

**Congress of the United States**  
**House of Representatives**  
**Washington, D.C. 20515**

April 26, 2023

The Honorable Julie Su  
Acting Secretary  
U.S. Department of Labor  
200 Constitution Ave., NW  
Washington, DC 20210

RE: Black Lung Benefits Act: Authorization of Self-Insurers (RIN 1240-AA16)

Dear Acting Secretary Su:

We submit these comments on the proposed rule published by the Office of Workers' Compensation Programs (OWCP) of the U.S. Department of Labor (DOL) to update requirements for coal operators that elect to self-insure their black lung liabilities (Proposed Rule).<sup>1</sup> We have monitored the issues addressed by this Proposed Rule for several years, during which we held three congressional hearings,<sup>2</sup> requested analyses by the Government Accountability Office (GAO),<sup>3</sup> and considered relevant legislation.<sup>4</sup>

We support DOL's effort to reform this program to ensure that, if a self-insured coal operator files for bankruptcy, there is sufficient surety to fully cover the costs of current and future liabilities. This action is necessary to protect the solvency of the Black Lung Disability Trust

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<sup>1</sup> Black Lung Benefits Act: Authorization of Self-Insurers, 88 Fed. Reg. 3349 (Jan. 19, 2023) [hereinafter "Proposed Rule"].

<sup>2</sup> *Strengthening the Safety Net for Injured Workers: Hearing on H.R. 2499, H.R. 3114, H.R. 6102, and H.R. 6087 Before the Subcomm. on Wrkf. Prots. of the H. Comm. on Educ. & Lab.*, 117th Cong. (2021) [hereinafter *Strengthening the Safety Net*]; *Asleep at the Switch: How the Department of Labor Failed to Oversee the Black Lung Disability Trust Fund: Hearing Before the Subcomm. on Wrkf. Prots. of the H. Comm. on Educ. & Lab.*, 116th Cong. (2020) [hereinafter *Asleep at the Switch*]; *Breathless and Betrayed: What Is MSHA Doing to Protect Miners from a Resurgence of Black Lung Disease?: Hearing Before the Subcomm. on Wrkf. Prots. of the H. Comm. on Educ. & Lab.*, 116th Cong. (2019) [hereinafter *Breathless and Betrayed*].

<sup>3</sup> See THOMAS COSTA, GOV'T ACCOUNTABILITY OFF., GAO-22-105546, BLACK LUNG BENEFITS PROGRAM: CONTINUED INACTION ON COAL OPERATOR SELF-INSURANCE INCREASES FINANCIAL RISK TO TRUST FUND (Dec. 2021); CINDY BROWN BARNES, GOV'T ACCOUNTABILITY OFF., GAO-20-438-T, BLACK LUNG BENEFITS PROGRAM: OVERSIGHT IS NEEDED TO ADDRESS TRUST FUND SOLVENCY STRAINED BY BANKRUPTCIES (Feb. 2020); GOV'T ACCOUNTABILITY OFF., GAO-20-21, BLACK LUNG BENEFITS PROGRAM: IMPROVED OVERSIGHT OF COAL MINE OPERATOR INSURANCE IS NEEDED (Feb. 2020).

<sup>4</sup> See H.R. Rep. No. 117-589, at 15-17 (2022) (describing legislation considered in the 116th and 117th Congresses to address, *inter alia*, deficiencies in oversight of self-insured operators).

Fund (Trust Fund) and correct for moral hazards that encourage operators to maximize their gains at the public's cost and profit by failing to comply with dust control standards. DOL's proposal to require self-insured operators to post surety equal to 120 percent of current estimated liabilities and the present value of future estimated liabilities is a well-reasoned approach to ensure there is commensurate collateral to secure black lung benefits at all times, including before, during, and after the filing for bankruptcy. The Proposed Rule addresses significant deficiencies in program oversight and implementation raised in congressional hearings and GAO findings, although we identify some additional areas for improvement to build on the solid foundation of this Proposed Rule.

## **I. THE STATUS QUO DOES NOT SUFFICIENTLY PROTECT THE TRUST FUND OR TAXPAYERS FROM LIABILITIES COAL OPERATORS SHOULD COVER.**

The Proposed Rule addresses a significant problem. Under title IV of the *Federal Mine Safety and Health Act of 1977* (Mine Act), better known as the *Black Lung Benefits Act* (BLBA),<sup>5</sup> coal operators are responsible for covering the benefits owed to miners and their families suffering from black lung disease, and operators must secure that obligation by either purchasing commercial insurance or committing to self-insurance secured by appropriate collateral. Weaknesses in the existing program for oversight of self-insured coal operators, however, have added red ink to the Trust Fund, shifting costs to the public that should instead be borne by operators themselves.

### **A. The black lung benefits program is a lifeline for miners and their families.**

At the heart of what matters in this rulemaking is the black lung benefits program, a safety net for stabilizing income and meeting the medical needs of miners and their families harmed by disabling and deadly black lung disease.

Coal miners, whose work has powered the American economy, are continuing to develop disabling and deadly lung diseases collectively known as "black lung." Dust inhaled during coal mining work causes fibrosis, or scarring, of the lung tissue, leading to the appearance of masses, or "opacities," on a chest X-ray. This tissue damage reduces the lungs' ability to remove carbon dioxide and transmit oxygen to the rest of the body.<sup>6</sup> Miners suffering from black lung liken the feeling to inhaling with a plastic bag over your head or drowning underwater.<sup>7</sup> Dr. Edward Petsonk, a physician who treats patients with black lung, describes suffering from the disease as

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<sup>5</sup> 29 U.S.C. § 901 *et seq.*

<sup>6</sup> SCOTT D. SZYMENDERA & MOLLY F. SHERLOCK, CONG. RES. SERV., R45261, THE BLACK LUNG PROGRAM, THE BLACK LUNG DISABILITY TRUST FUND, AND THE EXCISE TAX ON COAL: BACKGROUND AND POLICY OPTIONS 1 (Jan. 18, 2019), <https://crsreports.congress.gov/product/pdf/R/R45261>.

