THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS **SUPERIOR COURT**

Docket No. 03-E-0106

In the Matter of the Liquidation of
The Home Insurance Company

AFFIDAVIT OF PETER A. BENGELSDORF

I, Peter A. Bengelsdorf, hereby depose and say:

1. I was appointed Special Deputy Liquidator of the Home Insurance Company ("Home"), by the Insurance Commissioner for the State of New Hampshire, as Liquidator ("Liquidator") of Home. I submit this affidavit in support of the Liquidator's Section 15 Submission Concerning Department of Labor's Claim with respect to the claim of Hilda L. Solis, Secretary, United States Department of Labor ("DOL"). The facts and information set forth are either within my own knowledge gained through my involvement with this matter, in which case I confirm that they are true, or are based on information provided to me by others, in which case they are true to the best of my knowledge, information, and belief.

2. Home was placed in liquidation by Order of Liquidation issued by the Superior Court for Merrimack County, New Hampshire on June 11, 2003 in In the Matter of the Rehabilitation of The Home Insurance Company, No. 03-E-0106. The initial Order of Liquidation was vacated and replaced by an Order of Liquidation dated June 13, 2003. A true copy of this operative Order of Liquidation is attached as Exhibit 1.

3. Home and its subsidiaries (most of which were merged into Home in 1995) wrote insurance and reinsurance in all states and some territories of the United States, as well as in Canada, the United Kingdom, Bermuda and Hong Kong. Home and its subsidiaries generally

stopped writing personal lines business in the early 1990's. In 1995, they stopped writing all business, including commercial lines such as Longshore and Harbor Workers Compensation, subject to certain personal lines mandatory renewal requirements that required the writing of some personal lines business in 1996.

4. A true copy of the United States District Court's January 27, 2012 order in Solis v. The Home Insurance Co., et al., C.A. No. 1:10-cv-572-SM (D. N.H.) as reported as Solis v. Home Ins. Co., 848 F.Supp.2d 91 (D.N.H. 2012) is attached as Exhibit 2.

5. A true copy of DOL's Notice re: Regulations Implementing the Longshore and Harbor Workers' Compensation Act and Related Statutes, 70 Fed. Reg. 43224 (July 26, 2005), is attached as Exhibit 3.

6. A true copy of 20 C.F.R. 702.143-148 and 20 C.F.R. 703.201-213 (2012) is attached as Exhibit 4.

7. A true copy of DOL's State Guarantee Fund Longshore Security Factor Chart as posted on DOL's website at http://www.dol.gov/owcp/dlhwc/LS-276information.htm (visited on December 5, 2012) is attached as Exhibit 5.

8. In 1992, DOL required Home to make a security deposit in the amount of $800,000 to secure its LHWCA obligations. A true copy of DOL's letter to Home dated February 27, 1992 is attached as Exhibit 6. A true copy of the Agreement and Undertaking from Home concerning the security deposit dated June 1, 1992 is attached as Exhibit 7.

9. DOL has placed $25,000 of this deposit in a sub-account to pay claims for compensation under the LHWCA. A true copy of a string of emails between DOL and liquidation staff on this point is attached as Exhibit 8. The remaining $775,000 continues to be

held as a security deposit. A true copy of the most recent Agreement and Undertaking from Home (in liquidation) concerning the security deposit dated July 6, 2012 is attached as Exhibit 9.

Signed under the penalties of perjury this 6 day of December, 2012.

Peter A. Bengelsdorf
Special Deputy Liquidator of The Home Insurance Company

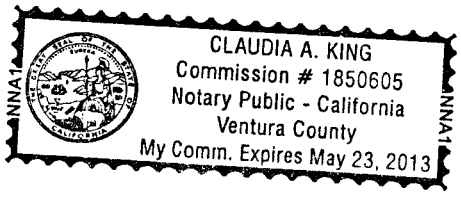
STATE OF CALIFORNIA
COUNTY OF VENTURA

On December 6, 2012 before me, CLAUDIA A. KING - NOTARY PUBLIC, personally appeared Peter A. Bengelsdorf, Special Deputy Liquidator of The Home Insurance Company, who proved to me on the basis of satisfactory evidence to be the person whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his authorized capacity, and that by his signature on the instrument the person, or the entity upon behalf of which the person acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature Claudia A. King
Signature of Notary Public



Liquidator's Exhibits
(Attachments to Affidavit of Peter A. Bengelsdorf)

Exhibit 1	Order of Liquidation dated June 13, 2003
Exhibit 2	Solis v. Home Ins. Co., 848 F.Supp.2d 91 (D.N.H. 2012)
Exhibit 3	DOL Notice re: Regulations Implementing the Longshore and Harbor Workers' Compensation Act and Related Statutes, 70 Fed. Reg. 43224 (July 26, 2005)
Exhibit 4	20 C.F.R. 702.143-148 and 20 C.F.R. 703.201-213 (2012)
Exhibit 5	DOL State Guarantee Fund Longshore Security Factor Chart
Exhibit 6	Letter from DOL to Home dated February 27, 1992
Exhibit 7	Agreement and Undertaking dated June 1, 1992
Exhibit 8	Email string
Exhibit 9	Agreement and Undertaking dated July 6, 2012

Exhibit 1

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS. SUPERIOR COURT

Docket No. 03-E-0106

In the Matter of the Rehabilitation of
The Home Insurance Company

ORDER OF LIQUIDATION

This proceeding was commenced on March 4, 2003, upon the Verified Petition for Rehabilitation of Paula T. Rogers, Commissioner of Insurance for the State of New Hampshire (the "Commissioner"). The Commissioner filed the Verified Petition for Rehabilitation pursuant to RSA 402-C:15, seeking appointment as receiver of The Home Insurance Company ("The Home") for the purpose of rehabilitating and conserving the assets of The Home. On March 5, 2003, this Court entered an Order Appointing Rehabilitator, in which the Commissioner was appointed Rehabilitator of The Home. The Commissioner, as Rehabilitator, has now determined pursuant to RSA 402-C:19 that further attempts to rehabilitate The Home would be futile, that The Home is insolvent within the meaning of RSA 402-C:3 and RSA 402-C:20, II, and that it should be liquidated. On May 8, 2003, the Commissioner, as Rehabilitator, filed a Verified Petition for Order of Liquidation pursuant to RSA 402-C:5, RSA 402-C:19 and RSA 402-C:20 (the "Petition"), in which she has sought an order of liquidation for The Home, her appointment as Liquidator, and the requested permanent injunctions. After having heard and considered the facts set forth in the Petition, the Court finds that the law and facts are

as the Commissioner has alleged in the Petition and that there exists a present necessity for the entry of this order.

WHEREFORE, it is hereby ordered, adjudged and decreed that:

(a) The proceeding for the rehabilitation of The Home is hereby terminated pursuant to RSA 402-C:19;

(b) The Home is declared to be insolvent;

(c) Sufficient cause exists for an order to liquidate The Home;

(d) Paula T. Rogers, Commissioner of Insurance for the State of New Hampshire, and her successors in office, is hereby appointed Liquidator of The Home;

(e) The Liquidator shall cancel all in-force contracts of insurance and bonds effective as of 30 days after the date of this Order;

(f) The Liquidator is directed forthwith to take possession of the assets of The Home wherever located and administer them under the orders of the Court. The Liquidator is vested with title to all of the property, contracts and rights of action and all of the books and records of The Home, wherever located, and in whomever's possession they may be found;

(g) The Liquidator is directed to secure all of the assets, property, books, records, accounts and other documents of The Home (including, without limitation, all data processing information and records comprised of all types of electronically stored information, master tapes, source codes, passwords, or any other recorded information relating to The Home);

(h) The Liquidator is authorized to transfer, invest, re-invest and otherwise deal with the assets and property of The Home so as to effectuate its liquidation;

(i) The Liquidator is authorized to acquire, hypothecate, encumber, lease, improve, sell, transfer, abandon or otherwise dispose of or deal with any property of the insurer at its market value or upon such terms and conditions as are fair and reasonable without prior permission of the Court in the ordinary course of business;

(j) The Home and its directors, officers, employees, agents, and representatives are prohibited from proceeding with the business of The Home, except upon the express written authorization of the Liquidator;

(k) The Home and its directors, officers, employees, agents, and representatives, and any persons acting in concert with The Home, are prohibited from disposing, using, transferring or removing any property of The Home, without the express written authorization of the Liquidator, or in any way (i) interfering with the conduct of the Liquidator or (ii) interfering with the Liquidator's possession and rights to the assets and property of The Home;

(l) Any bank, savings and loan association or other financial institution or other legal entity is prohibited from disposing of or allowing to be withdrawn in any manner property or assets of The Home, except under the express written authorization of the Liquidator or by further order of this Court.

(m) All actions and all proceedings against The Home whether in this state or elsewhere shall be abated in accordance with RSA 402-C:28 and RSA 402-C:5, except to the extent the Liquidator sees fit and obtains leave to intervene;

(n) To the full extent of the jurisdiction of the Court and the comity to which the orders of the Court are entitled, all persons are hereby permanently enjoined and restrained from any of the following actions:

(1) commencing or continuing any judicial, administrative, or other action or proceeding against The Home or the Liquidator;

(2) commencing or continuing any judicial, administrative, or other action or proceeding against The Home's, the Rehabilitator's or the Liquidator's present or former directors, officers, employees, agents, representatives, or consultants, including, without limitation, Risk Enterprise Management Limited and each of its officers, directors and employees, arising from their actions on behalf of The Home, the Rehabilitator or the Liquidator;

(3) enforcing any judgment against The Home or its property;

(4) any act to obtain possession of property of The Home or to exercise control over property of The Home;

(5) any act to create, perfect, or enforce any lien against property of The Home;

(6) any act to collect, assess, or recover a claim against The Home, other than the filing of a proof of claim with the Liquidator; and

(7) the setoff of any debt owing to The Home; provided, however, that notwithstanding anything in this Order to the contrary, nothing herein is intended nor shall it be deemed to stay any right of setoff of mutual debts or mutual credits by reinsurers as provided in and in accordance with RSA 402-C:34;

(o) The Court hereby seeks and requests the aid and recognition of any Court or administrative body in any State or Territory of the United States and any Federal Court or administrative body of the United States, any Court or administrative body in any Province or Territory of Canada and any Canadian Federal Court or

administrative body, and any Court or administrative body in the United Kingdom or elsewhere to act in aid of and to be complementary to this Court in carrying out the terms of the Order;

(p) All persons doing business with The Home on the date of the Liquidation Order are permanently enjoined and restrained from terminating or attempting to terminate such relationship for cause under contractual provisions on the basis of the filing of the petition to rehabilitate The Home, The Home's assent to the entry of the Rehabilitation Order, the entry of the Rehabilitation Order, the filing of this Petition, the entry of the Liquidation Order, the rehabilitation or liquidation proceedings for The Home, or The Home's financial condition during the rehabilitation or liquidation proceedings;

(q) All persons in custody or possession of any property of The Home are hereby directed and ordered to turn over any such property to the Liquidator;

(r) The Liquidator is authorized, in her discretion, to pay expenses incurred in the course of liquidating The Home, including the actual, reasonable, and necessary costs of preserving or recovering the assets of The Home, wherever located, and the costs of goods and services provided to The Home estate in this and other jurisdictions. Such costs shall include, but not be limited to: (1) reasonable professional fees for accountants, actuaries, attorneys and consultants with other expertise retained by the Department, the Commissioner or the Liquidator to perform services relating to the liquidation of The Home or the feasibility, preparation, implementation, or operation of a liquidation plan; (2) compensation and other costs related to representatives, employees or agents of The Home or its affiliates who perform services for The Home in liquidation;

and (3) the costs and expenses of and a reasonable allocation of costs and expenses associated with time spent by New Hampshire Insurance Department personnel and New Hampshire Department of Justice personnel in connection with the rehabilitation and the liquidation of The Home;

(s) The Liquidator is authorized to employ or continue to employ, to delegate authority to and fix the compensation of such appropriate personnel, including actuaries, accountants, consultants, special counsel, and counsel in this and other jurisdictions, as she deems necessary to carry out the liquidation of The Home and its worldwide operations, subject to compliance with the provisions of RSA 402-C, the supervision of the Liquidator, and of this Court. The Liquidator is authorized to continue at her sole discretion to retain the services of Risk Enterprise Management Limited, subject to court approval;

(t) The Liquidator is authorized to appoint, and determine the compensation and terms of engagement of, a special deputy to act for her pursuant to RSA 402-C:25, I.

(u) The actual, reasonable and necessary costs of preserving, recovering, distributing or otherwise dealing with the assets of The Home, wherever located, and the costs of goods or services provided to The Home estate under paragraph (i) of the Rehabilitation Order, during the Rehabilitation proceeding, and under paragraphs (r)-(t) and (v) of the Liquidation Order, during the Liquidation proceeding, shall be treated as "costs and expenses of administration," pursuant to RSA 402-C:44, I;

(v) The Liquidator is authorized and directed to work with any joint provisional liquidator or other person of comparable position appointed by a foreign

tribunal with respect to all or any portion of the estate of The Home located outside the United States (the "foreign estates") for the purpose of preserving, recovering and incorporating into the domiciliary estate all assets of The Home located outside the United States. The Liquidator is authorized to fund from the domiciliary estate the costs and expenses of administering the foreign estates;

(w) The Liquidator is directed to administer and make payments on all claims against The Home estate filed with the Liquidator in the domiciliary proceeding, including the claims of claimants residing in foreign countries (provided the assets of such foreign estate are transferred to the Liquidator), in accordance with New Hampshire's priority statute, RSA 402-C:44;

(x) The amounts recoverable by the Liquidator from any reinsurer of The Home shall not be reduced as a result of the prior rehabilitation proceeding or this liquidation proceeding or by reason of any partial payment or distribution on a reinsured policy, contract or claim, and each reinsurer of The Home is, without first obtaining leave of this Court, hereby enjoined and restrained from terminating, canceling, failing to extend or renew, or reducing or changing coverage under any reinsurance policy or contract with The Home. The Liquidator may, in her discretion, commute any contract with a reinsurer or reinsurers;

(y) To the full extent of the jurisdiction of the Court and the comity to which the orders of the Court are entitled, all actions or proceedings against an insured of The Home in which The Home has an obligation to defend the insured are hereby stayed for a period of six months from the date of the Order and such additional time as the Court may determine pursuant to RSA 404-B:18;

(z) Within one year of the entry of this Order, and then annually thereafter, the Liquidator shall file with the Court a financial report, as of the preceding December 31, in accordance with RSA 402-C:21, V, which shall include, at a minimum, the assets and liabilities of The Home and all funds received or disbursed by the Liquidator during the period;

(aa) The Liquidator shall have full powers and authority given the Liquidator under RSA 402-C of Title XXXVII, and under provisions of all other applicable laws, as are reasonable and necessary to fulfill the duties and responsibilities of the Liquidator under RSA 402-C of Title XXXVII, and under the Order, specifically including, but not limited to, each and every power and authority bestowed upon the Liquidator under RSA 402-C:25, I-XXII, the provisions of which are incorporated by reference in their entirety into this Order, and the common law of New Hampshire; and

(bb) The deadline for the filing of claims pursuant to RSA 402-C:26, II, RSA 402-C:37, I, and RSA 402-C:40, II, shall be one year from the date of this Order.

Date: 6/13/03
Time: _____

By: _____
Presiding Justice

848 F.Supp.2d 91
United States District Court,
D. New Hampshire.

Hilda SOLIS, Secretary, United States Department of Labor, Plaintiff
v.
The HOME INSURANCE COMPANY and Roger A. Sevigny, New Hampshire Insurance Commissioner, as Liquidator of the Home Insurance Company, Defendants.

Case No. 10–cv–572–SM. | Jan. 27, 2012.

Synopsis
Background: Secretary of the Department of Labor (DOL) sued an insolvent insurer and New Hampshire's Insurance Commissioner, as the insurer's liquidator, challenging the assigned priority of the DOL's claim regarding assessments allegedly owed by the insurer to a "Special Fund" administered by the DOL pursuant to the Longshore and Harbor Workers' Compensation Act. DOL moved for summary judgment.

[Holding:] The District Court, Steven J. McAuliffe, J., held that Longshore and Harbor Workers' Compensation Act (LHWCA) did not preempt state's priority-setting statute.

Motion denied.

Attorneys and Law Firms

*93 Kyle Forsyth, U.S. Dept. of Justice—Com'l Litigation, Washington, DC, for Plaintiff.

Eric A. Smith, J. David Leslie, Rackemann Sawyer & Brewster, Boston, MA, J. Christopher Marshall, NH Attorney General's *94 Office, Department of Justice, Concord, NH, for Defendants.

Opinion

ORDER

STEVEN J. McAULIFFE, District Judge.

The Home Insurance Company ("Home") was declared insolvent in 2003 by the New Hampshire Superior court, which ordered its liquidation and appointed the New Hampshire Commissioner of Insurance as liquidator. During the subsequent insolvency proceeding, the United States Department of Labor ("DOL") filed a proof of claim seeking over $2.6 million in assessments allegedly owed by Home to a "Special Fund" administered by DOL pursuant to the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901–50 (the "Longshore Act"). Applying state law—which establishes the priority in which payments from the assets of liquidated insurers are to be made—the Liquidator assigned DOL's claim to priority Class III. Home's assets are generally thought to be insufficient to cover Class III claims, so it is unlikely that DOL will recover anything substantial. The Department of Labor brought this suit against Home and Roger A. Sevigny, New Hampshire's Insurance Commissioner and Liquidator of Home, seeking a declaration that the Longshore Act preempts the state's priority-setting statute. Before the court is DOL's motion for summary judgment (document no. 29).

Standard of Review

When ruling on a motion for summary judgment, the court must "view the entire record in the light most hospitable to the party opposing summary judgment, indulging all reasonable inferences in that party's favor." *Griggs–Ryan v. Smith,* 904 F.2d 112, 115 (1st Cir.1990). Summary judgment is appropriate when the record reveals "no genuine dispute as to any material fact and ... the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a). "[A] federal preemption ruling" involves "a pure question of law." *United States v. Rhode Island Insurers' Insolvency Fund,* 80 F.3d 616, 619 (1st Cir.1996) (hereinafter "*RIIIF* ").

Background

The material facts are not in dispute.

I. *Procedural History*

The New Hampshire Superior Court (Merrimack County) declared Home insolvent and ordered its liquidation on June 13, 2003. The Liquidator (Sevigny) is "vested ... with the title to all of the property, contracts and rights of action and all of the books and records of [Home]." N.H.Rev.Stat. Ann. ("RSA") § 402–C:21. The Liquidator must review each claim filed in Home's liquidation, and determine whether the claim should be allowed, in what amount, and at what priority class level. After doing so, the Liquidator presents his findings to the superior court in the form of recommended action for the court's approval. RSA 402–C:45.

The DOL filed a proof of claim and an amended proof of claim in 2003 and 2005, respectively, for assessments totaling $2,672,527 that Home allegedly owes to DOL under the Longshore Act for the period between 2000–2004 (collectively the "claim"). In October 2010, the Liquidator issued a notice of redetermination, which allowed DOL's claim in full. Pursuant to New Hampshire's priority statute (RSA 402–C:44), however, the Liquidator assigned DOL's claim a Class III priority. He also rejected DOL's argument that state priority law does not apply because it is preempted by the Longshore Act.

Unhappy with the Liquidator's decision, DOL filed this federal declaratory judgment ***95** action to press the preemption issue. It also asserted, on alternative state law grounds, that its claim against Home's assets is entitled to either a Class I or Class II priority. The superior court stayed the liquidation proceedings with respect to the DOL's claim pending the outcome of this case. This court denied the defendants' motion to dismiss DOL's federal preemption cause of action, but granted, under *Wilton v. Seven Falls Co.*, 515 U.S. 277, 115 S.Ct. 2137, 132 L.Ed.2d 214 (1995), their motion to dismiss the state law claims. *See* Document No. 40. In addition, the Guaranty Funds were allowed to intervene to protect their rights as Class II claimants.[1] *Id.*

II. *The State Liquidation Statute and Priority Provision*

The New Hampshire Insurer Liquidation Act, RSA 402–C ("Liquidation Act"), provides a comprehensive statutory framework governing the rehabilitation or liquidation of troubled insurance companies. Under the Act, the assets of an insolvent insurer are distributed to claimants, as allowed by the liquidator "[u]nder the direction of the [state] court," and in accordance with statutory priorities. RSA 402–C:46, I. Those priorities are set out in RSA 402–C:44 (the "state priority law"), which establishes ten priority classes. The first three classes are relevant to DOL's claim in this case. *Id.* Class I includes the "costs and expenses of administration" of the insolvent insurer's estate. *Id.* Class II claims are "Policy Related Claims," including "claims of the New Hampshire Insurance Guaranty Association, the New Hampshire Life and Health Insurance Guaranty Association and any similar organization in another state." *Id.* Class III claims are "Claims of the Federal Government." *Id.* Every claim in a given priority class must be paid in full (or adequate funds retained for payment in full) before any payment is made on claims of the next lower class. *Id.*

III. *The Federal Longshore Act*

A. Generally

DOL's claim against the assets of Home arises from assessments DOL levied against Home pursuant to the Longshore Act. The Longshore Act creates "an extensive workers' compensation program that protects longshore and other specific classes of workers whose injuries occur upon navigable waters of the United States or adjoining facilities like piers and dry docks." *Reich v. Bath Iron Works Corp.*, 42 F.3d 74, 75 (1st Cir.1994) (citing 33 U.S.C. § 903(a)). The Longshore Act is similar to workers' compensation programs "provided by many states for non-maritime workers." *B.S. Costello, Inc. v. Meagher*, 867 F.2d 722, 723 (1st Cir.1989). It "establishes benefits to workers without regard to the employer's fault, but, at the same time, it eliminates common law tort liability and limits the employer's liability to predictable amounts." *Id.* The purpose of the Longshore Act, therefore, is "to afford expeditious relief to injured workers while distributing their economic losses on to industry and the consuming public." *Id.*

The Longshore Act sets the amount and duration of compensation payments it requires employers to make to their injured employees. Employers must "secure the ***96** payment of compensation" either (1) through a contract with an insurance carrier or (2) by qualifying as a self-insurer with the DOL. 33 U.S.C. § 932(a). Insurance carriers must receive authorization from the Secretary before they can insure the "payment of ... compensation," *id.*, and must disclose to the Secretary a "full and complete statement of [their] financial condition." 20 C.F.R. § 703.102. In deciding whether to authorize an insurance carrier to provide insurance under the Longshore Act, the Secretary may consider the recommendation of "any State authority having supervision over carriers or over workmen's compensation." 33 U.S.C. § 932(b). The Secretary may suspend or revoke its authorization for good cause shown. *Id.*

[11] Because "employees' claims will ... commonly be handled by an insurance carrier, the [Longshore Act] facilitates claim administration by allowing the Secretary of Labor to substitute the carrier for the employer for purposes of administrative proceedings and orders." *B.S. Costello,* 867 F.2d at 724. Nevertheless, and "notwithstanding the important role carved out for insurance carriers," employers remain liable for compensation despite any insurance. *Id.*

B. The Special Fund: § 944

Section 944 of the Longshore Act creates a "Special Fund" of money held in trust and administered by DOL. 33 U.S.C. § 944(a). The Special Fund operates primarily (1) to provide to "second injury" workers compensation beyond that which employers are required to provide (33 U.S.C. § 908), and (2) to provide compensation to workers in the event of employer insolvency (33 U.S.C. § 918). *See* 33 U.S.C. § 944(I). Section 944 authorizes the Secretary to fund the Special Fund through annual assessments on self-insured employers and insurance carriers. See 33 U.S.C. § 944(c)(2).[2]

(1) Second Injury Payments from the Special Fund

Employer liability for worker compensation under the Longshore Act is limited in cases of "second injury," that is, where a partially disabled worker suffers a work-related injury that increases her disability. Under such circumstances, the employer is usually liable only for 104 weeks of compensation payments. 33 U.S.C. § 908(f)(1); 20 C.F.R. 702.145(b) (2010). After that period, liability for payments shifts to the Special Fund. 33 U.S.C. § 908(f); *Reich,* 42 F.3d at 77 (Section 944 "mak[es] the special fund, and not the employer, liable ... for so-called 'second injury' compensation payments").

Shifting liability to the Special Fund is meant "to encourage employers to hire ***97** workers who have a previous partial permanent disability." *Reich,* 42 F.3d at 77. "For various reasons, employers feared that such a worker who suffered a *new* disability might impose extra liability on the employer where the first injury contributed to the severity of the second; a good example is the loss of an eye by a worker already blind in one eye." *Id.* (emphasis in original).

