The Commission believes that providing the public additional time to consider thoroughly the matters addressed by the release and to submit comprehensive responses to the release would benefit the Commission in its consideration of final rules. Therefore, the Commission is extending the comment period for Release Nos. 33–10098 and 34–78086, ''Modernization of Property Disclosures for Mining Registrants,'' until September 26, 2016.

By the Commission.

Dated: August 23, 2016.

Brent J. Fields,

Secretary.

[FR Doc. 2016–20548 Filed 8–25–16; 8:45 am]

BILLING CODE 8011–01–P

DEPARTMENT OF LABOR

Office of Workers' Compensation Programs

20 CFR Part 702

RIN 1240–AA06

Longshore and Harbor Workers' Compensation Act: Maximum and Minimum Compensation Rates

AGENCY: Office of Workers' Compensation Programs, Labor.

ACTION: Notice of proposed rulemaking; request for comments.

SUMMARY: The Office of Workers' Compensation Programs is proposing rules to implement the Longshore and Harbor Workers' Compensation Act's maximum and minimum compensation provisions. Some of these provisions, which cap the amounts of compensation and death benefits payable to entitled claimants and provide a floor below which compensation may not fall, have become the topic of litigation. The proposed rules would clarify how the Department interprets and applies these provisions. In addition, the proposed rules would implement the Act's annual compensation-adjustment mechanism for permanent total disability compensation and death benefits.

DATES: The Department invites written comments on the proposed regulations from interested parties. Written comments must be received by October 25, 2016.

ADDRESSES: You may submit written comments, identified by RIN number 1240–AA06, by any of the following methods. To facilitate the receipt and processing of comment letters, OWCP encourages interested parties to submit their comments electronically.

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions on the Web site for submitting comments.
- *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.
- *Regular Mail or Hand Delivery/Courier:* Submit comments on paper to the Division of Longshore and Harbor Workers' Compensation, Office of Workers' Compensation Programs, U.S. Department of Labor, Room C–4319, 200 Constitution Avenue NW., Washington, DC 20210. The Department's receipt of U.S. mail may be significantly delayed due to security procedures. 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 the Regulatory Information Number (RIN) for this rulemaking. All comments received will be posted without change to *http://www.regulations.gov*, including any personal information provided.

Docket: To read background documents or comments received, go to *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Antonio Rios, Director, Division of Longshore and Harbor Workers' Compensation, Office of Workers' Compensation Programs, U.S. Department of Labor, Room C–4319, 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 1–877–889–5627 for further information.

SUPPLEMENTARY INFORMATION:

I. Background of This Rulemaking

The Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901–50 (LHWCA or Act), establishes a federal workers' compensation system for an employee's disability or death arising in the course of covered maritime employment. 33 U.S.C. 903(a), 908, 909. This proposed rule would implement the Act's provisions on maximum and minimum amounts of compensation payable.

A. The Act's Compensation Scheme

Disability, which the Act defines as ''incapacity because of injury to earn the wages which the employee was receiving at the time of injury,'' 33 U.S.C. 902(10), ''is in essence an economic, not a medical concept.'' *Metro. Stevedores* v. *Rambo*, 515 U.S. 291, 297 (1995). From its inception in 1927, the Act has provided that ''the average weekly wage of the injured employee at the time of the injury'' must be used as the basis for computing his or her compensation rate. 33 U.S.C. 910. Thus, ''[a]n employee's compensation depends on the severity of his disability and his preinjury pay.'' *Roberts* v. *Sea-Land Services, Inc.*, 566 U.S. ____, 132 S.Ct. 1350, 1354 (2012).

Several statutory sections have an impact on determining the amount of compensation payable. Section 10, ''Determination of Pay,'' 33 U.S.C. 910, is the starting point in the statutory scheme. It sets out rules for calculating the employee's average weekly wage (AWW) as of the time of the employee's disabling injury. This AWW serves as the basis for all future benefit calculations for that worker throughout the life of his or her claim.

The second step is to determine what percentage of the employee's AWW a claimant will receive in compensation. This is determined under section 8, ''Compensation for Disability,'' and section 9, ''Compensation for Death,'' 33 U.S.C. 908, 909. Compensation payable for disability varies based on the nature and extent of an employee's disability. Section 8 establishes four basic categories of disability: Permanent total, temporary total, permanent partial, and temporary partial. 33 U.S.C. 908(a)–(c), (e). In general, an injury is ''total'' if the worker is unable to work after the injury and ''partial'' if the worker is able to work at a diminished wage. A disability is ''temporary'' if the employee's medical condition is improving and becomes ''permanent'' when he or she reaches maximum medical improvement. *See* 33 U.S.C. 908(a)–(c), (e); *see also Potomac Elec. Power Co.* v. *Director, OWCP*, 449 U.S. 268 (1980). And section 9 provides compensation payable to the employees' eligible survivors for injuries causing death. 30 U.S.C. 909.

For all disability categories, the Act uses a ''two-thirds'' rule to compute compensation. Totally disabled employees—those who are unable to return to their original employment or earn wages in suitable alternative employment—receive two-thirds the AWW they were earning at the time of injury. 33 U.S.C. 908(a)–(b). Partially disabled employees—those who experience the loss or loss-of-use of body parts specified in the statute—are entitled to two-thirds of their date-of-injury AWW for a specified number of weeks. 33 U.S.C. 908(c)(1)–(19). Other partially disabled employees—those

2016); and letter from Jeffrey Klenda, Chair of Ur-Energy Inc. (August 19, 2016). Comments are available on the Commission's Web site at: *https://www.sec.gov/comments/s7-10-16/s71016.htm.*

who are able to work after their injuries at a diminished wage—receive two-thirds of the difference between their pre-disability AWW and their residual earning capacity (*i.e.*, the post-injury wages they earn or could earn through suitable alternative employment). *See* 33 U.S.C. 908(c)(21), (e). Finally, the compensation rate for survivors of an employee who suffers a work-related death is usually based on the deceased employee's AWW at the time of death, and, with certain exceptions, can be as high as two-thirds of that wage. 33 U.S.C. 909(b).

