Response to comments submitted to OIRA

Coal-mine operators must secure their liabilities under the Black Lung Benefits Act (BLBA) by either purchasing commercial insurance or receiving authorization from the Department to self-insure. 30 U.S.C. § 933(a). To become an authorized self-insurer, the operator must apply to the Department, provide relevant information, and provide security in an amount determined by the Department. The security must be in an amount sufficient to ensure continued payment of benefits in the event the operator defaults, which usually occurs in the context of bankruptcy proceedings. *See* 20 CFR § 726.104(a); *see also id.* §§ 726.101-726.111.

The Department updated its BLBA self-insurance authorization process because the prior process was simply not working. The prior process often resulted in security deposits that were insufficient to cover operators' liabilities when they defaulted. Between 2014 and 2017, seven self-insured operators filed for bankruptcy protection. Some of these companies emerged from bankruptcy and they or their successors continued to meet their obligations under the BLBA. But others did not. They went out of business, or discharged liabilities, ceasing to pay black lung benefits. Their benefits liability (which the Department estimates to be approximately $325 million) now must be satisfied by the government's Black Lung Disability Trust Fund (Trust Fund), which pays benefits when there is no financially viable operator. The Trust Fund is currently $5.7 billion in debt to the U.S. Treasury.

Against this background, the Department determined that it could strengthen its self-insurance process by conducting a more robust analysis of both the operators' current financial health and their projected BLBA liabilities. This analysis requires the collection of financial information and actuarial projections of future liabilities from operators seeking authorization to self-insure. Under the updated process, operators will provide security for their black lung obligations in amounts based on their financial health and risk of default – the greater the risk of default, the higher the amount of security. The changes will help protect the Trust Fund from future operator bankruptcies, thus fulfilling the Secretary's fiduciary duty to protect Trust Fund assets, and ensure that self-insured operators meet their obligations under the BLBA.

To this end, the Department proposed a new information collection. As part of the approval process, the Department invited the public to submit comments on the proposed collection. This document addresses comments submitted in response to the 30-Day Notice published in the *Federal Register* on March 22, 2019 (84 FR 10839).

General comments

1. The National Mining Association (NMA) maintains that the Department should have had a "joint and collaborative effort" in proposing the information collection that included "self-insured [coal mine] operators, claimants for black lung benefits, the Department's black lung

claims administrators, public policymakers, the legal community and additional interested groups."

Response: While any member of the public could have responded to the FRN and the Agency would have considered those comments, the Department took a variety of extra steps in order to ensure all interested stakeholders were fully informed. For both the initial *Federal Register* publication (directing comments to the Department) and the most recent publication (directing comments to OMB/OIRA), the Department took the following steps:

- Mailed or e-mailed a letter and copy of the *Federal Register* publication to more than 150 operators, including currently authorized self-insured operators, to alert them to the comment period
- Posted a notice on the OWCP website asking for comments
- Sent an email notification to all individuals who subscribe to OWCP's black lung program's email notification service (more than 32,000 people and entities, including coal companies, insurance carriers, third-party administrators, black lung claimants and members of the legal community)

The only group of individuals expressing interest was self-insured operators. Black lung claimants have no stake in self-insurance issues because those who have been awarded benefits will continue to receive them from the Trust Fund if the liable operator is not financially viable. Moreover, operators' counsel actively participated in an April 18, 2019, meeting with OMB/OIRA, in addition to filing comments in response to the 60- and 30-Day Notices.. Likewise, the Agency's internal stakeholders, black lung claim administrators and policy makers were intimately involved during the deliberative process. The Department thus sees no or very limited added benefit in additional consultations at this time.

2. Reading Anthracite Coal (RAC) states that the Department's self-insurance program "has worked effectively and efficiently" for as long as that organization has participated in the program and that the information collection is "completely unnecessary."

Response: As already discussed, the Agency has found the process was not working and instead resulted in projected operator defaults of $325 million in benefits. Had the Department used the updated process, the Trust Fund would likely have been shielded from absorbing at least some of the defaulted liabilities.

3. RAC raises general concern about the costs of complying with the information collection, although it offers no concrete estimates of those costs.

Response: Most operators who apply for self-insurance authority are large entities with substantial value. For example, Peabody Energy's net worth at the end of CY 2018 was $3.45

billion. Even RAC's net worth, which is on the smaller end of the scale, is currently $25 million or more. In relative terms, the cost of supplying the information requested, some of which companies already generate in the usual course of business (as RAC recognizes), will be minimal.

Specific comments

1. NMA continues to assert that at least part of the information collection, including the actuarial report and report of claims information, is "not fully compatible" with the existing regulations and thus requires rulemaking. NMA also states that this information is "not clearly tied to criteria for the approval of" and application for self-insurance authority.

Response: The Department fully answered comments regarding the necessity for rulemaking in the Supporting Statement. *See* response number 8, Topic 1, at pp. 4-6. The regulations require self-insurance applicants to provide "such further information or such evidence as [OWCP] may deem necessary to have in order to enable it to give adequate consideration to such application." 20 CFR § 725.102(a)(6). The regulations similarly require operators seeking to renew self-insurance authority to "submit to [OWCP] reports containing such information as [OWCP] may from time to time require or prescribe." 20 CFR § 726.112(a). Determining the security deposit amount, which will be based in large part on the actuarial report, is integral to the Department's authorization determination. *See* 20 CFR §§ 726.101(b)(4), 726.104, 726.110, 726.111. Thus, contrary to NMA's most recent comments, existing regulations support collection of this information from self-insurance applicants.

