Sunshine Act Meetings

Federal Register
Vol. 51, No. 22
Monday, February 3, 1986

This section of the FEDERAL REGISTER contains notices of meetings published under the "Government in the Sunshine Act" (Pub. L. 94-409) 5 U.S.C. 552b(e)(3).

CONTENTS

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EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

DATE AND TIME: Monday, February 10, 1986, 2:00 p.m.

PLACE: Clarence M. Mitchell, Jr., Conference Room No. 200–C on the 2nd Floor of the Columbia Plaza Office Building, 2401 "E" Street, NW., Washington, DC 20507.

STATUS: Part will be open to the public and part will be closed to the public.

MATTERS TO BE CONSIDERED:

1. Announcement of Notation Vote(s)
2. A Report on Commission Operations (Optional)
3. Proposed Revisions to the Federal Sector Complaint Processing Regulations, 29 CFR Part 1613

Closed

1. Proposed Commission Decision
2. Litigation Authorization: General Counsel Recommendations

Note.—Any matter not discussed or concluded may be carried over to a later meeting. (In addition to publishing notices on EEOC Commission meetings in the **Federal Register**, the Commission also provides a recorded announcement a full week in advance on future Commission sessions. Please telephone (202) 634–6748 at all times for information on these meetings.)

CONTACT PERSON FOR MORE INFORMATION: Cynthia C. Matthews, Executive Officer at (202) 634–6748.

Dated: January 29, 1986.

Cynthia C. Matthews,

Executive Officer, Executive Secretariat.

[FR Doc. 86–2428 Filed 1–30–86; 3:59 pm]

BILLING CODE 6750–06–M

2

NATIONAL LABOR RELATIONS BOARD

"FEDERAL REGISTER" CITATION OF PREVIOUS ANNOUNCEMENT: January 29, 1986, 51 FR 3733.

PREVIOUSLY ANNOUNCED TIME AND DATE OF THE MEETING: January 29, 1986, 9:30 a.m.

CHANGE IN THE MEETING: Date and time of Meeting changed to: Thursday, January 30, 1986, 2:00 p.m.

CONTACT PERSON FOR MORE INFORMATION: John C. Truesdale, Executive Secretary, Washington, DC 20570, Telephone: (202) 254–9430.

Dated: Washington, DC, January 29, 1986.

By direction of the Board.

John C. Truesdale,

Executive Secretary, National Labor Relations Board.

[FR Doc. 86–2356 Filed 1–30–86; 11:09 am]

BILLING CODE 7545–01–M

3

NEIGHBORHOOD REINVESTMENT CORPORATION

Audit Committee

TIME AND DATE: 3:00 p.m., Monday, February 3, 1986.

PLACE: Comptroller of the Currency's Conference Room, 490 L'Enfant Plaza, SW.—6th Floor, Washington, DC 20219.

STATUS: Open Meeting.

CONTACT PERSON FOR MORE INFORMATION: Timothy S. McCarthy, Associate Director, Communications, (202) 653–2705.

AGENDA:

I. Review of FY 1985 Audit and Management Letter

Winnie D. Morton,

Assistant Secretary.

[FR Doc. 86–2350 Filed 1–30–86; 10:32 am]

BILLING CODE 7570–01–M

Federal Register

Monday
February 3, 1986

Part II

Department of Agriculture

Forest Service

Small Business Timber Set-Aside Program; Request for Additional Comments on Final Policy

DEPARTMENT OF AGRICULTURE

Forest Service

Small Business Timber Set-Aside Program

AGENCY: Forest Service, USDA.

ACTION: Request for additional comments on final policy.

SUMMARY: On June 13, 1985, the Forest Service published a notice of adoption of final policy (50 FR 24788) setting forth procedures for administration of the Small Business Timber Set-Aside Program. A minor correction in a table was published July 9 at 50 FR 27997. The Forest Service is now requesting additional comments on the policy as adopted. The adopted policy remains in effect during this additional comment period.

DATE: Comments must be received by April 4, 1986.

ADDRESS: Send written comments to R. Max Peterson, (2400), Forest Service, USDA, P.O. Box 2417, Washington, DC 20013.

FOR FURTHER INFORMATION CONTACT: David Spores, Timber Management Staff, (202) 447–4051.

SUPPLEMENTARY INFORMATION: Following adoption of the final policy governing the Small Business Timber Set-Aside Program on June 13, 1985, a lawsuit was filed asserting that changes made between the publication of the proposed policy (49 FR 45889) and the adoption of the final policy resulted in violation of the requirements of the Administrative Procedures Act, 5 U.S.C. 551 *et seq.* In settlement of the lawsuit, the Forest Service agreed to solicit additional comments on the final policy as adopted. During this additional comment period, the adopted policy remains in effect.

The text of the final policy is as follows:

A. Establishment of Small Business Shares

1. Definition of Structural Change

The final policy defines structural change, which was not in the proposed policy. This was needed in order to provide a common definition for use in recomputation of market shares. A structural change occurs during a recomputation period when a small or large business firm, that purchased at least 10 percent of the total sawlog volume during the last recomputation period, discontinues operations, or changes ownership (i.e., small business purchased by large business or vice versa). When this structural change occurs, the small business share will be recomputed in accordance with the appropriate procedure, as described in the sections relating to 1981–1985 structural changes, or future structural changes. The necessity for the recomputation of shares due to structural change will be determined by the Forest Supervisor, in consultation with the SBA representative.

There are two conditions that will determine structural change:

1. Change in the size class of the firm(s);

2. The discontinuance of the operation of the firm(s).

In making decisions concerning structural changes, judgment must be exercised about what constitutes "discontinued operations." A mill closing must be carefully evaluated in terms of intent to resume operations. Cessation of operations due to natural disasters beyond the control of a firm must be evaluated in terms of the declared intent to reconstruct and resume operations.

Examples of the factors that should be evaluated in determining whether a firm has discontinued operations are: statement of intent to resume operations; changes in physical site conditions which include the dismantling and/or sale of physical assets; indicated intent to harvest Forest Service timber volume under contract; market and general economic conditions; and planned mill reconstruction.

2. Limit on Shares

The timber set-aside program is designed to ensure that small business firms have the opportunity to purchase a fair proportion of the timber offered for sale in each marketing area. The small business share defines the proportion of the planned timber sale program that will be assured to small business over a 5-year period. When the small business share changes in a market area, the change results in a change in "share percentage points." For example, the small business share may change from 45 percent to 50 percent of the timber sale program within a market area. The proposed policy would have limited small business shares to no greater than 80 percent of the planned timber sale program and would have retained the current policy that shares can not decrease to less than 50 percent of the original base share established in 1971. The current policy permits small business shares of 100 percent, of the planned timber sale program in a market area, which does not represent a fair proportion.

The proposed change received substantial support, although a few individuals suggested some variation in upper and lower share limts. Upon consideration, the Forest Service adopts the provisions of proposed policy and will implement these provisions at the time of the recomputation in FY 1986.

This revision provides a fair market share to small business, permits large business an opportunity to participate in all market areas, and provides the Forest Service an opportunity to enhance utilization through a wider group of potential users.

3. Recomputation of Shares in FY 86—Region 8 (Southern), Region 9 (Eastern) and Region 10 (Alaska)

Under the proposed policy, current procedures would remain in effect, subject to an upper limit on small business shares of 80 percent, and shares in Regions 8 and 9 would be recomputed in FY 1986 based on the small business purchase history for FY 1981–1985.

Comments were near unanimous in support of retaining the present procedure. A few respondents favored no change in the existing procedure, wanted a different effective date, or desired different years of purchase history.

The agency agrees with these comments and has decided not to change the existing procedure, other than to implement the 80 percent upper limit at the time of the FY 1986 recomputation of small business shares in Regions 8 and 9. Continuation of current procedures recognizes the relatively stable marketing situation in Regions 8 and 9 during the current recomputation period.

4. Recomputation of Shares in FY 86—Region 1 (Northern), Region 2 (Rocky Mountain), Region 3 (Southwestern), Region 4 (Intermountain), and the following National Forests in Region 6 (Pacific Northwest): Wallowa-Whitman NF, Colville NF, Ochoco NF, Malheur NF, and Umatilla NF

The proposed policy would have calculated a new small business share in these areas at the end of FY 1985 based on the arithmetic average of the small business purchase and harvest history for 1975–1984.

Substantial comment from small business opposed changing recomputation procedures this late in the current period and argued for retaining existing procedures. Some respondents wanted some National Forests in the eastern part of Region 6 included. Some respondents wanted

recognition of structural changes which occurred in the industry during FY 1981–1985. A few respondents also wanted to include all of Region 5 in this calculation of shares approach rather than under the approach proposed for that Region. Some large businesses favored use of harvest history as the sole basis for establishing new shares for small purchasers in these Regions. They felt harvest history better reflected the actual needs of small business firms rather than purchase history.

The agency agrees with those who favored retaining existing procedures for recomputing the small business share. Overall, market disruptions did not distort purchase and harvest patterns to the extent that resulted in Region 5 and western Forests of Region 6. The five eastern Forests of Region 6 had marketing patterns more closely associated with those of Regions 1–4 and, therefore, fit the small business share recomputation procedures now used. Conversely, the marketing patterns of Region 5 more closely fit those of western Forests in Region 6. The agency also recognizes the need to provide for structural changes in the industry and for unique changes which the current procedure would not effectively represent.

Under the adopted policy, the procedure for share establishment in these areas for use during the period FY 1986–1990 will use small business purchase history from the period FY 1981–1985. When a share changes 5 share percentage points or less, surplus or deficit volumes accrued during the 5-year period will carry forward. Where a share change exceeds 5 share percentage points, one half of the surplus or one half of the deficit volume will be carried forward. This procedure will dampen the impact of market fluctuations during the 5-year period. Where a share change exceeding 5 share percentage points occurs in a market area where salvage operations have significantly disrupted normal purchase patterns, the full surplus or deficit volume may be carried forward.

Where structural changes occur in industry size classes during the period and the recomputed share changes over 5 share percentage points from the previous share, the surplus or deficit volumes will be dropped and not carried forward to the next computation period. Where the recomputed share changes less than 5 share percentage points from the previous share, the surplus or deficit volumes will be carried foward to the next computation period.

If unique circumstances in a market area make deviation from these procedures appropriate, the Forest Supervisor may recommend alternatives to the Regional Forester following procedures outlined under paragraph B.3. Special Recomputations. Examples of unique circumstances include catastrophic natural events which disrupt normal operations or an event which causes substantial damage to a processing facility and results in abnormal delay in repairs.

Implementation of this policy recognizes and provides for the geographic similarity of market conditions during the 5-year period and recognized structural changes which occurred.

5. Recomputation of Shares in FY 86—Region 5 (Pacific Southwest) and Remaining National Forests in Region 6 (Pacific Northwest)

The proposed policy would have compared shares established in 1981 in these Regions with the small business harvest history for 1975–1979. The shares would have been maintained, except where the difference exceeded 10 percent. Then the new share would have been set halfway between the current share and the harvest history for that period. Structural changes in the industry since 1980 would have followed the same policy as for Regions 1–4.

Generally, large business firms felt that the proposed policy recognized the market distortion which occurred during FY 1981–1985 and that the proposed procedure.would represent a more stable situation. About one third of small business respondents agreed with this rationale, including two associations who represent small business firms. Those small business respondents who opposed the proposed policy either wanted no change in the program or felt that data from other years would better reflect actual market conditions. Some small business firms and the associations representing small business argued for the need to use recent data for recognizing structural changes in the industry during FY 1981–1985. A few small business firms in Region 5 felt that a more stable situation existed in that Region during FY 1981–1985 and that purchase history or purchase and harvest history for that period would better reflect actual market conditions.

The Forest Service agrees that the FY 1981–1985 period distorted the market patterns which normally occur in Region 5 and the remaining portion of Region 6, and that adoption of the proposed policy would better recognize a more normal situation. The agency agrees with those who propose a special procedure to recognize structural changes in the industry between FY 1981–1985.

Therefore, under the adopted policy the shares established for use in Region 5 and the remainder of Region 6 during the period FY 1986–1990 will generally remain the same as those established in 1981, which used small business purchase history from the period FY 1976–1980. However, in market areas where the small business harvest history for FY 1975–1979 differed from the established share by more than 10 share percentage points, the small business share will be set half way between the current share and the small business harvest history for that period.

Where structural change occurred during the period 1981–1985, recomputation of the small business share will be based on the small business purchase and harvest history during this period. Surplus and deficit volumes will be carried forward when shares change 5 share percentage points or less. Surplus and deficit volumes will be dropped when shares change over 5 percent.

If unique circumstances in a market area make deviation from these procedures appropriate, the Forest Supervisor may recommend alternatives to the Regional Forester following procedures outlined under paragraph B.3. Special Recomputations.

This policy recognizes the market distortions during the FY 1982–1985 period which caused abnormal purchase and harvest operations. It serves to stablize the market shares to the previous period, which was a more normal 5-year period, except where recognized structural changes have occurred.

B. Future Share Changes

1. Regions 8, 9, and 10

The proposed policy would have continued the current system of establishing shares and have commissioned a two-year study by the Forest Service and SBA to determine the need to change the program in Regions 8 and 9. In Region 10, the set-aside program would have continued to operate based upon a volume quota basis.

This proposal received little comment, except support for completing the study promptly and to ensure that the study does not lead to adoption of restrictive conditions. The Forest Service and SBA will complete a study within the next 2 years which will determine whether changes are needed for future share recomputations in these Regions.

2. All Other Regions

The proposed policy would have stabilized shares at current levels in all market areas. However, where a structural change occurred, shares would have been adjusted at the start of the 6-month period beginning at least 12 months after the change occurred. The basis of change would have been the average of the percentages of purchase and harvest history for the past 5 years. No further recomputations would have occurred.

Large businesses strongly supported these proposed changes. Large business desired prompt recognition of structural change, generally 12 to 18 months after it occurred, and supported use of purchase and harvest data for the 5 years preceding the change. Some individuals suggested various options which use different data and time periods. Small businesses uniformly opposed this proposal or suggested a changed procedure. Small businesses emphasized that the small business share belongs to the small business community-at-large and not to individual entities. Assigning a share to individual mills would add value to them and encourage speculation. Many small business respondents supported a recomputation procedure jointly developed by two of the associations which represent small businesses. The procedure developed by the associations would have based recomputation of small business shares on a combination of small business purchase history and weighted average small business purchase and harvest history. The process would compare both small and large business harvest to purchase history as criteria used to determine the small business share and carryover volume amounts.

The Forest Service agrees with both large and small business respondents who propose use of both purchase and harvest history to recompute the small business share. This reflects the relationship of volume of timber purchased to actual need over a 5-year period. The agency agrees with those elements of the recomputation procedure proposed by small businesses which deal with harvest to purchase performance. However, the agency disagrees with the desirability of making a comparison between the performance of large and small business firms. The Forest Service also agrees with the need to recognize structural change in market area industries and to reflect the change with an adjustment period shorter than 5 years. Also, recomputation procedures must recognize unique situations mentioned by some respondents and provide for them.

3. Special Recomputations

Unique situations may develop which require special recomputations and departure from the established procedure. In such cases the Forest Supervisor, in consultation with the SBA Representative, may propose procedures necessary to adapt to the situtation. The Forest Supervisor will solicit the views of firms operating within the market area before submitting a proposal to deviate from the normal recomputation process to the Regional Forester for approval.