The third step is to apply the statute's compensation-limiting rules. Despite the general two-thirds rule, section 6, ''Compensation,'' 33 U.S.C. 906, both caps the compensation amounts that can be received (a ''maximum'') and provides a floor below which compensation may not fall (a ''minimum''). These limits are applied after calculating two-thirds of the worker's date-of-injury AWW. The Act sets the maximum for all disability compensation categories at 200 percent of the ''applicable national average weekly wage.'' 33 U.S.C. 906(b)(1). Total compensation for death—the amount payable to all survivors in the aggregate—is also limited to that 200-percent figure, or to the deceased employee's AWW, whichever is less. 33 U.S.C. 909(e)(1); *Donovan* v. *Newport News Shipbuilding & Dry Dock Co.,* 31 BRBS 2 (1997). The Act sets the minimum for total disability compensation at the lower of: (1) 50 percent of the applicable national average weekly wage; or (2) the employee's actual AWW. 33 U.S.C. 906(b)(2). The Act does not provide minimums for the remaining compensation categories.

The Secretary of Labor determines the national average weekly wage before October 1 of each year, and it applies for a fiscal year (FY), from October 1 until the next September 30. 33 U.S.C. 906(b)(3). A given fiscal year's national average weekly wage, and the resulting maximum and minimum rates, apply to ''employees or survivors *currently receiving* compensation for permanent total disability or death during such [fiscal year], as well as those *newly awarded* compensation during such [fiscal year].'' 33 U.S.C. 906(c) (emphasis added). Under the ''currently receiving'' clause, the maximum rate for claimants receiving benefits for permanent total disability or death is ''adjusted each fiscal year—and typically increases, in step with the usual inflation-driven rise in the national average weekly wage.'' *Roberts*, 132 S.Ct. at 1354 n.2. In fact, because the national average weekly wage has risen every year since Congress added this self-adjustment feature to section 6 in 1972, each year's maximum rate has risen as well. Thus, applying a later fiscal year's maximum generally results in a higher compensation rate.

Finally, in addition to section 6's provisions allowing adjustments to the maximum compensation rate, section 10(f) provides another mechanism for adjusting compensation amounts over time. ''[B]enefits payable for permanent total disability or death'' are increased at the beginning of each fiscal year (October 1) by the same percentage as any increase in the national average weekly wage (as calculated under section 6), but no more than 5 percent. 33 U.S.C. 910(f). The primary difference between the two adjustment provisions is that section 10(f) applies to all claimants receiving compensation for permanent total disability or death, while section 6(c) assists only those affected by the maximum rate. Through these provisions, compensation payable to a claimant each year increases by the same amount as wage-growth generally, ensuring that the value of the workers' compensation is not eroded over time.

In recent litigation, disputes have arisen over which fiscal year's maximum rate or rates apply to a given claimant, specifically: (1) In what fiscal year is a claimant ''newly awarded compensation''; and (2) in what fiscal year is a claimant ''currently receiving compensation for permanent total disability or death.'' On the first question, the dispute is whether a claimant is ''newly awarded compensation'' when he or she first becomes disabled—and therefore entitled to compensation—or when an administrative law judge issues a compensation order. On the second question, the dispute is whether a claimant is ''currently receiving compensation for permanent total disability'' when he or she first becomes permanently totally disabled or when he or she actually receives compensation for permanent total disability.

The Supreme Court resolved the first of these questions in its *Roberts* decision. But the second issue has not been addressed by all circuits around the country, and thus remains subject to litigation. The proposed rules would codify the Supreme Court's decision, resolve the second issue in a manner consistent with the courts that have addressed it, implement other aspects of the Act's maximum and minimum compensation provisions, and address the related section 10(f) annual adjustment provision.

B. Section 6(c)'s ''Newly Awarded Compensation During Such Period'' Clause

The Supreme Court construed this part of section 6(c) in *Roberts* and held ''that an employee is 'newly awarded compensation' when he first becomes disabled and thereby becomes statutorily entitled to benefits, no matter whether, or when, a compensation order issues on his behalf.'' 132 S.Ct. at 1363. Mr. Roberts was injured and became disabled in FY 2002. An administrative law judge (ALJ) order awarding compensation, however, was not issued until FY 2007. While Mr. Roberts' employer initially made some compensation payments, it stopped in May 2005 and did not resume payments until after the ALJ's FY 2007 order. The ALJ found that Mr. Roberts' disability was: Temporary total from March 11, 2002, to July 11, 2005; permanent total from July 12, 2005, to October 9, 2005; and permanent partial beginning on October 10, 2005. *Roberts* v. *Director, Office of Workers' Compensation Programs*, 625 F.3d 1204, 1205 (9th Cir. 2010). Because the employer had ceased paying compensation in May 2005, before Mr. Roberts' period of permanent total disability, it did not pay him for that disability until after the ALJ's order in FY 2007.

