fishing, and forestry occupations, is divided by 100 to convert to a decimal value. MSHA used the latest 4-quarter moving average 2016 Qtr. 1 - 2016 Qtr. 4 to determine that 32.5 percent of total loaded wages are benefits. The scaling factor is a detailed calculation, but may be approximated with the formula and values  $1 + (\text{benefit percentage} / (1 - \text{benefit percentage})) = 1 + (0.325 / (1 - 0.325)) = 1.48$ . Additionally, wage inflation is applied. Wage inflation is the change in Series ID: CIS2020000405000I; Seasonally adjusted; Series Title: Wages and salaries for Private industry workers in Construction, extraction, farming, fishing, and forestry occupations, Index. (Qtr. 4 2016/Qtr. 2 2016 =  $126.7/125.5 = 1.01$ ).

rule's costs results in a new examination cost base of \$27.6 million annually or approximately a \$0.7 million increase. MSHA also restates the 2017 rule estimates that—

- Mines with 1-19 employees operate 1.1 shift per day, 169 days per year;
- Mines with 20-500 employees operate 1.8 shifts per day, 285 days per year; and
- Mines with 500+ employees operate 2.2 shifts per day, 322 days per year.

#### Overhead Costs

MSHA notes that the Agency did not include an overhead labor cost in the economic analysis for this proposed rule. It is important to note that there is not one broadly accepted overhead rate and that the use of overhead to estimate the marginal costs of labor raises a number of issues that should be addressed before applying overhead costs to analyze the costs of any specific regulation. There are several approaches to look at the cost elements that fit the definition of *overhead* and there are a range of overhead estimates currently used within the federal government — for example, the Environmental Protection Agency has used 17 percent<sup>5</sup>, and the Employee Benefits

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<sup>5</sup> U.S. Environmental Protection Agency, "Wage Rates for Economic Analyses of the Toxics Release Inventory Program," June 10, 2002.

Security Administration has used 132 percent on average<sup>6</sup>. Some overhead costs, such as advertising and marketing, may be more closely correlated with output rather than with labor. Other overhead costs vary with the number of new employees. For example, rent or payroll processing costs may change little with the addition of 1 employee in a 500-employee firm, but those costs may change substantially with the addition of 100 employees. If an employer is able to rearrange current employees' duties to implement a rule, then the marginal share of overhead costs such as rent, insurance, and major office equipment (e.g., computers, printers, copiers) would be very difficult to measure with accuracy (e.g., computer use costs associated with 2 hours for rule familiarization by an existing employee). For this proposed rule, comparability is also a problem. The January 2017 rule is not in effect and therefore additional overhead costs have not been incurred and are unlikely to be incurred in the short term. Guidance on implementing

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<sup>6</sup> For a further example of overhead cost estimates, please see the Employee Benefits Security Administration's guidance at <https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/technical-appendices/labor-cost-inputs-used-in-ebsa-opr-ria-and-pra-burden-calculations-august-2016.pdf>.



Executive Order 13371<sup>7</sup> also provides general guidance that applies in this situation:

For EO 13771 deregulatory actions that revise or repeal recently issued rules, agencies generally should not estimate cost savings that exceed the costs previously projected for the relevant requirements, unless credible new evidence show that costs were previously underestimated.

If MSHA had included an overhead rate when estimating the marginal cost of labor, without further analyzing an appropriate quantitative adjustment, and adopted for these purposes an overhead rate of 17 percent on base wages, the overhead costs would increase cost savings from \$27.6 million to \$32.3 million at all discount rates. This increase in savings of \$4.7 million is the same 17 percent overhead rate as all rule costs are labor costs and therefore change in direct proportion to the rates selected.

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<sup>7</sup> Memorandum: Implementing Executive Order 13771, Titled "Reducing Regulation and Controlling Regulatory Costs, M-17-21", April 5, 2017, Question 21, <https://www.whitehouse.gov/the-press-office/2017/04/05/memorandum-implementing-executive-order-13771-titled-reducing-regulation>.

