

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: Notice of proposed rulemaking; request for comments.

SUMMARY: The Department of Labor (DOL) proposes to revise the regulations governing certain aspects of the administration of 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. The Office of Workers' Compensation Programs (OWCP), an agency within the Employment Standards Administration, administers the LHWCA and its extensions.

The proposed rule updates the existing regulations to reflect amendments to the LHWCA and organizational changes that have taken place within both the Employment Standards Administration and OWCP over the last several years. The proposed rule also requires, as a condition of being authorized to write LHWCA insurance, that a carrier establish to OWCP that its potential LHWCA obligations are sufficiently secured. A carrier's LHWCA obligations would be considered sufficiently secured if funds will be available to cover all of its workers' compensation claims in the event of the carrier's default or insolvency. As an alternative, a carrier could fully secure its obligations by posting a security deposit with the Secretary of Labor. Carriers would not, however, be required to make this showing for States with guaranty funds that fully and immediately cover LHWCA claims in the event of a carrier's default or insolvency. In addition, the proposed rule conforms, where appropriate, the rules governing OWCP's authorization of employers as self-insurers to the provisions governing carrier security deposits.

DATES: The Department invites written comments on the proposed rule and the new information collection requirements that are subject to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) from interested

parties. Written comments must be received by May 14, 2004.

ADDRESSES: You may submit written comments, identified by RIN number 1215-AB38, on the proposed rules by any of the following methods:

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.

- E-mail: OWCP-LS-REG-1215-AB38@dol.gov. Include RIN number 1215-AB38 in the subject line of the message. Your comment must be in the body of the e-mail message; do not send attached files.

- Fax: (202) 693-1380 (this is not a toll-free number). Only comments of ten or fewer pages (including a fax cover sheet and attachments, if any) will be accepted by fax.

- Mail: Submit comments (preferably with three copies) to Michael Niss, Director, Division of Longshore and Harbor Workers' Compensation, Office of Workers' Compensation Programs, Employment Standards Administration, U.S. Department of Labor, Room C-4315, 200 Constitution Avenue, NW., Washington, DC 20210. Because of security-related concerns, there may be a significant delay in the receipt of submissions by U.S. mail. You must take this into consideration when preparing to meet the deadline for submitting comments.

Instructions: All submissions received must include the agency name and Regulatory Information Number (RIN) 1215-AB38 for this rulemaking.

Comments on the proposed regulations will be available for public inspection during normal business hours at the above address.

You may submit written comments on the new information collection requirements by sending them to the Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Desk Officer for Employment Standards Administration, Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Michael Niss, Director, Division of Longshore and Harbor Workers' Compensation, Office of Workers' Compensation Programs, Employment Standards Administration, U.S. Department of Labor, Room C-4315, 200 Constitution Avenue, NW., Washington, DC 20210. Telephone: (202) 693-0038 (this is not a toll-free number). TTY/TDD callers may dial toll free (877) 889-5627 for further information.

SUPPLEMENTARY INFORMATION:**I. Background of This Rulemaking**

Employers subject to the Longshore and Harbor Workers' Compensation Act,

as amended (LHWCA), 33 U.S.C. 901 *et seq.*, are required by section 32 of the LHWCA to secure the payment of compensation under the Act by either purchasing insurance from an insurance carrier authorized by the Secretary of Labor to write LHWCA insurance, or by becoming authorized self-insured employers. The Division of Longshore and Harbor Workers' Compensation (DLHWC) within OWCP authorizes insurance carriers to write LHWCA coverage and employers to self-insure. It also requires that some authorized insurance carriers and all self-insured employers post security deposits in an amount sufficient to secure their future claim liabilities. Authorization to write insurance or to self-insure may be suspended or revoked for good cause shown.

Prior to June 29, 1990, DLHWC did not require authorized insurance carriers to post security deposits to guard against possible default or insolvency. Since LHWCA obligations of insolvent authorized insurance carriers accrue to, and are payable out of, the special fund in the United States Treasury established pursuant to section 44 of the LHWCA, the insolvency of a single carrier with a large amount of unsecured LHWCA obligations can result in a substantial drain on the resources of the fund. When this occurs, DLHWC, as guardian of the fund, must replenish the resources of the fund by increasing the annual assessments it collects from all authorized carriers and self-insured employers pursuant to 20 CFR 702.146(c).

Following a number of insurance carrier insolvencies in the 1980's, and to avoid further increases in annual assessments, DLHWC changed its policy regarding authorized insurance carriers and announced the change in a June 29, 1990, "Industry Notice." From that date, DLHWC began requiring authorized insurance carriers to post security deposits in an amount sufficient to secure the payment of their LHWCA obligations in States without guaranty or analogous funds and in States whose funds did not fully secure such obligations. This requirement was waived for insurance carriers with financial security ratings of "A" or higher issued by the A.M. Best Company. DLHWC determined the required security deposit amount after considering a number of factors, including the insurance carrier's scale of projected coverage, its financial history, its A.M. Best rating and its loss history.