The ALJ found that Mr. Roberts' compensation rate for total disability—two-thirds of his AWW—was $1,902.05, and that his compensation rate for permanent partial disability—two-thirds of the difference between his average weekly and his residual wage-earning capacity—was $1,422.05. He found, however, that Mr. Roberts was subject, for all periods of disability, to the maximum rate of $966.08 in effect during FY 2002, because that was when he first became disabled, and was thus ''newly awarded compensation.'' *Id.* at 1206. On Mr. Roberts' motion for reconsideration, the ALJ determined that he had applied the wrong maximum rate for the period from October 1, 2005, through October 9, 2005. The ALJ found that Mr. Roberts was entitled to the FY 2006 maximum rate of $1,703.64 per week for that period because he was ''currently receiving compensation for permanent total disability'' during that time. *Id.*

The Benefits Review Board, relying on its earlier decision in *Reposky* v. *Int'l Transp. Services*, 40 BRBS 65, 74–76 (2006) (holding that a claimant is newly awarded compensation ''when benefits commence, generally at the time of injury''), affirmed the ALJ's decision. The Ninth Circuit followed suit. In affirming the ALJ's decision, it held that an injured employee is ''newly awarded'' compensation when he or she first becomes entitled to compensation rather than when a formal compensation order is issued. *Roberts*, 625 F.3d at 1208. Although Mr. Roberts argued that ''awarded'' could mean only ''assigned by formal order in the course of adjudication,'' and that ''newly awarded'' must therefore mean newly issued a compensation order, *id.* at 1206, the court rejected that argument. It reasoned that the LHWCA sometimes uses ''awarded'' to mean ''entitled to.'' It found that use applied to section 6, and held that a claimant is ''newly awarded'' compensation when he first becomes entitled to compensation, which is when he first becomes disabled.

The Supreme Court agreed with the Ninth Circuit's interpretation of section 6(c)'s ''newly awarded compensation'' clause. The Court acknowledged that Mr. Roberts' contrary view was ''appealing'' because ''[i]n ordinary usage, 'award' most often means 'give by judicial decree' or 'assign after careful judgment.' '' *Roberts,* 132 S. Ct. at 1356 (quoting Webster's Third New International Dictionary 152 (2002)). It recognized, however, that ''award'' can also mean ''grant'' or ''confer or bestow upon.'' Thus, deciding that ''the text of § 906(c), in isolation, is indeterminate[,]'' the Court considered its function in the context of the statute as a whole. *Id.* at 1357. The Court concluded that in the Act's ''comprehensive, reticulated regime for worker benefits—in which § 906 plays a pivotal role—'awarded compensation' is much more sensibly interpreted to mean 'statutorily entitled to compensation because of disability,' '' *id.* at 1357, than ''awarded compensation in a formal order.'' *Id.* at 1356.

The Court gave several reasons for its holding. First, the Court recognized that construing ''newly awarded compensation'' to mean a formal compensation order would be ''incompatible with the Act's design.'' *Id.* at 1357. The Court reasoned that this construction of the clause would be impossible to apply in the many cases where benefits are paid voluntarily and a formal compensation order is never issued. Noting that the three provisions of section 6 that relate to the maximum compensation rate ''work together to cap disability benefits,'' and that section 6(b)(1)'s cap on benefits ''applies globally, to all disability claims,'' the Court concluded that section 6(c)'s ''newly awarded'' clause must also apply globally. *Id.* at 1358.

Second, the Court examined the Act's administrative structure, which requires employers to pay compensation within 14 days after the employer knows of the worker's injury (*see* 30 U.S.C. 914(b)). It determined that using the national average weekly wage at the time of disability to determine the applicable maximum ''coheres'' with that structure. *Roberts,* 132 S. Ct. at 1358. The Court recognized that the employer, as well as OWCP, must be able to calculate the amount of compensation due at the time of payment, a calculation that necessarily includes consideration of any applicable cap. Because an employer is ''powerless to predict'' future events related to the compensation claim or what a later national average weekly wage will be, the court reasoned that ''[i]t is difficult to see how an employer can apply or certify a national average weekly wage other than the one in effect at the time an employee becomes disabled.'' *Roberts,* 132 S. Ct. at 1358–59.

Reading section 6(c) in the context of the Act's comprehensive scheme, the Court further explained that ''applying the national average weekly wage for the fiscal year in which an employee becomes disabled advances the LHWCA's purpose to compensate disability,'' which focuses on wages at the time of the injury as the basis to compute compensation. *Id.* at 1359 (*citing* 33 U.S.C. 902(10)). It is thus ''logical to apply the national average weekly wage for the same point in time.'' *Id.*

Moreover, the Court found that applying the date-of-disability maximum rate as suggested by the Director and Employer ''avoids disparate treatment of similarly situated employees . . . who earn the same salary and suffer the same injury on the same day.'' *Id.* at 1359. By contrast, Mr. Roberts' approach could subject such employees to different rates based solely on the ''happenstance of their obtaining orders in different fiscal years.'' *Id.*

Third, the Court believed its approach ''discourages gamesmanship in the claims process.'' *Id.* at 1360. Using the date a compensation order issues would encourage claimants to delay the adjudication process or initiate additional administrative proceedings seeking to take advantage of a later year's national average weekly wage. At the same time, an employer who promptly pays compensation at the correct rate would be subject to an increased cap retroactively for those payments based on a later compensation order. The Court refused to ''reward'' claimants with these ''windfalls'' while ''punishing'' employers who have met their statutory obligations. *Id.*

C. Section 6(c)'s ''Currently Receiving Compensation for Permanent Total Disability or Death Benefits During Such Period'' Clause

While the Supreme Court's *Roberts* decision settled the interpretation of the ''newly awarded'' clause, the Court declined to consider section 6(c)'s ''currently receiving'' clause, leaving the phrase's correct interpretation open to further litigation. The Ninth Circuit *Roberts* court had interpreted the ''currently receiving'' clause consistently with the ''newly awarded'' clause, noting that ''[u]nder both clauses, the inquiry into the applicable maximum rate focuses on an employee's *entitlement* to compensation.'' *Roberts,* 625 F.3d at 1208. It held that ''the 'currently receiving' clause of section 6(c) unambiguously refers to the period during which an employee was entitled to receive compensation for permanent total disability, regardless of whether his employer actually paid it.'' *Id.* at 1209. Consequently, the court determined that Mr. Roberts was ''currently receiving compensation for permanent total disability'' as of July 12, 2005, and thus entitled to the FY 2005 maximum rate from that date through September 30, 2005 (the end of FY 2005), and to the FY 2006 rate from October 1, 2005, through October 9, 2005. Beginning October 10, 2005—when Mr. Roberts regained an earning capacity, making his disability permanent partial—the court concluded he was once again subject to the FY 2002 maximum rate. *Id.* at 1206, 1209.