In periods of significant market decline, Forest Supervisors will monitor harvest patterns of both small and large businesses by comparing harvest to purchase volume. Where both follow a similar pattern, the Forest Supervisor will adjust the effects of harvest performance criteria on carryover volume in conjunction with share establishment.

Departure from the standard procedure may also be warranted in the event volumes harvested by either large or small firms vary significantly from normal patterns in the market area as a result of salvage operations, a switch of harvest operations between market areas or ownerships, or other factors. Where such departure from the standard procedure is warranted, it may be achieved by adjusting carryover volumes, adjusting the time period, or by other means.

Implementation of policies in paragraph 2 (a) and (b), and (3) above will moderate the impact of short-term purchase and harvest fluctuations and their influence on the small business share. Inclusion of harvest history in recomputation recognizes the balance needed between purchase and harvest experience in share establishment. Use of both elements more accurately reflects actual raw material needs. The procedure permits recognition of structural change. The policy also helps stabilize market area shares in a responsive manner, and identifies unique situations which require special consideration.

In consideration of these views, the final policy will apply the following procedure for recomputing the small business share for a market area to scheduled recomputations and to those following structural changes in the industry between regular recomputation periods:

a. Regular Scheduled Recomputations

Normally, a scheduled recomputation will occur every 5 years and will use the past 5-year record of sawtimber purchase and harvest data as a basis.

Small business shares will be recomputed using the weighted average purchase and harvest history for small business firms in each market area. For purposes of share calculation, harvest history is based on actual deliveries of sawlog timber to small or large business firms for processing. Data for this calculation will be obtained from the 6-month reports submitted by purchasers for log export control. Carryover of surplus or deficit volumes from the previous period will be based on small business harvest performance. Exhibit 1 displays how harvest performance, calculated as a ratio of harvest to purchase, will be used to adjust carryover volumes.

b. Recomputation Due to Structural Change

Shares will be recomputed following structural change. Use exhibit 1 to adjust carryover volumes. The procedure is designed to provide small business firms the opportunity to maintain their historical share when a firm changes size, but provides a reasonably rapid adjustment of shares to reflect the actual purchase and harvest patterns which develop. Ordinarily, small business shares will be recomputed approximately 3 years after a structural change occurs, based on the purchase and harvest history for that 3-year period. When a recomputation for a structural change would occur within a year of a scheduled recomputation, the scheduled recomputation would be skipped.

C. Purchases by Non-Manufacturers

1. Regions 8, 9, and 10

Under the proposed policy the Forest Service would have retained the current procedure for allocating purchases by non-manufacturers to large and small businesses based on the anticipated size of the processor.

Nearly all comments supported the current procedures for allocating purchases by non-manufacturers. Sale procedures in Regions 8 and 9 provide for purchase of sales based on pre-sale measurement with no further measurement to determine actual harvest volume. The current method of anticipating delivery of sale volume to the respective size class of the processor best applies.

The Forest Service will retain the current procedure. Part of the planned Forest Service-Small Business Administration study will include review of this procedure and evaluation

of alternatives which may more accurately identify delivery source.

This policy recognizes the current method used to offer sales in Regions 8 and 9 and its relationship to tracking non-manufacturer volume to small and large firms. The policy also recognizes the need to evaluate these procedures, particularly in light of the manufacturing requirements discussed in paragraph F.3 below.

2. Regions 1–6

The proposed policy would credit harvest volumes in the 6-month program analysis based on actual deliveries to small or large businesses from open sales purchased by non-manufacturers.

Both large and small businesses support the proposal to credit sale volume purchased by non-manufacturers based on harvest records of delivery. Some large businesses wanted volume credited to the size class of the company processing the timber at the end of the period. Small businesses generally suggested a 3-year rolling average for harvest deliveries. A lesser number suggested use of an overall average with periodic corrections.

The new policy will use current reporting requirements for export control to monitor non-manufacturers' delivery of volume. Use of a 2-year rolling average, updated every 6 months, will develop the percentage of sawtimber which non-manufacturers deliver to each manufacturer size class. For each 6-month period, application of the calculated percentage to open sale volume purchased by non-manufacturers will develop the volume accrued to small businesses in order to determine set-aside needs for the next 6-month period.

This policy will result in more accurate assignment of non-manufacturer-purchased sale volumes and guard against short-term cyclic changes in deliveries.

D. Triggering of Set-Aside Sales

1. The proposed policy would have retained current procedures for triggering a set-aside program when small business firms fail to purchase their share by 10 percent or more. However, under the proposed policy, only a fractional change over 10 percent would not have triggered a set-aside program.

Both large and small businesses strongly supported continuance of the current procedure for initiating set-aside sales. However, small businesses strongly objected to dismissing a set-aside trigger if it occurred by only a fractional amount. They argued that use of the 10 percent figure precisely defines the threshold and avoids further interpretation.

The Forest Service agrees with these comments and will continue the current policy of initiating a set-aside program whenever small businesses fails to purchase their share by 10 percent or more and has dropped the fractional amount provision. Use of an exact percent amount will simplify administration of the set-aside program.

2. The current policy places no limit on the timber volume set-aside during each 6-month period. The proposed policy would have retained the existing process of setting aside a volume of timber equal to the small business share plus the accumulated deficit volume. However, at least 20 percent of the timber volume in each 6-month period would have been open sales.

Comments supported setting aside the deficit plus the small business share when the need to establish a set-aside program resulted and to provide at least 20 percent of the volume in a 6-month set-aside period as open sales. Some large businesses favored setting aside only the deficit. However, analysis has shown that this would not provide assurance that small business firms would have the opportunity to purchase the established small business share in a market area.

Therefore, the policy will be implemented as proposed. However, the Forest Supervisor may elect to use two 6-month periods to eliminate the deficit volume situation. If not eliminated by this time, the Forest Supervisor will act to eliminate it in the next 6-month period, subject to the 20 percent of open sale volume limitation.

This policy continues to recognize the advisability of eliminating a trigger situation requiring set-aside sales as rapidly as possible. It also recognizes the need to provide opportunities for large businesses to participate in the market each period.

E. Selection of Set-Aside Sales

The proposed policy would have continued the current procedure where the Forest Supervisor selects set-aside sales with the concurrence of the local SBA representative. Under the proposal, the tentative selection of set-aside sales in case of a triggered program would occur 60 days prior to the start of the next 6-month period.

This proposal received significant support, although a few large businesses wanted sale selection only by the Forest Service.

The final policy adopts the proposed sale selection process. Forest Supervisors will initiate the selection of tentative set-aside sales early enough to reach agreement with the local SBA representative 60 days prior to the start of the next 6-month period. If agreement cannot be resolved at the local level, the SBA may seek review by the Regional Forester. If not resolved at that level, the issue will be submitted to the Washington Office of the two agencies for resolution. Following review, the Chief of the Forest Service will make the decision.

This procedure will result in early selection of set-aside sales, help establish a firm timber sale program at the beginning of the 6-month period, allow development of a more orderly sale program well in advance of each 6-month period, and should avoid delays in sale offerings.

F. Manufacturing Requirements on Set-Aside Sales

1. Current policy requires that 70 percent of advertised volume from set-aside sales be processed in a small business facility. The proposed policy would have continued enforcement of the 70/30 rule except in Regions 8 and 10.

There was strong support for enforcement of the 70/30 rule.

The policy will continue for all Regions except Regions 8 and 10. Purchasers of set-aside sales may deliver no more than 30 percent of advertised sawtimber sale volume from set-aside timber sales to large business for manufacture. Continuance of the policy permits needed flexibility for purchasers to market their products.

2. The proposed policy would have continued the 50/50 rule for set-aside sale timber in Region 10 and received limited, but highly favorable, comment. Therefore, in Region 10, purchasers of set-aside sales may deliver up to 50 percent of advertised volume of a set-aside to a large business for processing. This policy recognizes the greater marketing flexibility needed in this unique market environment.

3. The proposed policy would have required a 100 percent rule for set-aside sale softwood sawtimber and a 70/30 rule for hardwood sawtimber in Region 8. Currently, the 70/30 rule applies to all sawtimber.

An association which represents small businesses in Region 8 supported the proposed policy on manufacturing requirements for softwood and hardwood sawtimber. However individual comments from some large businesses and ⅓ of individual small business respondents operating in the Southern Region opposed 100 percent delivery of set-aside softwood sawtimber volume to small business

manufacturers. Arguments against 100 percent delivery included inability of some purchasers to dispose of all softwood sawtimber products, reduced opportunity to let special products seek an appropriate level of product use, and elimination of log trading between large and small mills to obtain special raw materials used by each. The Forest Service believes that adequate markets exist with small business firms to provide competitive markets for southern pine sawtimber. The 70/30 rule which applies to all other species of sawtimber will permit marketing flexibility. Therefore, in Region 8, the adopted policy will require that purchasers deliver 100 percent of the southern pine sawtimber purchased on set-aside sales to small business processing facilities, but the 70/30 rule will apply to all other coniferous species and to all hardwoods. For these, purchasers of set-aside sales may deliver up to 30 percent of the advertised sawtimber volume to large business processing facilities.

This policy assures delivery of set-aside volume to small business facilities, makes enforcement of requirements for processing of set-aside sale volume easier where southern pine species prevail, and yet provides marketing flexibility for hardwoods and other coniferous species.

Of the few who commented on enforcement provisions to ensure strict compliance with new manufacturing requirements, nearly all supported strong enforcement and prompt penalties for violations.

The Forest Service will work with SBA to develop enforcement through agency policy and small business qualification process. In addition, the Forest Service will examine contractual provisions which require reporting of log delivery and will develop appropriate measures to deal with violations.

G. Special Salvage Timber Sale Program (SSTS)

The current policy places undue restriction on the Special Salvage Timber Sale Program (SSTS). The proposed policy would have removed the 70/30 manufacturing requirement for sales set-aside under the special salvage program. Also, timber volume from this program would not have been included in calculations for the regular timber set-aside program.

Large business strongly supported the proposal to discontinue inclusion of the special salvage program with the regular set-aside program and to eliminate the 70/30 manufacturing requirement. Small businesses substantially supported the proposal. Comments against it cited the need to assure that small business facilities receive a meaningful supply of timber.

On February 15, 1985, following publication of the Forest Service proposed policy changes, the SBA published a final rule at 50 FR 6337 which eliminated the 70/30 manufacturing requirement for the special salvage program. The Forest Service will not include the SSTS program volume in its operation of the regular set-aside program or in recomputation of shares after the scheduled recomputation at the end of fiscal year 1985.

This policy permits maximum flexibility for small operators to market their products. It also eliminates recordkeeping for the recomputation process and operation of the 6-month set-aside program.

Impacts

This policy has been reviewed against the objectives and criteria of Executive Order 12291 and it has been determined that these changes in policy will not result in any of the economic or regulatory impacts associated with a major rule. The discretion available to the Secretary is in selecting administrative procedures to facilitate operation of the set-aside program. This change in policy will not have an annual effect on the economy of $100 million or more and will not result in a major increase in costs for consumers, individual industries, Federal, State, or local government agencies, or geographic regions, and will not have significant adverse effects on competition, employment, investment, productivity, innovation, and the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

Moreover, this final policy would not have significant economic impact on a substantial number of small entities. The policy will continue to protect the interests of small business timber industry firms and to assure them of the opportunity to obtain a fair proportion of National Forest timber sales. The policy requires the use of existing reporting and inspection procedures and does not increase compliance or administrative costs of small entities.

This final policy will not significantly affect the environment. Therefore, an environmental impact statement has not been prepared. Furthermore, the final policy will not result in additional information collection requirements and, therefore, it has not been submitted for review under the regulations at 5 CFR Part 1320 which implement the Paperwork Reduction Act of 1980 (44 U.S.C. 3507). The policy revises procedural methods of conducting and administering the Small Business Timber Set-Aside Programs in response to a Forest Service-SBA Joint Review of the Small Business Timber sale Set-Aside Program which identified key procedures in the current program which needed revision in order to make the set-aside program operate more effectively. Substantial public involvement with associations representing both timber industry size groups, individuals from both large and small business firms, and from government entities helped shape the initial proposed changes. As noted above, substantial comments to the proposed changes published in the **Federal Register** have influenced the final policy. The final policy to be implemented has substantial support in the agency record, viewed as a whole, and full attention has been given to the comments of persons directly affected by the policy in particular. The revised program will set forth in a forthcoming revision of the Forest Service Manual.

Dated: January 27, 1986.

R. Max Peterson,

Chief.

EXHIBIT 1.—HANDLING OF CARRYOVER VOLUMES IN RECOMPUTING SHARES

Small business weighted average purchase and harvest percent causes	Small business harvest to purchase ratio of—	Result on share and carryover volume
1. Increase over current share which exceeds 5 share percentage points.	A. .90 ratio or more.	Adopt weighted average purchase and harvest percent. Drop surplus carryover.
	B. Less than .90 ratio.	Adopt weighted average purchase and harvest percent. Retain ½ surplus carryover.
2. Decrease from current share which exceeds 5 share percentage points.	A. .90 ratio or more.	Adopt weighted average purchase and harvest percent. Retain ½ deficit carryover.
	B. Less than .90 ratio.	Adopt weighted average purchase and harvest percent. Drop deficit carryover.
3. Increase or decrease from current share of 5 share percentage points or less.	A. .90 ratio or more.	Retain current share. Drop all carryover.
	B. Less than .90 ratio.	Retain current share: Retain ½ surplus carryover.

[FR Doc. 86-2245 Filed 1-31-86; 8:45 am]

BILLING CODE 3410-11-M

Federal Register

Monday
February 3, 1986

Part III

Department of Labor

Employment Standards Administration

20 CFR Parts 701, 702 and 703
Longshore and Harbor Workers' Compensation Act Amendments of 1984 and Related Statutes; Final Rule

DEPARTMENT OF LABOR

Employment Standards Administration

20 CFR Parts 701, 702 and 703

Longshore and Harbor Workers' Compensation Act of 1984 and Related Statutes

AGENCY: Employment Standards Administration, Labor.

ACTION: Final rule.

SUMMARY: On January 3, 1985, the Department of Labor published Interim Final Rules (IFR) implementing the various provisions of The Longshore and Harbor Workers' Compensation Act Amendments of 1984 (Pub. L. 98–426, 98 Stat. 1639), and making certain technical corrections in the regulations as previously promulgated in 1973 and 1977 (50 FR 384). These were effective December 27, 1984.

The many substantive changes made by the 1984 Amendments include the exclusion from Longshore Act coverage of certain workers and a certification process for exempting from coverage certain small vessel facilities; provisions granting to the Secretary authority to exclude medical care providers and claimant representatives who have committed certain specified fraudulent activities; changes in procedures for the approval of settlements and in the application process for section 8(f) (second injury "Special Fund") relief; and new ways to deal with occupational disease claims and for hearing loss claims.

Because the 1984 Amendments provided that most of the statutory changes became effective either on the date of enactment (September 28, 1984) or ninety days thereafter, the rules were published as final subject to comment, as authorized under the Administrative Procedure Act, 5 U.S.C. 553(b)(3)(B) and 553(d)(3). The interim final regulations were to remain in effect (as extended 50 FR 39661 and 50 FR 53308) until February 3, 1986, unless extended. These final rules supercede those regulations and incorporate changes suggested by the comments received.