Since that time, changing conditions have led DLHWC to reconsider the manner and extent to which authorized insurance carriers must secure their

LHWCA obligations. These conditions include: (1) Changes in the A.M. Best Company rating system; (2) the number of insurance carriers that have become insolvent over the past three years; (3) the significant increase in the number of insurance carriers that have been issued financial security ratings of "A -" or lower for the first time (which triggers the requirement to post security deposits under DLHWC's current policy) due to adverse conditions in the insurance industry and the general economic downturn; and (4) the industry-wide impact of September 11, 2001, losses. In addition to developing several possible solutions to this evolving problem internally, DLHWC also solicited suggestions and advice from the insurance industry in a request for information that was published in the **Federal Register** on February 22, 2002 (67 FR 8450).

DLHWC received 15 responses to this solicitation: eight from authorized self-insured employers or groups of authorized self-insured employers, five from authorized insurance carriers, and two from other groups. None of the responses set forth any legal or policy objections to requiring deposits from insurance carriers to fully secure their LHWCA obligations. On the contrary, many of the responses from all sources, including authorized insurance carriers, recommended requiring all authorized carriers to fully secure (through the posting of securities) their LHWCA obligations. The reasons offered for this position included the recognition that it was in the financial self-interest of carriers to insist on fully securing all LHWCA obligations since this would obviate the need for DLHWC to collect annual assessments from healthy carriers to pay for the insolvency of weaker carriers. Other reasons were 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 due to terrorism in the shipping and shipbuilding industries.

DLHWC recognizes that requiring all carriers to fully secure their LHWCA obligations would place the risk of an insolvency on the failed insurer rather than the surviving, healthy members of the insurance industry (and self-insured employers) and also would ensure that disabled workers will suffer no delay in obtaining their compensation following an insolvency. But DLHWC believes that this approach might force those insurance carriers who could not absorb the additional costs of posting securities to leave the market and therefore create instability that could lead to further

problems. DLHWC also believes that this approach would duplicate, at least to some extent, the reserve requirements imposed by State insurance regulators.

DLHWC has considered two other approaches not suggested in the responses to the request for information. The first approach would use the existing special fund as an overall guaranty fund for all LHWCA claims under the authority of 33 U.S.C. 918(b). Under this approach, the special fund would make the compensation payments insured by an insolvent carrier and recover these costs in current and subsequent years by means of increased annual assessments and supplemental assessments on the remaining authorized insurance carriers and self-insured employers, and through its subrogated rights against the insolvent carrier itself. Because DLHWC would not require any security deposits from authorized carriers, it would be relatively easy to administer. But this approach would likely create negative incentives for prudent fiscal responsibility in the insurance industry.

The second alternative DLHWC considered, and the one adopted in the proposed regulations, is to continue requiring authorized insurance carriers to post security deposits, but only where there is no adequate State guaranty fund and only in amounts that reflect the actual risk of loss to the special fund. The proposed rule represents a measured approach: It will end DLHWC's undue reliance on A.M. Best ratings yet limit the number of carriers that must post deposits to those carriers operating in States with inadequate guaranty funds. DLHWC believes that this approach is the best way for it to address this situation and still fulfill its fiduciary responsibility as the special fund's guardian.

II. Summary of the Proposed Rule

The proposed regulations, which are more fully described below, establish the processes by which OWCP will determine the extent of an insurance carrier's LHWCA obligations, the amount of the deposit 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, the manner in which such deposits will be held, and the circumstances under which they could be seized or otherwise used to avoid draining the available resources of the special fund. The proposed regulations also include those applicable to self-insured employers; the proposed revisions update the regulations and align them with the new carrier security deposit regulations. The

proposed regulations will appear in 20 CFR parts 701 and 703.

A. 20 CFR Part 701

The proposed regulations in this part have been updated to reflect amendments to the LHWCA and organizational changes that have taken place within both OWCP and the Employment Standards Administration over the last several years. Other than these minor changes, the proposed rule is substantially the same as current part 701, with the exception of the sections describing the establishment of OWCP, the functions assigned to OWCP by the Assistant Secretary of Labor for Employment Standards, and OWCP's historical background at §§ 701.201 through 701.203. In the proposed rule, § 701.202 and § 701.203 are reserved, and § 701.201 refers the reader to the description of these same matters that is set out in subchapter A of chapter I of title 20 (20 CFR part 1).