<sup>7</sup> Cat Schuknecht, "I Figured It Was Going to Be a Horrible Death, And It Probably Will Be", NPR (Jan. 23, 2019), <https://www.npr.org/2019/01/23/686000458/i-figured-it-was-going-to-be-a-horrible-death-and-it-probably-will-be>.

“a screw being slowly tightened across your throat. Day and night towards the end, the miner struggles to get enough oxygen. It is really almost a diabolical torture.”<sup>8</sup>

There is no cure for black lung disease.<sup>9</sup> However, certain treatments can slow disease progression and relieve symptoms. Pulmonary rehabilitation is typically recommended to help improve quality of life.<sup>10</sup> Supplemental oxygen and medication can be prescribed to increase airflow to the lungs.<sup>11</sup> In rare cases, medical providers may attempt a lung transplant to extend a patient’s life.<sup>12</sup> Absent a transplant, black lung leaves miners’ lungs scarred, shriveled, and black. As the disease progresses, miners struggle to do routine daily tasks such as eating and breathing.<sup>13</sup> To slow the progression of the disease, miners must eventually cease working in mines. When the disease progresses to disabling levels, they cannot work at all.

The cost to miners and their families is high, in more ways than one. To assist them with income stabilization and medical expenses, Congress established the black lung benefits program. The program was created in 1969 as a workers’ compensation program originally administered by the Social Security Administration to benefit miners totally disabled by black lung disease.<sup>14</sup> Three years later, the BLBA extended these benefits to surviving dependent family members and established a compensation program administered by DOL. The miner’s last employer is generally liable for the claim, but in such cases when a miner’s employer is insolvent, that miner is compensated from the Trust Fund.

In addition to coverage of qualified medical expenses, the BLBA provides for monthly cash payments set at 37.5 percent of the base salary of a federal employee at level GS-2, Step 1.<sup>15</sup> The level increases for beneficiaries with dependents. Although modest, these benefits are a vital lifeline for miners and their family members. The benefits are available only to miners with *total disability* from black lung disease arising from their employment in or around the nation’s coal mines,<sup>16</sup> and so miners are generally prohibited from receiving black lung benefits while

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<sup>8</sup> *Id.*

<sup>9</sup> *Breathless and Betrayed*, *supra* note 2, at 91 (statement of Dr. John Howard).

<sup>10</sup> *Treating and Managing Coal Worker’s Pneumoconiosis*, AM. LUNG ASS’N, <https://www.lung.org/lung-health-diseases/lung-disease-lookup/black-lung/treating-and-managing> (last visited Apr. 7, 2022).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> Chris Hamby, *Black Lung Surges Back in Coal Country*, CTR. FOR PUB. INTEGRITY (July 8, 2012), <https://publicintegrity.org/inequality-poverty-opportunity/workers-rights/black-lung-surges-back-in-coal-country/>.

<sup>14</sup> Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, Title IV.

<sup>15</sup> BLBA § 412(a) (30 U.S.C. § 922(a)).

<sup>16</sup> *Id.* §§ 411(a) (30 U.S.C. § 921(a)), 412(a)(1) (30 U.S.C. § 922(a)(1)).

employed in coal mining.<sup>17</sup> Miners therefore rely on these payments to permanently leave the mines,<sup>18</sup> cover their medical expenses,<sup>19</sup> and modestly support themselves and their families.

What this Proposed Rule protects, then, is not merely an account in the Treasury; it is the system for financing a benefit program that disabled and dying miners and their families need.

## **B. Coal operators should be responsible for paying these benefits.**

The bedrock principle of the black lung program is that coal operators should be responsible for compensating miners and their families when they are stricken by black lung disease.

As discussed above, the Trust Fund is integral to the black lung disability benefits program. The Trust Fund was created to cover the cost of benefits provided to eligible miners who ended their employment before January 1, 1970, and to serve as a backstop for claims related to miners whose employment ended after December 31, 1969. In the latter case, the Trust Fund covers the cost of benefits where no responsible operator can be identified or the responsible operator has become insolvent.

Congress never intended the Trust Fund to be the primary source of funding benefits for post-1969 claimants. The Trust Fund acts as a backstop to ensure financing of benefits, but that is part of a larger legislative scheme in which Congress intended “to ensure that individual coal operators rather than the Trust Fund bear the liability for [black lung] claims arising out of such operators’ mines to the maximum extent feasible.”<sup>20</sup>

## **C. Weak policy and oversight have enabled coal operators to abandon this responsibility.**

Despite Congress’s clear intention, approximately 52 percent of finalized claims are paid from the Trust Fund.<sup>21</sup> The Trust Fund is currently burdened with a nearly \$6.3 billion deficit;<sup>22</sup> as a result, it must borrow from the U.S. Treasury to cover benefits, the costs of administering the program, and servicing the existing debt in the Trust Fund.

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<sup>17</sup> *Id.* § 413(d) (30 U.S.C. § 923(d)).

<sup>18</sup> See, e.g., *Coal Miners’ Struggle for Justice: How Unethical Legal and Medical Practices Stack the Deck Against Black Lung Claimants: Hearing Before the Subcomm. on Emp. & Workplace Safety of the S. Comm. on Health, Educ., Lab. & Pensions*, 113th Cong. 27-28 (2014) [hereinafter *Struggle for Justice*] (testimony of claimant attorney John Cline) (discussing the example of client Gary Fox who continued working in the mines and breathing dust for several years even after a serious medical issue because the responsible operator’s attorneys suppressed claim-supporting evidence and blocked access to the benefits that could have supported him and his family).

