



[6735-01]

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

29 CFR Part 2700

Procedural Rules

AGENCY: Federal Mine Safety and Health Review Commission.

ACTION: Notice of Proposed Rulemaking.

SUMMARY: The Federal Mine Safety and Health Review Commission (the “Commission”) is an independent adjudicatory agency that provides trials and appellate review of cases arising under the Federal Mine Safety and Health Act of 1977 (the “Mine Act”). Trials 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. The Commission proposes revising its procedural rules in order to aid the just and efficient adjudication of such proceedings.

DATES: Written and electronic comments must be submitted on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: Written comments should be mailed to Michael A. McCord, General Counsel, Office of the General Counsel, Federal Mine Safety and Health Review Commission, 1331 Pennsylvania Ave., NW, Suite 520N, Washington, DC 20004-1710. Electronic comments should state “Comments on Procedural Rules” in the subject line and be sent to RulesComments@fmshrc.gov.

FOR FURTHER INFORMATION CONTACT: Sarah Stewart, Deputy General Counsel, Office of the General Counsel, Federal Mine Safety and Health Review Commission, at (202) 434-9935.

SUPPLEMENTARY INFORMATION:

I. Background

The Commission last significantly revised its procedural rules, 29 CFR part 2700, in August 2006. 71 FR 44,190 (Aug. 4, 2006). Since that time, the Commission has identified several rules that require revision or clarification in order to aid the efficient adjudication of proceedings at the Commission's trial and appellate levels. For instance, confusion has arisen in discrimination proceedings brought pursuant to section 105(c)(3) of the Mine Act, 30 U.S.C. 815(c)(3), regarding when a decision on the merits of discrimination becomes ripe for review. The Commission proposes changing procedures relating to section 105(c)(3) discrimination proceedings in order to make them more consistent with procedures relating to discrimination proceedings brought pursuant to section 105(c)(2) of the Mine Act, 30 U.S.C. 815(c)(2). Such changes are intended to provide greater clarity and to eliminate unnecessary delay.

In order to provide transparency as to its processes, the Commission has proposed both new rules and revisions to its current rules that reflect the Commission's actual practices. The Commission has proposed adding new Commission Procedural Rule 32 which pertains to motions to reopen orders that have become final as the result of a failure to make a timely filing. The Commission has also proposed new Commission Procedural Rule 72 which describes the method by which the Commission empanels Commissioners, as authorized by section 113(c) of the Mine Act, 30 U.S.C. 823(c). The Commission has proposed adding provisions to § 2700.5(e) for protecting sensitive commercial information, and for placing sensitive documents under Commission seal. In addition, the Commission has proposed numerous changes with respect to § 2700.80,

which more fully describe the Commission's process for investigating and making determinations in disciplinary proceedings.

Finally, the Commission has proposed more technical changes. A number of changes are necessitated by the evolution of the Commission's electronic management of its dockets. In addition, the Commission has proposed a number of corrections and stylistic changes to word usage throughout its rules.

The proposed changes are described more fully in the following section-by-section analysis. The Commission welcomes all comments and suggestions regarding the proposed changes and any necessary changes that have not been included.

II. Section-by-Section Analysis

Set forth below is an analysis of proposed changes to the Commission's procedural rules. Some proposals involve similar or identical changes to multiple rules. Those changes are described immediately below by subject matter. Other changes generally pertain to one rule and are described following the subject matter discussion on a rule-by-rule basis.

A. Changes related to the Commission's paperless docketing system

In 2014, the Commission began using an electronic case management system ("eCMS") in order to more efficiently manage its caseload. In late 2013, the Commission published interim rules permitting parties to file and serve documents electronically. 78 FR 77,354 (Dec. 23, 2013). The Commission later adopted those interim rules as final rules. 84 FR 59,931 (Nov. 7, 2019). Although parties may continue to file documents non-electronically with the Commission as they have in the past, unless otherwise directed by the Commission in response to emergencies and special circumstances such

as the COVID-19 considerations, experience has shown that a vast majority of documents are filed electronically through eCMS.

The Commission recognizes that, as eCMS evolves, the Commission's procedural rules should reflect any necessary changes. For instance, it is likely that in the future, eCMS will allow parties to serve documents electronically through the system.

Currently, parties may serve documents electronically only through the use of email. The Commission proposes changing its service requirements to allow parties to serve documents electronically by other means in addition to email in anticipation of such changes to eCMS. These proposed changes appear identically in §§ 2700.7(c) (general service requirements); 2700.9(a) (motions for extensions of time); 2700.24(d) (filing and service of pleadings in emergency response plan dispute proceedings); 2700.45(a) and 2700.45(f) (service in temporary reinstatement proceedings); 2700.46(d) (service of pleadings in temporary relief proceedings); 2700.70(f) (motions for leave to exceed page limit relating to petitions for discretionary review); and 2700.75(f) (motions for leave to exceed page limit relating to briefs).

In addition, documents issued by the Commission may be offered in electronic format rather than in paper format to parties. Consequently, the Commission proposes deleting provisions in §§ 2700.4(b)(1), 2700.24(f)(1), 2700.45(e)(3), 2700.54, and 2700.66(a) that specify a method of postal mail for the issuance of documents by the Commission under those provisions. Although the Mine Act does not specify the method by which the Commission must distribute its issuances, the Commission intends to use the most expeditious means reasonably available which is appropriate under the circumstances. Because Commission Procedural Rules 24 (emergency response plan

dispute proceedings) and 45 (temporary reinstatement proceedings) deal with expedited proceedings, they shall retain their current language stating that the parties shall be notified of the Judge’s decision or determination by the “most expeditious means reasonably available.” The Commission proposes adding similar language to Commission Procedural Rule 66 (summary disposition of proceedings) in paragraph (a) stating that the order to show cause shall be provided to the party who has failed to comply by “the most expeditious means reasonably available.”

B. Gender-specific pronouns

The masculine gender is currently used throughout the Commission’s Procedural Rules. The Commission proposes changing the gender-specific pronouns in its rules to more gender-neutral language. Conforming changes have been proposed for §§ 2700.4(a); 2700.6(a)(1), (a)(2)(ii) and (b); 2700.8 (Example 2); 2700.20(d); 2700.24(e)(2)(i) and (ii); 2700.25; 2700.26; 2700.27; 2700.41(a); 2700.45(b), (c), (d) and (g); 2700.55(h); 2700.56(c); 2700.58(c); 2700.61; 2700.62; 2700.63(b); 2700.68(a) and (b); 2700.69(a), (b) and (c); 2700.73(b); 2700.75(a)(1) and (e); and 2700.76(a)(1)(i); and 2700.81(a) and (c). The Commission also proposes deleting the provision in Procedural Rule 1(c) that currently states that “[w]herever the masculine gender is used in these rules, the feminine gender is also implied.” 29 CFR 2700.1(c). In addition, the Commission proposes revising references in § 2700.83 from “Chairman” to “Chair.”

C. Consistency in use of language

1. References to pleadings

The term “pleading” generally refers to those documents filed in the beginning stage of proceedings in which parties formally submit their claims and defenses (i.e.,

petitions, answers). The Commission’s rules sometimes erroneously use the term “pleading,” when the use of a more generic term, such as “document” or “filing” is intended. The Commission proposes changing the term “pleading” to the term “document” or “filing” when the more generic term is intended in §§ 2700.4(c), 2700.5(h), 2700.8(b) and Example 2, 2700.10(b), 2700.11, 2700.24(d), 2700.45(a), and 2700.46(d).

2. References to a Judge

The Commission proposes capitalizing the word “Judge” wherever it appears in the Commission’s Procedural Rules. Such changes are proposed with respect to §§ 2700.24(f)(2) and 2700.67(e).

3. References to the Secretary of Labor

The rules variously refer to the Secretary of Labor as “Secretary” and “Secretary of Labor.” For purposes of clarity and consistency, the Commission proposes making revisions so that the first reference in the text of a rule shall be to the “Secretary of Labor,” with a parenthetical indicating that subsequent references shall be to the “Secretary.” No parenthetical is included if “Secretary of Labor” appears only once in the rule. In addition, no parenthetical is included with the first reference to “Secretary of Labor” that appears in a title of the rule or in the title of its paragraphs. The Commission proposes making such changes to §§ 2700.4(a), 2700.20(b), 2700.21(a), 2700.22(c), 2700.24(a), 2700.25, 2700.26, 2700.27, 2700.28(a), 2700.30(b), 2700.31(b)(1), 2700.40(a), 2700.41(a), 2700.44(a), and 2700.45(b).

4. References to website

The Commission proposes changing all references from “Web site” to “website,”

in keeping with current accepted usage. Such changes are proposed with respect to §§ 2700.1(a)(1), and 2700.5(b), (c)(1), (f)(1), and (j).

D. Subpart A – General Provisions

§ 2700.3 Who may practice.

The Commission proposes revising Commission Procedural Rule 3 to clarify the conduct required of, and actions prohibited by, those who appear before the Commission and its Judges as a representative. The proposed revisions state that all individuals authorized to practice before the Commission, including attorney representatives and other non-attorney persons, shall be subject to the standards of conduct and disciplinary proceedings set forth in 29 CFR 2700.80. As discussed below, the Commission proposes revising Commission Procedural Rule 80(a) to state that the American Bar Association's Model Rules of Professional Conduct shall be considered in the Commission's disciplinary proceedings.

§ 2700.4 Parties, intervenors, and amici curiae.

Current Commission Procedural Rule 5, 29 CFR 2700.5, provides that parties may file documents by electronic means and non-electronic means and provides instructions for doing so. The Commission proposes revising § 2700.4(b) to state that notices of intervention shall be filed in accordance with the filing requirements set forth in Commission Procedural Rule 5. In addition, as noted with respect to changes proposed that are related to the Commission's paperless docketing system, the Commission proposes deleting the reference in current § 2700.4(b)(1) that appears to recognize that copies of a notice of intervention may be provided by the Commission only by postal mail.

