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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: Final rule.

SUMMARY: On January 23, 2017, the Mine Safety and Health Administration published a final rule (January 2017 rule) amending provisions regarding examinations of working places in metal and nonmetal mines which were later stayed. MSHA is further amending the affected provisions following expiration of the stay. These additional amendments provide mine operators additional flexibility in managing their safety and health programs and reduces regulatory burdens without reducing the protections afforded miners. A document announcing stakeholder meetings is published concurrently with this rule in the Federal Register.

DATES: Effective June 2, 2018.

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Availability of Information

Federal Register Publications: Access rulemaking documents electronically at <http://www.msha.gov/regsinfo.htm> or

<http://www.regulations.gov> [Docket Number: MSHA-2014-0030].

Obtain a copy of a rulemaking document from the Office of Standards, Regulations, and Variances, MSHA, by request to 202-693-9440 (voice) or 202-693-9441 (facsimile). (These are not toll-free numbers.)

E-mail Notification: MSHA maintains a list that enables subscribers to receive an e-mail notification when the Agency publishes rulemaking documents in the *Federal Register*. To subscribe, go to <http://www.msha.gov/subscriptions/subscribe.aspx>.

I. Introduction

Under the Federal Mine Safety and Health Act of 1977 (Mine Act), mine operators, with the assistance of miners, have the primary responsibility to prevent the existence of unsafe and unhealthful conditions and practices. Operator compliance with safety and health standards and implementation of safe work practices provide a substantial measure of protection against hazards that cause accidents, injuries, and fatalities. Effective working place examinations are a fundamental accident prevention tool used by operators of metal and nonmetal (MNM) mines. They allow operators to identify and correct adverse conditions that may affect the safety and health of miners and

violations of safety and health standards before they cause injury or death to miners.

MSHA's final rule makes changes to §§ 56.18002(a) and 57.18002(a), § 56.18002(b) and (c), and § 57.18002(b) and (c) as amended by the Agency's final rule on examinations of working places that was published on January 23, 2017 (January 2017 rule) (82 FR 7680 at 7695). MSHA's changes to §§ 56.18002(a) and 57.18002(a) require that a competent person 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 final rule also amends §§ 56.18002(b) and 57.18002(b) to require that the working place examination record include a description of each condition found that may adversely affect the safety or health of miners and is not corrected promptly. Lastly, MSHA's final rule makes a conforming change and amends §§ 56.18002(c) and 57.18002(c) to require that when a condition that may adversely affect the safety or health of miners is not corrected promptly, the examination record shall include, or be supplemented to include, the date of the corrective action.

This final rule does not address longstanding concepts, definitions in existing MNM standards, and clarifications related to competent person, working place,

promptly, and adverse conditions, as noted in the preamble to the January 2017 rule.

After consideration of comments received on the September 12, 2017 notice of proposed rulemaking, the Agency concludes that the final rule will reduce the regulatory burden and increase flexibility for mine operators without reducing protections for miners and is consistent with the Administration's initiatives to reduce and control regulatory costs.

A. Regulatory History

On January 23, 2017, MSHA published a final rule, *Examinations of Working Places in Metal and Nonmetal Mines*, amending the Agency's standards for the examinations of working places in MNM mines, 30 CFR 56.18002 and 57.18002 (82 FR 7680). The January 2017 rule was scheduled to become effective on May 23, 2017. On May 22, 2017, MSHA published a final rule delaying the effective date to October 2, 2017 (82 FR 23139).

On September 12, 2017, MSHA proposed to further delay the effective date of the final rule from October 2, 2017 to March 2, 2018 (82 FR 42765). On October 5, 2017, MSHA published a final rule that stayed the amendment from the January 2017 rule until June 2, 2018 (82 FR 46411). Also, the October 5, 2017 final rule reinstated, as 30 CFR

56.18002T and 57.18002T, the provisions of the working place examination standards that were in effect as of October 1, 2017; these temporary provisions expire June 2, 2018 (82 FR 46411). (Sections 56.18002T and 57.18002T are subsequently referenced in this document as the "standards in effect".) Also, on September 12, 2017, MSHA proposed a limited reopening of the rulemaking record for the January 2017 rule and proposed amendments to the January 2017 rule. The proposed changes that MSHA published for comment were limited to: 1) when working place examinations must begin; and 2) the adverse conditions and corrective actions that must be included in the working place examinations record (82 FR 42757). Specifically, MSHA proposed amending the introductory text of §§ 56.18002(a) and 57.18002(a) to require that an examination of a working place be conducted before work begins, or as miners begin work in that place. The Agency also proposed amending §§ 56.18002(b) and (c) and 57.18002(b) and (c) to require that the examination record include descriptions of adverse conditions that are not corrected promptly, and the dates of corrective action. MSHA held four public hearings from October 24, 2017, to November 2, 2017, at various locations, to provide the members of the public an opportunity to present their views on the limited proposed changes. These hearings were held

in Arlington, Virginia; Salt Lake City, Utah; Birmingham, Alabama; and Pittsburgh, Pennsylvania. The comment period for the proposed limited changes closed on November 13, 2017.