<sup>19</sup> GOV’T ACCOUNTABILITY OFF., GAO-18-351, BLACK LUNG BENEFITS PROGRAM: OPTIONS FOR IMPROVING TRUST FUND FINANCES 4 (May 30, 2018) (“DOL estimates that the average annual cost for medical treatment in fiscal year 2018 was approximately \$9,667 per miner.”).

<sup>20</sup> *Old Ben Coal Co. v. Luker*, 826 F.2d 688, 693 (7th Cir. 1987) (quoting S. Rep. No. 209, 95th Cong. (1977), at 9).

<sup>21</sup> Of the approximately 25,700 beneficiaries receiving black lung benefits in 2019, 13,335 were paid from the Trust Fund; 7,985 were paid by responsible mine operators; and 4,380 were receiving interim benefits, according to DOL data. GOV’T ACCOUNTABILITY OFF., *supra* note 3, at 8.

<sup>22</sup> U.S. DEP’T OF LAB., 2022 AGENCY FINANCIAL REPORT 145, <https://www.dol.gov/sites/dolgov/files/OPA/reports/2022annualreport.pdf>.

There are multiple reasons for that debt load, but one which we have investigated in the course of multiple hearings and GAO analyses is DOL's failure to oversee self-insured operators effectively. GAO revealed in February 2020 that three bankruptcies between 2014-2016 shifted \$865 million in black lung benefit liabilities into the Trust Fund from self-insured operators that had reserved a total of only \$27.4 million in collateral, meaning that nearly 97 percent of their liabilities were unsecured.<sup>23</sup> GAO testified that DOL's limited oversight of coal mine operator insurance exposed the Trust Fund to financial risk.<sup>24</sup> When setting the amount of collateral required to self-insure, DOL estimated current benefit liabilities but did not incorporate estimates of *future* liabilities.<sup>25</sup> Additionally, DOL did not conduct regular reviews of operators to assess whether the required amount of collateral was adequate or should change in light of circumstances such as increased projected liabilities or signs of potential instability in the business.<sup>26</sup> Moreover, DOL did not always take action to protect the Trust Fund by revoking an operator's ability to self-insure as appropriate.<sup>27</sup>

DOL's attempts to respond within the terms of the existing rules proved insufficient. DOL testified before the Subcommittee on Workforce Protections in February 2020 that it implemented some changes to the self-insurance program, such as updating collateral requirements to reflect future liabilities. That same week DOL issued letters to 14 self-insured operators requesting an increase in their collateral and to two other operators withdrawing authorization to self-insure. Some operators complied with the request, but seven operators appealed. In the absence of appeal procedures, OWCP collected only \$65 million of the \$251 million in additional collateral requested.<sup>28</sup>

DOL followed up that December with a bulletin, which was not announced in the *Federal Register* until the following month<sup>29</sup> (less than two weeks before the end of the Trump Administration), setting out varying levels of collateral for self-insurance depending on the level of an operator's financial risk.<sup>30</sup> Operators filed objections, arguing among other things that the guidelines are effectively legislative rules that should have been promulgated in accordance with the *Administrative Procedure Act* (APA).<sup>31</sup>

GAO discovered that DOL subsequently reversed course on the bulletin, without an apparent plan to address the problem:

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<sup>23</sup> BROWN BARNES, *supra* note 3.

<sup>24</sup> See generally BROWN BARNES, *supra* note 3.

<sup>25</sup> GOV'T ACCOUNTABILITY OFF., *supra* note 3, at 18-19.

<sup>26</sup> *Id.* at 20.

<sup>27</sup> *Id.* at 21-22.

<sup>28</sup> *Id.*

<sup>29</sup> Guidance on Black Lung Benefits Act Self-Insurance, 86 Fed. Reg. 1529 (Jan. 8, 2021).

<sup>30</sup> Off. of Workers' Comp. Progs., U.S. Dep't of Lab., *BLBA Bull. No. 21-01, DCMWC Self-Insurance Process Guidelines* (Dec. 7, 2020).

<sup>31</sup> See generally *Guidance on Black Lung Benefits Act Self-Insurance*, Docket ID WCPO-2020-0002, REGULATIONS.GOV, <https://www.regulations.gov/docket/WCPO-2020-0002> [hereinafter *Guidance Docket*].

In December 2020, DOL issued a preliminary bulletin for coal operator self-insurance that described significant changes and included actions that would have addressed GAO's recommendations. For instance, DOL set a goal to resolve coal operator appeals within 90 days after receiving supporting documents or meeting with the operator to discuss their concerns.

However, in February 2021, DOL rescinded the preliminary bulletin due to a program review by the current administration, according to DOL officials. DOL officials said they have taken no further actions to resolve appeals or to collect any additional collateral or other information from self-insured operators. As a result, DOL has not obtained about \$186 million in requested collateral from self-insured operators that appealed DOL's requested collateral. In addition, one of these operators, Lighthouse Resources, filed for bankruptcy in December 2020; this could result in a transfer of about \$2.4 million in estimated benefit responsibility to the Trust Fund, according to DOL. In addition, two operators DOL said no longer met their requirements to self-insure almost two years ago remain self-insured.

In November 2021, DOL officials said the current administration's program review is complete, but could not describe any anticipated changes to coal operator self-insurance going forward.<sup>32</sup>

GAO added that five mine operators became insolvent since that initial cohort, at least two of which were expected to transfer an additional \$61.1 million in under-collateralized liability to the Trust Fund.<sup>33</sup>

Accordingly, several recommendations from GAO to secure the Trust Fund by improving oversight of self-insured operators remain outstanding:

- “develop and implement procedures for coal mine operator self-insurance renewal that clarif[y] how long an operator is authorized to self-insure [and] when an operator must submit its renewal application and supporting documentation”;<sup>34</sup>
- define “the conditions under which an operator’s self-insurance authority would not be renewed”;<sup>35</sup> and
- “develop and implement procedures for self-insured coal mine operator appeals that identify timelines for self-insured operators to submit documentation supporting their appeals and that identify a goal for how much time DOL should take to make appeals decisions.”<sup>36</sup>

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<sup>32</sup> COSTA, *supra* note 3, at 8-9.