MSHA will continue to study overhead costs to ensure regulatory costs are appropriately attributed without double counting or showing savings for concepts not previously considered as costs.

#### Discounting

Discounting is a technique used to apply the economic concept that the preference for the value of money decreases over time. In this analysis, MSHA provides cost totals at zero, 3, and 7 percent discount rates. The zero percent discount rate is referred to as the undiscounted rate. MSHA used the Excel Net Present Value (NPV) function to determine the present value of costs and computed an annualized cost from the present value using the Excel PMT function.<sup>8</sup> The negative value of the PMT function provides the annualized cost over 10 years at a 3 and 7 percent discount rate using the function's end of period option.

#### Summary of Cost Savings

The following table shows the published 2017 rule costs, changes due to updating the base, and the resulting proposed rule cost savings (cost reductions have a negative sign and are a cost savings).

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<sup>8</sup> Office of Management and Budget, Office of Information and Regulatory Affairs, Regulatory Impact Analysis: Frequently Asked Questions, February 7, 2011.

Table 3: Undiscounted Costs, Changes, and Regulatory Savings (Annual Values, \$ millions)

	Record Keeping	Examination Timing	Total (may not sum due to rounding)
Costs as published in 2017 rule (published using 2015 dollars)	7.64	26.88	34.51
Changes due to updated 2016 baseline data	0.24	0.72	0.95
Total 2016 baseline	7.88	27.60	35.47
Regulatory savings of proposed rule (change from updated base, negative values = cost savings)	0.00	-27.60	-27.60

MSHA estimates that the total undiscounted costs of the proposed rule over a 10-year period would be approximately -\$276 million, -\$235.4 million at a 3 percent rate, and -\$193.8 million at a 7 percent rate. Negative cost values are cost savings that result in a positive net benefit. The same annual cost savings occurs in each of the 10 years so the cost annualized over 10 years would be approximately -\$27.60 million for all discount rates.

## **V. Feasibility**

### *A. Technological Feasibility*

The proposed rule contains recordkeeping requirements and is not technology-forcing. MSHA concludes that the proposed rule would be technologically feasible.

### *B. Economic Feasibility*

MSHA established the economic feasibility of the 2017 rule using its traditional revenue screening test – whether the yearly impacts of a regulation are less than one percent of revenues – to establish presumptively that the 2017 rule was economically feasible for the mining community. This proposed rule creates a cost (savings) of -\$27.6 million annually compared to the 2017 rule.

Although the associated revenues decreased slightly from the 2017 rule estimate of \$77.6 billion in 2015 to approximately \$74.6 billion for 2016, the costs retained from the 2017 rule of approximately \$7.9 million per year remains well less than one percent of revenues and the net decrease in costs is even more supportive of the Agency's conclusion. MSHA concludes that the proposed rule would be economically feasible for the MNM mining industry.

## **VI. Regulatory Flexibility Analysis and Small Business Regulatory Enforcement Fairness Act and Executive Order**

**13272: Proper Consideration of Small Entities in Agency Rulemaking**

MSHA has reviewed the proposed rule to assess and take appropriate account of its potential impact on small businesses, small governmental jurisdictions, and small organizations. MSHA has determined that the proposed rule would not have a significant economic impact on a substantial number of small entities but requested comments in Section IV. of this preamble.

Pursuant to the Regulatory Flexibility Act (RFA) of 1980, as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA), MSHA has analyzed the impact of the proposed rule on small entities. Based on that analysis, MSHA certifies that the proposed rule would not have a significant economic impact on a substantial number of small entities. The Agency, therefore, is not required to develop an initial regulatory flexibility analysis. MSHA presents the factual basis for this certification below.