Although the Eleventh Circuit initially disagreed with the Ninth Circuit's construction of the ''currently receiving'' clause, *Boroski* v. *DynCorp Int'l,* 662 F.3d 1197 (11th Cir. 2011), that court reversed its position after the Supreme Court decided *Roberts. Boroski* v. *DynCorp Int'l,* 700 F.3d 446 (11th Cir. 2012) *on remand from* 132 S.Ct. 2430 (2012). Mr. Boroski was first disabled by his work-related injury in April 2002. His employer, DynCorp International, timely contested his compensation claim and thus did not voluntarily pay him compensation. An ALJ entered an order in FY 2008 awarding him permanent total disability compensation from 2002 and continuing. DynCorp based its subsequent payments on the maximum compensation rate applicable for FY 2002, and adjusted the amount upward each year, beginning on October 1, 2002, as required by section 10(f). Mr. Boroski objected, arguing that he was not ''currently receiving compensation for permanent total disability'' until FY 2008, when the employer actually began paying him, and was thus entitled to the FY 2008 maximum rate from the outset.

The Eleventh Circuit rejected Mr. Boroski's argument and held that "'currently receiving compensation' in § 906(c) means 'currently entitled to compensation.'" *Boroski,* 700 F.3d at 451. The court agreed with the Director that for each year after 2002 during which Mr. Boroski was entitled to compensation for permanent total disability, he was "currently receiving compensation for permanent total disability," and thus subject to the new fiscal year's maximum rate, regardless of when the compensation was actually paid.

Taking its analytical lead from the Supreme Court in *Roberts,* the *Boroski* court considered the "currently receiving" clause's role in the context of the entire statute. The court noted that using the maximum for the year in which compensation was actually paid (2008) rather than for the first year Mr. Boroski was disabled (2002) would lead to "*two different and irreconcilable weekly benefit payment amounts*" under the Supreme Court's interpretation of the "newly awarded" clause, which also applied to his compensation calculation. *Id.* at 451. The Director's contrary interpretation instead harmonized the two clauses of section 6(c).

The court also found the Director's position more consistent with section 10(f)'s annual adjustment mechanism. The court reasoned that the Director's interpretation of the "currently receiving" clause operates similarly, "gradually increasing benefits to maintain the *value* of an injured employee's wages, determined 'at the time of the injury.'" *Id.* at 452. Mr. Boroski's interpretation—under which "employers who first pay benefits to an injured employee in a year other than the year of the injury would pay all past due payments based on the national average weekly wage *for the year in which the first payment is made* . . . effectively giv[ing] the injured employee a raise to the later year's national average weekly wage, and would make that raise *retroactive to the date of his disability*"—would be "incongruous" with section 10(f). *Id.* at 452. The court also rejected Mr. Boroski's assertion that Congress intended his interpretation to encourage prompt payment of benefits. The court noted that claimants are entitled to interest on late payments of compensation, and found that interest both adequately compensates claimants for the delayed receipt of benefits and discourages employers from refusing to promptly pay legitimate claims.

Finally, the court determined that the Director's interpretation avoided disparate treatment of similarly situated claimants. "Under the Director's interpretation, Boroski receives the same benefits as a similarly situated employee who was first injured *and* who first received payment in 2002, and, additionally, Boroski receives interest on all late payments, to compensate him for the delay." *Id.* at 453. By contrast, under Mr. Boroski's interpretation—in which Mr. Boroski "would receive, in addition to interest, higher benefits for the same period of disability than claimants who timely receive their benefits"—the same hypothetical employee "would receive approximately $30,000 less than Boroski." *Id.*

For all of these reasons, the Eleventh Circuit held, as had the Ninth Circuit in *Roberts,* that an employee is "currently receiving compensation for permanent total disability" when he is entitled to such compensation, not when he is actually paid that compensation. To date, the remaining circuits have not weighed in on this issue.

The Benefits Review Board subsequently reached the same conclusion as the Ninth and Eleventh Circuits. *Lake* v. *L–3 Communications,* 47 BRBS 45 (2013). In *Lake,* the Board held that a claimant is "currently receiving compensation" under section 6(c) "during a period in which he is entitled to receive such compensation, regardless of whether his employer actually pays it." *Id.* at 48. The Board also held that when a claimant's temporary total disability changes to permanent total disability during a fiscal year, the maximum rate in effect during that year applies immediately. *Id.* at 48. In reaching this conclusion, the Board overruled this portion of its earlier contrary decision in *Reposky,* 40 BRBS at 65. The Board thus held that the FY 2009 maximum rate applied as of December 10, 2008, the date that Mr. Lake's entitlement to permanent total disability benefits commenced, until the next October 1, when the new fiscal year's maximum rate applied.

