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# MSHA'S FINAL SILICA RULE & LEGAL CHALLENGES

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# **MSHA's FINAL RULE STATUS**



# MSHA'S FINAL RULE STATUS

- *Final rule published in the Federal Register: April 18, 2024*
- *Final rule effective date: June 17, 2024*
- *Compliance deadlines extended by MSHA:*
  - *Coal: April 14, 2025*
  - *M/NM: April 8, 2026*
- ***THE RULE IS NOT YET ENFORCEABLE***
- ***MSHA INSPECTORS CANNOT REQUIRE YOU TO COMPLY WITH PROVISIONS OF THE FINAL RULE***

# MSHA'S PROPOSED RULEMAKING

- *MSHA's Respirable Crystalline Silica rule is formally titled:*

*Lowering Miners' Exposure to Respirable Crystalline Silica and Improving Respiratory Protection*

- *It was published in the Federal Register on July 13, 2023*
  - *Comment deadline was originally 45-days after the publishing date*
  - *MSHA extended the comment period for 15-days, ending September 11, 2023*
- *MSHA held 3 in-person hearings during this time*
  - *Arlington, VA*
  - *Beaver, WV*
  - *Denver, CO*

# MSHA'S RULEMAKING PROCESS

- Following submission of comment: MSHA was required to review comments (respond to each point made in the final rule preamble)
  - This process can sometimes take a year or more
  - **MSHA completed its review and response in approximately 4 months...**
- **Final rule went through review at the White House Office of Management and Budget (OMB)**
  - **This included stakeholder meetings between MSHA, stakeholder, and OMB review team**
- **During this process OMB will either approve the rule to be published as final or send it back to the agency for modification.**
  - **OMB approved the rule in early April 2024**
- **MSHA must then publish the rule in the Federal Register as a Final Rule.**
  - **This occurred April 18, 2024**



# EXISTING MSHA REGULATION OF SILICA



# EXISTING MSHA STANDARDS

- *Current MSHA Permissible Exposure Limit – 100  $\mu\text{g}/\text{m}^3$* 
  - *Incorporated by reference of Threshold Limit Values for Chemical Substances in Workroom Air Adopted by ACGIH for 1973*
- Testing Requirements: 30 CFR 56/57.5002
  - Dust, gas, mist, and fume surveys shall be conducted as frequently as necessary to determine the adequacy of control measures.*
- *Respiratory Protection Program incorporated by Reference ANSI Z88.2-1969*



# EXISTING MSHA ENFORCEMENT INITIATIVE

- ***MSHA Silica Enforcement Initiative***

- *Rolled out in 2022 with several other MSHA safety initiatives*

*MSHA is implementing a Silica Enforcement Initiative to protect Coal and Metal and Nonmetal (MNM) miners' health by limiting their exposures to respirable crystalline silica. **This initiative has four components: inspections, sampling, compliance assistance, and miners' rights.***

## *1. Inspections*

### *Coal and MNM mines*

*MSHA will conduct spot inspections for silica at coal and MNM mines.*

- *At mines with repeated overexposures to silica.*
- *This will include, where warranted, inspections in accordance with Section 103(i) of the Mine Act.*
- *MSHA will require for overexposures over 100 micrograms per cubic meter (existing PEL):*
  - *For MNM mines, abatement within a period of time.*
    - ***For overexposures not abated, MSHA will issue a 104(b) withdrawal order.***
  - *For coal mines, MSHA will encourage mine operators to change the dust control and mine ventilation plans and review plans/exposures after changes are made.*

# EXISTING MSHA ENFORCEMENT INITIATIVE

- *MSHA Silica Enforcement Initiative*

## 4. Miners' Voice

- *MSHA will reinvigorate efforts to educate miners about their rights to make hazardous condition complaints and their protections against retaliation and discrimination.*
- *MSHA will ensure that miners are aware of their right to:*
  - *Accompany an MSHA inspector.*
  - *Obtain an immediate MSHA inspection if they believe safety or health hazards exists.*
  - *Identify hazardous conditions and refuse unsafe work without fear of retaliation and discrimination.*
  - *Additional information will be posted on the MSHA's website.*
  - *Compliance assistance materials will be provided through the Educational Field and Small Mine Services staff.*



