annual basis. This document proposes to amend the current version of that order, FAA Order JO 7400.11G, dated August 19, 2022, and effective September 15, 2022. These updates would be published subsequently in the next update to FAA Order JO 7400.11. That order is publicly available as listed in the **ADDRESSES** section of this document.

FAA Order JO 7400.11G lists Class A, B, C, D, and E airspace areas, air traffic service routes, and reporting points.

The Proposal

The FAA is proposing to amend 14 CFR part 71 by modifying the Class E airspace extending upward from 700 feet above the surface to within a 6.6-mile (decreased from a 7-mile) radius of Mount Pleasant Municipal Airport, Mount Pleasant, MI; and updating the geographic coordinates of airport to coincide with the FAA's aeronautical database.

This action is the result of an airspace review due to the decommissioning of the Mount Pleasant VOR, which provided navigation information to this airport, as part of the VOR MON Program, and to support IFR operations at this airport.

Regulatory Notices and Analyses

The FAA has determined that this proposed regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore: (1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this proposed rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

Environmental Review

This proposal will be subject to an environmental analysis in accordance with FAA Order 1050.1F, ''Environmental Impacts: Policies and Procedures'' prior to any FAA final regulatory action.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Proposed Amendment

In consideration of the foregoing, the Federal Aviation Administration proposes to amend 14 CFR part 71 as follows:

PART 71—DESIGNATION OF CLASS A, B, C, D, AND E AIRSPACE AREAS; AIR TRAFFIC SERVICE ROUTES; AND REPORTING POINTS

■ 1. The authority citation for 14 CFR part 71 continues to read as follows:

Authority: 49 U.S.C. 106(f), 106(g); 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of FAA Order JO 7400.11G, Airspace Designations and Reporting Points, dated August 19, 2022, and effective September 15, 2022, is amended as follows:

Paragraph 6005 Class E Airspace Areas Extending Upward From 700 Feet or More Above the Surface of the Earth.

* * * * *

AGL MI E5 Mount Pleasant, MI [Amended]

Mount Pleasant Municipal Airport, MI
(Lat 43°37′18″ N, long 84°44′14″ W)

That airspace extending upward from 700 feet above the surface within a 6.6-mile radius of Mount Pleasant Municipal Airport.

* * * * *

Issued in Fort Worth, Texas, on September 6, 2023.

Martin A. Skinner,

Acting Manager, Operations Support Group, ATO Central Service Center.

[FR Doc. 2023–19547 Filed 9–11–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF LABOR

Office of Workers' Compensation Programs

20 CFR Part 702

RIN 1240–AA17

Longshore and Harbor Workers' Compensation Act: Civil Money Penalties Procedures

AGENCY: Office of Workers' Compensation Programs, Labor.

ACTION: Notice of proposed rulemaking; request for comments.

SUMMARY: The Office of Workers' Compensation Programs (OWCP) administers the Longshore and Harbor Workers' Compensation Act and its extensions. To promote accountability and ensure fairness, OWCP proposes new rules for imposing and reviewing civil money penalties prescribed by the Longshore Act. The proposed rules would also set forth the procedures to contest OWCP's penalty determinations.

DATES: The Department invites written comments on the proposed rule from interested parties. Written comments must be received by November 13, 2023.

ADDRESSES: You may submit written comments, identified by RIN number 1240–AA17, by any of the following methods. To facilitate the receipt and processing of comments, OWCP encourages interested parties to submit their comments electronically.

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions on the website for submitting comments.
- *Regular Mail or Hand Delivery/Courier:* Submit comments on paper to the Division of Federal Employees', Longshore and Harbor Workers' Compensation, Office of Workers' Compensation Programs, U.S. Department of Labor, Room S–3229, 200 Constitution Avenue NW, Washington, DC 20210. The Department's receipt of U.S. mail may be significantly delayed due to security procedures. You must take this into consideration when preparing to meet the deadline for submitting comments.

Instructions: All submissions received must include the agency name and the Regulatory Information Number (RIN) for this rulemaking. All comments received will be posted without change to *https://www.regulations.gov.* Please do not include any personally identifiable or confidential business information you do not want publicly disclosed.

Docket: For access to the docket to read background documents or comments received, go to *https://www.regulations.gov.* Although some information (*e.g.,* copyrighted material) may not be available through the website, the entire rulemaking record, including any copyrighted material, will be available for inspection at OWCP. Please contact the individual named below if you would like to inspect the record.

FOR FURTHER INFORMATION CONTACT: Antonio Rios, Director, Division of Federal Employees', Longshore and Harbor Workers' Compensation, Office of Workers' Compensation Programs, (202) 693–0040, *rios.antonio@dol.gov.* TTY/TDD callers may dial toll free 1–877–889–5627 for further information.

SUPPLEMENTARY INFORMATION:

I. Background of This Rulemaking

The Longshore and Harbor Workers' Compensation Act (LHWCA or Act), 33 U.S.C. 901–50, establishes a comprehensive Federal workers' compensation system for an employee's disability or death arising in the course of covered maritime employment. *Metro. Stevedore Co.* v. *Rambo,* 515 U.S. 291, 294 (1995). The Act's provisions have been extended to (1) contractors working on military bases or U.S. government contracts outside the United States (Defense Base Act, 42 U.S.C. 1651–54); (2) employees of nonappropriated fund instrumentalities (Nonappropriated Fund Instrumentalities Act, 5 U.S.C. 8171–73); (3) employees engaged in operations that extract natural resources from the outer continental shelf (Outer Continental Shelf Lands Act, 43 U.S.C. 1333(b)); and (4) private employees in the District of Columbia injured prior to July 26, 1982 (District of Columbia Workers' Compensation Act of May 17, 1928, Public Law 70–419 (formerly codified at 36 DC Code 501 *et seq.* (1973) (repealed 1979)). Consequently, the Act and its extensions cover a broad range of claims for injuries that occur throughout the United States and around the world.

OWCP's sound administration of these programs involves periodic reexamination of the procedures used for claims processing and related issues. On April 28, 2020, OWCP hosted a public outreach webinar to solicit stakeholders' views on how OWCP could improve its processes. *See* E.O. 13563, sec. 2(c) (January 18, 2011) (requiring public consultation prior to issuing a proposed regulation). OWCP considered the feedback received during that session in developing the proposal. For example, participants noted that the statute only allows penalties for knowing and willful failures to file the report, so OWCP should establish knowledge and willfulness before assessing a penalty. They also noted that employers and insurance carriers should have a method to contest penalty assessments. On December 14, 2020, OWCP published a Notice of Proposed Rulemaking and a Direct Final Rule in the **Federal Register** revising regulations governing electronic filing and settlements and establishing new procedures for assessing and adjudicating penalties under the Act. 85 FR 80601, 85 FR 80698. On January 20, 2021, a new administration assumed office. The Assistant to the President and Chief of Staff issued a memorandum to the Heads of Executive Departments entitled ''Regulatory Freeze Pending Review.'' 86 FR 7424. The memorandum directed agencies to consider pausing or delaying certain regulatory actions for the purpose of reviewing questions of fact, law, and policy raised. OWCP believed that the most efficient way to implement the memorandum was to withdraw both the Direct Final Rule and the Notice of Proposed Rulemaking, rather than delay the effective date of the Direct Final Rule. The comment period was still open, and OWCP would have had to withdraw the Direct Final Rule anyway if it received significant adverse comments before the comment period closed. In accordance, on February 9, 2021, OWCP withdrew the Notice of Proposed Rulemaking and the Direct Final Rule. 86 FR 8686, 86 FR 8721. Withdrawing the rule gave the new administration time to review the rule and consider the policies it would have implemented. After careful consideration, OWCP decided to move forward with a proposal to update its existing penalty regulations and implement a procedural scheme for employers to challenge penalties assessed against them.

OWCP requests comments on all issues related to this rulemaking, including economic or other regulatory impacts on the regulated community.