B. 20 CFR Part 703

General Provisions

Except for the introductory statements in § 703.1 and the list of forms set out in § 703.2, those two proposed regulations and § 703.3 are generally unchanged from their current version.

Insurance Carrier Security Deposit Requirements

20 CFR 703.201

This section contains general introductory material, including the purpose of carrier security deposits.

20 CFR 703.202

In determining the required security deposit amount, DLHWC will consider the extent to which State insurance guaranty funds secure the carrier's LHWCA obligations in the event of default or insolvency. Section 703.202 sets forth a non-exclusive list of factors DLHWC may use to evaluate the coverage afforded by each State guaranty fund, if any. In the event a State guaranty fund's coverage cannot be determined, the regulation adopts a default rule providing that 33⅓ percent of a carrier's LHWCA obligations in that State will be deemed unsecured. This section also notes that DLHWC will make its determinations regarding each State's coverage available to the regulated community and the public by posting them on its Web site.

20 CFR 703.203

An insurance carrier will be required to apply annually for a determination of the extent of its unsecured LHWCA obligations, and the amount of the

deposit necessary to satisfy the regulations' security requirements. Section 703.203 describes the application process. As proposed, the carrier will submit yearly statements to the Branch of Financial Management and Insurance (Branch) within DLHWC setting forth its LHWCA obligations in each State where it does business. The carrier will also suggest an amount for the security deposit needed to fully secure such obligations. If the carrier chooses to base its suggested security deposit on a determination of a gap in State coverage that differs from that posted by DLHWC on its Web site, the carrier may submit evidence and/or argument in support.

20 CFR 703.204

Section 703.204 provides that the Branch may consider several different factors when it evaluates the carrier's suggested security deposit amount. One significant factor will be the extent to which a carrier's LHWCA obligations are secured by a State guaranty fund. Because State guaranty fund coverage varies dramatically among States, proposed § 703.204(b) adopts a sliding scale: carriers who write more than an insignificant amount of LHWCA insurance in States without guaranty funds or funds that only partially secure LHWCA obligations will be required to deposit an amount equal to 33⅓ percent of their outstanding LHWCA obligations in each State up to an amount equal to 100 percent of those obligations. DLHWC intends to evaluate a carrier's obligations on a state-by-state basis to determine the amount of its unsecured obligations in each State and to set the required security deposit in accordance with that evaluation. The carrier may challenge the Branch's decision by requesting a hearing before the Director of DLHWC. The Director will then issue the final agency decision on the application.

20 CFR 703.205, 703.207, 703.208

Once a final decision on the carrier's application is reached, section 703.205 requires the carrier to both execute an Agreement and Undertaking and post the required security within 45 days of its receipt of the decision. Neither of these requirements differs substantially from the requirements under DLHWC's current policy. In the Agreement and Undertaking, the carrier agrees to post the required security deposit and authorizes the Branch to seize the deposit if: (1) It defaults on any of its LHWCA obligations; (2) it fails to renew or replace deposited letters of credit or matured negotiable securities; (3) a State initiates insolvency proceedings against

the carrier; or (4) it violates any of the other terms of the Agreement and Undertaking (§ 703.205(a)). This section also sets out the three ways a carrier can satisfy the requirement for posting a security deposit: through the use of approved indemnity bonds, letters of credit, or negotiable securities (§ 703.205(b)). If the carrier chooses to deposit negotiable securities, §§ 703.207 and 703.208 detail the types of securities that may be deposited, conditions of their deposit and places for their deposit. Section 703.206 is reserved.

20 CFR 703.209, 703.210

Substitutions and/or withdrawals of the instruments representing a carrier's security deposit, as well as changes in the amounts of such deposits, are governed by §§ 703.209 and 703.210. These regulations conform to the Branch's current practice, with two exceptions. The Department has made explicit in § 703.209(b) that "no withdrawals will be authorized unless there has been no claim activity for a minimum of five years, and the Branch is reasonably certain no further claims will arise." The Department has proposed this provision to insure that funds are available to pay all claims that are attributable to the carrier. The Department has also linked DLHWC's demand for an additional security deposit under § 703.210(a) with the procedures applicable to initial security deposit determinations, including a hearing before the Longshore Director or his representative upon the carrier's request. This provision ensures that the carrier has the same rights regarding a determination increasing the security deposit amount as when that amount was initially set.