The Board also addressed a related question on the interplay between sections 6 and 10(f) in *Lake.* The employer argued that Mr. Lake, who first reached permanent total disability status in FY 2009, was not entitled to the FY 2009 maximum rate. Instead, the employer contended that he was limited to a section 10(f) increase on the FY 2006 maximum rate that he had been receiving since his injury, followed by a section 10(f) adjustment each subsequent October 1. The Board rejected this argument. Citing its earlier contrary holding in *Marko* v. *Morris Boney Co.,* 23 BRBS 353 (1990), the Board reiterated its conclusion that, "in a permanent total disability case in which two-thirds of the claimant's actual [AWW] exceeds the Section 6(b)(3) statutory maximum rate, he is entitled to the benefit of the new maximum rate each fiscal year . . . until such time as two-thirds of his actual average weekly wage falls below 200 percent of the applicable [national average weekly wage], and then annual adjustments under Section 10(f) apply." *Lake,* 47 BRBS at 50. The Board found its holding compelled by the plain language of section 6(c) and supported by the Ninth Circuit's *Roberts* decision.

II. Summary of the Proposed Rule

A. General Information

As discussed in the Section-by-Section Explanation below, this proposed rule implements the Act's provisions governing the maximum and minimum amount of disability compensation and death benefits payable. The proposed regulations do not govern general compensation calculations (referred to in the rules as the "calculated compensation rate"), and the fact that compensation payable is subject to these maximum and minimum rates does not mean that claimants are necessarily entitled to them. Rather, the proposed regulations simply provide that disability compensation and death benefits can go no higher than the applicable maximum rate or lower than the applicable minimum rate.

The proposed rule includes two subparts. Subpart G describes the annual adjustment to compensation and death benefits provided under section 10(f) of the Act, 33 U.S.C. 910(f). While section 10(f) allows for an annual adjustment to all payments of compensation for permanent total disability or death benefits, including those cases where neither the maximum nor the minimum rates are implicated, the Department has included section 10(f) in this rulemaking because its application can be closely tied with the maximum compensation or death benefits payable in certain cases. These interrelationships are detailed in the Section-by-Section Explanation below.

Subpart H includes proposed regulations implementing the Act's maximum and minimum provisions. The Department has organized these sections first to cover general topics, then by whether the rules govern maximum or minimum compensation payable, and finally by categories of compensation payable (*i.e.*, temporary total or partial, permanent total or partial, and death benefits).

B. Section-by-Section Explanation

This discussion contains an explanation of each proposed rule. Many of the rules include examples that use the Department's yearly calculation of the applicable national average weekly wage, the maximum and minimum weekly compensation rates, and percentage adjustments available under section 10(f), 33 U.S.C. 910(f). This information is routinely available on OWCP's Web site. *See https://www.dol.gov/owcp/dlhwc/* (last visited Aug. 1, 2016). For the reader's convenience, these amounts for FY 2000 to FY 2016 are provided in the following chart.

Period	NAWW [1]	Maximum weekly rate (200% of NAWW)	Minimum weekly rate (50% of NAWW)	Section 10(f) percent increase (%)
(FY 16) 10/01/2015–09/30/2016	$703.00	$1,406.00	$351.50	2.10
(FY 15) 10/01/2014–09/30/2015	688.51	1,377.02	344.26	2.25
(FY 14) 10/01/2013–09/30/2014	673.34	1,346.68	336.67	1.62
(FY 13) 10/01/2012–09/30/2013	662.59	1,325.18	331.30	2.31
(FY 12) 10/01/2011–09/30/2012	647.60	1,295.20	323.80	3.05
(FY 11) 10/01/2010–09/30/2011	628.42	1,256.84	314.21	2.63
(FY 10) 10/01/2009–09/30/2010	612.33	1,224.66	306.17	2.00
(FY 09) 10/01/2008–09/30/2009	600.31	1,200.62	300.16	3.47
(FY 08) 10/01/2007–09/30/2008	580.18	1,160.36	290.09	4.12
(FY 07) 10/01/2006–09/30/2007	557.22	1114.44	278.61	3.80
(FY 06) 10/01/2005–09/30/2006	536.82	1073.64	268.41	2.53
(FY 05) 10/01/2004–09/30/2005	523.58	1,047.16	261.79	1.59
(FY 04) 10/01/2003–09/30/2004	515.39	1,030.78	257.70	3.44
(FY 03) 10/01/2002–09/30/2003	498.27	996.54	249.14	3.15
(FY 02) 10/01/2001–09/30/2002	483.04	966.08	241.52	3.45
(FY 01) 10/01/2000–09/30/2001	466.91	933.82	233.46	3.61
(FY 00) 10/01/1999–09/30/2000	450.64	901.28	225.32	3.39

Some examples also include compensation calculations. When compensation is based on 66 and ⅔ percent of the injured employee's average weekly wage (*e.g.*, compensation for permanent total disability), the formula for calculating this percentage is expressed as: Average weekly wage amount $\times 2 \div 3$.

Subpart G—Section 10(f) Adjustments

20 CFR 702.701 What is an annual section 10(f) adjustment and how is it calculated?

Section 10(f) of the Act, 33 U.S.C. 910(f), provides for an annual upward percentage adjustment of permanent total disability compensation rates and death benefits so that the value of the compensation received does not erode over time. Proposed § 702.701 sets out the basic rules for section 10(f) adjustments.

Proposed paragraphs (a) and (b) describe the section 10(f) adjustment and how the fiscal year percentage is determined. Consistent with the statute, paragraph (a) states that section 10(f) adjustments apply each fiscal year to permanent total disability compensation and death benefits, and that those adjustments may only increase amounts payable. 33 U.S.C. 910(f) (''benefits payable for permanent total disability or death . . . shall be increased''); 33 U.S.C. 910(g) (''in no event shall compensation for death benefits be reduced''). Paragraph (b) describes how the Department calculates the annual section 10(f) adjustment, a method dictated by section 10(f) itself. In any given fiscal year, the 10(f) adjustment is the percentage increase in the applicable national average weekly wage over the prior fiscal year's applicable national average or five percent, whichever is lower. *See* 33 U.S.C. 910(f)(1), (2).