(2) Payments from the Special Fund in the Event of Employer Insolvency

The Secretary may also, in her discretion, disburse so-called "Section 918" payments from the Special Fund to workers whose employers have defaulted on paying compensation. *See* 33 U.S.C. §§ 918(b), 944(l). That relief is available to workers who have secured federal court judgments against their employers, but the judgment cannot be satisfied because of employer "insolvency or other circumstances precluding payment." 33 U.S.C. § 918(b).[3] In other words, Section 918 payments from the Special Fund act as a safety net with respect to the relationship between worker and employer.[4] However, the Special Fund does not pay compensation to claimants where an insurer becomes insolvent. See 33 U.S.C. § 944. *See also B.S. Costello,* 867 F.2d at 724 (when insurer becomes insolvent, employer is liable for compensation).

(3) Special Fund Assessments

Special Fund monies come primarily from insurance carriers and self-insured employers. *See* 33 U.S.C. § 944(c)(2). Section 944(c)(2) (the "Assessment Provision") charges the Secretary with "maintain[ing] adequate reserves in the fund," and grants her the authority to levy assessments necessary to accomplish that goal. *Id.* The Assessment Provision establishes a formula for calculating annual assessments, which applies specifically to "carrier[s] and self-insurer[s]." *Id.* The Secretary first "estimate[s] the fund's expected obligations for the forthcoming year." *Reich,* 42 F.3d at 75 (citing 33 U.S.C. § 944(c)(2)). Nothing in § 944 appears to limit the Secretary from increasing her estimate of probable expenses to cover assessments unpaid by insolvent insurers. From her estimate of probable expenses, the Secretary then subtracts "other fund income (*e.g.,* fines)."[5] *Id.* The remaining balance represents the amount that must be funded through assessments. *Id.* In determining how much to assess against each self-insured employer or insurance carrier, the Secretary applies a calculation that takes into consideration each entity's compensation payments during the preceding calendar year and second injury payments made during the preceding calendar year that are "attributable to" each entity. *Id.* at 75–76 (citing 33 U.S.C. § 944(c)(2)). Unpaid assessments are collected "by civil suit brought by the Secretary." 33 U.S.C. § 944(h). *See also* 20 C.F.R. § 702.147(c).

***98** For fiscal years 2000–2004, assessments against insurance carriers comprised more than ninety-nine percent of the Special Funds' revenues. Payments made from the Fund during that same period consisted primarily

of second injury payments, which accounted for over 90% of all Special Fund outlays. The next largest category of Special Fund payments for that period consisted of "Section 918" payments, which comprised less than 5% of payments from the Special Fund.

Discussion

The federal priority statute, 31 U.S.C. § 3713, provides that a "claim of the United States Government shall be paid first when ... a person indebted to the Government is insolvent and ... an act of bankruptcy is committed." 31 U.S.C. §§ 3713(a)(1)(A)(iii). DOL's claim, then, is arguably entitled to first priority in the state insolvency proceedings, notwithstanding the contrary state priority law. However, the Supreme Court, in *United States Dept. of Treasury v. Fabe,* 508 U.S. 491, 113 S.Ct. 2202, 124 L.Ed.2d 449 (1993), held that, to the extent a state statute protects policyholders by requiring a different priority class for federal claims in insurance insolvency proceedings, it may supersede the federal priority statute under the McCarran–Ferguson Act, which seeks to preserve "the supremacy of the States in the realm of insurance regulation." *Id.* at 500, 113 S.Ct. 2202. *See also Ruthardt v. United States,* 303 F.3d 375, 379–384 (1st Cir.2002) (applying *Fabe* and holding that federal claim priority statute was reverse-preempted by Massachusetts insurer insolvency priority law). Because *Fabe* precludes application of the federal priority statute to DOL's claim, DOL seeks to conjure up a similar "absolute priority" requirement (document no. 29–1, at 1) from the Assessment Provision of subsection 944(c)(2) of the Longshore Act—one DOL contends can survive reverse-preemption under McCarran–Ferguson.

In response, defendants and intervenors (collectively "defendants") point out that the Assessment Provision of the Longshore Act contains no explicit priority requirement, and they further note that the provision does not impliedly create one. Absent such a priority requirement, defendants contend, there is no conflict between federal law and the state's priority law. So, no federal preemption issue arises. Defendants also argue, in the alternative, that, even if the court were to find that the Assessment Provision would normally preempt the state's priority law under conventional preemption principles, the McCarran–Ferguson Act protects the state law and renders the federal law reverse-preempted.

I. *Conventional Preemption Analysis*

A. *Presumption Against Preemption*

[2] In determining whether the federal law at issue here preempts the state priority law, the court is guided by the "two cornerstones of ... preemption jurisprudence." *Wyeth v. Levine,* 555 U.S. 555, 565, 129 S.Ct. 1187, 173 L.Ed.2d 51 (2009). First, "the purpose of Congress is the ultimate touchstone in every pre-emption case." *Id.* (internal quotation marks omitted). Second, there is a "presumption against preemption," especially where state law operates in a field "traditionally occupied" by the states. *Massachusetts Med. Soc'y v. Dukakis,* 815 F.2d 790, 792, 796 (1st Cir.1987). The Supreme Court in *Wyeth* recently "put renewed emphasis on the presumption against preemption," *Genesee Cnty. Employees' Ret. Sys. v. Thornburg Mortg. Sec. Trust,* 825 F.Supp.2d 1082, 1145, No. Civ. 09–0300JB/KBM, 2011 WL 5840482, at *46 (D.N.M. Nov. 12, 2011), by clarifying that it applies **99 in all preemption cases, including those in which conflict-preemption is claimed. *See Wyeth,* 555 U.S. at 624 n. 14, 129 S.Ct. 1187 (Alito, J. dissenting).

[3] Here, the presumption that the federal statute does not preempt the state's priority law is "particularly strong," *Rhode Island Hospitality Ass'n v. City of Providence,* 667 F.3d 17, 46 (1st Cir.2011) (Stahl, J., concurring), because the insurance field, and the sub-field of insurance insolvency, are areas traditionally occupied by the states. *See In re Union Guarantee & Mortg. Co.,* 75 F.2d 984, 984–85 (2d Cir.1935) ("Congress meant to leave to local winding up statutes the liquidation of such companies; ... since the states commonly kept supervision over them during their lives, it was reasonable that they should take charge on their demise.").

B. *Preemption Theories Generally*

[4] [5] There are two general types of federal preemption—express and implied. *Liberty Cablevision of Puerto Rico, Inc. v. Municipality of Caguas,* 417 F.3d 216, 220 (1st Cir.2005). Express preemption occurs where Congress has used "explicit preemptive language." *Id.* Where Congress has not employed such language, its preemptive intent may, nevertheless, be implied from the statute's "structure and purpose." *Jones v. Rath Packing Co.,* 430 U.S. 519, 525, 97 S.Ct. 1305, 51 L.Ed.2d 604 (1977); *Geier v. Am. Honda Motor Co.,* 529 U.S. 861, 885, 120 S.Ct. 1913, 146 L.Ed.2d 914 (2000) ("[T]his Court traditionally distinguishes between 'express' and 'implied' pre-emptive intent...."). There are three forms of implied preemption. "Field" preemption occurs where the "scheme of federal regulation [is] so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." *Rice v. Santa Fe Elevator Corp.* 331 U.S. 218, 230, 67 S.Ct. 1146, 91 L.Ed. 1447

(1947). "Impossibility" preemption "arises where federal and state law 'impose directly conflicting duties,' e.g., 'if the federal law said, "you must sell insurance," while the state law said, "you may not." ' " *Bartlett v. Mut. Pharm. Co.*, 659 F.Supp.2d 279, 293 (D.N.H.2009) (LaPlante, J.) (quoting *Barnett Bank of Marion Cnty., N.A. v. Nelson,* 517 U.S. 25, 31, 116 S.Ct. 1103, 134 L.Ed.2d 237 (1996)). The third type of implied preemption is "obstacle" preemption, which occurs where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz,* 312 U.S. 52, 67, 61 S.Ct. 399, 85 L.Ed. 581 (1941). Both impossibility and obstacle preemption are so-called "conflict pre-emption" theories, which require an "actual conflict" between the federal and state law. *Freightliner Corp. v. Myrick,* 514 U.S. 280, 287, 115 S.Ct. 1483, 131 L.Ed.2d 385 (1995).

[6] In this case there is no express preemption because neither Section 944, nor the Assessment Provision of sub-section 944(c)(2), contains explicit preemptive language. DOL does not contend otherwise. DOL's position rests, instead, on the implied preemption theories of "impossibility" and "obstacle" preemption. Specifically, DOL says it is impossible for the defendants to comply with both their duty under § 944 to pay Home's assessment to the Special Fund and their duty under the state's priority law to pay Class I and Class II claims ahead of DOL's claim. In addition, DOL contends that, in the present case, the state law stands as an "obstacle" to the purposes and objectives of the federal law.

C. *Impossibility Preemption*

DOL bears a "demanding" burden to present "clear evidence" that " 'compliance ***100** with both [the] federal and state [laws] is a physical impossibility.' " *Wyeth,* 555 U.S. at 571, 573, 589, 129 S.Ct. 1187 (2009) (quoting *Florida Lime & Avocado Growers, Inc. v. Paul,* 373 U.S. 132, 142–143, 83 S.Ct. 1210, 10 L.Ed.2d 248 (1963)).[6] DOL argues that defendants cannot comply with both state and federal law because federal law requires them to pay the federal assessment, but the state's priority law forbids payment because Home's assets are insufficient to pay DOL's Class III claim.

The argument is difficult for several reasons. First, it incorrectly frames the conflict. *See Bartlett,* 659 F.Supp.2d at 293 (parties claiming impossibility preemption are required to "fit their claimed predicament" into the relevant "framework"). A conflict exists in this case if defendants' compliance with the state's priority law would "run[...] afoul" of the Assessment Provision. *Id.* at 290. Answering *that* question, *i.e.,* whether application of the state's priority law to DOL's claim would result in violation of the Assessment Provision of Section 944(c)(2), requires resolution of a subsidiary issue: Does that section command something that state law forbids? *See id.* at 293 ("[D]efendants would need to show a federal law saying 'You may not change your label' to conflict with the state law underlying the Bartletts' failure-to-warn claims, *i.e.,* 'You must change your label.' So the defendants' assertion that the FDCA does not say *one way or the other* whether they can change their label is insufficient.") (emphasis in original). Given that the state's priority law rules out Class I priority for DOL's claim, DOL must show that the Assessment Provision requires it. In other words, it is not enough to show the obvious—that the federal Assessment Provision creates an assessment claim. Of course it does. DOL must also show that the Assessment Provision creates a right of absolute priority for such a claim in state insurance insolvency proceedings. No express language in either Section 944 or in the Assessment Provision of subsection 944(c)(2) provides that assessments are entitled to absolute priority (or any priority). Similarly, no other provision of the Longshore Act speaks to the issue of assessment claim priority. DOL's argument, therefore, rests entirely on the notion that a preferential priority is implied. That argument is unsupported.

It is commonly understood that a debt obligation (a "claim") and the priority assigned to such an obligation in insolvency or bankruptcy proceedings are distinct. *See generally* Bankruptcy Code, 11 U.S.C. § 507(a) ("The following expenses and claims have priority in the following order ..."). Congress fully understands that difference, *see id.,* and has long created priorities for federal claims directly and expressly. For example, since 1797 Congress has provided priority for federal claims in insolvency proceedings through express statutory command in the federal priority statute. *See* Act of Mar. 3, 1797, ch. 20, § 5, 1 Stat. 515 (1797), *current version at* 31 U.S.C. § 3713. Congress has also expressly set forth a priority scheme for federal claims in bankruptcy proceedings. *See* 11 U.S.C. § 507; *see also United States v. Romani,* 523 U.S. 517, 531, 118 S.Ct. 1478, 140 L.Ed.2d 710 (1998). Except for federal tax claims, claims of the United States have been treated as general creditor claims in bankruptcy ***101** cases for over a hundred years. *See id.*

In the context of the Longshore Act, legislative history shows that when Congress meant to provide a specific priority it did so directly and expressly. Before 1978, § 917(a) of the Longshore Act expressly required that compensation claims be given a preferential priority in both employer and insurer insolvencies:

> Any person entitled to compensation under provisions of this Act *shall have a lien* against the assets of the carrier or employer for such compensation without limit of amount, and shall, upon insolvency, bankruptcy, or reorganization in bankruptcy proceedings of the carrier or employer, or both, *be entitled to preference and priority in the distribution of the assets of such carrier or employer, or both.*

33 U.S.C. § 917(a), as amended by Pub.L. No. 92–576 (1972) (emphasis added). Congress repealed that subsection as part of the Bankruptcy Reform Act of 1978. Pub.L. No. 95–598, tit. III, § 324, 92 Stat. 2679. Congress sought to eliminate the "special priority and super-priority lien" created by § 917(a) in order to promote "equality of treatment of all creditors" in bankruptcy proceedings. S.Rep. No. 95–989, at 159 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5950. Both the enactment and subsequent repeal of § 917(a) demonstrate that Congress did not overlook the matter of preferential priorities in the Longshore Act, and they provide strong evidence that Congress did not mean to create additional priorities. *Cf. Wyeth,* 555 U.S. at 567, 574–75, 129 S.Ct. 1187 (fact that Congress expressly dealt with issue in one part of federal statute but was silent as to same issue in another part of the same statute was "powerful evidence" of its intent). Had Congress wanted to create an absolute priority in Section 944, it could easily have done so. *See e.g., Pacific Operators Offshore, LLP v. Valladolid,* —— U.S. ——, 132 S.Ct. 680, 689, 181 L.Ed.2d 675 (2012) ("[I]t is unlikely that Congress intended to impose [the Longshore Act] situs-of-injury requirement" in a related federal statute because "creating an express situs-of-injury requirement in the text [of that related statute] ... would have been simple.")

Moreover, Congress's repeal of § 917(a) of the Longshore Act in the Bankruptcy Reform Act of 1978 was part of a larger effort to eliminate piecemeal treatment of priorities. The Bankruptcy Reform Act repealed many priority provisions. *See* Bankruptcy Reform Act of 1978, tit. III. The House legislative report noted:

> When an insolvent estate is liquidated and the proceeds distributed under the bankruptcy laws, myriad other laws that reorder the priorities fixed in the bankruptcy code create confusion and unfairness.... Thus, the bill, in the interest of a coherent bankruptcy policy, eliminates special priorities found in other laws and brings all priorities into the bankruptcy code itself.

H.R.Rep. No. 95–595, 95th Cong., 1st Sess. 252 (1977) *reprinted in* 1978 U.S.C.C.A.N. at 6242. The Bankruptcy Reform Act also made the federal priority statute inapplicable to bankruptcy proceedings. *See* 31 U.S.C. § 3713(a)(2). Congress's intent to provide for a more unified and less piecemeal treatment of priorities, including priorities for the federal government's claims, is manifest in these legislative changes.

At bottom, there is nothing to suggest that Congress meant to attach "absolute priority" status to assessments made under Section 944. And such a requirement should not be inferred from Congress's silence in Section 944, particularly given that Congress normally addresses priority issues expressly, including within the ***102** Longshore Act itself. *See generally Edmonds v. Compagnie Generale Transatlantique,* 443 U.S. 256, 266–67, 99 S.Ct. 2753, 61 L.Ed.2d 521 (1979) (refusing to infer from amendment to the Longshore Act a Congressional intent to change pre-existing rights where the statutory language was silent and the legislative history did not support it).

Because neither Section 944 as a whole, nor its Assessment Provision in particular, assigns a preferential priority status to DOL's claim there is no "actual conflict," *Freightliner,* 514 U.S. at 287, 115 S.Ct. 1483, with the state's priority law assigning DOL's claim Class III status. In short, it is not "impossible" for defendants to comply with both the state and federal laws because federal law does not command something that state law forbids.

D. *Obstacle Preemption*

The Assessment Provision supports the Special Fund's objective of providing funds for injured workers. *See* discussion *supra* at Background Part 3.b. DOL's primary "obstacle preemption" argument is that the state's priority law is preempted because, under the circumstances of this case, that law impairs the Special Fund's ability to make compensation payments to injured workers. Defendants do not deny that compensation payments from the Special Fund promote the Fund's dual mission of encouraging employer hiring of second injury workers and helping injured workers whose employers have become insolvent. *See* Document No. 33, at 5, 13–14. They contend,

however, that DOL's inability to collect Home's assessment does not, in fact, impair the Special Fund's ability to carry out those purposes. *See id.* at 17; Document No. 42, at 9.

As an initial matter, the court notes that "there is always a federal interest to collect moneys" which are owed the government. *United States v. Yazell,* 382 U.S. 341, 348, 86 S.Ct. 500, 15 L.Ed.2d 404 (1966). However, "generalities as to the paramountcy of th[at] federal interest do not lead inevitably to" a "total disregard of state laws." *Id.* at 349, 86 S.Ct. 500 (holding, federal interest in collecting on Small Business Administration loan did not require extending a preferred right to proceed against wife's separate property to the government, in contravention of state law of coverture). DOL's general interest in having its assessments paid is, in similar way, not an interest sufficient to overcome the state priority law under a theory of obstacle preemption.

As for DOL's argument that application of the state priority law will obstruct the specific purposes of the Special Fund, the court finds the facts unsupportive. As defendants point out, the Secretary may offset Home's unpaid assessment by increasing next year's assessments against other carriers and self-insured employers. DOL does not suggest that the statute expressly or impliedly limits the Secretary's authority to redistribute the cost of Home's unpaid assessment. Indeed, DOL concedes that the Assessment Provision allows her to do so. *See* Document No. 46 at 6. The Secretary's statutory duty to "maintain adequate reserves in the fund," 33 U.S.C. § 944(c)(2), suggests that she may well be obligated to exercise her authority as necessary to offset the Special Fund's losses.

DOL insists, nevertheless, that even if the Secretary's ability to recoup Home's unpaid assessments means that the state law does not impair the Special Fund's overall purposes, recoupment would impair a subsidiary purpose of the Assessment Provision. That subsidiary purpose—which defendants do not disclaim—is the spreading of Special Fund costs among industry participants. DOL essentially argues that Congress intended that cost- ***103** spreading among industry participants include even insurers in liquidation. Defendants say that expression of Congressional intent is incorrect, and that while the subsidiary purpose of the Assessment Provision is certainly to spread costs among insurance carriers and self-insured employers, Congress did not "say [...] anything about what should happen if an insurer is insolvent." Document No. 51, at 2.

The court rejects as "untenable" DOL's articulation of Congress's cost-spreading purpose. *Wyeth,* 555 U.S. at 573, 129 S.Ct. 1187 (finding no obstacle preemption where petitioner's proffered articulation of congressional purpose "relie[d] on an untenable interpretation of congressional intent"). Nothing suggests Congressional intent to preclude redistribution of the cost of unpaid insurer assessments. Indeed, that the Assessment Provision authorizes the Secretary to effect such a re-distribution suggests otherwise.[7] Congress's silence in Section 944 does not suggest an intent to create a cost-spreading scheme so critical that it necessarily displaces state insurer insolvency priority laws. *See Marsh v. Rosenbloom,* 499 F.3d 165, 178–79 (2d Cir.2007) (state statute of limitations did not present an obstacle to accomplishment of federal environmental law's cost-sharing objective, even where its application would reduce funds otherwise available from responsible parties for environmental clean-up; federal statute's cost-sharing objective "while strong, [was] not absolute").

In sum, the state's priority law, as applied in this case, poses an obstacle neither to the primary purposes of the Special Fund nor to the Assessment Provision's subsidiary purpose of spreading Special Fund costs among industry participants. As to both its impossibility and obstacle preemption arguments, therefore, the court finds that DOL has failed to overcome the presumption that Congress did not intend, when it created an assessment mechanism to fund the Special Fund, to displace state priority laws operating in the field of insurer insolvency proceedings, a field traditionally occupied by the states.

II. *Reverse Preemption Under the McCarran–Ferguson Act*

[7] Even assuming that Section 944, and the Assessment Provision of subsection 944(c)(2), preempt, under normal preemption principles, the state's priority law, the McCarran–Ferguson Act prohibits that result. The federal statutory provisions at issue here do not "specifically relate to the business of insurance," 15 U.S.C. §§ 1011–1015, and, therefore, do not strip the state's priority law of McCarran–Ferguson's protection.

[8] The McCarran–Ferguson Act, 15 U.S.C. § 1011 et seq., was enacted to protect " 'the continued regulation and taxation by the several States of the business of insurance.' " *Fabe,* 508 U.S. at 500, 113 S.Ct. 2202 (quoting 15 U.S.C. § 1011). Toward that end, the first section of the Act explicitly provides "that silence on the part of the Congress shall not be construed to impose any barrier to [such] ... regulation ***104** or taxation...." 15 U.S.C. § 1011. The Act, therefore, prohibits federal

preemption of state laws that regulate insurance, "unless the federal statute expressly announce[s] Congress's specific intention to inject itself into the area of state insurance law." *RIIIF,* 80 F.3d at 620 (requiring a "clear statement" of congressional intent to intrude upon state insurance regulation). "[I]nadvertent federal intrusion," therefore, is not enough to strip a state law of the Act's protection. *Id.*[8]

For McCarran–Ferguson to protect a state law from the application of "normal federal preemption principles," "three conditions" must be met. *Id.* at 619. First, the federal statute "must not 'specifically relat[e] to the business of insurance.' " *Id.* (quoting 15 U.S.C. § 1012). Second, the state law "must have been enacted 'for the purpose of regulating the business of insurance.' " *Id.* Third, the federal statute must " 'invalidate, impair, or supersede' " the state law. *Id.* Here, the parties agree that the second condition is met in that New Hampshire's insurer insolvency priority law regulates the business of insurance. *See generally Ruthardt,* 303 F.3d at 379–84 (Massachusetts insurer insolvency priority law, in part, regulated the business of insurance). Moreover, for purposes of this analysis the court assumes that the third condition is also met, *i.e.,* that the federal law supersedes the state priority law under normal preemption principles. What remains primarily in dispute is the first condition—whether the federal law is "specifically related to the business of insurance."

Here, the relevant federal law is Section 944 of the Longshore Act, and, more specifically, the Assessment Provision of subsection 944(c)(2). Although DOL points to many provisions of the Longshore Act that might support its contention that the Act as a whole relates to the "business of insurance," precedent employing the McCarran–Ferguson analysis suggests that the proper focus is on the allegedly preemptive provision, and not on the entire federal statute. *See e.g., RIIIF,* 80 F.3d at 621–22 (applying McCarran–Ferguson analysis to Medicare secondary payer provision, not entire Medicare program). *See also Barnett Bank,* 517 U.S. at 38, 116 S.Ct. 1103 (applying McCarran–Ferguson analysis to section 13 of the Bank Act); *Blackfeet Nat'l Bank v. Nelson,* 171 F.3d 1237, 1249 (11th Cir.1999) (holding that, unlike section 13 of the Bank Act, section 24 (Seventh) of the same Act does not specifically relate to the business of insurance).

A. *"Specific Relation"*

[9] The requirement under McCarran–Ferguson that the relevant federal statutory provision "specifically" relate to the business of insurance means that the provision must not simply "encompass" the business of insurance by implication through language of "general application." *RIIIF,* 80 F.3d at 620. Rather, it must "explicity, particularly, [or] definitely" refer ***105** to insurance. *Barnett Bank,* 517 U.S. at 38, 116 S.Ct. 1103 (1996) (quotation omitted). Defendants here concede that the Assessment Provision makes "specific," *i.e.,* explicit, reference to insurance, in that it authorizes the Secretary to fund the Special Fund through assessments against "carrier[s] and self-insurer[s]."

B. *"Business of Insurance"*

[10] A federal statutory provision is related to the "business of insurance" where it affects the "core relationship between a private insurer and its insured." *RIIIF,* 80 F.3d at 621. Matters at the "core" of that relationship include:

> 'the type of [insurance] policy that could be issued, its reliability, interpretation, and enforcement' ... as well as the standards governing performance under insurance contracts.

Id. at 621–22 (quoting *Fabe,* 508 U.S. at 501, 508–10, 113 S.Ct. 2202) (citations omitted). As the Court in *Fabe* explained, "the focus ... is upon the relationship between the insurance company and its policyholders." *Fabe,* 508 U.S. at 501, 113 S.Ct. 2202.

Applying these principles, the Court in *Barnett Bank* found that the federal statutory provision at issue there related to the "business of insurance" where it "explicitly grant[ed to] national banks permission to": (1) " 'act as the agent for any fire, life, or other insurance company,' " (2) "to 'solici[t] and sel[l] insurance,' " (3) to " 'collec[t] premiums,' " and (4) to " 'receive for services so rendered ... fees or commissions.' " *Barnett Bank,* 517 U.S. at 39, 116 S.Ct. 1103 (quoting 12 U.S.C. § 92). The Court found that "[t]he statute thereby not only focuse[d] directly upon industry-specific selling practices, but also affect[ed] the relation of insured to insurer and the spreading of risk—matters ... at the core of the McCarran–Ferguson Act's concern." *Id.* at 39, 116 S.Ct. 1103.