20 CFR 703.211

Paragraphs (a) and (b) of § 703.211 together constitute one of the major improvements to DLHWC's policy. Currently, DLHWC seizes a carrier's security deposit when the carrier defaults on its LHWCA obligations. But to protect the special fund and ensure funds are available for compensation payments, DLHWC must take action on the deposited security when a carrier fails to secure future payments even though the carrier is meeting its current payment obligations. Accordingly, proposed §§ 703.211 (a) and (b) make explicit DLHWC's authority to draw upon a letter of credit or seize a carrier's deposit of negotiable securities at maturity when the carrier fails to keep its LHWCA obligations secured by renewing or replacing the deposited security, even if the carrier is not in

default. Letters of credit currently acceptable to DLHWC routinely spell out this authority. While deposited negotiable securities do not contain similar terms, they are nevertheless held subject to DLHWC's order (see §§ 703.208 and 703.209). A carrier who has deposited negotiable securities with a Federal Reserve bank must withdraw (or roll over) those securities upon maturity. A viable carrier usually rolls the matured securities over or replaces them with new securities to continue meeting the security deposit requirements. A financially troubled carrier, however, may not be able to replace the matured securities. Rather than allowing the securities to revert to the carrier—assets that the carrier could deplete for purposes other than payment of LHWCA benefits—DLHWC will seize the negotiable securities at maturity and hold those funds as security for the carrier's future LHWCA obligations, even if the carrier has not yet defaulted on its obligations. Finally, proposed §§ 703.211 (a) and (b) codify DLHWC's authority to seize the deposited security when a State initiates insolvency proceedings against a carrier. Like a carrier that is unable to renew its posted security, an insolvent carrier may not be able to meet its LHWCA obligations. Seizure of the security insures continued payment of those obligations. When it determines that the security is no longer necessary, DLHWC will return any negotiable securities (and their proceeds) still in its possession to the carrier (§ 703.211(c)).

20 CFR 703.212

This section provides for the submission of certain periodic and *ad hoc* reports to the Branch so it can monitor the financial health of all authorized insurance carriers and thereby assist DLHWC fulfill its obligation as guardian of the special fund.

20 CFR 703.213

Should a carrier fail to meet its obligations under these security deposit regulations, § 703.213 clarifies that OWCP may revoke or suspend its authorization to write LHWCA insurance.

Authorization of Self-Insurers

The proposed revisions to §§ 703.301 through 703.312 are designed to: Modernize their language and structure; reflect organizational changes within OWCP; and conform them to both DLHWC's current policies and the proposed carrier security deposit regulations. As a result, most of the revisions are not intended to change the

substance of the current regulatory requirements. Several revisions, however, are noteworthy. Throughout this part, the proposed regulations add letters of credit as a method an employer may use to secure its LHWCA obligations. This is in addition to indemnity bonds and deposits of negotiable securities, the two methods set forth in the current regulations. Proposed § 703.303(b) clarifies that DLHWC's authorization to self-insure, although effective immediately, will later be deemed ineffective for all periods if the employer does not timely complete and file with DLHWC an Agreement and Undertaking and give security in the amount DLHWC requires. Proposed § 703.303(d) also affords employers the same hearing rights accorded carriers who wish to challenge DLHWC's security deposit determination in proposed § 703.204(d). Finally, like the carrier security deposit regulations, proposed §§ 703.310 (a) and (b) codify DLHWC's authority to draw upon a letter of credit or seize a self-insurer's deposit of negotiable securities at maturity when the self-insurer fails to keep its future LHWCA obligations secured by renewing or replacing the deposited security, even if the self-insurer has not defaulted on its current payment obligations.

III. Information Collection Requirements (Subject to the Paperwork Reduction Act) Imposed Under the Proposed Rule

The new collections of information contained in this rulemaking have been submitted to 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. No person is required to respond to a collection of information request unless the collection of information displays a valid OMB control number.

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 the Branch of Financial Management and Insurance within DLHWC 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 is proposing to create two new forms (Form LS-276 and LS-275

IC) described below. 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 is proposing one new form (Form LS-275 SI) described below.

The public is invited to submit comments on the new information collection requirements. The Department is particularly interested in comments that:

(1) Evaluate whether the proposed collections of information are necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimates of the burdens of the collections of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility and clarity of the information to be collected; and

(4) Minimize the burden of the collections of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses.

Send comments regarding these proposed collections of information to the Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Desk Officer for Employment Standards Administration, Washington, DC 20503. Comments must be received by May 14, 2004.

This proposed rulemaking also restates, with no substantive changes, the currently approved collections of information in §§ 703.302, 703.308, 703.309 and 703.311 (Forms LS-271 and LS-274, OMB Control No. 1215-0160 (expires December 31, 2006)). These collections relate to information that employers applying to be self-insurers under the LHWCA and its extensions or who are currently authorized self-insurers must submit; the rulemaking does not change these collections in any manner.