In addition to the changes in the interim final rules, this publication includes another change which is purely administrative in nature. The final rules at § 702.101 update the regulations to reflect changes made in 1980 to the organizational structure of the Office of Workers' Compensation Programs, which eliminated the Kansas City and Denver district offices. More specifically, section 39(b) of the Longshore Act, 33 U.S.C. 939(b), authorizes the Secretary of Labor to establish compensation districts as he deems advisable and necessary to ensure the proper administration of the Act. It has been determined that those states formerly served by Districts 11 and 12 should be transferred to the jurisdiction of Districts 10 and 14, respectively. This organizational change was designed, and has been made, to improve the administration of the Longshore Act and its extensions. All persons who had been serviced by Districts Numbered 11 and 12 have been informed of this change. Further, the changes made by this rule are not substantive but relate solely to agency organization and personnel matters. For that reason, the Department finds that, under 5 U.S.C. 553, notice and comment on the rule are unnecessary and that good cause exists to make the rule effective immediately upon publication.

EFFECTIVE DATE: These final rules shall be effective on January 31, 1986.

FOR FURTHER INFORMATION CONTACT: Richard A. Staufenberger, Deputy Director, Office of Workers' Compensation Programs, Employment Standards Administration, U.S. Department of Labor, Room S–3524, Frances Perkins Building, 200 Constitution Avenue, NW., Washington, DC 20210; Telephone (202) 523–7503 (this is not a toll free number).

SUPPLEMENTARY INFORMATION: The Interim Final Regulations (IFR) provided a period for submitting written comments which (with an extension) closed March 22, 1985. Seventy-eight comments were received during this period from a variety of interested sources including employers, insurance companies, industry representatives, lawyers who practice in this area of law, the Department of the Air Force, and a labor union.

Based on the comments received and the lessons derived from the experience of working with the IFR, a number of changes have been made. The final rule as published today sets forth only the changes made to various sections of the IFR. All other portions of the IFR are adopted as published at 50 CFR 391–407. Readers should refer to the January 3, 1985 issue of the **Federal Register** for the other sections of the regulations implementing the 1984 amendments to the Longshore Act.

Foremost among these are modifications in the Section 8(f)/second injury funds application process. Other changes involve § 701.301 (definitions), incorporating a definition of recreational vessel; §§ 702.171–702.175 (certification of exemption), revising the definition of "commercial"; and §§ 702.401–702.436 (medical care and debarment of physicians and medical care providers).

For the readers' convenience, each section of the IFR that is being amended is discussed in turn. The Longshore and Harbor Workers' Compensation Act (LHWCA or the Act) and the changes made by the 1984 Amendments (the Amendments) are discussed first, followed by a description of the IFR, a summary of the significant comments which addressed that particular point and the Department's response, and finally any changes in the final rules.

Scope of this Subchapter

The Interim Final Rules, at § 701.101, stated that these regulations (and by reference the 1984 Amendments) apply to the Longshore and Harbor Workers' Compensation Act (LHWCA) and its direct extensions, including the District of Columbia Workmen's Compensation Act of 1928 (DCCA, or the 1928 Act).

Several affected parties submitted comments asserting that the 1984 Amendments should have no application to cases that arose under the 1928 Act, which was "repealed" by the District of Columbia City Council in its own District of Columbia Workers' Compensation Act that became effective July 26, 1982 [the 1982 Act]. Further, some courts considering the question in the context of the 1984 Amendments' changes in the incidents of injured workers' tort rights have found the 1984 Amendments inapplicable to cases arising under the repealed 1928 Act. The subject is of immediate concern in continuing litigation and administration of many cases arising out of pre-1982 employment injuries. The Department has determined that all concerned parties and tribunals could benefit from a further statement of the Department's construction of the interrelationship between the 1928 Act, the 1982 Act, and the 1984 Amendments. These final rules state that construction: that the 1928 Act is to be treated as still in effect, for all purposes (including application of the current version of the LHWCA according to its terms), in cases in which the employment event or events on which the claim is predicated occurred before the new D.C. Act took effect.

Congress enacted the DCCA in 1928, in the exercise of its power to legislate generally for the District of Columbia. The DCCA provided simply that the Longshore and Harbor Workers' Compensation Act [LHWCA], enacted the previous year (44 Stat. 1424), "including all amendments that may hereafter be made thereto, shall apply" to private employment in the District. Pub. L. 419, 45 Stat. 600. In 1979,

pursuant to authority conferred by Congress in the District of Columbia Self-Government and Governmental Reorganization Act of 1973, D.C. Code sections 1–102 to –295 (1981), the District of Columbia City Council and Mayor enacted the District of Columbia Workers' Compensation Act, D.C. Law 3–77 (July 1, 1980), D.C. Code sections 36–301 to –344 (1981). After amendments extending its effective date, this act took effect on July 26, 1982. It contains no provision, other than that specifying its effective date, delimiting the class of cases to which it is applicable. It does contain a provision that the 1928 Act "is hereby repealed." *Id.* section 46, 27 D.C. Reg. 2503, 2541.

The local government and the United States Department of Labor, responsible for administration of the old law, were in full agreement that the new law did not disturb the operation of the old one with respect to pre-1982 cases, and the District of Columbia regulations promulgated under the new law limited its application to "injuries which occur on or after July 26, 1982." (Code of D.C. Reg. section 3602.1, 29 D.C. Reg. 5540 (Dec. 17, 1982)). No one then challenged the proposition that the 1928 Act was fully viable for purposes of applying the LHWCA to determine and enforce liabilities *continuing* to accrue for *post*-1982 medical services, disabilities, and survivorship related to injuries arising out of employment before the new law took effect. Such continued applicability of the 1928 Act was assumed and stated without analysis by both the District of Columbia Court of Appeals (*Garrett* v. *Washington Air Compressor Co.*, 466 A.2d 462, 462 n.1 (D.C. 1983); *Carey* v. *Crane Service Co.*, 457 A.2d 1102, 1103 n.2 (D.C. 1983)), and the federal Court of Appeals for the District of Columbia Circuit (*Crum* v. *General Adjustment Bureau*, 738 F.2 474, 475 n.2 (D.C. Cir. 1984); *Randall* v. *Comfort Control, Inc.*, 725 F.2d 791, 792 n.1 (D.C. Cir. 1984); *Stevenson* v. *Linens of the Week*, 688 F.2d 93, 95 n.1 (D.C. Cir. 1982)). Conversely, the local administrative authorities denied claims under the new law for post-1982 consequences of pre-1982 employment.

The LHWCA was amended on September 28, 1984. The Amendments have detailed effective-date provisons making many of their changes in the law applicable to future determinations of rights and liabilities based on *past* injuries and deaths, as well as those based on injuries occurring thereafter (*Id.* § 28, 98 Stat. 1655). The question whether these amendments to the LHWCA apply to liabilities under the 1928 Act has been presented in several contexts.

First, in *WMATA* v. *Johnson*, 104 S.Ct. 2827 (1984), the Supreme Court had interpreted sections 4(a), and 5(a) of the LHWCA as extending the tort immunity of an injured worker's employer to the "general contractor" to whom the immediate employer is a "subcontractor," under nearly all circumstances. Hence, the Washington Metropolitan Area Transit Authority (WMATA) was held immune to tort liability, based on its negligence, to injured employees of its subway-construction contractors. The cases that had been before the Supreme Court, many other pending tort suits against WMATA to which the *Johnson* ruling applied, and still more suits against other "general contractors" similarly situated, were still pending (final judgments not yet having been entered) when the LHWCA Amendments of 1984 were enacted. The plaintiffs immediately relied upon the amendments to sections 4(a) and 5(a), which were expressly made applicable to pending cases as well as new ones (1984 Amendments section 28(a), 98 Stat. 1655) and were expressly intended to preclude any still-pending cases from dismissal on the basis of the *Johnson* decision. (Conference Report, H.R. Rep. No. 98–1027, at 24 (1984)). In cases arising under the LHWCA itself, this position was readily sustained, and dismissals under *WMATA* v. *Johnson* were reversed on the basis of the 1984 Amendments. *E.g., Louviere* v. *Marathon Oil Co.*, 755 F.2d 428 (5th Cir. 1985). In cases under the old DCCA, however, WMATA and other defendants asserted, inter alia, that the 1984 LHWCA Amendments could have no operation under the "repealed" 1928 Act. Although at least one judge of the U.S. District Court for the District of Columbia had apparently held that the *Johnson* decision was no longer the applicable law, (*Leher* v. *AFGO Engineering Corp., Civ.* No 81–1593 (D.D.C. Oct. 10, 1984) (Gasch, J.) (unpublished order denying summary judgment for defendant), WMATA's position was accepted by Judge Pratt in *In re Metro Subway Accident Referral*, Misc. No. 82–306 (D.D.C. Dec. 18, 1984). The *Metro Subway* opinion "accept[ed] as a fact that the Congress in enacting the 1984 amendments intended the amendments to sections 4(a) and 5(a) of the [LHWCA] to apply to the District of Columbia and therefore to this litigation," but reasoned that "[t]he crucial question is not whether Congress possessed the power and had this intent, but whether the means it employed achieved this result." (*In re Metro Subway Accident Referral, supra*, Slip op. at 7). The court concluded that, "[h]aving been repealed, the 1928 Act could not be affected by amendments to the [LHWCA]," and that the effect of the general saving statute, 1 U.S.C. 109, is only to "preserve . . . accrued rights and liabilities" that "exist[ed] at the time of the repeal." This decision has been appealed to the District of Columbia Circuit, which also has the issue before it in other indistinguishable cases.

The IFR, at § 701.101(b), provided that the new regulations (and, by implication, the amendments they embodied) would apply to old DCCA cases. This assertion has been challenged in comments on the interim final regulations, submitted on behalf of WMATA, in reliance on the *Metro Subway Accident Referral* opinion.

The applicability of the 1984 Amendments to old-DCCA cases was presented again in tort litigation in *O'Connell* v. *Maryland Steel Erectors, Inc.*, 495 A.2d 1134 (D.C. 1985). *O'Connell* involved the viability of an injured worker's tort suit against a negligent third party, where the suit was filed more than six months after entry of a formal award of compensation. Before the 1984 Amendments, LHWCA § 33(b) provided that, perhaps subject to rare exceptions based on conflicts of interest, the worker's right to sue was irrevocably assigned to the employer six months after an award; under the 1984 Amendments, the right reverts to the employee if the employer does not exercise it within 90 days. The court generally followed the reasoning of the *Metro Subway* decision in holding that because the injury was covered by the old DCCA rather than the LHWCA itself, the amendment was wholly inapplicable. It reasoned that because of its repeal in 1982 by the new DCCA, the old DCCA "had ceased to exist" and "was no longer on the books" before 1984, so that the Amendments "did not affect any rights created by [the] prior law." 495 A.2d at 1142. The court denied any deference to the IFR at 701.101(b), on the ground that "provisions dealing with the jurisdiction of the courts are not within the province of an agency to interpret." *Id.* at 1144. And it determined that the 1984 Amendments were not "meant . . . to cover persons injured in purely land based occupations" and "affected only the maritime industry." *Id.*

Contrary to the reasoning *Metro Subway* and *O'Connell*, the proposition asserted in the IFR—that the LHWCA Amendments of 1984, insofar as they

apply in terms to "pending claims," apply to such claims under the old DCCA—is both sound and, as a practical matter, strictly necessary. The "general saving statute," 1 U.S.C. 109, not only preserves "liabilit[ies] incurred" under a repealed statute, but further provides that for purposes of determining and enforcing such liabilities the repealed statutes "shall be treated as still remaining in force." Hence, as to the preserved claims and liabilities, the 1928 Act is "still . . . in force." The terms of the statute that is thus preserved for the relevant class of rights and liabilities (the 1928 Act) expressly make the LHWCA *as amended* applicable; and the LHWCA, as currently amended, includes provisions added in 1984 which are expressly applicable to claims arising out of employment before 1982 as much as to those arising after 1984.

The contrary view expressed in *In re Metro Subway Accident Referral, supra,* and *O'Connell, supra,* would appear to have consequences far beyond the inapplicability of the 1984 LHWCA Amendments to rights and liabilities under the 1928 Act. The statement that the saving statute preserves only *"accrued* rights and liabilities" "existing at the time of the repeal," *In re Metro,* Slip op. at 10, would lead to legal and administrative chaos. The only rights and liabilities "accrued" under the 1928 Act as of July 26, 1982, were for medical services rendered by that date, disability or survivor status continuing to that date, attorneys' services performed up to that date, and special fund assessments made up to that date. Thus, if only such "accrued" liabilities and rights were preserved for enforcement after that date, there would be no basis for the *continuing* accrual of rights and liabilities under the 1928 Act after its repeal, even in circumstances where the *employment events* on which the rights and liabilities are based occurred before then.

The Department of Labor, like all relevant judicial tribunals, the local District of Columbia administrators, and indeed all insurers and self-insurers responsible for payments up to now under the old DCCA, *have certainly assumed the contrary*—i.e., that what is preserved under the old DCCA is all rights and liabilities, whenever "accruing," arising out of *employment* events before July 26, 1982. The future liabilities resulting from those events, though contingent in duration and amount on future events (and hence neither "accrued" nor "vested"), were, in the language of the general saving statute, "incurred" by the employers or insurers at the time of the employment events. *O'Connell*'s reasoning that the old DCCA "had ceased to exist" and "was no longer on the books" in 1984 is as inconsistent with the court's own application of the pre-1984 version of the LHWCA, through the 1928 Act, as it would be with application of the amended version. Pursuant to the general saving statute, the 1928 Act *remains in force* for all circumstances in which the employer's liabilities were "incurred" before its repeal, even if those liabilities had not yet accrued. The *O'Connell* court also erred in reasoning that Congress and the President intended the 1984 Amendments to apply only to maritime, not "purely land based," employment; even apart from the old DCCA, the Amendments certainly apply to entirely non-maritime employment through the other statutory extensions of the LHWCA (see 20 CFR 701.101(a)).

Since the rights and liabilities preserved by the general saving statute included liabilities that were not "accrued" or "vested," but were *contingent* (even though already "incurred"), the application of new legislation readjusting some of those liabilities upwards and others downwards is entirely valid. It is clear that the District of Columbia government's intent and understanding when it enacted and implemented the 1982 Act was that the 1928 Act would remain fully in effect with respect to past *and future* liabilities deriving from pre-1982 employment events. It is equally clear that when Congress passed the 1984 LHWCA Amendments, it intended to readjust and to rebalance the rights and liabilities in *all* cases in which the LHWCA was the measure of those rights and liabilities.

In sum, the reasoning of the opinions in *In re Metro Subway Accident Referral* and *O'Connell* is unsound and would have extremely unfortunate consequences. The question should not be characterized as whether a repealed statute can be amended, but whether an incorporating statute which remains in effect as to a class of cases should apply the incorporated statute according to the latter's current terms. The 1928 Act remains in effect pursuant to the general saving statute, so as to apply the *current* version of the LHWCA (where its terms so provide), to determine liabilities resulting from employment events before July 26, 1982.

The IFR stated that the 1928 Act applies to "injuries or deaths sustained prior to July 26, 1982," when the new local legislation superseding the 1928 Act took effect. 20 CFR 701.101(b), 50 FR 391. This statement is substantially revised for clarity.