Soon after *Barnett Bank,* the appellate court for this circuit considered whether a provision of the Medicare Secondary–Payer Act, 42 U.S.C. § 1395y(b), related to the "business of insurance." *RIIIF,* 80 F.3d at 622. The federal provision "explicitly prohibit[ed] private insurers from negotiating or enforcing any insurance-contract term which purports to make Medicare the primary-insurance obligor in lieu of a private insurance carrier, even though authorized by state law." *Id.* The court found that the federal provision related to the business of insurance

because it "control[ed] the core contract relationship at both the negotiation and performance stages." *Id.*[9] Noting that the McCarran–Ferguson Act "seeks to protect state [insurance] regulation primarily against inadvertent federal intrusion," it found that the Act afforded the state law no protection because the federal provision at issue was ***106** a clear and "overt federal intervention." *Id.* at 620, 622.

Here, Section 944 and its Assessment Provision are nothing like the federal provisions at issue in *Barnett Bank* and *RIIIF*.[10] As noted, Section 908 of the Longshore Act limits employer liability for second injury compensation. *See* 33 U.S.C. § 908(f). Section 944 supports that goal by creating the Special Fund and making it liable for compensation for second injuries when employer liability ends. *Reich,* 42 F.3d at 77. With respect to its primary function as a reserve for second injury compensation, therefore, the Special Fund operates beyond employer liability and, thus, outside the insurer-insured contract relationship. Likewise, to the extent the Special Fund operates as a discretionary safety net in the event of employer insolvency, *see* 33 U.S.C. § 918(b), it does not regulate the core relationship between insurer and insured. No limitation in either Section 918(b) or Section 944 requires that an insolvent employer, whose default may be covered by the Special Fund, be a self-insured employer. Moreover, there is no provision in Section 944 providing a safety net in the event of *insurance carrier* insolvency. Accordingly, because Section 944 creates a Special Fund that may, in the Secretary's discretion, apply broadly to all insolvent employers, but not at all to insolvent insurance carriers, it simply does not control the "core relationship between a private insurer and its insured." *RIIIF,* 80 F.3d at 621. Neither Section 944, nor the Assessment Provision of subsection 944(c)(2), therefore, seek to dictate "the type of [insurance] policy that could be issued, its reliability, interpretation, and enforcement," nor "the standards governing performance under insurance contracts." *RIIIF,* 80 F.3d at 621–22 (quotations omitted).

[11] In reaching this conclusion, the court is mindful of DOL's argument that, by supporting Section 908's narrowing of the scope of employer liability, Section 944 affects, at least indirectly, the scope of insurance coverage employers must secure. "This argument," however, "goes too far." *Fabe,* 508 U.S. at 508, 113 S.Ct. 2202. To be sure, courts should consider a statute's indirect effects when determining whether it relates to the "business of insurance." *See Ruthardt,* 303 F.3d at 382.[11] Here, the asserted indirect effect that Section 944 (including the Assessment Provision of sub-section 944(c)(2)) may arguably have on the scope of insurance coverage obtained by employers is so remote from the statute's purpose, *i.e.,* encouraging employers ***107** to hire and retain injured workers, that, even if real, that effect can only be described as an "inadvertent federal intrusion" on the state's regulation of insurance matters. Section 944 cannot plausibly be construed as specifically relating to the business of insurance, and does not displace the state's priority law. *RIIIF,* 80 F.3d at 620 (requiring a "clear statement" of congressional intent to intrude upon state insurance regulation). *See also Pallozzi v. Allstate Life Ins. Co.,* 198 F.3d 28, 35 (2d Cir.1999) (even if federal statute is found to relate to the relationship of insured to insurer and the spreading of risk, court must also consider whether the federal intrusion on the state regulation appears deliberate or "inadvertent").

Conclusion

DOL has not shown a clear and manifest Congressional intent to preempt the state priority law in Section 944, or in the Assessment Provision of sub-section 944(c)(2). That law, in any event, is protected from federal intrusion under the McCarran–Ferguson Act. For those reasons DOL's motion for summary judgment, document no. 29, is denied. As plaintiff is not entitled to the relief she seeks, as a matter of law, judgment shall be entered in favor of defendants, and the case closed.

SO ORDERED.

Parallel Citations

2012 DNH 020

Footnotes

1 The intervenor "Guaranty Funds" are insurance guaranty funds and associations from fifteen states. They are statutory entities created, and governed by the laws of their respective jurisdictions, to provide protection to policyholders from hardships occasioned by property and casualty insurer insolvencies. They have claims against the assets of Home by virtue of assessments against Home as a "member insurer" of the funds.

2 Section 944 of the Longshore Act provides in pertinent part: § 944. Special fund

(a) Establishment; administration; custody, trust
There is established in the Treasury of the United States a special fund. Such fund shall be administered by the Secretary. The Treasurer of the United States shall be the custodian of such fund, and all moneys and securities in such fund shall be held in trust by such Treasurer and shall not be money or property of the United States.
* * *
(c) Payments into fund
Payments into such fund shall be made as follows:
* * *
(2) At the beginning of each calendar year the Secretary shall estimate the probable expenses of the fund during that calendar year and the amount of payments required (and the schedule therefor) to maintain adequate reserves in the fund. Each carrier and self-insurer shall make payments into the fund on a prorated assessment by the Secretary [as] determined [below].
33 U.S.C. § 944.

3 In addition, and on a much smaller scale, Special Fund monies are used to provide workers with information and legal advice and to defray medical examination expenses. 33 U.S.C. § 944(i).

4 Where an insurer is insolvent, DOL may seek compensation from the employer in lieu of payments from the insolvent insurer. If the employer, too, is insolvent, DOL may withdraw funds from security deposits previously posted by the insurer. *See* "Dep't of Labor, Notice re: Regulations Implementing the Longshore and Harbor Workers' Compensation Act and Related Statutes," 70 Fed.Reg. 43224 (July 26, 2005).

5 The Special Fund is also funded in small part by amounts collected as fines and penalties and from employers when there is no person entitled to receive benefits upon the death of a covered employee. 33 U.S.C. § 944(c)(1),(3).

6 DOL says it is asserting an "as-applied" impossibility theory, *i.e.*, that *in this case,* because there are not enough Home assets to pay Class III claims, compliance with both the federal statute and the state priority law is not possible. Defendant responds, in part, that there is no impossibility because *in other cases* insurer assets may be sufficient to pay Longshore Act assessments. The court addresses DOL's theory as presented.

7 In this as-applied challenge to the state priority law, the comparative size of the actual loss that DOL must recoup among the remaining industry participants is relevant. The evidence shows that Home's assessments are small in comparison to the total annual assessments to the Special Fund. For example, Home's 2004 assessment ($586,595), was less than one-half of one-percent of the Special Fund's total assessments ($135,813,028). Under these circumstances, spreading the loss among remaining industry participants would not seem to pose a risk of significant disruption with respect to any identified statutory purposes.

8 The McCarran–Ferguson Act provides in pertinent part:
(a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.
(b) [First Clause] No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance:
[Second Clause] Provided, That ... [the Sherman, Clayton, and FTC antitrust acts] shall be applicable to the business of insurance to the extent that such business is not regulated by State law.
15 U.S.C. § 1012 (alterations added).

9 In focusing on the "core contract relationship at both the negotiation and performance stage," the court in *RIIIF* rejected a strict application of the so-called *Pireno* factors. In *Union Labor Life Ins. Co. v. Pireno,* 458 U.S. 119, 102 S.Ct. 3002, 73 L.Ed.2d 647 (1982), the Supreme Court set forth three criteria for assessing whether a practice involves the "business of insurance" for purposes of the second clause of § 2(b) of the McCarran–Ferguson Act. The second clause addresses whether a given practice is exempt from federal antitrust laws. The three *Pireno* factors are: (1) "whether the practice has the effect of transferring or spreading a policyholder's risk," (2) "whether the practice is an integral part of the policy relationship between the insurer and the insured," and (3) "whether the practice is limited to entities within the insurance industry." *Id.* at 129, 102 S.Ct. 3002. In *RIIIF,* the appellate court for this circuit rejected a strict application of the *Pireno* factors in cases arising under the first clause of the McCarran–Ferguson Act. *See RIIIF,* 80 F.3d at 622.

10 The *RIIIF* court's citation to *Texas Employers' Ins. Ass'n v. Jackson,* 820 F.2d 1406, 1414–15 (5th Cir.1987) does not settle the issue of whether Section 944, and subsection 944 (c)(2), relate to the business of insurance. In *Texas Employers',* the Fifth Circuit held that the Longshore Act specifically relates to the business of insurance. *Id.* The *RIIIF* court cited that holding when discussing the meaning of "specifically relates," and for the subsidiary proposition that a federal program or agency need not "technically [be] considered part of the 'business of insurance' " for the relevant federal provision to "specifically relate" to the business of insurance. *See RIIIF,* 80 F.3d at 621. The *RIIIF* court did not refer to *Texas Employers'* in its analysis of the "business of

insurance" issue. Moreover, although the court in *Texas Employers'* ruled that the Longshore Act relates to the business of insurance, it did so in the context of deciding whether a claimant's state law bad faith "claim handling" claim against a Longshore Act insurer was precluded by the Act, but not in the context of Section 944. *See Texas Employers'*, 820 F.2d at 1410.

11 The appellate court in *Ruthardt* found that a state law regulated the "business of insurance," in part, because it "indirectly assure[d] that policyholders get what they were promised." *Ruthardt*, 303 F.3d at 382.

End of Document

Exhibit 3

DEPARTMENT OF LABOR

Employment Standards Administration

20 CFR Parts 701 and 703

RIN 1215–AB38

Regulations Implementing the Longshore and Harbor Workers' Compensation Act and Related Statutes

AGENCY: Employment Standards Administration, Labor.

ACTION: Final rule.

SUMMARY: This final rule requires each insurance carrier authorized to write insurance under the Longshore and Harbor Workers' Compensation Act and its extensions (the Defense Base Act; the Outer Continental Shelf Lands Act; the Nonappropriated Fund Instrumentalities Act; and the District of Columbia Workmen's Compensation Act) to demonstrate to the Office of Workers' Compensation Programs (OWCP) that its LHWCA obligations are sufficiently secured and, if necessary, to deposit security in an amount set by OWCP. This procedure will ensure the prompt and continued payment of compensation and medical benefits to injured workers and help protect the Longshore special fund's assets from consequences flowing from insurance carrier insolvencies. In addition, the rule conforms, where appropriate, the rules governing OWCP's authorization of employers as self-insurers to the provisions governing carrier security deposits.

DATES: This rule is effective August 25, 2005.

FOR FURTHER INFORMATION CONTACT: Michael Niss, Director, Division of Longshore and Harbor Workers' Compensation, Office of Workers' Compensation Programs, Employment Standards Administration, 202–693–0038. TTY/TDD callers may dial toll free (877) 889–5627 for further information.

SUPPLEMENTARY INFORMATION:

I. Background of This Rulemaking

On March 15, 2004, the Department issued a Notice of Proposed Rulemaking (NPRM) under the Longshore and Harbor Workers' Compensation Act, as amended (LHWCA), 33 U.S.C. 901 *et seq.*, proposing rules governing insurance carrier security deposits. 69 FR 12218–31 (March 15, 2004). As explained in the NPRM (69 FR 12218–19 (March 15, 2004)), since 1990 the Department has required insurance carriers it has authorized to write Longshore coverage to deposit security in an amount sufficient to secure the payment of their LHWCA obligations in States without guaranty or analogous funds and in States whose funds do not fully secure such obligations. The Department waived the deposit requirement for carriers with financial security ratings of "A" or higher issued by the A.M. Best Company. Intervening changes in the insurance industry and related insurance rating systems, however, prompted the Department to re-examine and reformulate its security deposit policy. The NPRM embodied the Department's proposal to revamp this policy.

The NPRM proposed a process by which OWCP would determine: (1) The extent of an insurance carrier's unsecured LHWCA obligations; (2) the deposit amount necessary to secure those obligations in light of the guaranty or analogous funds in the State or States in which the carrier writes LHWCA insurance; (3) how such deposit will be held; and (4) when OWCP may seize or otherwise use deposited funds. 69 FR 12219 (March 15, 2004). The proposed rules also eliminated the Department's prior waiver policy so that all carriers, regardless of their financial strength, would be subject to the deposit requirements. 69 FR 12219 (March 15, 2004).

The Department has received five written comments in response to the NPRM: two from insurance carriers and one each from an insurance carrier association, a Longshore employer association, and a state insurance division. The Department has found these comments very helpful and, in several important respects, has revised the final rule in response.

II. Explanation of Changes

A. Statutory Authority

Congress granted the Department broad authority to "administer the provisions of [the LHWCA], and for such purpose the Secretary is authorized (1) to make such rules and regulations * * * as may be necessary in the administration of the Act." 33 U.S.C. 939(a). Three commenters fully support the Department's efforts to ensure a financially sound Longshore program through the proposed rules. Two commenters, however, argue that the LHWCA does not grant the Department authority to require carriers to post security deposits. They contend that section 32 (33 U.S.C. 932, erroneously referenced by the commenters as 33 U.S.C. 939) allows the Department to require employers who seek to self-insure to deposit security but does not allow imposition of a similar requirement on carriers. In these two commenters' view, the Department must instead rely on the various State regulators' supervision of carriers and those regulators' assessment of a carrier's financial strength to ensure solvency and the carrier's future ability to meet its obligations.

The Department disagrees with the commenters' construction of the statute and believes it has acted well within its rulemaking authority. Section 32 provides, in relevant part:

> (a) Every employer shall secure the payment of compensation under this Act—
>
> (1) By insuring and keeping insured the payment of such compensation with any stock company or mutual company or association, or with any other person or fund, which such person or fund is authorized (A) under the laws of the United States or of any State, to insure workmen's compensation, and (B) by the Secretary, to insure payment of compensation under this Act; or
>
> (2) By furnishing satisfactory proof to the Secretary of his financial ability to pay such compensation and receiving an authorization from the Secretary to pay such compensation directly. The Secretary may, as a condition to such authorization, require such employer to deposit * * * either an indemnity bond or securities * * * in an amount determined by the Secretary, based on the employer's financial condition, the employer's previous record of payments, and other relevant factors. * * *
>
> (b) In granting authorization to any carrier to insure payment of compensation under this Act the Secretary may take into consideration the recommendation of any State authority having supervision over carriers or over workmen's compensation. * * * The Secretary may suspend or revoke any such authorization for good cause shown. * * *

33 U.S.C. 932.

Section 32 ensures that there is money available to pay compensation to an injured worker. *United Marine Mutual Indemnity Assn.* v. *Marshall,* 510 F.Supp. 34, 36 (N.D. Cal. 1981), *affm'd sub nom., United Marine Mutual Indemnity Assn.* v. *Donovan,* 701 F.2d 791 (9th Cir. 1983). The Act seeks "certain and absolute payment" of compensation, *United Marine,* 510 F.Supp. at 36, and the "major guarantee of the financial ability of the employer to compensate those injured or killed in the scope of employment is found in section 32." *Id.* at 793. As one court has noted, "[i]t is obvious from the language chosen that Congress wanted a central approval mechanism to support the fiscal soundness of the LHWCA system." *Id.*

To accomplish these goals, section 32(a)(1)(B) gives the Secretary discretion to authorize insurance carriers to write Longshore coverage. Apart from

requiring that the carrier be authorized by a State (or the United States) to insure workers' compensation, 33 U.S.C. 932(a)(1)(A), and permitting the Secretary to consider a State's recommendation as to the insurer's status, 33 U.S.C. 932(b), section 32 grants the Secretary the power to authorize carriers without any limitation, description, standards, or guidance. The power to authorize necessarily includes the power to refuse authorization as well; any other interpretation would render meaningless section 32(a)(1)(B)'s grant of authority to the Secretary to authorize carriers. Once granted, authorization may be suspended or revoked for "good cause." *Id.* By using broad, undefined terms such as "authorization" and "good cause," Congress afforded the Secretary wide discretion in deciding which carriers should be allowed to write Longshore insurance.

Requiring carriers to post security as a condition of authorization to write Longshore insurance is a proper exercise of the Secretary's authority under section 32. The deposits fulfill section 32's goal because they will prevent interruption in compensation payments and medical benefits to injured workers in the event the carrier defaults or becomes insolvent. Moreover, the statute does not compel the Secretary to authorize any carrier she believes may not be able to meet its LHWCA obligations. No conceivable legislative purpose would be served, however, by precluding authorization of a carrier who demonstrates actual reliability by posting security. In fact, permitting the Secretary to require insurance carriers whom she might not otherwise authorize to post security enlarges, rather than diminishes, the opportunities available to carriers.

One commenter points to section 32(b), 33 U.S.C. 932(b), and argues that Congress intended the Secretary to rely exclusively on the various States' supervision of carriers to assure a carrier's future ability to meet its LHWCA obligations. The plain terms of the statute, however, contradict this interpretation. First, Congress wrote section 32(b) in permissive language: "the Secretary *may*" consider a State supervisory authority's recommendation in making an authorization decision, but the statute does not require her to do so. Second, although State licensure is a condition to authorization, 33 U.S.C. 932(a)(1)(A), State approval is not sufficient alone because the statute also requires authorization by the Secretary to write Longshore insurance. 33 U.S.C. 932(a)(1)(B). Indeed, the commenter's view reads Section 32(a)(1)(B) out of the statute. The sweeping language of the statute and the sparseness of its requisites, coupled with Congress' decision not to make State licensure sufficient alone, all suggest congressional intent to permit the Secretary to condition authorization on the terms the Secretary considers most appropriate.

One comment states that because the statute expressly permits the Secretary to impose a security deposit requirement on employers seeking authorization to self-insure, 33 U.S.C. 932(a)(2), but does not include the same provision for carriers, Congress intended to preclude the Secretary from imposing this condition on carriers. The Department disagrees. The statute's express security deposit provision for self-insurers is logical because Longshore employers, unlike insurers, would not have funds put aside to cover their liabilities under the statute. Thus, security deposits the Department requires from self-insurers under section 32(a)(2) may be the only source of payment available for an employer's LHWCA obligations. Insurers, on the other hand, may have additional sources for the payment of carrier obligations, such as State guaranty funds. The statute therefore appropriately gives the Secretary wide latitude to regulate within the carrier authorization arena.

The Secretary could have determined that the steps States take to ensure a carrier's fiscal soundness, including any coverage afforded by State insurance guaranty funds, were sufficient to fulfill section 32's goal of ensuring adequate funds to compensate injured workers. But experience has proved that wrong. *See generally* 69 FR 12218–19 (March 15, 2004). In 2003 and 2004, 23 carriers authorized to write Longshore insurance became insolvent. For one of these carriers, the Department has already exhausted the company's $200,000 deposit (made under OWCP's existing policy) and is now paying the carrier's remaining obligations from the special fund. For two other carriers, whose security deposits total approximately $11,000,000, the Department is currently meeting the carriers' obligations by using the deposited security. The Department anticipates that it will exhaust those funds and will have to pay all remaining obligations from the special fund. Had the security deposits not been available, the industry as a whole, through annual special fund assessments, would have borne the full brunt of these insurers' insolvency. *See* 33 U.S.C. 918(b), 944.

Moreover, the statute's structure does not reveal congressional intent to limit the Secretary's regulatory options by negative implication. As already noted, section 32 contains virtually no limitations on the Secretary's right to authorize carriers to write Longshore coverage. And the Secretary may exercise her right to revoke authorization for "good cause," a term of broad compass. Given the broad general rulemaking authority conferred on the Secretary by section 39(a), and the sweeping authority section 32 gives the Secretary to grant or deny carrier authorization, it is counterintuitive to draw from Congress' silence a flat prohibition on the Secretary's ability to condition a carrier's authorization to write Longshore insurance on a deposit of security.

One comment contends that the proposed rules improperly create an "extra-statutory" funding and payment structure because the Secretary has no authority to put seized deposits into the special fund under the funding mechanism set out in section 44 of the Act (33 U.S.C. 944), and the statute gives the Secretary no obligation or authority to pay for insolvent employers or insurers except from the special fund under section 18(b) (33 U.S.C. 918(b)). In this same vein, the commenter also argues that the Secretary cannot set up a separate guaranty fund for Longshore benefits to protect employers from carrier insolvencies.

The commenter misapprehends the nature of carrier security deposits. Security posted by a carrier under OWCP's current policy and these final rules is neither allocable to, nor payable from, the special fund established by section 44. Instead, the Department treats carrier security deposits in the same manner as security deposits made by authorized self-insurers, which are not placed in the special fund. *See* 33 U.S.C. 932(a)(2) (as a condition to self-insurer authorization, the Secretary may "require such employer to deposit in a depository designated by the Secretary either an indemnity bond or securities * * *"). Accordingly, negotiable securities posted by carriers are deposited in a Department of Labor Federal Reserve Bank account (now in St. Louis, Missouri) and held under sub-accounts the Bank creates in the name of each carrier and self-insurer. The Bank pays the carrier interest on the deposited securities as it accrues. The Department has no authority to disperse funds from these accounts. Letters of credit and indemnity bonds posted by carriers are held by OWCP in its Washington, DC office.

In the event the Department redeems the posted security, and the security is in the form of a surety bond, the surety will pay claims directly. If, however, the

security is in the form of a letter of credit or negotiable securities, OWCP deposits the proceeds of the security in an OWCP agency account, established by the Treasury Department, so that OWCP may disperse the funds when necessary. This agency account also contains, *inter alia*, monies that constitute the section 44 special fund, proceeds of seized self-insurer security deposits, and monies payable under the District of Columbia Workmen's Compensation Act. The carriers' security proceeds are neither part of the section 44 special fund nor pooled to form a separate insurance carrier guaranty fund. Instead, like the Federal Reserve Bank, OWCP creates sub-accounts for each carrier so that both interest on, and payments from, the security deposit proceeds are allocated to the individual carrier.

Security deposits simply provide some measure of assurance that a carrier will meet its *own* payment obligations. These obligations are separate from the increased assessment costs the carrier may also bear for another carrier's or employer's insolvency when the special fund makes payments under Section 18(b). Because OWCP uses a carrier's security deposit solely to satisfy the carrier's own liabilities, OWCP pays claims from the deposits in the same manner the carrier would. Accordingly, OWCP does not require claimants to follow the procedure set forth in section 18(b) for payments made from the special fund. If, for example, the employer is bankrupt and the carrier was voluntarily paying compensation to an injured worker prior to becoming insolvent, OWCP will continue those payments on the carrier's behalf if that carrier deposited security and continued payments are appropriate. Once the security deposit is exhausted, however, the claimant must obtain a compensation order before OWCP will make payments from the special fund under section 18(b).

Thus, rather than imposing an independent obligation on the United States or seeking to alter the role of the special fund, as the commenter suggests, security deposits provide a separate mechanism through which a carrier's liabilities may be satisfied. If the carrier fully discharges its payment obligations, then OWCP never uses the carrier's security deposit and returns it (or any unused portion) to the carrier (or its successor in interest) when the carrier ceases writing Longshore insurance or becomes insolvent. *See* §§ 703.209(c) and 703.211(c). For instance, one of the 23 insolvent carriers mentioned above had posted a $400,000 deposit in the form of negotiable securities. Because the carrier had no remaining LHWCA obligations, OWCP returned the deposited securities to the State office handling the carrier's liquidation.

Finally, nothing in the proposed or final rules relieves an employer from its payment obligations if its insurer is financially incapable of meeting those obligations. *See generally* 33 U.S.C. 904(a); *B.S. Costello* v. *Meagher*, 867 F.2d 722 (1st Cir. 1989). In these circumstances, OWCP routinely seeks payment from the employer before turning to any deposited security. Only if the employer is also unable to pay due to insolvency does OWCP use the carrier's deposited security. OWCP intends to continue this practice under these rules.

B. Changes Made Between Proposed and Final Rule To Allow Exemption From the Deposit Requirements for Certain Carriers

The proposed rule eliminated OWCP's current practice of exempting from the security deposit requirements those carriers who have an "A" or higher A.M. Best rating. *See* 69 FR 12218–19 (March 15, 2004). Instead, the proposal required all carriers authorized to write Longshore insurance, regardless of their financial strength, to deposit security based on the amount of their outstanding Longshore obligations not otherwise secured by State guaranty funds. Two comments generally support this approach. Two other comments, however, object to eliminating the exemption and propose alternatives.