<sup>33</sup> *Id.* at 4.

<sup>34</sup> GOV'T ACCOUNTABILITY OFF., *supra* note 3, at 28.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

## **II. THE PROPOSED RULE IS NEEDED TO IMPROVE OVERSIGHT OF SELF-INSURED OPERATORS.**

DOL is now addressing these outstanding recommendations through this Proposed Rule. What DOL proposes heeds the counsel of GAO, preserving the BLBA self-insurance option while protecting the Trust Fund from the risk of further red ink.

### **A. The streamlined approach of the Proposed Rule better secures the Trust Fund while facilitating oversight.**

The current rules for self-insurance take a largely risk-based approach. The basic criteria for allowing operators to self-insure (having been a coal operator for at least three consecutive years; having average current assets over the preceding three years that exceed liabilities sufficient to cover black lung benefit payments plus cost of any indemnity bond; having administrative capacity to service claims; obtaining security in an OWCP-approved form; and having no fewer than five employees<sup>37</sup>) can be read as a risk assessment in miniature, sizing up an operator's financial stability in terms of its size and three-year history. The same is true of the current approach to determining the amount of required collateral, which is set based on somewhere between three and fifteen years of currently awarded benefits, depending on the operator's assets.<sup>38</sup>

The effectiveness of this approach hinges on the accuracy of the underlying risk assessment, which must be regularly updated to reflect changes in an operator's business, fluctuations in the coal market, changes in the black lung benefits program, updated calculations of the relevant period of black lung liabilities, and capacity to intervene rapidly when the risk assessment yields a negative result. As GAO has observed, as the recent history of operator bankruptcies has demonstrated, and as DOL admits with admirable frankness,<sup>39</sup> these conditions are all absent.

The Proposed Rule streamlines the self-insurance requirements considerably, jettisoning the risk-based approach and replacing it with a proposed requirement for all operators seeking to choose or maintain self-insurance to post security equal to 120 percent of the "actuarial estimated liabilities (all present and future liabilities) for self-insured claims, as determined by OWCP based on the actuarial report" or other information submitted by the operator or on file.<sup>40</sup> The Proposed Rule is an elegant solution to the challenges discussed above: it improves the security of the Trust Fund not only by requiring an amount of security that covers future liabilities but also by adopting a cost-effective process that, by virtue of being easier to implement and focused on the core question of sufficient collateral, facilitates better oversight of self-insured operators.

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<sup>37</sup> These provisions from the current 20 C.F.R. Part 726 Subpart B are summarized in Proposed Rule, *supra* note 1, at 3350.

<sup>38</sup> *Id.* ("Under this model, most large operators therefore posted fewer years of payment relative to smaller operators.").

<sup>39</sup> *Id.* at 3350-3351.

<sup>40</sup> *Id.* at 3365 (text of proposed revised 20 C.F.R. § 726.105).

**B. The Proposed Rule corrects for moral hazards in the current self-insurance system.**

The current rules for self-insurance invite operators to play a game of “heads I win, tails you lose” with their black lung liabilities.

Take, for example, two of the largest cost-shifters identified by GAO: Alpha Natural Resources (ANR) and Patriot Coal (Patriot). DOL had authorized ANR to provide only \$12 million in surety to cover nearly \$500 million in present and projected future liabilities. ANR exploited weaknesses in the current program—chiefly the low collateral requirement and DOL’s inability to seize additional assets once an operator enters bankruptcy—by notifying DOL of its impending failure to make good on its self-insured liabilities in accordance with the current rules and then racing to file for bankruptcy protection before the end of the 90-day compliance period during which it should have secured alternative collateral.<sup>41</sup> Patriot, meanwhile, was the product of ingenious corporate engineering by its predecessor firm, Peabody Energy, having been spun off with only 13 percent of the parent company’s coal reserves but the lion’s share of black lung and other employment-related liabilities.<sup>42</sup> Carrying the liabilities of 16 self-insured operators,<sup>43</sup> Patriot filed for bankruptcy in May 2015 with only \$15 million in collateral to cover the \$230 million in black lung liabilities it shifted to the Trust Fund.<sup>44</sup>

ANR and Patriot are examples of moral hazards that emerged from the current rules. First, as Rep. Alma Adams (NC-12), Chair of the Subcommittee on Workforce Protections, noted in a 2020 hearing:

What we are seeing here is nothing less than a gaming of the system. The winners are the coal operators and their Wall Street creditors. The losers are the American taxpayers. In other words, the costs of black lung disease have been socialized and the gains from DOL’s failed oversight have been privatized.<sup>45</sup>

As explained above, self-insured operators have been able to avoid collateralizing the full cost of current and future black lung liability. Operators thus enjoy costs lower than they should bear and are left free to transfer that under-insured liability to the Trust Fund (and thus taxpayers) if there is a bankruptcy. The Proposed Rule corrects for this hazard by reducing opportunities for self-insured coal operators to under-insure and transfer this cost to the public, provided DOL enforces it.

Second, by enabling operators to socialize risk while privatizing gain, the current rules also essentially empower operators to escape the consequences of operating mines with inadequate

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<sup>41</sup> Joshua Macey & Jackson Salovaara, *Bankruptcy as Bailout: Coal Company Insolvency and the Erosion of Federal Law*, 71 STAN. L. REV. 879, 897 n.2 (2019).

<sup>42</sup> *Id.* at 912-913.