First, when an "injury [is] sustained" is ambiguous, and to the extent it is the appropriate standard it is defined differently for these purposes than for others. For example, if a worker whose leg was injured at work in 1980 falls while at home, because of the impaired leg, in 1984, that injury is "consequential" to the 1980 injury, and its consequences and sequellae are compensable based on their relationship to the earlier injury; yet the compensable consequential injury was "sustained" in 1984. It is not compensable under the new local legislation, and must reasonably be compensable under the old law. Further, the "injury" represented by an occupational disease is not considered for other purposes to "occur," or to be "sustained," until it causes symptoms; but for the purpose of determining whether a workers' compensation statute *applies* to such an injury ("coverage"), the relevant legal provisions are those in effect at the time of the *employment exposure* to the conditions that cause the disease. Finally, coverage of a *death* claim does not turn on when "death [is] sustained." The LHWCA itself, for example, until its shoreward extension in 1972, covered only employment afloat; it was never applied to cases of death *after* the 1972 amendments, related to employment events *before* 1972 in *shoreside* longshoring or shipyard work. See generally *Stark* v. *Bethlehem Steel Corp.*, 10 BRBS 350, 353–354 (1979); *Verderane* v. *Jacksonville Shipyards, Inc.*, 14 BRBS 220.15, 223–224 (1981); *id.* at 228 (concurrence); *id.* at 231 (dissent). Similarly, a death in 1985 resulting from a 1981 employment injury will not be within the coverage of the local DCCA that took effect in 1982, any more than an occupational disease, becoming manifest in 1985, arising out of employment exposure before 1982.

Workers' compensation laws operate upon the employment relationship. The occurrence of an event or events in the course of that relationship is the foundation of any compensation-law liabilities that arise thereafter. The insurance requirement that is a socially and practically critical aspect of compensation legislation attaches to the *conduct* of *covered employment.* The strictly standardized form of compensation insurance policy defines the liabilities covered by a policy for a specified term, as all those arising out of *employment* during the policy's term, regardless of when the liabilities arise. Hence a policy issued to a District of

Columbia employer under the 1928 Act for the year 1981 will cover the employer's liability, *under the old law* (including any statutory amendments to that law that are applicable to the case), for a 1985 death related to *employment* in 1981; but the employer's 1985 insurance policy (if the employer is still in business), under the new law, will not include such liability.

Thus, highly unsettling consequences would follow if the distinction between 1928-Act and 1982-Act cases were different from the distinction between what is covered under old-DCCA insurance policies and what is covered on new-DCCA policies. Insurers would be relieved of liabilities they contracted to bear, and either some cases that would otherwise be compensable would not be or the liabilities in those cases, if under the 1982 Act, would be uninsured and would fall on the employers themselves even though they were continuously insured under one law or the other.

The courts that have included footnotes in their opinions explaining their continued application of the old DCCA in the cases before them after its repeal have stated a variety of bases—that "events in this case occurred prior to the passage of" the 1982 Act, (*Carey* v. *Crane Service Co.*, 457 A.2d 1102, 1103 n.2 (D.C 1983) (employee's tort suit)), or that "all of the pertinent events occurred bofore [its] effective date," (*Garrett* v. *Washington Air Compressor Co.*, 466 A.2d 462, 462 n.1 (D.C. 1983)(same)), or that the "injury and claim occurred" before repeal, (*Stevenson* v. *Linens of the Week*, 688 F.2d 93, 95 n.1 (D.C. Cir. 1982) (review of old-DCCA award)) or that the "claim arose before the enactment" of the repeal, (*Crum* v. *General Adjustment Bureau*, 738 F.2d 474, 475 n.2 (D.C. Cir. 1984) (same)), or that "the claim was filed before the effective date" of the repeal. (*Carter* v. *Director, OWCP*, 751 F.2d 1398, 1399 n.1 (D.C. Cir. 1985) (same)). None of these statements was the result of consideration and resolution of a disagreement between the parties, nor would the different standard here promulgated have changed the results. It is appropriate to preserve the applicability of the 1928 Act for *all* liabilities arising out of *employment* before its repeal. The general saving statute, 1 U.S.C. 109, may be seen to support this analysis. It preserves any "liability incurred" under a statute before its repeal. The liability of an employer under a workers' compensation statute is "incurred" at the time of its conduct of the employment out of which a disabling injury arises, even though such liability may not even begin to *accrue* until later.

ALJ decisions issued under the 1928 Act, as well as decisions issued by the District of Columbia under the 1982 Act, have concluded that disabilities resulting from employment events that occured prior to July 26, 1982, are subject to the provisions of the 1928 Act even though such disabilities did not become mannifest until after the 1982 Act became effective. *Coward* v. *Peter Kiewit & Sons, Inc.*, OALJ Nos. 85–DCW–38 to –40 (Aug. 30, 1985) (1928 Act); *Pryor* v. *James McHugh Construction Co.*, OALJ No. 85–LHC–114 (Sept. 9, 1985) (1928 Act); *Jones* v. *PEPCO*, H&AS No. 83–182 (Oct. 23, 1985) (1982 Act).

Accordingly, these final rules revise § 701.101(b) to state that the old law applies, not to "injuries or deaths sustanied" before its repeal, but to "all claims based on *employment events* before July 26, 1982."

Definition and Coverage

The 1984 Amendments changed the Act's coverage in two significant ways: by specifically excluding certain categories of workers' from coverage, and by providing that certain facilities which work on small vessels (as defined) may be certified as exempt from coverage. Both are dependent on coverage of the worker under a state workers' compensation law. The IFR incorporated those changes, providing where possible definitions of the terms used in the statute and establishing a procedure for certifying small vessel facilities. A number of comments were received on these portions of the IFR.

One commentator objected to that section of the IFR which excluded "longshore cargo checkers and cargo clerks" from the definition of "individuals employed exclusively to perform office clerical, secretarial, security, or data processing work" (20 CFR 701.301(a)(12)(iii)(A)). The commentator contended that such exclusion constituted an expansion of coverage beyond that which existed prior to the amendments. The Department does not agree. First, the legislative history of the 1972 Longshore amendments clearly states that "checkers, for example, who are directly involved in the loading or unloading functions are covered by the new amendment." S. Rpt. No. 92–1125, 92D Cong. 2d Sess., 13 (1972); H. Rpt. No. 92–1441, 92D Cong. 2d Sess., 11 (1972). The Supreme Court sustained this position in *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249, 271 (1977). More importantly, the Conference Managers Statement specifically states with regard to the 1984 Amendments that "cargo checkers and clerks remain fully within Longshore Act jurisdiction." H. Rpt. 98–1027, 98th Cong. 2d Sess., 23 (1984). See also Statement of Congressman George Miller, 130 Cong. Rec. H9731 (Daily ed. September 18, 1984). Because Congress expressly stated its intent to include within the coverage of the Act employees classified as longshore cargo checkers and clerks as well as other individuals performing tasks related to cargo movement, no change has been made to § 701.301(a)(12)(iii)(A) of the regulations.

Recreation

The Amendments remove from coverage those workers engaged in the building, repair or dismantling of recreational vessels under sixty-five feet and those employed by a "recreational operation", but does not define the term "recreational." In the preamble to the IFR, the Department specifically invited comments suggesting definitions for this term; thirteen were received. Each comment recommended that the Department should adopt the definition of "recreational vessel" set forth at 46 U.S.C. 2101 (25): "recreational vessel means a vessel: (A) Manufactured or operated primarily for pleasure, or (B) leased, rented, or chartered to another for the latter's pleasure." It was also recommended that the definition of "recreational operation" should be expanded to include activities conducted for the personal pleasure of the individuals involved. The Department accepts these suggestions and has amended § 701.301(a)(12)(iii) (B) and (F) to reflect these changes.

Marina

Among the categories of workers excluded from the Act's coverage are marina employees (except for those building, repairing or dismantling the structure). Comments related to the term marina employees in the IFR urged the Department to define "marina" and to specify which marina employees would be excluded from coverage.

The legislative history provides no guidance and research provided no definition of marina in other statutes which might be adopted.

Given this lack of guidance, the Department has not defined the term in the final rules, nor has it specified which employees may be included under this exclusion. The Department's position is that every employee of a marina (except those specifically excluded from the term in the statute) would be excluded from coverage.

One commentator questioned why the Department's IFR used the phrase "whether or not over the navigable waters of the United States" only with regard to the exclusion of individuals employed by a club, camp, recreational operation, restaurant, museum or retail outlet (§ 701.301(a)(12)(iii)(B)). Such usage, the comment noted, implied that the exclusion set forth in section 2(3) (A), (C), (D), (E) and (F) of the Act would not apply to persons injured while working over water. Further review of the statue and its legislative history support the view that the phrase in question applies to all excluded groups. In explaining the scope of section 2(a) of P.L. 98–426 which amended Section 2(3) of the Longshore Act, Congressman John N. Erlenborn said:

> The consensus among the conferees was to reaffirm the purposes of the 1972 jurisdictional changes, and in that light, the substitute narrowed its focus to certain fairly identifiable employers and employees who, although by circumstances happened to work on or adjacent to navigable waters, lack a sufficient nexus to maritime navigation and commerce.

130 Cong. Rec. H9733 (Daily ed. September 18, 1984).

To correct this oversight and to eliminate any possible confusion on this point § 701.301(a)(12(iii) has been amended to include the phrase quoted above so that it applies to all subsections and not merely to subsection (B).

Small Vessel Certification

The Amendments exempted from coverage those facilities certified by the Secretary to be engaged in building, repairing, or dismantling exclusively small vessels as defined. The definition of small vessels includes only commercial barges under 900 lightship displacement tons, and commercial tugboats, towboats, crewboats, supply boats, fishing vessels "or other work vessels" under 1600 tons gross. Two comments addressed this subject which has been revised in the final rules.

In § 702.172(a)(2) of the IFR the Department excluded from the definitions of commercial vessels "military supply boats, patrol boats, utility vessels, ferries, Corps of Engineers dredges, pressure barges or Coast Guard vessels." Two commentators suggested that most of these vessels qualified as "small vessels" within the meaning of section 3(d) of the amended Act and recommended that the regulations be changed accordingly.

The Department agrees and the definition of "commercial" has been modified to exclude from the term only military and Coast Guard vessels. Although the same commentators also maintained that military supply vessels should be included within the definition of small vessels, a review of the legislative history convinces the Department that—except for Army Corps of Engineers Dredges—military vessels of whatever nature are excluded from the term "commercial" vessels.

Certification Process

The IFR at §§ 702.171–702.175 describe the certification process through which a facility can gain exemption from coverage. Two points of clarification were suggested in the comments and experience has pointed out the need for additional clarification; corresponding changes have been made in the final rules.

Section 702.175(a) of the IFR provides examples of when the exemption granted under section 3(d) of the Longshore Act will terminate when the exempted facility engages in the repair of a non-small vessel or enters into a contract containing provision for a Federal maritime subsidy. No guidance was given, however, as to when the exemption would terminate should the facility agree to build a non-small vessel. Section 702.175(a) has been amended to provide that the exemption would cease to apply when the construction first takes on the characteristics of a vessel, that is, when the keel is laid. See 129 Cong. Rec. S8661 (Daily ed. June 16, 1983).

Another comment suggested that the requirement at § 702.174(d)(2) for posting a notice "along" those areas of an exempted facility which are over navigable waters, or upon any adjoining pier, wharf, dock, facility over land for launching vessels or for hauling, lifting or drydocking vessels (and are thus not exempt from coverage) be modified to read "at" the entrance, in order to avoid an unnecessarily burdensome posting requirement. That suggestion has been incorporated in the final rules.

Another comment suggested that § 702.174, which requires that a description of the facility be filed as part of the application, should specifically require a site plan or aerial photograph. Most applicants under the IFR have met the description requirement through submission of just such material and therefore the Department has concluded that such a change is not only proper but that it would not add any additional burden on those facilities seeking certificates of exemption; § 702.174 has therefore been revised to require the submission of a site plan or aerial photograph.

Coverage Under State Workers' Compensation Laws

Both the exclusion from the definition of employee and the small vessel certification exemption provisions of the Amendments are contingent on coverage under a state workers' compensation program. Several commentators pointed to a potential conflict with state laws which require a claimant first to file under any Federal law which might provide coverage. The commentators suggested such state law provisions could void the new exclusions from coverage intended by Congress in enacting the 1984 Amendments. They suggested that the regulations overrule such state laws.

The Department recognized that a conflict with State laws may arise and in § 701.401 set forth its position that any such law should not be used to avoid the changes in coverage made by the 1984 Amendments. *See* Discussion at 50 FR 386. Thus, the statute itself requires an employee who falls within one of the categories of workers' excluded from coverage of the Act, to first file under a State workers' compensation program. Only if the individual is specifically excluded from coverage under the State law would such individual retain rights under the Longshore Act. No changes have been made in this section of the IFR, in part, because experience has not demonstrated that further clarification is necessary or appropriate.

Subpart B—Claims Procedures

The Amendments made several changes in the notice and filing provisions of the Act (e.g., Sections 12 and 13, Longshore Act), which generally require that a notice of injury be filed within thirty days and the claim within one year of the date of injury. For occupational diseases, however, the Amendments provide those time limitations are one-year and two-years, respectively, and further define when an "injury" occurs.

In addition to changes in the time frames for submission of notice and claim, the Amendments call for designating a particular individual to whom the notice is to be given ("designated official"). Finally the Amendments provide that when no time is lost from work because of an injury, the employer is required only to keep a record of the injury but need not submit notice to the deputy commissioner. The IFR reflect these changes in the time limits and establish the procedure for designating an official. Comments on those subjects addressed several topics:

Designated Official

The Amendments provide that each employer designate an official to receive notice and claims. This official (in the language of the Amendments) must be a first line supervisor, local plant manager or personnel office official. The IFR (at § 702.211(b)(1)) described the type of individual who may be designated, consistent with the positions described in the Amendments; following the language of the Amendments, they called for "an individual" to be designated. They also noted that where an individual has not been properly designated, the time limitations might not be used as a defense, and that, for retirees, notice might be filed with any officer or person in charge of the business, whether or not an official had been designated.

One comment urged the Department to broaden the categories of individuals (first line supervisors, local plant managers or personnel office official) who may be designated, to include such individuals as the health facility nurse.

The Department notes the language of the statute specifically identifies the categories of individuals from which the designee "shall" be selected. The legislative history shows that this provision was included to ensure that an injured employee not be excluded from benefits because he/she failed to provide notice to the appropriate person when that person was obscure or at a distant location. The purpose was to make it easier for the employee to meet the notice requirement, not more difficult. Accordingly, longstanding customs should not be changed and the provisions at § 702.211(b)(1) have been broadened to allow other individuals to be designated.

Another comment also suggested that the regulations permit more than one individual to be designated at a facility which is so large that reporting only to one individual might be difficult. The final rules remove the word "an" and allow the designation or more than one individual, at the discretion of the employer. The Department expects that this multiple designation would only be where the size of the facility required it, and notes that the identity of all designated officials must be posted.

Filing a Claim for Occupational Disease: Sections 702.212(b) and 702.222(c) of the IFR provided that if the claim is for an occupational disease, both the notice and claim time limitation provisions did "not begin to run until the employee is disabled, or in the case of a retired employee, until a permanent impairment exists." Commentators objected to this provisions, stating there was no statutory authority for distinguishing occupational diseases from any other claim.

