

MSHA's Response to Draft Report

U.S. Department of Labor

Mine Safety and Health Administration
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MEMORANDUM FOR ELLIOT P. LEWIS
Assistant Inspector General for Audit

FROM: JOSEPH A. MAIN 
Assistant Secretary of Labor for
Mine Safety and Health

SUBJECT: Response to OIG Draft Audit Report No. 05-11-003-06-001

Thank you for the opportunity to review your draft audit report. The Mine Safety and Health Administration (MSHA) believes that the report contains sound recommendations for improving the Agency's civil penalty collection practices. However, I am providing additional information so that some of the audit findings and recommendations can be put in proper context. I also want to report on some relevant activities that occurred after the FY 2009-2010 period that was the subject of the OIG review.

The OIG stated that the objective of the audit was to determine if MSHA properly collected and accounted for final civil penalties. Although the OIG found that MSHA does not always apply penalty payments timely, I note that the audit report cites no instances where MSHA could not account for final civil penalties assessed or payments received. At the entrance conference for this audit, MSHA requested that, as a part of its review, OIG provide information on the effectiveness of the Agency's civil penalty collections compared to other federal collection efforts. The OIG report states that as of October 2010, 80 percent of the \$104.4 million of civil penalties that had become final orders in FYs 2009 and 2010 had been paid. The collections have increased since that time. As of October 6, 2011, there was a total of \$147.1M in final civil penalties for those two fiscal years, and \$124.8M (85 percent) had been paid. The OIG review team informed me they were unable to obtain statistics for other federal agencies, but I believe this is necessary in order to gauge the relative effectiveness of MSHA's civil penalty collection practices.

The report contains reference to citations for which MSHA did not propose civil penalties between 1995 and 2006. These are citations that should have been assessed 5-16 years ago. Given that the period the OIG reviewed was FY 2009-2010, the reference to unassessed citations that occurred some years prior to the review period is outside the scope of this review. During the review, the OIG did not find any unassessed citations.

The report focuses on three areas (a) the timely application of payments against outstanding debt and timely and consistent referral of delinquent debt to Treasury; (b) the identification of potential "scofflaws"; and (c) ensuring that penalties are uncollectable before writing off the debt. I note that the findings associated with these three areas do not identify MSHA noncompliance with federal statutes or requirements. Rather, the recommendations refer to modifications of, or adherence to, MSHA internal policies and procedures that in some cases exceed federal requirements. These and other issues noted below are not described in the proper context in the draft report. We would appreciate if you would revise the report to reflect changes in the context, as appropriate.

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OIG Recommendation No. 1: *Revise existing procedures to assure timely application of civil penalty payments, particularly when applying payments to the oldest debt if the violator does not identify how to apply the payment.*

MSHA agrees with this recommendation. Please note that mine operators send civil penalty payments directly to the Treasury Department lockbox bank designated to receive these payments and the bank immediately deposits the payments in the Federal Government's general fund. The timeliness standards to which the OIG compared the civil penalty payment applications are MSHA's internal timeliness standards. MSHA's standard operating procedures (SOPs), implemented in 2008, require payments to be applied within three days of notification from Treasury that payment has been received; that is the timeliness standard the OIG used as a benchmark. However, the SOPs also address how payment processors should handle checks that they cannot apply within three days, recognizing that many factors can cause delays in applying payments. Nevertheless, MSHA recognizes the need to apply payments as quickly as possible and agrees with the OIG recommendation that MSHA apply payments to the oldest debt when, for example, the operator does not identify how to apply the payment.

Specifically, the OIG recommends that when an operator furnishes insufficient information for MSHA to identify the specific civil penalties the operator intends to pay, MSHA should apply the payment to the oldest debt for that operator. MSHA has been applying payments to the oldest debt in cases where there is insufficient information to identify penalties the operator intends to pay. However, MSHA cannot do this in every case when information is lacking, for example when the mine operator cannot be identified.

In FY 2009, MSHA initiated a long-term, phased in project to: obtain more information from mine operators when they submit their payments; automate the payment application process; and ensure payments received for final orders of the Federal Mine Safety and Health Review Commission (FMSHRC) are reserved for FMSHRC decisions. MSHA deployed a new Proposed Assessment and Statement of Account in December, 2010. This document is sent to mine operators to inform them of the proposed assessment for each cited violation and replaced the former Notice of Proposed Assessment. The new Proposed Assessment provides a coupon for submission with payments. The Treasury Department lockbox bank that receives the civil penalty payments and deposits the funds in the Treasury enters the coupon information into its system and transmits this information to MSHA.

This new process resulted in fewer payments for which the penalties could not be identified and set the stage for the second phase of the project that was implemented in August, 2011. In this phase, MSHA deployed a computer system enhancement that replaced the manual payment application process. The automated process applies all payments for which the lockbox bank enters sufficient information (i.e. the coupon is returned). The system was also programmed to apply payments to the oldest available debt when the mine and the operator are identifiable and the operator does not identify a specific penalty to pay.