A. Form LS-276, Application for Security Deposit Determination

Summary: As discussed above, the LHWCA gives the Secretary of Labor authority to authorize insurance carriers to write insurance under the Act and its extensions (33 U.S.C. 932). As a condition to authorization, each carrier will be required to establish that its

LHWCA obligations are fully secured either through an applicable state guaranty (or analogous) fund, a deposit of security with DLHWC in an amount determined by DLHWC, or a combination of both. To meet these requirements, each currently authorized carrier and any carrier seeking such authorization will apply annually for a determination of the amount of security it must deposit by completing Form LS-276. Form LS-276 is structured to elicit information regarding a carrier's outstanding LHWCA obligations on a state-by-state basis. DLHWC will use the information collected on Form LS-276 to determine the required security deposit amount for each carrier in light of any applicable state guaranty fund coverage.

Respondents and frequency of response: Approximately 385 insurance carriers annually will file Form LS-276.

Total annual burden estimates: The Department estimates that on average, it will take an insurance 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. There are no capital or startup costs associated with this information collection. The Department estimates respondents' total annual operating and maintenance (printing and mailing) costs to be \$163.80.

B. LS-275 IC, Agreement and Undertaking (Insurance Carrier); LS-275 SI, Agreement and Undertaking (Self-Insured Employer)

Summary: After DLHWC determines the amount of the required security deposit, an insurance carrier or self-insured employer will execute Form LS-275 IC or LS-275 SI, respectively, to: (1) Report the security it has deposited and grant the Department a security interest in the collateral; (2) agree to abide by the Department's rules; and (3) authorize the Department to bring suit on any deposited indemnity bond, draw upon any deposited letters of credit, or to collect the interest and principal or sell any deposited negotiable securities when it deems it necessary to assure the carrier's or self-insurer's prompt and continued payment of compensation and any other LHWCA obligations it has. DLHWC will review the information collected to verify that the carrier or self-insurer has deposited the correct amount of security. DLHWC will also use this information if it takes action on the security deposited when necessary to insure that the carrier or self-insurer meets its LHWCA obligations.

Respondents and proposed frequency of response: 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.

Total annual burden estimates: 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. There are no capital or startup costs associated with this information collection. The Department estimates respondents' total annual operating and maintenance (printing and mailing) costs to be \$145.60.

Copies of the complete information collection request, including the OMB 83-I form and supporting statement, may be obtained from the Department of Labor by contacting Linda Myer at 202-693-0289 (this is not a toll free number).

IV. Statutory Authority

Section 39 of the LHWCA (33 U.S.C. 939) authorizes the Secretary of Labor to prescribe rules and regulations necessary for the administration and enforcement of the Act and its extensions, and section 32 of the LHWCA (33 U.S.C. 932) requires that all insurance carriers writing coverage under the LHWCA and all employers seeking to self-insure its liabilities be authorized by the Secretary.

V. Executive Order 12866 (Regulatory Planning and Review)

This proposed rule has been drafted and reviewed in accordance with Executive Order 12866, section 1(b), entitled "The Principles of Regulation." The Department has determined that this proposed rule is not a "significant regulatory action" under Executive Order 12866, section 3(f). Accordingly, it does not require an assessment of potential costs and benefits under section 6(a)(3) of that order.

VI. Small Business Regulatory Enforcement Fairness Act of 1996

As required by Congress under the Small Business Regulatory Enforcement Fairness Act of 1996, enacted as Title II of Public Law 104-121, 110 Stat. 847, 857 (March 29, 1996), the Department will report promulgation of this proposed rule to both Houses of the Congress and to the Comptroller General prior to its effective date as a final rule. The report will state that the Department has concluded that the rule is not a "major rule" as defined under 5 U.S.C. 804(2).

VII. Unfunded Mandates Reform Act of 1995

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

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

The Regulatory Flexibility Act of 1980 (RFA), 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.

If promulgated as a final rule, the proposed carrier security deposit regulations would apply to the approximately 385 insurance carriers currently authorized by DLHWC to write LHWCA insurance, as well as to any other carriers seeking such authorization in the future.

To evaluate the proposed rule's potential impact on small entities, the Department evaluated insurance carriers currently authorized to write Longshore insurance. While carriers enter and leave the market over time and their individual liability fluctuates, over at least the past two years the number and nature of the authorized carrier pool and the total benefit payments made by insurance carriers have remained relatively constant. Moreover, many of these carriers already comply with the security deposit requirements that the proposed regulations would impose on all carriers. Finally, because authorized carriers must file annual reports detailing LHWCA payments they have made for the prior calendar year, the Department possesses concrete information supplied by these carriers on which to base its analysis. Thus, the Department believes that the recent past experience of authorized carriers forms a valid basis for judging the potential impact of the proposed rule.