In making this distinction, the IFR reflect the language of the Amendments, which provide that the date of injury in occupational disease cases is the date the claimant becomes aware of the relationship between the employment, the disease and the death or disability. The Amendments for the first time provide a separate definition of disability for retired employees (section 2(10) ". . . such term shall mean permanent impairment . . ."). For those who are not retired the Amendments require that the date of injury begins only when there is a disability; until there is a disability to connect to the employment, there is no injury and the time limitation provisions do not begin to run. The regulations remain unchanged.

No Lost Time Cases: Section 30(a) of the Act was amended to provide that a report of injury need not be submitted by the employer where the injury does not result in time lost from work. This change is reflected in the IFR at § 702.201. The regulations specify which type of record to keep (§ 702.202) and for how long these must be retained (§ 702.111). One comment requested clarification on the record keeping requirement, noting that records of injury for LHWCA claims also served to meet the record keeping requirements of the Occupational Safety and Health Act (OSHA). The comment indicated that the information required by the Act (§ 702.202) and OSHA, did not coincide. To clarify, § 702.201(b) has been revised to provide that compliance with OSHA injury report record keeping requirements would satisfy the record keeping requirements for no-lost-time injuries under LHWCA.

Another comment on the no lost time reporting requirement concerned its affect on the running of the time limitation provisions under sections 12 and 13 of the Act (§§ 702.211 and 702.221). The commentator requested clarification on when the limitations period would begin in those cases where there is no immediate compensable disability. Section 30(a) of the Longshore Act requires covered employers to file reports only where the injury "causes loss of one or more shifts of work." Thus, where an injury does not result in lost time, the employer is not under a duty to file a report with the Secretary. In such cases (e.g., no lost time) the filing of a report cannot cause the time within which a claim must be filed (Act section 13) to commence. This conclusion is premised on the fact that: (1) Congress recognized that an employee could not be "injured" until he or she suffered an impairment (either presumed or actual) to that person's earning capacity, and (2) Congress deemed that, in the absence of such impairment or loss, no report should be required from the employer. *See* generally *Marathon Oil Co.* v. *Lundsford*, 733 F. 2d 1139 (5th Cir., 1984); *Bath Iron Works Corp.*, v. *Galen*, 605 F. 2d 583 (1st Cir. 1979). Because no report is required by section 30(a) in no lost time cases, the filing of such reports cannot be deemed to start the statute of limitations within which the employee must file a claim. It is the Department's further position that no report should be filed with the OWCP district office in no lost time cases.

General Notice Provisions: Other issues concerning the notice and claim provisions of the IFR included:

—The elimination of the requirement that the claimant deliver a notice of injury to the deputy commissioner. Because few notices are actually delivered to the deputy commissioner, the IFR changed the old wording from "shall" to "may", since it more accurately reflected existing practice. Several commentators questioned whether the Department could do away with the statutory requirement. The statute also gives the deputy commissioner authority to waive this requirement. Since this provision represents merely a formalization of a longstanding practice, the regulations remain unchanged on this point.

—The employee may provide notice of an injury orally, under the IFR. Some commentators suggested the deputy commissioner make a record of all oral notices received. This practice will be required through Department procedures.

—The IFR (at § 702.216) failed to reflect accurately the statutory changes effected by the Amendments to section 12(d) of the Act. The final rules provide, as the statute now does, that a claim will not be barred by untimely notice if *either* the employer had knowledge of the assertedly work-related injury within the applicable notice period *or*, despite the absence of timely notice or knowledge, the employer or carrier was not prejudiced by the delay beyond the applicable period.

Settlements

The settlement provisions of the IFR were the subject of twenty-eight comments. Most objected to the settlement provisions of the IFR as going beyond the intent of Congress.

The 1984 Amendments amended section 8(i) of the Act in several important respects. While it retained the requirement that settlements under the Act must be approved by the deputy commissioner or administrative law judge, the Amendments altered the basis for review, requiring that the settlement application be approved unless it was found to be "inadequate or procured by duress"; it imposed a thirty-day time limitation period within which the application must be acted on, and provided that where the parties are represented by attorneys, approval was automatic unless specifically disapproved within thirty days; settlement of medical and/or death claims was allowed; and it eliminated the commutation provision under section 14(j) of the Act.

The IFR, at §§ 702.241–702.245, established procedures for implementing these changes. These clarified that the thirty-day period for approval of settlement applications does not begin to run until the adjudicator (meaning the ALJ or deputy commissioner) receives a completed application and that where the claim was pending at the OALJ, that the time does not begin until five days before the hearing is scheduled, so as to ensure that the case is assigned to a judge and the application will be reviewed.

At § 702.242, the information necessary for a complete settlement application was described; included was a requirement for personal information on the claimant's education and skills, an explanation as to why the settlement amount is adequate, and a current medical report. While the IFR did not define adequate in most situations, they provided that for cases where compensation is being paid under an order and there are no outstanding issues, a settlement amount which does not equal the present value of future compensation payments commuted at a discount rate (for which comments were invited), would be considered inadequate unless shown to be adequate.

The comments received addressed a variety of issues concerning the settlement provisions. Many commentators considered the provisions to be contrary to the intent of Congress which limited the basis for denial of settlements and required action on a settlement application within thirty days. In addition, several commentators stated that the provisions denying the right to settle survivors claims prior to the employee's death were inconsistent with the statute. These comments and the response are discussed in turn below.

Information Required in the Settlement Application: The IFR at § 702.242, describe the information necessary for a complete settlement application. A number of objections to this provision were received.

First, a number of comments asserted that the amount of information required was burdensome and that the requirement would complicate, not simplify, the settlement process as Congress had intended. Some noted that much of the information required was already a part of the case record and the applicant should not be required to duplicate the information. Others objected to the provisions in §§ 702.242(b) (5) and (6), which required a "current medical report" and "an estimate of the cost of future medical treatment", respectively.

The information required by § 702.242(b) remains essentially the same in the final rules. While Congress narrowed the basis for evaluating a settlement application and imposed a time frame within which to take action, it retained the requirement that the deputy commissioner or administrative law judge approve the settlement. The information required in the settlement application is essential for the proper evaluation of the terms of the settlement, and is based on those factors which are considered essential in evaluating the settlement, as described by the Benefits Review Board (BRB) in *Clefsted* v. *Perini North River Associates*, 9 BRBS 217 (1978). However, the Department agrees with one commentator who suggested that the adjudicator should not be required to evaluate the "probability of success" before ruling on the application. This element, the Department agrees, is very difficult to evaluate and therefore should not be a separate factor to consider. Section 702.243(f) has been amended to delete this as a separate criterion to be evaluated. However, it is a circumstance which the adjudicator may consider in deciding whether the settlement should be approved.

The application requirements as established in the IFR are not only essential to the approval process, but have not proven to be burdensome. As many of the comments pointed out, much of the information is already in the case record, presumably submitted by the parties seeking the settlement. Moreover, experience in the past year has revealed no significant difficulties incurred by the parties in obtaining the required information.

Several comments suggested that § 702.243(g) be deleted because it was inconsistent with the 1984 amendments which repealed section 14(j) of the Act. The Department does not agree. Rather, the Department has determined that § 702.243(g) provides a sound annuity basis for determining the adequacy of settlements in those cases where benefits are being paid pursuant to a final compensation order and there are no substantive issues in dispute between the parties. This conclusion is consistent with the statement of Professor Larson in his treatise on workers' compensation wherein he noted that:

> [1] lump-sum settlements, when they are authorized by statute, are not compromises in the usual sense; that is, they do not assume concessions and adjustments in the amount of payment because of the existence of a disputed issue. Rather, they are essential commutations, and should be calculated on a sound annuity basis in accordance with any statutory rules provided. Larson, The Law of Workmen's Compensation, Vol. 3 section 82.71, p. 15–590–1. (Footnotes omitted).

In response to the Department's request many comments were received concerning the discount rate to the applied under § 702.243(g). The comments uniformly objected to the 5 per centum true discount rate set forth in the IFR. A more reasonable, and therefore acceptable, rate, some commentators suggested, was the interest rate provided for in section 302(f) of the The Federal Courts Improvement Act of 1982, Pub. L. 97–164, 96 Stat. 55. The Department agrees and has revised § 702.243(g) to require a discount rate identical to the rate specified at 28 U.S.C. 1961.

Many comments objected to the provisions of § 702.241(g) which prohibit parties to a disability claim from settling potential future survivors' claims at the same time they settle the employee's claim. The statute itself states that only "the parties to [a] claim for compensation" may agree to settle the claims. Since a claim for survivor benefits does not arise until the employee's death, there is no claim that can be settled. Therefore, under no circumstances may a person seeking benefits under section 7 or 8 of the Act settle a claim for survivor benefits which may be filed under section 9 of the Act.

While the settlement application requirements have remained essentially the same, certain modifications have been made in response to the comments and on the basis of experience. In addition, to ensure that information is required only where it is necessary to

properly evaluate the application, the Department is establishing procedures which allow deputy commissioners and ALJs flexibility in determining exactly what information is required in each case. Moreover, § 702.242(b)(5) has been changed to clarify that a new medical report is not always required; where permanency was established prior to the settlement, a report made at that time might meet the requirement. This avoids the unnecessary expense of a medical examination in cases where reports on file or in existence are adequate.

Several comments objected to that portion of § 702.243(a) which provides that the failure to submit a complete settlement application shall toll the thirty date period set forth in section 8(i) of the Act, 33 U.S.C. 908(i). The Department believes that this provision is both reasonable and necessary to ensure that the deputy commissioner or administrative law judge can properly evaluate the proposed settlement agreement in light of the statutory criteria. Without this limitation a settlement could be deemed approved without appropriate review, a result contrary to the Congressional directive that settlement proposals must be submitted to the Department for its evaluation and approval or disapproval.

Special Fund/Second Injury Cases

The special fund was established by section 44 of the Act to pay certain costs which are to be shared by the industry in general. Foremost among these is under section 8(f), which, under certain circumstances, limits to 104 weeks the liability of an employer/carrier in cases involving a second injury to a previously partially disabled employee. Section 8(f) was designed to discourage employers from discrimination in the hiring or retention of handicapped employees. As administrator of the fund, the Director, OWCP, is responsible for monitoring the fund and defending it against improper applications for relief.

The fund comes from an annual assessment, which prior to the 1984 Amendments was based on the amount of compensation and medical costs paid during the preceding year. Also, prior to the Amendments, an employer could apply for section 8(f) relief either at the deputy commissioner level or at the first hearing conducted by an ALJ. In the 1984 Amendments, Congress made two significant changes relating to the fund and to section 8(f) in particular. First, the assessment formula was modified, and second, the employer was required to raise the issue of special fund relief before the deputy commissioner. The IFR, at § 702.146 reflected the change in the assessment formula, and at § 702.321 established procedures for determining the applicability of section 8(f). Both were the subject of a significant number of comments and have been modified in response to those comments.

Assessment Formula

A number of comments expressed concern that the assessment formula still included the amount paid for medical benefits. These commentators pointed out that Congress changed the wording of the statute to delete the reference to medical payments and that continued inclusion of medical benefits in the assessment formula was inconsistent with the amended Act. Further review of the statute and the legislative history established that although section 44(c)(2) of the 1972 Longshore Act did require that the assessment be based on the "total compensation and medical payments made . . . by each carrier and self-insurer", the 1984 amendments (Pub. L. 98–426 § 24(a)) deleted the reference to medical payments. Under section 44(c)(2) as amended, the assessment is now dependent only on the compensation payments made during the preceding calendar year. Because "compensation" as defined in section 2 (12) of the Act does not include medical benefits, the Department now agrees that the formula set forth in the IFR should be changed. Accordingly, § 702.146(c) has been revised to delete the reference to medical payments. It should be noted, however, that this change will be applied only to assessments levied after publication of this final rule.

Section 8(f) and the Application Process

The requirement, at § 702.321, that a fully documented application must accompany the request for Section 8(f) relief brought more comments than any other section of the IFR. The 1984 Amendments for the first time required that all requests for section 8(f) relief, together with a statement documenting the employer's entitlement to such relief, must be presented first to the deputy commissioner before the request may be considered. Failure to present the request at that level operates as an absolute bar to relief, unless the employer/carrier could not have reasonably anticipated that sectioin 8(f) would be an issue.

The IFR at § 702.321, set out the procedures for determining the applicability of section 8(f), established when the request must be made, detailed what information must be contained in the application and set time limitations within which the request and the documentation must be submitted (90 days from the date when permanency first becomes an issue but no later than the informal conference).

Over thirty comments addressed this issue; some raised concerns with various aspects of the application process such as the ninety-day time requirement. Others asserted that the rules requiring a fully documented application and a recommendation by the deputy commissioner on the 8(f) request go beyond both the intent of Congress and the letter of the Amendments. These commentators maintained that the 1984 Amendments require only that the issue be raised before the deputy commissioner and do not require the submission of supporting documentation nor a decision on the issue by the deputy commissioner.

In drafting the IFR, the Department carefully considered the legislative history of the Amendments, which shows that this requirement in section 8(f)(3) is one of several changes made in order to stem the growing liability of the special fund. These concerns of Congress are amply illustrated by the legislative history; indeed the Senate version of the bill (which required the application to be raised before the ALJ) called for a fund conservator to represent the special fund. Senator Hatch described this provision as a response to the "growing liability" of the fund, 128 Cong. Rec. S9207 (Daily ed. July 27, 1982), which Senator Nickles noted was "not adequately protected and is being raided by questionable claims" 128 Cong. Rec. S9210.

While the conservator provision was dropped in Conference, similar concerns motivated the House version of the bill, which was eventually accepted by both houses. The House Labor Committee report explained that:

> The Committee further amended section 8(f) by requiring that employer's petitions for Special Fund relief be filed as soon in the claims adjudication process as possible, and that the Secretary be noticed with respect to any such petitions. The Committee believes that the Secretary has an obligation to safeguard the Special Fund, which should be met in connection with the adjudication of the claims.

H. Rept. No. 98–570, 98th Cong. 1st Sess., 10 (November 18, 1983).

Congressman Erlenborn noted that "no one guards the fund . . . [t]he result is that employers and claimants can stipulate fund coverage and often no one questions that factual claims." 130 Cong. Rec. H2488 (Daily ed. April 9, 1984).

Finally, the Conference Managers' report noted that the provision in section 8(f)(3) was intended

to encourage employers to raise the special fund issue early in the claims adjudication process, in order to assure the deputy commissioner and the Director of OWCP the opportunity to examine the validity of the employer's basis for seeking special fund relief.

H. Rept. 98–1027, 98th Cong., 2d Sess. 31 (September 14, 1984).

Congressional intent is clear: to end the practice of first raising the section 8(f) issue at the ALJ level, where it could often go unnoticed and uncontested, and to provide the deputy commissioner with an opportunity to "examine the validity of the" request to identify cases eligible for special fund relief and to defend against cases where necessary. The comments objecting to the requirement for a fully documented application are not supported by the legislative history, and this principle which is the basis of the final rules remains in tact.

In addition, experience over the last year in working with the interim rules does not support the contention that the requirement for a fully documented application is burdensome. This experience shows that employers have been able to meet this requirement, and have not encountered problems in obtaining the necessary documentation, even where other issues are outstanding on which the final decision for section 8(f) relief is dependent. Requiring the employer to document its entitlement, even where permanency or basic liability is contested, means merely that the employer must argue in the alternative, a practice which is nothing new to those who practice in this area of law. *See Verderane* v. *Jacksonville Shipyards, Inc.*, 772 F. 2d 775 (11th Cir. 1985).