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

Commission Procedural Rule 5 is currently entitled, “General requirements for pleadings and other documents; status or informational requests.” A large part of Rule 5 pertains to filing requirements. A party who is unfamiliar with the Commission’s Procedural Rules would not know which rule to consult for filing requirements. The Commission proposes inserting “filing requirements” in the title of Rule 5.

The Commission also proposes revising paragraph (a) to replace an erroneous citation of “30 U.S.C. 820(c)” with the correct citation of “30 U.S.C. 820.”

Paragraph (c)(2) of Rule 5 (§ 2700.5(c)(2)) provides instructions for filing documents by non-electronic means. The Commission proposes two changes with respect to this paragraph. First, the Commission proposes amending paragraph (c)(2)(i) of Rule 5 to require that filings submitted by a means other than electronic transmission should be sent to the Commission’s Docket Office rather than to the Commission’s Executive Director. The Commission’s Executive Director plays no role with respect to filings, and the proposed change reflects the Commission’s actual practice.

Second, the Commission proposes deleting paragraph (c)(2)(iii) as superfluous and possibly confusing. Paragraph (2)(c) sets forth filing instructions pertaining to the following specific time-frames: (i) before a Judge has been assigned; (ii) after a Judge has been assigned; (iii) interlocutory review; and (iv) after a Judge has issued a final decision. Section 2700.5(c)(2)(iii) relating to documents filed in connection with interlocutory review is unnecessary and possibly confusing because such documents also fall under section 5(c)(2)(ii) (after a Judge has been assigned). In addition, § 2700.5(c)(2)(iii) refers

the reader to § 2700.76, which does not provide detailed information about how to file documents non-electronically.

The Commission proposes revising paragraph (e) of Commission Procedural Rule 5 in order to address various privacy considerations. Parties sometimes provide sensitive commercial information to the Commission. Further, a party may request documents from an opposing party that contain such information. The Commission proposes adding paragraph (5) to § 2700.5(e) in order to include a requirement that parties take steps to protect their sensitive commercial information. In addition, while the Commission's Judges already consider and decide motions to place records under seal, there currently is no Commission rule that specifically addresses the Commission's procedure for doing so. The Commission proposes adding paragraph (6) to § 2700.5(e) in order to expressly address the procedures for placing sensitive documents under Commission seal.

Paragraph (j) of Rule 5 sets forth the manner in which status or informational requests shall be made. It provides that such requests may be satisfied by accessing the Commission's website or by directing the request to the address of the Docket Office. The Commission proposes revising the rule to include a telephone number for contacting the Docket Office for those who need to contact the Docket Office in an expeditious manner but who do not have access to a computer.

§ 2700.6 Signing of documents.

Although Commission Procedural Rule 6 states how and by whom documents filed with the Commission must be signed, there is no specific requirement that all such documents shall be signed. The Commission proposes adding a requirement that all documents filed with the Commission must be signed.

§ 2700.8 Computation of time.

Section 2700.8(b) currently provides that five additional days are added to the due date for responding to a pleading served by a method of delivery resulting in other than same-day service. As noted above with respect to references to pleadings, the Commission proposes changing the term “pleading” to “filing” since the Commission intends for the provision to apply to more documents than just those filed with the Commission during the initial stage of proceedings that set forth a party’s claims and defenses.

The Commission also proposes adding a clarification to Rule 8(b) that the five extra days are not added for a response to a proposed penalty assessment because a proposed penalty assessment is not a filing with the Commission. Rather, a proposed penalty assessment is a notification sent by the Secretary of Labor to the operator or any other person against whom a civil penalty is proposed.

§ 2700.10 Motions.

Commission Procedural Rule 10, which addresses motions, currently provides that oral motions may be made during a hearing or a conference. However, the rule does not require that any proceedings on such oral motions shall be on the record. A lack of such record makes review of proceedings on oral motions difficult. The Commission proposes adding a provision requiring that proceedings on any motion made at hearing or during a conference shall be on the record. The Commission also proposes making a conforming revision to § 2700.53(a) recognizing that a Judge has the discretion to record any in-person or telephonic conference.

E. Subpart C – Contests of Proposed Penalties

§ 2700.25 Proposed penalty assessment.

The Commission received a suggestion that the service requirements in a regulation promulgated by the Department of Labor's Mine Safety and Health Administration ("MSHA") at 30 CFR 100.8(a) are inconsistent with the service requirements in § 2700.25, and that changes should be made to Commission Procedural Rule 25. The Commission has considered the matter and has concluded not to propose any such changes.

Section 2700.25 requires that the Secretary of Labor shall send a notice of a proposed civil penalty to an operator or any other person against whom a penalty is proposed by "certified mail." The requirements of Commission Procedural Rule 25 are taken directly from the language of section 105(a) of the Mine Act, 30 U.S.C. 815(a), which authorizes notification of a proposed penalty by "certified mail" only.

In contrast, section 100.8 states that proposed penalty assessments shall be "delivered" to an operator's name and address of record. Section 100.8 sets forth what constitutes a proper service address but does not state how service to that address should be made. The Commission declines proposing changes to Commission Procedural Rule 25 since the rule is wholly consistent with the Mine Act.

§ 2700.28 Filing of petition for assessment of penalty with the Commission.

The Commission proposes adding a provision to § 2700.28(b)(1) indicating that no more than 20 citations or orders may be the subject of a petition for assessment of penalty. Past practice has demonstrated that more than 20 citations or orders make a docket too large and unwieldy for the Commission to efficiently manage.

Current Commission Procedural Rule 28(b)(2) mistakenly refers to a “single penalty assessment that has been proposed under 30 CFR 100.4.” Single penalty assessments have been subsumed by regular assessments. The Commission proposes deleting the reference to single penalty assessments.

§ 2700.31 **Penalty settlement.**

Paragraph (a) of § 2700.31 currently provides that in “all penalty proceedings, except for discrimination proceedings arising under section 105(c) of the Mine Act,” a settlement motion must be accompanied by a proposed order approving settlement. In “discrimination proceedings, a party need not file a proposed order.” 29 CFR 2700.31(a). The Commission proposes deleting the reference to discrimination proceedings because the reference appears to erroneously include discrimination proceedings arising under section 105(c) of the Act as a subcategory of “all penalty proceedings.” The proposed change to paragraph (a) of Rule 31 would require parties to file proposed orders approving settlement in penalty proceedings associated with a discrimination proceeding as they are required to do in all penalty proceedings.

Section 2700.31(d) currently sets forth requirements for electronically filing proposed settlement documents under the rule. Paragraph (d) was added to Rule 31 prior to the development of e-CMS. After the development of e-CMS, the Commission promulgated rule changes for the electronic filing and service of documents, which are now final rules and include all documents filed in accordance with Rule 31. *See, e.g.*, 29 CFR 2700.5, 2700.7. The Commission proposes deleting references to electronic filing appearing in Rule 31 as superfluous and potentially confusing.

The Commission also proposes deleting references that appear in Rule 31 regarding forms for approved orders approving settlement. The Commission no longer provides sample forms for proposed orders approving settlement on its website. Rather, parties draft proposed orders appropriate to each case.

§ 2700.32 **Motions to reopen.**

The Commission receives requests to reopen final orders that generally fall into two categories. Requests in the first category involve circumstances in which a party has failed to file a timely contest of a proposed penalty assessment and the proposed penalty thereby becomes a final order of the Commission by operation of section 105(a) of the Mine Act, 30 U.S.C. 815(a). *See* 29 CFR 2700.27. Requests in the second category involve circumstances in which a Commission Administrative Law Judge issues a default order because a party has failed to file an answer to a petition for assessment of penalty filed by the Secretary of Labor. *See* 29 CFR 2700.28, 2700.29.

In 2008, the Commission published an Advanced Notice of Proposed Rulemaking (“ANPRM”). 73 FR 51,256 (Sept. 2, 2008). In the notice, the Commission sought suggestions for improving its procedures for processing requests to reopen and reducing the number of cases in which a party seeks relief before the Commission after default. The Commission stated that one of its key considerations was whether it should set forth requirements for requesting relief from default in a rule, or whether further guidance should be provided in an informal document.

The Commission ultimately decided to provide guidance concerning motions to reopen in its case law and in informal guidance available on the Commission’s website. In 2016, the Court of Appeals for the Fifth Circuit held that the Commission applied its

case law precedent arbitrarily in denying a motion to reopen. *Noranda Alumina, LLC v. Perez*, 841 F.3d 661, 665-69 (5th Cir. 2016). The Court noted that the Commission has not promulgated any regulations concerning motions to reopen, “although it has provided nonbinding guidance on its website.” *Id.* at 666 n.1.

From the comments received on the ANPRM and the Commission’s own experience, the Commission recognizes that there are many arguments in favor of adopting a rule and arguments against such a rule. For instance, creating a rule may provide more visibility for the Commission’s expectations regarding information necessary to support a motion to reopen. Application of a rule may result in more consistency in the Commission’s case law. However, the creation of a rule may not necessarily increase the efficiency of the Commission’s processing of motions to reopen or reduce the instances in which a party seeks relief.

The Commission has proposed a rule setting forth a procedure for motions to reopen drawn from the Commission’s experience in receiving and disposing of such motions. The Commission invites comment regarding whether a rule would be beneficial and, if so, whether any changes to the proposed rule are appropriate.

F. Subpart E – Complaints of Discharge, Discrimination or Interference
§ 2700.44 Petition for assessment of penalty in discrimination cases.

In discrimination proceedings arising under section 105(c)(2) of the Act, 30 U.S.C. 815(c)(2), a Judge’s decision is not considered final and reviewable by the Commission until the Judge has ruled upon the merits of the discrimination complaint, and, in instances in which discrimination has been found, awarded compensation to the miner and assessed a civil penalty against the operator. A Judge’s decision that reaches only the merits of the complaint, and

reserves for later such issues as compensation and the penalty, is an “interim decision” and is thus not appealable to the Commission (except by a petition for interlocutory review) until the resolution of the outstanding issues.