Commenters lodging objections point out that eliminating the exemption increases operating costs for the financially strongest companies who are exempt under OWCP's current policy. These companies pose the least risk to the special fund. The commenters also argue against moving away from private insurance carrier rating systems to a new system of OWCP's creation because the private rating systems provide an objective, verifiable standard for determining whether a particular company is financially fit. Thus, rather than eliminating the exemption altogether, the commenters recommend that OWCP elevate the standard for exempting companies, and they offer a variety of suggestions for accomplishing this goal: Raise the required rating above the current A.M. Best "A" rating; consider ratings from multiple recognized carrier rating systems; factor in the carrier's overall size, as well as the size of its Longshore exposure; and consider the carrier's longevity in the workers' compensation insurance market.

The Department agrees that the strongest carriers should be exempt from the security deposit requirements. In implementing this decision, the Department has adopted the commenters' suggestion to strengthen the criteria for exemption. Under the final rule, carriers awarded the highest rating by each of three private insurance carrier rating services designated on OWCP's web site—currently, A.M. Best, Standard & Poor's, and Weiss Research—for the current rating year and the immediately preceding year will be exempt from the security deposit requirements. This change is reflected in revisions the Department has made to §§ 703.203(a) and 703.204(c)(1). The Department estimates that 10% of currently authorized carriers will meet the new exemption requirements.

The Department's decision to exempt certain carriers remains faithful to the measured approach the Department advocated in the NPRM. 69 FR 12219 (March 15, 2004). Although exempting even one carrier necessarily entails some degree of additional risk for the special fund, the Department believes that it has substantially reduced that risk by adopting a more stringent financial test for exemption than currently used so that only the strongest carriers—those least likely to run into financial difficulties—are granted an exemption. Moreover, by looking at ratings from three private systems and requiring sustained superior financial ratings over a two-year period, the Department believes it has minimized the impact of flaws inherent in any one static rating scheme for predicting future financial performance.

Granting an exemption to the strongest carriers has additional benefits. First, very strong carriers will not be discouraged from participating in the Longshore insurance market by the added costs the security deposit requirement would impose. Second, OWCP's administrative burden will be lessened because it will not have to determine security deposit amounts for exempt carriers.

The Department has responded to the remaining comments in the following section-by-section discussion.

C. Section-by-Section Explanation

The Department received two comments addressing specific sections of the proposed rule. The following discussion responds to those comments and explains any changes the Department has made in the final rules. The Department received no comments concerning, and has made no changes to, proposed rule sections not discussed

here; these sections appear in the final rule as proposed.

20 CFR 701.301(a)(7)

(a) The Department proposed revising the definition of "District Director" by adding a sentence stating that "[a]ny action taken by a person under the authority of a district director will be considered the action of a deputy commissioner." 69 FR 12225 (March 15, 2004). The Department added this sentence to clarify that substitution of the title "district director" for "deputy commissioner" did not in any way alter OWCP staff members" authority to act.

(b) One comment states that this sentence should be removed in order to avoid any implication that OWCP claims examiners have the same scope of authority as district directors. The Department agrees with this comment and has deleted the last sentence from the final rule. The Department did not intend to change the scope of authority of either district directors or claims examiners. Deleting the last sentence removes any implication to the contrary.

20 CFR 703.201

(a) Section 703.201 provides a general overview of security deposits and their purpose. As proposed, it states, in part: "Security deposits secure the payment of benefits when an insurance carrier defaults on any of its obligations under the LHWCA, regardless of the date such obligations arose." 69 FR 12226 (March 15, 2004).

(b) One comment states that the phrase "obligations under the LHWCA" is unclear and should be revised. The Department agrees that this phrase in the proposed rule could be misconstrued. Accordingly, the Department has revised this section in the final rule by including specific language clarifying that the phrase "obligations under the LHWCA" means a carrier's liability for both compensation payments and medical benefits, and that such meaning applies to the entire subpart.

(c) The same comment states that the word "default" is unclear because it could include situations where a solvent insurer simply disputes a claim. The comment suggests that default be expressly limited to a carrier's failure "to timely pay a final judgment against the carrier for its obligation to pay benefits under the LHWCA and against which there is a right of execution."

In both legal and everyday parlance, the term "default" is commonly understood to mean a failure to meet a legal or contractual duty. *See, e.g., Black's Law Dictionary* (8th Ed. 2004); *The New Shorter Oxford English Dictionary* (1993). Such duty does not arise simply because an employer or insurance carrier contests a claim. Instead, it arises when a valid compensation order is entered. Under the Longshore Act's comprehensive adjudication scheme, claims are initially considered by an OWCP district director. 33 U.S.C. 919(c); 20 CFR 702.311–.317. If the district director is unable to resolve all disputed issues to the parties' satisfaction, an administrative law judge holds a *de novo* hearing and issues a compensation order. 33 U.S.C. 919(d), (e); 20 CFR 702.301, 702.332. Once filed by the district director, the administrative law judge's order becomes effective and imposes a legal obligation on the employer or carrier to pay any compensation awarded, notwithstanding any appeal from the order. 33 U.S.C. 919(e), 921(a), 921(b)(3); 20 CFR 702.350. Failure to comply with this effective order within the statutory 10-day time period constitutes a default. 33 U.S.C. 914(f); 20 CFR 702.350.

To the extent this comment implies that OWCP should be allowed to use the posted security only when a carrier fails to satisfy a district court order enforcing an underlying compensation order (or, as put by the commenter, a "final judgment * * * against which there is a right of execution") issued under section 18 of the statute, 33 U.S.C. 918, the Department rejects the comment. Requiring claimants or the Director to go to district court in every case in which a financially troubled carrier defaults runs counter to the primary purpose of the security deposit requirement: the uninterrupted and prompt payment of compensation and medical benefits when a carrier is no longer capable of paying. Accordingly, the Department has not changed this portion of the rule.

(d) The Department has also revised the third sentence of this regulation for stylistic and grammatical purposes. As proposed, this sentence stated that security deposits "also secure the payment of compensation and medical benefits when a carrier with LHWCA obligations becomes insolvent in States with no insurance guaranty funds, or with guaranty funds that do not fully secure such obligations." The final rule states more simply and clearly that security deposits "secure the payment of compensation and medical benefits when a carrier becomes insolvent and such obligations are not otherwise fully secured by a State guaranty fund."

20 CFR 703.202

(a) Section 703.202 discusses how the Department will determine gaps in State guaranty fund coverage and how it will convey those determinations to the public. Specifically, the rule: (1) Outlines factors OWCP will consider in determining each State's guaranty fund coverage of Longshore obligations; (2) requires OWCP to post its findings on the agency's web site, where they will be open for public inspection and comment; (3) provides that OWCP will deem 33 % of a carrier s Longshore obligations unsecured if the amount of State fund coverage cannot be determined or is ambiguous; and (4) states that OWCP will revise its findings in response to substantiated public comments or for any other relevant reason. 69 FR 12226 (March 15, 2004).

(b) One comment suggests that OWCP should complete State fund reviews and receive public comments before calculating and requiring security deposits. The commenter states that this would give State legislators and regulators an opportunity to remedy any State guaranty fund coverage deficiencies OWCP identifies, thus implying that the need for certain security deposits would be eliminated.

While the Department agrees that public comment on OWCP's State guaranty fund evaluations will be helpful, it has not incorporated the commenter's proposal in the final rule. The procedure § 703.202 adopts is a dynamic one: OWCP will revisit its determinations regarding State guaranty fund coverage when public comment or other relevant information makes a re-determination useful. This can happen before, during, or after calculating deposits for insurers on an individual basis. At a minimum, though, OWCP will consider each insurer's comments prior to setting the required security deposit amount for that company. Section 703.203(b) explicitly gives each insurer who disagrees with OWCP's assessment of State fund coverage the opportunity to submit evidence and/or argument on the question with its security deposit application. Thus, although OWCP might make a security deposit determination before all public comments are received, it is unlikely that general public comments will be more enlightening than information offered by insurers with a direct financial stake in the determination.

Moreover, the regulation's dynamic process is designed to take into account actions States may take in response to OWCP's evaluation of their guaranty funds' coverage for Longshore claims. The legislative process is often protracted, outcomes are uncertain, and OWCP has no control over that process in any event. If and when a State alters its guaranty fund coverage, that

alteration will be considered in the security deposit calculation process.

20 CFR 703.203

(a) Section 703.203 requires carriers to apply annually for a security deposit determination and prescribes the information the application must include. In addition to reporting its outstanding Longshore Act liabilities, the subsection (a)(2) of the proposed rule required each carrier to include a statement either "[o]f the deposit amount it believes will fully secure its obligations" or "[t]hat it has sufficient assets or other means to fully secure its obligations." 69 FR 12227 (March 15, 2004).

(b) One commenter states that the proposed rule does not clearly explain: (1) How an insurance carrier "fully secures" its obligations; (2) what factors a carrier should consider in suggesting a security deposit amount that will fully secure its liability; and (3) how a carrier determines whether it has sufficient assets to secure its obligations. The Department has reconsidered proposed subsection (a)(2) and determined that a carrier should not be required either to suggest a security deposit amount or to state that it has sufficient assets to fully secure its obligations. The statement the proposed rule describes is superfluous and unnecessary to the security deposit determination process set forth in the final rules. Accordingly, the Department has deleted these requirements. This change will make the application process simpler because the carrier need only supply very limited, clearly defined information: (1) A statement of its outstanding liabilities on a state-by-state basis; (2) other specific information OWCP requests; and (3) if the carrier wishes, evidence and/or argument regarding OWCP's evaluation of relevant State guaranty funds. Moreover, given the changes the Department has made to § 703.204 (*see* discussion below), a carrier generally will not be asked to submit voluminous financial information because it will no longer be necessary.

(c) The final version of § 703.203 adds a new subsection (a)(1) to implement the Department's decision to exempt the financially strongest carriers from the security deposit requirement. In order to obtain this exemption, a carrier must submit, as part of its annual application, documentation from three OWCP-designated private insurance rating organizations demonstrating the rating each service awarded the carrier for both the current year and the immediately preceding year. The carrier must receive the highest rating each service awards for both years in order to qualify for the exemption. OWCP will make an exemption decision each year. Thus, an exempt carrier whose rating is downgraded by any one of the rating services the following year will be required to deposit security. The carrier may again qualify for an exemption, but only after it has demonstrated sustained superior financial performance by receiving the highest ratings from the three designated rating organizations for two consecutive years.

Currently, OWCP has designated A.M. Best, Standard & Poor's, and Weiss Research as the three private rating services it will use. The rule does not name these rating services; instead, the rule requires OWCP to publish the services it selects by posting their names on the agency's web site. This procedure will give OWCP the option of selecting different rating services from time to time without having to engage in a new rulemaking. A variety of factors may lead OWCP to change its selections. For instance, a selected service could change its name or corporate form, or even go out of business. By the same token, new rating services that prove to be reliable may enter the market. The procedure the rule adopts allows OWCP the flexibility to make changes as the agency deems necessary. Subsection (a)(2) of the final rule also clarifies that a carrier seeking an exemption based on its financial standing need not include a statement of its outstanding LHWCA liabilities with its application unless OWCP denies its exemption request.

20 CFR 703.204

(a) This section sets forth the process OWCP will follow in determining the security deposit amount for each carrier.

(b) Proposed § 703.204(b) lists a variety of factors, most financial in nature, that OWCP could evaluate and consider in making its determination. These factors include the carrier's: (1) Financial strength; (2) insureds' strength; (3) reinsurance protection; (4) surplus and recent settlements; (5) amount of business written through the National Reinsurance Pool; (6) deductibles secured by letters of credit; (7) reduced exposure; (8) increases in capitalization; (9) State guaranty fund coverage for its LHWCA obligations; and (10) expansion of business into States without guaranty fund coverage for Longshore obligations. 69 FR 12227 (March 15, 2004).

One comment states that evaluation of these factors requires highly technical expertise in both insurance company and general financial analysis. The factors encompass voluminous information that is often confidential and difficult, if not impossible, to present in a meaningful way. The commenter contends that private insurance rating organizations are in a better position to conduct this analysis. In addition, the commenter notes that it is unclear whether OWCP intends to consider these factors as they pertain only to the carrier's Longshore business or its business as a whole.

The Department agrees with this comment. Accordingly, it has made substantial revisions in the final rule. OWCP has insufficient resources to conduct a financial evaluation of each carrier that matches the breadth and depth of recognized private rating organizations' evaluations. Moreover, a survey of private organizations' rating methodology documents verifies that they consider many of the same financial factors listed in the proposed rule.

Thus, the Department agrees that it should rely on insurance rating organizations for a picture of each carrier's financial health and has eliminated those factors already considered by the rating organizations from the list in § 703.204(b). There is one exception. The final rule retains consideration of the strength of a carrier's insureds in the Longshore industry. Because a carrier's insolvency does not absolve an employer of its own liabilities under the LHWCA, the size and financial strength of the employers a carrier insures is an important consideration in determining the special fund's risk in the event the carrier becomes insolvent. If the employer is financially capable of meeting its LHWCA obligations, notwithstanding its carrier's insolvency, the risk to the special fund is diminished. In some instances, the strength of a carrier's insureds is also relevant to the amount of coverage a State guaranty fund affords. For example, some State guaranty funds will not pay any of an insolvent carrier's obligations where the insured employer is insolvent as well; as a result, the special fund's risk increases.

The final rule also adds a variety of Longshore-insurance-related factors that fall within OWCP's particular expertise as administrator of the program. The Department drew two of these factors—a carrier's longevity in the Longshore insurance market and Longshore claim-payment history—from the comments discussing criteria for exempting carriers from the security deposit requirements. While a reliable payment history of significant duration does not guarantee future performance, this information is nevertheless a helpful indicator for OWCP in setting the

security deposit amount for a particular carrier.

The Department has also deleted from § 703.204(b) language regarding the deposit amount suggested by the insurance carrier. *See* 69 FR 12227 (March 15, 2004). This language is no longer necessary in light of the Department's revisions to proposed § 703.203 explained above.

(c) Proposed § 703.204(c) provides that OWCP will require all carriers that write LHWCA insurance in States without complete guaranty fund coverage identified under § 703.202(b) to deposit security for their unsecured LHWCA obligations. For each carrier who writes more than an insignificant or incidental amount of LHWCA insurance, OWCP will fix a security deposit amount between 33⅓% and 100% of the carrier's outstanding LHWCA obligations in each State. 69 FR 12227 (March 15, 2004).

One comment states that § 703.204(c) is unclear. The commenter suggests that the rule be revised to clarify that: (1) OWCP will require a security deposit for only those obligations not covered by State guaranty funds; (2) the 33⅓% minimum deposit applies only to that portion of a carrier's Longshore obligations not covered by State guaranty funds; and (3) OWCP will consider the factors set forth in § 703.204(b) in making its security deposit determination. The commenter's first two points have merit. Accordingly, the Department has revised the final rule by breaking § 703.204(c) into three subparts. Subpart (1) implements the Department's decision to exempt from the security deposit requirements those carriers awarded the highest financial ratings for both the current rating year and the immediately preceding year from the three rating organizations selected by OWCP. Subpart (2) clarifies that carriers whose LHWCA obligations are fully secured by State guaranty funds will not be required to deposit security. Subpart (3) contains language similar to proposed § 703.204(c), but specifically qualifies the phrase "outstanding LHWCA obligations" by adding "not secured by a State guaranty fund." The Department does not believe any change to the proposed rule is necessary in response to the commenter's third point because § 703.204(b) makes clear that OWCP may consider the factors listed in that subsection in rendering a security deposit determination (*i.e.*, "The Branch may consider a number of factors in setting the security deposit amount, including. * * *" § 703.204(b).).

One comment asks whether a carrier must make a pledge or other assurance that it will meet its payment obligations in addition to the security deposit if that deposit is less than 100% of its outstanding obligations. The Department does not believe an additional pledge or other guaranty is necessary. The statute already requires each carrier to meet its payment obligations, regardless of the amount of security a carrier deposits.

20 CFR 703.205

(a) Section 703.205(a) requires each carrier to execute an Agreement and Undertaking containing terms set forth in the regulation. As proposed, these terms give OWCP authority to act upon any deposited security when "[t]he carrier fails to renew any deposited letter of credit or substitute acceptable securities in their place" or "[t]he carrier fails to renew any deposited negotiable securities at maturity or substitute acceptable securities in their place." 69 FR 12227 (March 15, 2004) (proposed § 703.205(a)(2)(ii), (iii)).

One comment suggests that proposed § 703.205(a)(2)(ii) be rewritten to clarify that a carrier may substitute a new letter of credit or a bond, in addition to negotiable securities, in lieu of renewing any deposited letter of credit. This comment has merit. As proposed, § 703.205(a)(2)(ii) could be read to foreclose a carrier's ability to use a new letter of credit or an indemnity bond to secure its obligations. Proposed § 703.205(a)(2)(iii) similarly could be read to preclude a carrier from substituting a letter of credit or an indemnity bond for matured securities. The Department does not wish to restrict a carrier's ability to shift among approved forms of security as the carrier deems necessary. Accordingly, the Department has revised both § 703.205(a)(2)(ii) and (iii) to make clear that a carrier may substitute approved forms of security for others that have reached maturity or expired. As set forth below, the Department has also revised several other regulations that contain the same language as proposed §§ 703.205(a)(2)(ii) and (iii).

(b) Proposed § 703.205(a)(2)(iii) requires that the carrier either renew matured negotiable securities or substitute acceptable securities in their place. 69 FR 12227 (March 15, 2004). One commenter contends this provision is unnecessary because the Treasury Department's regulations, which govern the conduct of the custodian of the deposited securities (*e.g.* the Federal Reserve Bank), prohibit release of the principal to the carrier unless OWCP consents or the carrier provides substitute securities. The commenter misconstrues this provision's point. The rule requires that carriers authorize OWCP to take possession of their security deposits under certain conditions. Thus, unlike the Treasury Department's rule, which governs the custodian's conduct, § 703.205(a)(2)(iii) governs the carrier's obligations and OWCP's rights with respect to the deposited security. The regulation is therefore appropriate and necessary.

(c) The Department has also corrected a typographical error that appeared in the proposed rule. As proposed, § 703.205's introductory paragraph cross-referenced § 703.203 when referring to OWCP's decision fixing a carrier's required security deposit amount. 69 FR 12227 (March 15, 2004). The regulation governing OWCP's decision, however, is § 703.204. Accordingly, the final rule contains the correct cross-reference to § 703.204.

20 CFR 703.207

(a) Proposed § 703.207 cross-references the Treasury Department's regulations to define the types of negotiable securities a carrier may post. The rule states that if a carrier elects to use negotiable securities, the carrier "shall deposit any negotiable securities acceptable as security for the deposit of public monies of the United States under regulations issued by the Secretary of the Treasury. (See 31 CFR part 225.)" 69 FR 12228 (March 15, 2004).

(b) One comment objects to this provision on the ground that the Treasury Department's regulations appear inapplicable. The commenter states that those regulations define "bond" as a written instrument that guarantees fulfillment of an obligation to the United States. From this premise, the commenter contends that because the statute does not place any financial obligations on the United States, the Treasury Department's rules are not applicable. The Department disagrees. As the statutorily designated administrator of the LHWCA invested with broad rulemaking authority, 33 U.S.C. 939(a), 944(a), the Secretary (and, thus, the United States) has a direct interest in ensuring that the statute's primary goal is met. That goal is the prompt and certain payment of compensation and medical benefits to injured workers and their families. Taking steps to safeguard the Longshore program's fiscal vitality by requiring insurers to deposit security furthers that goal. The Treasury Department rule referred to by the commenter does not lead to a different conclusion. That rule specifically pertains to obligations *to* the United States—the sort of obligation these rules impose on insurance

carriers—as opposed to obligations *of* the United States—those duties the United States owes to other entities. Obligations *to* the United States—the kind governed by this regulation—squarely fall within the Treasury Department's rules. *See* 31 CFR 225.2 ("Bond means an executed written instrument, which guarantees the fulfillment of an obligation to the United States and sets forth the terms, conditions, and stipulations of the obligation.")

To the extent this comment relates to the Department's authority to require carriers to post security deposits, the Department has responded fully in the Statutory Authority discussion above. Accordingly, the Department rejects this comment and has made no changes in the final rule.

20 CFR 703.208

(a) This section provides that a carrier who chooses to secure its Longshore obligations with negotiable securities must deposit the securities with a Federal Reserve bank or the Treasurer of the United States. As proposed, this rule also sets forth OWCP's discretionary authority to authorize the securities' custodian to pay interest accrued on the deposited securities to the carrier. 69 FR 12228 (March 15, 2004).

(b) One comment states that the rule should be revised to require OWCP to direct interest payments to the carrier unless the carrier has defaulted on its Longshore obligations. OWCP currently directs the Federal Reserve bank to pay accrued interest on deposited negotiable securities to the carrier absent other specific instructions. OWCP does not plan to depart from its current practice under the new rules. The Department has therefore revised § 703.208 to reflect that interest accruing on deposited negotiable securities will be paid to the carrier unless any of the conditions set forth in § 703.211(a) occur (*i.e.* the conditions that allow OWCP to seize a carrier's security deposit and/or use its proceeds).

20 CFR 703.209

(a) Proposed § 703.209 proscribes substitution of "an indemnity bond, letters of credit or negotiable securities deposited by an insurance carrier under the regulations in this part" without OWCP authorization. This regulation also explains how carriers may apply to withdraw their security deposits when they have ceased writing Longshore insurance. 69 FR 12228 (March 15, 2004).

(b) One comment suggests that for carriers who secure their obligations with negotiable securities, the Department should include in the rule a list of acceptable securities that a carrier could substitute without OWCP's consent. The commenter notes that this would reduce the administrative burden on OWCP and carriers alike.

The Department agrees in principal with this comment. Section 703.207 limits the types of negotiable securities a carrier may use to those approved by the Treasury Department. Because the approved list of securities and their valuations change over time, the Treasury Department has eliminated from its regulations all mention of acceptable classes of securities. It has opted instead to put this information in other documents (*e.g.* Treasury Department circulars) and to post it on the Treasury Department's Web site. Thus, it would not be advisable for the Department to promulgate a rule containing a list of acceptable substitute securities.

Nevertheless, the Treasury Department's regulations governing the conduct of the custodian (*e.g.* a Federal Reserve Bank holding the carrier's deposited securities) allow the custodian to release proceeds from matured securities to the depositor without specific instructions from the agency, but only if the depositor substitutes Treasury Department-approved securities in their place. 31 CFR 225.7(c). Because the custodian will allow substitution only with approved negotiable securities, a carrier need not seek the Department's approval in those circumstances. To implement this change in the final rule, the Department has: (1) Limited § 703.209(a) to requirements regarding substitution of security; (2) added language to § 703.209(a) to allow different treatment for substitution of negotiable securities; (3) moved language regarding withdrawal of security from proposed § 703.209(a) to § 703.209(b); and (4) renumbered proposed § 703.209(b) as § 703.209(c).

20 CFR 703.211

For the reasons set forth in paragraph (a) of the discussion of comments received regarding § 703.205(a)(2)(ii) and (iii), the Department has revised §§ 703.211(a)(2) and (3) in the same manner.

20 CFR 703.301

(a) Section 703.301 discusses the Department's authority to authorize employers to self-insure. As proposed, the rule allows the Department to authorize any employer who furnishes "satisfactory proof of its ability to pay compensation directly, and who agrees to immediately cancel any existing insurance policy when OWCP approves the employer's application to be self-insured."

(b) Although the Department received no comments on this section, the Department realized in finalizing the rule that the phrase "immediately cancel any existing insurance policy" could be construed more broadly than intended. For instance, the phrase could be read as requiring an employer to cancel any excess or catastrophic insurance it may have to cover its Longshore obligations, a reading that would be contrary to other regulations authorizing the Department to require a self-insurer to carry catastrophic coverage. *See, e.g.*, § 703.304(a)(6). To avoid confusion, the Department has added language to § 703.301 clarifying that an approved self-insurer must agree to cancel existing insurance policies covering its Longshore obligations but may continue to carry excess or catastrophic coverage it chooses (or is required by the Department) to purchase.

20 CFR 703.304

For the reasons set forth in paragraph (a) of the discussion of comments received regarding § 703.205(a)(2)(ii) and (iii), the Department has revised § 703.304(a)(4)(ii) and (iii) in the same manner. The Department has also added a comma after the phrase "in a form prescribed and provided by OWCP" in § 703.304(a) for grammatical purposes.

20 CFR 703.307

For the reasons set forth in the discussion of comments received regarding § 703.208, the Department has revised § 703.307 in the same manner.

20 CFR 703.308

For the reasons set forth in the discussion of comments received regarding § 703.209, the Department has revised § 703.308 in the same manner.

20 CFR 703.310

For the reasons set forth in paragraph (a) of the discussion of comments received regarding § 703.205(a)(2)(ii) and (iii), the Department has revised §§ 703.310(a)(2) and (3) in the same manner.