Proposed paragraphs (c) through (e) set out how the fiscal year percentage is applied in individual cases. Paragraph (c) specifies that section 10(f) adjustments are applied each October 1 to the prior year's compensation or death benefits payable to the claimant. By using the statutory term ''payable,'' the Department intends the percentage increase to apply to the compensation and death benefits due during the prior year, even if not actually paid. Paragraph (d) implements the statutory requirements that calculations resulting from section 10(f) adjustments are rounded to the nearest dollar and that no adjustment is made if the amount is less than one dollar. *See* 33 U.S.C. 910(g). And paragraph (e) provides that section 10(f) adjustments may not increase compensation or death benefits beyond the maximum rate for any fiscal year. This limitation is consistent with LHWCA section 6(b)(1)'s command that compensation payments, whether for disability or death, must not exceed the applicable fiscal year's maximum rate.

Finally, proposed paragraph (f) states that the adjustments do not apply to compensation for temporary or partial disability, including temporary total disability, temporary partial disability, and permanent partial disability. The paragraph reflects the limitation set forth in paragraph (a) and is added for clarity.

Subpart H—Maximum and Minimum Compensation Rates

General

20 CFR 702.801 Scope and Intent of This Subpart

Proposed § 702.801 describes the statutory provisions this subpart is intended to implement. Paragraph (a) generally lists the statutory provisions that affect the maximum and minimum compensation and death benefits payable to entitled individuals. Section 6(b) of the LHWCA, 33 U.S.C. 906(b), sets the maximum compensation rate for death or disability compensation at 200 percent of the applicable national average weekly wage, and the minimum compensation rate for total disability at the lower of the employee's average weekly wage or 50 percent of the applicable national average weekly wage. Section 6(b) also provides that the

[1] For purposes of this chart, ''NAWW'' means the applicable national average weekly earnings of production or nonsupervisory workers on private nonagricultural payrolls during the first three quarters of the preceding fiscal year as determined by the Department.

Secretary of Labor determines the applicable national average weekly wage for each one-year period from October 1 to September 30. Section 6(c), 33 U.S.C. 906(c), provides that the Secretary's determination of the national average weekly wage for each one-year period ''shall apply to employees or survivors currently receiving compensation for permanent total disability or death benefits during such period, as well as those newly awarded compensation during such period.'' Section 9(e), 33 U.S.C. 909(e), includes provisions that affect the minimum death benefits payable to a deceased employee's survivors.

Because the interpretation of section 6(c) is important to determining how the maximum and minimum provisions apply and has been the subject of litigation, proposed paragraph (b) more specifically addresses section 6(c)'s ''newly awarded compensation'' and ''currently receiving compensation'' phrases. Paragraph (b)(1) adopts the Supreme Court's conclusion in *Roberts* that a claimant, regardless of the nature or extent of disability, is ''newly awarded compensation'' when he or she first becomes disabled and entitled to compensation. *See supra* Section I. B. Claimants are initially subject to the maximum and minimum rates derived from the national average weekly wage in effect during the fiscal year his or her disability begins. Paragraph (b)(2) applies the Supreme Court's *Roberts* analysis to death benefits by providing that a deceased employee's survivor is ''newly awarded compensation'' on the day of the employee's death, the first time a survivor may be entitled to death benefits. *See* discussion *infra* at proposed § 702.807. And paragraph (b)(3) provides that a claimant is ''currently receiving compensation'' during the period for which the compensation is payable, regardless of when it is actually paid. This construction is consistent with the Ninth and Eleventh Circuits' interpretations. *See supra* Section I. C. While these phrases are not used in the remainder of the proposed subpart, the concepts set forth in paragraph (b) underlie the rules.

20 CFR 702.802 Applicability of This Subpart

Proposed § 702.802(a) lists several circumstances in which this subpart's rules do not apply, including: Approved settlements made under section 8(i) of the Act, 33 U.S.C. 908(i); payments for an employee's compensable death made to the Special Fund when the employee has no eligible survivors, 33 U.S.C. 944(c)(1); payments for medical expenses, 33 U.S.C. 907; and any other compensation calculated and paid in a lump sum, such as the two years of death benefits payable to an employee's eligible surviving spouse who remarries, 33 U.S.C. 909(b), or when compensation payments are commuted, 33 U.S.C. 909(g). In all of these circumstances, the maximum and minimum weekly rates do not apply either because the compensation due is not based on a weekly rate (*e.g.,* medical expenses) or it is not necessarily paid on a weekly basis (*e.g.,* settlements, commutations). Although not subject to the rules in this subpart, the maximum and minimum compensation rates will nevertheless be relevant in some of these circumstances. For example, the Department would consider such compensation rates in calculating a commuted award or death benefits payable when a survivor remarries. Similarly, the Department anticipates that private parties will consider the maximum and minimum compensation rates in settlement negotiations, and the Department will consider them in deciding whether to approve settlements.

Proposed § 702.802(b) provides that the rules governing minimum compensation and death benefits payable do not apply to claims arising under the Defense Base Act (DBA), 42 U.S.C. 1651 *et seq.* The DBA specifically precludes application of the LHWCA's minimum compensation provisions: ''The minimum limit on weekly compensation for disability, established by section 6(b), and the minimum limit on the average weekly wages on which death benefits are to be computed, established by section 9(e) of the [Longshore] Act, shall not apply in computing compensation and death benefits under [the DBA].'' 42 U.S.C. 1652(a). The Secretary's regulations implementing the DBA also reflect this limitation. *See* 20 CFR 704.103. The limitation in proposed § 702.802(b) comports with these authorities.