The Department first determined the number of small entities in the authorized carrier group. The Department divided the authorized carrier group into two segments based on their classifications under the North American Industry Classification System for 2002 (NAICS 2002). It then applied the Small Business Administration's (SBA) size standards for each of these segments.¹

The first segment is direct property and casualty insurers (code 524126). For these insurers, the SBA size standard is 1,500 employees, regardless of a firm's annual revenues. Entities with fewer employees are considered "small" for RFA purposes. Applying this size standard, the Department estimates that one direct property and casualty insurer authorized to write Longshore insurance is "small."

The second segment is all other insurers (including direct life insurance carriers, code 524113; direct health and medical insurance carriers, code 524114; direct title insurance carriers, code 524127; all other direct insurance carriers, code 524128; and reinsurance carriers, code 524130). The SBA's size standard for the rest of the insurance carrier industry is annual revenues of \$6,000,000. Entities with revenues falling below this amount are considered "small" for RFA purposes. Applying this size standard, the Department estimates that three of the authorized carriers falling into the remaining categories are "small." Thus, of the 385 carriers authorized to write Longshore insurance, the Department estimates that approximately 4, or a total of 1.05%, are small entities under the SBA's size standards.²

The Department then evaluated the potential impact the proposed regulations would have had on these four individual insurance carriers had they been in place for calendar years 2001 and 2002. Two of these carriers currently have no security deposited and, for calendar years 2001 and 2002,

¹ The Department was unable to determine the number of employees and/or total revenues for seven authorized carriers and, thus, unable to determine whether they meet the SBA's size standards for small entities. These entities include two non-U.S. public companies.

² Two of these four carriers are not-for-profit; thus, they potentially meet the "small organization" definition in RFA section 601(4). To determine whether these carriers should be considered small, the Department applied the SBA size standards for a "small business." Both carriers meet those standards. Thus, the Department has classified both as "small organizations." Because these carriers serve the same function and would be governed by the same security deposit requirements as for-profit carriers, the Department has chosen to include them with the "small business" carriers in evaluating the proposed rule's potential impact.

paid no Longshore benefits. Under the proposed rule, these carriers would not have had to post a security deposit because the rule ties the security deposit amount to a carrier's current liabilities. Thus, for these two small carriers, the rule would have imposed no additional cost.

The third carrier's premium revenues (apart from other income) for calendar year 2002 totaled \$3,262,000. During calendar years 2001 and 2002, which are representative of average years for this carrier, the carrier paid a total of \$47,000 in Longshore benefits. In 1992, this carrier posted \$400,000 in negotiable securities to secure its liabilities. Under the proposed rules, this carrier would not have been required to post security because it is in a State whose guaranty fund fully secures Longshore Act obligations. Thus, its security deposit would have been reduced. Even assuming this or a similar carrier were required to post \$400,000 under the proposed rules because it was not in such a State, it could have met its security obligation by a method requiring a small initial cash outlay, such as by purchasing an indemnity bond. The Department estimates a \$400,000 bond would cost approximately \$6,000–\$8,000 at typical current rates; that cost amounts to only 0.18% to 0.24% of the carrier's 2002 revenues. Many carriers choose to deposit negotiable securities to secure their obligations, as this one did. Although in this case the deposit of \$400,000 in negotiable securities amounted to approximately 12% of the carrier's 2002 revenues, the carrier continued to own the securities (subject to DLHWC's security interest) and received the income generated by them. Moreover, because carriers may freely choose whether to deposit negotiable securities or purchase an indemnity bond, the appropriate cost measure for this analysis is the cost of the indemnity bond.

The fourth carrier is a direct property and casualty insurer that is classified as "small" because it employs fewer than 1,500 people. Its high premium revenues, however, render its security deposit obligations under both DLHWC's current policy and the proposed regulations insignificant. For calendar year 2002, this carrier's premium revenues (apart from other income) totaled approximately \$300,000,000. It pays, on average, \$2,000,000 per year in Longshore benefits and currently has posted \$3,125,000 in negotiable securities to secure its LHWCA obligations. Assuming the same deposit would be required under the proposed rule, the

cost to the carrier would be approximately 1.04% of its annual revenues, a percentage the Department does not deem significant especially because the carrier would continue to receive any income from the negotiable securities posted.

Thus, the Department believes that the proposed rule will have no significant economic impact on any currently authorized small carriers. For reasons similar to those explained above, the Department further believes that the proposed rule will have no significant economic impact on possible small carrier entrants.

