

## Regulatory Certifications

### *Executive Order 12866*

This final rule has been written and reviewed in accordance with Executive Order 12866, Sec. 1(b), Principles of Regulation. OJP has determined that this final rule is not a "significant regulatory action" under Executive Order 12866, Sec. 3(f), Regulatory Planning and Review, and accordingly this rule has not been reviewed by the Office of Management and Budget.

### *Regulatory Flexibility Act of 1980*

OJP, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed this final rule and by approving it certifies that this rule will not have a significant economic impact on a substantial number of small entities because the economic impact is limited to OJP's appropriated funds.

### *Unfunded Mandates Act of 1995*

This final rule will not result in the expenditure by State, local and tribal governments, in the aggregate, or by the private sector, of \$100,000,000 or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

### *Small Business Regulatory Enforcement Fairness Act of 1996*

This final rule is not a major rule as defined by section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. 804. This rule will not result in an annual effect on the economy of \$100,000,000 or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

### *Paperwork Reduction Act*

No new collection of information requirements as defined under the Paperwork Reduction Act (44 U.S.C. 3504(h)) are being added by this final rule.

### *Environmental Impact*

OJP has evaluated this final rule in accordance with its procedures for ensuring full consideration of the potential environmental impacts of OJP's actions, as required by the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*) and related directives. OJP has concluded that the

issuance of this final rule does not have a significant impact on the quality of the human environment and, therefore, does not require the preparation of an Environmental Impact Statement.

### *Energy Impact Statement*

OJP has evaluated this final rule and has determined that it creates no new impact on the energy supply or distribution.

### List of Subjects in 28 CFR Part 91

Grant programs law.

## PART 91—GRANTS FOR CORRECTIONAL FACILITIES

■ Accordingly, OJP is adopting as a final rule, without change, the second interim rule that amended 28 CFR part 91 and that was published at 69 FR 2298 on January 15, 2004.

**Regina B. Schofield,**

*Assistant Attorney General, Office of Justice Programs.*

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## FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

### 29 CFR Part 2700

### Emergency Response Plan Dispute Proceedings and Related Procedural Rules

**AGENCY:** Federal Mine Safety and Health Review Commission.

**ACTION:** Final rule.

**SUMMARY:** The Federal Mine Safety and Health Review Commission (the "Commission") is an independent adjudicatory agency that provides hearings and appellate review of cases arising under the Federal Mine Safety and Health Act of 1977 (the "Mine Act"). Hearings are held before the Commission's Administrative Law Judges, and appellate review is provided by a five-member Review Commission appointed by the President and confirmed by the Senate. On July 18, 2006, the Commission published an interim rule to implement the Mine Improvement and New Emergency Response Act of 2006 (the "MINER Act"), which amended the Mine Act to improve the safety of miners, particularly in underground coal mines. The MINER Act provides for Commission review of disputes arising over emergency response plans for underground coal mines. The interim rule established procedures for the submission and consideration of such

disputes. The Commission invited public comment on the interim rule. The Commission has reviewed the comments on the interim rule and has decided to make certain changes in the rule. This publication makes final changes to Rule 24, the rule designed to implement the MINER Act. In connection with revising Rule 24, the Commission is also amending four of its other procedural rules to make them consistent with Rule 24.

**DATES:** This final rule will take effect on January 18, 2007.

**ADDRESSES:** Comments and questions may be mailed to Michael A. McCord, General Counsel, Office of the General Counsel, Federal Mine Safety and Health Review Commission, 601 New Jersey Avenue, NW., Suite 9500, Washington, DC 20001, or sent via facsimile to 202-434-9944.

**FOR FURTHER INFORMATION CONTACT:** Michael A. McCord, General Counsel, Office of the General Counsel, 601 New Jersey Avenue, NW., Suite 9500, Washington, DC 20001; telephone 202-434-9935; fax 202-434-9944.

**SUPPLEMENTARY INFORMATION:** The final rules will apply to cases initiated after the rules take effect. The final rules also apply to proceedings pending on the effective date, except to the extent that such application would not be feasible, or would work injustice, in which event the former rules of procedure would continue to apply.