B. Executive Orders 12866, 13563, and 13771 Summary

Based on its evaluation of the costs and benefits, MSHA has determined that this final rule will not have an annual effect of \$100 million or more on the economy and, therefore, will not be an economically significant regulatory action pursuant to section 3(f) of Executive Order (E.O.) 12866. MSHA estimates that the total undiscounted costs (using 2016 dollars) of the final rule over a 10-year period will be approximately -\$276 million, -\$235.4 million at a 3 percent rate, and -\$193.8 million at a 7 percent rate. The same annual cost savings occur in each of the 10 years so the cost annualized over 10 years will be approximately -\$27.6 million for all discount rates. This final rule is an E.O. 13771 deregulatory action. Negative cost values are cost savings that result in a positive net benefit. MSHA estimates that this final rule results in annual cost savings of \$27.6 million. Details on the estimated cost savings of this final rule can be found in the rule's economic analysis.

II. Regulatory Procedures

On October 5, 2017, MSHA published a final rule staying the amendments from the January 2017 rule and temporarily reinstating the working place examinations standards that were in effect as of October 1, 2017, until June 2, 2018 (82 FR 46411). MSHA is confirming that both the stay and temporary provisions expire June 2, 2018.

III. Section-by-Section Analysis

After further review of the rulemaking record in the September 12, 2017 Federal Register notice of proposed rulemaking, MSHA requested comments and information from the mining community only on the limited changes in the proposed rule-- that is the timing of the working place examination and the recording of adverse conditions and corrective action dates in the examination record -- and how these proposed changes may affect the safety and health of miners. MSHA also solicited comments on cost and benefit estimates presented in the preamble to the proposed rule and on the data and assumptions the Agency used to develop these estimates. This included the Agency's assumptions on the number of instances adverse conditions are promptly corrected, and time saved by not requiring these corrected conditions to be included in the record.

MSHA received many comments related to issues other than those that were proposed. For example, commenters

indicated that amendments to standards in effect are not needed or are not justified. Many stated the working place examination standards in effect which have been in effect since 1979 are sufficient and effective in identifying and correcting conditions that may adversely affect the safety and health of miners and in reducing accidents and injuries in the work place. In some cases, commenters suggested alternatives that included, for example, better mine and miner training, and work place inspection programs and plans.

MSHA has not considered or addressed comments on issues other than those proposed because they are outside the scope of this rulemaking. The Agency's purpose for the limited reopening of the rulemaking record for the January 2017 rule, and for issuing a proposed rule, was to reconsider issues related to the timing of the examination and the recording of adverse conditions and corrective actions in the examination record.

Many commenters generally indicated that the changes in the proposed rule were improvements to the January 2017 rule, but several expressed concerns that the proposal did not go far enough in reducing mine operators' regulatory and cost burdens. Some also maintained that the proposal would not increase miners' protections at MNM mines, but

would increase mine operators' administrative and paperwork burdens.

One commenter stated that the proposed changes offer additional flexibility for operators to manage their safety and health programs more efficiently, while reducing burden without compromising miners' safety and health.

MSHA agrees that the proposed changes to the January 2017 rule would reduce mine operators' burdens without compromising the safety and health of miners. Under the final rule, like the proposal, mine operators will have more flexibility on when to conduct their working place examinations. Furthermore, compared to the January 2017 rule, the examination record will be less burdensome for operators since only those adverse conditions that are not corrected promptly, and dates of corrective actions for those conditions, must be included in the record. MSHA concludes that the final rule changes will reduce the regulatory burden and provide operators flexibility, without reducing the safety and health protections afforded miners.

A. Before Work Begins or as Miners Begin Work

This final rule, consistent with the proposed rule, amends the introductory text of §§ 56.18002(a) and 57.18002(a) and requires a 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 final rule amends the January 2017 provisions to allow miners to enter a working place at the same time that the competent person conducts the examination. The January 2017 rule required the examination of each working place to be conducted before miners begin work in that place.