Small carriers who would not be required to post security deposits with DLHWC under its current policy (such as carriers doing business in States with guaranty funds that fully secure their liability) will for the same reason likely not be required to post security deposits, including the minimum security provided for in proposed § 703.204(c), under the proposed policy. Other small carriers will only have to post security deposits in the amount of their own current obligations, making posting more affordable for firms with low liabilities and thus making entry easier for small firms that would like to enter this market. Indeed, the proposed rules will not require the posting of any security by carriers with no outstanding obligations, so such carriers would no longer have to post the minimum \$200,000 deposit that DLHWC currently requires of all carriers who do not have an A or better rating from the A.M. Best Company.

The proposed regulations will also result in a financial benefit to some small carriers in another way. Once all carriers have fully secured their liabilities, as the proposed rule requires, special fund assessments for those small carriers who must pay them are expected to decrease. 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 benefit 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). 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 small carriers are expected to decrease commensurately.

Although not dispositive, the Department has also noted that no carriers—small or otherwise—left the authorized carrier ranks when DLHWC

first instituted its security deposit requirements in 1990. Moreover, no one who responded to DLHWC's Request For Information published in the **Federal Register** on February 22, 2002, expressed concern over any impact that OWCP's current security deposit requirements or those it might adopt would have on small entities.

Thus, whether viewed as four small entities out of 385, 11 small entities (four plus the seven carriers the Department was unable to classify) out of 385, or no entities within the four identified as small, the Department concludes that the proposed carrier security deposit rules will not have a significant economic impact on a substantial number of small entities.

The Department also believes that the proposed revisions to the self-insurer authorization regulations will not have a significant economic impact on a substantial number of small entities. These revisions do not change the financial or record-keeping requirements currently imposed on self-insurers. As explained above, the revisions are principally designed to modernize the rules' language and structure, reflect organizational changes within OWCP, and conform the rules to DLHWC's current policies and practices. For instance, the proposed revisions codify DLHWC's longstanding policy of allowing self-insurers to use letters of credit from approved financial institutions to secure their LHWCA obligations. DLHWC will continue to require self-insured employers to deposit security in the same amounts and form as under the current regulations. Thus, the proposed revisions to the self-insurer regulations will not have a significant economic impact on any entities, including those that might be classified as small under the SBA's size standards.

The Assistant Secretary of Labor for Employment Standards hereby 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. The factual basis for this certification is set out above. The Department invites comments from members of the public who believe the proposed regulations will have a significant economic impact on a substantial number of small insurance carriers or employers seeking authority to self-insure. The Assistant Secretary has also provided the Chief Counsel for Advocacy with a copy of this certification, together with the factual basis for the certification.

IX. Executive Order 12988 (Civil Justice)

This proposed rule has been drafted and reviewed in accordance with Executive Order 12988 and will not unduly burden the Federal court system if promulgated as a final rule. The LHWCA does not provide any specific procedures for insurance carriers to follow in order to seek review of DLHWC decisions regarding the extent of their LHWCA obligations and the amount of any required security deposit. Nor does the statute set out procedures for employers denied authorization to self-insure or who disagree with the security deposit amount set by DLHWC. A very small number of these carriers and employers annually (three or less) will likely seek review of adverse decisions in the United States district courts pursuant to the Administrative Procedure Act. This rule should minimize the burden placed upon the courts by litigation seeking to challenge these decisions by giving carriers and employers an opportunity to seek administrative review of adverse decisions and by providing a clear legal standard for such decisions. The rule has also been reviewed carefully to eliminate drafting errors and ambiguities.

X. Executive Order 13132 (Federalism)

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

XI. Executive Order 13045 (Protection of Children From Environmental, Health Risks and Safety Risks)

In accordance with Executive Order 13045, the Department has evaluated the environmental health and safety effects this proposed rule would have on children. The Department has determined that if promulgated as a final rule, the proposed rule would have no effect on children.

XII. Executive Order 13211 (Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use)

In accordance with Executive Order 13211, the Department has evaluated the effects of this proposed rule on energy supply, distribution or use, and

has determined that this rule, if promulgated as a final rule, would likely not have a significant adverse effect on them.

XIII. Congressional Review Act

This proposed rule is not a “major rule” as defined in the Congressional Review Act (5 U.S.C. 801 *et seq.*). If promulgated as a final rule, this rule will not result in an annual effect on the economy of \$100,000,000 or more; a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.

XIV. Catalog of Federal Domestic Assistance Number

This program is not listed in the Catalog of Federal Domestic Assistance.

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 proposed to be amended 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. Any action taken by a person under the authority of a district director will be

considered the action of a deputy commissioner.

(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 designating §§ 703.1 through 703.3 as "Subpart A—Generals," by designating the center heading "Authorization of Insurance Carriers" as "Subpart B—Authorization of Insurance Carriers" and revising 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/dlhwcl/forms.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 subpart designations to the undesignated center headings "Authorization of Self-Insurers" and "Issuance of Certificates of Compliance," adding Subpart C, and revising subpart D to read as follows:

Subpart C—Insurance Carrier Security Deposit Requirements

Sec.