II. Overview of the Proposed Rule

The proposed rule would add new sections and amend existing sections to implement the Act's civil money penalty provisions. The Act allows OWCP to impose a penalty when an employer or insurance carrier fails to timely report a work-related injury or death, 33 U.S.C. 930(e), or fails to timely report its final payment of compensation to a claimant, 33 U.S.C. 914(g). *See* 20 CFR 702.204, 702.236. The proposed rule would revise current § 702.204 to provide for graduated penalties for an entity's failure to timely file, or falsification of, the required report of an employee's work-related injury or death. *See* 33 U.S.C. 930(a); 20 CFR 702.201. The proposed rule provides that the penalty assessed will increase for each additional violation the employer has committed over the prior two years. The current regulation states only the maximum penalty allowable, without providing further guidance or a graduated penalty scheme. The proposed rule would also add new §§ 702.206, 207, and 208. These proposed sections would add procedures for the District Director to notify entities of failures to accurately and timely file, provide an opportunity for a response before the District Director issues a notice of proposed penalty, and provide guidance to both the District Director and the Director in determining the amount of the proposed penalty and penalty by setting forth aggravating and mitigating factors they may consider.

The proposed rule also contains a new subpart I setting out procedures for challenging proposed penalties and penalties under both § 702.204 (for an entity's failure to timely file, or falsification of, the required report of an employee's work-related injury or death) and § 702.236 (for failing to report the termination of payments). These proposed procedures would allow an entity against whom a penalty is assessed the opportunity for a hearing before an administrative law judge, and to petition the Secretary of Labor (Secretary) for further review. After receiving the OWCP Director's final penalty order assessing the penalty, consistent with sections 554 and 556 of the Administrative Procedure Act (5 U.S.C. 551 *et seq.*), the respondent would be able to request a hearing before an administrative law judge (ALJ) under proposed § 702.906(a). During the hearing, entities would have the opportunity to submit facts and arguments for consideration consistent with the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges (29 CFR part 18). The ALJ would determine whether the respondent violated the statutory or regulatory provision under which the penalty was assessed and whether the amount of the penalty assessed was appropriate. Consistent with section 557 of the APA, the ALJ's decision would become the decision of the Agency without further proceedings, unless within 30 days, the respondent requested reconsideration of the ALJ's decision under proposed § 702.907 or petitioned the Secretary for review under proposed § 702.908. The Secretary's review would be discretionary and based on the record. These additional levels of review are consistent with the formal adjudication procedures under the Administrative Procedure Act, 5 U.S.C. 554, 556–557, and Recommendation 93–1 of the Administrative Conference of the United States, which recommends that formal adjudication under the Administrative Procedure Act be made available where a civil money penalty is at issue. The proposed procedures would fully protect employers' and insurance carriers' rights to challenge OWCP's action before any penalty becomes final and subject to collection

and ensure transparency and fairness in the enforcement proceedings.

IV. Section-by-Section Explanation

Section 702.204 Employer's Report; Penalty for Failure To Furnish and or Falsifying

Under 33 U.S.C. 930(e), ''any employer, insurance carrier, or self-insured employer who knowingly and willfully fails or refuses to send any report'' required by section 930 or ''knowingly or willfully makes a false statement or misrepresentation in any such report'' is subject to a civil penalty for each violation. Proposed § 702.204 would revise the current regulation in several ways. First, paragraphs (a)(1) and (a)(3) clarify that ''knowingly'' means actual knowledge or constructive knowledge—that is, that the entity knew or reasonably should have known of the violation. This is similar to the test for knowledge under the Occupational Safety and Health Act (OSH Act), 29 U.S.C. 651 *et seq. See, e.g., Sanderson Farms, Inc.* v. *Perez,* 811 F.3d 730, 735 (5th Cir. 2016) (explaining that to satisfy the knowledge element of a prima facie case of an Occupational Safety and Health Administration (OSHA) violation, the Secretary of Labor has to prove that the employer had actual or constructive knowledge of the violation); *N & N Contractors, Inc.* v. *Occupational Safety & Health Rev. Comm'n,* 255 F.3d 122, 127 (4th Cir. 2001) (noting that an employer has constructive knowledge of a violation of a safety regulation if the employer fails to use a reasonable diligence to discern the presence of the violative condition); *Halmar Corp.,* 18 BNA OSHC 1014, 1016 (No. 94–2043, 1997) (explaining that the Commission's test for knowledge is whether the employer knew, or with the exercise of reasonable diligence could have known, of the violation.)

Proposed paragraph (a)(1) further explains that the entity must have knowledge of ''the employee's injury or death, that the injury or death is likely covered by the Act, that a report is required, and that a report was not timely filed.'' The statute allows the Secretary to assess penalties when the failure, refusal, false statement, or misrepresentation is knowing, so this would clarify that knowledge includes knowledge of the employee's condition as well as of the legal requirement for a report and the fact that the report was not properly submitted. Similarly, paragraph (a)(3) explains that knowledge of a false statement or misrepresentation requires knowledge that the information in the report is untrue, incomplete, or misleading.

Proposed paragraphs (a)(2) and (a)(4) address the willfulness requirement in the statute. Proposed paragraph (a)(2) explains that an entity willfully fails or refuses to send a report when it intentionally disregards the reporting requirement or is plainly indifferent to the reporting requirement. This is similar to the definition of willfulness in other contexts. The OSH Act, 29 U.S.C. 666(a), also provides for penalties for willful violations but does not define willfulness. The Department of Labor's OSHA has provided that a willful violation exists under the OSH Act where an employer has demonstrated either an intentional disregard for the requirements of the OSH Act or a plain indifference to employee safety. OSHA Instruction CPL 02–00–164, Field Operations Manual, issued April 14, 2020, pp. 4–22—4–24. There is ample case law validating the Department's willfulness definition. *See, e.g., Bianchi Trison Corp.* v. *Sec'y,* 409 F.3d 196, 208 (3d Cir. 2005) (''Although the [OSH] Act does not define the term 'willful,' courts have unanimously held that a willful violation of the [OSH] Act constitutes 'an act done voluntarily with either an intentional disregard of, or plain indifference to, the [OSH] Act's requirements.'''); *Chao* v. *Occupational Safety and Health Rev. Comm'n,* 401 F.3d 355 (5th Cir. 2005) (''A willful violation is one committed voluntarily, with either intentional disregard of, or plain indifference to, OSH Act requirements''); *Fluor Daniel* v. *Occupational Safety and Health Rev. Comm'n,* 295 F.3d 1232 (11th Cir. 2002) (explaining that ''[a]lthough Section 666 does not define the terms 'willful' or 'willfully,''' it is ''an intentional disregard of, or plain indifference to, OSHA requirements''); *Stanley Roofing Co.,* 21 BNA OSHC 1462, 1466 (2006) (discussing that a willful violation is one committed with intentional, knowing or voluntary disregard for the requirements of the Act or with plain indifference). Proposed paragraph (a)(4) addresses willfulness in making a false statement or misrepresentation. Similar to paragraph (a)(2), OWCP proposes to establish willfulness when an entity intentionally disregards or exhibits plain indifference to the truth. Proposed paragraph (a)(5) is intended to explain that when establishing a false statement or misrepresentation, OWCP only needs to demonstrate that doing so was knowing *or* willful—not both. *See* 33 U.S.C. 930(e).

Proposed paragraph (b) provides that the number of penalties assessed in the prior two years against an entity will be considered in proposing and assessing further penalties. Proposed paragraph (b) also lists the baseline penalty amounts that will be recommended, beginning at five percent of the maximum penalty amount for a first violation, with the penalty doubling for each subsequent violation through the fifth violation. The sixth violation and subsequent violations will result in the maximum penalty. OWCP has proposed a percentage scheme because the maximum penalty amount will be adjusted every year under the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, Public Law 114–74, section 701. Basing the baseline proposed penalty on a percentage of the maximum penalty amount, rather than a dollar amount, will allow OWCP to rely on the table even as the maximum penalty amount changes each year. Furthermore, as the maximum penalty is set by statute and regulation, a graduated penalty scheme beginning at a low percentage will allow OWCP to increase the baseline penalty with each subsequent violation and thereby increase the deterrent effect. As expanded upon later in the explanation for § 702.208, the baseline proposed penalty amount for each violation can be adjusted higher or lower, consistent with the statutory maximum, based on relevant aggravating and mitigating factors.