<sup>43</sup> Off. of Workers’ Comp. Progs., U.S. Dep’t of Lab., *BLBA Bull. No. 16-01, Patriot Coal Corporation Bankruptcy* (Nov. 12, 2015), <https://www.dol.gov/sites/dolgov/files/owcp/dcmwc/blba/indexes/BL16.01OCR.pdf>.

<sup>44</sup> GOV’T ACCOUNTABILITY OFF., *supra* note 3.

<sup>45</sup> *Asleep at the Switch*, *supra* note 2, at 3-4.



dust controls. Inasmuch as self-insured operators are, as a group, securing only 17 percent of their black lung liability, according to DOL data,<sup>46</sup> there is a perverse incentive to overlook inadequate coal mine dust controls on miners' health. Since the resulting bill for the cost of black lung claims may never have to be paid by the self-insured operator under current rules, there is a moral hazard inherent in a scheme where operators can take risks with miners' lives they would not otherwise take if they were forced to internalize these health costs. The Proposed Rule corrects for this hazard by setting a 120 percent collateral requirement based on a periodically updated actuarial assessment of an operator's present and future liabilities.

**C. The Proposed Rule is reasonable, prudent, and consistent with congressional intent.**

DOL has persuasively made a case for its careful and well-reasoned choice of 120 percent compared to other possible levels for the collateral level in this proposed new approach to self-insurance.<sup>47</sup> It is a level that reflects the full actuarial value of projected liabilities, anticipates uncertainty and the potential for changes in conditions between reviews of liability projections, and protects the Trust Fund while leaving operators maximum opportunity to continue their usual business plans. Notably, the Proposed Rule will not necessarily require operators to actually bank the full 120 percent; instead, as DOL points out, an operator "would have to purchase an instrument that would pay out up to 120 percent of the liability," such as a surety bond for which premiums would likely cost in the range of 2-12 percent of the security amount.<sup>48</sup>

Facing Increasing Pressure on the Black Lung Benefits Program

Among the uncertainties this new 120 percent requirement would accommodate is the remarkable increase in black lung disease. Following the passage of the *Federal Coal Mine Health and Safety Act*<sup>49</sup> (Coal Act) in 1969, which established enforceable limits on miners' coal dust exposure for the first time, rates of black lung disease dropped from more than 30 percent in miners in the 1970s to only 5 percent by the late 1990s while rates of its most severe form, progressive massive fibrosis (PMF), declined from 3.5 percent to 0.5 percent.<sup>50</sup> More than three times as many coal miners were identified as having black lung disease from 2010 to 2014 compared to 1995 to 1999.<sup>51</sup> By the late 1990s, the goal of eradicating black lung disease seemed within reach.

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<sup>46</sup> Proposed Rule, *supra* note 1, at 3357 Tbl.1.

<sup>47</sup> *Id.* at 3356-3361.

<sup>48</sup> *Id.* at 3350 n.2.

<sup>49</sup> Pub. L. No. 91-173, 83 Stat. 742 (1969).

<sup>50</sup> David J. Blackley *et al.*, *Continued Increase in Prevalence of Coal Workers' Pneumoconiosis in the United States, 1970–2017*, 108 AM. J. PUB. HEALTH 1220 (2018) [hereinafter *Continued Increase*]; David J. Blackley *et al.*, *Resurgence of Progressive Massive Fibrosis in Coal Miners—Eastern Kentucky, 2016*, 65 MORB. & MORT. WKLY. REP. 1385 (2016).

<sup>51</sup> OFF. OF INSPECTOR GEN., U.S. DEP'T OF LAB., REP. NO. 05-21-001-06-001, MSHA NEEDS TO IMPROVE EFFORTS TO PROTECT COAL MINERS FROM RESPIRABLE CRYSTALLINE SILICA 1 (Nov. 12, 2020), <https://www.oig.dol.gov/public/reports/oa/2021/05-21-001-06-001.pdf>.

Now, however, black lung disease among working and former coal miners is returning with a vengeance. Researchers can see this resurgence in chest X-ray surveillance data, black lung benefits claim data, and mortality data.<sup>52</sup> X-ray surveillance data indicates that 10 percent of miners had imaging consistent with a CWP diagnosis by 2017, up from 5 percent two decades prior.<sup>53</sup> This resurgence is most severe in the central Appalachian states of Kentucky, West Virginia, and Virginia, where 20.6 percent of coal miners with tenures of 25 years or more now have black lung disease.<sup>54</sup>

The most severe form of black lung, PMF, is also on the rise among miners in the United States. PMF prevalence tripled between the 1980s and the 2000s<sup>55</sup> and now exceeds rates reported in the 1970s.<sup>56</sup> In 2014, 8.3 percent of black lung benefits claims were due to PMF, an increase from less than 2 percent of claims between 1970 and 1996.<sup>57</sup> The PMF resurgence appears to be most severe in central Appalachia.<sup>58</sup>

One explanation for the increase in both simple black lung and advanced PMF since the late 1990s is that miners are now breathing a more potent mix of mine dust. As larger coal seams are mined out, coal companies have turned to mining thinner seams surrounded by more rock.<sup>59</sup> The rock which surrounds coal seams contains silica. When this rock is cut, the resulting silica dust is approximately 20 times more toxic than coal dust and causes faster lung disease progression.<sup>60</sup> A study released in April 2022 analyzing pathology specimens now backs this theory<sup>61</sup> and, in the words of the study's lead author, is "the smoking gun" establishing the causal role of silica.<sup>62</sup>

It is likely that the current black lung resurgence is even more severe than the data show. Many miners avoid medical screening, as a black lung diagnosis would mean having to leave their mining careers—oftentimes the only way miners know how to provide for their families.<sup>63</sup> This resurgence of the disease will add to the demand on the black lung benefit program, because of

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<sup>52</sup> *Breathless and Betrayed*, *supra* note 2, at 13 (statement of Dr. Robert Cohen).

<sup>53</sup> Blackley *et al.*, *Continued Increase*, *supra* note 50, at 1221.