20 CFR 702.803 Definitions

This section defines certain terms used in this subpart; these definitions do not apply outside of this subpart. Proposed paragraph (a) defines a claimant's ''calculated compensation rate'' as the weekly compensation or death benefits payable prior to any consideration of the maximum or minimum rates, or a section 10(f) adjustment. As discussed above (*see supra* Section I. A.), this figure is a specified percentage of the employee's average weekly wage at the time of the injury or death. But there are exceptions. For example, in certain claims, the calculated compensation rate is based on the national average weekly wage rather than on the employee's actual earnings. 33 U.S.C. 909(e), 910(d)(2)(B).

Proposed paragraph (b) defines the phrase ''date of disability'' as the date an employee first becomes economically impaired—or, in other words, unable to earn the same wages—as a result of a covered injury. The phrase incorporates the statutory definition of ''disability,'' *see* 33 U.S.C. 902(10), and is based on the Supreme Court's decision in *Roberts,* which held that the maximum compensation rate applicable on the day the employee became ''entitled to compensation because of disability'' controlled. *Roberts,* 132 S.Ct. at 1357. The phrase is used in this subpart to delineate when certain minimum or maximum compensation rates apply.

The proposed rule, however, excepts from the general ''date of disability'' definition three situations that demand special treatment. Paragraph (b)(2)(i) provides that for scheduled permanent partial disabilities under 33 U.S.C. 908(c)(1)–(20) that are not preceded by another category of disability (*i.e.,* permanent total, temporary total, or temporary partial), the date of disability is when the employee first becomes permanently impaired by the injury to the scheduled member. This exception is necessary because an employee may suffer a scheduled injury without any loss in wage-earning capacity, which is the touchstone for the general ''date of disability'' definition. Paragraph (b)(2)(ii) establishes a separate date of disability for occupational diseases because the disease may manifest after voluntary retirement, when the employee does not experience a loss of wage-earning capacity. Paragraph (b)(2)(iii) provides that for very short-term disabilities lasting no more than 14 days, the date of disability is 4 days after the injury affected the employee's wage earning capacity. For such a short-term disability, section 6(a) of the Act provides that no compensation is payable for the first 3 days of disability. 33 U.S.C. 906(a). Thus, using the fourth day as the ''date of disability'' for determining the maximum and minimum compensation payable reflects the date on which the employee is actually entitled to compensation.

The remaining definitions explain how basic terms are used in the proposed rule. Paragraph (c) defines the dates of a standard fiscal year. Paragraphs (d) and (e) define ''maximum rate'' and ''minimum rate'' as the weekly compensation rates the Department calculates for each fiscal year. And paragraph (f) defines a ''section 10(f) adjustment'' as the annual compensation increase some claimants receive under LHWCA section 10(f), 33 U.S.C. 910(f). *See* proposed § 702.701.

20 CFR 702.804 What are the weekly maximum and minimum rates for each fiscal year and how are they calculated?

Proposed § 702.804 explains how the Department calculates basic weekly maximum and minimum rates for each fiscal year. Paragraph (a) notes that these weekly compensation rates are one factor considered when calculating compensation and death benefits payable. Paragraphs (b) and (c) set forth the calculation formulas for weekly maximum and minimum rates. Both are based on the national average weekly wage, which the Act defines as the ''national average weekly earnings of production or nonsupervisory workers on private nonagricultural payrolls.'' 33 U.S.C. 902(19). These statistics are compiled on an ongoing basis by the Department's Bureau of Labor Statistics. Before each new fiscal year, the Department calculates the average earnings of these employees for the period October 1 through June 30 (*i.e.,* the first three quarters) of the current fiscal year. 33 U.S.C. 906(b)(3). The Act pegs the maximum weekly rate at 200 percent of this number and the minimum at 50 percent. 33 U.S.C. 906(b)(1), (2). For example, the national average weekly earnings of production or nonsupervisory workers on private, nonagricultural payrolls for the period from October 1, 2013, to June 30, 2014 (*i.e.,* the first three quarters of FY 2014), were $688.51. As a result, the Department determined that the maximum compensation rate for FY 2015 was $1,377.02 ($688.51 × 2) and the minimum compensation rate was $344.26 ($688.51 × 2).

Maximum Rates

20 CFR 702.805 What weekly maximum rates apply to compensation for permanent partial disability, temporary total disability, and temporary partial disability?

Proposed § 702.805 provides that the maximum rate in effect for the fiscal year on the employee's date of disability applies to all compensation payable for temporary partial disability, temporary total disability, or permanent partial disability, including compensation payable in subsequent fiscal years. This rule effectuates the Supreme Court's construction of the ''newly awarded compensation'' clause by applying the maximum rate for the fiscal year the employee's disability begins. For these types of compensation, the date-of-disability fiscal year's maximum rate applies to all compensation payments—including compensation payable for subsequent fiscal years—because section 6(c)'s ''currently receiving compensation'' clause does not apply. 33 U.S.C. 906(c) (maximum rate determinations ''with respect to a period shall apply to employees or survivors currently receiving compensation for permanent total disability or death benefits during such period[.]'').

The first example at paragraph (b)(1) sets out a common scenario involving an injured employee who is temporarily totally disabled for a period prior to being permanently partially disabled. Although his compensation periods span more than one fiscal year, the maximum rate that applies remains the rate in effect on his date of disability. *See* proposed § 702.803(b)(1). The second example at paragraph (b)(2) is slightly more complicated. The employee incurs two separate periods of temporary total disability from the same injury; each period begins in a different fiscal year. Under section 6(c), the maximum rate applicable at the beginning of the first disability period applies to all payments for temporary total disability, including those in the second period. The third example at paragraph (b)(3) addresses an occupational disease discovered post-retirement. Occupational diseases occurring after an employee has voluntarily retired are considered permanent partial disabilities. 20 CFR 702.601(b). Thus, compensation payable in this instance is subject to the maximum rate in effect on the date of disability—when the employee becomes aware of the relationship between employment, the disease and any disability. *See* proposed § 702.803(b)(2)(ii).