Section 702.206 Notice of Failure To Timely Submit Accurate Report

Under proposed paragraph (a) of § 702.206, when OWCP receives information that indicates an injury or death has occurred on a particular date but has not received a report as required by § 702.201, the District Director will send a notice to the employer. This is consistent with the procedures set forth in chapter 08–0302 of OWCP's Longshore Procedure Manual, which instructs the District Director to send a missing form LS–202 pre-penalty letter. As explained in section 6 of chapter 08–0302, this pre-penalty letter describes the evidence OWCP has received that indicates an injury or death has occurred on a particular date; notifies the employer of its responsibility to file a report within 10 days of that date; and requests an explanation for the employer's failure to file a report within the required time limit. Furthermore, under proposed paragraph (a), the District Director's notice would specifically notify the employer that it may be subject to a penalty if its failure to timely submit a report is knowing and willful and instructs the employer

that it must file the required report no later than ten days after the receipt of the notice. As explained in the manual, ''once an employer has been advised in writing of its responsibility to file a timely report, any further failure should be considered knowing and willful.'' OWCP has therefore preliminarily determined that the first notice should clearly explain the penalties for not filing the report once the employer is undeniably on notice of the requirements—*i.e.,* that OWCP will consider continued disregard of the legal requirement to be knowing and willful.

Proposed paragraph (b) provides that ''if the employer does not file the required report within ten days of receipt of the notice described in paragraph (a), the District Director will send a second notice to the employer. As explained above, once the first notice has been sent to the employer, the employer is undeniably on notice of the requirement to timely file an accurate report and any future failures demonstrate a conscious disregard for the requirement. In this second notice, the District Director would notify the employer that its failure to file the required report after receipt of the notice described in paragraph (a) constitutes evidence that its failure to timely submit a report is knowing and willful; request an explanation for the failure to file a report within the required time limit and request the employer's reasons why the full baseline penalty amount under § 702.204 should not be assessed against the employer, including documentation supporting any mitigating factors claimed under § 702.208(c); and instruct the employer that its response should be filed within 30 days of receipt of the notice. This is consistent with the procedures set forth in the manual, although under the proposed rule, the information requested by the District Director is bifurcated into two notices rather than the single pre-penalty letter for a missing form LS–202 described in the manual. While the District Director may have other evidence that demonstrates knowledge and willfulness, this bifurcated notice system would ensure that by the time the District Director notifies the employer that its failure to timely submit a report is knowing and willful, the District Director has clear evidence that the employer was, at a minimum, aware of the legal requirements and yet chose to disregard them by failing to timely submit a report.

Under proposed paragraph (c), when OWCP receives a report filed more than ten days from the date of an employee's injury or death or the date an employer has knowledge of an employee's injury or death, and the District Director has not already sent a notice under paragraph (a), the District Director may notify the employer of its responsibility to file a report within ten days of the date of an employee's injury or death or the date an employer has knowledge of an employee's injury or death. This is consistent with the first part of the pre-penalty letter for a late form LS–202 and the procedure manual, which also instructs the District Director to notify the employer of their obligations when a report is filed late. Unlike with a second notice of a missing form, however, the District Director would not automatically inform the employer that it may be subject to a penalty. In certain situations, however, the District Director may have information indicating evidence of knowledge and willfulness, in which case they will inform the employer that it may be subject to a penalty for failing to timely file the report as required by section 930(a) of the Act. In such circumstances, the notice will also request an explanation for the failure to file a report within the required time limit and the employer's reasons why the full baseline penalty amount under § 702.204 should not be assessed against the employer, including documentation supporting any mitigating factors claimed under § 702.208(c), and instruct the employer that its response should be filed within 30 days of receipt of the notice.

Under proposed paragraph (d), when OWCP receives a report containing a false statement or misrepresentation, the District Director would send a notice to the employer that describes the evidence that indicates the report contains a false statement or misrepresentation; notifies the employer that it may be subject to a penalty if the false statement or misrepresentation was made knowingly or willfully; requests an explanation for the false statement or misrepresentation and the employer's reasons why the full baseline penalty amount under § 702.204 should not be assessed against the employer; and instructs the employer that its response should be filed within 30 days of the date of the letter. Unlike with missing reports, the statute only requires that the false statement or misrepresentation be made knowingly *or* willingly, but not necessarily both. The District Director could obtain this evidence from many different sources if they suspect a false statement or misrepresentation. For example, the District Director may learn about injuries from news reports, from employee advocates, or from employees themselves.

OWCP requests comments on all aspects of proposed § 702.206, and particularly on the sources and type of information the agency should use to determine whether a failure was knowing or willful.

As described earlier, this proposed rule applies to the LHWCA and its extensions, including the Defense Base Act, which covers contractors working on military bases or U.S. government contracts outside the United States. 42 U.S.C. 1651–54. There may be special considerations when determining whether an employer acts with knowledge and willfulness when it comes to reporting injuries sustained by employees of Federal contractors abroad. For example, there may be a heightened awareness of the legal requirements, either through the procurement process or other avenues. The contracting agencies may have related reporting requirements, and such information may demonstrate the contractor-employer's state of mind. OWCP therefore seeks comment on how to address failures under the Defense Base Act in particular, in light of the additional information available to the Federal Government, that would establish knowledge and willfulness.

Section 702.207 Consideration of Response; Notice of Proposed Penalty

Proposed § 702.207 sets forth the process for considering the response and issuing the notice of proposed penalty. Under proposed paragraph (a), the District Director would consider the employer's responses, if any, to the notices described in § 702.206, as well as any other information the District Director has about the injury or the respondent, to determine whether the failure, refusal, false statement, or misrepresentation was knowing or willful as set forth in § 702.204. As with § 702.206(d), the District Director may have information about an injury or illness from many different sources, such as news reports, employee advocates, or employees themselves.

Under proposed paragraph (b), if the District Director determines that there was a violation, they will issue a notice of proposed penalty. Proposed paragraph (b) also provides that the Director has the authority and responsibility for assessing a penalty using the procedures set forth at subpart I. The notice of proposed penalty is described in detail in section 903 and the corresponding section of this preamble.

Section 702.208 Special Considerations in Setting Penalty Amounts

In proposed § 702.208, proposed paragraph (a) provides that the District Director and Director may consider mitigating and aggravating factors when determining the amount of the proposed and assessed penalties. This must be consistent with the statutory maximum, which is currently $28,304 as adjusted for inflation, so the penalty cannot exceed that amount. *See* Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, Public Law 114–74, sec. 701; Federal Civil Penalties Inflation Adjustment Act Annual Adjustments for 2023, 88 FR 2210 (January 13, 2023). Proposed paragraph (b) lists the aggravating factors that may be considered: extent of delay in filing the report; attempts to conceal the injury or death; failure to timely pay compensation due the claimant; failure to submit information sufficient to determine whether the correct compensation has been paid; any prior settlements of penalties assessed by the Director; any outstanding proposed penalties assessed against the entity; any prior penalties assessed against an entity's parent company or subsidiary; and any other factors relevant to the respondent's conduct with respect to the contents of the report. The statutory instruction that the penalty is ''not to exceed'' a maximum amount indicates that Congress intended to provide the agency with some discretion in setting an appropriate penalty. These are factors that OWCP has preliminarily determined are relevant to the appropriateness of the penalty and its potential to deter future violations, and they are largely consistent with the factors listed in chapter 08–0302 of the Longshore Procedure Manual. The final factor is meant to address facts specific to a particular employer or situation that may not be generally applicable but are still relevant in a particular case. The agency welcomes comment on these proposed factors.

Similarly, proposed paragraph (c) lists the mitigating factors that may be considered in lowering the amount: bringing the failure to comply with the Act or regulations to the District Director's attention; full payment of the correct amount of compensation to the claimant; timely compliance with the District Director's requests once failure to comply with the Act or regulations was brought to their attention; history of compliance with the Act and the regulations of this subchapter; a mass casualty event preventing the timely filing in all related cases; whether the respondent is a ''small entity'' within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601(6); and any other relevant factors. These are meant to address situations where a penalty would still have a deterrent effect at a lower level and are largely consistent with the mitigating factors listed in chapter 08–0302 of the Longshore Procedure Manual. The sixth factor, whether the respondent is a ''small entity,'' is listed as a proposed mitigating factor rather than a required consideration. The Regulatory Flexibility Act allows agencies to decline to consider small entity status for willful or criminal violations. *See* 5 U.S.C. 601 note § 223(b)(4). Because violations under section 930 of the statute are all necessarily willful or involve knowing misrepresentation, OWCP includes it as a mitigating factor to consider when appropriate. As with the aggravating factors, the final factor is meant to address facts specific to a particular employer or situation that may not be generally applicable but are still relevant in a particular case. OWCP welcomes comment on these proposed factors.