Because the Secretary of Labor is not involved in a discrimination proceeding brought by a miner under section 105(c)(3) of the Mine Act, 30 U.S.C. 815(c)(3), in the past the Commission has often separately docketed the Secretary’s civil penalty proposal, which is made subsequent to the Judge’s determination of discrimination. Thus, unlike in section 105(c)(2) proceedings, the discrimination docket is separate from the associated civil penalty docket in section 105(c)(3) proceedings.

In a section 105(c)(3) proceeding, if a penalty determination is unresolved at the time that the Judge’s merits and compensation decision becomes ripe for court review, a question arises regarding whether the pendency of the penalty before the Commission renders the merits determination in the discrimination proceeding non-final for court review purposes.

Consequently, in order to afford more clarity, the Commission has proposed revisions to Commission Procedural Rule 44 so that section 105(c)(3) cases may be treated in a manner similar to section 105(c)(2) cases in terms of when a decision becomes ripe for review. In addition, in recognition of the Mine Act’s requirement that proceedings under section 105(c) “shall be expedited by the Secretary and the Commission,” the Commission has proposed changes to § 2700.44 that permit expedition and eliminate unnecessary delay. 30 U.S.C. 815(c)(3).

More specifically, the Commission proposes making changes to § 2700.44(b) that clarify that a Judge’s finding of discrimination in a section 105(c)(3) proceeding is an interim decision, rather than a final decision. Under the proposed changes, after the Judge sustains a

discrimination complaint brought pursuant to section 105(c)(3), the Secretary must enter an appearance within 10 days in that discrimination proceeding and file a petition for assessment of penalty within 30 days. When necessary to expedite the issuance of a final decision in the proceeding, the Judge is authorized under the proposed changes to shorten the 30-day period and the period within which the operator has to respond to the petition. The proposed changes also set forth other procedural safeguards to prevent unnecessary delay. Under these proposed revisions, the final decision of the Judge will include the compensation to the miner and the penalty to be assessed against the operator.

The Commission also proposes making a conforming change to Commission § 2700.41 by adding a new paragraph (c). Proposed Commission Procedural Rule 41(c) would state that proceedings under subpart E of the part 2700, which pertain to complaints of discharge, discrimination or interference, are to be expedited.

The Commission further proposes making a conforming change to Commission Procedural Rule 69. The Commission proposes revising § 2700.69(a) to explicitly require that any decision of a Judge that is not final shall be denoted as an “interim decision.”

G. Subpart G – Hearings

§ 2700.53 Prehearing conferences and statements.

The Commission proposes revising § 2700.53(a) to add a provision stating that a Judge has the discretion to record any in-person or telephonic conference. As discussed with respect to § 2700.10, the Commission also proposes making changes to Commission Procedural Rule 10 by adding a requirement that proceedings on any motion made at a hearing or during a conference shall be on the record. Thus, while a Judge may record

any in-person or telephonic conference within the Judge's discretion, proceedings on any motion must be made part of the record.

§ 2700.64 **Retention of exhibits.**

Commission Procedural Rule 64 pertains generally to exhibits which are made part of the official record. The Commission proposes revising the title of the rule to more generally refer to "exhibits," rather than "retention of exhibits" since the rule encompasses more than the retention of exhibits. In addition, the Commission proposes changing the rule to reflect that exhibits shall be "deemed part of" the official record, rather than "retained with" the official record. The Commission's official record is electronic and some physical exhibits will be deemed to be part of the official record although they may not be retained in a digital format with the other parts of the official record.

H. **Subpart H – Review by the Commission**

§ 2700.72 **Commission Panels.**

Rule 72 is currently reserved. In order to promote transparency as to its functioning, the Commission proposes creating a new Procedural Rule 72 which would explain the Commission's process for impaneling Commissioners. Section 113(c) of the Mine Act, 30 U.S.C. 823(c), provides in part that the Commission is authorized "to delegate to any group of three or more members any or all of the powers of the Commission." Proposed Rule 72 would provide that the Commission may impanel a group of three or more members to hear any pending matter, and that a Commissioner's assignment to such a panel may be made by a random method agreed upon by a majority of Commissioners.

§ 2700.78 Reconsideration.

The Commission proposes revising Commission Procedural Rule 78 in order to clarify when a motion for reconsideration must be filed. Rule 78 currently provides that a petition for reconsideration must be filed with the Commission within 10 days after a decision or order. The proposed revision clarifies that the ten-day period is counted from the issuance of the decision or order.

I. Subpart I – Miscellaneous

§ 2700.80 Standards of conduct; disciplinary proceedings.

The Commission proposes making changes to Commission Procedural Rule 80 that would clarify the Commission's procedure in disciplinary proceedings and the standards applicable in such proceedings.

Rule 80(a) currently provides that individuals practicing before the Commission or its Judges shall conform to the standards of ethical conduct required of practitioners in the courts of the United States. Practitioners appearing before the Commission could appear in Commission proceedings, live, and work, in varying locations, making a number of jurisdictions' rules of conduct potentially applicable. The Commission considers it more equitable to apply the same standards of conduct to all individuals practicing before the Commission. Therefore, the Commission proposes revising Rule 80(a) to state that the American Bar Association's Model Rules of Professional Conduct shall be considered in the Commission's disciplinary proceedings.

The Commission also proposes revising § 2700.80(c) to provide appropriate notice to the person named in a disciplinary referral, and to permit the person an opportunity for response. Proposed paragraph (c)(1) of Rule 80 would require the

Commission to provide written notice to the person named in a disciplinary referral of the initiation of an investigation. The Commission proposes revising paragraph (c)(2) of rule 80 to provide that after the Commission has determined that a hearing is warranted on the matter described in the disciplinary referral, the Commission shall specify the disciplinary issues to be resolved through hearing.

Paragraph (c)(3) permits the respondent named in the disciplinary proceeding an opportunity to file a response. In addition, paragraph (c)(3) provides that the Chief Administrative Law Judge may assign the proceeding to a Commission Administrative Law Judge or to a non-Commission Administrative Law Judge. Such assignment will be made in an impartial manner. Paragraph (c)(3) clarifies that subpart G of part 2700, pertaining to hearings before the Commission's Administrative Law Judges, also applies as appropriate to all Commission disciplinary proceedings.

§ 2700.82 Ex parte communications.

Commission Procedural Rule 5(j) sets forth requirements regarding the manner in which status or informational requests shall be made. Section 2700.82(d) sets forth slightly different requirements for making status or informational requests. In keeping with the Commission's actual practice, the Commission proposes making changes to § 2700.82(d) so that it conforms with the provisions of § 2700.5(j).

§ 2700.83 Authority to sign orders.

Under current § 2700.83, the Chairman or other designated Commissioner is authorized to sign an order on behalf of the other Commissioners disposing of certain procedural motions. The motions subject to Commission Procedural Rule 83 are non-

substantive and involve minor procedural issues such as motions for extensions of time. The vast majority of those motions are unopposed.

The Commission proposes adding a provision to § 2700.83 clarifying that in the absence of a quorum, the remaining Commissioner or Commissioners may dispose of the procedural motions subject to the rule. The proposed change would reflect the Commission's practice.

The Commission also proposes deleting the provision in Procedural Rule 83 stating that a person aggrieved by an order signed by the Chairman or designated Commissioner under the rule may request that the order be signed by the participating Commissioners. The Commission has not received such a request and, given the unopposed nature of the motions at issue, considers it unlikely that it would receive such a request in the future. Thus, the Commission considers the provision unnecessary.

Finally, consistent with changing gender-specific pronouns to more gender neutral language throughout its rules, the Commission proposes changing references from "Chairman" to "Chair."

III. Notice and Public Procedure

A. Executive Orders:

The Commission is an independent regulatory agency under section 3(b) of Executive Order ("E.O.") 12866 (Sept. 30, 1993), 58 FR 51735 (Oct. 4, 1993); E.O. 13563 (Jan. 18, 2011), 76 FR 3821 (Jan. 21, 2011); E.O. 13771 (Jan. 30, 2017), 82 FR 9339 (Feb. 3, 2017); E.O. 13777 (Feb. 24, 2017), 82 FR 12285 (Mar. 1, 2017); and E.O. 13132 (Aug. 4, 1999), 64 FR 43255 (Aug. 10, 1999).

The Commission has determined that this rulemaking does not have “takings implications” under E.O. 12630 (Mar. 15, 1988), 53 FR 8859 (Mar. 18, 1988).

The Commission has determined that these regulations meet all applicable standards set forth in E.O. 12988 (Feb. 5, 1996), 61 FR 4729 (Feb. 7, 1996).

B. Statutory Requirements:

Although notice-and-comment rulemaking requirements under the Administrative Procedure Act (“APA”) do not apply to rules of agency procedure (5 U.S.C. 553(b)(3)(A)), the Commission invites members of the interested public to submit comments on this final rule. The Commission will accept public comment until [Insert date 60 days after date of publication in the FEDERAL REGISTER].

The Commission has determined that this rulemaking is exempt from the requirements of the Regulatory Flexibility Act (“RFA”) (5 U.S.C. 601 et seq.), because the proposed rule would not have a significant economic impact on a substantial number of small entities.

The Commission has determined that this rule is not a “major rule” under the Small Business Regulatory Enforcement Fairness Act (“SBREFA”) (5 U.S.C. 804(2)).

The Commission has determined that the Paperwork Reduction Act (“PRA”) (44 U.S.C. 3501 et seq.) does not apply because these rules do not contain any information collection requirements that require the approval of the OMB.