- 703.201 Deposits of security by insurance carriers.
- 703.202 Identification of significant gaps in State guaranty fund coverage for LHWCA obligations.
- 703.203 Application for security deposit determination; information to be submitted; other requirements.
- 703.204 Decision on insurance carrier's application; minimum amount of deposit.
- 703.205 Filing of Agreement and Undertaking; deposit of security.
- 703.206 [Reserved]
- 703.207 Kinds of negotiable securities that may be deposited; conditions of deposit; acceptance of deposits.
- 703.208 Deposits of negotiable securities with Federal Reserve banks or the Treasurer of the United States; interest thereon.
- 703.209 Substitution and withdrawal of indemnity bond, letters of credit or negotiable securities.
- 703.210 Increase or reduction in security deposit amount.
- 703.211 Authority to seize security deposit; use and/or return of proceeds.

- 703.212 Required reports; examination of insurance carrier accounts.
- 703.213 Failure to comply.

Subpart D—Authorization of Self-Insurers

- 703.301 Employers who may be authorized as self-insurers.
- 703.302 Application for authority to become a self-insurer; how filed; information to be submitted; other requirements.
- 703.303 Decision on employer's application.
- 703.304 Filing of Agreement and Undertaking; deposit of security.
- 703.305 [Reserved]
- 703.306 Kinds of negotiable securities that may be deposited; conditions of deposit; acceptance of deposits.
- 703.307 Deposits of negotiable securities with Federal Reserve banks or the Treasurer of the United States; interest thereon.
- 703.308 Substitution and withdrawal of indemnity bond, letters of credit or negotiable securities.
- 703.309 Increase or reduction in the amount of indemnity bond, letters of credit or negotiable securities.
- 703.310 Authority to seize security deposit; use and/or return of proceeds
- 703.311 Required reports; examination of self-insurer accounts.
- 703.312 Period of authorization as self-insurer.
- 703.313 Revocation of authorization to self-insure.

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 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 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. 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. The terms "obligations under the Act" and "LHWCA obligations" include a carrier's obligations 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/dlhwclstable.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—

- (1) 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;

(2) A statement:

(i) Of the deposit amount it believes will fully secure its obligations; or

(ii) That it has sufficient assets or other means to fully secure its obligations; and

(3) 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 reject the deposit amount suggested by the insurance carrier in its application and make its own determination of this amount. When evaluating the suggested amount, the Branch may consider a number of factors including, but not limited to, the—

- (1) Financial strength of the carrier;
- (2) Financial strength of the carrier's insureds;
- (3) Carrier's reinsurance protection;

(4) Carrier's surplus and its recent settlements;

(5) Amount of the carrier's business that is written through the National Reinsurance Pool operated by the National Council on Compensation Insurance or other assigned risk pool providing full protection for LHWCA obligations;

(6) Carrier's deductibles secured by letters of credit;

(7) Carrier's reduced exposure;

(8) Carrier's increases in capitalization;

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

(10) Carrier's expansion of business into additional States with guaranty funds that will not fully secure its LHWCA obligations.

(c) The Branch will require all carriers that write LHWCA insurance in one or more of the States identified by OWCP under § 703.202(b) to deposit security for its unsecured LHWCA obligations in each State identified. 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 in each State, but may require a deposit up to an amount equal to the carrier's total outstanding LHWCA obligations (100 percent) in each State.

(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 § 703.203), 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 acceptable securities in its place;

(iii) The carrier fails to renew any deposited negotiable securities at maturity or substitute acceptable 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 may, however, authorize the insurance carrier to collect interest on the securities deposited by it.

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

(a) No substitution or withdrawal of an indemnity bond, letters of credit or negotiable securities deposited by an insurance carrier under the regulations in this part shall be made except when authorized by the Branch. 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.

(b) 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 acceptable securities in its place;

(3) Fails to renew any deposited negotiable securities at maturity or substitute acceptable 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 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 this part 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 this part.

§ 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 acceptable securities in its place;

(iii) Fails to renew any deposited negotiable securities at maturity or substitute acceptable 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 may, however, authorize the self-insurer to collect interest on the securities deposited by it.

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

(a) No substitution or withdrawal of an indemnity bond, letters of credit or negotiable securities deposited by a self-insurer under the regulations in this part shall be made except when authorized by the Office. 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.

(b) 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 acceptable securities in its place;

(3) Fails to renew any deposited negotiable securities at maturity or substitute acceptable 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 in Washington, DC, this 5th day of March, 2004.

Victoria Lipnic,

Assistant Secretary for Employment Standards.

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