*A. Definition of a Small Mine*

Under the RFA, in analyzing the impact of a rule on small entities, MSHA must use the Small Business Administration's (SBA's) definition for a small entity, or after consultation with the SBA Office of Advocacy,

establish an alternative definition for the mining industry by publishing that definition in the *Federal Register* for notice and comment. MSHA has not established an alternative definition and, therefore, must use SBA's definition. On February 26, 2016, SBA's revised size standards became effective. SBA updated the small business thresholds for mining by establishing a number of different levels. MSHA used the new SBA standards for the screening analysis of the final rule.

MSHA has also examined the impact of the proposed rule on mines with fewer than 20 employees, which MSHA and the mining community have traditionally referred to as "small mines." These small mines differ from larger mines not only in the number of employees, but also in economies of scale in material produced, in the type and amount of production equipment, and in supply inventory. Therefore, the impact of MSHA's rules and the costs of complying with them will also tend to differ for these small mines. This analysis complies with the requirements of the RFA for an analysis of the impact on "small entities" using both SBA's definition for small entities in the mining industry and MSHA's traditional definition.

*B. Factual Basis for Certification*

MSHA initially evaluates the impacts on small entities by comparing the estimated compliance costs of a rule for small entities in the sector affected by the rule to the estimated revenues for the affected sector. When this threshold analysis shows estimated compliance costs have been less than one percent of the estimated revenues, the Agency has concluded that it is generally appropriate to conclude that there is no significant adverse economic impact on a substantial number of small entities. Additionally, there is the possibility that a rule might have a positive economic impact. To properly apply MSHA's traditional criteria and consider the positive impact case, MSHA is adjusting its traditional threshold analysis criteria to consider the absolute value of one percent rather than only the adverse case. This slight change means when the absolute value of the estimated compliance costs exceed one percent of revenues, MSHA investigates whether further analysis is required. For small entities impacted by this proposed rule, MSHA estimates the revenue at \$63.2 billion and costs at -\$30.3 million. As a percentage, the absolute value of the impact is less than 0.05 percent; therefore, using the threshold analysis, MSHA concludes no further analysis is required and concludes the

proposed rule would not have a significant impact on a substantial number of small entities. MSHA requests comments on this conclusion.

#### **VII. Paperwork Reduction Act of 1995**

The proposed changes due to this rulemaking are unlikely to change the number of collections or respondents in the currently approved collection 1219-0089. The minor recordkeeping change may reduce the burden very slightly but MSHA concludes that any small decrease in the time needed to make the record may not be measurable. MSHA requested comments on this issue in Section IV. of this preamble but is not requesting any change to the approved collection at this time.

#### **VIII. Other Regulatory Considerations**

##### *A. The Unfunded Mandates Reform Act of 1995*

MSHA has reviewed the proposed rule under the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1501 *et seq.*). MSHA has determined that this proposed rule does not include any federal mandate that may result in increased expenditures by State, local, or tribal governments; nor will it increase private sector expenditures by more than \$100 million (adjusted for inflation) in any one year or significantly or uniquely affect small governments.



Accordingly, the Unfunded Mandates Reform Act requires no further Agency action or analysis.

*B. The Treasury and General Government Appropriations Act of 1999: Assessment of Federal Regulations and Policies on Families*

Section 654 of the Treasury and General Government Appropriations Act of 1999 (5 U.S.C. 601 note) requires agencies to assess the impact of Agency action on family well-being. MSHA has determined that this proposed rule will have no effect on family stability or safety, marital commitment, parental rights and authority, or income or poverty of families and children. Accordingly, MSHA certifies that this proposed rule would not impact family well-being.

*C. Executive Order 12630: Government Actions and Interference with Constitutionally Protected Property Rights*

Section 5 of E.O. 12630 requires Federal agencies to "identify the takings implications of proposed regulatory actions ...". MSHA has determined that this proposed rule does not include a regulatory or policy action with takings implications. Accordingly, E.O. 12630 requires no further Agency action or analysis.