### I. Background

On June 15, 2006, President George W. Bush signed into law the MINER Act, Pub. L. 109-236, 120 Stat. 493 (2006). Section 2 of the MINER Act amends section 316 of the Mine Act (30 U.S.C. 876) by adding a new section (b), entitled "Accident Preparedness and Response." Section 316(b)(2)(A) provides that, within 60 days of enactment, each underground coal mine operator is required to develop and adopt a "written accident response plan." Section 316(b)(2)(B) requires the plan to provide for the evacuation of all individuals endangered by an emergency and the maintenance of individuals trapped underground in the event that miners are not able to evacuate the mine. Under section 316(b)(2)(C), all plans shall be subject to review and approval by the Secretary of Labor (the "Secretary"), and must: (i) Afford miners a level of safety protection at least consistent with the existing standards; (ii) reflect the most recent credible scientific research; (iii) be technologically feasible, make use of current commercially available technology, and account for the specific

physical characteristics of the mine; and (iv) reflect the improvements in mine safety gained from experience under this Act and other worker safety and health laws. Section 316(b)(2)(D) specifies that the Secretary shall review plans periodically, but at least every 6 months. Sections 316(b)(2)(E) and (F) set forth plan content requirements, including a provision allowing the Secretary to make additional plan requirements with respect to any of the content matters.

Section 316(b)(2)(G), entitled "Plan Dispute Resolution," provides for Commission resolution and administrative appellate review of emergency response plan disputes. Section 316(b)(2)(G)(i) states that any dispute between the Secretary and an operator with respect to the content of the operator's plan or any refusal by the Secretary to approve such a plan shall be resolved on an "expedited basis." Section 316(b)(2)(G)(ii) further provides that, in the event of a dispute or refusal described in clause (i), the Secretary shall issue a citation which shall be immediately referred to a Commission Administrative Law Judge, and the Secretary and the operator shall submit all relevant material regarding the dispute to the Administrative Law Judge within 15 days of the date of the referral. The section concludes by providing that the Administrative Law Judge shall render his or her decision with respect to the plan content dispute within 15 days of the receipt of the submission. Section 316(b)(2)(G)(iii) states that a party adversely affected by a decision under clause (ii) may pursue all further available appeal rights with respect to the citation involved, except that inclusion of the disputed provision in the plan will not be limited by such appeal unless such relief is requested by the operator and permitted by the Administrative Law Judge.

On July 18, 2006, the Commission published Interim Rule 24 to implement section 316(b)(2)(G), providing for Commission hearings and administrative appellate review of emergency response plan disputes. The Commission chose to establish an interim rule and then request public comments on the rule in order to implement the MINER Act as soon as possible after the Act became effective. Although the interim rule was procedural in nature and did not require notice-and-comment rulemaking under the Administrative Procedure Act, 5 U.S.C. 551, 553(b)(3)(A), the Commission invited public comment. The comment period on the interim rule closed on August 17, 2006. The Commission received comments from

the Secretary through the U.S. Department of Labor's Office of the Solicitor; the United Mine Workers of America (the "UMWA"); and other individual members of the mining community or bar who practice before the Commission.

The final rule retains the same approach as the interim rule; however, the text of the rule has changed in several areas in response to comments received. In addition, the Commission on its own has made several changes upon further consideration of the interim rule. Finally, the Commission has made conforming changes to four of its other procedural rules.

## II. Section-by-Section Analysis and Summary of Comments to Rule 24

The title of the interim rule is "Accident response plan dispute proceedings." One commenter stated that the title is confusing because section 2 of the MINER Act, which Rule 24 implements, is entitled "Emergency Response." Congress used both terms—"accident response plan" and "emergency response plan"—in section 2 in referring to the plans and apparently viewed the terms as interchangeable. Nevertheless, the term, "emergency response plans," is broader in scope than the current title used in the interim rule and provides a more precise description of the variety of plans covered by section 2, which Rule 24 implements. Therefore, in agreement with the comment, the Commission has revised the title of Rule 24 to "Emergency response plan dispute proceedings." Consistent with the change in the title, all other references in Rule 24 to the plans have been changed to "emergency response plans."

Interim Rule 24(a) requires that the Secretary refer to the Commission, within one day of its issuance, any citation arising from a dispute over the content of an emergency response plan. In her comment, the Secretary states that the one-day period provided in the interim rule for referral of the dispute to the Commission is insufficient to complete her administrative review of the documents in the referral. The Commission, however, is constrained by the mandate of section 316(b)(2)(G)(ii) of the MINER Act, which requires that a citation issued by the Secretary shall be referred to the Commission "immediately." In addition, section 316(b)(2)(G)(i) also states that any such dispute "shall be resolved on an expedited basis." The Commission has determined that a period of two business days should address, to some degree, the Secretary's concerns, while

adhering to the strictures of the MINER Act. In addition, the Commission notes that preparation and review of the documentation needed for a referral can occur concurrently with the preparation of the citation, thus alleviating the need for additional time to prepare the documents after issuance of the citation.