<sup>54</sup> *Id.*

<sup>55</sup> Hamby, *supra* note 13.

<sup>56</sup> Chris Hamby, *Black Lung Surges to Highs Not Seen Since the 70s, Research Shows*, CTR. FOR PUB. INTEGRITY (Sept. 15, 2014), <http://www.publicintegrity.org/2014/09/15/15538/black-lung-disease-surges-highs-not-seen-70s-research-shows>.

<sup>57</sup> *Breathless and Betrayed*, *supra* note 2, at 12.

<sup>58</sup> Hamby, *supra* note 13.

<sup>59</sup> *Id.*

<sup>60</sup> Howard Berkes *et al.*, *An Epidemic Is Killing Thousands of Coal Miners. Regulators Could Have Stopped It*, NPR (Dec. 18, 2018), <https://www.npr.org/2018/12/18/675253856/an-epidemic-is-killing-thousands-of-coal-miners-regulators-could-have-stopped-it>.

<sup>61</sup> Robert A. Cohen *et al.*, *Pathology and Mineralogy Demonstrate Respirable Crystalline Silica is a Major Cause of Severe Pneumoconiosis in US Coal Miners*, 19 ANNALS AMER. THORACIC SOC'Y 1469 (2022).

<sup>62</sup> Robert Benincasa, *Researchers Say They've Linked Silica Dust Directly to Severe Black Lung Disease*, NPR (Apr. 13, 2022), <https://www.npr.org/2022/04/13/1092690291/researchers-say-theyve-linked-silica-dust-directly-to-severe-black-lung-disease>.

<sup>63</sup> Hamby, *supra* note 13.

not just the volume of claims but also the increasing need for expensive medical treatments such as lung transplants, which can cost as much as \$1.2 million per patient.<sup>64</sup>

### Securing the Trust Fund

While these costs are growing, the red ink in the Trust Fund is also rising.

The Trust Fund is financed primarily by a tax on coal produced and sold domestically.<sup>65</sup> The tax was first established in 1978 at \$0.50 per ton on underground coal and \$0.25 per ton on surface coal, both up to 2 percent of sales price. In 1982, the tax was raised to \$1 per ton for underground coal and \$0.50 per ton for surface coal, in each case up to 4 percent of sale price.<sup>66</sup> The last increase came in 1986, when the rates were raised to \$1.10 per ton on underground coal and \$0.55 per ton of surface coal.<sup>67</sup> The 1986 rate was subject to periodic reauthorization, and the last reauthorization occurred in December 2020 for the calendar year 2021.<sup>68</sup> That reauthorization lapsed without further action on December 31, 2021, and the tax rate reverted to the 1978 levels. Congress has since permanently extended the 1986 level.<sup>69</sup>

The Trust Fund has operated on a deficit in almost every year since its first fiscal year in operation. The Trust Fund began paying out benefits prior to collecting the excise tax that was intended to be the Trust Fund's primary financial source, so the Trust Fund began operation at a loss. In its first three fiscal years, the Trust Fund's revenue provided less than 40 percent of the administrative and benefit costs.<sup>70</sup>

When the Trust Fund runs a deficit, the Treasury issues it loans as "repayable advances."<sup>71</sup> The Trust Fund must repay these advances back to the General Fund with interest. In the first ten years of operation, the Trust Fund borrowed from the General Fund at interest rates between 6.5 and 13.9 percent on 30-year terms.<sup>72</sup> In 1985, the Trust Fund paid out roughly \$275 million, or about half of the Fund's revenue for that year, in interest payments.<sup>73</sup> While the Trust Fund's revenue has generally exceeded expenses since 1990, the earlier borrowing saddled the Trust Fund with debt.<sup>74</sup>

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<sup>64</sup> Blackley *et al.*, *Continued Increase*, *supra* note 50, at 1220.

<sup>65</sup> 26 U.S.C. § 4121.

<sup>66</sup> GOV'T ACCOUNTABILITY OFF., *supra* note 3, at 7.

<sup>67</sup> *Id.* at 9.

<sup>68</sup> Further Consolidated Appropriations Act of 2020, Pub. L. No. 116-94, Div. EE, Title I, § 149.

<sup>69</sup> Pub. L. No. 117-169, § 13901.

<sup>70</sup> GOV'T ACCOUNTABILITY OFF., *supra* note 3, at 12.

<sup>71</sup> Siddhi Doshi & Adele Morris, *Putting the Trust Back in the Black Lung Disability Trust Fund*, BROOKINGS INST., at 5 (Sept. 24, 2021), <https://www.brookings.edu/wp-content/uploads/2021/10/Black-Lung-Disability-Trust-Fund-2021.pdf>.

<sup>72</sup> GOV'T ACCOUNTABILITY OFF., *supra* note 3, at 9.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

By 2008, the Trust Fund's debt exceeded \$10 billion.<sup>75</sup> Congress authorized an appropriation in the *Energy Improvement and Extension Act of 2008* that forgave \$6.5 billion of the Trust Fund's debt.<sup>76</sup> However, in the wake of the 2008 recession, revenue from the coal excise tax was less than expected, and increased competition with other, cheaper forms of energy has meant that coal use has decreased. As a result, the Trust Fund began again borrowing from the Treasury in 2010,<sup>77</sup> and the Trust Fund is now almost \$6.3 billion in the red.<sup>78</sup> Since federal law does not place a cap on the amount that the Trust Fund can borrow from the Treasury's General Fund, the Trust Fund could borrow in perpetuity while significantly increasing insolvency.