*D. Executive Order 12988: Civil Justice Reform*

Section 3 of E.O. 12988 contains requirements for Federal agencies promulgating new regulations or reviewing existing regulations to minimize litigation by eliminating drafting errors and ambiguity, providing a clear legal standard for affected conduct rather than a general standard, promoting simplification, and reducing burden. MSHA has reviewed this proposed rule and has determined that it would meet the applicable standards provided in E.O. 12988 to minimize litigation and undue burden on the Federal court system.

*E. Executive Order 13132: Federalism*

MSHA has determined that this proposed rule does not have federalism implications because it will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Accordingly, E.O. 13132 requires no further Agency action or analysis.

*F. Executive Order 13175: Consultation and Coordination with Indian Tribal Governments*

MSHA has determined that this proposed rule does not have tribal implications because it will not have

substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes. Accordingly, E.O. 13175 requires no further Agency action or analysis.

*G. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use*

E.O. 13211 requires agencies to publish a statement of energy effects when a rule has a significant energy action that adversely affects energy supply, distribution, or use. In its 2017 rule, MSHA reviewed the rule for its energy effects. The impact on uranium mines is applicable in this case. MSHA data show only two active uranium mines in 2016. Because this proposed rule would have a net cost savings, MSHA has concluded that it would not be a significant energy action because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Accordingly, under this analysis, no further Agency action or analysis is required.

List of Subjects in 30 CFR Parts 56 and 57

Metals, Mine safety and health, Reporting and recordkeeping requirements

Wayne D. Palmer,  
Acting Assistant Secretary of Labor  
for Mine Safety and Health

For the reasons set out in the preamble, and under the authority of the Federal Mine Safety and Health Act of 1977, as amended by the Mine Improvement and New Emergency Response Act of 2006, MSHA is proposing to amend chapter I of title 30 of the Code of Federal Regulations as amended by the final rule published on January 23, 2017 (82 FR 7695), effective May 23, 2017, and delayed on May 22, 2017 (82 FR 23139), until October 2, 2017 (82 FR 23139), as follows:

PART 56—SAFETY AND HEALTH STANDARDS--SURFACE METAL AND NONMETAL MINES

1. The authority citation for part 56 continues to read as follows:

Authority: 30 U.S.C. 811.

2. In § 56.18002, revise paragraph (a) introductory text, the second sentence of paragraph (b), and paragraph (c) to read as follows:

§ 56.18002 Examination of working places.

(a) A competent person designated by the operator shall examine each working place at least once each shift before work begins or as miners begin work in that place for conditions that may adversely affect safety or health.

\* \* \* \* \*

(b) \* \* \* The record shall contain the name of the person conducting the examination; date of the examination; location of all areas examined; and description of each condition found that may adversely affect the safety or health of miners and is not corrected promptly.

(c) When a condition that may adversely affect safety or health is not corrected promptly, the examination record shall include, or be supplemented to include, the date of the corrective action.

\* \* \* \* \*

PART 57—SAFETY AND HEALTH STANDARDS--UNDERGROUND METAL AND NONMETAL MINES

3. The authority citation for part 57 continues to read as follows:

Authority: 30 U.S.C. 811.

4. In § 57.18002, revise paragraph (a) introductory text, the second sentence of paragraph (b), and paragraph (c) to read as follows:

§ 57.18002 Examination of working places.

(a) A competent person designated by the operator shall examine each working place at least once each shift before work begins or as miners begin work in that place for conditions that may adversely affect safety or health.

\* \* \* \* \*

(b) \* \* \* The record shall contain the name of the person conducting the examination; date of the examination; location of all areas examined; and description of each condition found that may adversely affect the safety or health of miners and is not corrected promptly.

(c) When a condition that may adversely affect safety or health is not corrected promptly, the examination record shall include, or be supplemented to include, the date of the corrective action.

\* \* \* \* \*

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