Many commenters, including some who stated the proposed change to the timing of the examination is an improvement, stated that the proposed rule continues to unnecessarily constrain when operators can conduct their examinations. The reasons commenters gave included that shifts vary and that circumstances and conditions often change during the shift. Some commenters expressed concern that operators need flexibility to conduct examinations at any time during the shift as circumstances dictate, particularly to address changing conditions and hazards that can occur at any time throughout the shift. One of these commenters stated that requiring work place exams to be performed before miners begin working implicitly means that exams would take place before conditions start to change. One commenter commented that, generally, it is a good practice to conduct the exam before anybody enters the

work area, whether at the start of the shift or later in the day. This same commenter acknowledged that unsafe conditions can occur throughout the shift and that operators are not relieved from their ongoing obligation to provide a safe and healthy work environment under the Mine Act simply because a work place exam was done. Another commenter stated that the industry's existing practice of conducting these examinations during the shift constitutes a best safety practice. According to the commenter, operators know their work processes best, and are in the best position to tailor their examination practices to occur at a time that would provide the maximum safety benefit to miners. The majority of commenters expressed their support for retaining the standards in effect which, as previously noted in this preamble, is not within the scope of this rulemaking.

In response to commenters' concerns, MSHA does not believe this final rule restricts operators' ability to conduct their examinations, or restricts their ability to conduct as many examinations as they need, depending on work place conditions. The final rule provides operators more flexibility in scheduling examinations than the January 2017 rule. Rather than requiring that examinations occur only before work begins in a working place, the final

rule provides the option for a competent person to perform the examination at the same time that miners begin working in that place. With this option available, operators will be better able to manage work schedules to comply with examination requirements without incurring additional costs and burden.

In addition, MSHA recognizes that mining operations have dynamic work environments where conditions are always changing. For that reason, mine operators and miners need to be aware of conditions that may occur at any time that could affect the safety and health of miners. The final rule requires that examinations be conducted at least once per shift before work begins or as miners begin work in that place. As a best practice, operators should perform examinations, consistent with what one commenter stated, to identify and correct adverse conditions as they occur throughout the shift. Other commenters indicated that their companies' practices already include work place examinations that continue during the shift.

Furthermore, as stated in the preamble to the January 2017 rule, MSHA acknowledges 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). In these cases, MSHA will continue to permit mine operators to conduct an examination on the previous shift. However, as MSHA stated in the January 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 miners' potential exposure to conditions that may adversely affect their safety or health.

One commenter noted that the change in the proposed rule to allow workers to enter an area at the same time as the competent person does not consider the geographic differences between surface and underground mines and how surface mine supervision differs between the two. The commenter explained that in many cases, due to the geographic locations of crews starting at a surface mine, a competent person would not be able to examine all areas of the mine where several crews of miners would be starting work at the same time.

As indicated in the preamble to the January 2017 rule, it is not MSHA's intent that the mine operator examine the entire mine, unless work is beginning in the entire mine. An examination is only required in those areas where work will be performed. If miners are not scheduled for work in a particular area or place at the mine, that place does not need to be examined.

MSHA also recognizes that there are mines where several crews start work at the same time in different areas of the mine. The competent person designation is not restricted to supervisors and foremen. If designated by the operator as having the required experience and ability, a non-supervisory miner on the crew starting work also may be "competent" to conduct the examination. MSHA believes that existing requirements for competent persons provide flexibility for operators while requiring the level of competency necessary to conduct adequate examinations.

Some commenters did not support the proposed changes stating that allowing examinations as miners begin work in a potentially hazardous area would be less protective than the January 2017 amendments; one commenter stated the proposed revision is contrary to Section 101(a)(9) of the Mine Act. The commenters supported implementing the January 2017 requirement that the examination must occur before miners begin work in a working place. One commenter further questioned how sending miners into their work place before an examination has been conducted can be safer than identifying those hazards beforehand, correcting them, and informing the miners of such hazards before they begin their work. This commenter stated that examinations are particularly effective in the discovery and correction of

hazardous conditions and practices before they lead to injuries or fatalities, that is, if they are conducted before miners are exposed. The commenter further stated the standard should not be changed to allow examinations after miners are already exposed. Another commenter did not support the changes, describing them as cutbacks in safety regulations, stating that lives will be lost and that the money saved is insignificant.

While this final rule allows miners to enter a working place at the same time a competent person examines for adverse conditions, as stated in the preamble to the January 2017 rule, MSHA intends for adverse conditions to be identified and miner notification provided before miners are potentially exposed to the conditions. Under this final rule, a competent person will identify adverse conditions that can be corrected promptly and the operator will be responsible for correcting them. Miners will be promptly notified of adverse conditions found that cannot be corrected promptly, and operators will be required to include them in the examination record. This final rule, like the January 2017 rule, will promote early identification and improve communication of adverse conditions. MSHA believes that prudent operators will correct many adverse conditions as competent persons

perform examinations, or as soon as possible after the completion of examinations. For these reasons, MSHA concludes that the requirements in this final rule are as protective as those in the January 2017 rule. Under this final rule, adverse conditions will be identified and miners will be notified of those adverse conditions that are not promptly corrected, before they are potentially exposed.