Section 702.233 Additional Compensation for Failure To Pay Without an Award

OWCP proposes to substitute the phrase ''additional compensation'' for the word ''penalty'' in § 702.233's current title (*i.e.,* ''Penalty for failure to pay an award''). Section 702.233 implements section 14(e) of the Act, 33 U.S.C. 914(e), which provides that claimants are entitled to an additional 10 percent of any compensation payable without an award when not paid within 14 days of when it is due. The Board has held that payments under section 14(e) (which are paid to claimants, not OWCP) are ''compensation'' and not ''penalties.'' *Robirds* v. *ICTSI Oregon, Inc.,* 52 BRBS 79 (2019) (en banc). In reaching its conclusion, the Board relied on the Federal Circuit's decision in *Ingalls Shipbuilding, Inc.* v. *Dalton,* 119 F.3d 972, 979 (Fed. Cir. 1997), which held that payments under section 14(e) are compensation. The majority of courts have also construed the similar language in section 14(f) of the Act, 33 U.S.C. 914(f) (requiring payment of additional 20 percent for late payments under terms of an award), as payments of ''compensation'' rather than a penalty. *See Tahara* v. *Matson Terminals, Inc.,* 511 F.3d 950, 953 (9th Cir. 2007) (''[T]he LHWCA's plain language supports that a § 914(f) late payment award is compensation''); *Newport News Shipbuilding and Dry Dock Co.* v. *Brown,* 376 F.3d 245, 251 (4th Cir. 2004) (''[I]t is plain that an award for late payment under [section] 14(f) is compensation.''). *But see Burgo* v. *General Dynamics Corp.,* 122 F.3d 140, 145–46 (2d Cir. 1997). Using ''additional compensation'' in the title of § 702.233 promotes accuracy and clarifies the instances in which the new penalty procedures apply.

Section 702.236 Penalty for Failure To Report Termination of Payments

Proposed § 702.236 revises the current rule to incorporate the penalty procedural rules proposed in new subpart I. It also clarifies that the Director, not the District Director, has the ultimate authority and responsibility for assessing the penalty. This is consistent with the process set forth in the new proposed subpart I.

Section 702.274 Employer's Refusal To Pay Penalty

The proposed changes to § 702.274 would simply (1) clarify that consequences for refusing to pay would occur only after the penalty becomes final and (2) update the outdated references to officials and offices within the Department of Labor.

Section 702.901 Scope of This Subpart

Proposed § 702.901 provides that the procedures set forth in subpart I apply when the District Director imposes civil monetary penalties under § 702.204 or 702.236 and that any penalties collected are to be deposited into the special fund described in 33 U.S.C. 944.

Section 702.902 Definitions

Proposed § 702.902 defines ''respondent'' as the employer, insurance carrier, or self-insured employer against whom the District Director is seeking to assess a penalty. This covers the possible entities against which penalties may be assessed under the scope of this subpart. 33 U.S.C. 914(g) authorizes the Secretary to assess a penalty against an employer, and section 935 substitutes the carrier for the employer regarding any obligations and duties imposed by the Act on the employer. Section 930(a) requires the employer to send the report to the Secretary, and section 930(e) explicitly makes employers, insurance carriers, and self-insured employers subject to possible penalties.

For the purpose of this subpart, OWCP interprets insurance carriers to include self-insured employer groups. Under 20 CFR 701.301(a)(13), a carrier is an insurance carrier or self-insurer meeting the statutory requirements with respect to authorization to provide insurance fulfilling the obligation of an

employer to secure the payment of compensation. The penalties in this rulemaking are meant to address failures and misrepresentations in filing required reports, so to the extent the obligation to file falls on self-insured employer groups, they too may be respondents under subpart I.

Section 702.903 Notice of Penalty; Response; Consequences of No Response

Proposed § 702.903 is a new provision governing the District Director's notice of proposed penalty, the respondent's response, and the consequences of not responding. Paragraph (a) requires OWCP to serve a written notice on the respondent by a method that verifies the delivery date because date of receipt triggers the respondent's response period. If the respondent does not accept service, the receipt date will be the attempted date of delivery. This is to ensure respondents do not have an incentive to evade service. Proposed paragraph (b) prescribes the contents of the notice: the facts giving rise to the proposed penalty, the statutory and regulatory basis for the proposed penalty, the amount of the proposed penalty and explanation of the amount, instructions for including documentation in the response, and the consequences of failing to timely respond. Proposed paragraph (c) gives the respondent 30 days to respond. The response may include an explanation of why the full proposed penalty amount should not be assessed and documentation relevant to the factual basis for the penalty, including any mitigating factors claimed under proposed § 702.208. Proposed paragraph (d) provides that if the respondent does not respond within 30 days, the District Director will submit the notice of proposed penalty to the Director as a preliminary decision. This ensures the process continues without delay while still providing the respondent with a fair opportunity to provide additional information or reasons that the District Director may not have considered.

§ 702.904 Preliminary Decision on Notice of Proposed Penalty After Timely Response

Proposed § 702.904 addresses the District Director's preliminary decision after a timely response from the respondent. If the respondent files a timely response to the notice described in § 702.903, the District Director would review the facts and any argument presented in the response, revise the proposed penalty amount, if warranted, and submit the revised notice of proposed penalty to the Director as a preliminary decision. This provision, along with proposed § 702.903, allows the respondent a meaningful opportunity to be heard before the District Director and allows the District Director time to revise the proposed penalty if appropriate.

Section 702.905 Director's Penalty Order; Request for Hearing

Proposed § 702.905 addresses the Director's issuance of the penalty order and the process for requesting a hearing before the Office of Administrative Law Judges. Proposed paragraph (a) provides that the Director will consider the District Director's preliminary decision and issue a penalty order in no more than 30 days. OWCP welcomes comment on this time frame.

Under proposed paragraph (a)(1) through (3), the penalty order must contain a statement of the reasons for the assessment, including an evaluation of any mitigating or aggravating factors considered, and the amount of the penalty; a statement of the respondent's right to request a hearing on the Director's penalty order and the method for doing so; and a statement of the consequences of failing to timely request a hearing. By including the reasons for the penalty and information about how to contest it, OWCP intends to provide the respondent with fair notice and a full opportunity to contest the penalty order.

Proposed paragraph (b) provides that the respondent has 15 days from receipt of the Director's penalty order to request a hearing before an Administrative Law Judge by filing a request for hearing with the District Director. *See, e.g.,* 20 CFR 702.316 (providing 14 days for parties to object to the District Director's recommendations and request a hearing). The request must be typewritten or legibly written so that the District Director can understand the contents. It must state the specific determinations in the Director's penalty order with which the respondent disagrees so that the ALJ understands the scope of the matter. It must also be signed and dated and include physical and electronic addresses so that OWCP and OALJ can document the date of the request and communicate with the respondent about the hearing.

Proposed paragraph (c) would stay the collection of the penalty until final resolution, either by the ALJ or the Secretary. This provision would ensure the respondent does not have to pay a penalty until it is fully adjudicated. Proposed paragraph (d) provides that if the respondent does not request a hearing within 15 days of receipt of the Director's penalty order, the assessment and amount of the penalty set forth in the Director's penalty order will be deemed a final decision of the Secretary. This is to ensure the decision becomes final and that OWCP can collect the penalty even if the respondent takes no action. *See* 20 CFR 726.320(a).

Section 702.906 Referral to the Office of Administrative Law Judges

Proposed § 702.906 addresses referral of an assessment and penalty for a hearing before an administrative law judge and is similar to the civil money penalty provisions for failure to insure under the Black Lung Benefits Act, 20 CFR 726.309 through 311. Paragraph (a) provides that, when the District Director receives a request for hearing, the District Director will notify the Chief Administrative Law Judge, who will assign the case to an administrative law judge. The District Director will also forward the administrative record, which consists of the District Director's notice of proposed penalty and preliminary decision, the documentation upon which the District Director relied in issuing the notice of proposed penalty and preliminary decision, all written responses and documentation filed by the respondent with the District Director, the Director's penalty order, the documentation upon which the Director relied in issuing the penalty order, and the respondent's request for hearing. Limiting the administrative record to documents considered by the District Director and Director will allow the ALJ to determine the appropriateness of the penalty.