# MSHA's FINAL RULE



# MSHA'S FINAL RULE FOR RCS

- *Lowering Miners' Exposure to Respirable Crystalline Silica and Improving Respiratory Protection*
- *Proposes creation of new part in 30 CFR, Part 60 - Uniform Mine Health Regulations (subpart M)*
- *Part 60 – Respirable Crystalline Silica*
  - *60.1 Scope; compliance date.*
  - *60.2 Definitions.*
  - *60.10 Permissible Exposure Limit (PEL).*
  - *60.11 Methods of compliance.*
  - *60.12 Exposure monitoring.*
  - *60.13 Corrective actions.*
  - *60.14 Respiratory protection.*
  - *60.15 Medical surveillance for metal and nonmetal mines.*
  - *60.16 Recordkeeping requirements.*
  - *60.17 Severability.*

# UPDATES / CHANGES IN THE FINAL RULE

- **§60.10 – Permissible Exposure Level (PEL)**
  - The mine operator shall ensure that no miner is exposed to an airborne concentration of respirable crystalline silica *in excess of 50 $\mu\text{g}/\text{m}^3$  for a full-shift exposure, calculated as an 8-hour TWA.*
- **§60.2 – Definitions:**
  - **Action Level:** means an airborne concentration of respirable crystalline silica of 25 micrograms per cubic meter of air ( $\mu\text{g}/\text{m}^3$ ) for a full-shift exposure, calculated as an 8-hour time weighted average (TWA).
- **§60.11 – Methods of Compliance:**
  - (a) *The mine operator shall install, use, and maintain feasible engineering controls, supplemented by administrative controls when necessary, to keep each miner's exposure at or below the PEL, except as specified in § 60.14.*
  - (b) *Rotation of miners shall not be considered an acceptable administrative control used for compliance with this part.*

# COMPLIANCE METHODS

- ***§60.11 – Methods of Compliance:***

- (a) The mine operator shall install, use, and maintain feasible engineering controls, supplemented by administrative controls when necessary, to keep each miner's exposure at or below the PEL, except as specified in § 60.14.*

- (b) Rotation of miners shall not be considered an acceptable administrative control used for compliance with this part.*

- Engineering controls are prioritized over administrative controls, including use of respiratory protection.
  - Examples provided by MSHA include ventilation systems, dust suppression, enclosed cabs with filtered breathing air, water sprays, etc.
  - This is consistent with what MSHA's approach the last few years when overexposures are identified
  - Places burden on operators to update equipment and/or processes to bring RCS exposure below PEL and Action Level (AL)
- Administrative controls are stated as a *supplement* to engineering. MSHA identifies the following as administrative controls, housekeeping, work positions, cleaning of spills, and measure to prevent contamination of clothing.