The Commission has determined that the Congressional Review Act (“CRA”) (5 U.S.C. 801 et seq.) does not apply because, pursuant to 5 U.S.C. 804(3)(C), these rules are rules of agency procedure or practice that do not substantially affect the rights or obligations of non-agency parties.

The Commission has determined that this rulemaking is not a major Federal action significantly affecting the quality of the human environment requiring an environmental assessment under the National Environmental Policy Act (“NEPA”) (42 U.S.C. 4321 et seq.).

The Commission is an independent regulatory agency, and as such, is not subject to the requirements of the Unfunded Mandates Reform Act (“UMRA”) (2 U.S.C. 1532 et seq.).

List of Subjects in 29 CFR Part 2700

Administrative practice and procedure, Confidential business information, Mine safety and health, Penalties, Whistleblowing.

For the reasons stated in the preamble, the Commission proposes amending 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, and 823.

2. In § 2700.1, revise paragraphs (a)(1) and (c) to read as follows:

§2700.1 Scope; applicability of other rules; construction.

(a) *Scope.* (1) This part sets forth rules applicable to proceedings before the Federal Mine Safety and Health Review Commission (“the Commission”) and its Administrative Law Judges. The Commission is an adjudicative agency that provides administrative trial and appellate review of legal disputes arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (“the Act”). The Commission is an independent agency, not a part of nor affiliated in any way with the U.S. Department of

Labor or its Mine Safety and Health Administration (“MSHA”). The location of the Commission’s headquarters is at 1331 Pennsylvania Avenue, N.W., Suite 520N, Washington, DC 20004-1710; its primary phone number is 202-434-9900; and the fax number of its Docket Office is 202-434-9954. The Commission maintains a website at <http://www.fmshrc.gov> where these rules, recent and many past decisions of the Commission and its Judges, and other information regarding the Commission, can be accessed.

* * * * *

(c) *Construction.* These rules shall be construed to secure the just, speedy and inexpensive determination of all proceedings, and to encourage the participation of miners and their representatives.

3. Revise § 2700.3 to read as follows:

§ 2700.3 Who may appear before the Commission as a representative of a party.

(a) *Notice of appearance.* When first making an appearance, each representative of a party must file a notice of appearance that indicates on whose behalf the appearance is made and the proceeding name and docket number.

(b) *Persons who may represent a party or subpoenaed witness before an Administrative Law Judge or the Commission.* (1) An attorney who is a member of a bar in good standing of the highest court of a State, Commonwealth, or Territory of the United States, or the District of Columbia where the attorney has been licensed to practice law, who will promptly disclose to the Judge any action suspending, enjoining, restraining, disbaring, or otherwise currently restricting the attorney in the practice of law in any jurisdiction where the attorney is licensed to practice law;

(2) A party;

(3) A representative of miners;

(4) An owner, partner, officer or employee of a party when the party is a labor organization, an association, a partnership, a corporation, governmental agency, other business entity, or a political subdivision; or

(5) Any other person with the permission of the presiding Judge or the Commission.

(c) *Entry of appearance.* A representative of a party shall enter an appearance in a proceeding under the Act or these procedural rules by signing the first document filed on behalf of the party with the Commission or Judge in accordance with § 2700.6; filing a written entry of appearance with the Commission or Judge; or, if the Commission or Judge permits, by orally entering an appearance in open hearing.

(d) *Duties.* All individuals authorized to practice before the Commission shall be subject to § 2700.80 (Standards of conduct; disciplinary proceedings). A representative must be diligent, prompt, and forthright when dealing with parties, other representatives and the Judge, and act in a manner that furthers the fair and orderly conduct of the proceeding.

(e) *Prohibited actions.* A representative must not:

(1) Threaten, coerce, intimidate, deceive or knowingly mislead a party, representative, witness, potential witness, Judge, or anyone participating in the proceeding regarding any matter related to the proceeding.

(2) Knowingly make or present false or misleading statements, assertions, or misrepresentations about a material fact or law related to the proceeding;

(3) Unreasonably delay, or cause to be delayed without good cause, any proceeding;

(4) Violate or attempt to violate the standards of conduct (*see* 29 CFR 2700.80(a)), knowingly assist or induce another to do so, or do so through acts of another; or

(5) Engage in any other action or behavior prejudicial to the fair and orderly conduct of the proceeding.

(f) *Withdrawal of appearance.* A representative who desires to withdraw after filing a notice of appearance, or a party desiring to withdraw the appearance of a representative, must file a motion with the Commission or Judge. The motion must state that a notice of the withdrawal has been provided to all parties. The Commission or Judge may deny a representative's motion to withdraw when necessary to avoid undue delay or prejudice to the rights of a party.

4. In § 2700.4, revise paragraphs (a), (b)(1), and (c) to read as follows:

§ 2700.4 Parties, intervenors, and amici curiae.

(a) *Party status.* A person, including the Secretary of Labor ("Secretary") or an operator, who is named as a party or who is permitted to intervene, is a party. In a proceeding instituted by the Secretary under section 105(c)(2) of the Act, 30 U.S.C. 815(c)(2), the complainant on whose behalf the Secretary has filed the complaint is a party and may present additional evidence. A miner, applicant for employment, or representative of a miner who has filed a complaint with the Commission under section 105(c)(3) or 111 of the Act, 30 U.S.C. 815(c)(3) and 821, and an affected miner or the

miner's representative who has become a party in accordance with paragraph (b) of this section, are parties.

(b) *Intervention--(1) Intervention by affected miners and their representatives.*

Before a case has been assigned to a Judge, affected miners or their representatives shall be permitted to intervene upon filing a written notice of intervention with the Commission. If the case has been assigned to a Judge, the notice of intervention shall be filed with the Judge. Notices of intervention shall be filed with the Commission or Judge in accordance with § 2700.5(c). The Commission or the Judge shall provide forthwith a copy of the notice to all parties. After the start of the hearing, affected miners or their representatives may intervene upon just terms and for good cause shown.

* * * * *

(c) *Procedure for participation as amicus curiae.* Any person may move to participate as amicus curiae in a proceeding before a Judge. Such participation as amicus curiae shall not be a matter of right but of the sound discretion of the Judge. A motion for participation as amicus curiae shall set forth the interest of the movant and show that the granting of the motion will not unduly delay or prejudice the adjudication of the issues. If the Judge permits amicus curiae participation, the Judge's order shall specify the time within which such amicus curiae memorandum, brief, or other filing must be filed and the time within which a reply may be made. The movant may conditionally attach its memorandum, brief, or other filing to its motion for participation as amicus curiae.

5. Revise § 2700.5 to read as follows:

§ 2700.5 General requirements for pleadings and other documents; filing requirements; status or informational requests.

(a) *Jurisdiction.* A proposal for a penalty under section 110, 30 U.S.C. 820; an answer to a notice of contest of a citation or withdrawal order issued under section 104, 30 U.S.C. 814; an answer to a notice of contest of an order issued under section 107, 30 U.S.C. 817; a complaint issued under section 105(c) or 111, 30 U.S.C. 815(c) and 821; and an application for temporary reinstatement under section 105(c)(2), 30 U.S.C. 815(c)(2), shall allege that the violation or imminent danger took place in or involves a mine that has products which enter commerce or has operations or products that affect commerce. Jurisdictional facts that are alleged are deemed admitted unless specifically denied in a responsive pleading.

(b) *How to file.* Unless otherwise provided for in the Act, these rules, or by order, filing may be accomplished in person, by U.S. Postal Service, by third-party commercial carrier, by facsimile transmission, or by electronic transmission. Instructions for electronic filing may be accessed on the Commission's website (<http://www.fmshrc.gov>).

(c) *Where to file.* Unless otherwise provided for in the Act, these rules, or by order:

(1) Filing by electronic transmission. A document may be filed by electronic transmission with the Commission and its Judges. Instructions for electronic filing may be accessed on the Commission's website (<http://www.fmshrc.gov>).

(2) Filing in person, by U.S. Postal Service, by third-party commercial carrier, or by facsimile transmission.

(i) Before a Judge has been assigned. Before a Judge has been assigned to a case, all documents shall be filed with the Commission. Documents filed with the Commission shall be addressed to the Docket Office, Federal Mine Safety and Health Review Commission, 1331 Pennsylvania Avenue, NW, Suite 520N, Washington, DC 20004-1710; facsimile delivery shall be transmitted to (202) 434-9954.

(ii) After a Judge has been assigned. After a Judge has been assigned, and before a decision has been issued, documents shall be filed with the Judge at the address set forth on the notice of the assignment.

(iii) After a Judge has issued a final decision. After the Judge has issued a final decision, documents shall be filed with the Commission as described in paragraph (c)(2)(i) of this section.

(d) *Necessary information.* All documents shall be legible and shall clearly identify on the cover page the filing party by name. All documents shall be dated and shall include the assigned docket number, page numbers, and the filing person's address, business telephone number, cell telephone number if available, fax number if available, and email address if available. Written notice of any change in contact information shall be given promptly to the Commission or the Judge and all other parties.

(e) *Privacy considerations.* Persons submitting information to the Commission shall protect information that tends to identify certain individuals, to constitute an unwarranted intrusion of personal privacy, or disclose confidential commercial information in the following manner:

(1) Social security numbers, financial account numbers, driver's license numbers, or other personal identifying numbers, shall be redacted or excluded;

(2) Minor children shall be identified only by initials;

(3) If dates of birth must be included, only the year shall be used;

(4) Parties shall exercise caution when filing medical records, medical treatment records, medical diagnosis records, employment history, and individual financial information, and shall redact or exclude materials unnecessary to a disposition of the case, provided the party gives notice to other parties and the Judge of the types of material redacted and the reason for such redactions.

(5) Parties shall, consistent with 29 CFR 2702.6, exercise caution when providing corporate or commercial information and, with the permission of the Judge, shall redact or exclude any portion of its filing unnecessary to a disposition of the case or shall designate by appropriate markings any portion that it considers to be confidential.