Also, this final rule, like the January 2017 rule, does not require a specific time frame for the examination to be conducted. However, whether conducted before work begins in a working place or as work begins in that place, the examination should be conducted within a time frame sufficient to assure any adverse conditions would be identified before miners are potentially exposed.

Some commenters supported the option to allow examinations to be performed as miners begin work in a working place. One commenter noted that it is best to train miners to perform examinations of their own working areas, and thus appropriate to allow examinations as they begin work. Another commenter stated that the change would maintain safe working conditions and provide sufficient flexibility for operators to conduct an examination while not interrupting the transition of shifts. This commenter

pointed out that if only a pre-shift exam were required, as in the January 2017 rule, the start of the shift would be delayed to provide time for completion of the exam and communication of adverse conditions, or require personnel to arrive before the shift, resulting in overtime pay and/or delay of work.

The final rule allows mine operators to perform examinations at the same time miners begin work. This provides operators with additional flexibility in scheduling working place examinations.

B. Record of Adverse Conditions

Sections 56.18002(b) and 57.18002(b), like the proposal, require mine operators to make a record of the working place examination and to include, among other information, a description of each condition found that may adversely affect the safety or health of miners that is not corrected promptly. The January 2017 rule required that each adverse condition be listed in the examination record. This final rule reduces the mine operator's recordkeeping burden by requiring that the examination record include only a description of each adverse condition that is not corrected promptly. A similar conforming change to §§ 56.18002(c) and 57.18002(c) requires that the examination record include the dates of corrective actions for only

those adverse conditions that are not corrected promptly. In response to comments, the Agency concludes that providing a mine operator an exception to the recordkeeping requirement for conditions that are corrected promptly provides increased incentive to correct conditions promptly, without reducing protections for miners' safety and health. The Agency also believes that this action will likely result in operators' correcting adverse conditions more quickly, and thereby improving protections for miners.

Consistent with the explanation in the preamble to the January 2017 rule regarding miner notification requirements in §§ 56.18002(a)(1) and 57.18002(a)(1), MSHA interprets promptly to mean before miners are potentially exposed to adverse conditions. In the preamble, MSHA stated that if adverse conditions in the work area are corrected before miners are potentially exposed, notification is not necessary because no miners are exposed to the adverse conditions. Similarly, an adverse condition that is corrected promptly no longer presents a danger to miners, and a description of the adverse condition would not be required as part of the examination record. Similarly, if an adverse condition is not promptly corrected, the mine operator must notify miners and record it in the examination record.

In addition, the purpose of the working place examinations rulemaking is to ensure that adverse conditions will be timely identified, communicated to miners, and corrected, thereby improving miners' safety and health. This final rule reduces the mine operator's recordkeeping burden but does not reduce the protections afforded miners under the January 2017 rule. Consistent with industry best practices, and with comments, MSHA recognizes that prudent mine operators routinely correct many adverse conditions during the examination, or as soon as possible after the completion of the working place examination, and that the corrective action may be taken by the competent person or someone else. For these reasons, the final rule requires the mine operator to record only those conditions that are not promptly corrected and that may expose miners to adverse conditions affecting their safety and health.

In the preamble to the January 2017 rule, MSHA explained that recording all adverse conditions, even those that are corrected promptly, would be useful in identifying trends and areas that could benefit from an increased safety emphasis. While this may be true, MSHA also believes that a recording exception for adverse conditions that are corrected promptly will yield as much or more in

safety benefits, because it encourages prompt correction of adverse conditions.

Some commenters opposed the proposed changes to the examination record provisions and expressed their support for implementing requirements of the January 2017 rule. These commenters suggested that all adverse conditions identified during a working place examination must be recorded to encourage mine operators to explore the possible causes of those conditions and to take appropriate corrective actions.

Consistent with the purpose of the January 2017 rule, amending §§ 56.18002(b) and 57.18002(b) reduces the mine operator's burden in recording each adverse condition and encourages prompt correction by requiring that the record include only those conditions that are not corrected promptly and may affect the safety and health of miners.

Most commenters, however, were generally receptive to the proposed changes to the examination record requirements. They expressed that the changes were an improvement over the January 2017 rule and provided more flexibility for operators. Some noted that many adverse conditions are found and corrected during the examination. Others pointed out that requiring all adverse conditions be recorded in the examination record would overwhelm the

record with minor housekeeping issues, and the proposed change would reduce the regulatory burden on the operator. Another commenter stated that removing the requirement to record all adverse conditions will provide an incentive for operators to take corrective actions immediately.

MSHA agrees with these commenters and concludes that requiring mine operators to record only those adverse conditions that are not corrected promptly is as protective as the January 2017 rule. When a mine operator is not required to record an adverse condition which is corrected promptly in the examination record, the mine operator is incentivized to correct these conditions.

