BRUCE WATZMAN
Senior Vice President, Regulatory Affairs

December 29, 2017

Mr. Michael A. Chance
Director
Division of Coal Mine Workers' Compensation
200 Constitution Avenue, NW
Room S-3323
Washington, DC 20210

Dear Director Chance:

These comments are submitted on behalf of the members of the National Mining Association (NMA) in response to the Proposed Collection of Information notice published in the Federal Register on Oct. 30, 2017 (82 Fed. Reg. 50166). We appreciate having the opportunity to provide comments.

We understand the challenging process involved in standardizing the self-insurance requirements, however, our members have raised a variety of significant concerns which are outlined below. Based on these, NMA objects to the notice's proposed information collection requirements and urges the department to withdraw the new submittal requirements.

Initially, we find the proposed collection of information to be an apparent attempt to re-write, under the guise of data collection, the regulations governing the authorization for self-insurance under 20 CFR § 726.101 – 104 and § 726.112. As such, the process pursued by the Department violates the protections afforded by mine operators under the Federal Mine Safety and Health Act and the Administrative Procedures Act (APA). Both statutory regimes define the process that a federal agency's must pursue when promulgating new, or revising existing, regulatory requirements.

As the Department well knows, before an agency adopts a rule carrying the force and effect of law, the APA requires it to comply with a specific set of procedures: it must issue a "notice of proposed rulemaking"; "give interested parties an opportunity to participate in the rulemaking through submission of written data, views, or arguments"; and promulgate a final rule only "[a]fter consideration of the relevant matter presented." 5 U.S.C. § 553(b)-(d). A rule issued in violation of these requirements must be set aside. *See U.S. Steel Corp. v. EPA*, 595 F.2d 207, 212-13, 215 (5th Cir. 1979).

As one of the APA's sponsors noted, the APA is "a bill of rights for the hundreds of thousands of Americans whose affairs are controlled or regulated by federal government agencies." It is these fundamental rights that the Department is denigrating by the process being employed to promulgate a significant rule masquerading as a benign data collection vehicle for self-insured mine operators.

While the Department has issued a "notice" concerning the proposed information collection, it has failed to identify with any specificity the full scope of its intended actions. "One of the basic procedural requirements of administrative rulemaking is that an agency must give adequate reasons for its decisions," including when it changes its policy. *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016). An agency therefore "must at least 'display awareness that it is changing position' and 'show that there are good reasons for the new policy,'" as "an 'unexplained inconsistency' . . . is a 'reason for holding an interpretation to be an arbitrary and capricious change.'" *Id.* at 2126 (brackets omitted).

And where – as here – the "prior policy has engendered serious reliance interests," an even "more detailed justification" becomes necessary. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). That is because rubberstamping a shift in positions that "impose[s] potentially massive liability . . . for conduct that occurred well before that interpretation was announced . . . would seriously undermine the principle that agencies should provide regulated parties 'fair warning of the conduct a regulation prohibits or requires," and "result in precisely the kind of 'unfair surprise'" administrative law condemns. *See Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2167 (2012) (brackets omitted). In issuing the "proposed Collection of Information; Comment Request," the Department is ignoring these basic principles.

Before this new information collection regime's announcement, the Department gave no hint about the changes contemplated under the self-insurance rules. And, indeed, long-established regulations already standardize and control the information to be submitted by proposed self-insurers. *See* 20 C.F.R. §726.102. While the Department characterizes the newly proposed collection requirements as merely providing "OWCP with sufficient information to determine whether a coal mine operator should be (or continue to be) authorized to self-insure," the proposal appears to be designed to go much further since regulations already control the provision of such information.

The information that operators will have to provide and the stipulation for filing a parental guarantee expand well beyond the existing regulatory requirements and impose a level of oversight and financial responsibility not envisioned by the law or the existing regulations. Additionally, the inability or unwillingness of the Department in sharing guidelines for determination of self-insurance qualification implies either a lack of trust in the respondents, or an arbitrary process that it chooses not to disclose.

Make no mistake, the self-insurance program needs reform, but not in the manner the Department proposes. Rather than providing clarity so operators understand the criteria under which their applications will be evaluated, the Department is advancing data collection requirements designed to provide cover to reject operator self-insurance applications.

As all participants in the federal black lung arena know, the marketplace for insuring federal black lung liabilities has been very limited historically, and there have been several insurers that have ceased offering this coverage in recent years. Additionally, where commercial insurance may be available in some limited capacity, it is generally not available at a reasonable cost. This is the reality of the confluence of factors affecting the insurance and surety marketplace. The Department's action defies the intent and spirit of the BLBA and creates the potential, given the withdrawal of insurers from the marketplace, that the Department will become the insurer of last resort under 30 USC 943.

The parental guarantee in particular is a rule of considerable significance that does not exist under current self-insurance regulations. The parental guaranty creates an uninsurable obligation by sellers to insure and pay benefits to miners who no longer work for the original employer and are essentially unknown to the parent. It will significantly impact a self-insurer's ability to buy or sell subsidiary coal properties and may, as a result, effectively deprive all operators of their statutory right to self-insure their liabilities under the black lung program and thus disrupt the normal course of corporate transactions that are common in the coal mining industry. Not only is this change significant but is undeniably a rule under 5 U.S.C. § 551(4) and thus must be published as a proposed rule in accordance with 5 U.S.C. § 553(b). NMA does not believe that such a rule would be legally authorized under the BLBA. Congress did not authorize the Department to intrude upon the ordinary course of commerce in the coal mining industry in this fashion and the Department's attempt to do so under the cover of the Paperwork Reduction Act seems improper and well beyond the authority of the Act.

Of equal significance is the fact that the camouflaged rules in this proposal are in violation of E.O. 13771, prohibiting the promulgation of new rules unless the new proposal identified at least two rules that the Department proposed to repeal. No compliance with this obligation is apparent. It is deeply troubling that the Administration's efforts to promote regulatory reform in all agencies is being flaunted by this proposal.

Further, the new requirement to submit actuarial reports is without foundation. As the Department is aware, past practice has been an annual review of an operator's financial suitability to self-insure for all or some of its black lung obligations. The annual review provided the Department the opportunity to require adjustments to the operator's self-insurance obligations based on the claims experience during the year preceding the review. For reasons unknown to the industry, the annual review process has

languished, leaving operator's in-the-dark on their self-insurance eligibility. Requiring the submittal of actuarial reports that project future, long-term liability is not a substitute for the annual review process. If administered correctly and timely the annual review process negates the need for long-term projections of potential liability often of dubious reliability.

The new application has also expanded the requirements to include three (3) years of payroll data and the types of security/amounts for each state a company self-insures for Worker's Compensation. Both of these requests appear to be excessive knowing that census data for those covered under the Act or insurance are already required and the listing of self-insured states for workers compensation is already provided. Worker's Compensation surety considers traumatic injuries, occupational disease injuries and occupational pneumoconiosis. Requiring submittal of the types of surety and the specific amounts is an excessive request and provides no rationale for maintaining self-insurance.

In conclusion, employers have statutory rights to self-insure under reasonable terms that are affordable and sufficiently protective to ensure the payment of benefits under normal circumstances. The proposal and especially the parental guaranty violate operator's statutory rights, departs from any known self-insurance formula and will have significant adverse consequences for the industry and the free flow of commerce among all mine operators.

We request withdrawal of the newly proposed collection requirement forms. Should the department decide to proceed we insist that our concerns highlighted above will be addressed prior to the department moving forward to finalize any new information collection requirements.

Sincerely,

Bruce Watzman

Cc: Julia Hearthway, Director, OWCP