# MONITORING/TESTING



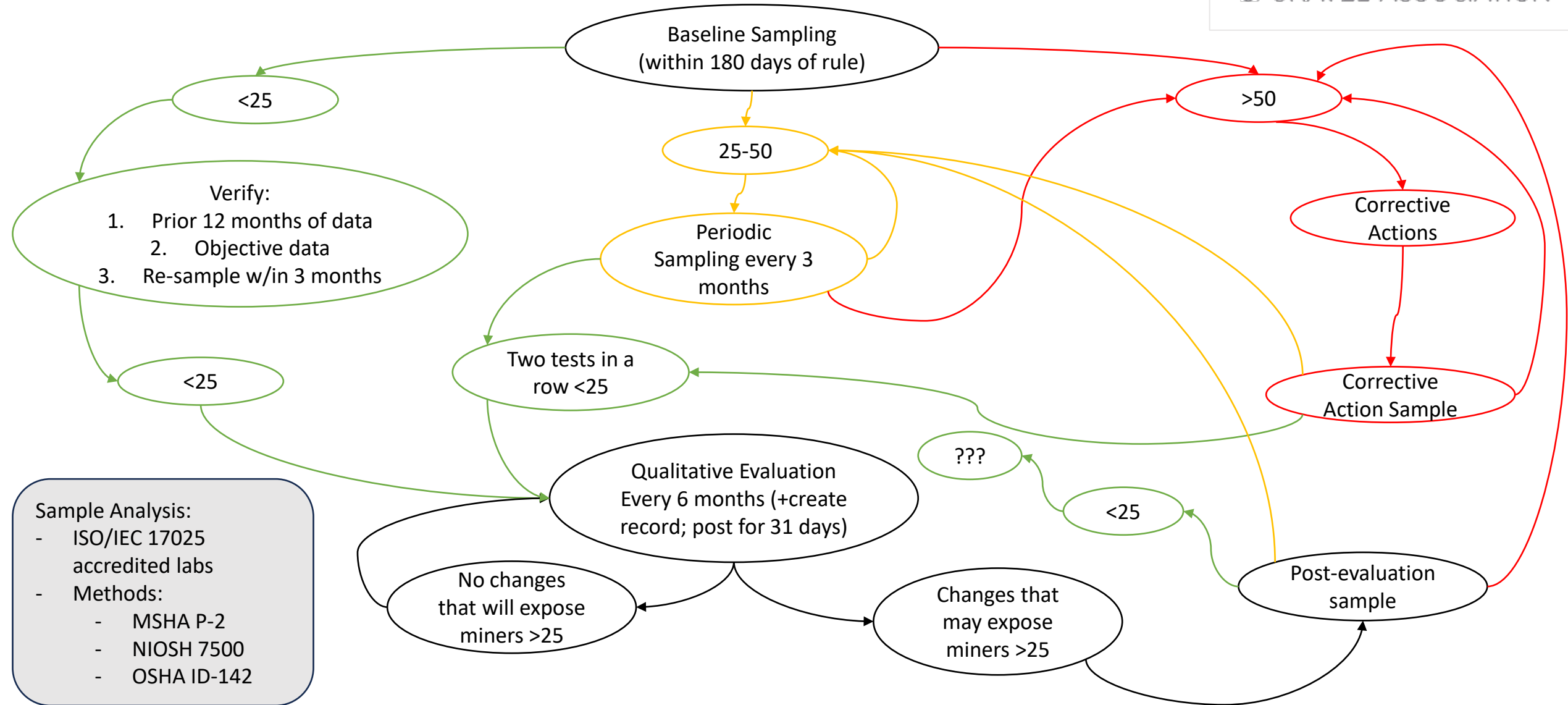
## SAMPLING REQUIREMENTS

- Sample during “typical mining activities”
- Representative sampling: 2+ miners doing same task, same shift, same work area

- Full-shift sample; time weighted average
- Breathing zone air samples
- Post sampling results 31 days; retain 2 years

# NSSGA

NATIONAL STONE, SAND & GRAVEL ASSOCIATION



### Sample Analysis:

- ISO/IEC 17025 accredited labs
- Methods:
  - MSHA P-2
  - NIOSH 7500
  - OSHA ID-142



# EXPOSURE MONITORING

- **§60.12 – Exposure Monitoring:**
  - The proposal requires both monitoring by means of sampling, what MSHA refers to as *quantitative*, and periodic evaluation of process and controls measure, or *qualitative*
- **§60.12(a) –Sampling:**
  - **Mine operators shall commence sampling by the compliance date in § 60.1 [April 8, 2025] to assess the full shift, 8-hour TWA exposure of respirable crystalline silica for each miner who is or may reasonably be expected to be exposed to respirable crystalline silica..**
    - May reasonably be expected – MSHA assumes this includes ***all miners in processing and extraction***
  - Can use representative sampling for miners performing the same task, on the same shift, in the same work area. (§60.12(f)(3))
  - If initial sampling comes back below 25µg/m<sup>3</sup>, operator must *verify* this collecting another sample
  - **The operator can no longer rely on...**
    - MSHA or operator sampling data in last 12 months (from time of sample)
    - Another sample taken within 3-months
    - ***Objective Data***