The Secretary also suggested that Rule 24(a) specify that filing, as well as service, of the referral can be accomplished through facsimile transmission. The Commission concluded that Rule 24(c) and its other applicable procedural rules (Rules 5(e)(1) and 7(c)(1)) are sufficiently specific on allowing filing and service via facsimile, and that no clarification is needed in subparagraph (a). However, the Commission is separately amending Rules 5(e)(1) and 7(c)(1) to provide that filing of referrals by facsimile transmission is an exception to the prohibition in those rules against filing or serving by facsimile documents that are more than 15 pages in length. Thus, filing or service of documents under Rule 24 may be accomplished through facsimile transmission even though such documents exceed 15 pages in length.

Interim Rule 24(b) specifies that the Secretary is required to file, as part of a referral: The citation; a notice describing the dispute; a short and plain statement of her position on the disputed provision; and a copy of the emergency response plan. The Secretary states that the rule should not require her to submit a copy of the entire emergency response plan, noting that the plan is likely to be lengthy and include many undisputed provisions. The Commission agrees, and the rule has been revised to provide that copies of only the disputed plan provisions shall be submitted with the referral.

The Secretary also commented that subparagraph (b) does not require a "short and plain statement" from the operator, as it does from the Secretary. The Secretary reasoned that such a statement from the operator would assist in framing the issues for resolution and assist the parties and the Judge in determining the need for a hearing. The Commission agrees with the Secretary's position. The Commission has revised the interim rule to add a new subparagraph (c) to require the operator to file a "short and plain statement" of its position with respect to the disputed plan provision within five calendar days after the referral. The addition of this subparagraph requires the redesignation of the subsequent subparagraphs.

Interim Rule 24(c) currently specifies that the filing of any document with the

Commission is effective upon receipt and that copies shall be expeditiously served on parties, such as by courier service or facsimile transmission. Subparagraph (c) is redesignated as (d). One commenter suggested that the paragraph be clarified to specify that the referral is effective upon receipt. The Commission intends that the filing of all documents in emergency response plan dispute proceedings, including the referral, is effective upon receipt and has explicitly included a reference to the referral in the final rule.

The UMWA proposed that present subparagraph (c) also require service of the referral on miners' representatives. Further, the UMWA stated that Rule 4 (*Parties, intervenors, and amici curiae*) should be amended to provide that any miners and miners' representatives who submitted comments during the emergency plan review process will be designated as parties in the Commission proceeding. Finally, the UMWA recommended that the Commission require that the operator, after service of the referral, post the referral on its bulletin board at the mine.

The Commission recognizes the importance of miner participation in the formulation of emergency response plans. In light of that consideration, the Commission is revising the interim rule to provide for service of the referral on any miners and miners' representatives who have participated in the plan review process. Regarding the suggestion that miners and miners' representatives who submitted comments be designated as parties, the Commission believes that its current intervention rule provides a sufficient mechanism for their participation. The Commission does not view the requirements of Rule 4, which governs the process for gaining intervenor status in a Commission proceeding, as burdensome; nor does the Commission view the interests of miners and miners' representatives in an emergency plan dispute proceeding as sufficiently different to require an additional rule of intervention. As to the suggestion regarding posting of the referral, the Commission has concluded that, as with other Mine Act violations, posting the citation underlying the referral would sufficiently inform miners of the dispute over the emergency response plan provision and that posting the referral itself, which may be unwieldy in size, would be unnecessary.

Interim Rule 24(d) has been redesignated as (e), and the heading that follows has been revised to read, "*Proceedings before the Judge*," to more accurately describe the content of the provision. Interim Rule 24(d)(1)

presently requires parties to submit to the Judge "all relevant materials regarding the dispute" within 15 days of the referral. The subparagraph further requires that a party who seeks to stay the operation of the disputed plan provision, pending an appeal of the Judge's decision, should file a request for a stay when its materials are submitted to the Judge. Two commenters stated that the MINER Act provides that only an operator can seek a stay of the Judge's decision. One of the commenters also added that seeking a stay of the disputed plan provision before the Judge's decision has been issued might be problematic because the dispute regarding the plan provision would be, as yet, unresolved, and it might be difficult to know what relief to request from the Judge.