III. Executive Order 12866 (Regulatory Planning and Review)

The Office of Management and Budget (OMB) has determined that this rule is a "significant regulatory action" under section 3(f)(4) of Executive Order 12866. Under that section, a "significant regulatory action" includes one that "raise[s] novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles

set forth in this Executive order." Accordingly, OMB has reviewed this rule.

In adopting this final rule, the Department considered several alternatives set forth in the NPRM. 69 FR 12219 (March 15, 2004). The Department considered requiring all carriers to fully secure their LHWCA obligations. This approach would place the risk of insolvency on the failed insurer rather than the surviving, healthy members of the insurance industry and self-insured employers through special fund assessments. 33 U.S.C. 944(c)(2). The Department rejected this approach, however, because it might lead some insurance carriers to leave the market and would duplicate, at least to some extent, the reserve requirements imposed by State insurance regulators.

Another alternative the Department considered but rejected was to use the existing special fund as an overall guaranty fund for all LHWCA claims. Although easy to administer, this approach would likely create negative incentives for prudent fiscal responsibility in the insurance industry.

Thus, the Department proposed a third approach in the NPRM. The proposed rules required all authorized insurance carriers to post security deposits, but only where there was no adequate State guaranty fund and only in amounts that reflected the actual risk of loss to the special fund. 69 FR 12226–12228 (March 15, 2004). As discussed in detail above, the Department has adopted this approach in the final rule, with the addition of an exemption from the security deposit requirements for the financially strongest carriers.

The benefits of this rule are numerous. First, security deposits will ensure that the Longshore Act's primary purpose—the prompt payment of compensation and medical benefits to injured workers and their survivors—is fulfilled, notwithstanding an insurance carrier's insolvency.

Second, security deposits protect both healthy members of the insurance industry and the special fund. The special fund's costs, which are calculated and assessed against authorized Longshore insurance carriers and self-insured employers each year, are primarily incurred for compensation payments in two circumstances: (1) When a carrier (and the employer it insured) or a self-insurer is insolvent; and (2) when a carrier or employer is entitled to relief under 33 U.S.C. 908(f) (second-injury fund). Security deposits will avoid draining the special fund's available resources in the event a carrier becomes insolvent. Moreover, as many industry members recognized in responding to the Department's request for information published in the **Federal Register** on February 22, 2002 (67 FR 8450), requiring authorized carriers to fully secure their LHWCA obligations obviates the need to collect annual special fund assessments from healthy carriers to pay for the insolvency of weaker carriers. *See* 69 FR 12219 (March 15, 2004). Because the requirement that liabilities be fully secured should decrease the fund's costs for benefits paid on behalf of insolvent carriers, the special fund assessments levied against carriers and self-insured employers are expected to decrease commensurately.

Third, security deposits protect the special fund from the unpredictable future, including the inherent inability of any static rating scheme to accurately predict the future financial stability of an insurance carrier, and the potential for catastrophic losses beyond the carrier's control (*e.g.* natural disasters, acts of terrorism) in the shipping and shipbuilding industries. *See* 69 FR 12219 (March 15, 2004).

By providing three methods for meeting the security deposit requirements, the final rules allow carriers to manage the direct costs associated with posting security by choosing an appropriate financial instrument. A carrier who deposits negotiable securities, for instance, continues to own the negotiable securities (subject to OWCP's security interest) and receive the income generated by them. *See* § 703.208. The majority of carriers have chosen this method for securing their LHWCA obligations under OWCP's current policy. A carrier may also elect to purchase an indemnity bond or letter of credit to meet its security deposit obligation. As noted in the NPRM, the Department estimates a $400,000 bond would require only a small initial cash outlay of approximately $6,000–$8,000 at typical current rates. *See* 69 FR 12223 (March 15, 2004).

In sum, the final rule balances the interests of insurance carriers, Longshore Act claimants, and the Department. The rule exempts from the deposit requirements those insurance carriers with the highest financial ratings who demonstrate solid financial strength, and limits the number of remaining carriers who must post deposits to those carriers operating in States with inadequate guaranty funds. At the same time, the rule meets the Department's objectives of protecting the special fund from insurance carrier insolvency and ensuring the prompt and continued payment of compensation and medical benefits to injured workers.

IV. Information Collection Requirements (Subject to the Paperwork Reduction Act)

As explained in the NPRM, the Department submitted several new collections of information contained in the proposed rules to the Office of Management and Budget (OMB) for review in accordance with the Paperwork Reduction Act of 1995, 44 U.S.C. 3501 *et seq.*, and its implementing regulations at 5 CFR part 1320. 69 FR 12221–22 (March 15, 2004). The new information collection requirements are found in §§ 703.2, 703.203, 703.204, 703.205, 703.209, 703.210, 703.212, 703.303 and 703.304.

With the exception of §§ 703.303 and 703.304, these collections relate to information insurance carriers are required to submit as part of the authorization process for writing LHWCA insurance, and as part of the process by which OWCP decides both the extent of an authorized insurance carrier's unsecured LHWCA obligations and the amount of the required security deposit. To implement these new collections, the Department proposed creating two new forms for insurance carriers (LS–276 and LS–275 IC). 69 FR 12221 (March 15, 2004). The information collections established in §§ 703.303 and 703.304 relate to the security a self-insured employer deposits to secure its payment of compensation under the LHWCA and its extensions. To implement these collections, the Department proposed one new form for self-insurers (Form LS–275 SI). 69 FR 12221 (March 15, 2004).

Burden estimates. (1) Form LS–276, Application for Security Deposit Determination. As fully explained in the NPRM, approximately 385 insurance carriers annually will file Form LS–276. The Department estimates that on average, it will take a carrier one hour to collect the information, complete Form LS–276 and mail it. Thus, the total annual hour burden is estimated to be 385 hours. The Department also estimates respondents' total annual operating and maintenance (printing and mailing) costs to be $163.80. 69 FR 12221 (March 15, 2004).

(2) LS–275 IC, Agreement and Undertaking (Insurance Carrier); LS–276 SI, Agreement and Undertaking (Self-Insured Employer). As fully explained in the NPRM, the Department estimates that approximately 343 (or 50%) of all authorized insurance carriers and self-insurers annually will complete and file Form LS–275 IC or LS–275 SI. The

Department estimates that on average, it will take a respondent 15 minutes to locate the information, complete form LS–275 IC or LS–275 SI and mail it. Thus, the total annual hour burden is estimated to be 85.75 hours. The Department also estimates respondents' total annual operating and maintenance (printing and mailing) costs to be $145.60. 69 FR 12222 (March 15, 2004).

The Department invited public comment on the new information collection requirements. 69 FR 12218, 12221 (March 15, 2004). No comments were received. OMB subsequently approved the use of the three new forms under OMB No. 1215–0204 until June 30, 2007, provided that the Department reports on the viability of developing criteria to exempt financially secure carriers from making a security deposit when it renews these collections of information in 2007.

Changes made between the proposed and final rules in response to public comment require a minor revision to Form LS–276, Application for Security Deposit Determination. Under the final rules, any carrier seeking an exemption from the security deposit requirements must submit documentation establishing its current rating and its rating for the immediately preceding year from each of three private insurance rating services designated by the Department. The Department intends to revise Form LS–276 to: (1) Allow a carrier to indicate that it is seeking an exemption; and (2) notify the carrier that it must submit the required ratings from private insurance rating services with its application. The Department believes this new reporting requirement will result in only de minimus increases in the cost and time burdens estimated for completing Form LS–276 that the Department set forth in the NPRM's preamble. 69 FR 12221 (March 15, 2004).

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

The Regulatory Flexibility Act of 1980, as amended (5 U.S.C. 601 *et seq.*), requires an agency to prepare regulatory flexibility analyses when it proposes regulations that will have "a significant economic impact on a substantial number of small entities," or to certify that the proposed regulations will have no such impact, and to make the analyses or certification available for public comment. For the reasons set forth in the NPRM, the Department determined that a complete regulatory flexibility analysis was not necessary, and certified that the proposed rules would not have a significant economic impact on a substantial number of small entities. 69 FR 12222–23. The Department invited public comment on the certification and delivered a copy of the NPRM to the Chief Counsel for Advocacy of the Small Business Administration.

The Department has received no comments responding to the certification or its underlying factual basis. Accordingly, for the reasons stated in the NPRM, the Assistant Secretary of Labor for Employment Standards again certifies that this rule will not have a significant economic impact on a substantial number of small entities. As a result, no regulatory impact analysis is required.

List of Subjects

20 CFR Part 701

Longshore and harbor workers, Organization and functions (government agencies), Workers' compensation.

20 CFR Part 703

Bonds, Insurance companies, Longshore and harbor workers, Reporting and recordkeeping requirements, Securities, Workers' compensation.

■ For the reasons set forth in the preamble, title 20, Chapter VI, Subchapter A of the Code of Federal Regulations is amended to read as follows:

PART 701—GENERAL PROVISIONS, DEFINITIONS AND USE OF TERMS

■ 1. The authority citation for Part 701 is revised to read as follows: Authority: 5 U.S.C. 301 and 8171 *et seq.*; 33 U.S.C. 939; 36 D.C. Code 501 *et seq.*; 42 U.S.C. 1651 *et seq.*; 43 U.S.C. 1331; Reorganization Plan No. 6 of 1950, 15 FR 3174, 3 CFR, 1949–1953 Comp., p. 1004, 64 Stat. 1263.

■ 2. Revise § 701.101 to read as follows:

§ 701.101 Scope of this subchapter and subchapter B.

(a) This subchapter contains the regulations governing the administration of the Longshore and Harbor Workers' Compensation Act, as amended (LHWCA), 33 U.S.C. 901 *et seq.*, except activities, pursuant to 33 U.S.C. 941, assigned to the Assistant Secretary of Labor for Occupational Safety and Health. It also contains the regulations governing the administration of the direct extensions of the LHWCA: the Defense Base Act (DBA), 42 U.S.C. 1651 *et seq.*; the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. 1331; and the Nonappropriated Fund Instrumentalities Act (NFIA), 5 U.S.C. 8171 *et seq.*

(b) The regulations in this subchapter also apply to claims filed under the District of Columbia Workmen's Compensation Act (DCCA), 36 D.C. Code 501 *et seq.* 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, as amended (D.C. Code 32–1501 *et seq.*).

(c) The regulations governing the administration of the Black Lung Benefits Program are in subchapter B of this chapter.

■ 3. Revise § 701.102 to read as follows:

§ 701.102 Organization of this subchapter.

Part 701 provides a general description of the regulations in this subchapter; sets forth information regarding the persons and agencies within the Department of Labor authorized by the Secretary of Labor to administer the Longshore and Harbor Workers' Compensation Act, its extensions and the regulations in this subchapter; and defines and clarifies use of specific terms in the several parts of this subchapter. Part 702 of this subchapter contains the general administrative regulations governing claims filed under the LHWCA. Part 703 of this subchapter contains the regulations governing insurance carrier authorizations, insurance carrier security deposits, self-insurer authorizations, and certificates of compliance with the insurance regulations, as required by sections 32 and 37 of the LHWCA (33 U.S.C. 932, 937). Because the extensions of the LHWCA (*see* § 701.101) incorporate by reference nearly all the provisions of the LHWCA, the regulations in parts 701, 702 and 703 also apply to the administration of the extensions (DBA, DCCA, OCSLA, and NFIA), unless otherwise noted. Part 704 of this subchapter contains the exceptions to the general applicability of parts 702 and 703 for the DBA, the DCCA, the OCSLA, and the NFIA.

■ 4. Revise § 701.201 to read as follows:

§ 701.201 Office of Workers' Compensation Programs.

The Office of Workers' Compensation Programs (OWCP) is responsible for administering the LHWCA and its extensions (*see* 20 CFR 1.2(e)). The regulations in subchapter A of chapter I of this title (20 CFR part 1) describe OWCP's establishment within the Employment Standards Administration, the functions assigned to it by the Assistant Secretary of Labor for

Employment Standards, and how those functions were performed before OWCP's establishment.

§ 701.202 [Reserved]

§ 701.203 [Reserved]

■ 5. Remove and reserve §§ 701.202 and 701.203.

■ 6. Amend § 701.301 by revising paragraphs (a)(1), (a)(5), (a)(6), (a)(7), (a)(8), (a)(9), (a)(10), (a)(12)(i)(B), (a)(12)(ii)(A) and (a)(12)(iii)(E) to read as follows:

§ 701.301 Definitions and use of terms.

(a) * * *

(1) *Act* or *LHWCA* means the Longshore and Harbor Workers' Compensation Act, as amended (33 U.S.C. 901 *et seq.*), and includes the provisions of any statutory extension of such Act (*see* § 701.101(a) and (b)) pursuant to which compensation on account of an injury is sought.

* * * * *

(5) *Office of Workers' Compensation Programs* or *OWCP* or *the Office* means the Office of Workers' Compensation Programs within the Employment Standards Administration, referred to in § 701.201 and described more fully in part 1 of this title. The term *Office of Workmen's Compensation Programs* shall have the same meaning as *Office of Workers' Compensation Programs* (*see* 20 CFR 1.6(b)).

(6) *Director* means the Director of OWCP, or his or her authorized representative.

(7) *District Director* means a person appointed as provided in sections 39 and 40 of the LHWCA or his or her designee, authorized to perform functions with respect to the processing and determination of claims for compensation under the LHWCA and its extensions as provided therein and under this subchapter. The term District Director is substituted for the term *Deputy Commissioner* used in the statute. This substitution is for administrative purposes only and in no way affects the power or authority of the position as established in the statute.

(8) *Administrative Law Judge* means a person appointed as provided in 5 U.S.C. 3105 and subpart B of 5 CFR part 930, who is qualified to preside at hearings under 5 U.S.C. 557 and is empowered by the Secretary to conduct formal hearings whenever necessary in respect of any claim for compensation arising under the LHWCA and its extensions.

(9) *Chief Administrative Law Judge* means the Chief Judge of the Office of Administrative Law Judges, United States Department of Labor, whose office is at the location set forth in 29 CFR 18.3(a).

(10) *Board or Benefits Review Board* means the Benefits Review Board established by section 21 of the LHWCA (33 U.S.C. 921) as amended and constituted and functioning pursuant to the provisions of chapter VII of this title and Secretary of Labor's Order No. 38–72 (38 FR 90), whose office is at the location set forth in 20 CFR 802.204.

* * * * *

(12) * * *

(i) * * *

(B) Any harbor worker, including a ship repairer, shipbuilder and shipbreaker; and

* * * * *

(ii) * * *

(A) A master or member of a crew of any vessel; or

* * * * *

(iii) * * *

(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; or

* * * * *

PART 703—INSURANCE REGULATIONS

■ 7. The authority citation for Part 703 is revised to read as follows:

Authority: 5 U.S.C. 301 and 8171 *et seq.*; 31 U.S.C. 9701; 33 U.S.C. 932 and 939; 36 D.C. Code 501 *et seq.*; 42 U.S.C. 1651 *et seq.*; 43 U.S.C. 1331; Reorganization Plan No. 6 of 1950, 15 FR 3174, 3 CFR, 1949–1953 Comp., p. 1004, 64 Stat. 1263; Secretary's Order 4–2001, 66 FR 29656.

■ 8. Amend Part 703 by redesignating §§ 703.001 through 703.003 as §§ 703.1 through 703.3 and designating them as new "Subpart A—General," by designating center heading "Authorization of Insurance Carriers" as "Subpart B—Authorization of Insurance Carriers," and revising newly designated subpart A to read as follows:

Subpart A—General

Sec.
703.1 Scope of part.
703.2 Forms.
703.3 Failure to secure coverage; penalties.

Subpart B—Authorization of Insurance Carriers

* * * * *

Subpart A—General

§ 703.1 Scope of part.

Part 703 governs insurance carrier authorizations, insurance carrier security deposits, self-insurer authorizations, and certificates of compliance with the insurance regulations. These provisions are required by the LHWCA and apply to the extensions of the LHWCA except as otherwise provided in part 704 of this subchapter.

§ 703.2 Forms.

(a) Any information required by the regulations in this part to be submitted to OWCP must be submitted on forms the Director authorizes from time to time for such purpose. Persons submitting forms may not modify the forms or use substitute forms without OWCP's approval.

Form No.	Title
(1) LS–271 ...	Application for Self-Insurance.
(2) LS–274 ...	Report of Injury Experience.
(3) LS–275 SI	Self-Insurer's Agreement and Undertaking.
(4) LS–275 IC	Insurance Carrier's Agreement and Undertaking.
(5) LS–276 ...	Application for Security Deposit Determination.
(6) LS–405 ...	Indemnity Bond.
(7) LS–570 ...	Card Report of Insurance.

(b) Copies of the forms listed in this section are available for public inspection at the Office of Workers' Compensation Programs, Employment Standards Administration, U.S. Department of Labor, Washington, D.C. 20210. They may also be obtained from OWCP district offices and on the Internet at *http://www.dol.gov/esa/owcp/dlhwc/lsforms.htm.*

§ 703.3 Failure to secure coverage; penalties.

(a) Each employer must secure the payment of compensation under the Act either through an authorized insurance carrier or by becoming an authorized self-insurer under section 32(a)(1) or (2) of the Act (33 U.S.C. 932(a)(1) or (2)). An employer who fails to comply with these provisions is subject, upon conviction, to a fine of not more than $10,000, or by imprisonment for not more than one year, or both. Where the employer is a corporation, the president, secretary and treasurer each will also be subject to this fine and/or imprisonment, in addition to the fine against the corporation, and each is severally personally liable, jointly with the corporation, for all compensation or other benefits payable under the Act while the corporation fails to secure the payment of compensation.

(b) Any employer who willingly and knowingly transfers, sells, encumbers, assigns or in any manner disposes of, conceals, secretes, or destroys any property belonging to the employer after an employee sustains an injury covered by the Act, with the intent to avoid payment of compensation under the Act to that employee or his/her dependents, shall be guilty of a misdemeanor and punished, upon conviction, by a fine of not more than $10,000 and/or imprisonment for one year. Where the employer is a corporation, the president, secretary and treasurer are also severally liable to imprisonment and, along with the corporation, jointly liable for the fine.

■ 9. Amend Part 703 by adding new "Subpart C—Insurance Carrier Security Deposit Requirements" (consisting of §§ 703.201 through 703.213), designating the center heading "Authorization of Self-Insurers" as "Subpart D—Authorization of Self-Insurers," designating center heading "Issuance of Certificates of Compliance," as "Subpart E—Issuance of Certificates of Compliance," and revising new Subpart D.

The addition and revision read as follows:

Subpart C—Insurance Carrier Security Deposit Requirements

Sec.

Subpart D—Authorization of Self-Insurers

Subpart E—Issuance of Certificates of Compliance

* * * * *

Subpart C—Insurance Carrier Security Deposit Requirements

§ 703.201 Deposits of security by insurance carriers.

The regulations in this subpart require certain insurance carriers to deposit security in the form of indemnity bonds, letters of credit or negotiable securities (chosen at the option of the carrier) of a kind and in an amount determined by the Office, and prescribe the conditions under which deposits must be made. Security deposits secure the payment of compensation and medical benefits when an insurance carrier defaults on any of its obligations under the LHWCA, regardless of the date such obligations arose. They also secure the payment of compensation and medical benefits when a carrier becomes insolvent and such obligations are not otherwise fully secured by a State guaranty fund. Any gap in State guaranty fund coverage will have a direct effect on the amount of security the Office will require a carrier to post. As used in this subpart, the terms "obligations under the Act" and "LHWCA obligations" mean a carrier's liability for compensation payments and medical benefits arising under the Longshore and Harbor Workers' Compensation Act and any of its extensions.

§ 703.202 Identification of significant gaps in State guaranty fund coverage for LHWCA obligations.

(a) In determining the amount of a carrier's required security deposit, the Office will consider the extent to which a State guaranty fund secures the insurance carrier's LHWCA obligations in that State. When evaluating State guaranty funds, the Office may consider a number of factors including, but not limited to—

(1) Limits on weekly benefit amounts;

(2) Limits on aggregate maximum benefit amounts;

(3) Time limits on coverage;

(4) Ocean marine exclusions;

(5) Employer size and viability provisions; and

(6) Financial strength of the State guaranty fund itself.

(b) OWCP will identify States without guaranty funds and States with guaranty funds that do not fully and immediately secure LHWCA obligations and will post its findings on the Internet at *http://www.dol.gov/esa/owcp/dlhwc/lstable.htm.* These findings will indicate the extent of any partial or total gap in coverage provided by a State guaranty fund, and they will be open for inspection and comment by all interested parties. If the extent of coverage a particular State guaranty fund provides either cannot be determined or is ambiguous, OWCP will deem one third (33⅓ percent) of a carrier's LHWCA obligations in that State to be unsecured. OWCP will revise its findings from time to time, in response to substantiated public comments it receives or for any other reasons it considers relevant.

§ 703.203 Application for security deposit determination; information to be submitted; other requirements.

(a) Each insurance carrier authorized by OWCP to write insurance under the LHWCA or any of its extensions, and each insurance carrier seeking initial authorization to write such insurance, must apply annually, on a schedule set by OWCP, for a determination of the extent of its unsecured obligations and the security deposit required. The application must be addressed to the Branch of Financial Management and Insurance (Branch) within OWCP's Division of Longshore and Harbor Workers' Compensation, and be made on a form provided by OWCP. The application must contain the following:

(1) Any carrier seeking an exemption from the security deposit requirements based on its financial standing (*see* § 703.204(c)(1)) must submit documentation establishing the carrier's current rating and its rating for the

immediately preceding year from each insurance rating service designated by the Branch and posted on the Internet at *http://www.dol.gov/esa/owcp/dlhwc/lstable.htm.*

(2) All other carriers, and any carrier whose exemption request under paragraph (a)(1) of this section has been denied, must provide—

(i) A statement of the carrier's outstanding liabilities under the LHWCA or any of its extensions for its LHWCA obligations for each State in which the obligations arise; and

(ii) Any other information the Branch requests to enable it to give the application adequate consideration including, but not limited to, the reports set forth at § 703.212.

(b) If the carrier disagrees with any of OWCP's findings regarding State guaranty funds made under § 703.202(b) as they exist when it submits its application, the carrier may submit a statement of its unsecured obligations based on a different conclusion regarding the extent of coverage afforded by one or more State guaranty funds. The carrier must submit evidence and/or argument with its application sufficient to establish that such conclusion is correct.

(c) The carrier must sign and swear to the application. If the carrier is not an individual, the carrier's duly authorized officer must sign and swear to the application and list his or her official designation. If the carrier is a corporation, the officer must also affix the corporate seal.

(d) At any time after filing an application, the carrier must inform the Branch immediately of any material changes that may have rendered its application incomplete, inaccurate or misleading.

(e) By filing an application, the carrier consents to be bound by and to comply with the regulations and requirements in this part.

§ 703.204 Decision on insurance carrier's application; minimum amount of deposit.

(a) The Branch will issue a decision on the application determining the extent of an insurance carrier's unsecured LHWCA obligations and fixing the amount of security the carrier must deposit to fully secure payment of its unsecured obligations. The Branch will transmit its decision to the applicant in a way it considers appropriate.

(b) The Branch may consider a number of factors in setting the security deposit amount including, but not limited to, the—

(1) Financial strength of the carrier as determined by private insurance rating organizations;

(2) Financial strength of the carrier's insureds in the Longshore industry;

(3) Extent to which State guaranty funds secure the carrier's LHWCA obligations in the event the carrier defaults on its obligations or becomes insolvent;

(4) Carrier's longevity in writing LHWCA or other workers' compensation coverage;

(5) Extent of carrier's exposure for LHWCA coverage; and

(6) Carrier's payment history in satisfying its LHWCA obligations.

(c) In setting the security deposit amount, the Branch will follow these criteria:

(1) Carriers who hold the highest rating awarded by each of the three insurance rating services designated by the Branch and posted on the Internet at *http://www.dol.gov/esa/owcp/dlhwc/lstable.htm* for both the current rating year and the immediately preceding year will not be required to deposit security.

(2) Carriers whose LHWCA obligations are fully secured by one or more State guaranty funds, as evaluated by OWCP under § 703.202 of this subpart, will not be required to deposit security.

(3) The Branch will require all carriers not meeting the requirements of paragraphs (c)(1) or (2) of this section to deposit security for their LHWCA obligations not secured by a State guaranty fund, as evaluated by OWCP under § 703.202 of this subpart. For carriers that write only an insignificant or incidental amount of LHWCA insurance, the Branch will require a deposit in an amount determined by the Branch from time to time. For all other carriers, the Branch will require a minimum deposit of one third (33⅓ percent) of a carrier s outstanding LHWCA obligations not secured by a State guaranty fund, but may require a deposit up to an amount equal to the carrier's total outstanding LHWCA obligations (100 percent) not secured by a State guaranty fund.