Many commenters suggested that MSHA revise the examination record requirement to include only those adverse conditions not corrected during the shift, instead of the proposed requirement to include those not corrected promptly. They articulated that the reason for the record is to document adverse conditions that were not corrected timely and still need to be corrected. Some indicated that their recommended exception is consistent with the requirement that the mine operator make the record before the end of the shift.

Recording adverse conditions that are not corrected promptly, rather than those corrected anytime during the

shift as suggested by commenters, provides increased incentive for the mine operator to correct the adverse conditions sooner and reduces the risk of accidents, injuries, or illnesses.

MSHA's change to the examination record requirements will reduce the operators' regulatory burden, while continuing to provide equivalent protection to miners' safety and health.

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 final rule is an E.O. 13771 deregulatory action. MSHA believes that this rule reflects industry best practices and the estimated cost savings will likely be realized. As discussed in this section, MSHA estimates that this final rule results in annual cost savings of \$27.6 million¹.

Under E.O. 12866, MSHA must determine 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 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

¹ Except where noted, the analysis presents all dollar values using 2016 dollars.

arising out of legal mandates, the President's priorities, or the principles set forth in this Executive Order.

Based on its evaluation of the costs and benefits, MSHA has determined that this final rule will not have an annual effect of \$100 million or more on the economy and, therefore, will not be an economically significant regulatory action pursuant to section 3(f) of E.O. 12866.

A. Affected Employees and Revenue Estimates

The final rule applies to all MNM mines in the United States. 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.² Table 2 presents the hours worked and revenue produced at MNM mines by mine size.

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	\$22,289
20-500 Employees	153,459,578	\$40,920
501+ Employees	35,396,747	\$11,390
Total	278,757,594	\$74,600

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

B. Baseline

MSHA estimated that the January 2017 rule would have resulted in \$34.5 million in annual costs for the MNM industry. The Agency estimated that the total undiscounted cost over 10 years would have been \$345.1 million; at a 3 percent discount rate, \$294.4 million; and at a 7 percent discount rate, \$242.4 million.

For the January 2017 rule, MSHA estimated costs associated with conducting an examination before miners begin work, the additional time to make a record, and providing miners' representatives a copy of the record. In

² Revenue estimates are from U.S. Geological Survey, 2017, Mineral Commodity Summaries 2017: U.S. Geological Survey, 202 pages, <https://doi.org/10.3133/70180197>, p. 9.

the preamble to the January 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). In addition, MSHA considered the following variables: 1) percent of mine operators currently conducting workplace examinations before miners begin work; 2) number of shifts by mine size; 3) average time to conduct a workplace examination by mine size; 4) hourly wage rate; and 5) number of days a mine operates, on average, by mine size. The hourly wage rate used in MSHA's analysis assumes an average rate for all MNM mines. Like the January 2017 rule, wage rates for this final rule are from the U.S. Department of Labor's Bureau of Labor Statistics (BLS), Occupation Employment Statistics (OES). For this final rule, MSHA applied 2016 wage and employment data to the January 2017 rule cost estimate to calculate a baseline. In the January 2017 rule, MSHA estimated that a mine operator would pay overtime for a competent person to arrive before the shift begins to conduct the working place examination. MSHA also estimated the cost for overtime as time and a half ($52.92/\text{hr} = \$35.28 \times 1.5$). MSHA retained the calculations and assumptions used in the January 2017 rule to conduct the examination before miners begin work. The revised annual cost base is \$27.6 million, or an

approximate \$0.7 million increase. The updated annual cost consists of:

- \$5.13 million = 10,428 mines with 1-19 employees x 15 percent x 20 minutes x 1 hr/60 min x \$52.92 wage x 1.1 shifts per day x 1 exam x 169 workdays per year;
- \$20.72 million = 1,174 mines with 20-500 employees x 65 percent x 1 hour x \$52.92 wage x 1.8 shifts per day x 1 exam x 285 workdays per year; and
- \$1.75 million = 22 mines with 501+ employees x 85 percent x 2.5 hours x \$52.92 wage x 2.2 shifts per day x 1 exam x 322 workdays per year.

In the January 2017 rule, MSHA estimated the cost of making a record of each examination before the end of the shift for which the examination was conducted. MSHA retained the calculations and assumptions used for this cost estimate (82 FR 7691). The revised annual cost base, which was updated for wage inflation and final 2016 data on the number of mines in operation, is \$7.516 million, an approximate \$216,000 increase. The updated annual cost consists of:

- \$5.70 million = 10,428 mines with 1-19 employees x 1.1 shift per day x 1 exam record x 169 workdays per year

x 5 additional minutes x 1 hr/60 min x \$35.28 per hour;

- \$1.77 million = 1,174 mines with 20-500 employees x 1.8 shifts per day x 1 exam record x 285 workdays per year x 5 additional minutes x 1 hr/60 min x \$35.28 per hour; and

- \$45,816 = 22 mines with 501+ employees x 2.2 shifts per day x 1 exam record x 322 workdays per year x 5 additional minutes x 1 hr/60 min x \$35.28 per hour.