Although the final rules retain the provision for submission of a fully documented application, that part of § 702.321(a) which describes the evidence required has been clarified. The modifications stem from experience during the interim period which showed a need to clarify further the nature of the required information. Accordingly, the final rules contain a more detailed description of the necessary documentation; although described in more detail, the modifications do not add to the information which is required.

Commentators also objected to having the issue adjudicated by the deputy commissioner. They argue that the Amendments require only that the deputy commissioner be put on notice that relief would be sought, not that it should be adjudicated at that level. Many commentators pointed out that other issues going to the basis of liability remain outstanding at that level and argue that an application for special fund relief may be premature. These objections, too, are without merit.

The IFR require that the deputy commissioner consider the request for relief and include in the recommended decision a finding on all outstanding issues. This provision (which many commentators described as adjudication) is not new, but merely describes the longstanding practice by which the deputy commissioner's recommended decision addresses all issues, including a request for section 8(f) relief. The IFR do not change the role of the deputy commissioner, although the Amendments, by requiring that special fund relief be raised first before the deputy commissioner, may add to the frequency with which the issue needs to be addressed.

While the provisions requiring submission of a fully documented application and consideration of the request for special fund relief have been retained, the rules which detail the time frames for submission of the application and other factors in the process have been substantially revised in response to comments. Many comments objected to the 90-day period for submission of the documented application, noted the difficulty of obtaining essential documentation where the employee would not cooperate, and sought clarification of the nature of the absolute defense. The changes in the final rules concerning these issues are discussed in turn below:

Time Frames

A principal objection to the application process is that provision in §702.321(b) requiring submission of the fully documented application within ninety (90) days of the date when either: (1) The informal conference is held where permanency of the claimant's condition is at issue; or (2) benefits are first paid for permanent disability. Both the length of time (90 days) and the events which start the time running were confusing in practice and have been substantially modified.

When time begins

A number of comments described the 90-day period as inadequate and described the process as confusing. Among the concerns were:

- Some commentators described possible hardship to claimants resulting from the procedure. These comments suggested that in order to avoid starting th 90-day period when permanency becomes an issue, employers might prematurely terminate benefits for temporary disability which they previously might have continued to pay during the dispute process.
- The IFR seem contradictory, since the employer was given 90 days to submit an application, but not later than the date of the informal conference at which permanency was at issue. If permanency was not raised until the conference, many comments expressed concern that the employer, caught by surprise and unprepared, would lose the right to seek section 8(f) relief.
- Claimants who were not beng paid would face additional hardship where the case was not transmitted to the OALJ because the employer took the full 90 days to submit its section 8(f) application.
- A number of commentators considered the 90-day period to be insufficient for gathering the required documentation. Several commentators noted that, where the claimant did not cooperate, it would be impossible to obtain the evidence required for the completed application, since the deputy commissioner is without authority to order depositions.

The commentators suggested alternatives to the IFR process. Some urged the elimination of the 90-day period; others suggested that in order to avoid delaying the formal hearing process, the case should be transmitted to the OALJ while the section 8(f) documentation was being compiled, after which the section 8(f) issue would be presented to and considered by the deputy commissioner and later submitted to the OALJ along with the rest of the case; still other comments suggested bifurcating the hearing process by allowing the case to go before the OALJ for consideration of all other issues and then remanding it to the deputy commissioner for a determination on section 8(f). One group of comments suggested requiring the issue be raised within 14 days f receipt of the conference memorandum recommending permanent disability, with all supporting evidence to be submitted within 90 days thereafter.

While the Department recognizes the time frames established in the IFR create potential difficulties, the suggested changes do not present viable alternatives. The suggestions that the case be transmitted to the OALJ while the deputy commissioner considers the section 8(f) issue is contrary to the statutory scheme established by Congress—once the case is transmitted to the OALJ, the Director, OWCP, as administrator of the special fund, loses jurisdiction over the claim and cannot consider, other than as a party, any issues in the case, nor make a

recommendation. Bifurcating the process would add additional and unnecessary workload to the hearing process and further extend the claims process, since once the case was remanded and the deputy commissioner made a determination on the issue, the employer/carrier may be able to request another hearing before the OALJ on the section 8(f) issue.

For these reasons, the Department has not implemented the changes suggested in the comments. However, substantial modifications in the application process described in § 702.321(b) have been made in response to the concerns. These changes are consistent with the law and are designed to clarify the period for submission of the documentation and eliminate confusion, avoid unnecessary delay in the informal conference stage which could work hardship on claimants, and better define the nature of the absolute defense for failure to raise and adequately document the request for section 8(f) relief.

First, the 90-day period for submission of a fully documented application has been eliminated. Instead of a set period established for all cases, the final rules call for a period fixed by the deputy commissioner according to the circumstances of each case. In certain circumstances, such as where all parties are notified that the issue of permanency will be addressed at the informal conference, the final rules specify that the final date for the submission of the section 8(f) application is at the informal conference. Where the issue is first raised during the informal conference and the employer/carrier could not reasonably be expected to have gathered the necessary documentation to support a section 8(f) application, the date will be fixed according to the circumstances of the case. Factors to be considered by the deputy commissioner in fixing the date of submission include the effect on the claimant of any delay in submission to the OALJ, the difficulty in obtaining the necessary evidence, and the reasons given by the employer in support of any request for additional time.

Second, the final rules clarify that the absolute defense is an affirmative defense and, as such, it must be raised and specifically pleaded by the Director before the OALJ.

Along with comments requesting clarification of the nature of the absolute defense, several comments noted that in many instances, employers would be unable to comply with the documentation requirements because, for example, a claimant involved in third party litigation refused to cooperate with the employer. Under these circumstances, the commentators noted, it would be unfair to penalize the employer by raising the absolute defense. While the Department recognizes that compliance may not always be possible, no change is necessary in the final rules to address this problem. As noted previously, experience with the interim rules for the past year has shown that employers have not experienced major difficulty in obtaining necessary documentation. Further, even in cases where the problem may arise, the employer would not be penalized: where the employer was not aware, due to lack of information, that section 8(f) would be an issue, the absolute defense would not apply. Thus, where the application was denied because of the inaccessible evidence, the employer would not be barred by the absolute defense from seeking section 8(f) relief, and could take the issue before an administrative law judge, whose deposition authority could be invoked to gain access to the evidence.

Administrative Matters

Other concerns raised by the comments regarding the 8(f) procedures are addressed below:

Time limits

Several comments suggested that rules include time limits for decisions on the section 8(f) application. The Department, through internal performance standards, already requires a timely response to applications. Experience has shown that, except where employers fail to submit required documentation, the Department has been able to address requests for section 8(f) relief in a timely fashion.

Approval authorization

Some comments proposed that the deputy commissioner be authorized to approve as well as deny section 8(f) applications. Although deputy commissioners can now approve section 8(f) relief in hearing loss claims, at this time all other applications must be reviewed by the OWCP Longshore Division national office staff. This review does not, as stated by those suggesting the change, substantially delay the process, as all requests for review are acted upon within two weeks of receipt. This central office review does, however, ensure unformity in application and consistency of policy and is retained.

Physicians, Health Care Providers, and Claimant Representatives

The 1984 Amendments to the Longshore Act authorized the Secretary to prepare a list of medical care providers (including physicians) and claimant's representatives who have been disqualified from providing medical care and/or services or representation services to injured employees. The amendments also strengthened the Secretary's authority to regulate the activities of such persons to ensure that the rights of the injured employees or their survivors are adequately protected. Several comments were received concerning these provisions including questions as to

—Whether the Secretary has the authority to excuse the failure to submit medical reports;
—Whether the ALJ, in addition to the deputy commissioner, has the authority to suspend compensation for failure to undergo medical examination or treatment;
—What standard should be used to evaluate prevailing community medical charges; and
—Whether the deputy commissioner should be required to investigate all fee disputes.

These are discussed in turn below.

Failure to file reports

The Act provides, at section 7(d)(2), that the attending physician must file a medical report within ten days of treatment or the employer is not obligated to pay the bill. The deputy commissioner may excuse the failure to submit a report for good cause. The IFR did not change the previous § 702.422 regarding this point. One comment queried whether the employer must await a finding of fact before being relieved from the liability of medical costs. Such issue must be raised as a defense against the obligation, and a finding of fact would therefore be necessary.

Failure to undergo medical exam

Section 702.410 of the IFR authorized the deputy commissioner to order suspension of benefits for failure to undergo a medical examination. Several comments questioned whether an ALJ also had that authority, since it was not specifically mentioned in the IFR. The ALJ does have such authority, and § 702.410 has been amended to clarify this. See Longshore Act 7(d)(4), 33 U.S.C. 907(d)(4).

Prevailing community rate

Several comments suggested that existing state fee schedules should serve as prima facie evidence of the prevailing community rate for fee disputes. Section 702.413 provides that the agency medical director (changed to an Office of Workers' Compensation Programs district medical director in the final rules) or deputy commissioner must determine the prevailing community rate in medical fee disputes. While the Department recognizes the value of fee schedules in helping to establish the prevailing rate, it does not adopt them as the single criterion for determining the rate. In response to the comments received, however, the final rule has been changed and the phrase which was previously a part of § 702.413 (1984) which makes clear that such state fee schedules may be used as one criterion in making this determination, has been reinstated.

Investigation of fee disputes

Section 702.414 established the procedure for handling fee disputes. It permits the deputy commissioner to exercise discretion in determining whether to initiate a formal dispute process. Several comments suggested that the Office should be required to initiate the formal process whenever requested to do so by an employer. The Department declines to be bound to initiate a formal process where the assertions are patently frivolous or constitute a nuisance. The deputy commissioner will investiage any complaint received to the extent necessary, and, where such complaint is found to be meritorious, will institute the formal complaint process.

While the Department retains the right to determine when the facts warrant a formal investigation into medical fee disputes, it has clarified § 702.413 to provide that *any* interested party will be entitled to a hearing before an ALJ, including an employer who is ordered to pay but maintains the charge is excessive. The Department cautions that such actions as medical fee determinations cannot be taken unilaterally by any party, but must follow the process established by law and structured in the regulations.

Debarment

The 1984 Amendments authorized the Secretary to exclude physicians and other health care providers and claimant representatives from practicing under the Act, and specifies the grounds for debarment. The IFR described the procedures for debarring physicians (§ 702.431) and representatives (§ 702.131).

Two comments were received directly concerning the debarment process. One comment called for expanding the specific grounds for debarment of claimant representatives, and suggested that the Secretary should have the authority to debar for incompetence. Because the statute explicitly defines the grounds for debarment, however, the Department cannot expand the grounds through regulation.

Other comments suggested that employers be given the authority to appeal a finding by the deputy commissioner that debarment was not warranted in a particular case. The Department rejects this suggestion. The statute at section 7(c) gives to the Secretary the sole authority to debar physicians or claimant representatives. The regulations set forth the grounds for debarment as established by the Act and establish the procedures to be followed. Consistent with the statute, these regulations provide the right of hearing from an informal adverse decision only to the medical care provider or representative, e.g., the person directly affected. Allowing the employer to challenge this determination would, in effect, be placing the provider in double jeopardy, requiring that he/she first face the Department, and after, convincing the Department not to institute formal debarment proceedings, would have to face an inquiry before an ALJ initiated not by the Secretary but by an employer. Because the authority to initiate debarment procedures is given by law to the Director, OWCP, no change in the regulations on this point have been made.

Miscellaneous Subjects

Other subjects addressed in the comments include:

Hearing Loss

The IFR, at § 702.441, detailed procedures for claims for loss of hearing. Among other changes made by the 1984 Amendments was the requirement that properly administered audiograms are presumptive evidence of a hearing loss. To be properly administered, the Amendments require them to have been performed by a certified audiologist or otolaryngologist. In the Managers' Report, the legislative history clarifies this to allow qualified technicians to actually administer the test, as long as it is certified as correct and interpreted by an audiologist or otolaryngologist. One professional association objected to the use of technicians in performing hearing tests. The final rules remain unchanged, given the express direction of the Conference Managers that technicians be allowed to perform the examination.

The Amendments also required that a copy of the audiogram along with a statement that showed a loss of hearing be given to the employee in order to start the limitation period for notice and filing. The IFR, at § 702.212(a)(3) and § 702.221(b), respectively, implemented this provision. Several comments suggested the language be expanded to clarify that the report must also state that the loss is related to employment to start the running of limitation periods. These suggestions have been incorporated into the final rules, since they merely clarify the statutory requirement that the claimant must not only be aware of a disability but also of its relation to the employment.

Occupational Diseases

The Amendments made several changes regarding occupational diseases which do not immediately result in death or disability. Section 10 of the amended Act provides that in those cases where the job related disease does not become manifest until after retirement, compensation shall be paid based, not on the loss of earning capacity, but on the extent of impairment as determined by the American Medical Association's *Guides to Permanent Impairment*. The IFR provided a definition of retirement at § 702.601(c). Several comments noted that the definition in the IFR was different from that described in the preamble. To eliminate the ambiguity thus created and clarify the meaning, the final rules contain an amended definition of retirement. Section 702.604(b) was also clarified to ensure that the same limitation on benefits applied to death claims in occupational disease cases, as in all other death claims.

Liens on Compensation

One comment concerned the ability to enforce the provisions section 17 of the Act implemented in § 702.162 of the regulations, which allow a trust fund which pays disability benefits to a claimant while a claim is pending, a lien on the compensation benefits paid. The commentator stated that the provision of the IFR was not sufficient to recoup the entire lien from any lump-sum back recovery of benefits, but was limited to ten percent. A close reading of the section shows that the lien can be satisfied out of the entire past due compensation benefits which may be paid, and any excess can be recovered out of continuing benefits (limited to ten

percent of bi-weekly compensation). There is no need for a change in this provision.

Third Party Recovery

The Amendments provide that a claimant must obtain the agreement of an employer to any settlement agreement in a third party action for an amount less than that to which he/she would be entitled under the Act. In the alternative, the claimant must notify the employer of any judgement or settlement against a third party. Failure to obtain the consent or make the required notification relieves the employer of liability for compensation and medical benefits, even where payments have been made or entitlement acknowledged (see section 33(g) of the amended Act). One commentator noted that § 702.281 did not fully explain this. Accordingly, the final rules include additional language clarifying the responsibilities of the claimant in third party actions, consistent with the Amendments.

Effective date

The Department has determined that the public interest requires the immediate issuance of regulations in order to assure continued smooth implementation of the amended Longshore Act. The IFR will expire on February 3, 1986, unless extended or superceded by revised rules. Further delay in issuing the final rule is not in the best interest of the parties subject to the Longshore Act. It is essential, therefore, that these regulations become effective immediately in order to ensure compliance with the statute and effective adjudication of claims that are subject to the 1984 amendments to the Longshore Act. Because immediate issuance of this final regulation is required by the public interest in having a smooth implementation of the Longshore Act amendments, it shall become effective immediately instead of thirty days after publication. This determination is made pursuant to 5 U.S.C. 553(d)(3).

Information collection requirements contained in this regulation have been approved by the Office of Management and Budget and have been assigned OMB control number 1215–0160.