(d) If a carrier believes that a lesser deposit would fully secure its LHWCA obligations, the carrier may request a hearing before the Director of the Division of Longshore and Harbor Workers' Compensation (Longshore Director) or the Longshore Director's representative. Requests for hearing must be in writing and sent to the Branch within 10 days of the date of the Branch's decision. The carrier may submit new evidence and/or argument in support of its challenge to the Branch's decision and must provide any additional documentation OWCP requests. The Longshore Director or his representative will notify the carrier of the hearing date within 10 days of receiving the request. The Longshore Director or his representative will issue the final agency decision on the application within 60 days of the hearing date, or, where evidence is submitted after the hearing, within 60 days of the receipt of such evidence, but no later than 180 days after receiving the carrier's request for a hearing.

§ 703.205 Filing of Agreement and Undertaking; deposit of security.

Within 45 days of the date on which the insurance carrier receives the Branch's decision (or, if the carrier requests a hearing, a period set by the Longshore Director or the Longshore Director's representative) determining the extent of its unsecured LHWCA obligations and fixing the required security deposit amount (*see* § 703.204), the carrier must:

(a) Execute and file with the Branch an Agreement and Undertaking, in a form prescribed and provided by OWCP, in which the carrier shall agree to—

(1) Deposit with the Branch indemnity bonds or letters of credit in the amount fixed by the Office, or deposit negotiable securities under §§ 703.207 and 703.208 in that amount;

(2) Authorize the Branch, at its discretion, to bring suit under any deposited indemnity bond or to draw upon any deposited letters of credit, as appropriate under the terms of the security instrument, or to collect the interest and principal as they become due on any deposited negotiable securities and to sell or otherwise liquidate such negotiable securities or any part thereof when—

(i) The carrier defaults on any of its LHWCA obligations;

(ii) The carrier fails to renew any deposited letter of credit or substitute a new letter of credit, indemnity bond or acceptable negotiable securities in its place;

(iii) The carrier fails to renew any deposited negotiable securities at maturity or substitute a letter of credit, indemnity bond or acceptable negotiable securities in their place;

(iv) State insolvency proceedings are initiated against the carrier; or

(v) The carrier fails to comply with any of the terms of the Agreement and Undertaking; and

(3) Authorize the Branch, at its discretion, to pay such ongoing claims of the carrier as it may find to be due

and payable from the proceeds of the deposited security;

(b) Give security in the amount fixed in the Office's decision:

(1) In the form of an indemnity bond with sureties satisfactory to the Branch and in such form, and containing such provisions, as the Branch may prescribe: *Provided*, That only surety companies approved by the United States Treasury Department under the laws of the United States and the rules and regulations governing bonding companies may act as sureties on such indemnity bonds (*see* Department of Treasury's Circular–570), and that a surety company that is a corporate subsidiary of an insurance carrier may not act as surety on such carrier's indemnity bond;

(2) In the form of letters of credit issued by a financial institution satisfactory to the Branch and upon which the Branch may draw; or

(3) By a deposit of negotiable securities with a Federal Reserve Bank or the Treasurer of the United States in compliance with §§ 703.207 and 703.208.

§ 703.206 [Reserved]

§ 703.207 Kinds of negotiable securities that may be deposited; conditions of deposit; acceptance of deposits.

An insurance carrier electing to deposit negotiable securities to secure its obligations under the Act in the amount fixed by the Office under the regulations in this part shall deposit any negotiable securities acceptable as security for the deposit of public monies of the United States under regulations issued by the Secretary of the Treasury. (*See* 31 CFR part 225.) The approval, valuation, acceptance, and custody of such securities is hereby committed to the several Federal Reserve Banks and the Treasurer of the United States.

§ 703.208 Deposits of negotiable securities with Federal Reserve banks or the Treasurer of the United States; interest thereon.

Deposits of negotiable securities provided for by the regulations in this part must be made with any Federal Reserve bank or any branch of a Federal Reserve bank designated by the Branch, or the Treasurer of the United States, and must be held subject to the order of the Branch. The Branch will authorize the insurance carrier to collect interest on the securities it deposits unless any of the conditions set forth at § 703.211(a) occur.

§ 703.209 Substitution and withdrawal of indemnity bond, letters of credit or negotiable securities.

(a) A carrier may not substitute other security for any indemnity bond or letters of credit deposited under the regulations in this part except when authorized by the Branch. A carrier may, however, substitute negotiable securities acceptable under the regulations in this part for previously-deposited negotiable securities without the Branch's prior approval.

(b) A carrier that has ceased to write insurance under the Act may apply to the Branch for withdrawal of its security deposit. The carrier must file with its application a sworn statement setting forth—

(1) A list of all cases in each State in which the carrier is paying compensation, together with the names of the employees and other beneficiaries, a description of causes of injury or death, and a statement of the amount of compensation paid;

(2) A similar list of all pending cases in which the carrier has not yet paid compensation; and

(3) A similar list of all cases in which injury or death has occurred within one year before such application or in which the last payment of compensation was made within one year before such application.

(c) The Branch may authorize withdrawal of previously-deposited indemnity bonds, letters of credit and negotiable securities that, in the opinion of the Branch, are not necessary to provide adequate security for the payment of the carrier's outstanding and potential LHWCA liabilities. No withdrawals will be authorized unless there has been no claim activity involving the carrier for a minimum of five years, and the Branch is reasonably certain that no further claims will arise.

§ 703.210 Increase or reduction in security deposit amount.

(a) Whenever the Office considers the security deposited by an insurance carrier insufficient to fully secure the carrier's LHWCA obligations, the carrier must, upon demand by the Branch, deposit additional security in accordance with the regulations in this part in an amount fixed by the Branch. The Branch will issue its decision requiring additional security in accordance with § 703.204, and the procedures set forth at §§ 703.204(d) and 703.205 for requesting a hearing and complying with the Office's decision will apply as appropriate.

(b) The Branch may reduce the required security at any time on its own initiative, or upon application of a carrier, when in the Branch's opinion the facts warrant a reduction. A carrier seeking a reduction must furnish any information the Office requests regarding its outstanding LHWCA obligations for any State in which it does business, its obligations not secured by a State guaranty fund in each of these States, and any other evidence as the Branch considers necessary.

§ 703.211 Authority to seize security deposit; use and/or return of proceeds.

(a) The Office may take any of the actions set forth in paragraph (b) of this section when an insurance carrier—

(1) Defaults on any of its LHWCA obligations;

(2) Fails to renew any deposited letter of credit or substitute a new letter of credit, indemnity bond or acceptable negotiable securities in its place;

(3) Fails to renew any deposited negotiable securities at maturity or substitute a letter of credit, indemnity bond or acceptable negotiable securities in their place;

(4) Has State insolvency proceedings initiated against it; or

(5) Fails to comply with any of the terms of the Agreement and Undertaking.

(b) When any of the conditions set forth in paragraph (a) of this section occur, the Office may, within its discretion and as appropriate to the security instrument—

(1) Bring suit under any indemnity bond;

(2) Draw upon any letters of credit;

(3) Seize any negotiable securities, collect the interest and principal as they may become due, and sell or otherwise liquidate the negotiable securities or any part thereof.

(c) When the Office, within its discretion, determines that it no longer needs to collect the interest and principal of any negotiable securities seized pursuant to paragraphs (a) and (b) of this section, or to retain the proceeds of their sale, it must return any of the carrier's negotiable securities still in its possession and any remaining proceeds of their sale.

§ 703.212 Required reports; examination of insurance carrier accounts.

(a) Upon the Office's request, each insurance carrier must submit the following reports:

(1) A certified financial statement of the carrier's assets and liabilities, or a balance sheet.

(2) A sworn statement showing the extent of the carrier's unsecured LHWCA obligations for each State in which it is authorized to write insurance under the LHWCA or any of its extensions.

(3) A sworn statement reporting the carrier's open cases as of the date of such report, listing by State all death and injury cases, together with a report of the status of all outstanding claims.

(b) Whenever it considers necessary, the Office may inspect or examine a carrier's books of account, records, and other papers to verify any financial statement or other information the carrier furnished to the Office in any statement or report required by this section, or any other section of the regulations in this part. The carrier must permit the Office or its duly authorized representative to make the inspection or examination. Alternatively, the Office may accept an adequate independent audit by a certified public accountant.

§ 703.213 Failure to comply.

The Office may suspend or revoke a carrier's certificate of authority to write LHWCA insurance under § 703.106 when the carrier fails to comply with any of the requirements of this part.

Subpart D—Authorization of Self-Insurers

§ 703.301 Employers who may be authorized as self-insurers.

The regulations in this subpart set forth procedures for authorizing employers to self-insure the payment of compensation under the Longshore and Harbor Workers' Compensation Act, or its extensions. The Office may authorize any employer to self-insure who, pursuant to the regulations in this part, furnishes to the Office satisfactory proof of its ability to pay compensation directly, and who agrees to immediately cancel any existing insurance policy covering its Longshore obligations (except for excess or catastrophic workers' compensation insurance, *see* §§ 703.302(a)(6), 703.304(a)(6)) when OWCP approves the employer's application to be self-insured. The regulations require self-insurers to deposit security in the form of an indemnity bond, letters of credit or negotiable securities (at the option of the employer) of a kind and in an amount determined by the Office, and prescribe the conditions under which such deposits shall be made. The term "self-insurer" as used in these regulations means any employer securing the payment of compensation under the LHWCA or its extensions in accordance with the provisions of 33 U.S.C. 932(a)(2) and these regulations.

§ 703.302 Application for authority to become a self-insurer; how filed; information to be submitted; other requirements.

(a) Any employer may apply to become an authorized self-insurer. The application must be addressed to the Branch of Financial Management and Insurance (Branch) within OWCP's Division of Longshore and Harbor Workers' Compensation, and be made on a form provided by OWCP. The application must contain—

(1) A statement of the employer's total payroll for the 12 months before the application date;

(2) A statement of the average number of employees engaged in employment within the purview of the LHWCA or any of its extensions for the 12 months before the application date;

(3) A statement of the number of injuries to such employees resulting in disability of more than 7 days' duration, or in death, during each of the 5 years before the application date;

(4) A certified financial report for each of the three years before the application date;

(5) A description of the facilities maintained or the arrangements made for the medical and hospital care of injured employees;

(6) A statement describing the provisions and maximum amount of any excess or catastrophic insurance; and

(7) Any other information the Branch requests to enable it to give the application adequate consideration including, but not limited to, the reports set forth at § 703.310.

(b) The employer must sign and swear to the application. If the employer is not an individual, the employer's duly authorized officer must sign and swear to the application and list his or her official designation. If the employer is a corporation, the officer must also affix the corporate seal.

(c) At any time after filing an application, the employer must inform the Branch immediately of any material changes that may have rendered its application incomplete, inaccurate or misleading.

(d) By filing an application, the employer consents to be bound by and to comply with the regulations and requirements in this part.

§ 703.303 Decision on employer's application.

(a) The Branch will issue a decision granting or denying the employer's application to be an authorized self-insurer. If the Branch grants the application, the decision will fix the amount of security the employer must deposit. The Branch will transmit its decision to the employer in a way it considers appropriate.

(b) The employer is authorized to self-insure beginning with the date of the Branch's decision. Each grant of authority to self-insure is conditioned, however, upon the employer's execution and filing of an Agreement and Undertaking and deposit of the security fixed in the decision in the form and within the time limits required by § 703.304. In the event the employer fails to comply with the requirements set forth in § 703.304, its authorization to self-insure will be considered never to have been effective, and the employer will be subject to appropriate penalties for failure to secure its LHWCA obligations.

(c) The Branch will require security in the amount it considers necessary to fully secure the employer's LHWCA obligations. When fixing the amount of security, the Branch may consider a number of factors including, but not limited to, the—

(1) Employer's overall financial standing;

(2) Nature of the employer's work;

(3) Hazard of the work in which the employees are employed;

(4) Employer's payroll amount for employees engaged in employment within the purview of the Act; and

(5) Employer's accident record as shown in the application and the Office's records.

(d) If an employer believes that the Branch incorrectly denied its application to self-insure, or that a lesser security deposit would fully secure its LHWCA obligations, the employer may request a hearing before the Director of the Division of Longshore and Harbor Workers' Compensation (Longshore Director) or the Longshore Director's representative. Requests for hearing must be in writing and sent to the Branch within ten days of the date of the Branch's decision. The employer may submit new evidence and/or argument in support of its challenge to the Branch's decision and must provide any additional documentation OWCP requests. The Longshore Director or his representative will notify the employer of the hearing date within 10 days of receiving the request. The Longshore Director or his representative will issue the final agency decision on the application within 60 days of the hearing date, or, where evidence is submitted after the hearing, within 60 days of the receipt of such evidence, but no later than 180 days after receiving the employer's request for a hearing.

§ 703.304 Filing of Agreement and Undertaking; deposit of security.

Within 45 days of the date on which the employer receives the Branch's decision (or, if the employer requests a hearing, a period set by the Longshore Director or the Longshore Director's representative) granting its application to self-insure and fixing the required security deposit amount (*see* § 703.303), the employer must:

(a) Execute and file with the Branch an Agreement and Undertaking, in a form prescribed and provided by OWCP, in which the employer shall agree to:

(1) Pay when due, as required by the provisions of the Act, all compensation payable on account of injury or death of any of its employees injured within the purview of the Act;

(2) Furnish medical, surgical, hospital, and other attendance, treatment and care as required by the Act;

(3) Deposit with the Branch indemnity bonds or letters of credit in the amount fixed by the Office, or deposit negotiable securities under §§ 703.306 and 703.307 in that amount;

(4) Authorize the Branch, at its discretion, to bring suit under any deposited indemnity bond or to draw upon any deposited letters of credit, as appropriate under the terms of the security instrument, or to collect the interest and principal as they become due on any deposited negotiable securities and to seize and sell or otherwise liquidate such negotiable securities or any part thereof when the employer:

(i) Defaults on any of its LHWCA obligations;

(ii) Fails to renew any deposited letter of credit or substitute a new letter of credit, indemnity bond or acceptable negotiable securities in its place;

(iii) Fails to renew any deposited negotiable securities at maturity or substitute a letter of credit, indemnity bond or acceptable negotiable securities in their place; or

(iv) Fails to comply with any of the terms of the Agreement and Undertaking;

(5) Authorize the Branch, at its discretion, to pay such compensation, medical, and other expenses and any accrued penalties imposed by law as it may find to be due and payable from the proceeds of the deposited security; and

(6) Obtain and maintain, if required by the Office, excess or catastrophic insurance in amounts to be determined by the Office.

(b) Give security in the amount fixed in the Office's decision:

(1) In the form of an indemnity bond with sureties satisfactory to the Office, and in such form and containing such provisions as the Office may prescribe: *Provided*, That only surety companies approved by the United States Treasury Department under the laws of the United States and the rules and regulations governing bonding companies may act as sureties on such indemnity bonds (*see* Department of Treasury's Circular–570);

(2) In the form of letters of credit issued by a financial institution satisfactory to the Branch and upon which the Branch may draw; or,

(3) By a deposit of negotiable securities with a Federal Reserve Bank or the Treasurer of the United States in compliance with §§ 703.306 and 703.307.

§ 703.305 [Reserved]

§ 703.306 Kinds of negotiable securities that may be deposited; conditions of deposit; acceptance of deposits.

A self-insurer or a self-insurer applicant electing to deposit negotiable securities to secure its obligations under the Act in the amount fixed by the Office under the regulations in this part shall deposit any negotiable securities acceptable as security for the deposit of public monies of the United States under regulations issued by the Secretary of the Treasury. (*See* 31 CFR part 225.) The approval, valuation, acceptance, and custody of such securities is hereby committed to the several Federal Reserve Banks and the Treasurer of the United States.

§ 703.307 Deposits of negotiable securities with Federal Reserve banks or the Treasurer of the United States; interest thereon.

Deposits of negotiable securities provided for by the regulations in this part shall be made with any Federal Reserve bank or any branch of a Federal Reserve bank designated by the Office, or the Treasurer of the United States, and shall be held subject to the order of the Office. The Office will authorize the self-insurer to collect interest on the securities deposited by it unless any of the conditions set forth at § 703.304(a)(4) occur.

§ 703.308 Substitution and withdrawal of indemnity bond, letters of credit or negotiable securities.

(a) A self-insurer may not substitute other security for any indemnity bond or letters of credit deposited under the regulations in this part except when authorized by the Office. A self-insurer may, however, substitute negotiable securities acceptable under the regulations in this part for previously-deposited negotiable securities without the Office's prior approval.

(b) A self-insurer discontinuing business, discontinuing operations within the purview of the Act, or securing the payment of compensation by commercial insurance under the provisions of the Act may apply to the Office for the withdrawal of the security it provided under the regulations in this part. The self-insurer must file with its application a sworn statement setting forth—

(1) A list of all cases in each compensation district in which the self-insurer is paying compensation, together with the names of the employees and other beneficiaries, a description of causes of injury or death, and a statement of the amount of compensation paid;

(2) A similar list of all pending cases in which the self-insurer has not yet paid compensation; and

(3) A similar list of all cases in which injury or death has occurred within one year before such application or in which the last payment of compensation was made within one year before such application.

(c) The Office may authorize withdrawal of previously-deposited indemnity bonds, letters of credit and negotiable securities that, in the opinion of the Office, are not necessary to provide adequate security for the payment of the self-insurer's outstanding and potential LHWCA obligations. No withdrawals will be authorized unless there has been no claim activity involving the self-insurer for a minimum of five years, and the Office is reasonably certain no further claims will arise.

§ 703.309 Increase or reduction in the amount of indemnity bond, letters of credit or negotiable securities.

(a) Whenever the Office considers the principal sum of the indemnity bond or letters of credit filed or the amount of the negotiable securities deposited by a self-insurer insufficient to fully secure the self-insurer's LHWCA obligations, the self-insurer must, upon demand by the Office, deposit additional security in accordance with the regulations in this part in an amount fixed by the Branch. The Branch will issue its decision requiring additional security in accordance with § 703.303, and the procedures set forth at §§ 703.303(d) and 703.304 for requesting a hearing and complying with the Office's decision will apply as appropriate.

(b) The Office may reduce the required security at any time on its own initiative, or upon application of a self-

insurer, when in the Office's opinion the facts warrant a reduction. A self-insurer seeking a reduction must furnish any information the Office requests regarding its current affairs, the nature and hazard of the work of its employees, the amount of its payroll for employees engaged in maritime employment within the purview of the Act, its financial condition, its accident experience, a record of compensation payments it has made, and any other evidence the Branch considers necessary.

§ 703.310 Authority to seize security deposit; use and/or return of proceeds.

(a) The Office may take any of the actions set forth in paragraph (b) of this section when a self-insurer—

(1) Defaults on any of its LHWCA obligations;

(2) Fails to renew any deposited letter of credit or substitute a new letter of credit, indemnity bond or acceptable negotiable securities in its place;

(3) Fails to renew any deposited negotiable securities at maturity or substitute a letter of credit, indemnity bond or acceptable negotiable securities in their place; or

(4) Fails to comply with any of the terms of the Agreement and Undertaking.

(b) When any of the conditions set forth in paragraph (a) of this section occur, the Office may, within its discretion and as appropriate to the security instrument—

(1) Bring suit under any indemnity bond;

(2) Draw upon any letters of credit;

(3) Seize any negotiable securities, collect the interest and principal as they may become due, and sell or otherwise liquidate the negotiable securities or any part thereof.

(c) When the Office, within its discretion, determines that it no longer needs to collect the interest and principal of any negotiable securities seized pursuant to paragraphs (a) and (b) of this section, or to retain the proceeds of their sale, it must return any of the employer's negotiable securities still in its possession and any remaining proceeds of their sale.

§ 703.311 Required reports; examination of self-insurer accounts.

(a) Upon the Office's request, each self-insurer must submit the following reports:

(1) A certified financial statement of the self-insurer's assets and liabilities, or a balance sheet.

(2) A sworn statement showing by classifications the payroll of employees of the self-insurer who are engaged in employment within the purview of the LHWCA or any of its extensions.

(3) A sworn statement covering the six-month period preceding the date of such report, listing by compensation districts all death and injury cases which have occurred during such period, together with a report of the status of all outstanding claims showing the particulars of each case.

(b) Whenever it considers necessary, the Office may inspect or examine a self-insurer's books of account, records, and other papers to verify any financial statement or other information the self-insurer furnished to the Office in any report required by this section, or any other section of the regulations in this part. The self-insurer must permit the Office or its duly authorized representative to make the inspection or examination. Alternatively, the Office may accept an adequate report of a certified public accountant.

§ 703.312 Period of authorization as self-insurer.

(a) Self-insurance authorizations will remain in effect for so long as the self-insurer complies with the requirements of the Act, the regulations in this part, and OWCP.

(b) A self-insurer who has secured its liability by depositing an indemnity bond with the Office will, on or about May 10 of each year, receive from the Office a form for executing a bond that will continue its self-insurance authorization. The submission of such bond, duly executed in the amount indicated by the Office, will be deemed a condition of the continuing authorization.

§ 703.313 Revocation of authorization to self-insure.

The Office may for good cause shown suspend or revoke the authorization of any self-insurer. Failure by a self-insurer to comply with any provision or requirement of law or of the regulations in this part, or with any lawful order or communication of the Office, or the failure or insolvency of the surety on its indemnity bond, or impairment of financial responsibility of such self-insurer, shall be deemed good cause for suspension or revocation.

Signed at Washington, DC, this 18th day of July, 2005.

Victoria A. Lipnic,

Assistant Secretary for Employment Standards.

[FR Doc. 05–14530 Filed 7–25–05; 8:45 am]

BILLING CODE 4510–CF–P

declared an intention to return and has stated a time for returning, nor shall any commutation be made except upon the basis of a compensation order fixing the right of the beneficiary to compensation.

[50 FR 394, Jan. 3, 1985]

§ 702.143 Establishment of special fund.

Congress, by section 44 of the Act, 33 U.S.C. 944, established in the U.S. Treasury a special fund, to be administered by the Secretary. The Treasurer of the United States is the custodian of such fund, and all monies and securities in such fund shall be held in trust by the Treasurer and shall not be money or property of the United States. The Treasurer shall make disbursements from such funds only upon the order of the Director, OWCP, as delegatee of the Secretary. The Act requires that the Treasurer give bond, in an amount to be fixed and with securities to be approved by the Secretary of the Treasury and the Comptroller General of the United States, conditioned upon the faithful performance of his duty as custodian of such fund.

§ 702.144 Purpose of the special fund.

This special fund was established to give effect to a congressional policy determination that, under certain circumstances, the employer of a particular employee should not be required to bear the entire burden of paying for the compensation benefits due that employee under the Act. Instead, a substantial portion of such burden should be borne by the industry generally. Section 702.145 describes this special circumstance under which the particular employer is relieved of some of his burden. Section 702.146 describes the manner and circumstances of the input into the fund.

§ 702.145 Use of the special fund.

(a) *Under section 10 of the Act.* This section provides for initial and subsequent annual adjustments in compensation and continuing payments to beneficiaries in cases of permanent total disability or death which commenced or occurred prior to enactment of the 1972 Amendments to this Act (Pub. L. 92-576, approved Oct. 27, 1972). At the discretion of the Director, such payments may be paid directly by him to eligible beneficiaries as the obligation accrues, one-half from the special fund and one-half from appropriations, or he may require insurance carriers or self-insured employers already making payments to such beneficiaries to pay such additional compensation as the amended Act requires. In the latter case such carriers and self-insurers shall be reimbursed by the Director for such additional amounts paid, in the proportion of one-half the amount from the special fund and one-half the amount from appropriations. To obtain reimbursement, the carriers and self-insurers shall submit claims for payments made by them during previous periods at intervals of not less than 6 months. A form has been prescribed for such purpose and shall be used. No administrative claims service expense incurred by the carrier or self-insurer shall be included in the claim and no such expense shall be allowed. The amounts reimbursed to such carrier or self-insurer shall be limited to amounts actually due and previously paid to beneficiaries.

(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 district director 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.

(c) *Under sections 8(g) and 39(c)(2) of the Act.* These sections, 33 U.S.C. 908(g) and 939(c)(2), respectively, provide for vocational rehabilitation of disabled employees, and authorize, under appropriate circumstances, a maintenance allowance for the employee (not to exceed $25 a week) in additional to other compensation benefits otherwise payable for his injury-related disability. Awards under these sections are made from the special fund upon order of the Director or his designee. The district directors may be required to make investigations with respect to any case and forward to the Director their recommendations as to the propriety and need for such maintenance.

(d) *Under section 39(c)(2) of the Act.* In addition to the maintenance allowance for the employee discussed in paragraph (c) of this section, the Director is further authorized to use the fund in such amounts as may be necessary to procure the vocational training services.