(6) The Commission may order, sua sponte or pursuant to a party's motion, that a filing be placed under seal. The Commission may subsequently unseal the filing or order the person who made the submission to substitute a redacted version in the record. Prior to unsealing a filing, the Commission shall provide the party that submitted the filing a reasonable opportunity to object to the sealing or to withdraw the filing. If no response is received, the Commission will take appropriate action at its discretion. No placements under seal, redactions or withdrawals shall be permitted during the pendency of a subpoena duces tecum validly issued to the Commission or a valid request pursuant to 29 CFR part 2702 related to the filing.

(f) *Effective date of filing.* Unless otherwise provided for in the Act, these rules, or by order:

(1) Filing by electronic transmission. When filing is by electronic transmission, filing is effective upon successful receipt by the Commission. The electronic transmission shall be in the manner specified by the Commission's website (<http://www.fmshrc.gov>).

(2) Filing in person, by U.S. Postal Service, by third-party commercial carrier, or by facsimile transmission. When filing is by U.S. Postal Service, 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, and a motion to exceed page limit is effective only upon receipt. See §§ 2700.9(a), 2700.24(d), 2700.45(f), 2700.67(a), 2700.70(a), (f), and 2700.75(f). When filing is in person, by third-party commercial carrier, or by facsimile, filing is effective upon successful receipt by the Commission.

(g) *Number of copies.* Unless otherwise ordered or stated in this part, only the original of a document shall be filed.

(h) *Form of filings.* All documents, including those filed electronically, shall appear in at least 12-point type on paper 8½ by 11 inches in size, with margins of at least 1 inch on all four sides. Text and footnotes shall appear in the same size type. Text shall be double spaced. Headings and footnotes may be single spaced. Quotations of 50 words or more may be single spaced and indented left and right. Excessive footnotes are prohibited. The failure to comply with the requirements of this paragraph (h) or the use of compacted or otherwise compressed printing features may be grounds for rejection of a filing.

(i) *Citation to a decision of a Judge.* Each citation to a decision of a Judge should include “(ALJ)” at the end of the citation.

(j) *Status or informational requests.* Information concerning filing requirements, the status of cases, or docket information may be accessed through the Commission’s website (<http://www.fmshrc.gov>). In the event such information is unavailable through the Commission’s website or the requesting party does not have access to the website, such status or informational requests must be directed to the Docket Office of the Federal Mine Safety and Health Review Commission, 1331 Pennsylvania Avenue, NW, Suite 520N, Washington, DC 20004-1710; 202-434-9950.

6. Revise § 2700.6 to read as follows:

§ 2700.6 Signing of documents.

(a) *Signature.* All documents filed with the Commission must be signed by a party or representative of the party.

(1) Documents not filed by electronic transmission. A party or representative of the party shall sign a document by handwritten signature.

(2) Documents filed by electronic transmission. (i) A party or representative of the party may sign a document by including the notation “/s/” followed by the typewritten name of the party or representative of the party filing the document.

(ii) A party or representative of the party may sign a document by including a graphical duplicate of the handwritten signature.

(b) *Meaning of Signature.* A document or signature may not be denied legal effect or enforceability solely because it is in electronic form. When a party or

representative of the party signs a document in the manner described in paragraph (a) of this section, that person's signature shall constitute a certification:

(1) That under the provisions of the law, including these rules and all federal conflict of interest statutes, the person is authorized and qualified to represent the particular party in the matter; and

(2) That the person has read the document; that based on knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for extension, modification, or reversal of existing law; and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

7. In § 2700.7, revise paragraphs (c)(1) and (2) to read as follows:

§ 2700.7 Service.

* * * * *

(c) * * *

(1) Methods of service. Documents may be served in person, by U.S. Postal Service, by third-party commercial carrier, by facsimile transmission, or by email or other electronic transmission. For documents filed pursuant to §§ 2700.9(a), 2700.24, 2700.45, 2700.70(f), 2700.75(f), and subpart F (applications for temporary relief), the method of service used must be no less expeditious than that used for filing, except that if service by email or other electronic transmission is impossible, the filing party must serve in person, by third party commercial carrier, or facsimile transmission, resulting in same-day delivery.

(2) Effective date of service. When service is by U.S. Postal service, service is effective upon mailing. When service is in person, by third-party commercial carrier, by facsimile transmission, or by email or other electronic transmission, service is effective upon successful receipt by the party intended to be served.

* * * * *

8. In § 2700.8, revise paragraph (b) and Example 2 to read as follows:

§ 2700.8 Computation of time.

* * * * *

(b) When a party serves a filing by a method of delivery resulting in other than same-day service, the due date for party action in response is extended 5 additional calendar days beyond the date otherwise prescribed, after consideration of paragraph (a) of this section where applicable. (n.b. A proposed penalty assessment is not a filing with the Commission and additional days are not added to the time for responding to a proposed assessment.)

* * * * *

Example 2: A Commission Judge issues a final decision in a case on Friday, July 5, 2013. Under § 2700.70(a), parties have until August 4, 2013, to file with the Commission a petition for discretionary review of the Judge’s decision. Even though the decision was mailed, 5 additional calendar days are not added, because paragraph (b) of this section only applies to actions in response to parties’ filings. However, because August 4, 2013, is a Sunday, the actual due date for the petition is Monday, August 5, 2013.

* * * * *

9. In § 2700.9, revise paragraph (a) to read as follows:

§ 2700.9 Extensions of time.

(a) The time for filing or serving any document may be extended for good cause shown. Filing of a motion requesting an extension of time is effective upon receipt. A motion requesting an extension of time shall be received no later than 3 days prior to the expiration of the time allowed for the filing or serving of the document, and shall comply with § 2700.10. The motion and any statement in opposition shall include proof of service on all parties by a means of delivery no less expeditious than that used for filing the motion, except that if service by email or other electronic transmission is impossible, the filing party must serve in person, by third party commercial carrier, or by facsimile transmission resulting in same-day delivery.

* * * * *

10. In § 2700.10, revise paragraphs (a) and (b) to read as follows:

§ 2700.10 Motions.

(a) An application for an order shall be by motion which, unless made during a hearing or a conference, shall be made in writing and shall set forth the relief or order sought. Proceedings on any motion made at a hearing or during a conference shall be on the record.

(b) Written motions shall be set forth in a document separate from other filings.

* * * * *

11. Revise § 2700.11 to read as follows:

§ 2700.11 Withdrawal of filing.

A party may withdraw a filing at any stage of a proceeding with the approval of the Judge or the Commission.

12. In § 2700.20, revise paragraphs (b) and (d) to read as follows:

§ 2700.20 Notice of contest of a citation or order issued under section 104 of the Act.

* * * * *

(b) *Time to contest.* Contests filed by an operator pursuant to paragraph (a)(1) of this section shall be filed with the Secretary of Labor (“Secretary”) at the appropriate Regional Solicitor’s Office or at the Solicitor’s Office, Mine Safety and Health Division, Arlington, Virginia, within 30 days of receipt by the operator of the contested citation, order, or modification. Contests filed by a miner or representative of miners pursuant to paragraph (a)(2) of this section shall be filed in the same manner within 30 days of receipt by the miner or representative of miners of the contested order, modification, or termination.

* * * * *

(d) *Copy to Commission.* The contesting party shall also file a copy of the notice of contest with the Commission at the time the party files with the Secretary.

* * * * *

13. In § 2700.21, revise paragraph (a) to read as follows:

§ 2700.21 Effect of filing notice of contest of citation or order.

(a) The filing of a notice of contest of a citation or order issued under section 104 of the Act, 30 U.S.C. 814, does not constitute a challenge to a proposed penalty assessment that may subsequently be issued by the Secretary of Labor under section 105(a) of the Act, 30 U.S.C. 815(a), which is based on that citation or order. A challenge

to such a proposed penalty assessment must be filed as a separate notice of contest of the proposed penalty assessment. See § 2700.26.

* * * * *

14. In § 2700.22, revise paragraph (c) to read as follows:

§ 2700.22 Notice of contest of imminent danger withdrawal orders under section 107 of the Act.

* * * * *

(c) *Answer.* Within 15 days after service of the notice of contest, the Secretary of Labor shall file an answer responding to each allegation of the notice of contest.

15. Revise § 2700.24 to read as follows:

§ 2700.24 Emergency response plan dispute proceedings.

(a) *Referral by the Secretary of Labor.* The Secretary of Labor (“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 (a) 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 documents.* 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 served on all parties and on any miner or miners' representative who has participated in the emergency response plan review process by a method of service no less expeditious than that used for filing, except that if service by email or other electronic transmission is impossible, the filing party must serve in person, by third party commercial carrier, or by facsimile transmission, resulting in same-day delivery.

(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 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 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 section, 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 section, 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.

(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 paragraph (g). 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.

16. Revise § 2700.25 to read as follows:

§ 2700.25 Proposed penalty assessment.

The Secretary of Labor (“Secretary”), by certified mail, shall notify the operator or any other person against whom a penalty is proposed of the violation alleged, the amount of the proposed penalty assessment, and that such person shall have 30 days to notify the Secretary of the intent to contest the proposed penalty assessment.

17. Revise § 2700.26 to read as follows:

§ 2700.26 Notice of contest of proposed penalty assessment.

A person has 30 days after receipt of the proposed penalty assessment within which to notify the Secretary of Labor (“Secretary”) of the contest of the proposed penalty assessment. A person who wishes to contest a proposed penalty assessment must provide such notification regardless of whether the person has previously contested the

underlying citation or order pursuant to § 2700.20. The Secretary shall immediately transmit to the Commission any notice of contest of a proposed penalty assessment.

18. Revise § 2700.27 to read as follows:

§ 2700.27 Effect of failure to contest proposed penalty assessment.