Paragraph (b) provides that the rules set forth in 29 CFR part 18 will apply to any hearing before an administrative law judge under subpart I. 29 CFR part 18 contains the existing rules of practice and procedure for administrative hearings before the Office of Administrative Law Judges and covers, among other things, general procedures, filing, service, and hearings.

Section 702.907 Decision and Order of Administrative Law Judge

Proposed § 702.907 governs the contents, issuance, service, and finality of the administrative law judge's decision on the Director's penalty order. Proposed paragraph (a) limits the administrative law judge's determinations to whether the respondent has violated the provision under which the penalty was assessed, and whether the penalty is appropriate under the standards set forth in §§ 702.204, 702.236, and 702.903(c)(2). Limiting the judge's consideration to these issues will help streamline the hearing and decision process. Proposed

paragraph (b) provides that documentation not presented to the District Director may not be admitted in any further proceedings before an ALJ unless the ALJ finds that the failure to submit the documentation to the District Director should be excused due to extraordinary circumstances. This is similar to 20 CFR 725.456(b)(1), which governs the admissibility of documentary evidence pertaining to the liability of a potentially liable operator and the identification of a responsible operator in a claim filed to seek benefits under the Black Lung Benefits Act, 30 U.S.C. 901–944. Similar to the limitation on issues considered by an ALJ, the limitation on evidence would simplify and streamline the penalty-assessment process. Proposed paragraph (b) would arm the District Director with sufficient information to accurately assess the proposed penalty before the case is referred to the Office of Administrative Law Judges. Extraordinary circumstances may be shown where an employer encounters ''particular difficulty obtaining the necessary evidence.'' *See* 65 FR 79989. This would entail showing that even after reasonable diligence, the respondent could not have produced the evidence at the District Director stage. For example, assume that after receiving the notice of proposed penalty, respondent requests but is unable to acquire documentation because of a catastrophic event or natural disaster that caused a delay in processing the request. If respondent obtains the documentation after the District Director issues the preliminary decision on the notice of proposed penalty, it may be able to demonstrate that extraordinary circumstances justify the admission of the evidence before the ALJ. Moreover, there is ample case law applying the extraordinary circumstances requirement under the Black Lung Benefits Act and confirming that it is a high bar to meet. *See, e.g., Howard* v. *Apogee Coal Company,* BRB No. 20–0229 BLA (Oct. 18, 2022) (rejecting employer's argument that extraordinary circumstances exist based on Director's actions in separate claims); *Dallas McCoy* v. *Eastern Associated,* BRB No. 19–0520 BLA (March 31, 2021) (unpub.) (''[T]he mere fact employer's exhibits were in DOL's possession does not show extraordinary circumstances for why Employer did not timely obtain and submit them.''); *Bobby Knight* v. *Heritage Coal Co.,* BRB No. 19–0435 BLA (Dec. 15, 2020) (unpub.) (rejecting employer's assertion that extraordinary circumstances exist where ''employer requested the relevant documents after the deadline'' to submit additional evidence).

Proposed paragraph (c) requires the administrative law judge's decision to include a statement of findings and conclusions, with the reasons and bases for those findings and conclusions; instructions for filing a motion for reconsideration with the Administrative Law Judge; and instructions for filing a petition for review with the Secretary. This would allow the Secretary or a court to review the decision and determine its reasonableness if the respondent seeks further judicial review.

Proposed paragraph (d) would require the administrative law judge to deliver a copy of the decision and order to the District Director for service on the parties. This is consistent with the procedures set forth in 20 CFR 702.349, where the administrative law judge delivers the compensation order to the District Director for service on the parties and on the representatives of the parties, if any. Proposed paragraph (e) provides that any party may move for reconsideration of the decision within 30 days of the date the District Director serves the decision, and that any such motion will suspend the running of time to file a petition for review under § 702.908 until the date the motion for reconsideration is denied or 30 days after a new decision is issued. This would allow time for the ALJ to consider the motion and, if warranted, issue a new decision while still preserving the parties' rights to further appeal the decision. Proposed paragraph (f) provides that, absent a timely request for reconsideration or petition for review, or if any such motions or petitions are denied, the administrative law judge's decision will be deemed a final decision of the Secretary. Proposed paragraph (g) provides that the ALJ will forward the complete hearing record to the District Director at the conclusion of all hearing proceedings. This is consistent with 20 CFR 702.349(a), where the District Director retains custody of the record after ALJ proceedings regarding a compensation order.

Section 702.908 Review by the Secretary

Proposed § 702.908 allows any party aggrieved by an administrative law judge's decision to petition the Secretary for review. Proposed paragraph (a) requires that any petition be filed within 30 days of the date on which the District Director serves the decision. Under proposed paragraph (b), if any party files a timely motion for reconsideration with the administrative law judge, the 30-day period will not begin to run until the judge issues a decision on reconsideration and any petition for review filed earlier will be dismissed without prejudice as premature. This is to ensure the ALJ process is complete before moving to the next level in the appeal process. Proposed paragraph (c) sets out the requirements for the petition for review: that it be typewritten or legibly written, state the specific determinations in the ALJ decision with which the petitioner disagrees, be signed and dated, and include attached copies of the ALJ's decision and any other relevant documents in the record. This is to ensure the Secretary or their designee has sufficient information on which to render a decision. And proposed paragraph (d) provides the mailing address for sending the petition, notes that documents are not considered filed until actually received by the Secretary, and requires the petition to be filed in the manner specified in the ALJ's decision and order. This is to allow for future address changes and technological advancements, while avoiding confusion if information in the regulation becomes outdated.

Section 702.909 Discretionary Review

Proposed § 702.909(a) provides that the Secretary's review of a timely petition is discretionary and that the Secretary will send written notice of their determination to all parties. Paragraph (a)(1) provides that, if the Secretary declines review, the administrative law judge's decision will be considered the final agency decision 30 days after the filing of the petition for review. Under paragraph (b)(2), if the Secretary chooses to review the decision, the Secretary will notify the parties of the issues to be reviewed and set a schedule for the parties to submit written arguments in whatever form the Secretary deems appropriate. Proposed paragraph (b) requires the District Director to forward the administrative record to the Secretary if the Secretary decides to review the administrative law judge's decision.

Section 702.910 Final Decision of the Secretary

Proposed § 702.910 limits the Secretary's review to the hearing record. The Secretary will review findings of fact under a substantial evidence standard and conclusions of law *de novo.* The Secretary may affirm, reverse, modify, or vacate the decision, and may remand to the Office of Administrative Law Judges for further review. This is based on the scope of review for the Benefits Review Board for cases under

its jurisdiction. *See* 20 CFR 802.301 (''Such findings of fact and conclusions of law may be set aside only if they are not, in the judgment of the Board, supported by substantial evidence in the record considered as a whole or in accordance with law.''). The Secretary's decision must be served on all parties and the Chief Administrative Law Judge.

Section 702.911 Settlement of Penalty

Proposed § 702.911 provides that the respondent and the Director or District Director may enter into a settlement at any time during the penalty proceedings. This provision would cover both proposed penalties and assessed penalties and is meant to allow flexibility and forestall further litigation if OWCP and the respondent reach agreement at any point during the proceedings. Upon settlement, the OWCP official with whom the respondent settled would transmit a copy of the settlement agreement to the Deputy Director for Longshore Claims. This is to ensure the Longshore program is aware of every settlement for the purpose of tracking collections and recovery, as well as for possible consideration as an aggravating factor under any future penalty proceedings involving the same respondent. Proposed § 702.911 also provides that penalties agreed upon in settlement agreements may be collected and recovered pursuant to § 702.912. This is to ensure that the Department has a mechanism for collecting agreed-upon payments. OWCP welcomes comment on this proposed paragraph, and specifically whether settlement agreements should be made public when transmitted to the Deputy Director for Longshore Claims.