Upon review of the MINER Act and the comments, the Commission has concluded that the comments have merit. The Commission has clarified that only an operator can seek a stay of the disputed plan provision, as is provided for in section 316(b)(2)(G)(iii) of the MINER Act. The Commission has also deleted the requirement that a party seek a stay before the Judge has issued his decision from Interim Rule 24(d)(1) and moved the procedure for seeking a stay to newly designated subparagraph (f).

Interim Rule 24(d)(2) afforded the parties the opportunity for a hearing before a Commission Administrative Law Judge, either at the request of a party or by order of the Judge. The preamble accompanying the interim rule, 71 FR 40655, stated that, although the MINER Act does not explicitly provide for hearings on emergency plan disputes, section 105(d) of the Mine Act states, "the Commission shall afford an opportunity for a hearing [on any notice of contest]." 30 U.S.C. 815(d). One commenter disagreed with the Commission's rationale for requiring a hearing upon a party's request. The commenter stated that section 105(d) applies to orders and citations issued under section 104 or to proposed penalty assessments issued under section 105. The commenter noted that citations relating to emergency response plans are issued under section 316, which is silent regarding the right to a hearing.

Upon further consideration of the interim rule, the Mine Act, and the MINER Act, the Commission agrees that the mandatory hearing procedures specified in section 105(d) of the Mine Act are not directly applicable to emergency response plan dispute proceedings. The Commission has revised the interim rule to provide in

the final rule that, when a party requests a hearing on an emergency response plan dispute, the Judge has discretion whether to grant the request. The commenter further suggested that the Judge should order a hearing only when there are factual issues in dispute. However, the Commission views the standard governing the need for a hearing more broadly: That is, the Judge should order a hearing whenever it would assist in resolving the issues. In any event, the Commission expects that the question of whether a hearing should be held and the question of the precise form that such a hearing will take will be resolved consistent with due process considerations.

Another commenter objected to the reference in the interim rule to the "hearing on the referral." The commenter explained that the hearing more accurately involves the emergency response plan dispute. The Commission agrees with the commenter and has clarified in the final rule that the hearing concerns the disputed plan provision. Contrary to another comment, the Commission sees no need to define "disputed plan provision." The Commission believes that a broad definition of what constitutes a "disputed plan provision" would likely not be useful and that any issue as to whether a particular provision is disputed could best be answered in the specific context of an actual case. The same commenter also asked the Commission to specify the legal standard that would be applied in reviewing plan provisions. The Commission has concluded that it would be inappropriate to specify in its procedural rules the standard for resolving disputes over emergency response plan provisions. The commenter also requested that the Commission specify which party bears the burden of proof. While the Commission concludes that the burden of proof in establishing a violation alleged in a citation is on the Secretary, the Commission believes it is unnecessary to address this well-settled principle in its procedural rules.

Upon further consideration of the requirement in the interim rule regarding the Judge's authority to sua sponte order a hearing, the Commission has increased the time for a Judge to issue such an order from 5 days to 10 days following the filing of the referral, so that the Judge has sufficient time to review the record in the proceeding and evaluate the need for a hearing.

Final Rule 24(e)(2)(iii) states that, if a hearing on the referral is ordered, the hearing shall be held within 15 calendar days of the filing of the referral. The

Commission anticipates that such a hearing shall be scheduled so as to be completed within that time period.

Interim Rule 24(e) has been redesignated as (f), the heading has been changed to more accurately reflect the content of the section (including the procedure for requesting a stay), and subheadings have been added for clarity. Interim Rule 24(e)(1) presently provides for the issuance of the Judge's decision, including a disposition on the request for a stay of the inclusion of the disputed provision in the emergency response plan, and Interim Rule 24(e)(2) addresses notification and service of the decision. In light of the change to delete the requirement that a party prospectively seek a stay at the time materials are submitted to the Judge, newly designated Rule 24(f)(1) has also been revised to delete the reference to the Judge's issuance of a ruling on the stay at the time of the decision. Further, the specifics of the issuance and notification of the Judge's decision have been moved into this subparagraph from Interim Rule 24(e)(2).