One constraint on the Trust Fund beyond the scope of this rulemaking is that a significant chunk of the coal industry does not fund it. While coal produced and sold domestically is subject to the excise tax to finance the Trust Fund, coal that is exported is not included in the excise tax scheme.<sup>79</sup> The resulting impact on the Trust Fund is significant. In 2020, U.S. coal mines produced 540.1 million short tons (MMst) of coal, 12.8 percent of which was exported and thus excluded from the excise tax.<sup>80</sup> Metallurgical coal in particular is largely shielded from the excise tax: of the 55.5 MMst of metallurgical coal produced in 2020, 42.0 MMst—or more than 75 percent—was exported.<sup>81</sup>

The Proposed Rule does, however, address the threat of additional red ink being transferred from insolvent self-insured operators. The risk of more red ink in the Trust Fund is growing: self-insured operators have reported about \$700 million in current and projected black lung liabilities backed by only \$119 million (about 17 percent) on deposit with DOL.<sup>82</sup> In the event of future bankruptcies, under-collateralization of these liabilities would increase Trust Fund indebtedness.

Permanent reauthorization of the 1986 levels of the excise tax will also address the problem of red ink. It is not, however, a panacea: although it will, according to the Joint Committee on Taxation, generate \$1.16 billion in revenue in excess of the amount that would have been collected over 10 years if the tax had been allowed to permanently sunset at the 1978 levels,<sup>83</sup> self-insured operators gaming the system as Patriot and ANR did could easily add just as much in red ink.

### Comporting with Congressional Intent

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<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 9-10 (characterizing effect of Pub. L. No. 110-343, Div. B, § 113 (2008) (26 U.S.C. § 9501 note)).

<sup>77</sup> *Id.* at 10.

<sup>78</sup> See *supra* note 22 & accompanying text.

<sup>79</sup> ERIKA K. LUNDER, CONG. RES. SERV., R42780, EXPORT CLAUSE: LIMITATION ON CONGRESS'S TAXING POWER, (Oct. 18, 2012).

<sup>80</sup> U.S. ENERGY INFO. ADMIN., ANN. COAL REP. 2020, at ix (Oct. 2021), <https://www.eia.gov/coal/annual/pdf/acr.pdf>.

<sup>81</sup> *Id.*

<sup>82</sup> Proposed Rule, *supra* note 1, at 3357 Tbl.1.

<sup>83</sup> Jt. Cmte. on Tax., *JCX-18-22, Estimated Budget Effects of the Revenue Provisions of Title I – Committee on Finance, of an Amendment in the Nature of a Substitute to H.R. 5376, “An Act to Provide for Reconciliation Pursuant to Title II of S. Con. Res. 14,” as Passed by the Senate on August 7, 2022, and Scheduled for Consideration by the House of Representatives on August 12, 2022* (Aug. 9, 2022), <https://www.jct.gov/getattachment/efcca154-9fc1-4e72-83c0-d78b9e7372eb/x-18-22.pdf>.

The black lung benefits program is part of a larger statutory scheme which vests DOL with three significant responsibilities relevant to the self-insurance issue. First, DOL is vested with authority to establish regulations governing qualification for self-insurance.<sup>84</sup> Second, the Secretary of Labor serves as a trustee of the Trust Fund.<sup>85</sup> Third, since the BLBA is a title of the Mine Act, DOL must execute the previous two responsibilities in light of Congress’s command elsewhere in the Mine Act that “the first priority and concern of all in the coal or other mining industry must be the health and safety of its most precious resource—the miner,”<sup>86</sup> by developing standards<sup>87</sup> to ensure that “the operators of such mines” bear their “ultimate responsibility to prevent the existence”<sup>88</sup> of “unsafe and unhealthful conditions and practices.”<sup>89</sup> In other words, DOL’s responsibility over self-insurance does not exist in a vacuum: DOL must develop regulations that are consistent with the Secretary’s role as a trustee of the Trust Fund and with DOL’s responsibility to ensure that operators prevent black lung in the first instance.

The recent spate of operator bankruptcies have demonstrated the inadequacy of DOL’s current rules. The nearly \$1 billion in liabilities shifted onto the Trust Fund are a cost that DOL should have, consistent with its role as a trustee of the Trust Fund, made every effort to prevent the Trust Fund from bearing. As discussed above, the resulting moral hazards effectively encourage self-insured operators not only to threaten the integrity of the Trust Fund but also to undermine the effectiveness of the standards that DOL, acting through OWCP’s sibling agency, the Mine Safety and Health Administration, has promulgated to prevent miners from being stricken by black lung.

In light of these overlapping responsibilities and the empirical evidence of the failure of the existing rules, the proposal to require security equal to 120 percent of current liabilities and the present value of projected future liabilities is an elegant, reasonable, and prudent solution. It is consistent with the contemporary approach of many state workers’ compensation programs.<sup>90</sup>

In short, the Proposed Rule maintains the BLBA’s option for operators to self-insure with a policy that has proven workable elsewhere, and it does so while protecting the Trust Fund. Accordingly, it serves two important goals of the larger statutory scheme simultaneously—and, by better reflecting the true cost of black lung liabilities in an operator’s security requirement, it realigns incentives in favor of primary prevention. Operators are free, as always, to criticize any increased security amount, but they cannot credibly claim that the Proposed Rule violates congressional intent.

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<sup>84</sup> BLBA § 423(a) (30 U.S.C. § 933(a)).

<sup>85</sup> 26 U.S.C. § 9501(a)(2).

<sup>86</sup> Mine Act § 2(a) (30 U.S.C. § 801(a)).

<sup>87</sup> *Id.* § 2(g)(1) (30 U.S.C. § 801(g)(1)).

<sup>88</sup> *Id.* § 2(e) (30 U.S.C. § 801(e)).

<sup>89</sup> *Id.* § 2(d) (30 U.S.C. § 801(d)).

<sup>90</sup> Proposed Rule, *supra* note 1, at 3353.

### **III. ADDITIONAL REFORMS ARE NEEDED TO PROTECT THE TRUST FUND AND TAXPAYERS.**

While we generally support the direction that DOL is taking with this Proposed Rule, we propose some additional areas for improvement.