Classification—Executive Order 12291

These final rules only implement the amendments to the Longshore Act and make certain technical corrections to the regulations as previously promulgated. They do not, in themselves, impose any additional requirements. Therefore, this is not classified as a "major rule" under Executive Order 12291 on Federal Regulations, because it is not likely to result in: (1) An annual effect on the economy of $100 million or more; (2) a major increase in cost or prices for consumers, individual industries, Federal, State or local government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based enterprises to compete in domestic or export markets. Accordingly, no regulatory impact analysis is required.

Regulatory Flexibility Act

The Department believes that the rule will have no "significant economic impact upon a substantial number of small entities" within the meaning of section 3(a) of the Regulatory Flexibility Act. Pub. L. 96–354, 91 Stat. 1164 (5 U.S.C. 605(b)). The Secretary has certified to the Chief Counsel for Advocacy of the Small Business Administration to this effect. This conclusion is reached because the final rules are only implementing this 1984 amendments to the Longshore Act and they do not, in themselves, impose any additional requirements upon small entities. On the contrary, these regulations implement those amendments which exclude many small entities from coverage under the Longshore Act, establish procedures whereby some small entities may seek an exemption from the statute, and eliminate the reporting requirements for all employers in cases of no lost time injuries. Accordingly, no regulatory impact analysis is required.

List of Subjects

20 CFR Part 701

Longshoremen, Workers' compensation.

20 CFR Part 702

Administrative practice and procedure, Claims, Insurance, Longshoremen, Vocational rehabilitation, and Workers' compensation.

20 CFR Part 703

Insurance, Longshoremen, Workers' compensation.

Accordingly, 20 CFR Parts 701, 702 and 703 as published in the **Federal Register** on January 3, 1985 (50 FR 384) are adopted as final with the changes noted below.

1. The citation of authorities for Parts 701, 702 and 703, continues to read as follows:

Authority: 5 U.S.C. 301; Reorg. Plan No. 6 of 1950, 15 FR 3174, 64 Stat. 1263; 83 U.S.C. 939; 36 D.C. Code 501 et seq.; 42 U.S.C. 1651 et seq.; 43 U.S.C. 1331; 5 U.S.C. 8171, et seq.; Secretary's Order 6–84, 49 FR 32473; Employment Standards Order 78–1, 43 FR 51469.

PART 701—GENERAL; ADMINISTERING AGENCY DEFINITIONS AND USE OF TERMS

2. Section 701.101(b) is revised to read as follows:

Rules in This Subchapter

§ 701.101 Scope of this subchapter and Subchapter B.

* * * * *

(b) The regulations also apply to claims filed under the District of Columbia Workmen's Compensation Act (DCCA). That law applies to all claims for injuries or deaths based on employment events that occurred prior to July 26, 1982, the effective date of the District of Columbia Workers' Compensation Act.

3. In § 701.301, paragraph (a)(12)(iii) is revised to read as follows:

Terms Used in This Subchapter

§ 701.301 Definitions and use of terms.

(a) * * *

(iii) Nor does this term include the following individuals (whether or not the injury occurs over the navigable waters of the United States) where it is first determined that they are covered by a state workers' compensation act:

(A) Individuals employed exclusively to perform office clerical, secretarial, security, or data processing work (but not longshore cargo checkers and cargo clerks);

(B) Individuals employed by a club (meaning a social or fraternal organization whether profit or nonprofit), camp, recreational operation (meaning any recreational activity, including but not limited to scuba diving, commercial rafting, canoeing or boating activities operated for pleasure of owners, members of a club or organization, or renting, leasing or chartering equipment to another for the latter's pleasure), restaurant, museum or retail outlet;

(C) Individuals employed by a marina, provided they are not engaged in its construction, replacement or expansion, except for routine maintenance such as cleaning, painting, trash removal, housekeeping and small repairs;

(D) Employees of suppliers, vendors and transporters temporarily doing business on the premises of a covered employer, provided they are not performing work normally performed by employees of the covered employer;

(E) Aquaculture workers, meaning those employed by commercial enterprises involved in the controlled cultivation and harvest of aquatic plants and animals, including the cleaning, processing or canning of fish and fish products, the cultivation and harvesting of shellfish, and the controlled growing and harvesting of other aquatic species;

(F) Individuals engaged in the building, repairing or dismantling of recreational vessels under 65 feet in length. For purposes of this subparagraph "recreational vessel" means a vessel manufactured or operated primarily for pleasure, or rented, leased or chartered by another for the latter's pleasure, and "length" means a straight line measurement of the overall length from the foremost part of the vessel to the aftmost part of the vessel, measured parallel to the center line. The measurement shall be from end to end over the deck, excluding sheer.

PART 702—ADMINISTRATION AND PROCEDURE

4. In § 702.101 the entries for District Nos. 11 and 12 are removed and reserved, and the entries for District Nos. 10 and 14 are revised to read as follows:

§ 702.101 Establishment of Compensation Districts.

* * * * *

District No. 10. Comprises the States of Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, Missouri, Nebraska, Ohio and Wisconsin; with headquarters in Chicago, Illinois.

District No. 11 [Reserved]

District No. 12 [Reserved]

* * * * *

District No. 14. Comprises the States of Alaska, Colorado, Idaho, Montana, North Dakota, South Dakota, Oregon, Utah, Washington and Wyoming; with headquarters in Seattle, Washington.

* * * * *

5. In § 702.145, paragraph (b) is revised to read as follows:

§ 702.145 Use of the special fund.

* * * * *

(b) Under section 8(f) of the Act (Second Injuries), In any case in which an employee having an existing permanent partial disability suffers injury, the employer shall provide compensation for such disability as is found to be attributable to that injury based upon the average weekly wages of the employee at the time of injury. If, following an injury falling within the provisions of section 8(c)(1)–(20), the employee with the pre-existing permanent partial disability becomes permanently and totally disabled after the second injury, but such total disability is found not to be due solely to his second injury, the employer (or carrier) shall be liable for compensation as provided by the provisions of section 8(c)(1)–(20) of the Act, 33 U.S.C. 908(c)(1)–(20) or for 104 weeks, whichever is greater. However, if the injury is a loss of hearing covered by section 8(c)(13), 33 U.S.C. 908(c)(13), the liability shall be the lesser of these periods. In all other cases of a second injury causing permanent total disability (or death), wherein it is found that such disability (or death) is not due solely to the second injury, and wherein the employee had a pre-existing permanent partial disability, the employer (or carrier) shall first pay compensation under section 8(b) or (e) of the Act, 33 U.S.C. 908(b) or (e), if any is payable thereunder, and shall then pay 104 weeks compensation for such total disability or death, and none otherwise. If the second injury results in permanent partial disability, and if such disability is compensable under section 8(c)(1)–(20) of the Act, 33 U.S.C. 908(c)(1)–(20), but the disability so compensable did not result solely from such second injury, and the disability so compensable is materially and substantially greater than that which would have resulted from the second injury alone, then the employer (or carrier) shall only be liable for the amount of compensation provided for in section 8(c)(1)–(20) that is attributable to such second injury, or for 104 weeks, whichever is greater. However, if the injury is a loss of hearing covered by section 8(c)(13), 33 U.S.C. 908(c)(13), the liability shall be the lesser of these periods. In all other cases wherein the employee is permanently and partially disabled following a second injury, and wherein such disability is not attributable solely to that second injury, and wherein such disability is materially and substantially greater than that which would have resulted from the second injury alone, and wherein such disability following the second injury is not compensable under section 8(c)(1)–(20) of the Act, then the employer (or carrier) shall be liable for such compensation as may be appropriate under section 8(b) or (e) of the Act, 33 U.S.C. 908(b) or (e), if any, to be followed by a payment of compensation for 104 weeks, and none other. The term "compensation" herein means money benefits only, and does not include medical benefits. The procedure for determining the extent of the employer's (or carrier's) liability under this paragraph shall be as provided for in the adjudication of claims in Subpart C of this Part 702. Thereafter, upon cessation of payments which the employer is required to make under this paragraph, if any additional compensation is payable in the case, the deputy commissioner shall forward such case to the Director for consideration of an award to the person or persons entitled thereto out of the special fund. Any such award from the special fund shall be by order of the Director or Acting Director.

* * * * *

6. In §702.146, paragraph (c) is revised to read as follows:

§ 702.146 Source of the special fund.

* * * * *

(c) The Director annually shall assess an amount against insurance carriers and self-insured employers authorized under the Act and Part 703 of this subchapter to replenish the fund. That total amount to be charged all carriers and self-insurers to be assessed shall be based upon an estimate of the probable expenses of the fund during the calendar year. The assessment against each carrier and self-insurer shall be based upon (1) the ratio of the amount each paid during the prior calendar year for compensation in relation to the amount all such carriers of self-insurers paid during that period for compensation, and (2) the ratio of the amount of payments made by the special fund for all cases being paid under section 8(f) of the Act, 33 U.S.C. 908(f), during the preceding calendar year which are attributable to the carrier or self-insurer in relation to the total of such payments during such year attributable to all carriers and self-insurers. The resulting sum of the percentages from paragraphs (c) (1) and (2) of this section will be divided by two, and the resulting percentage multiplied by the probable expenses of the fund. The Director may, in his or her discretion, condition continuance or renewal of authorization under Part 703 upon prompt payment of the assessment. However, no action suspending or revoking such authorization shall be taken without affording such carrier or self-insurer a hearing before the Director or his/her designee.

7. In § 702.162, paragraphs (a) and (h) are revised to read as follows:

§ 702.162 Liens on compensation authorized under special circumstances.

(a) Pursuant to section 17 of the Act, 33 U.S.C. 917, when a trust fund which complies with section 302(c) of the Labor-Management Relations Act of 1947, 29 U.S.C. 186(c) [LMRA], established pursuant to a collective bargaining agreement in effect between

an employer and an employee entitled to compensation under this Act, has paid disability benefits to an employee which the employee is legally obligated to repay by reason of his entitlement to compensation under this Act, a lien shall be authorized on such compensation in favor of the trust fund for the amount of such payments.

* * * * *

(h) In the event that either the deputy commissioner or the administrative law judge is not satisfied that the trust fund qualifies for a lien under section 17, the deputy commissioner or administrative law judge may require further evidence including but not limited to the production of the collective bargaining agreement, trust agreement or portions thereof.

* * * * *

8. Section 702.172 is revised to read as follows:

§ 702.172 Certification; definitions.

For purposes of §§ 702.171 through 702.175 dealing with certification of small vessel facilities, the following definitions are applicable.

(a)(1) "Small vessel" means only those vessels described in section 3(d)(3) of the Act, 33 U.S.C. 903(d)(3), that is:

(i) A commercial barge which is under 900 lightship displacement tons (long); or

(ii) A commercial tugboat, towboat, crewboat, supply boat, fishing vessel or other work vessel which is under 1,600 tons gross.

(2) For these purposes: (i) One gross ton equals 100 cubic feet, as measured by the current formula contained in the Act of May 6, 1894 as amended through 1974 (46 U.S.C. 77); (ii) one long ton equals 2,240 lbs; and (iii) "Commercial" as it applies to "vessel" means any vessel engaged in commerce but does not include military vessels or Coast Guard vessels.

(b) "Federal Maritime Subsidy" means the construction differential subsidy (CDS) or operating differential subsidy under the Merchant Marine Act of 1936 (46 U.S.C. 1101 et seq.).

(c) "facility" means an operation of an employer at a particular contiguous geographic location.

9. In § 702.174, paragraphs (a)(1) and (d)(2) are revised to read as follows:

§ 702.174 Exemptions; necessary information.

(a) * * *

(1) Name, location, physical description and a site plan or aerial photograph of the facility for which an exemption is sought.

* * * * *

(d) * * *

(2) A notice, where applicable, at the entrances to all areas to which the exemption does not apply.

10. In § 702.175, paragraph (a) is revised to read as follows:

§ 702.175 Effect of work on excluded vessels; reinstatement of certification.

(a) When a vessel other than a small commercial vessel, as defined in § 702.172, enters a facility which has been certified as exempt from coverage, the exemption shall automatically terminate as of the date such a vessel enters the facility. The exemption shall also terminate on the date a contract for a Federal maritime subsidy is entered into, and, in the situation where the facility undertakes to build a vessel other than a small vessel, when the construction first takes on the characteristics of a vessel, i.e., when the keel is laid. All duties, obligations and requirements imposed by the Act, including the duty to secure compensation liability as required by sections 4 and 32 of the Act, 33 U.S.C. 904 and 932, and to keep records and forward reports, are effective immediately. The employer shall notify the Director or his/her designee immediately where this occurs.

10A. In § 702.201, paragraph (b) is revised to read as follows:

§ 702.201 Reports from employers of employee's injury or death.

* * * * *

(b) No report shall be filed unless the injury causes the employee to lose one or more shifts from work. However, the employer shall keep a record containing the information specified in § 702.202. Compliance with the current OSHA injury record keeping requirements at 29 CFR 1904 will satisfy the record keeping requirements of this section for no lost time injuries.

11. In § 702.211(b), paragraphs (1) and (4) are revised to read as follows:

§ 702.211 Notice of employee's injury or death; designation of responsible official.

* * * * *

(b) In order to facilitate the filing of notices, each employer shall designate at least one individual responsible for receiving notices of injury or death; this requirement applies to all employers. The designation shall be by position and the employer shall provide the name and/or position, exact location and telephone number of the individual to all employees by the appropriate method described below.

(1) *Type of individual.* Designees must be a first line supervisor (including a foreman, hatchboss or timekeeper), local plant manager, personnel office official, company nurse or other individual traditionally entrusted with this duty, who is located full-time on the premises of the covered facility. The employer must designate at least one individual at each place of employment or one individual for each work crew where there is no fixed place of employment (in that case, the designation should always be the same position for all work crews).

* * * * *

(4) *Effect of failure to designate.* Where an employer fails to properly designate and to properly publish the name and/or position of the individual authorized to receive notices of injury or death, such failure shall constitute satisfactory reasons for excusing the employee/claimant's failure to give notice as authorized by section 12(d)(3)(ii) of the Act, 33 U.S.C. 912(d)(3)(ii).

12. In § 702.212, paragraph (a)(3) is revised to read as follows:

§ 702.212 Notice; when given for certain occupational diseases.

(a) * * *

(3) In the case of claims for loss of hearing, the date the employee receives an audiogram, with the accompanying report which indicates the employee has suffered a loss of hearing that is related to his or her employment. (See § 702.441).

* * * * *

13. Section 702.216 is revised to read as follows:

§ 702.216 Effect of failure to give notice.

Failure to give timely notice to the employer's designated official shall not bar any claim for compensation if: (a) The employer, carrier, or designated official had actual knowledge of the injury or death; or (b) the deputy commissioner or ALJ determines the employer or carrier has not been prejudiced; or (c) the deputy commissioner excuses failure to file notice. For purposes of this subsection, actual knowledge shall be deemed to exist if the employee's immediate supervisor was aware of the injury and/or in the case of a hearing loss, where the employer has furnished to the employee an audiogram and report which indicates a loss of hearing. Failure to give notice shall be excused by the deputy commissioner if: a) notice, while not given to the designated official, was given to an official of the employer or carrier, and no prejudice resulted; or b) for some other satisfactory reason, notice could not be

given. Failure to properly designate and post the individual so designated shall be considered a satisfactory reason. In any event, such defense to a claim must be raised by the employer/carrier at the first hearing on the claim.