Subparagraph (e)(1) of the interim rule states that, within 15 calendar days following receipt by the Judge of all submissions and testimony, the Judge shall issue his or her decision. The Secretary commented that this provision arguably conflicts with section 2(b)(2)(G)(ii) of the MINER Act, 30 U.S.C. 316(b)(2)(G)(ii), which requires the parties to submit all relevant material regarding the dispute to the judge within 15 days of the referral and requires the Judge to issue his or her decision "within 15 days of the receipt of the submission." The Secretary stated that, to the extent a hearing may last longer than one day, the requirement in Rule 24(e) that the Judge issue a decision within 15 calendar days following receipt of all submissions and testimony arguably conflicts with this statutory provision. She suggested that the final rule should conform to the statute.

Because the Commission expects that hearings shall be scheduled to be completed within 15 calendar days of the referral, the Commission concludes that the language of the rule is consistent with the statute, and therefore retains the relevant language without further revision.

Newly designated Rule 24(f)(2) specifies the procedures for seeking a stay from the Judge after issuance of the decision on the disputed plan provision. Initially, the rule provides that, notwithstanding the provisions of Rule 69(b), 29 CFR 2700.69(b), the judge retains jurisdiction over a request for a stay after the issuance of the decision.

The subparagraph provides that an operator may seek from the Judge, within two business days after service of the decision, a stay of the inclusion of the disputed provision in the emergency response plan during the pendency of an appeal with the Commission. The Secretary has two business days to respond to the stay request following service of the operator's motion. The Judge, in turn, has two business days following filing of the Secretary's response to issue an order granting or denying the stay. One commenter requested that the Commission place in the rule the standard under which a Judge would issue a stay. The Commission declines to do so because the determination of the appropriate standard involves substantive legal analysis that is best resolved through individual case disposition.

Interim Rule 24(f) has been redesignated as (g). The interim rule specifies that Commission rules governing petitions for discretionary review of Mine Act cases apply to appeals from Judges' decisions in proceedings involving emergency response plan disputes. Newly designated subparagraph (g) contains a new provision clarifying that a Judge's order granting or denying an operator's request for a stay may also be reviewed in conjunction with the Judge's disposition of the underlying disputed plan provision. One commenter suggested that the interim rule did not clearly state whether the procedures in the rules that are applicable to a case on appeal before the Commission governed emergency response dispute proceedings. In response, the reference in Rule 24 to Rule 75, 29 CFR 2700.75, which governs the filing of briefs with the Commission, has been modified to clarify that the provisions in that rule apply except to the extent that they are superseded by a Commission briefing order. Such orders are specifically provided for in the rule, and it may be anticipated that, in some instances, the order will modify the page limits or time periods for filing in Rule 75.

Finally, one commenter requested that the Commission incorporate into the subparagraph a "good cause" standard for extending the time for filing briefs, when all parties have agreed to such an extension. However, the Commission believes that the "extraordinary circumstances" test in the interim rule should be retained because a more lenient standard would undermine the time-sensitive scheme that Congress embodied in the MINER Act for resolving disputes over plan provisions in emergency response plans.

### III. Summary of Changes to Other Procedural Rules in Light of Rule 24

The Commission is also amending four of its other Procedural Rules to make them consistent with Rule 24. Procedural Rules 5 and 7, 29 CFR 2700.5 and 2700.7, govern the filing and service of documents by facsimile transmission, respectively. Presently, those rules prohibit the use of fax for filing or service when the document is more than 15 pages in length. Accordingly, subparagraph (1) of Rule 5(e), *Manner and effective date of filing*, is revised to add Rule 24 proceedings to the list of enumerated exceptions to the 15-page limitation on documents that can be filed by fax. Subparagraph (1) of Rule 7(c), *Methods of service*, is also revised to add Rule 24 proceedings to the list of enumerated exceptions to the 15-page limitation on documents that can be served by fax. These revisions will permit parties to fax documents exceeding 15 pages in Rule 24 proceedings, so that parties may file and serve lengthy pleadings and other documents expeditiously.