(e) *Under section 7(e) of the Act.* This provision, 33 U.S.C. 907(e), authorizes payment by the Director from the special fund for special medical examinations, *i.e.*, those obtained from impartial specialists to resolve disputes, when such special examinations are deemed necessary under that statutory provision. The Director has the discretionary power, however, to charge the cost of such examination to the insurance carrier or self-insured employer.

(f) *Under section 18(b) of the Act.* This section, 33 U.S.C. 918(b), provides a source for payment of compensation benefits in cases where the employer is insolvent, or other circumstances preclude the payment of benefits due in any case. In such situations, the district director shall forward the case to the Director for consideration of an award from the special fund, together with evidence with respect to the employer's insolvency or other reasons for nonpayment of benefits due. Benefits, as herein used, means medical care or supplies within the meaning of section 7 of the Act, 33 U.S.C. 907, and subpart

D of this part 702, as well as monetary benefits. Upon receipt of the case, the Director shall promptly determine whether an award from the special fund is appropriate and advisable in the case, having due regard for all other current commitments from the special fund. If such an award is made, the employer shall be liable for the repayment into the fund of the amounts paid therefrom, as provided in 33 U.S.C. 918(b).

(The information collection requirements contained in paragraph (a) were approved by the Office of Management and Budget under control number 1215–0065. The information collection requirements contained in paragraph (b) were approved by the Office of Management and Budget under control number 1215–0073)

(Pub. L. No. 96–511)

[38 FR 26861, Sept. 26, 1973, as amended at 49 FR 18294, Apr. 30, 1984; 51 FR 4282, Feb. 3, 1986]

§ 702.146 Source of the special fund.

(a) All amounts collected as fines and penalties under the several provisions of the Act shall be paid into the special fund (33 U.S.C. 44(c)(3)).

(b) Whenever an employee dies under circumstances creating a liability on an employer to pay death benefits to the employee's beneficiaries, and whenever there are no such beneficiaries entitled to such payments, the employer shall pay $5,000 into the special fund (Act, section 44(c)(1)). In such cases, the compensation order entered in the case shall specifically find that there is such liability and that there are no beneficiaries entitled to death benefits, and shall order payment by the employer into the fund. Compensation orders shall be made and filed in accordance with the regulations in subpart C of this part 702, except that for this purpose the district director settling the case under § 702.315 shall formalize the memorandum of conference in a compensation order, and shall file such order as provided for in § 702.349.

(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.

[38 FR 26861, Sept. 26, 1973, as amended at 50 FR 395, Jan. 3, 1985; 51 FR 4282, Feb. 3, 1986]

§ 702.147 Enforcement of special fund provisions.

(a) As provided in section 44(d)(1) of the Act, 33 U.S.C. 944(d)(1), for the purpose of making rules, regulations, and determinations under the special fund provisions in section 44 and for providing enforcement thereof, the Director may investigate and gather appropriate data from each carrier and self-insured employer, and may enter and inspect such places and records (and make such transcriptions of records), question such employees, and investigate such facts, conditions, practices, or other matters as he may deem necessary or appropriate. The Director may require the employer to have audits performed of claims activity relating to this Act. The Director may also require detailed reports of payments made under the Act, and of estimated future liabilities under the Act, from any or all carriers of self-insurers. The

Director may require that such reports be certified and verified in whatever manner is considered appropriate.

(b) Pursuant to section 44(d)(3) of the Act, 33 U.S.C. 944(d)(3), for the purpose of any hearing or investigation related to determinations or the enforcement of the provisions of section 44 with respect to the special fund, the provisions of 15 U.S.C. 49 and 50 as amended (the Federal Trade Commission Act provisions relating to attendance of witnesses and the production of books, papers, and documents) are made applicable to the jurisdiction, powers, and duties of the Director, OWCP, as the Secretary's delegatee.

(c) Civil penalties and unpaid assessments shall be collected by civil suits brought by and in the name of the Secretary.

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

[38 FR 26861, Sept. 26, 1973, as amended at 50 FR 395, Jan. 3, 1985]

§ 702.148 Insurance carriers' and self-insured employers' responsibilities.

(a) Each carrier and self-insured employer shall make, keep, and preserve such records, and make such reports and provide such additional information as the Director prescribes or orders, which he considers necessary or appropriate to effectively carry out his responsibilities.

(b) Consistent with their greater direct liability stemming from the amended assessment formula, employers and insurance carriers are given the authority to monitor their claims in the special fund as outlined in paragraph (c) of this section. For purposes of monitoring these claims, employers and insurance carriers remain parties in interest to the claim and are allowed access to all records relating to the claim. Similarly, employers and insurance carriers can initiate proceeding to modify an award of compensation after the special fund has assumed the liability to pay benefits. It is intended that employers and insurance carriers have neither a greater nor a lesser responsibility in this new role that they not have with regard to cases that remain their sole liability. (See §702.373(d).)

(c) An employer or insurance carrier may conduct any reasonable investigation regarding cases placed into the special fund by the employer or insurance carrier. Such investigation may include, but shall not be limited to, a semi-annual request for earnings information pursuant to section 8(j) of the Act, 33 U.S.C. 908(j) (See §702.285) periodic medical examinations, vocational rehabilitation evaluations, and requests for any additional information needed to effectively monitor such a case.

(Approved by the Office of Management and Budget under control number 1215–0118)

(Pub. L. No. 96–511, 94 Stat. 2812 (44 U.S.C. 3501 *et seq.*))

[38 FR 26861, Sept. 26, 1973, as amended at 47 FR 145, Jan. 5, 1982; 50 FR 395, Jan. 3, 1985]

LIENS ON COMPENSATION

§ 702.161 Liens against assets of insurance carriers and employers.

Where payments have been made from the special fund pursuant to section 18(b) of the Act, 33 U.S.C. 918(b) and §704.145(f) the Secretary of Labor shall, for the benefit of the fund, be subrogated to all the rights of the person receiving such payments. The Secretary may institute proceedings under either section 18 or 21(d) of the Act, 33 U.S.C. 918 or 921(d), or both, to recover the amount expended by the fund or so much as in the judgement of the Secretary is possible, or the Secretary may settle or compromise any such claim.

[50 FR 395, Jan. 3, 1985]

§ 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

on whose behalf it is submitted. Notice to or knowledge of an employer of the occurrence of the injury or death shall be notice to or knowledge of such carrier. Jurisdiction of the employer by a district director, the Office, or appropriate appellate authority under said Act shall be jurisdiction of such carrier. Any requirement under any compensation order, finding, or decision shall be binding upon such carrier in the same manner and to the same extent as upon the employer.

§ 703.116 Report by carrier of issuance of policy or endorsement.

Each carrier shall report to the district director assigned to a compensation district each policy and endorsement issued by it to an employer who carries on operations in such compensation district. The report shall be made in such manner and on such form as the district or the Office may require.

§ 703.117 Report; by whom sent.

The report of issuance of a policy and endorsement provided for in § 703.116 shall be sent by the home office of the carrier, except that any carrier may authorize its agency or agencies in any compensation district to make such reports to the district director, provided the carrier shall notify the district director in such district of the agencies so duly authorized.

§ 703.118 Agreement to be bound by report.

Every applicant for authority to write insurance under the provisions of this Act, shall be deemed to have included in its application an agreement that the acceptance by the district director of a report of the issuance of a policy of insurance, as provided for by § 703.116, shall bind the carrier to full liability for the obligations under this Act of the employer named in said report, and every certificate of authority to write insurance under this Act shall be deemed to have been issued by the Office upon consideration of the carrier's agreement to become so bound. It shall be no defense to this agreement that the carrier failed or delayed to issue the policy to the employer covered by this report.

[50 FR 406, Jan. 3, 1985]

§ 703.119 Report by employer operating temporarily in another compensation district.

Where an employer having operations in one compensation district contemplates engaging in work subject to the Act in another compensation district, his carrier may submit to the district director of such latter district a report pursuant to § 703.116 containing the address of the employer in the first mentioned district with the additional notation "No present address in _____ compensation district. Certificate requested when address given."

§ 703.120 Name of one employer only shall be given in each report.

A separate report of the issuance of a policy and endorsement, provided for by § 703.116, shall be made for each employer covered by a policy. If a policy is issued insuring more than one employer, a separate report for each employer so covered shall be sent to the district director concerned, with the name of only one employer on each such report.

Subpart C—Insurance Carrier Security Deposit Requirements

SOURCE: 70 FR 43234, July 26, 2005, unless otherwise noted.

§ 703.201 Deposits of security by insurance carriers.

The regulations in this subpart require certain insurance carriers to deposit security in the form of indemnity bonds, letters of credit or negotiable securities (chosen at the option of the carrier) of a kind and in an amount determined by the Office, and prescribe the conditions under which deposits must be made. Security deposits secure the payment of compensation and medical benefits when an insurance carrier defaults on any of its obligations under the LHWCA, regardless of the date such obligations arose. They also secure the payment of compensation and

medical benefits when a carrier becomes insolvent and such obligations are not otherwise fully secured by a State guaranty fund. Any gap in State guaranty fund coverage will have a direct effect on the amount of security the Office will require a carrier to post. As used in this subpart, the terms "obligations under the Act" and "LHWCA obligations" mean a carrier's liability for compensation payments and medical benefits arising under the Longshore and Harbor Workers' Compensation Act and any of its extensions.

§ 703.202 Identification of significant gaps in State guaranty fund coverage for LHWCA obligations.

(a) In determining the amount of a carrier's required security deposit, the Office will consider the extent to which a State guaranty fund secures the insurance carrier's LHWCA obligations in that State. When evaluating State guaranty funds, the Office may consider a number of factors including, but not limited to—

(1) Limits on weekly benefit amounts;

(2) Limits on aggregate maximum benefit amounts;

(3) Time limits on coverage;

(4) Ocean marine exclusions;

(5) Employer size and viability provisions; and

(6) Financial strength of the State guaranty fund itself.

(b) OWCP will identify States without guaranty funds and States with guaranty funds that do not fully and immediately secure LHWCA obligations and will post its findings on the Internet at *http://www.dol.gov/esa/owcp/dlhwc/lstable.htm.* These findings will indicate the extent of any partial or total gap in coverage provided by a State guaranty fund, and they will be open for inspection and comment by all interested parties. If the extent of coverage a particular State guaranty fund provides either cannot be determined or is ambiguous, OWCP will deem one third (33⅓ percent) of a carrier's LHWCA obligations in that State to be unsecured. OWCP will revise its findings from time to time, in response to substantiated public comments it receives or for any other reasons it considers relevant.

§ 703.203 Application for security deposit determination; information to be submitted; other requirements.

(a) Each insurance carrier authorized by OWCP to write insurance under the LHWCA or any of its extensions, and each insurance carrier seeking initial authorization to write such insurance, must apply annually, on a schedule set by OWCP, for a determination of the extent of its unsecured obligations and the security deposit required. The application must be addressed to the Branch of Financial Management and Insurance (Branch) within OWCP's Division of Longshore and Harbor Workers' Compensation, and be made on a form provided by OWCP. The application must contain the following:

(1) Any carrier seeking an exemption from the security deposit requirements based on its financial standing (*see* § 703.204(c)(1)) must submit documentation establishing the carrier's current rating and its rating for the immediately preceding year from each insurance rating service designated by the Branch and posted on the Internet at *http://www.dol.gov/esa/owcp/dlhwc/lstable.htm.*

(2) All other carriers, and any carrier whose exemption request under paragraph (a)(1) of this section has been denied, must provide—

(i) A statement of the carrier's outstanding liabilities under the LHWCA or any of its extensions for its LHWCA obligations for each State in which the obligations arise; and

(ii) Any other information the Branch requests to enable it to give the application adequate consideration including, but not limited to, the reports set forth at § 703.212.

(b) If the carrier disagrees with any of OWCP's findings regarding State guaranty funds made under § 703.202(b) as they exist when it submits its application, the carrier may submit a statement of its unsecured obligations based on a different conclusion regarding the extent of coverage afforded by one or more State guaranty funds. The carrier must submit evidence and/or argument with its application sufficient to establish that such conclusion is correct.

(c) The carrier must sign and swear to the application. If the carrier is not an individual, the carrier's duly authorized officer must sign and swear to the application and list his or her official designation. If the carrier is a corporation, the officer must also affix the corporate seal.

(d) At any time after filing an application, the carrier must inform the Branch immediately of any material changes that may have rendered its application incomplete, inaccurate or misleading.

(e) By filing an application, the carrier consents to be bound by and to comply with the regulations and requirements in this part.

§ 703.204 Decision on insurance carrier's application; minimum amount of deposit.

(a) The Branch will issue a decision on the application determining the extent of an insurance carrier's unsecured LHWCA obligations and fixing the amount of security the carrier must deposit to fully secure payment of its unsecured obligations. The Branch will transmit its decision to the applicant in a way it considers appropriate.

(b) The Branch may consider a number of factors in setting the security deposit amount including, but not limited to, the—

(1) Financial strength of the carrier as determined by private insurance rating organizations;

(2) Financial strength of the carrier's insureds in the Longshore industry;

(3) Extent to which State guaranty funds secure the carrier's LHWCA obligations in the event the carrier defaults on its obligations or becomes insolvent;

(4) Carrier's longevity in writing LHWCA or other workers' compensation coverage;

(5) Extent of carrier's exposure for LHWCA coverage; and

(6) Carrier's payment history in satisfying its LHWCA obligations.

(c) In setting the security deposit amount, the Branch will follow these criteria:

(1) Carriers who hold the highest rating awarded by each of the three insurance rating services designated by the Branch and posted on the Internet at *http://www.dol.gov/esa/owcp/dlhwc/lstable.htm* for both the current rating year and the immediately preceding year will not be required to deposit security.

(2) Carriers whose LHWCA obligations are fully secured by one or more State guaranty funds, as evaluated by OWCP under § 703.202 of this subpart, will not be required to deposit security.

(3) The Branch will require all carriers not meeting the requirements of paragraphs (c)(1) or (2) of this section to deposit security for their LHWCA obligations not secured by a State guaranty fund, as evaluated by OWCP under § 703.202 of this subpart. For carriers that write only an insignificant or incidental amount of LHWCA insurance, the Branch will require a deposit in an amount determined by the Branch from time to time. For all other carriers, the Branch will require a minimum deposit of one third (33⅓ percent) of a carrier s outstanding LHWCA obligations not secured by a State guaranty fund, but may require a deposit up to an amount equal to the carrier's total outstanding LHWCA obligations (100 percent) not secured by a State guaranty fund.

(d) If a carrier believes that a lesser deposit would fully secure its LHWCA obligations, the carrier may request a hearing before the Director of the Division of Longshore and Harbor Workers' Compensation (Longshore Director) or the Longshore Director's representative. Requests for hearing must be in writing and sent to the Branch within 10 days of the date of the Branch's decision. The carrier may submit new evidence and/or argument in support of its challenge to the Branch's decision and must provide any additional documentation OWCP requests. The Longshore Director or his representative will notify the carrier of the hearing date within 10 days of receiving the request. The Longshore Director or his representative will issue the final agency decision on the application within 60 days of the hearing date, or, where evidence is submitted after the hearing, within 60 days of the receipt of such evidence, but no later than 180 days after receiving the carrier's request for a hearing.

§ 703.205 Filing of Agreement and Undertaking; deposit of security.

Within 45 days of the date on which the insurance carrier receives the Branch's decision (or, if the carrier requests a hearing, a period set by the Longshore Director or the Longshore Director's representative) determining the extent of its unsecured LHWCA obligations and fixing the required security deposit amount (*see* § 703.204), the carrier must:

(a) Execute and file with the Branch an Agreement and Undertaking, in a form prescribed and provided by OWCP, in which the carrier shall agree to—

(1) Deposit with the Branch indemnity bonds or letters of credit in the amount fixed by the Office, or deposit negotiable securities under §§ 703.207 and 703.208 in that amount;

(2) Authorize the Branch, at its discretion, to bring suit under any deposited indemnity bond or to draw upon any deposited letters of credit, as appropriate under the terms of the security instrument, or to collect the interest and principal as they become due on any deposited negotiable securities and to sell or otherwise liquidate such negotiable securities or any part thereof when—

(i) The carrier defaults on any of its LHWCA obligations;

(ii) The carrier fails to renew any deposited letter of credit or substitute a new letter of credit, indemnity bond or acceptable negotiable securities in its place;

(iii) The carrier fails to renew any deposited negotiable securities at maturity or substitute a letter of credit, indemnity bond or acceptable negotiable securities in their place;

(iv) State insolvency proceedings are initiated against the carrier; or

(v) The carrier fails to comply with any of the terms of the Agreement and Undertaking; and

(3) Authorize the Branch, at its discretion, to pay such ongoing claims of the carrier as it may find to be due and payable from the proceeds of the deposited security;

(b) Give security in the amount fixed in the Office's decision:

(1) In the form of an indemnity bond with sureties satisfactory to the Branch and in such form, and containing such provisions, as the Branch may prescribe: *Provided*, That only surety companies approved by the United States Treasury Department under the laws of the United States and the rules and regulations governing bonding companies may act as sureties on such indemnity bonds (*see* Department of Treasury's Circular–570), and that a surety company that is a corporate subsidiary of an insurance carrier may not act as surety on such carrier's indemnity bond;

(2) In the form of letters of credit issued by a financial institution satisfactory to the Branch and upon which the Branch may draw; or

(3) By a deposit of negotiable securities with a Federal Reserve Bank or the Treasurer of the United States in compliance with §§ 703.207 and 703.208.

§ 703.206 [Reserved]

§ 703.207 Kinds of negotiable securities that may be deposited; conditions of deposit; acceptance of deposits.

An insurance carrier electing to deposit negotiable securities to secure its obligations under the Act in the amount fixed by the Office under the regulations in this part shall deposit any negotiable securities acceptable as security for the deposit of public monies of the United States under regulations issued by the Secretary of the Treasury. (*See* 31 CFR part 225.) The approval, valuation, acceptance, and custody of such securities is hereby committed to the several Federal Reserve Banks and the Treasurer of the United States.

§ 703.208 Deposits of negotiable securities with Federal Reserve banks or the Treasurer of the United States; interest thereon.

Deposits of negotiable securities provided for by the regulations in this part must be made with any Federal Reserve bank or any branch of a Federal Reserve bank designated by the Branch, or the Treasurer of the United States, and must be held subject to the order of the Branch. The Branch will authorize the insurance carrier to collect interest on the securities it deposits unless any of the conditions set forth at § 703.211(a) occur.

§ 703.209 Substitution and withdrawal of indemnity bond, letters of credit or negotiable securities.

(a) A carrier may not substitute other security for any indemnity bond or letters of credit deposited under the regulations in this part except when authorized by the Branch. A carrier may, however, substitute negotiable securities acceptable under the regulations in this part for previously-deposited negotiable securities without the Branch's prior approval.

(b) A carrier that has ceased to write insurance under the Act may apply to the Branch for withdrawal of its security deposit. The carrier must file with its application a sworn statement setting forth—

(1) A list of all cases in each State in which the carrier is paying compensation, together with the names of the employees and other beneficiaries, a description of causes of injury or death, and a statement of the amount of compensation paid;

(2) A similar list of all pending cases in which the carrier has not yet paid compensation; and

(3) A similar list of all cases in which injury or death has occurred within one year before such application or in which the last payment of compensation was made within one year before such application.

(c) The Branch may authorize withdrawal of previously-deposited indemnity bonds, letters of credit and negotiable securities that, in the opinion of the Branch, are not necessary to provide adequate security for the payment of the carrier's outstanding and potential LHWCA liabilities. No withdrawals will be authorized unless there has been no claim activity involving the carrier for a minimum of five years, and the Branch is reasonably certain that no further claims will arise.

§ 703.210 Increase or reduction in security deposit amount.

(a) Whenever the Office considers the security deposited by an insurance carrier insufficient to fully secure the carrier's LHWCA obligations, the carrier must, upon demand by the Branch, deposit additional security in accordance with the regulations in this part in an amount fixed by the Branch. The Branch will issue its decision requiring additional security in accordance with § 703.204, and the procedures set forth at §§ 703.204(d) and 703.205 for requesting a hearing and complying with the Office's decision will apply as appropriate.

(b) The Branch may reduce the required security at any time on its own initiative, or upon application of a carrier, when in the Branch's opinion the facts warrant a reduction. A carrier seeking a reduction must furnish any information the Office requests regarding its outstanding LHWCA obligations for any State in which it does business, its obligations not secured by a State guaranty fund in each of these States, and any other evidence as the Branch considers necessary.

§ 703.211 Authority to seize security deposit; use and/or return of proceeds.

(a) The Office may take any of the actions set forth in paragraph (b) of this section when an insurance carrier—

(1) Defaults on any of its LHWCA obligations;

(2) Fails to renew any deposited letter of credit or substitute a new letter of credit, indemnity bond or acceptable negotiable securities in its place;

(3) Fails to renew any deposited negotiable securities at maturity or substitute a letter of credit, indemnity bond or acceptable negotiable securities in their place;

(4) Has State insolvency proceedings initiated against it; or

(5) Fails to comply with any of the terms of the Agreement and Undertaking.

(b) When any of the conditions set forth in paragraph (a) of this section occur, the Office may, within its discretion and as appropriate to the security instrument—

(1) Bring suit under any indemnity bond;

(2) Draw upon any letters of credit;

(3) Seize any negotiable securities, collect the interest and principal as they may become due, and sell or otherwise liquidate the negotiable securities or any part thereof.

(c) When the Office, within its discretion, determines that it no longer

needs to collect the interest and principal of any negotiable securities seized pursuant to paragraphs (a) and (b) of this section, or to retain the proceeds of their sale, it must return any of the carrier's negotiable securities still in its possession and any remaining proceeds of their sale.

§ 703.212 Required reports; examination of insurance carrier accounts.

(a) Upon the Office's request, each insurance carrier must submit the following reports:

(1) A certified financial statement of the carrier's assets and liabilities, or a balance sheet.

(2) A sworn statement showing the extent of the carrier's unsecured LHWCA obligations for each State in which it is authorized to write insurance under the LHWCA or any of its extensions.

(3) A sworn statement reporting the carrier's open cases as of the date of such report, listing by State all death and injury cases, together with a report of the status of all outstanding claims.

(b) Whenever it considers necessary, the Office may inspect or examine a carrier's books of account, records, and other papers to verify any financial statement or other information the carrier furnished to the Office in any statement or report required by this section, or any other section of the regulations in this part. The carrier must permit the Office or its duly authorized representative to make the inspection or examination. Alternatively, the Office may accept an adequate independent audit by a certified public accountant.

§ 703.213 Failure to comply.

The Office may suspend or revoke a carrier's certificate of authority to write LHWCA insurance under § 703.106 when the carrier fails to comply with any of the requirements of this part.

Subpart D—Authorization of Self-Insurers

SOURCE: 70 FR 43234, July 26, 2005, unless otherwise noted.

§ 703.301 Employers who may be authorized as self-insurers.

The regulations in this subpart set forth procedures for authorizing employers to self-insure the payment of compensation under the Longshore and Harbor Workers' Compensation Act, or its extensions. The Office may authorize any employer to self-insure who, pursuant to the regulations in this part, furnishes to the Office satisfactory proof of its ability to pay compensation directly, and who agrees to immediately cancel any existing insurance policy covering its Longshore obligations (except for excess or catastrophic workers' compensation insurance, *see* §§ 703.302(a)(6), 703.304(a)(6)) when OWCP approves the employer's application to be self-insured. The regulations require self-insurers to deposit security in the form of an indemnity bond, letters of credit or negotiable securities (at the option of the employer) of a kind and in an amount determined by the Office, and prescribe the conditions under which such deposits shall be made. The term "self-insurer" as used in these regulations means any employer securing the payment of compensation under the LHWCA or its extensions in accordance with the provisions of 33 U.S.C. 932(a)(2) and these regulations.

§ 703.302 Application for authority to become a self-insurer; how filed; information to be submitted; other requirements.