Section 702.912 Collection and Recovery of Penalty

Paragraph (a) of proposed § 702.912 provides that, when a penalty becomes final under § 702.905(d), 702.907(f), 702.909(a)(1), 702.910, or 702.911, the penalty is immediately due and payable to the Department on behalf of the special fund described in 33 U.S.C. 944. Paragraph (b) provides that, if payment is not received within 30 days after it becomes due and payable, it may be recovered by a civil action brought by the Secretary, who will be represented by the Solicitor of Labor.

V. Legal Basis for the Proposed Rule

Section 39(a) of the LHWCA, 33 U.S.C. 939(a)(1), authorizes the Secretary of Labor to prescribe rules and regulations necessary for the administration of the Act. The statute further allows OWCP to impose a penalty when an employer or insurance carrier fails to timely report a work-related injury or death, 33 U.S.C. 930(e), or fails to timely report its final payment of compensation to a claimant, 33 U.S.C. 914(g). This proposed rule would effectuate these statutory provisions and falls well within these statutory grants of authority.

VI. Information Collection Requirements

The Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3501 *et seq.,* and its implementing regulations, 5 CFR part 1320, require that the Department consider the impact of paperwork and other information collection burdens imposed on the public. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless it is approved by the Office of Management and Budget (OMB) under the PRA and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, an agency generally may not subject a person to penalty for failing to comply with a collection of information that does not display a valid Control Number. *See* 5 CFR 1320.5(a) and 1320.6.

This proposed rule would not change any existing collections of information or generate any new collections of information. The forms for the first report of injury and notice of final payment are already approved under OMB Control Numbers 1240–0003 and 1240–0041, respectively. The information that respondents would submit to OWCP under this proposal would be in response to specific notices of proposed penalties and penalty orders. It would therefore fall under the exemption for requests for facts or opinions addressed to a single person. *See* 5 CFR 1320.3(h)(6).

VII. Executive Orders 12866, 13563, and 14094 (Regulatory Planning and Review)

Under E.O. 12866, OMB's Office of Information and Regulatory Affairs determines whether a regulatory action is significant and, therefore, subject to the requirements of the E.O. and review by OMB. *See* 58 FR 51735 (Oct. 4, 1993). Section 1(b) of E.O. 14094 amends sec. 3(f) of E.O. 12866 to define a ''significant regulatory action'' as an action that is likely to result in a rule that may (1) have an annual effect on the economy of $200 million or more (adjusted every 3 years by the Administrator of the Office of Information and Regulatory Affairs (OIRA) for changes in gross domestic product) or adversely affects in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, territorial, or tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impacts of entitlements, grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or (4) raise legal or policy issues for which centralized review would meaningfully further the President's priorities or the principles set forth in the E.O. *See* 88 FR 21879 (Apr. 11, 2023). This proposal would clarify the process for assessing and appealing penalties and is largely consistent with practices already in OWCP's procedural manual. As such, this proposal is not likely to generate additional costs to the regulated community. OIRA has determined that this proposed rule is not a significant regulatory action under sec. 3(f)(1) of E.O. 12866, so it has not reviewed it prior to publication.

Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. It directs agencies to, among other things, propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs; that it is tailored to impose the least burden on society, consistent with obtaining the regulatory objectives; and that, in choosing among alternative regulatory approaches, the agency has selected those approaches that maximize net benefits. Executive Order 13563 recognizes that some costs and benefits are difficult to quantify and provides that, when appropriate and permitted by law, agencies may consider and discuss qualitatively values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts.

The Department has considered this proposed rule with these principles in mind and has concluded that, if adopted, the regulated community would benefit from this regulation. Promulgating procedural rules related to civil money penalties would benefit employers (and their insurance carriers) against whom OWCP may assess penalties. Currently, the regulations contain no set procedures for employers to challenge penalties, which can lead to procedural decisions being made on a case-by-case basis. The proposed rules

would establish a transparent and consistent pathway for assessment and adjudication of penalties: clear notice of the proposed penalty and an opportunity to contest it; hearing by an administrative law judge upon request; the opportunity to petition the Secretary for discretionary review; and a stay of payment for the penalty assessed until review is complete and the decision becomes final. These procedures would clearly protect an employer's rights to be fully heard before having to pay a penalty and promote consistency and fairness across different districts and regions.

VIII. Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531 *et seq.*) directs agencies to assess the effects of Federal regulatory actions on state, local, and tribal governments, and the private sector, ''other than to the extent that such regulations incorporate requirements specifically set forth in law.'' This proposed rule does not include any Federal mandate that may result in increased expenditures by state, local, and tribal governments, or increased expenditures by the private sector of more than $100,000,000 (in 1995 dollars). It is therefore not covered by the Unfunded Mandates Reform Act.

IX. Regulatory Flexibility Act and Executive Order 13272 (Proper Consideration of Small Entities in Agency Rulemaking)

The Regulatory Flexibility Act of 1980, as amended (5 U.S.C. 601 *et seq.*) (RFA), requires an agency to prepare a regulatory flexibility analysis when it proposes regulations that will have ''a significant economic impact on a substantial number of small entities'' or to certify that the proposed regulations will have no such impact, and to make the analysis or certification available for public comment.

The Department has determined that a regulatory flexibility analysis under the RFA is not required for this rulemaking. While many longshore employers and a handful of insurance carriers may be small entities within the meaning of the RFA, *see generally* 77 FR 19471–72 (March 30, 2012), this proposed rule, if adopted as a final rule, will not have a significant economic impact on them. The procedures related to penalties generally simply provide additional structure and consistency to the assessment of penalties. While 33 U.S.C. 914(g) does not allow any discretion on the part of the agency, OWCP will take small entity status into account as a mitigating factor for penalties assessed under 33 U.S.C. 930(e). *See* 5 U.S.C. 601 note § 223(b) (limiting the mitigation provisions in section 223 of the Small Business Regulatory Enforcement Fairness Act to be subject to ''the requirements or limitations of other statutes.'') *See* proposed § 702.208(c)(6).

The Department therefore certifies that this proposed rule would not have a significant economic impact on a substantial number of small entities. Thus, an initial regulatory flexibility analysis is not required. The Department, however, invites comments from members of the public who believe the proposed rule would have a significant economic impact on a substantial number of small longshore employers or insurers. The Department has provided the Chief Counsel for Advocacy of the Small Business Administration with a copy of this certification. *See* 5 U.S.C. 605(b).

X. Executive Order 13132 (Federalism)

The Department has reviewed this proposed rule in accordance with Executive Order 13132 regarding federalism and has determined that it does not have ''federalism implications.'' The proposed rule will not ''have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government'' if promulgated as a final rule.

List of Subjects in 20 CFR Part 702

Administrative practice and procedure, Claims, Longshore and harbor workers, Workers' compensation.

For the reasons set forth in the preamble, the Department of Labor proposes to amend 20 CFR part 702 as follows:

PART 702—ADMINISTRATION AND PROCEDURE

■ 1. The authority citation for part 702 continues to read as follows:

Authority: 5 U.S.C. 301, and 8171 *et seq.;* 33 U.S.C. 901 *et seq.;* 42 U.S.C. 1651 *et seq.;* 43 U.S.C. 1333; 28 U.S.C. 2461 note (Federal Civil Penalties Inflation Adjustment Act of 1990); Pub. L. 114–74 at sec. 701; Reorganization Plan No. 6 of 1950, 15 FR 3174, 64 Stat. 1263; Secretary's Order 10–2009, 74 FR 58834.

■ 2. Revise § 702.204 to read as follows:

§ 702.204 Employer's report; penalty for failure to furnish and or falsifying.

(a) Any employer, insurance carrier, or self-insured employer who knowingly and willfully fails or refuses to send any report required by § 702.201, or who knowingly or willfully makes a false statement or misrepresentation in any report, shall be subject to a civil penalty not to exceed $28,304 for each such failure, refusal, false statement, or misrepresentation for which penalties are assessed after January 15, 2023.

(1) An entity knowingly fails or refuses to send a report required by § 702.201 when it has actual knowledge, or reasonably should have known, of the employee's injury or death, that the injury or death is likely covered by the Act, that a report is required, and that a report was not timely filed.

(2) An entity willfully fails or refuses to send a report required by § 702.201 when it intentionally disregards the reporting requirement or is plainly indifferent to the reporting requirement.

(3) An entity knowingly makes a false statement or misrepresentation in any report required by § 702.201 when it has actual knowledge, or reasonably should have known, that information it provides in the report is untrue, incomplete, or misleading.