The Commission is revising Procedural Rule 8, 29 CFR 2700.8, governing time computation, to expressly except Rule 24, in addition to Rule 45, 29 CFR 2700.45, from the provisions of Rule 8(a). In the proposed change to Rule 8, the language excluding the application of Rule 8(a) is moved from the prefatory language of Rule 8 to subsection (a), where it is more appropriate. In order to clarify time computation under Rule 24, the Commission has described time periods in Rule 24 in terms of "calendar" and "business" days, similar to the language in Rule 45. In addition, a third example discussing the application of Rule 8 to a Rule 24 proceeding has been added to further clarify the application of Rule 8. Finally, Rule 69(b), 29 CFR 2700.69(b), is revised to recognize that Rule 24(f)(2) creates an exception to the general principle that a Judge no longer has jurisdiction over an emergency response plan dispute proceeding following the issuance of his decision on the merits. Rule 24(f)(2) specifies that a Judge retains jurisdiction over the proceeding to dispose of a stay request from the operator.

#### Public Comment

The Commission, which is always open to comments and suggestions, welcomes comment on this procedural rule.

**List of Subjects in 29 CFR Part 2700**

Administrative practice and procedure, Mine safety and health, Penalties, Whistleblowing.

■ For the reasons stated in the preamble, the Federal Mine Safety and Health Review Commission amends 29 CFR part 2700 as follows:

**PART 2700—PROCEDURAL RULES**

■ 1. The authority citation for part 2700 is revised to read as follows:

**Authority:** 30 U.S.C. 815, 820, 823, and 876.

■ 2. Section 2700.5 is amended by revising the second sentence of paragraph (e)(1) and the second and third sentences of paragraph (e)(2) to read as follows:

**§ 2700.5 General requirements for pleadings and other documents; status or information requests.**

\* \* \* \* \*

(e) *Manner and effective date of filing.*

\* \* \*

(1) \* \* \* With the exception of documents filed pursuant to §§ 2700.70 (Petitions for discretionary review), 2700.45 (Temporary reinstatement proceedings), 2700.24 (Emergency response plan dispute proceedings), or Subpart F (Applications for temporary relief), documents filed by facsimile transmission shall not exceed 15 pages, excluding the facsimile cover sheet.

\* \* \*

(2) \* \* \* When filing is by mail, filing is effective upon mailing, except that the filing of a motion for extension of time, any document in an emergency response plan dispute proceeding, a petition for review of a temporary reinstatement order, a motion for summary decision, a petition for discretionary review, a motion to exceed page limit is effective upon receipt. *See* §§ 2700.9(a), 2700.24(d), 2700.45(f), 2700.67(a), 2700.70(a), (f), and 2700.75(f).

\* \* \* \* \*

■ 3. Section 2700.7 is amended by revising the second sentence of paragraph (c)(1) to read as follows:

**§ 2700.7 Service.**

\* \* \* \* \*

(c) *Methods of service.* \* \* \*

(1) \* \* \* With the exception of documents served pursuant to §§ 2700.70 (Petitions for discretionary review), 2700.45 (Temporary reinstatement proceedings), 2700.24 (Emergency response plan dispute proceedings), or subpart F (Applications for temporary relief), documents served by facsimile transmission shall not

exceed 15 pages, excluding the facsimile cover sheet. \* \* \*

\* \* \* \* \*

■ 4. Section 2700.8 is amended by revising its introductory text and paragraph (a) and adding Example 3 to read as follows:

**§ 2700.8 Computation of time.**

The due date for a pleading or other deadline for party or Commission action (hereinafter “due date”) is determined sequentially as follows:

(a) Except to the extent otherwise provided herein (see, e.g., §§ 2700.24 and 2700.45), when the period of time prescribed for action is less than 11 days, Saturdays, Sundays, and federal holidays shall be excluded in determining the due date.

\* \* \* \* \*

*Example 3:* Pursuant to § 2700.24(a), the Secretary of Labor files a referral of a citation arising out of a dispute over the content of an operator’s emergency response plan. Certain subsequent deadlines in such cases are specifically established by reference to calendar days, and thus paragraph (a) of this section would not necessarily apply in determining due dates. For instance, if the referral was filed on Thursday, January 4, 2007, the short and plain statement the operator must file in response within 5 calendar days would be due Tuesday, January 9, 2007, because the intervening weekend days would not be excluded in determining the due date. If the fifth calendar day were to fall on a weekend, holiday, or other day on which the Commission is not open however, the terms of paragraph (c) would apply and the due date would be the next day the Commission is open.