# EXPOSURE MONITORING

- **§60.12(a)(2)(ii) –**
  - *At or above the action level but at or below the PEL, the mine operator shall take another sampling within 3 months.*
    - *Completed within 3 months of prior sample date, not date result received.*
    - *Completed until there are two consecutive samples collected below the AL (25µg/m<sup>3</sup>)*
- **§60.12(b) – Corrective Action Sampling:**
  - Where the most recent sampling indicates that miner exposures are above the PEL, the mine operator shall sample after corrective actions are taken pursuant to § 60.13 until the sampling indicates that miner exposures are at or below the PEL. . .

*The mine operator shall immediately report all operator samples above the PEL to the MSHA District Manager or to any other MSHA office designated by the District Manager.*

# EVALUATION AND MONITORING

- **§60.12(c) – Periodic Evaluation:**

- *At least every 6 months after commencing sampling under 60.12(a)(1) or whenever there is a change in: production; processes; installation or maintenance of engineering controls; installation or maintenance of equipment; administrative controls; or geological conditions; mine operators shall evaluate whether the change may reasonably be expected to result in new or increased respirable crystalline silica exposures. Once the evaluation is completed, the mine operator shall:*
  - (1) Make a record of the evaluation and the date of the evaluation; and
  - (2) Post the record on the mine bulletin board and, if applicable, by electronic means, for the next 31 days.
- Required to take place at least every 6-months
- Begins 6-months after starting testing...

- **§60.12(d) – Post-Evaluation Sampling:**

- *If the mine operator determines as a result of the periodic evaluation under paragraph (c) of this section that miners **may be exposed to respirable crystalline silica at or above the action level**, the mine operator shall perform sampling to assess the full shift, 8-hour TWA exposure of respirable crystalline silica for each miner who is or may reasonably be expected to be at or above the action level.*

# SAMPLE COLLECTION AND RECORDS

- ***Additional Sampling Requirements:***

- Samples are conducted the duration of miner's regular shift and during typical mining activities and measure on an 8-hour time weighted average
- Must be in the breathing zone of miner
- Must use sampling equipment that conform to ISO 7708:1995 requirements
- Must use ISO/IEC 17025 Accredited Labs for analysis
- Must ensure labs use proper methods outlined by MSHA, NIOSH, or OSHA

- ***§60.12(g) – Sampling Records:***

- Records must include, date, sampled occupation, results for **RCS and respirable dust** exposure level
- Records must be maintained for at least 5 years by operator
- **Records and lab reports** must be posted – including the lab report – for 31 days.
  - Posting either electronically, physically, or both

# RECORDKEEPING

- **§60.16(a)**

Table 1 to paragraph (a)—Recordkeeping Requirements		
Record	Section references	Retention period
1. Evaluation records	§ 60.12(c)	At least 5 years from date of each evaluation.
2. Sampling records	§ 60.12(g)	At least 5 years from sample date.
3. Corrective actions records	§ 60.13(c)	At least 5 years from date of each corrective action.
4. Written determination records received from a PLHCP	§ 60.14(b)	Duration of miner's employment plus 6 months.
5. Written medical opinion records received from a PLHCP or specialist	§ 60.15(f)	Duration of miner's employment plus 6 months.

- **§60.16(b)** *Upon request from an authorized representative of the Secretary, from an authorized representative of miners, or from miners, mine operators shall promptly provide access to any record listed in this section.*



# **CORRECTIVE ACTION, PPE, AND SURVEILLANCE**



# CORRECTIVE ACTION & PPE

- **§60.13 – Corrective Actions:**

- If sampling results are *greater than the PEL* ( $50\mu\text{g}/\text{m}^3$ ), operator must implement corrective actions

- (2) Ensure that affected miners wear respirators properly for the full shift or during the period of overexposure until miner exposures are at or below the PEL; and*

- (3) Immediately take corrective actions to lower the concentration of respirable crystalline silica to at or below the PEL.*