Phase three of this project, scheduled for December, 2011, is a system enhancement to reserve payments for pending FMSHRC decisions.

OIG Recommendation No. 2: *Revise procedures to assure consistent referrals to Treasury.*

MSHA agrees with this recommendation. As the OIG reports states, although the Debt Collection Improvement Act requires debt that is more than 180 days delinquent to be referred to Treasury for collection, MSHA uses a standard of 150 days delinquent. Each week, MSHA's system identifies debt that is 150 days delinquent. Office of Assessments staff research this debt and, if no payments are in suspense for the debtor, it is marked for referral to Treasury. Since 2006, the files have been transferred electronically to the Treasury Department's Financial Management Services system every week.

This recommendation refers to MSHA's current procedure of not referring to Treasury debt that appears to be delinquent for certain companies (the Exclusion List) who regularly pay their civil penalties. This procedure was implemented in 2008 to prevent non-delinquent debt from being referred to Treasury. MSHA takes issue with referring to its debt delinquency information as "unreliable". The information is reliable for identifying potentially delinquent debt. The Exclusion List has served the purpose of not referring debt to Treasury for which payments have been received but not yet applied, a significant savings in time and administrative costs for Treasury, MSHA, and, most importantly, the companies that have paid civil penalties that are pending payment application.

With the deployment of the system enhancements referenced in MSHA's response to OIG recommendation 1, MSHA is now able to eliminate companies from the Exclusion List as existing payments with balances are applied to the oldest debt for these companies. This will result in the systematic removal of companies from the Exclusion List and the elimination of the Exclusion List in its entirety during this fiscal year.

OIG Recommendation 3: *Finalize policies and procedures to identify all potential scofflaw operators.*

The Agency agrees that it should finalize policies and procedures to identify potential scofflaw operators. We also agree, as the report states "...MSHA's actions to pursue scofflaw violators went above the requirements of the Debt Collection Improvement Act of 1996..." In fact, I assigned staff to work with the Solicitor's Office to develop scofflaw definitions, and these criteria are nearing completion.

It is important to note that the MSHA scofflaw initiative is an enhanced enforcement initiative that is an important element in MSHA's enforcement program. It is not a collection effort. This is an evolving initiative and one that MSHA has no legal duty to implement. It is important to note also that there is no legal requirement for MSHA to collect delinquent debt after referring the debt to Treasury for collection.

MSHA strongly believes that the OIG mischaracterized the current situation when it stated that operators were "...able to ignore their civil penalty obligations without consequence" within the context of the scofflaw program. When mine operators ignore their civil penalty obligations, MSHA refers the delinquent debt to Treasury for collection as required under the Debt Collection Improvement Act. Treasury takes the following actions, as applicable:

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1. Treasury sends a demand letter within five business days of MSHA referral;
2. Debtors and FMS personnel enter repayment negotiations;
3. Debt is submitted to the Treasury Offset Program (TOP) within 20 days of referral;
4. Debt is referred to credit bureaus;
5. Debt is referred to at least one, and in most cases two, private collection agencies;
6. Administrative wage garnishment;
7. Referral to Justice Department for litigation; and
8. Unpaid debt is reported to the Internal Revenue Service as potential income to the debtor on Form 1099-C.

MSHA believes that this initiative is an important enhanced enforcement tool that will help to improve the safety and health of miners. I instructed staff to start finalizing the policies and procedures for the scofflaw initiative in October, 2010. MSHA and the Office of the Solicitor have employed several new strategies to pursue "scofflaw" operators with mixed results. MSHA is developing the policies and procedures for the scofflaw program within the context of the experience gained using these strategies.

OIG Recommendation 4: *Implement controls to assure appropriate and consistent write-off of uncollectable civil penalties.*

MSHA concurs with this recommendation. The report states that MSHA may have written off civil penalties for companies that still had an ability to pay their debt. As a point of clarification, MSHA's current procedures, implemented in 2007, prohibit writing off debt of companies still in business, although federal requirements do not contain this prohibition. A company's ability to pay does not factor into the federal write-off requirements. According to federal requirements, write-offs should occur when the agency determines that the likelihood of collection is less than 50%. According to federal requirements, write-offs are mandatory (unless documented and justified to the Office of Management and Budget in consultation with Treasury) for delinquent debt that has no value for accounting purposes or is older than two years. The Office of Assessments is currently reviewing and revising the write-off procedures and developing stronger internal controls to ensure compliance with the procedures.

In conclusion, I look forward to providing more specific details on the actions MSHA will take in response to each of the OIG recommendations. MSHA will provide the planned actions within 60 days.

If you have any questions concerning this response, please contact Jay Mattos, Director of Assessments, at 202-693-9702.