■ 5. Section 2700.24 is revised to read as follows:

**§ 2700.24 Emergency response plan dispute proceedings.**

(a) *Referral by the Secretary.* The Secretary shall immediately refer to the Commission any citation arising from a dispute between the Secretary and an operator with respect to the content of the operator’s emergency response plan, or any refusal by the Secretary to approve such a plan. Any referral made pursuant to this paragraph shall be made within two business days of the issuance of any such citation.

(b) *Contents of referral.* A referral shall consist of a notice of plan dispute describing the nature of the dispute; a copy of the citation issued by the Secretary; a short and plain statement of the Secretary’s position with respect to any disputed plan provision; and a copy of the disputed provision of the emergency response plan.

(c) *Short and plain statement by the operator.* Within five calendar days following the filing of the referral, the

operator shall file with the Commission a short and plain statement of its position with respect to the disputed plan provision.

(d) *Filing and service of pleadings.* The filing with the Commission of any document in an emergency response plan dispute proceeding, including the referral, is effective upon receipt. A copy of each document filed with the Commission in such a proceeding shall be expeditiously served on all parties and on any miner or miners’ representative who has participated in the emergency response plan review process, such as by personal delivery, including courier service, by express mail, or by facsimile transmission.

(e) *Proceedings before the Judge.*

(1) *Submission of materials.* Within 15 calendar days of the referral, the parties shall submit to the Judge assigned to the matter all relevant materials regarding the dispute. Such submissions shall include a request for any relief sought and may include proposed findings of fact and conclusions of law. Such materials may be supported by affidavits or other verified documents, and shall specify the grounds upon which the party seeks relief. Supporting affidavits shall be made on personal knowledge and shall show affirmatively that the affiant is competent to testify to the matters stated.

(2) *Hearing.*

(i) Within 5 calendar days following the filing of the Secretary’s referral, any party may request a hearing and shall so advise the Commission’s Chief Administrative Law Judge or his designee, and simultaneously notify the other parties.

(ii) Within 10 calendar days following the filing of the Secretary’s referral, the Commission’s Chief Administrative Law Judge or his designee may issue an order scheduling a hearing on the Judge’s own motion, and must immediately so notify the parties.

(iii) If a hearing is ordered under paragraphs (e)(2)(i) or (ii) of this section, the hearing shall be held within 15 calendar days of the filing of the referral. The scope of such a hearing is limited to the disputed plan provision or provisions. If no hearing is held, the Judge assigned to the matter shall review the materials submitted by the parties pursuant to paragraph (e)(1) of this subsection, and shall issue a decision pursuant to paragraph (f) of this section.

(f) *Disposition.*

(1) *Decision of the Judge.* Within 15 calendar days following receipt by the Judge of all submissions and testimony made pursuant to paragraph (e) of this

subsection, the Judge shall issue a decision that constitutes the Judge's final disposition of the proceedings. The decision shall be in writing and shall include all findings of fact and conclusions of law, and the reasons or bases for them, on all the material issues of fact, law or discretion presented by the record, and an order. The parties shall be notified of the Judge's decision by the most expeditious means reasonably available. Service of the decision shall be by certified or registered mail, return receipt requested.

(2) *Stay of plan provision.* Notwithstanding § 2700.69(b), a Judge shall retain jurisdiction over a request for a stay in an emergency response plan dispute proceeding. Within two business days following service of the decision, the operator may file with the judge a request to stay the inclusion of the disputed provision in the plan during the pendency of an appeal to the Commission pursuant to paragraph (g) of this section. The Secretary shall respond to the operator's motion within two business days following service of the motion. The judge shall issue an order granting or denying the relief sought within two business days after the filing of the Secretary's response.

(g) *Review of decision.* Any party may seek review of a Judge's decision, including the Judge's order granting or denying a stay, by filing with the Commission a petition for discretionary review pursuant to § 2700.70. Neither an operator's request for a stay nor the issuance of an order addressing the stay request affects the time limits for filing a petition for discretionary review of a Judge's decision with the Commission under this subparagraph. The Commission shall act upon a petition on an expedited basis. If review is granted, the Commission shall issue a briefing order. Except as otherwise ordered or provided for herein, the provisions of § 2700.75 apply. The Commission will not grant motions for extension of time for filing briefs, except under extraordinary circumstances.

■ 6. Section 2700.69 is amended by revising paragraph (b) to read as follows:

**§ 2700.69 Decision of the Judge.**

\* \* \* \* \*

(b) *Termination of the Judge's jurisdiction.* Except to the extent otherwise provided herein, the jurisdiction of the Judge terminates when his decision has been issued.