If, within 30 days from the receipt of the proposed penalty assessment, the operator or other person fails to notify the Secretary of Labor (“Secretary”) of the contest of the proposed penalty, the Secretary’s proposed penalty assessment shall be deemed to be a final order of the Commission not subject to review by any court or agency.

19. In § 2700.28, revise paragraphs (a), and (b)(1) and (2) to read as follows:

§ 2700.28 Filing of petition for assessment of penalty with the Commission.

(a) *Time to file.* Within 45 days of receipt of a timely contest of a proposed penalty assessment, the Secretary of Labor shall file with the Commission a petition for assessment of penalty.

(b) * * *

(1) List the alleged violations and the proposed penalties. Each violation shall be identified by the number and date of the citation or order and the section of the Act or regulations alleged to be violated. The list shall include no more than 20 citations or orders which are the subject of the petition for assessment of penalty.

(2) Include a short and plain statement of supporting reasons based on the criteria for penalty assessment set forth in section 110(i) of the Act, 30 U.S.C. 820(i).

* * * * *

20. In § 2700.30, revise paragraph (b) to read as follows:

§ 2700.30 Assessment of penalty.

* * * * *

(b) In determining the amount of penalty, neither the Judge nor the Commission shall be bound by a penalty proposed by the Secretary of Labor or by any offer of settlement made by a party.

21. Revise § 2700.31 to read as follows:

§ 2700.31 Penalty settlement.

(a) *General.* A proposed penalty that has been contested before the Commission may be settled only with the approval of the Commission upon motion. In all penalty proceedings, a settlement motion must be accompanied by a proposed order approving settlement.

(b) *Content of motion--(1) Factual support.* A motion to approve a penalty settlement shall include for each violation the amount of the penalty proposed by the Secretary of Labor (“Secretary”), the amount of the penalty agreed to in settlement, and facts in support of the penalty agreed to by the parties.

(2) Certification. The party filing a motion must certify that the opposing party has authorized the filing party to represent that the opposing party consents to the granting of the motion and the entry of the proposed order approving settlement.

(c) *Content of proposed order--(1) Factual support.* A proposed order approving a penalty settlement shall include for each violation the amount of the penalty proposed by the Secretary, the amount of the penalty agreed to in settlement, and facts in support of the penalty agreed to by the parties. Proposed orders shall not be submitted in PDF format.

(2) Appearance by CLR. If a motion has been filed by a Conference and Litigation Representative (“CLR”) on behalf of the Secretary, the proposed order approving settlement accompanying the motion shall include a provision in which the Judge accepts the CLR to represent the Secretary in accordance with the notice of either limited or unlimited appearance previously filed with the Commission. A CLR does not need to obtain authorization from the Commission to represent the Secretary before the CLR files a motion to approve settlement and proposed order.

(d) *Filing of motion and proposed order prior to filing of petition*. If a motion to approve settlement and proposed order is filed with the Commission before the Secretary has filed a petition for assessment of penalty, the filing party must also submit as attachments, electronic copies of the proposed penalty assessment and citations and orders at issue. If such attachments are filed, the Secretary need not file a petition for assessment of penalty.

(e) *Final order*. Any order by the Judge approving a settlement shall set forth the reasons for approval and shall be supported by the record. Such order shall become the final order of the Commission 40 days after issuance unless the Commission has directed that the order be reviewed. A Judge may correct clerical errors in an order approving settlement in accordance with the provisions of 29 CFR 2700.69(c).

22. Add § 2700.32 to read as follows:

§ 2700.32 Motions to reopen.

(a) *General*. This section applies to situations:

(1) Where an operator has failed to file a timely notice of contest of a proposed penalty assessment issued by the Department of Labor’s Mine Safety and Health Administration

(“MSHA”), resulting in the proposed penalty assessment being deemed a final order of the Commission pursuant to section 105(a) of the Act, 30 U.S.C. 815(a), and § 2700.27; and

(2) Where an operator has failed to file a timely answer to a petition for assessment of a penalty and the Judge has issued a default order. Either situation is termed a “default.”

(b) *Definition.* For purposes of this section only, “operator” also includes a person subject to the provisions of section 110(c) of the Act, 30 U.S.C. 820(c), as well as an entity considered an operator under section 3(d) of the Act, 30 U.S.C. 802(d).

(c) *Grounds for relief.* In reviewing motions to reopen cases where a default has occurred, the Commission is guided by Rule 60(b) of the Federal Rules of Civil Procedure, under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of inadvertence, surprise, mistake, misrepresentation, misconduct by an opposing party, or other reason that justifies relief. The operator bears the burden of establishing entitlement to such extraordinary relief.

(d) *Time limits for filing the motion.* (1) A party seeking relief from a default must promptly file a motion with the Commission requesting that the final order be reopened with a full explanation of why reopening is warranted, accompanied by appropriate documentation, as required by paragraph (e) of this section. A party’s diligence in promptly filing the motion will be taken into account in the decision whether to grant relief. If a party fails to file its motion to reopen within 30 days of notice or discovery of its delinquency, it must provide a reasonable explanation for the delay.

(2) Motions for relief based on mistake, inadvertence, surprise, excusable neglect, newly discovered evidence, fraud, misrepresentation, or misconduct by an

opposing party must be filed within one year after a proposed penalty assessment has become a final order of the Commission. Failure to do so will result in denial of the motion.

(e) *Contents of the motion.* (1) In submitting a motion, the operator should seek guidance from the Commission's website (<https://www.fmshrc.gov/content/requests-reopen> and <https://www.fmshrc.gov/guides/faq#problems>).

(2) The motion must include the operator's name and mine ID number, the name of the operator's representative, the representative's relationship to the mine operator, and the representative's contact information.

(3) The motion shall include a detailed explanation of facts related to the grounds for relief, including:

(i) The nature of the event, error, or omission leading to the default, including, if applicable, the movant's control of the filing of a notice of contest, the circumstances causing the lateness, and any factor bearing upon the good faith of the movant;

(ii) The steps taken in attempting to contest the proposed penalty or to answer the penalty petition;

(iii) The reason for the untimeliness; and

(iv) Any other relevant factor.

(4) The reasons for the default must be substantiated by documentation containing, as appropriate, affidavits and documents, including written and electronic communications, which are relevant to the issues raised in the motion to reopen and are within the party's custody or control.

(5) Motions seeking to reopen a proposed penalty that has been deemed a final order must also include:

(i) The assessment case number(s) that the operator seeks to reopen and the individual penalties within the assessment case which the operator seeks to contest upon reopening.

(ii) The operator's internal procedures for timely contesting proposed penalty assessments or answer penalty petitions, including the existence of the tracking and backup systems, and

(iii) Any available documentation of the mailing and/or delivery of the operator's contest if the movant claims that it timely contested a proposed penalty assessment.

(f) *Secretary of Labor's response to motion.* (1) The Secretary of Labor ("Secretary") may submit a response to the Commission within 30 days after receipt of the operator's motion to reopen a default. In the response, the Secretary shall state whether the Secretary opposes the motion and, if so, the reasons for such opposition, including any prejudice resulting from the delay.

(2) The Secretary shall also submit a copy of all relevant documents to which the Secretary has access that were not submitted by the operator in its motion.

(3) In response to a motion to reopen a penalty assessment, the Secretary shall include a summary, from the MSHA Mine Data Retrieval System or other sources, of the operator's status regarding penalty delinquencies during the preceding 24-month period. Such information shall be presumed to be correct unless rebutted by the operator.

(g) *Operator's reply.* The operator may file a reply within 20 days after service of the Secretary's response.

(h) *Refiling of motion.* (1) If a motion is denied "without prejudice," a new motion may be refiled within 30 days of the issuance of the Commission's decision. If no new motion is filed within 30 days, the initial motion is denied permanently, "with prejudice."

(2) If a motion is denied "with prejudice," in cases involving a failure to timely contest a proposed penalty assessment, the underlying assessment shall be deemed to have been a final order of the Commission. In cases involving a Judge's default order, the order shall be a final order.

(3) When a motion is refiled, for purposes of § 2700.32(d)(2), the time during which the initial motion that was denied without prejudice was pending before the Commission shall not be counted toward the one-year period within which some motions to reopen a default must be filed.

23. In § 2700.40, revise paragraph (a) to read as follows:

§ 2700.40 Who may file.

(a) *The Secretary of Labor.* A discrimination complaint under section 105(c)(2) of the Act, 30 U.S.C. 815(c)(2), shall be filed by the Secretary of Labor ("Secretary") if, after an investigation conducted pursuant to section 105(c)(2), the Secretary determines that a violation of section 105(c)(1), 30 U.S.C. 815(c)(1), has occurred.

* * * * *

24. In § 2700.41, revise paragraph (a) and add paragraph (c) to read as follows:

§2700.41 Time to file.

(a) *The Secretary of Labor.* A discrimination complaint shall be filed by the Secretary of Labor (“Secretary”) within 30 days after the Secretary’s written determination that a violation has occurred.

* * * * *

(c) *Expedition.* Proceedings held under this subpart E are to be expedited. 30 U.S.C. 815(c)(3).

25. Revise § 2700.44 to read as follows:

§ 2700.44 Petition for assessment of penalty in discrimination cases.

(a) *Petition for assessment of penalty in Secretary of Labor’s complaint.* A discrimination complaint filed by the Secretary of Labor (“Secretary”) shall propose a civil penalty of a specific amount for the alleged violation of section 105(c) of the Act, 30 U.S.C. 815(c). The petition for assessment of penalty shall include a short and plain statement of supporting reasons based on the criteria for penalty assessment set forth in section 110(i) of the Act. 30 U.S.C. 820(i).