MSHA also retained the calculations and assumptions used to estimate the costs of making a copy of the examination record and providing it to miners' representatives. The annual costs, which were also updated for wage inflation and the number of mines in operations, consist of:

- \$137,121 = 10,428 mines with 1-19 employees x 10 percent x 1.1 shifts per day x 169 workdays per year x ((1 minute x \$24.44 per hour) + \$0.30 copy costs);
- \$213,000 = 1,174 mines with 20-500 employees x 50 percent x 1.8 shifts per day x 285 workdays per year x ((1 minute x \$24.44 per hour) + \$0.30 copy costs); and

- $\$11,024 = 22 \text{ mines with } 501+ \text{ employees} \times 100 \text{ percent} \times 2.2 \text{ shifts per day} \times 322 \text{ workdays per year} \times ((1 \text{ minute} \times \$24.44 \text{ per hour}) + \$0.30 \text{ copy costs})$.

The revised annual cost base is \$.361 million, an approximate \$15,000 increase.

C. Net Benefits

Net benefits are the result of subtracting costs from benefits. As detailed in the Benefits and Compliance Cost sections below, no monetized benefits minus the cost savings of -\$27.6 million results in a net benefit of \$27.6 million annually undiscounted as well as the same value at discount rates of 7 and 3 percent.

D. Benefits

As previously stated, this final rule modifies §§ 56.18002(a) and 57.18002(a) that required the examination be conducted before miners begin work in that place to also allow an examination to be as miners begin work in that place. In addition the final rule modifies §§ 56.18002(b) and 57.18002(b) to require a description of each adverse condition found that is not corrected promptly. MSHA's final rule also modifies §§ 56.18002(c) and 57.18002(c) to require that the examination record include, or be supplemented to include, the date of the

corrective action for conditions that are not corrected promptly.

MSHA does not believe the changes to the January 2017 rule reduce the protections afforded miners. As MSHA stated in the preamble to the January 2017 rule, the Agency was unable to separate quantifiable benefits from the January 2017 rule from those benefits attributable to conducting a workplace examination under the standards in effect. MSHA continues to anticipate, however, that there will be benefits from more effective and consistent working place examinations that help to ensure that adverse conditions will be timely identified, communicated to miners, and corrected. MSHA anticipates that the record requirements will improve accident prevention by helping mine operators identify any patterns or trends of adverse conditions and preventing these conditions from recurring. Since MSHA was unable to quantify benefits for this rulemaking, MSHA is not claiming a monetized benefit for this final rule.

E. Compliance Costs

The costs of this final rule are associated with conducting examinations of a working place as miners begin work in that place. For the January 2017 rule estimate, MSHA assumed that operators could have incurred overtime

costs, hiring costs, or experience rescheduling costs to comply with the requirement that an examination occur before miners began work. Under this rulemaking, MSHA estimated that mine operators would not incur these costs. MSHA solicited comments, but did not receive specific data or information on the Agency's assumptions or costs saving estimate.

MSHA did not change the longstanding definition related to "competent person." Many commenters recognized that MSHA did not propose changing this definition and, that in many mines, miners are trained and perform as competent persons. However, other commenters considered the requirement that a competent person perform the examination to be a new cost. In addition, the standards in effect require a competent person designated by a mine operator to examine each working place at least once per shift. Therefore, requiring a competent person to perform the examination is not a new cost.

Some commenters suggested that mine operators would incur other costs related to the January 2017 rule due to differences in physical mine sizes, or differences between underground and surface mining operations, and these amendments did not eliminate all of the timing costs attributable to the 2017 rule. However, these commenters

did not provide MSHA sufficient data or information for the Agency to quantify the costs associated with the differences in mine size or mining operations. Further, MSHA's estimates represent averages; individual mines have costs above and below the average.

The January 2017 rule also specified the contents of the examination record, which included a requirement that the record include a description of all adverse conditions found. Under this final rule, MSHA reduces the mine operators' burden by modifying the required contents of the examination record. The final rule requires that the examination record include a description of each adverse condition that is not corrected promptly, and no longer requires a record of adverse conditions that are corrected promptly. MSHA solicited 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 corrected conditions to be included in the record. MSHA did not receive data or information in response to this request; therefore, the Agency has estimated no change in costs related to the change to the recordkeeping requirements. The following table reports the published January 2017 rule costs, updates to the baseline, and the final rule's cost savings (cost

reductions have a negative sign and are a cost savings). As the table reports, only the timing of the examination has a cost impact for this rulemaking.