14. In § 702.221 paragraph (b) is revised to read as follows:

§ 702.221 Claims for compensation; time limitations.

* * * * *

(b) In the case of a hearing loss claim, the time for filing a claim does not begin to run until the employee receives an audiogram with the accompanying report which indicates the employee has sustained a hearing loss that is related to his or her employment. (See § 702.441).

15. In 702.241, paragraph (c) is revised to read as follows:

§ 702.241 Definitions and supplementary information.

* * * * *

(c) If a settlement application is first submitted to an ALJ, the thirty day period mentioned in paragraph (f) of this section does not begin until five days before the date the formal hearing is set. This rule does not preclude the parties from submitting the application at any other time such as (1) after the case is referred for hearing, (2) at the hearing, or (3) after the hearing but before the ALJ is issues a decision and order. Where a case is pending before the ALJ but not set for a hearing, the parties may request the case be remanded to the deputy commissioner for consideration of the settlement.

16. In § 702.242, paragraphs (b)(5) and (7) are revised to read as follows:

§ 702.242 Information necessary for a complete settlement application.

* * * * *

(b) * * *

(5) A current medical report which fully describes any injury related impairment as well as any unrelated conditions. This report shall indicate whether maximum medical improvement has been reached and whether further disability or medical treatment is anticipated. If the claimant has already reached maximum medical improvement, a medical report prepared at the time the employee's condition stabilized will satisfy the requirement for a current medical report. A medical report need not be submitted with agreements to settle survivor benefits unless the circumstances warrant it.

* * * * *

(7) If the settlement application covers medical benefits an itemization of the amount paid for medical expenses by year for the three years prior to the date of the application. An estimate of the claimant's need for future medical treatment as well as an estimate of the cost of such medical treatment shall also be submitted which indicates the inflation factor and/or the discount rate used, if any. The adjudicator may waive these requirements for good cause.

17. In § 702.243, paragraphs (a), (c), (f), and (g) are revised to read as follows:

§ 702.243 Settlement application; how submitted, how approved, how disapproved, criteria.

(a) When the parties to a claim for compensation, including survivor benefits and medical benefits, agree to a settlement they shall submit a complete application to the adjudicator. The application shall contain all the information outlined in § 702.242 and shall be sent by cetified mail, return receipt requested or submitted in person, or by any other delivery service with proof of delivery to the adjudicator. Failure to submit a complete application shall toll the thirty day period mentioned in section 8(i) of the Act, 33 U.S.C. 908(i), until a complete application is received.

* * * * *

(c) If the adjudicator disapproves a settlement application, the adjudicator shall serve on all parties a written statement or order containing the reasons for disapproval. This statement shall be served by certified mail within thirty days of receipt of a complete application (as described in § 702.242.) if the parties are represented by counsel. If the disapproval was made by a deputy commissioner, any party to the settlement may request a hearing before an ALJ as provided in sections 8 and 19 of the Act, 33 U.S.C. 908 and 919, or an amended application may be submitted to the deputy commissioner. If, following the hearing, the ALJ disapproves the settlement, the parties may: (1) Submit a new application, (2) file an appeal with the Benefits Review Board as provided in section 21 of the Act, 33 U.S.C. 921, or (3) proceed with a hearing on the merits of the claim. If the application is initially disapproved by an ALJ, the parties may (1) submit a new application or (2) proceed with a hearing on the merits of the claim.

* * * * *

(f) When presented with a settlement, the adjudicator shall review the application and determine whether, considering all of the circumstances, including, where appropriate, the probability of success if the case were formally litigated, the amount is adequate. The criteria for determining the adequacy of the settlement application shall include, but not be limited to:

(1) The claimant's age, education and work history;

(2) The degree of the claimant's disability or impairment;

(3) The availability of the type of work the claimant can do;

(4) The cost and necessity of future medical treatment (where the settlement includes medical benefits).

* * * * *

(g) In cases being paid pursuant to a final compensation order, where no substantive issues are in dispute, a settlement amount which does not equal the present value of future compensation payments commuted, computed at the discount rate specified below, shall be considered inadequate unless the parties to the settlement show that the amount is adequate. The probability of the death of the beneficiary before the expiration of the period during which he or she is entitled to compensation shall be determined according to the most current United States Life Table, as developed by the United States Department of Health and Human Services, which shall be updated from time to time. The discount rate shall be equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of 52 weeks U.S. Treasury Bills settled immediately prior to the date of the submission of the settlement application.

18. In § 702.281, paragraph (b) is revised to read as follows:

§ 702.281 Third party action.

* * * * *

(b) Where the claim or legal action instituted against a third party results in a settlement agreement which is for an amount less than the compensation to which a person would be entitled under this Act, the person (or the person's representative) must obtain the prior, written approval of the settlement from the employer and the employer's carrier before the settlement is executed. Failure to do so relieves the employer and/or carrier of liability for compensation described in section 33(f) of Act, 33 U.S.C. 933(f) and for medical benefits otherwise due under section 7 of the Act, 33 U.S.C. 907, regardless of whether the employer or carrier has made payments of acknowledged entitlement to benefits under the Act. The approval shall be on a form provided by the Director and filed, within thirty days after the settlement is

entered into, with the deputy commissioner who has jurisdiction in the district where the injury occurred.

19. Section 702.321 is revised to read as follows:

§ 702.321 Procedures for determining applicability of section 8(f) of the Act.

(a) *Application: filing, service, contents.* (1) an employer or insurance carrier which seeks to invoke the provisions of section 8(f) of the Act must request limitation of its liability and file, in duplicate, with the deputy commissioner a fully documented application. A fully documented application shall contain the following information: (i) A specific description of the pre-existing condition relied upon as constituting an existing permanent partial disability; (ii) the reasons for believing that the claimant's permanent disability after the injury would be less were it not for the pre-existing permanent partial disability or that the death would not have ensued but for that disability. These reasons must be supported by medical evidence as specified in (iv) below; (iii) the basis for the assertion that the pre-existing condition relied upon was manifest in the employer; and (iv) documentary medical evidence relied upon in support of the request for section 8(f) relief. This medical evidence shall include, but not be limited to, a current medical report establishing the extent of all impairments and the date of maximum medical improvement. If the claimant has already reached maximum medical improvement, a report prepared at that time will satisfy the requirement for a current medical report. If the current disability is total, the medical report must explain why the disability is not due solely to the second injury. If the current disability is partial, the medical report must explain why the disability is not due solely to the second injury and why the resulting disability is materially and substantially greater than that which would have resulted from the subsequent injury alone. If the injury is loss of hearing, the pre-existing hearing loss must be documented by an audiogram which complies with the requirements of § 702.441. If the claim is for survivor's benefits, the medical report must establish that the death was not due solely to the second injury. Any other evidence considered necessary for consideration of the request for section 8(f) relief must be submitted when requested by the deputy commissioner or Director.

(2) If claim is being paid by the special fund and the claimant dies, an employer need not reapply for section 8(f) relief. However, survivor benefits will not be paid until it has been established that the death was due to the accepted injury and the eligible survivors have been identified. The deputy commissioner will issue a compensation order after a claim has been filed and entitlement of the survivors has been verified. Since the employer remains a party in interest to the claim, a compensation order will not be issued without the agreement of the employer.

(b) *Application: Time for filing.* (1) A request for section 8(f) relief should be made as soon as the permanency of the claimant's condition becomes known or is an issue in dispute. This could be when benefits are first paid for permanent disability, or at an informal conference held to discuss the permanency of the claimant's condition. Where the claim is for death benefits, the request should be made as soon as possible after the date of death. Along with the request for section 8(f) relief, the applicant must also submit all the supporting documentation required by this section, described in paragraph (a), of this section. Where possible, this documentation should accompany the request, but may be submitted separately, in which case the deputy commissioner shall, at the time of the request, fix a date for submission of the fully documented application. The date shall be fixed as follows: (i) where notice is given to all parties that permanency shall be an issue at an informal conference, the fully documented application must be submitted at or before the conference. For these purposes, notice shall mean when the issues of permanency is noted on the form LS–141, Notice of Informal Conference. All parties are required to list issue reasonably anticipated to be discussed at the conference when the initial request for a conference is made and to notify all parties of additional issues which arise during the period before the conference is actually held. (ii) Where the issue of permanency is first raised at the informal conference and could not have reasonably been anticipated by the parties prior to the conference, the deputy commissioner shall adjourn the conference and establish the date by which the fully documented application must be submitted and so notify the employer/carrier. The date shall be set by the deputy commissioner after reviewing the circumstances of the case.

(2) At the request of the employer or insurance carrier, and for good cause, the deputy commissioner, at his/her discretion, may grant an extension of the date for submission of the fully documented application. In fixing the date for submission of the application under circumstances other than described above or in considering any request for an extension of the date for submitting the application, the deputy commissioner shall consider all the circumstances of the case, including but not limited to: Whether the claimant is being paid compensation and the hardship to the claimant of delaying referral of the case to the Office of Administrative Law Judges (OALJ); the complexity of the issues and the availability of medical and other evidence to the employer; the length of time the employer was or should have been aware that permanency is an issue; and, the reasons listed in support of the request. If the employer/carrier requested a specific date, the reasons for selection of that date will also be considered. Neither the date selected for submission of the fully documented application nor any extension therefrom can go beyond the date the case is referred to the OALJ for formal hearing.

(3) Where the claimant's condition has not reached maximum medical improvement and no claim for permanency is raised by the date the case is referred to the OALJ, an application need not be submitted to the deputy commissioner to preserve the employer's right to later seek relief under section 8(f) of the Act. In all other cases, failure to submit a fully documented application by the date established by the deputy commissioner shall be an absolute defense to the liability of the special fund. This defense is an affirmative defense which must be raised and pleaded by the Director. The absolute defense will not be raised where permanency was not an issue before the deputy commissioner. In all other cases, where permanency has been raised, the failure of an employer to submit a timely and fully documented application for section 8(f) relief shall not prevent the deputy commissioner, at his/her discretion, from considering the claim for compensation and transmitting the case for formal hearing. The failure of an employer to present a timely and fully documented application for section 8(f) relief may be excused only where the employer could not have reasonably anticipated the liability of the special fund prior to the consideration of the claim by the deputy commissioner. Relief under section 8(f) is not available to an employer who fails to comply with section 32(a) of the Act, 33 U.S.C. 932(a).

(c) *Application: Approval, disapproval.* If all the evidence required by paragraph (a) was submitted with the application for section 8(f) relief and the

facts warrant relief under this section, the deputy commissioner shall award such relief after concurrence by the Associate Director, DLHWC, or his or her designee. If the deputy commissioner or the Associate Director or his or her designee finds that the facts do not warrant relief under section 8(f) the deputy commissioner shall advise the employer of the grounds for the denial. The application for section 8(f) relief may then be considered by an administrative law judge. When a case is transmitted to the Office of Administrative Law Judges the deputy commissioner shall also attach a copy of the application for section 8(f) relief submitted by the employer, and notwithstanding § 702.317(c), the deputy commissioner's denial of the application.

(Approved by the Office of Management and Budget under control number 1215–0160.)

20. In § 702.410, paragraph (c) is revised to read as follows:

§ 702.410 Duties of employees with respect to special examinations.

* * * * *

(c) Where an employee unreasonably refuses to submit to medical or surgical treatment, or to an examination by a physician selected by the employer, the deputy commissioner or administrative law judge may by order suspend the payment of further compensation during such time as the refusal continues. Except that refusal to submit to medical treatment because of adherence to the tenets of a recognized church or religious denomination as described in § 702.401(b) shall not cause the suspension of compensation.

21. Section 702.413 is revised to read as follows:

§ 702.413 Fees for medical services; prevailing community charges.

All fees charged by medical care providers for persons covered by this Act shall be limited to such charges for the same or similar care (including supplies) as prevails in the community in which the medical care provider is located and shall not exceed the customary charges of the medical care provider for the same or similar services. Official state medical fee schedules for workers' compensation charges may be used as guidelines in determining the prevailing community rate where available and to the extent appropriate. The opinion of the OWCP district medical director that a charge by a medical care provider disputed under the provisions of § 702.414 exceeds the charge which prevails in the community in which said medical care provider is located shall constitute sufficient evidence to warrant further proceedings pursuant to § 702.414 and to permit the Director to direct the claimant to select another medical provider for care to the claimant.

22. Section 702.414 is revised to read as follows:

§ 702.414 Fees for medical services; unresolved disputes on prevailing charges.

(a) The Director may, upon written complaint of an interested party, or upon the Director's own initiative, investigate any medical care provider or any fee for medical treatment, services, or supplies that appears to exceed prevailing, community charges for similar treatment, services or supplies or the provider's customary charges. Such investigation may initially be conducted informally through contact of the medical care provider by the district medical director. If this informal investigation is unsuccessful further proceedings may be undertaken. These proceedings may include, but not be limited to: An informal conference involving all interested parties; agency interrogatories to the pertinent medical care provider; and issuance of subpoenas duces tecum for documents having a bearing on the dispute.

(b) The failure of any medical care provider to present any evidence required by the Director pursuant to this section without good cause shall not prevent the Director from making findings of fact.

(c) After any proceeding under this section the Director shall make specific findings on whether the fee exceeded the prevailing community charges or the provider's customary charges and provide notice of these findings to the affected parties.

(d) The Director may suspend any such proceedings if after receipt of the written complaint the affected parties agree to withdraw the controversy from agency consideration on the basis that such controversy has been resolved by the affected parties. Such suspension, however, shall be at the discretion of the Director.

Section 702.415 is revised to read as follows:

§ 702.415 Fees for medical services; unresolved disputes on charges; procedure.

After issuance of specific findings of fact and proposed action by the Director as provided in § 702.414 any affected provider employer or other interested party has the right to seek a hearing pursuant to section 556 of Title 5, United States Code. Upon written request for such a hearing, the matter shall be referred by the Deputy Commissioner to the OALJ for formal hearing in accordance with the procedures in subpart C of this part. If no such request for a hearing is filed with the deputy commissioner within thirty (30) days the findings issued pursuant to § 702.414 shall be final.

In § 702.601, paragraph (c) is revised to read as follows:

Subpart F—Occupational Disease Which Does Not Immediately Result in Death or Disability

§ 702.601 Definitions.

* * * * *

(c) *Retirement.* For purposes of this subpart, retirement shall mean that the claimant, or decedent in cases involving survivor's benefits, has voluntarily withdrawn from the workforce and that there is no realistic expectation that such person will return to the workforce.

In § 702.604, paragraph (b) is revised to read as follows:

§ 702.604 Determining the amount of compensation for occupational disease claims which become manifest after retirement.

* * * * *

(b) If the claim is for death benefits and the time of injury occurs after the decedent has retired, compensation shall be the percent specified in section 9 of the Act, 33 U.S.C. 909, times the payrate determined according to § 702.603. Total weekly death benefits shall not exceed one fifty-second part of the decedent's average annual earnings during the fifty-two week period preceding retirement, such benefits shall be subject to the limitation provided for in section 6(b)(1) of the Act, 33 U.S.C. 906(b)(1).

Signed at Washington, D.C., this 29th day of January, 1986.

William E. Brock,

Secretary of Labor.

[FR Doc. 86–2371 Filed 1–31–86; 8:45 am]

BILLING CODE 4510–27–M