- (3)(b) Once corrective actions have been taken, the mine operator shall:*

- (i) Conduct sampling pursuant to § 60.12(b); and*

- (ii) Take additional or new corrective actions until sampling indicates miner exposures are at or below the PEL.*

- Operator must document the corrective actions taken, and maintain record of the corrective actions for 5-years, providing them to MSHA upon request

# CORRECTIVE ACTION & PPE

- **§60.14 – Respiratory Protection:**

- Only permitted for temporary use if:

- (1) *Engineering control measures are being developed and implemented; or*

- (2) *It is necessary by the nature of work involved* (for example, occasional entry into hazardous atmospheres to perform maintenance or investigation).

- Respirators must be protection classified as 100 series (i.e. no more N95)

- Respiratory Protection Program compliant with ASTM F3387-19 must be implemented

- **§60.14(b) Miners unable to wear respirators.** Upon written determination by a physician or other licensed health care professional (PLHCP) that an affected miner is unable to wear a respirator, the miner shall be temporarily transferred either to work in a separate area of the same mine or to an occupation at the same mine where respiratory protection is not required.

- (1) The affected miner shall continue to receive compensation at no less than the regular rate of pay in the occupation held by that miner immediately prior to the transfer.

- (2) The affected miner may be transferred back to the miner's initial work area or occupation when temporary non-routine use of respirators under paragraph (a) of this section is no longer required.



# MEDICAL SURVEILLANCE

- **§60.15 – Medical Surveillance**
  - Metal/Nonmetal operators shall provide to each miner periodic medical examination to include;
    - Medical/work history
    - Physical exam (emphasis on respiratory)
    - Chest X-ray
    - Pulmonary function test
  - Medical examination must be offered at least every 5 years, and during the first 12-months of the compliance date
    - It is not required for miners to participate in this examination, *However...*
- **§60.15(c): Every new miner *must* receive medical examination within 60-days of employment, a follow-up within 3 years, and follow-up with specialist within 2-years if the follow-up show evidence of decreased lung function**
  - *Must be completed within 60-days of beginning employment*
- **§60.15(d)(2): Written medical opinion**
  - *Required submission of result of med exams are submitted to NIOSH (once a system is created)*
- **§60.15(e): Written medical opinion**
  - *The mine operator shall obtain a written medical opinion from the PLHCP or specialist within 30 days of the medical examination. The written opinion shall contain only the following:*
    - (1) The date of the medical examination;*
    - (2) A statement that the examination has met the requirements of this section; and*
    - (3) Any recommended limitations on the miner’s use of respirators.*



# LEGAL CHALLENGES AND THE FUTURE OF THE RULE



# LEGAL CHALLENGES TO THE RULE

- Industry associations are challenging the MSHA rule in 8<sup>th</sup> Circuit
- *Sorptive Minerals Institute*
  - *Filed challenge to the rule seeking the exemption of its operations based on risk analysis and medical research MSHA did not accept, but OSHA did in its RCS rulemaking*
- *Joint Industry Coalition*
  - *Includes 5 national, and 1 state association.*
    - *NSSGA, PCA, NMA, AEMA, AISI, TACA*
    - *Challenging a number of items and seeking the Vacatur of the Rule in its entirety*
      - *Feasibility of compliance*
        - *Prohibition on miner rotation and use of respirators*
        - *Medical surveillance*

# THE FUTURE OF THE RULE

- MSHA's response brief is due January 17, 2024 (before inauguration of President-Elect Trump)
- MSHA has limited options for changing or rescinding the rule on its own
  - Rule became Final before deadline for Congressional Review Act
  - *No Less Protection Clause* in the Mine Act
- Any changes to the rule (or vacatur of the rule) will come as a result of the litigation
  - Likely will not have a decision by the 8<sup>th</sup> Circuit until at least Summer or early Fall 2025
- With compliance deadline for M/NM in April 2026, companies will need to evaluate how close they are to compliance if there is an appetite to await the court decision to begin compliance efforts.

# QUESTIONS?





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