(4) An entity willfully makes a false statement or misrepresentation in any report required by § 702.201 when it intentionally disregards or exhibits plain indifference to the truth.

(5) Proof of a false statement or misrepresentation made either knowingly or willfully in a report required by § 702.201 is sufficient to warrant imposition of a penalty under this section.

(b) In determining the penalty amount under paragraph (a) of this section, the number of penalties, if any, that have been assessed against the employer, insurance carrier, self-insured employer, or self-insured employer group in the two years preceding the most recent reporting violation will be considered. The baseline penalty will be in accordance with the following table and rounded up to the next dollar.

TABLE 1 TO PARAGRAPH (b)

Number of violations	Baseline (unadjusted) penalty as a percentage of statutory maximum
First missing/falsified report:	5
Second missing/falsified report:	10
Third missing/falsified report:	20
Fourth missing/falsified report:	40
Fifth missing/falsified report:	80
Sixth (and above) missing/falsified report:	100

■ 3. Add § 702.206 to read as follows:

§ 702.206 Notice of failure to timely submit accurate report.

(a) When OWCP receives information that indicates an injury or death has occurred on a particular date but has not received a first report of injury or death as required by § 702.201, the District Director will send a notice to the employer that:

(1) Describes the evidence that indicates a covered injury or death occurred on a particular date;

(2) Notifies the employer of its responsibility to file a report within 10 days of that date;

(3) Requests an explanation for the failure to file a report within the required time limit;

(4) Notifies the employer that it may be subject to a penalty if its failure to timely submit a report is knowing and willful; and

(5) Instructs the employer that it must file the required report no later than ten days after receipt of the notice.

(b) If the employer does not file the required report within ten days of receipt of the notice described in paragraph (a) of this section, the District Director will send a second notice to the employer that:

(1) Notifies the employer that its failure to file the required report after receipt of the notice described in paragraph (a) of this section constitutes evidence that its failure to timely submit a report is knowing and willful;

(2) Requests an explanation for the failure to file a report within the required time limit and reasons why the full penalty amount should not be assessed against the employer, including documentation supporting any mitigating factors claimed under § 702.208(c); and

(3) Instructs the employer that its response should be filed within 30 days of receipt of the notice.

(c) When OWCP receives a report filed more than ten days from the date of an employee's injury or death or the date an employer has knowledge of an employee's injury or death, and the District Director has not already sent a notice under paragraph (a) of this section, the District Director may notify the employer of its responsibility to file a report within ten days of that date. If the District Director preliminarily determines the failure to timely file was knowing and willful, this notice will also request an explanation for the failure to file a report within the required time limit and request the employer's reasons why the full penalty amount should not be assessed against the employer, including documentation supporting any mitigating factors claimed under § 702.208(c), and instruct the employer that its response should be filed within 30 days of receipt of the notice.

(d) When OWCP receives a report required by § 702.201 containing a false statement or misrepresentation, the District Director will send a notice to the employer that

(1) Describes the evidence that indicates the report contains a false statement or misrepresentation;

(2) Notifies the employer that it may be subject to a penalty if the false statement or misrepresentation was made knowingly or willfully;

(3) Requests an explanation for the false statement or misrepresentation and reasons why the full penalty amount should not be assessed against the employer; and

(4) Instructs the employer that its response should be filed within 30 days of the date of the letter.

■ 4. Add § 702.207 to read as follows:

§ 702.207 Consideration of response; notice of proposed penalty.

(a) The District Director will consider the employer's responses, if any, to the notices described in § 702.206, as well as any other information the District Director has about the injury or the respondent, to determine whether the failure, refusal, false statement, or misrepresentation was knowing or willful as set forth in § 702.204.

(b) If the District Director determines that the failure to file a timely report was knowing and willful, or the false statement or misrepresentation in such a report was knowing or willful, the District Director will issue a notice of proposed penalty. The Director has the authority and responsibility for assessing a penalty using the procedures set forth at subpart I of this part.

■ 5. Add § 702.208 to read as follows:

§ 702.208 Special considerations in setting penalty amounts.

(a) In proposing and setting penalty amounts, the District Director and Director may, consistent with the maximum penalty set forth in § 702.204, consider aggravating and mitigating factors.

(b) The Director may consider the following aggravating factors in determining whether to increase the proposed penalty amount:

(1) Extent of delay in filing the report;

(2) Attempts to conceal the injury or death;

(3) Failure to timely pay compensation due the claimant;

(4) Failure to submit information sufficient to determine whether the correct compensation has been paid;

(5) Any prior settlements of penalties assessed by the Director;

(6) Any outstanding proposed penalties assessed against the entity;

(7) Any prior penalties assessed against an entity's parent company or subsidiary; and

(8) Any other factors relevant to the respondent's conduct with respect to the contents of the report.

(c) The Director may consider the following mitigating factors in determining whether to reduce the proposed penalty amount:

(1) Bringing the failure to comply with the Act or regulations to the District Director's attention;

(2) Full payment of the correct amount of compensation to the claimant;

(3) Timely compliance with the District Director's requests once failure to comply with the Act or regulations was brought to their attention;

(4) History of compliance with the Act and the regulations of this subchapter;

(5) A mass casualty event preventing the timely filing in all related cases;

(6) Whether the respondent is a ''small entity'' within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601(6); and

(7) Any other relevant factors.

■ 6. Revise the section heading of § 702.233 to read as follows:

§ 702.233 Additional compensation for failure to pay without an award.

■ 7. Revise § 702.236 to read as follows:

§ 702.236 Penalty for failure to report termination of payments.

Any employer failing to notify the District Director that the final payment of compensation has been made as required by § 702.235 shall be assessed a civil penalty in the amount of $345 for any violation for which penalties are assessed after January 15, 2023. The Director has the authority and responsibility for assessing this penalty using the procedures set forth at subpart I of this part.

■ 8. Revise § 702.274 to read as follows:

§ 702.274 Employer's refusal to pay penalty.

In the event the employer refuses to pay the penalty assessed after it becomes final as set forth in subpart I of this part, the District Director shall refer the complete administrative file to the Deputy Director for Longshore Claims, Division of Federal Employees', Longshore and Harbor Workers' Compensation, for subsequent transmittal to the Associate Solicitor for Black Lung and Longshore Legal Services, with the request that appropriate legal action be taken to recover the penalty.

■ 8. Add subpart I to read as follows:

Subpart I—Procedures for Civil Money Penalties

§ 702.901 Scope of this subpart.

These procedures apply to the proposal, assessment, and adjudication of the civil money penalties prescribed by § 702.204 or § 702.236.

§ 702.902 Definitions.

In addition to the definitions provided in §§ 701.301 and 701.302, the following definition applies to this subpart:

Respondent means the employer, insurance carrier, or self-insured employer against whom the District Director is seeking to assess a civil penalty.

§ 702.903 Notice of proposed penalty; response; consequences of no response.

(a) The District Director will serve a written notice of proposed penalty through an electronic method authorized by OWCP or by trackable delivery method on each respondent against whom they are considering assessing a penalty. Where service is not accepted by a respondent, the notice will be deemed received by the respondent on the attempted date of delivery.

(b) The notice must set forth the—

(1) Facts giving rise to the proposed penalty;

(2) Statutory and regulatory basis for the proposed penalty;

(3) Amount of the proposed penalty, including an explanation for the amount proposed;

(4) Instructions for including documentation in the response, as set forth in paragraph (d) of this section; and

(5) Consequences of failing to timely respond to the notice as set forth in paragraph (e) of this section.

(c) The respondent must respond within 30 days of receipt of the notice. The response may include—

(1) Any explanation for why the full proposed penalty amount should not be assessed; and

(2) Documentation relevant to the factual basis for the penalty, including any mitigating factors under § 702.208.

(d) If the respondent does not respond within 30 days of receipt of the notice, the District Director will submit the notice of proposed penalty to the Director as a preliminary decision.

§ 702.904 Preliminary decision on notice of proposed penalty after timely response.

If the respondent files a timely response to the notice described in § 702.903, the District Director will review the facts and any argument presented in the response, revise the proposed penalty amount, if warranted, and submit the revised notice of proposed penalty to the Director as a preliminary decision.