#### **A. The Proposed Rule should clarify timelines for appeal and resolution.**

Clarifying the timelines for appeals and timely resolution is of particular importance because, as GAO documented, the failure to set time frames for decision making has resulted in significant costs to the Trust Fund.

It is laudable that the Proposed Rule sets time frames for submission of operator appeals and the filing of briefs to the Division of Coal Mine Workers' Compensation (DCMWC).<sup>91</sup> It does not, however, set goals or a time frame for a *decision* by the DCMWC.

There are several additional steps at which time limits are warranted. DCMWC would be empowered to extend the deadline for an appeal filing for good cause,<sup>92</sup> but there is no limit placed on the extension. OWCP is authorized to schedule a conference on its own initiative or if one is requested when the appeal is filed, but there is no time frame for the conference to take place or conclude.<sup>93</sup> Similarly, the text of the Proposed Rule permits appeals to the Director of OWCP within 30 days,<sup>94</sup> but it sets no timelines for decision making. Although the preamble of the Proposed Rule states, "Paragraph (e)(3) provides that the Director of OWCP will issue a final agency decision within 30 days of receipt of an appeal,"<sup>95</sup> the text of the proposed section 726.116(e)(3) contains no such provision.<sup>96</sup>

Open-ended delays create the risk of liabilities being shifted to the Trust Fund if, as has happened in the cases GAO documented, an operator seeks bankruptcy protection during the pendency of an appeal. These potential loopholes need to be closed.

#### **B. The Proposed Rule should clarify continued self-insurance eligibility and provide for interim security protections pending appeal.**

The Proposed Rule does not provide any interim protection for the Trust Fund while an appeal over increased collateral requirements or rejected approval for continued self-insurance eligibility is pending. When there is such an appeal, which could take months or even years under the Proposed Rule and during the course of judicial review, the Trust Fund remains vulnerable.

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<sup>91</sup> *Id.* at 3366 (text of proposed 20 C.F.R. § 726.116(b), (d)).

<sup>92</sup> *Id.* (text of proposed 20 C.F.R. § 726.116(b)).

<sup>93</sup> *Id.* (text of proposed 20 C.F.R. § 726.116(c)).

<sup>94</sup> *Id.* (text of proposed 20 C.F.R. § 726.116(e)).

<sup>95</sup> *Id.* at 3355.

<sup>96</sup> *Id.* at 3366.

DOL must live up to its obligation as a trustee of the Trust Fund by requiring some sort of interim measure, such a requirement to purchase commercial insurance, deposit negotiable securities, or place an additional amount in escrow during the pendency of an appeal.

If the status quo will be allowed to remain in place in these cases, with no interim protection for the Trust Fund such as an additional amount placed in escrow or other measure, then there remains a significant risk to the Trust Fund from the same tactical gamesmanship that operators have used to shift liabilities through the bankruptcy process. As noted above, the timelines for appeals are still not locked down through this rulemaking, and even then the prospect of litigation could delay a final decision for years, during which the Trust Fund would not be fully protected. Accordingly, if there is no interim protection, DOL should explain in the final rule why this is the case, including whether an alternative would better protect the Trust Fund and whether DOL needs any additional statutory authority to implement such a requirement.

### **C. The Proposed Rule needs to address additional technical questions and matters.**

In addition to the matters discussed above, the Proposed Rule should address the following:

- The final rule should, consistent with GAO’s recommendations, define conditions under which an operator’s authorization to self-insure would not be renewed. If the Proposed Rule intends to collapse that question in its entirety into the same 120% solution, it would be helpful to so state.
- Additionally, it would be helpful in the final rule to clarify how and in accordance with what criteria DOL will be able to assess whether the operator has sufficient resources to secure and maintain an indemnity/surety bond, the cost of any reinsurance, and the cost of administration or a third-party administrator, in addition to other requirements under this Act.
- The Proposed Rule uses but does not define the term “future liabilities.” This is a gap that needs to be closed.
- Transparency requirements would aid DOL in the implementation of the final rule, because DOL would then be able to benefit from the on-the-ground expertise of the miners and their representatives, who are acutely aware of the operator’s resources and liabilities. The final rule should require OWCP to post operator applications for self insurance, actuarial estimates of an operator’s black lung liability, operator appeals documents, and DOL decisions to authorize or deny self-insurance.
- Some small technical amendments are necessary:
  - In section 726.101(d) of the Proposed Rule, the following underlined words are missing but appear to be intended: “No operator whose application for authorization to self-insure or to renew authorization to self-insure has been denied may reapply until 12 months after a final decision denying such application.”
  - The reference to the “Bureau of Mines” in section 726.102 of the Proposed Rule alludes to an agency that has been superseded by the Mine Safety and Health Administration.

## CONCLUSION

The purpose of the Trust Fund and the larger statutory program establishing black lung benefits was to ensure that coal mine operators, or the coal industry, will fully bear the cost of black lung disease for the present time and in the future. The Proposed Rule effectuates this policy by providing more effective oversight of self-insured operators.

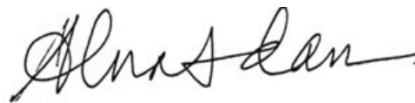
The black lung benefit program is important to the lives of miners and their families, and the Trust Fund is an essential part of that program. We thank DOL for thoughtfully addressing the deficiencies that we have identified in recent years. We look forward to the swift issuance of a final rule that addresses the matters we identified above, and we request that this letter be placed in the rulemaking docket.

Sincerely,



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**ROBERT C. "BOBBY" SCOTT**  
Ranking Member  
Committee on Education and  
the Workforce



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**ALMA S. ADAMS, Ph.D.**  
Ranking Member  
Subcommittee on Workforce Protections  
Committee on Education and  
the Workforce