Table 3: Undiscounted Costs, Changes, and Regulatory Savings (Annual Values, millions, 2016 Dollars except as noted)

	Record Keeping	Examination Timing	Total (may not sum due to rounding)
Costs as published in Jan. 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 revised baseline for Jan. 2017 rule	7.88	27.60	35.47
Regulatory savings of final rule (change from updated baseline, negative values = cost savings)	0.00	-27.60	-27.60

Overhead Costs

MSHA did not include an overhead labor cost in the economic analysis for this final rule. It is also important to note that there is not one broadly accepted overhead rate, and the use of overhead rate to estimate the marginal costs of labor raises a number of issues that

should be addressed before applying overhead costs to analyze costs of any 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 percent³, and the Employee Benefits Security Administration has used 132 percent on average⁴. 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

³ U.S. Environmental Protection Agency, "Wage Rates for Economic Analyses of the Toxics Release Inventory Program," June 10, 2002.

⁴ 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>.

accuracy (e.g., computer use costs associated with 2 hours for rule familiarization by an existing employee).

Guidance on implementing Executive Order 13771⁵ 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.

The cost estimate for the January 2017 rule did not include overhead. If, for this rule, MSHA had included an overhead rate when estimating the marginal cost of labor 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, 17 percent more than costs previously projected. This increase in savings of \$4.7 million is the same as the 17 percent overhead rate because all rule costs are labor costs and therefore total costs change in direct proportion to the overhead rates selected. MSHA will continue to study overhead costs to ensure regulatory costs are appropriately attributed without double counting or

⁵ 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>.

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.⁶ The negative value of the PMT function provides the annualized cost over 10 years at 3 and 7 percent discount rates using the function's end of period option.

MSHA estimates that the total undiscounted costs of the final rule over a 10-year period will 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. The same annual cost savings occurs in each of the 10 years so the cost annualized over 10 years will be approximately -\$27.6 million.

⁶ Office of Management and Budget, Office of Information and Regulatory Affairs, Regulatory Impact Analysis: Frequently Asked Questions, February 7, 2011.

V. Feasibility

A. Technological Feasibility

The final rule contains examination timing and recordkeeping requirements and is not technology-forcing. MSHA concludes that the final rule will be technologically feasible.

B. Economic Feasibility

MSHA established the economic feasibility of the January 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 January 2017 rule was economically feasible for the mining community. This final rule creates a cost savings of -\$27.6 million annually compared to the January 2017 rule. Although the associated revenues decreased slightly from the January 2017 rule estimate of \$77.6 billion in 2015 to approximately \$74.6 billion for 2016, the costs retained from the January 2017 rule of approximately \$7.9 million per year remain well less than one percent of revenues and the net decrease in costs (-\$27.6 million annually) is even more supportive of the Agency's conclusion. MSHA concludes that the final rule will 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**

In the proposed rule, *Examinations of Working Places in Metal and Nonmetal Mines*, MSHA requested comments on its proposed certification. MSHA has reviewed comments pursuant to the Regulatory Flexibility Act (RFA) of 1980, as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA). For the RFA considerations and certification, MSHA has included the impact of the final rule on small entities only as defined by the Small Business Administration. Based on that analysis, MSHA certifies that this final rule will not have a significant economic impact on a substantial number of small entities. The Agency, therefore, is not required to develop a final 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. Although the description of the base costs in the Baseline section includes various mine sizes, MSHA has not established an alternative definition and, therefore, must use SBA's definition. MSHA's traditional definition of a small mine (1-19 employees) is used to assist the mining community understand MSHA's compliance cost estimates and not intended to determine the impact of the final rule on small entities, as required.

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 SBA standards, definitions, and the 2017 NAICS updates for the screening analysis of the final rule. To align MSHA's data with the SBA definitions, the Agency used the largest value of total mine employment identified by total employment reported to MSHA by the mine operators, total controller employment, or total employment identified from MSHA's research.

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 adjusted 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 exceeds one percent of revenues, MSHA investigates whether further analysis is required. For small entities impacted by this final rule, MSHA used the average per mine cost savings and average revenues per mine (See Table 2) to estimate the revenue at \$40.4 billion and costs savings at \$17.2 million (subtracting negative costs results in a positive).

As a percentage, the absolute value of the impact is approximately 0.04 percent ($\$17.2 \text{ million} / \40.4 billion); therefore, using the threshold analysis, MSHA concludes no further analysis is required and concludes the final rule will not have a significant impact on a substantial number

of small entities. Table 4 shows the estimate of impact by NAICS code.