§ 702.905 Director's penalty order; request for hearing.

(a) The Director will consider the District Director's preliminary decision and issue a Director's penalty order no more than 30 days after receipt of the District Director's preliminary decision. The Director's penalty order must—

(1) Include a statement of the reasons for the assessment, including an evaluation of any mitigating or aggravating factors considered, and the amount of the penalty;

(2) Set forth the respondent's right to request a hearing on the Director's penalty order and the method for doing so; and

(3) Set forth the consequences of failing to timely request a hearing as set forth in paragraph (d) of this section.

(b) The respondent has 15 days from receipt of the Director's penalty order to request a hearing before an Administrative Law Judge by filing a request for hearing with the District Director. The request must—

(1) Be typewritten or legibly written;

(2) State the specific determinations in the Director's penalty order with which the respondent disagrees;

(3) Be signed and dated by the respondent making the request or by the respondent's authorized representative;

(4) State both the physical mailing address and electronic mailing address for the respondent and the authorized representative for receipt of further communications.

(c) A timely hearing request will operate to stay collection of the penalty until final resolution of the penalty is reached by the Administrative Law Judge or the Secretary, as appropriate.

(d) If the respondent does not request a hearing within 15 days of receipt of the Director's penalty order, the assessment and amount of the penalty set forth in the Director's penalty order will be deemed a final decision of the Secretary.

§ 702.906 Referral to the Office of Administrative Law Judges.

(a) When the District Director receives a request for hearing in response to a Director's penalty order issued under § 702.905, the District Director will notify the Chief Administrative Law Judge, who will assign an Administrative Law Judge to the case. The District Director will also forward to the Office of Administrative Law Judges the following documentation, which will be considered the administrative record:

(1) The District Director's notice of proposed penalty and preliminary decision issued under §§ 702.903 and 702.904;

(2) The documentation upon which the District Director relied in issuing the notice of proposed penalty and preliminary decision;

(3) All written responses and documentation filed by the respondent with the District Director;

(4) The Director's penalty order;

(5) The documentation upon which the Director relied in issuing the penalty order; and

(6) The respondent's request for hearing.

(b) Except as otherwise provided in this subpart, the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges at 29 CFR part 18 will apply to hearings under this subpart.

§ 702.907 Decision and order of Administrative Law Judge.

(a) In reviewing the Director's penalty order, the Administrative Law Judge must limit their determinations to:

(1) Whether the respondent has violated the sections of the Act and regulations under which the penalty was assessed;

(2) The appropriateness of the penalty assessed as set forth in §§ 702.204, 702.236, 702.271, and 702.903(c)(2).

(b) Documentation not presented to the District Director may not be admitted in any further proceedings before an Administrative Law Judge unless the Administrative Law Judge finds that the failure to submit the documentation to the District Director should be excused due to extraordinary circumstances.

(c) The decision of the Administrative Law Judge must include a statement of findings and conclusions, with reasons and bases therefor, instructions for filing a motion for reconsideration with the Administrative Law Judge, and instructions for filing a petition for review with the Secretary.

(d) On the date of issuance, the Administrative Law Judge must deliver a copy of the decision and order on the District Director for service on the parties.

(e) Any party may ask the Administrative Law Judge to reconsider their decision by filing a motion within 30 days of the date the District Director serves the decision. A timely motion for reconsideration will suspend the running of the time for any party to file a petition for review under § 702.908 until the date the motion for reconsideration is denied or 30 days after a new decision is issued.

(f) If no party files a motion for reconsideration or petition for review within 30 days of the date the District Director serves the Administrative Law Judge's decision, or if any such motions or petitions are denied, the decision will be deemed a final decision of the Secretary.

(g) At the conclusion of all hearing proceedings, the Administrative Law Judge will forward the complete hearing record to the District Director who referred the matter for hearing, who will retain custody of the record.

§ 702.908 Review by the Secretary.

(a) Any party aggrieved by the decision of the Administrative Law Judge may petition the Secretary for review of the decision by filing a petition within 30 days of the date on which the District Director serves the decision. Copies of the petition must be served on all parties and on the Chief Administrative Law Judge.

(b) If any party files a timely motion for reconsideration under § 702.907(e), any petition for review filed before service of a decision on reconsideration, whether filed prior to or subsequent to the filing of a timely motion for reconsideration, will be dismissed without prejudice as premature. The 30-day time limit for filing a petition for review by any party will begin upon service of a decision on reconsideration.

(c) The petition for review must—

(1) Be typewritten or legibly written;

(2) State the specific determinations in the Administrative Law Judge's decision with which the party disagrees;

(3) Be signed and dated by the party or the party's authorized representative; and

(4) Include attached copies of the Administrative Law Judge's decision and any other documents admitted into the record by the Administrative Law Judge that would assist the Secretary in determining whether review is warranted.

(d) All documents submitted to the Secretary, including a petition for review, must be filed with the Secretary of Labor, U.S. Department of Labor, 200 Constitution Ave. NW, Washington, DC 20210, in the manner specified in the Administrative Law Judge's decision and order. Documents are not considered filed with the Secretary until actually received.

§ 702.909 Discretionary review.

(a) Following receipt of a timely petition for review, the Secretary will determine whether the Administrative Law Judge's decision warrants review. This determination is solely within the Secretary's discretion. The Secretary will send written notice of their determination to all parties.

(1) If the Secretary does not notify the parties within 30 days of the petition for review's filing that they will review the decision, the Administrative Law Judge's decision will be considered the final decision of the agency at the expiration of that 30 days.

(2) If the Secretary decides to review the decision, the Secretary will notify the parties within 30 days of the petition for review's filing of the issue or issues to be reviewed and set a schedule for the parties to submit written argument in whatever form the Secretary deems appropriate.

(b) If the Secretary decides to review the decision, the District Director must forward the administrative record compiled before the Administrative Law Judge to the Secretary.

§ 702.910 Final decision of the Secretary.

The Secretary's review is limited to the hearing record. The findings of fact in the decision under review shall be conclusive if supported by substantial evidence in the record as a whole. The Secretary's review of conclusions of law will be *de novo.* Upon review of the decision, the Secretary may affirm, reverse, modify, or vacate the decision, and may remand the case to the Office of Administrative Law Judges for further proceedings. The Secretary's final decision must be served upon all parties and the Chief Administrative Law Judge.

§ 702.911 Settlement of penalty.

At any time during proceedings under this subpart, the Director or District Director and the respondent may enter into a settlement of any proposed or assessed penalties. Upon settlement, the District Director or Director will transmit a copy of the settlement agreement to the Deputy Director for Longshore Claims. Any settlement agreement under this subpart may be considered as an aggravating factor under any future proceedings under this subpart. Penalties agreed upon in settlement agreements may be collected and recovered pursuant to § 702.912.

§ 702.912 Collection and recovery of penalty.

(a) When the determination of the amount of the penalty becomes final (*see* §§ 905(d), 907(f), 909(a)(1), 910, 911), the penalty is immediately due and payable to the U.S. Department of Labor on behalf of the special fund described in section 44 of the Act, 33 U.S.C. 944. The respondent will promptly remit the final penalty imposed to the Secretary of Labor by either check or automated clearinghouse (ACH).

(b) If such remittance is not received within 30 days after it becomes due and payable, it may be recovered in a civil action brought by the Secretary in any court of competent jurisdiction, in which litigation the Secretary will be represented by the Solicitor of Labor.

Signed at Washington, DC, this 5th day of September 2023.

Christopher Godfrey,

Director, Office of Workers' Compensation Programs.

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DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Parts 140 and 146

46 CFR Parts 4 and 109

[Docket No. USCG–2013–1057]

RIN 1625–AB99

Marine Casualty Reporting on the Outer Continental Shelf

AGENCY: Coast Guard, DHS.

ACTION: Supplemental notice of proposed rulemaking; extension of comment period.

SUMMARY: The Coast Guard is extending the comment period for the supplemental notice of proposed rulemaking, ''Marine Casualty Reporting on the Outer Continental Shelf,'' published June 14, 2023, that seeks comments on proposed changes to reporting criteria for certain casualties on the outer continental shelf (OCS) and a proposed increase to property damage dollar threshold that triggers a casualty report for fixed facilities on the OCS. We are extending the comment period an additional 60 days to allow the public more time to comment. The