(a) Any employer may apply to become an authorized self-insurer. The application must be addressed to the Branch of Financial Management and Insurance (Branch) within OWCP's Division of Longshore and Harbor Workers' Compensation, and be made on a form provided by OWCP. The application must contain—

(1) A statement of the employer's total payroll for the 12 months before the application date;

(2) A statement of the average number of employees engaged in employment within the purview of the LHWCA or any of its extensions for the 12 months before the application date;

(3) A statement of the number of injuries to such employees resulting in

Exhibit 5

Division of Longshore and Harbor Workers' Compensation (DLHWC)

State Guarantee Fund Longshore Security Factor Chart

Each Carrier's security deposit will be determined in accordance with the State Guarantee Fund Longshore Security Factor Chart. The Factor in the far right column determines the percent of Longshore coverage that must be secured in each state. For example:

State	Total	Percent	Estimated Obligations Unsecured Deposit
West Virginia	$200,000	100%	$200,000
Maryland	$200,000	0%	$ 0
Delware	$200,000	33%	$66,000

State Guarantee Fund Longshore Security Factor Chart

State	Guarantee Funds	Security	Factor
Defense Base Act	No Guarantee Fund applicable	Yes - full	1
Alabama	May not pay "deductible" amount, and time limits apply	Yes - partial	0.33
Alaska	Will pay, except Longshore written as surplus line	Not required	0
Arizona	Will not pay	Yes - full	1
Arkansas	$300,000 limit	Yes - partial	0.33
California	Will not pay any Longshore Act benefit	Yes - full	1
Colorado	Will pay	Not required	0
Connecticut	Will pay	Not required	0
Delaware	Will not pay "deductible" amount	Yes - partial	0.33
Florida	Will pay	Not required	0
Georgia	Will pay	Not required	0
Hawaii	Will pay	Not required	0
Idaho	Will pay	Not required	0
Illinois	Will not pay if insured nw >$25 m	Yes - partial	0.33
Indiana	Maximum benefit of $100,000 per claim	Yes - partial	0.33
Iowa	Will not pay	Yes - full	1
Kansas	Will pay	Not required	0
Kentucky	Will not pay	Yes - full	1
Louisiana	Will not pay if insured has net worth of over $25 million	Yes - partial	0.33
Maine	Will pay, but 1 year filing requirement from date of insolvency	Yes - partial	0.33
Maryland	Will pay	Not required	0
Massachusetts	Will pay	Not required	0
Michigan	Will pay	Not required	0
Minnesota	Will pay	Not required	0
Mississippi	Will pay	Not required	0
Missouri	Will not pay	Yes - full	1
Montana	Will pay	Not required	0
Nebraska	Will pay	Not required	0
Nevada	Will pay	Not required	0
New Hampshire	Will pay	Not required	0
New Jersey	Will not pay if insured is "insolvent"	Yes - partial	0.33
New Mexico	Will not pay	Yes - full	1
New York	Will not pay if insured is "insolvent"	Yes - partial	0.33
North Carolina	Will pay	Not required	0
North Dakota	Monopolistic state, no guaranty fund	Yes - full	1
Ohio	Monopolistic state, no guaranty fund	Yes - full	1
Oklahoma	Will not pay	Yes - full	1
Oregon	Will possibly pay	Yes - partial	0.33
Pennsylvania	Will not pay if insured is "insolvent" and only up to state rates	Yes - partial	0.66
Rhode Island	Will pay	Not required	0
South Carolina	Will pay	Not required	0
South Dakota	Will not pay	Yes - full	1
Tennessee	Will not pay	Yes - full	1
Texas	May pay, but not in full	Yes – partial	0.66
Utah	Will possibly pay	Yes - partial	0.33
Vermont	Will pay	Not required	0
Virginia	Will pay	Not required	0
Washington	Will pay	Not required	0
West Virginia	Will not pay Longshore Act benefits	Yes - full	1
Wisconsin	Will not pay if insured's nw > ($10 m)	Yes - partial	0.33
Wyoming	Monopolistic state, no guaranty fund	Yes - full	1

Back to Top

Exhibit 6

U.S. Department of Labor

Employment Standards Administration
Office of Workers' Compensation Programs
Division of Longshore and
Harbor Workers' Compensation
Washington, D.C. 20210

FEB 27 1992

File Number:

The Home Insurance Company
59 Maiden Lane
New York, NY 10038

Attention: John M. Tetro
Senior Vice President and
Chief Actuary

Dear Mr. Tetro:

This is in reference to our ongoing review of insurance carriers authorized by this office to write workers' compensation insurance coverage under the Longshore and Harbor Workers' Compensation Act and its extensions.

With this regard, we have completed our review of the 1991 edition of the A. M. Best Insurance Reports for your company and your company's financial statement for 1990, along with any previously submitted payment and/or financial information of record. The current A. M. Best assigned rating of "A-" for The Home Insurance Company does not meet our requirement for an "A" or better rating.

In connection with this review and the continuing authorization of The Home Insurance Company to write insurance coverage under the Act and its extensions, you are hereby required to deposit securities in the amount of $800,000 in the Federal Reserve Bank of New York, 33 Liberty Street, New York, N.Y. 10045, Attention: Custody Records, Transfer Division (Telephone (720-7932). These securities must be fully guaranteed (principal and interest) by an agency of the U.S Government and the deposit value (cash value) of these securities must be equal to the amount of security of $800,000 as established by this Office.

In order to effect a timely deposit of securities, it is necessary that The Home Insurance Company furnish this Office with the details concerning the new securities that will be used. This information is required by the Federal Reserve Bank of New York in writing from this Office prior to the deposit transaction. Specifically, the Federal Reserve Bank will not effect the deposit of securities until they receive a letter from this Office which authorizes the deposit and provides the following information regarding the new securities:

1. the amount of the new securities
2. the type of securities to be deposited
3. the maturity date(s)
4. the CUSIP number(s)
5. the name and address of the bank from which the securities were purchased

Should there be any questions, please contact Ruth Paley of this Office at (202) 523-8710.

Sincerely,

FRANK A. FIORINI
Chief, Insurance and
Assessment Section

Exhibit 7

U.S. Department of Labor

Employment Standards Administration
Office of Workers' Compensation Programs
Division of Longshore and
Harbor Workers' Compensation
Washington, D.C. 20210

AGREEMENT AND UNDERTAKING

WE DO HEREBY UNDERTAKE AND AGREE AS A CONDITION TO AUTHORIZATION AS AN INSURANCE CARRIER TO WRITE COVERAGE UNDER THE LONGSHORE AND HARBOR WORKERS' COMPENSATION ACT AND/OR ITS EXTENSIONS.

1. We will, and hereby do, make an initial deposit to secure our liability to pay compensation benefits provided in the Act and/or its extensions in the amount of the indemnity bond or securities listed below.

Total Value of Securities Deposited $ 800,000 (Par Value) OR Amount of Indemnity Bond $

Where Deposited FRB - New York Holding Bank The Bank of New York Name of Surety Company

Par Value of Securities	Deposit Value of Securities	Issued By	Rate of Interest	Due Date	Number of Certificate
$ 800,000.00	$ 839,504.00	U.S. Treasury	8.00%	10/15/96	Cusip 912827YB2
as of COB	4/9/92 per	I.D.S.I.			

If, in the opinion of the OWCP, we are in default in the payment of compensation or other benefits required by the Act and/or its extensions, we hereby authorize the OWCP to sell the securities or any of them as may be required, as well as any others hereafter deposited, or bring suit under the bonds, in order to procure prompt payment of all benefits provided by the Act and/or its extensions. Such securities, as well as any others hereafter deposited, are to be held subject to the order of the OWCP, with power to collect the interest and the principal as the same become due. In the absence of default, the interest collected by the depository bank shall be paid at our direction.

2. We will comply with the regulations for insurance carriers promulgated by the OWCP, including such modifications thereof as the OWCP may make from time to time.

3. We will comply with the orders of the OWCP requiring the deposit of additional indemnity bonds or securities, proof of our financial condition and the verification thereof, statements of our accident experience and exposure and in any other way pertaining to the exercise by us of the authorization within the time specified in any notice mailed to us by the OWCP at our last given address, failing which we consent that this authorization may be revoked by OWCP.

NOTARY SEAL 6/1/92 Date

LEWIS HEFTEL
NOTARY PUBLIC, State of New York
No. 4748330
Qualified in New York County
Certificate Filed in New York County
Commission Expires May 31, 19[illegible]

Signature of Corporate Officer

The Home Insurance Company
Name of Insurance Carrier

NAME OF DEPOSITOR	DATE
THE HOME INSURANCE COMPANY/THE HOME INDEMNITY COMPANY/CITY INSURANCE COMPANY	

LOCATION	PHONE
59 Maiden Lane New York, NY 10038	(212)530-6951

To The Federal Reserve Bank of New York:

The Seven signatures written below are the duly authorized signatures of this institution. Any ☐ one ☒ two of which you will recogniz
n payments of funds and the transaction of other business for our account.

You may continue to recognize such authorization until express notice of revocation or modification thereof shall have been received by you in writing.

SPECIMEN OFFICIAL SIGNATURES OF

NAME	SIGNATURE	TITLE
MR./MS. Ronald M. Cacciola	WILL SIGN	Senior Vice President
MR./MS. Stephen F. Berman	WILL SIGN	Vice President
MR./MS. Patrick J. Dixon	WILL SIGN	Vice President
MR./MS. Richard F. Seyffarth	WILL SIGN	Vice President
MR./MS. Steven T. Prisco	WILL SIGN	Assistant Vice President
MR./MS. Leonard J. Calderaro	WILL SIGN	Treasurer
MR./MS. Robert F. Mars	WILL SIGN	Assistant Controller & Secretary
~~MR./MS.~~	~~WILL SIGN~~	
~~MR./MS.~~	~~WILL SIGN~~	
~~MR./MS.~~	~~WILL SIGN~~	
~~MR./MS.~~	~~WILL SIGN~~	

RULE OUT SPACES NOT USED AND MENTION ABOVE THE NUMBER OF SIGNATURES AUTHORIZED.

CERTIFYING OFFICER (MUST NOT BE LISTED ABOVE)	TITLE
BY Lois R. Corbo	Secretary of The Board

On the 3rd day of June, 19 92, before me personally came _____ to me personally known, who by me duly sworn, did depose and say that he resides at 59 Maiden Lane, in the City of New York in State of New York, that he is the Secretary of The Board (Title) of Above Listed Companies (name of depositor and who executed this Card on behalf of that depositor before me.

RETURN TO

Federal Reserve Bank of New York
SECURITIES TRANSFER DIVISION
CUSTODY RECORDS SECTION
33 LIBERTY STREET
NEW YORK, NEW YORK 10045-0001

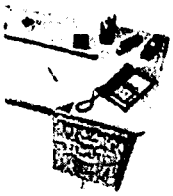
TELEPHONE(212) 720-5384

SIGNATURE OF NOTARY PUBLIC
PRINTED NAME OF NOTARY PUBLIC
LEWIS HEFTEL

State of	
License No.	LEWIS HEFTEL NOTARY PUBLIC, State of New York No. 4748330
Qualified in	Qualified in New York County Certificate Filed in New York County Commission Expires May 31, 1993
My Commission Expires	

ACC 177 8 (5/91)

Exhibit 8



Angela Anglum
03/10/2005 12:39 PM

To: "Martone, John A - ESA" <Martone.John@dol.gov>
cc: helene.steinberg@homeinsco.com, pabinsconsult@aol.com@HomeInsco, Tom Kober/New York/HomeIns@HomeInsco, Paul Reeves/New York/HomeIns@HomeInsco
Subject: RE: [redacted] Claim - Debit of Home's Sub Account with the DOL re Longshore and Harbor Workers' Compensation Act

Mr. Martone,

This is to confirm that I received your voice mail from earlier today. Per your advice, I understand that Home's sub - account with the DOL will be debited in response to a default order which was based upon an outstanding order of an administrative law judge arising from an unpaid medical bill incurred by the claimant [redacted] in the amount of $7500. In that regard, I would appreciate if you would fax to me for our records a copy of the default order, the underlying order of the administrative law judge, together with any supporting papers. Thank you for your assistance.

Angela Anglum, Esq.
Vice President Legal Affairs
The Home Insurance Company in Liquidation
phone (212) 530-7490
fax (2120 299-4224

"Martone, John A - ESA" <Martone.John@dol.gov>

"Martone, John A - ESA" <Martone.John@dol.gov>
02/18/2005 09:26 AM

To: angela.angium@homeinsco.com
cc: peter.bengelsdorf@homeinsco.com, helene.steinberg@homeinsco.com
Subject: RE: Rollover Procedures at the Federal Reserve Bank - Longshore a nd Harbor Workers' Compensation Act Security Deposit

The $25,000 proceeds are placed into a sub-account of the Special Fund established by section 44 of the Longshore Act (33 U.S.C. 944). The sole purpose of the security in the sub-account is to insure the prompt payment of compensation. It will only be used by us to pay indemnity and/or medical benefits due and payable on behalf of Home.

The sub-account will accrue interest. The Special Fund is limited to what it may invest in; namely, short term Treasuries. I will provide you with monthly statements if you want me to. I have already committed not to disperse money from the account without notifying you in advance.

-----Original Message-----
From: angela.anglum@homeinsco.com [mailto:angela.anglum@homeinsco.com]
Sent: Tuesday, February 15, 2005 2:23 PM
To: Martone, John A - ESA
Cc: peter.bengelsdorf@homeinsco.com; helene.steinberg@homeinsco.com
Subject: RE: Rollover Procedures at the Federal Reserve Bank - Longshore a nd Harbor Workers' Compensation Act Security Deposit

Mr. Martone,
As per the attached response from Mr. La Lena, I would appreciate if you provide me with information concerning the terms of the sub-account which I understand per our discussions will

be established in the name of The Home Insurance Company in the amount of $25,000. In addition, this is to confirm that you will e-mail to me details concerning the [redacted] claim in order that The Home may review same prior to the DOL debiting The Home's account in payment of the claim. Thank you for your assistance.

Angela Anglum, Esq.
Vice President Legal Affairs
The Home Insurance Company in Liquidation

----- Forwarded by Angela Anglum/New York/HomeIns on 02/15/2005 02:08 PM -----

"Lalena, Peter A - ESA"
<Lalena.Peter@dol.gov>

02/15/2005 01:53 PM

To: angela.anglum@homeinsco.com
cc: "Lalena, Peter A - ESA" <Lalena.Peter@dol.gov>, "Martone, John A - ESA" <Martone.John@dol.gov>, "Myer, Linda C - ESA" <Myer.Linda@dol.gov>, "Smith, Amanda F - ESA" <Smith.Amanda@dol.gov>, "Abildso, Carl B - ESA" <Abildso.Carl@dol.gov>
Subject: RE: Rollover Procedures at the Federal Reserve Bank - Longshore and Harbor Workers' Compensation Act Security Deposit

Dear Ms. Anglum:

I am not privy to your earlier discussions with Jack Martone. You should discuss the establishment of a subaccount within the DOL with Mr. Martone as that is not in my area of expertise.

I am unaware, however, of the DOL allowing any outside party to produce and execute any agreement with us regarding the investment and/or dispersal of any seized funds for the payment of its claims. Obviously, the funds will only be used for Home Insurance Company's cases. However, the types of investments of securities and the payment of claims is done at DOL discretion if I am not mistaken. Seized securities held in a DOL subaccount is not similar to securities on deposit in the Federal Reserve Bank.

Home Insurance Company will be obligated to execute and return an Agreement and Undertaking form when the DOL authorizes a rollover of the $775,000.00. The remittance for the $830,000.00 will continue unchanged for the remaining $775,000.00.

Peter A. La Lena
Insurance and
Assessment Section

-----Original Message-----
From: angela.anglum@homeinsco.com [mailto:angela.anglum@homeinsco.com]
Sent: Tuesday, February 15, 2005 1:30 PM
To: Lalena, Peter A - ESA
Cc: Abildso, Carl B - ESA; Lalena, Peter A - ESA; Martone, John A - ESA; Myer, Linda C - ESA; Smith, Amanda F - ESA; pabinsconsult@aol.com; tom.kober@homeinsco.com; james.hamilton@homeinsco.com; paul.reeves@homeinsco.com; helene.steinberg@homeinsco.com
Subject: Re: Rollover Procedures at the Federal Reserve Bank - Longshore and Harbor Workers' Compensation Act Security Deposit

Dear Mr. Lalena,

Per your request, I will fax to you shortly the requisite bank information for purposes of remittance to The Home of any excess proceeds after the Federal Reserve Bank has rolled over the securities and purchased a replacement US Treasury Bill with a six month maturity date.

As per our conversation earlier today, I understand that the amount of the security to be held by the Federal Reserve Bank will be reduced from the presently held sum of $800,000 to $775,000 (par value) and the remaining $25,000 will be held by the Department of Labor ("DOL") for purposes of satisfying claim obligations, including the [redacted] claim which I understand is the only claim presently pending with the DOL.

I would appreciate if you would confirm that my understanding as outlined above is correct. In addition, I would like to confirm that the security deposit to be held by the Federal Reserve will be pursuant to the same form of Agreement which presently governs the deposit and that we will be receiving a new agreement for execution to reflect the substitution of securities, as well as the reduction in the sum to be held by the Federal Reserve.

Finally, last week, Mr. Martone and I briefly discussed the establishment of a sub account at the DOL in The Home's name to be funded by a portion of the securities presently held by the Federal Reserve Bank. As $25,000 will be held by the DOL, I would appreciate if you would advise me as to the details concerning the sub-account to be established, including whether the DOL and The Home will be entering into an Agreement to reflect the terms and conditions of the handling of the funds maintained in the account (i.e. how the funds are to be invested, the treatment of accrued interest and other relevant provisions).

Thank you for your assistance. If you would like to discuss the foregoing, please feel free to give me a call.

Angela Anglum, Esq.
Vice President Legal Affairs
The Home Insurance Company in Liquidation
59 Maiden Lane
New York, New York 10038
phone (212) 530-7490
fax (212) 530-6143

"Lalena, Peter A - ESA"
<Lalena.Peter@dol.gov>

02/15/2005 11:36 AM

To: Angela.anglum@homeinsco.com
cc: "Lalena, Peter A - ESA" <Lalena.Peter@dol.gov>, "Martone, John A - ESA" <Martone.John@dol.gov>, "Myer, Linda C - ESA" <Myer.Linda@dol.gov>, "Smith, Amanda F - ESA" <Smith.Amanda@dol.gov>, "Abildso, Carl B - ESA" <Abildso Carl@dol.gov>
Subject: Rollover Procedures at the Federal Reserve Bank

Dear Ms. Anglum:

Home Insurance Company has securities on deposit in the Federal Reserve Bank of St. Louis (FRB) for obligations incurred under the Longshore and Harbor Workers' Compensation Act and its extensions. These securities mature on February 15, 2005.

In order to instruct the FRB to rollover the securities (matured proceeds), I'll need specific agent bank information from Home Insurance Company. During the rollover process, securities are purchased at a discount so any excess proceeds may be released over and above of the specific par amount to be rolled over. Presumably, Home Insurance Company would want the excess proceeds. Please furnish to me, via fax transmission, written information on company letterhead giving the following information:

1. Name of Home's agent bank,
2. The agent bank ABA number,
3. Name on the account at the agent bank,
4. The account number,
5. Contact name at the agent bank*,
6. The contact's phone number*.

*This is needed in the event that there are transmission problems from the FRB to the agent bank.

The securities will be rolled over into a US Treasury Bill with six month maturity date.

Thank you.

Peter A. La Lena

Insurance and
Assessment Section
(202) 693-0910 Ofc
(202) 693-1380 Fax

Agreement and Undertaking (Insurance Carrier)

U.S. Department of Labor

Office of Workers' Compensation Programs
Division of Longshore and Harbor Workers' Compensation

Exhibit 9

An insurance carrier's authorization to write insurance for the payment of compensation under the Longshore and Harbor Workers' Compensation Act, 33 USC 901-945, or any of its extensions, may be suspended or revoked if this agreement and undertaking form is not executed and returned to the Office of Workers' Compensation Programs (30 USC 932; 20 C.F.R. 703.213) on request and/or whenever a security deposit is required. The Office will use the information collected to assure the carrier's prompt payment of compensation, medical services and supplies, and any other obligations it has under these statutes.

OMB No. 1240-0005
Exp Date: 11/30/2013

Carrier's Name and Address (Principal Office)

HOME INSURANCE CO IN LIQUIDATION
61 BROADWAY - 6 TH FL

NEW YORK NY 10006

Coverage Under

- ✓ Longshore and Harbor Workers' Compensation Act (33 USC 901)
- ☐ Outer Continental Shelf Lands Act (43 USC 1331)
- ☐ Defense Base Act (42 USC 1651)
- ☐ Nonappropriated Fund Instrumentalities Act Act (5 USC 8171)

Having applied for and received authorization from the Office of Workers' Compensation Programs (OWCP) to write insurance under the statutes indicated above, **WE UNDERTAKE AND AGREE TO THE FOLLOWING CONDITIONS ON SUCH AUTHORIZATION:**

1. We grant to OWCP a security interest in the collateral described below to secure our liability for payment of all compensation, medical services and supplies, other expenses, and any other obligations due under the Longshore and Harbor Workers' Compensation Act, 33 USC 901-945, and its extensions.

Amount of Indemnity Bond $		Name of Surety Company			
Amount of Letter of Credit $		Name of Financial Institution			
Total Value of Securities Deposited $ $775,000		Where Deposited FRB - PHILADELPHIA PA.			
Par Value of Securities	Deposit Value of Securities	Issued By	Rate of Interest	Due Date	CUSIP Number
$ $775,000	$ $774,451	U.S TREASURY		Nov 29, 2012	9127956U0

2. We have delivered the indemnity bonds and letters of credit described in section one to OWCP. We have deposited any negotiable securities described in section one with a Federal Reserve Bank or the Treasurer of the United States in accordance with 20 CFR 703.207 and 703.208 and make the deposited securities subject to OWCP's control.

3. In the event we renew, replace or increase this collateral, it will be subject to the terms of this Agreement and Undertaking, including the security interest granted in section one.

PUBLIC BURDEN STATEMENT

According to the Paperwork Reduction Act of 1995, no persons are required to respond to a collection of information unless such collection displays a valid OM control number. Public reporting burden for this collection of information is estimated to average 15 minutes per response, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Use of this form is optional, however furnishing the information is required in order to obtain and/or retain benefits (20 CFR 703.205.) Send comments regarding the burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden to the U.S. Department of Labor, 200 Constitution Avenue, N.W., Room C-4315, Washington, D.C. 20210, and reference the OMB Control Number.

OMB No. 1240-0005
Exp Date: 11/30/2013

4. We authorize OWCP to bring suit under any indemnity bond, draw upon any letters of credit or seize any negotiable securities, collect the interest and principal, and sell or otherwise liquidate the negotiable securities or any part thereof, when, in OWCP's opinion we -

a) Default on any of our obligations under the Longshore and Harbor Workers' Compensation Act or its extensions;
b) Fail to renew any deposited letter of credit or substitute acceptable securities in its place;
c) Fail to renew any deposited negotiable securities at maturity or substitute acceptable securities in their place; or
d) Have state insolvency proceedings initiated against us.
e) Fail to comply with any of the terms of this Agreement and Undertaking.

5. This agreement incorporates the regulations governing insurance carriers and their deposit of security promulgated by the Department of Labor, including any modifications the Department makes from time to time. We agree to comply with these regulations.

6. We will comply with OWCP's orders requiring deposits of additional security, proof and verification of our financial condition, statements of our unsecured obligations under the Longshore Act and its extensions, statements of the status of all outstanding claims, and any other orders concerning our authorization to write insurance within the time specified in any notice OWCP delivers to us at our last reported mailing address.

7. If we fail to comply with any applicable statutory or regulatory provision, the terms of this Agreement and Undertaking, or any lawful order or communication from OWCP, we consent to have OWCP suspend or revoke our certificate of authority to write insurance for the payment of compensation under the Longshore and Harbor Workers' Compensation Act and its extensions.

Signed at 10:47 AM Time (Include AM/PM)

this 6 day of JULY 20 12

By Arthur D. Wilson

Title VP & CFO HOME INSURANCE CO IN LIQUIDATION

IF THE CARRIER IS A CORPORATION USE THIS FORM OF ACKNOWLEDGEMENT

STATE OF NEW YORK

County of NEW YORK

On the 6 day of JULY in the year 2012; before me personally came

ARTHUR D. WILSON, to me known, or being by me duly sworn did depose and say that he/she

resides in NEW YORK; that he/she is the VP & CFO
(President or other Officer)

of THE HOME INSURANCE CO IN LIQUIDATION the corporation described in and which executed the above instrument; that he/she knows the seal of said corporation, that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation and that he/she signed his/her name thereto by like authority.

JOHN F. TRUSSY
NOTARY PUBLIC, State of New York
No. 43-4931270
Qualified in Richmond County
Commission Expires June 20, 2014

John F. Trussy
Notary Public (SEAL)

IF THE CARRIER IS AN INDIVIDUAL USE THIS FORM OF ACKNOWLEDGEMENT

STATE OF _____

County of _____

On the _____ day of _____ in the year _____; before me personally came

_____, to me known and known to me to be the person described in and who executed the above instrument and acknowledged to me that he/she executed the same.

_____
Notary Public (SEAL)

IF THE CARRIER IS A PARTNERSHIP USE THIS FORM OF ACKNOWLEDGEMENT

STATE OF _____

County of _____

On the _____ day of _____ in the year _____; before me personally came

_____, described on the foregoing instrument to me known and known to me to be a member of the said firm and the person who executed said instrument and acknowledged to me that he/she executed the same on behalf of said firm.

_____
Notary Public (SEAL)