(b) *Petition for assessment of penalty after sustaining of complaint by miner, representative of miners, or applicant for employment.* Immediately upon issuance of a decision by a Judge sustaining a discrimination complaint brought pursuant to section 105(c)(3), 30 U.S.C. 815(c)(3), the Judge shall notify the Secretary in writing of such determination. The Secretary shall enter an appearance in the case within 10 days and file with the Commission a petition for assessment of civil penalty within 30 days of receipt of such notice. When necessary to expedite the issuance of a final decision in the proceeding, the Judge is authorized to shorten the Secretary’s 30-day filing period and the

period in which the operator has to respond to the petition. In the event the Judge does not receive a petition for assessment of a civil penalty within 30 days of the Secretary's receipt of the notice, or a shorter period specified in the notice, the Judge shall issue an order to show cause as to why the Secretary has not filed a petition. If after 7 days of issuance of such order the Secretary has not filed with the Commission a petition for civil penalty and the Judge has not granted an extension of time for filing, the Judge shall presume the Secretary has proposed no penalty and assess a penalty in accordance with 29 CFR 2700.30.

26. Revise § 2700.45 to read as follows:

§ 2700.45 Temporary reinstatement proceedings.

(a) *Service of documents.* A copy of each document filed with the Commission in a temporary reinstatement proceeding shall be served on all parties by a method of service as expeditious as that used for filing, except that, if service by email or other electronic transmission is impossible, the filing party must serve in person, by third party commercial carrier, or by facsimile transmission, resulting in same-day delivery.

(b) *Contents of application.* An application for temporary reinstatement shall state the finding by the Secretary of Labor ("Secretary") that the miner's discrimination complaint was not frivolously brought and shall be accompanied by an affidavit setting forth the Secretary's reasons supporting this finding. The application also shall include a copy of the miner's complaint to the Secretary and proof of notice to and service on the person against whom relief is sought by the most expeditious method of notice and delivery reasonably available.

(c) *Request for hearing.* Within 10 calendar days following receipt of the Secretary's application for temporary reinstatement, the person against whom relief is sought shall advise the Commission's Chief Administrative Law Judge or designee, and simultaneously notify the Secretary, whether a hearing on the application is requested. If no hearing is requested, the Judge assigned to the matter shall immediately review the Secretary's application and, if based on the contents thereof the Judge determines that the miner's complaint was not frivolously brought, the Judge shall immediately issue a written order of temporary reinstatement. If a hearing on the application is requested, the hearing shall be held within 10 calendar days following receipt of the request for hearing by the Commission's Chief Administrative Law Judge or designee, unless compelling reasons are shown in an accompanying request for an extension of time.

(d) *Hearing.* The scope of a hearing on an application for temporary reinstatement is limited to a determination as to whether the miner's complaint was frivolously brought. The burden of proof shall be upon the Secretary to establish that the complaint was not frivolously brought. In support of the application for temporary reinstatement, the Secretary may limit presentation to the testimony of the complainant. The respondent shall have an opportunity to cross-examine any witnesses called by the Secretary and may present testimony and documentary evidence in support of its position that the complaint was frivolously brought.

(e) *Order on application.* (1) Within 7 calendar days following the close of a hearing on an application for temporary reinstatement, the Judge shall issue a written order granting or denying the application. However, in extraordinary circumstances, the Judge's time for issuing an order may be extended as deemed necessary by the Judge.

(2) The Judge's order shall include findings and conclusions supporting the determination as to whether the miner's complaint has been frivolously brought.

(3) The parties shall be notified of the Judge's determination by the most expeditious means reasonably available.

(4) A Judge's order temporarily reinstating a miner is not a final decision within the meaning of § 2700.69, and except during appellate review of such order by the Commission or courts, the Judge shall retain jurisdiction over the temporary reinstatement proceeding.

(f) *Review of order.* Review by the Commission of a Judge's written order granting or denying an application for temporary reinstatement may be sought by filing with the Commission a petition, which shall be captioned "Petition for Review of Temporary Reinstatement Order," with supporting arguments, within 5 business days following receipt of the Judge's written order. The filing of any such petition is effective upon receipt. The filing of a petition shall not stay the effect of the Judge's order unless the Commission so directs; a motion for such a stay will be granted only under extraordinary circumstances. Any response shall be filed within 5 business days following service of a petition. Pleadings under this rule shall include proof of service on all parties by a means of delivery no less expeditious than that used for filing, except that if service by email or other electronic transmission is impossible, the filing party must serve in person, by third party commercial carrier, or by facsimile transmission, resulting in same-day delivery. The Commission's ruling on a petition shall be made on the basis of the petition and any response (any further briefs will be entertained only at the express direction of the Commission), and shall be rendered within 10 calendar days following

receipt of any response or the expiration of the period for filing such response. In extraordinary circumstances, the Commission's time for decision may be extended.

(g) *Dissolution of order.* If, following an order of temporary reinstatement, the Secretary determines that the provisions of section 105(c)(1), 30 U.S.C. 815(c)(1), have not been violated, the Judge shall be so notified. An order dissolving the order of reinstatement shall not bar the filing of an action by the miner on the miner's own behalf under section 105(c)(3) of the Act, 30 U.S.C. 815(c)(3), and § 2700.40(b) of these rules.

27. In § 2700.46, revise paragraph (d) to read as follows:

§ 2700.46 Procedure.

* * * * *

(d) *Service of documents.* A copy of each document filed with the Commission under subpart F of this part must be served on all parties by a means of delivery no less expeditious than that used for filing, except that if service by email or other electronic transmission is impossible, the filing party must serve in person, by third party commercial carrier, or by facsimile transmission, resulting in same-day delivery.

28. In § 2700.53, revise the introductory text of paragraph (a) to read as follows:

§ 2700.53 Prehearing conferences and statements.

(a) The Judge may require the parties to participate in a prehearing conference, either in person or by telephone or other video/audio teleconferencing. Notwithstanding the mandatory recording of motions on the record in accordance with § 2700.10(a), the Judge has the discretion to record any in-person or telephonic conference, a transcript of which shall be provided to the parties upon reasonable request. The participants at any such conference may consider and take action with respect to:

* * * * *

29. Revise § 2700.54 to read as follows:

§ 2700.54 Notice of hearing.

Except in expedited proceedings, written notice of the time, place, and nature of the hearing, the legal authority under which the hearing is to be held, and the matters of fact and law asserted shall be given to all parties at least 20 days before the date set for hearing.

30. In § 2700.55, revise paragraph (h) to read as follows:

§ 2700.55 Powers of Judges.

* * * * *

(h) Make decisions in the proceedings, provided that the Judge shall not be assigned to make a recommended decision; and

* * * * *

31. In § 2700.56, revise paragraph (c) to read as follows:

§ 2700.56 Discovery; general.

* * * * *

(c) *Limitation of discovery.* Upon motion by a party or by the person from whom discovery is sought or upon the Judge's own motion, a Judge may, for good cause shown, limit discovery to prevent undue delay or to protect a party or person from oppression or undue burden or expense.

* * * * *

32. In § 2700.58, revise paragraph (c) to read as follows:

§ 2700.58 Interrogatories, requests for admissions and requests for production of documents.

* * * * *

(c) *Request for production, entry or inspection.* Any party, without leave of the Judge, may serve on another party a written request to produce and permit inspection, copying or photocopying of designated documents or objects, or to permit a party or its agent to enter upon designated property to inspect and gather information. A party served with such a request shall respond in writing within 25 days of service unless the party making the request agrees to a longer time. The Judge may order a shorter or longer period for responding. A party objecting to a request for production, entry or inspection shall state the basis for the objection in its response.

33. Revise § 2700.61 to read as follows:

§ 2700.61 Name of miner informant.

A Judge shall not, except in extraordinary circumstances, disclose or order a person to disclose to an operator or its agent the name of an informant who is a miner.

34. Revise § 2700.62 to read as follows:

§ 2700.62 Name of miner witness.

A Judge shall not, until 2 days before a hearing, disclose or order a person to disclose to an operator or its agent the name of a miner who is expected by the Judge to testify or whom a party expects to summon or call as a witness.

35. In § 2700.63, revise paragraph (b) to read as follows:

§ 2700.63 Evidence; presentation of case.

* * * * *

(b) The proponent of an order has the burden of proof. A party shall have the right to present a case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts.

36. Revise § 2700.64 to read as follows:

§ 2700.64 Exhibits.

All exhibits received in evidence in a hearing or submitted for the record in any proceeding before the Commission shall be deemed part of the official record of the proceeding. The withdrawal of original exhibits may be permitted by the Commission or the Judge, upon request and after notice to the other parties, if true copies are substituted, where practical, for the originals.

37. In § 2700.66, revise paragraph (a) to read as follows:

§ 2700.66 Summary disposition of proceedings.

(a) *Generally.* When a party fails to comply with an order of a Judge or these rules, except as provided in paragraph (b) of this section, an order to show cause shall be directed to the party before the entry of any order of default or dismissal. The order shall be provided to the party by the most expeditious means reasonably available.

* * * * *

38. In § 2700.67, revise paragraph (e) to read as follows:

§ 2700.67 Summary decision of the Judge.

* * * * *

(e) *Affidavits.* Supporting and opposing affidavits shall be made on personal knowledge and shall show affirmatively that the affiant is competent to testify to the

matters stated. Sworn or certified copies of all papers or parts of papers referred to in an affidavit shall be attached to the affidavit or be incorporated by reference if not otherwise a matter of record. The Judge shall permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, admissions, or further affidavits.

* * * * *

39. Revise § 2700.68 to read as follows:

§ 2700.68 Substitution of the Judge.

(a) *Generally.* Should a Judge become unavailable to the Commission, the proceedings assigned to that Judge shall be reassigned to a substitute Judge.

(b) *Substitution following a hearing.* The substitute Judge may render a decision based upon the existing record, provided the parties are notified of the Judge’s intent and they are given an opportunity to object. An objection to the Judge rendering a decision based upon the existing record shall be filed within 10 days following receipt of the Judge’s notice, or the objection shall be deemed to be waived. An objection shall be founded upon a showing of a need for the resolution of conflicting material testimony requiring credibility determinations. Upon good cause shown the Judge may order a further hearing on the merits, which shall be limited, so far as practicable, to the testimony in dispute.