Table 4: Small entity impact by NAICS code

NAICS	NAICS Description	Small Standard (maximum employees)	No. Small Mines	Revenue Small Mines (\$ millions)	One Percent of Revenues (\$millions)	Cost Savings for Small Mines (\$millions, savings are positive)	Cost Exceeds 1 Percent (absolute value)
211111	Crude Petroleum and Natural Gas Extraction	1,250	6	16	0	0.0	No
212210	Iron Ore Mining	750	24	1,671	17	0.3	No
212221	Gold Ore Mining	1,500	116	2,125	21	0.4	No
212222	Silver Ore Mining	250	8	155	2	0.0	No
212230	Copper, Nickel, Lead, and Zinc Mining	750	40	2,423	24	0.5	No
212291	Uranium-Radium-Vanadium Ore Mining	250	3	85	1	0.1	No
212299	All Other Metal Ore Mining	750	11	205	2	0.1	No
212311	Dimension Stone Mining and Quarrying	500	762	2,993	30	1.8	No
212312	Crushed and Broken Limestone Mining and Quarrying	750	1,320	7,102	71	3.3	No
212313	Crushed and Broken Granite Mining and Quarrying	750	146	1,310	13	0.7	No
212319	Other Crushed and Broken Stone Mining and Quarrying	500	1,048	4,030	40	2.2	No
212321	Construction Sand and Gravel Mining	500	5,278	9,550	95	4.4	No
212322	Industrial Sand Mining	500	232	1,182	12	0.7	No
212324	Kaolin and Ball Clay Mining	750	9	226	2	0.1	No
212325	Clay and Ceramic and Refractory Minerals Mining	500	211	1,380	14	0.9	No
212391	Potash, Soda, and Borate Mineral Mining	750	8	936	9	0.1	No
212392	Phosphate Rock Mining	1,000	8	556	6	0.1	No

212393	Other Chemical and Fertilizer Mineral Mining	500	46	603	6	0.3	No
327310	Cement Manufacturing	1,000	39	2,114	21	0.7	No
327410	Lime Manufacturing	750	32	985	10	0.5	No
331313	Alumina Refining and Primary Aluminum Production	1,000	5	728	7	0.1	No
Grand Total (totals do not sum due to rounding)	n/a	n/a	9,352	40,374	404	17.2	No

VII. Paperwork Reduction Act of 1995

The final changes due to this rulemaking are unlikely to change the number of collections or respondents in the currently approved collection 1219-0089. The recordkeeping change from the January 2017 rule may reduce the burden 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 the September 2017 proposed rule preamble (82 FR 42761). MSHA received a comment accepting the conclusion and other comments stating the requirement to record all adverse conditions was overly burdensome. MSHA revised the regulatory requirement to reduce the burden but did not receive any comments with information that would help MSHA decrease the burden estimate. MSHA concludes that the previously approved collection 1219-0089 remains representative and is not

requesting any change to the burden estimate in the approved collection.

VIII. Other Regulatory Considerations

A. The Unfunded Mandates Reform Act of 1995

MSHA has reviewed the final rule under the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1501 *et seq.*). MSHA has determined that this 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 final 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 final rule will 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 final 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 final rule and has determined that it will 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 final 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 final 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 January 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 final rule will have a net cost savings, MSHA has concluded that it will 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.

David G. Zatezalo,
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 amending parts 56 and 57 of title 30 of the Code of Federal Regulations 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. Revise § 56.18002 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.

(1) The operator shall promptly notify miners in any affected areas of any conditions found that may adversely affect safety or health and promptly initiate appropriate action to correct such conditions.

(2) Conditions noted by the person conducting the examination that may present an imminent danger shall be brought to the immediate attention of the operator who shall withdraw all persons from the area affected (except persons referred to in section 104(c) of the Federal Mine Safety and Health Act of 1977) until the danger is abated.

(b) A record of each examination shall be made before the end of the shift for which the examination was

conducted. 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.

(d) The operator shall maintain the examination records for at least one year, make the records available for inspection by authorized representatives of the Secretary and the representatives of miners, and provide these representatives a copy on request.

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. Revise § 57.18002 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.

(1) The operator shall promptly notify miners in any affected areas of any conditions found that may adversely affect safety or health and promptly initiate appropriate action to correct such conditions.

(2) Conditions noted by the person conducting the examination that may present an imminent danger shall be brought to the immediate attention of the operator who shall withdraw all persons from the area affected (except persons referred to in section 104(c) of the Federal Mine Safety and Health Act of 1977) until the danger is abated.

(b) A record of each examination shall be made before the end of the shift for which the examination was conducted. 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.

(d) The operator shall maintain the examination records for at least one year, make the records available for inspection by authorized representatives of the Secretary and the representatives of miners, and provide these representatives a copy on request.

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