2. RAC raises concerns with the proposal for applicants to produce and incur the costs for an actuarial report. NMA states that operators do not create Federal-specific actuarial reports and that they would not be useful, stating that there would be "no obvious benefit" to the Department.

Response: Given its recent experience with bankruptcies, the Department has determined that actuarial reports projecting a self-insured's future BLBA liabilities are essential to setting an adequate security deposit amount. Liabilities under the BLBA have a "long tail" because benefits are paid for the miner's or survivor's lifetime. Further, disabling black lung disease (and resulting benefits claims) may arise long after a miner has left the operator's employ. Projecting an operator's black lung liabilities therefore requires taking account of not only existing claims, but also future, not-yet-filed claims. An actuarial report factors in these and other long-term considerations to estimate a company's future liabilities, which is the liability that must be adequately secured if the operator goes into bankruptcy. Without this estimate, neither the Department nor the operator itself can with any degree of accuracy know the amount of reserves necessary to secure their obligations under the BLBA. This is the obvious benefit of

actuarial reports to both individual operators and the Department. In OWCP's experience, operators have not hesitated to provide actuarial reports upon individual request.

The Department has also greatly reduced the costs related to actuarial reports. The Department initially proposed that self-insured operators submit updated actuarial reports every year. As explained in the supporting statement, the Department has revised this requirement and extended the actuarial report submission interval to once every three years unless there is a significant change in the operator's circumstances. *See* response number 8, Topic 3, at p. 7. The Department also pledged to reevaluate this requirement when it renews the information collection to determine whether the time interval could be extended further while still adequately projecting self-insureds' liabilities and protecting the Trust Fund. *Id.*

3. RAC raises concerns with the Department's proposed requirement for certified financial reports each year and to reporting financial information on a quarterly basis. RAC believes both of these requirements are burdensome from a cost perspective and unnecessary to the self-insurance program.

Response: The Department answered this comment in the Supporting Statement. *See* response number 8, Topic 5, at p. 8. Requiring certified financial statements is essential to allow the Department to verify the accuracy of the information submitted. The quarterly financial reports (which do not need to be certified) allow operators to extract key information from their financial documents and ensure that it is summarized correctly for the Department. Moreover, the Department will use the quarterly reports to meet its ongoing duty of monitoring self-insurers and spotting those whose financial health is deteriorating. The Department can then reevaluate whether the operator retains the ability to meet its black lung obligations. In OWCP's experience, business declines can happen very quickly and looking at self-insureds' financial information only once a year is insufficient to protect the Trust Fund from unsecured liabilities.

4. RAC also raises concerns with the proposal to reporting current claim information because "OWCP should already have this information on file and its computer system."

Response: The majority of OWCP's work is in processing and adjudicating individual Black Lung Benefits Act claims. The agency's computer systems, which have not been overhauled in many years due to funding issues, are geared to capturing information on a claim-by-claim basis. Thus, OWCP cannot easily generate a detailed report on an operator-by-operator basis. A self-insured operator necessarily must keep this information so that it can estimate potential liabilities, administer claims, and pay benefits to entitled beneficiaries. In the supporting statement, the Department has expressed its intention to be flexible in the submission method for this information and will accommodate any format convenient for the respondent that is compatible with OWCP's computer systems. *See* response no. 3, at p. 3.

5. RAC expresses concern about the confidentiality of the financial information submitted and asks that the Department provide assurances that the information would not be disclosed. RAC also asks that operators be allowed to redact any information the Department has not requested.

Response: As explained in the Supporting Statement, *see* response number 10, at p. 9, the Department's regulations specifically address this topic: "Any financial information or records, or other information relating to the business of an authorized self-insurer or applicant for the authorization of self-insurance obtained by [OWCP] shall be exempt from public disclosure to the extent provided in [FOIA] and the applicable regulations of the Department of Labor promulgated thereunder." 20 CFR § 726.113. Thus, the Department will not publish this information and will maintain paper documents in confidential files and electronic versions in OWCP's computer files, which may only be accessed by approved personnel. The Department has no objection to operators redacting any business information not requested from any documents submitted.

6. RAC states that the Department has grossly underestimated the costs of complying with the information collection and that the costs could impose additional burdens on small businesses; however, RAC offers no alternative analysis.

Response: The Department believes its average annual hour and cost estimates for completing the forms are accurate. While more time may be involved with preparing the initial filing of each form, subsequent filings would generally be updates of the information already submitted. The Department did not include the cost of preparing the actuarial report in the initial burden estimates because prudent self-insurers following sound business practices will already have a current report so that they set aside adequate reserves for potential liabilities. But because some currently approved self-insured operators and all new applicants will have to obtain a report, the Department has increased the burden estimate in the supporting statement. If any additional cost is incurred, that cost will not be an annual expenditure. Instead, the Department is requiring an actuarial report only once every three years, absent special circumstances. The average cost the Department has recently incurred for obtaining actuarial reports of operators' black lung liabilities is approximately $5,000 per operator. Spread over three years, the average annual cost is only $1,667. Finally, as noted above, operators who self-insure generally have a large net worth and any additional cost to them is unlikely to be a significant burden. An operator who is unable or unduly burdened by meeting the Department's requirements will, in all likelihood, not be a candidate to self-insure its BLBA obligations.

7. NMA states, without further explanation, that the information collection would impose unnecessary and irrelevant burdens on "independent contractors who qualify as small businesses and who perform work for mine operators."

Response: As noted by the industry representatives during the meeting with OMB/OIRA, small independent contractors regularly obtain commercial insurance and do not attempt to qualify as self-insurers. The comment is thus irrelevant to this particular information collection.