40. In § 2700.69, revise paragraphs (a) through (c) to read as follows:

§ 2700.69 Decision of the Judge.

(a) *Form and content of the Judge’s decision.* The Judge shall make a decision that constitutes a final disposition of the proceedings. A decision that is not final shall be titled “Interim Decision.” Any 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. If a decision is announced orally from the bench, it shall be reduced to writing after the filing of the transcript. An order by a Judge approving a settlement proposal is a 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 the Judge's decision has been issued.

(c) *Correction of clerical errors.* At any time before the Commission has directed that a Judge's decision be reviewed, and on the Judge's own motion or the motion of a party, the Judge may correct clerical errors in decisions, orders, or other parts of the record. After the Commission has directed that a Judge's decision be reviewed, the Judge may correct such errors with the leave of the Commission. If a Judge's decision has become the final order of the Commission, the Judge may correct such errors with the leave of the Commission. Neither the filing of a motion to correct a clerical error, nor the issuance of an order or amended decision correcting a clerical error, shall toll the time for filing a petition for discretionary review of the Judge's decision on the merits.

* * * * *

41. In § 2700.70, revise paragraph (f) to read as follows:

§ 2700.70 Petitions for discretionary review.

* * * * *

(f) *Motion for leave to exceed page limit.* A motion requesting leave to exceed the page limit shall be received not less than 3 days prior to the date the petition for

discretionary review is due to be filed, shall state the total number of pages proposed, and shall comply with § 2700.10. Filing of a motion requesting an extension of page limit is effective upon receipt. The motion and any statement in opposition shall include proof of service on all parties by a means of delivery no less expeditious than that used for filing the motion, except that if service by email or other electronic transmission is impossible, the filing party must serve in person, by third party commercial carrier, or by facsimile transmission, resulting in same-day delivery.

* * * * *

42. Add § 2700.72 to read as follows:

§ 2700.72 Commission panels.

The Commission may, at its discretion, impanel a group of three or more members to hear any pending matter. Assignment to such panels shall be made by a random method agreed upon by a majority of the Commissioners.

43. In § 2700.73, revise paragraph (b) to read as follows:

§ 2700.73 Procedure for intervention.

* * * * *

(b) A showing that the disposition of the proceeding may impair or impede the movant's ability to protect that interest;

* * * * *

44. In § 2700.75, revise paragraphs (a)(1), (e), and (f) to read as follows:

§ 2700.75 Briefs.

(a) *Time to file--(1) Opening and response briefs.* Within 30 days after the Commission grants a petition for discretionary review, the petitioner shall file an opening

brief. The petitioner may notify the Commission and all other parties within the 30-day period that the petition and any supporting memorandum are to constitute the opening brief. Other parties may file response briefs within 30 days after the petitioner's brief is served. If the Commission directs review on its own motion, all parties shall file any opening briefs within 30 days of the direction for review. In such cases, a party may file a response brief within 20 days after service of the opposing party's opening brief.

* * * * *

(e) *Consequences of petitioner's failure to file brief.* If a petitioner fails to timely file a brief or to designate the petition as the opening brief, the direction for review may be vacated.

(f) *Motion for leave to exceed page limit.* A motion requesting leave to exceed the page limit for a brief shall be received not less than 3 days prior to the date the brief is due to be filed, shall state the total number of pages proposed, and shall comply with § 2700.10. Filing of a motion requesting an extension of page limit is effective upon receipt. The motion and any statement in opposition shall include proof of service on all parties by a means of delivery no less expeditious than that used for filing the motion, except that if service by email or other electronic transmission is impossible, the filing party must serve in person, by third party commercial carrier, or by facsimile transmission, resulting in same-day delivery.

* * * * *

45. In § 2700.76, revise paragraph (a)(1)(i) to read as follows:

§ 2700.76 Interlocutory review.

(a) * * *

(1) * * *

(i) The Judge has certified, upon the Judge’s own motion or the motion of a party, that an interlocutory ruling involves a controlling question of law and that in the Judge’s opinion immediate review will materially advance the final disposition of the proceeding; or

* * * * *

46. In § 2700.78, revise paragraph (a) to read as follows:

§ 2700.78 Reconsideration.

(a) A petition for reconsideration must be filed with the Commission within 10 days after the issuance of a decision or order of the Commission. Any response must be filed with the Commission within 10 days of service of the petition.

* * * * *

47. In § 2700.80, revise paragraphs (a) through (c) to read as follows:

§ 2700.80 Standards of conduct; disciplinary proceedings.

(a) *Standards of conduct.* Representatives practicing before the Commission or before Commission Judges pursuant to 29 CFR 2700.3(b) shall conform to the standards of ethical conduct required of practitioners under the American Bar Association’s Rules of Professional Conduct (“ABA’s Model Rules”). The Commission shall apply the ABA’s Model rules as far as practicable.

(b) *Grounds.* Disciplinary proceedings may be instituted against anyone who is practicing or has practiced before the Commission on grounds that such person has engaged in unethical or unprofessional conduct; has failed to comply with these rules or

an order of the Commission or its Judges; has been disbarred or suspended by a court or administrative agency; or has been disciplined by a Judge under paragraph (e) of this section.

(c) *Procedure.* Disciplinary proceedings shall be subject to the following procedure:

(1) Disciplinary referral. Except as provided in paragraph (e) of this section, a Judge or other person having knowledge of circumstances that may warrant disciplinary proceedings against an individual who is practicing or has appeared before the Commission shall forward to the Commission for action such information in the form of a written disciplinary referral. Whenever the Commission receives a disciplinary referral, the matter shall be assigned a docket number and a notice will be issued to the individual named in the referral of the initiation of an investigation.

(2) Inquiry and preliminary determination by the Commission. The Commission shall conduct an inquiry concerning a disciplinary referral and shall determine whether disciplinary proceedings are warranted. The Commission may require persons to submit affidavits setting forth their knowledge of relevant circumstances.

(i) Termination of referral. If the Commission determines that disciplinary proceedings are not warranted, it shall issue an order terminating the referral.

(ii) Further disciplinary proceedings. Whenever, as a result of its inquiry, the Commission, by a majority vote of the full Commission or a majority vote of a duly constituted panel of the Commission, determines that the circumstances warrant a hearing, the Commission shall issue an order specifying the disciplinary issues to be resolved through hearing and order the Commission's Chief Administrative Law Judge to assign the matter to an

Administrative Law Judge, from within or outside of the Commission, other than the referring Judge, for hearing and decision. The Commission may designate counsel from within or outside of the Commission to prosecute the matter before the Judge.

(3) Hearing before an Administrative Law Judge--(i) Assignment. Upon the Commission's order determining that further proceedings are warranted, the Commission's Chief Administrative Law Judge shall select a Commission Administrative Law Judge, or select a non-Commission Administrative Law Judge, and issue an order of assignment for hearing. The order of assignment shall advise the respondent that the respondent may file a statement in accordance with paragraph (c)(3)(ii) of this section.

(ii) Response. The respondent named in the disciplinary proceeding may file a statement responding to the Commission's decision within 30 days after service of the order of assignment.

(iii) Evidence and applicability of hearing rules. The parties shall have the opportunity to present evidence and cross-examine witnesses. Subpart G of the Commission's procedural rules governing Commission hearings before Administrative Law Judges shall apply as appropriate to all Commission disciplinary proceedings.

(iv) Judge's decision. The Judge's decision shall include findings of fact and conclusions of law and either an order dismissing the proceedings or an appropriate disciplinary order, which may include reprimand, suspension, or prohibition from practice before the Commission.

* * * * *

48. In § 2700.81, revise paragraphs (a) and (c) to read as follows:

§ 2700.81 Recusal and disqualification.

(a) *Recusal.* Whenever a Commissioner or a Judge deems appropriate, the Commissioner or Judge may choose to be recused from a proceeding.

* * * * *

(c) *Procedure if Commissioner or Judge does not withdraw.* If, upon being requested to withdraw pursuant to paragraph (b) of this section, the Commissioner or the Judge does not withdraw from the proceeding, the Commissioner or Judge shall so rule upon the record, stating the grounds for such ruling. If the Judge does not withdraw, the Judge shall proceed with the hearing, or, if the hearing has been completed, the Judge shall proceed with the issuance of a decision, unless the Commission stays the hearing or further proceedings upon the granting of a petition for interlocutory review of the Judge's decision not to withdraw.

49. In § 2700.82, revise paragraph (d) to read as follows:

§ 2700.82 Ex parte communications.

* * * * *

(d) *Status or informational requests.* Information concerning filing requirements, the status of cases, or docket information may be accessed through the Commission's website (<http://www.fmshrc.gov>). In the event such information is unavailable through the Commission's website, such status or informational requests must be directed to the Docket Office of the Federal Mine Safety and Health Review Commission, 1331 Pennsylvania Avenue, NW, Suite 520N, Washington, DC 20004-1710; 202-434-9950.

50. Revise § 2700.83 to read as follows:

§ 2700.83 Authority to sign orders.

The Chair or other designated Commissioner is authorized to sign on behalf of the Commissioners, orders disposing of the following procedural motions: motions for extensions of time, motions for permission to file briefs in excess of page limits, motions to accept late filed briefs, motions to consolidate, motions to expedite proceedings, motions for oral argument, and similar procedural motions. In the absence of a designated Chair, Acting Chair or quorum, the remaining Commissioner or Commissioners continue to be authorized to sign orders disposing of procedural motions as identified above.

Dated: August 31, 2020

Marco M. Rajkovich, Jr.

Chair, Federal Mine Safety and Health Review Commission

[FR Doc. 2020-19492 Filed: 10/5/2020 8:45 am; Publication Date: 10/6/2020]