\* \* \* \* \*

Dated: January 11, 2007.

**Michael F. Duffy,**

*Chairman, Federal Mine Safety and Health Review Commission.*

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## DEPARTMENT OF THE TREASURY

### Fiscal Service

#### 31 CFR Part 356

[Docket No. BPD GSRS 06-03]

#### Sale and Issue of Marketable Book-Entry Treasury Bills, Notes and Bonds—Securities Eligible for Purchase in Legacy Treasury Direct

**AGENCY:** Bureau of the Public Debt, Fiscal Service, Treasury.

**ACTION:** Final rule.

**SUMMARY:** This final rule provides that the Department of the Treasury may announce that certain marketable Treasury securities to be offered will not be eligible for purchase or holding in the Legacy Treasury Direct system. Treasury is issuing this amendment to the auction rules because the Legacy Treasury Direct system will eventually be phased out.

**DATES:** Effective January 18, 2007.

**ADDRESSES:** You may download this final rule from the Bureau of the Public Debt's Web site at <http://www.treasurydirect.gov> or from the Electronic Code of Federal Regulations (e-CFR) Web site at <http://www.gpoaccess.gov/ecfr>. It is also available for public inspection and copying at the Treasury Department Library, Room 1428, Main Treasury Building, 1500 Pennsylvania Avenue, NW., Washington, DC 20220. To visit the library, call (202) 622-0990 for an appointment.

**FOR FURTHER INFORMATION CONTACT:** Lori Santamarena (Executive Director) or Chuck Andreatta (Associate Director), Bureau of the Public Debt, Government Securities Regulations Staff, (202) 504-3632 or e-mail us at [govsecreg@bpd.treas.gov](mailto:govsecreg@bpd.treas.gov).

**SUPPLEMENTARY INFORMATION:** The Uniform Offering Circular ("UOC"), in conjunction with the announcement for each auction, provides the terms and conditions for the sale and issuance in an auction to the public of marketable Treasury bills, notes and bonds.<sup>1</sup> There

<sup>1</sup> The Uniform Offering Circular was published as a final rule on January 5, 1993 (58 FR 412). The circular, as amended, is codified at 31 CFR part 356. A final rule converting the UOC to plain language

are three book-entry securities systems—the commercial book-entry system, TreasuryDirect<sup>®</sup>, and Legacy Treasury Direct<sup>®</sup>—into which we issue marketable Treasury securities.<sup>2</sup> The current UOC generally authorizes purchases of all types of marketable Treasury securities in any of the three book-entry systems. The Legacy Treasury Direct system, which was implemented in 1986, will eventually be phased out, leaving only the newer, on-line TreasuryDirect system as the system for purchasing marketable Treasury securities directly on the records of the Bureau of the Public Debt, Department of the Treasury.<sup>3</sup> The commercial book-entry system will remain an option for all securities for those investors who want to purchase and hold their securities through a depository institution or dealer.

As we begin phasing out Legacy Treasury Direct, we plan to discontinue the practice of generally allowing all marketable Treasury securities being offered by Treasury to be purchased and held in this system. This final rule amendment states explicitly that we may announce that certain marketable securities to be offered will not be eligible for purchase or holding in Legacy Treasury Direct. Any such restriction will be included in that security's offering announcement. This change will not affect any outstanding securities currently held in Legacy Treasury Direct.

#### Procedural Requirements

This final rule is not a significant regulatory action for purposes of Executive Order 12866. The notice and public procedures and delayed effective date requirements of the Administrative Procedure Act do not apply, under 5 U.S.C. 533(a)(2).

Since a notice of proposed rulemaking is not required, the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) do not apply.

The Office of Management and Budget previously approved the collections of information in this final amendment in accordance with the Paperwork Reduction Act under control number

and making certain other minor changes was published in the **Federal Register** on July 28, 2004 (69 FR 45202).

<sup>2</sup> On September 30, 2005, Treasury issued a final amendment to the UOC to make the changes necessary to accommodate participation in Treasury marketable auctions for securities to be held in either the TreasuryDirect or the Legacy Treasury Direct system (70 FR 57347).

<sup>3</sup> Legacy Treasury Direct was called TreasuryDirect from 1986 to 2005. The regulations for Legacy Treasury Direct are found at 31 CFR part 357. The regulations for TreasuryDirect are found at 31 CFR part 363.