20 CFR 702.806 What weekly maximum rates apply to compensation for permanent total disability?

Proposed § 702.806 implements both the ''newly awarded'' and ''currently receiving'' compensation clauses for permanent total disability compensation as they pertain to the maximum compensation payable. Paragraph (a) provides that the maximum rate for the fiscal year during which the employee first becomes permanently and totally disabled applies to all compensation payable during that fiscal year. Paragraph (b) then provides that all periods of permanent total disability in subsequent fiscal years arising from the same injury are subject to the maximum rates for those subsequent fiscal years because the employee is then ''currently receiving compensation.''

Proposed paragraph (c) addresses how the 10(f) adjustment applies in a ''cross-over'' year. A cross-over year is one in which the claimant's compensation was paid at the maximum rate in the current fiscal year, but the claimant's calculated compensation rate does not exceed the maximum rate set for the next fiscal year. In those circumstances, the rule requires that the claimant's compensation for the next fiscal year be increased by the amount of the 10(f) adjustment up to the maximum for that fiscal year.

The examples in proposed paragraph (d) apply these principles. Paragraph (d)(1) presents the relatively straightforward situation of an employee who is permanently totally disabled from the time of injury. He is ''newly awarded'' compensation in the fiscal year he became disabled and his compensation is subject to that fiscal year's maximum rate. In subsequent years, he is ''currently receiving'' compensation and his compensation is subject to the maximum rate for each subsequent fiscal year. Paragraph (d)(2) adds an additional wrinkle to the first example. Here, the employee suffers a period of temporary total disability that spans more than one fiscal year before he becomes permanently totally disabled. The maximum that applies to the entire temporary total disability compensation period is the fiscal year rate in effect on the date of disability (in the example, FY 2000), which is when the employee is ''newly awarded'' compensation. *See* proposed § 702.805(a). When the employee becomes permanently totally disabled two years later, however, he is ''currently receiving'' permanent total disability compensation and the maximum rate in effect at that time (in the example, FY 2002) applies. Compensation for permanent total disability in succeeding years is subject to those subsequent fiscal years' maximum rates because he continues to be ''currently receiving'' compensation.

Finally, proposed paragraph (d)(3) demonstrates how the rule operates in a ''cross-over'' year. In the example, employee C's calculated compensation rate exceeds the annual fiscal year maximum rate each year from when he was first permanently totally disabled in FY 2009 through FY 2012. In FY 2013, however, the employee's calculated compensation rate falls below the maximum rate and remains below that rate even after the addition of a section 10(f) adjustment. Thus, for FY 2013, employee C's compensation is not limited by the maximum rate.

20 CFR 702.807 What weekly maximum rates apply to death benefits?

Determining the maximum rates for death benefits in any particular case can be straightforward or involve several statutory provisions. The proposed rule integrates these provisions to provide a comprehensive approach to the issue.

LHWCA section 6(b)(1) applies the ''applicable'' maximum rate to all compensation for disability or death. For death benefits purposes, proposed § 702.807(a) defines the ''applicable'' rate as the fiscal-year rate in effect when the employee died. By using the employee's date of death, the rule applies the ''newly awarded'' clause in the same manner as the Supreme Court applied it to disability claims in *Roberts:* A survivor's right to benefits first arises at the time of death. *See generally Ingalls Shipbuilding, Inc.* v. *Director, OWCP,* 519 U.S. 248, 257–58 (1997) (survivors seeking death benefits cannot satisfy prerequisites prior to employee's death); *Travelers Insurance Co.* v. *Marshall,* 634 F.2d 843, 846 (5th Cir. 1981) (section 9 ''cause of action for death benefits certainly does not arise until [employee's] death'').

Proposed § 702.807(b) sets out the general rules for determining the death-benefits cap in the year the employee died. These limits are compelled by LHWCA section 6(b)(1) along with the provisions of section 9(e), 33 U.S.C. 909(e). Section 9(e) provides an alternative method for computing death benefits for survivors of lower-wage employees to boost the benefit amount. If the deceased employee's actual average weekly wage was lower than the national average weekly wage, death benefits are calculated as a percentage of the national average weekly wage instead of a percentage of the actual wage. This results in a higher calculated compensation rate than if the calculation were based on the employee's actual wage. Survivors are entitled to benefits at the higher calculated rate except when that rate exceeds the employee's full actual weekly wage. In that event, section 9(e)(1) sets an initial cap by providing that total weekly death benefits ''shall not exceed the lesser of the average weekly wages of the deceased'' (or the section 6(b)(1) maximum rate). 33 U.S.C. 909(e)(1). Thus, in no event may weekly death benefits payable in the year of the employee's death exceed the employee's actual average weekly wages. Proposed paragraph (b) implements these provisions by limiting ''aggregate'' weekly death benefits—meaning the death benefits payable to all survivors combined—to the lower of the maximum rate applicable for the fiscal year in which the employee died or the employee's actual average weekly wages.

Proposed paragraph (c) sets out rules governing payments for subsequent fiscal years. Consistent with the ''currently receiving'' clause, paragraph (c)(1) provides that each subsequent fiscal year's maximum rate applies to aggregate death benefits. Paragraph (c)(2) provides an exception to the section 9(e)(1) feature limiting death benefits to no more than the employee's actual average weekly wages. If death benefits were paid at the employee's full average weekly wage in the year of death, paragraph (c)(2) provides that death benefits payable may be adjusted upward under section 10(f). *See Donovan,* 31 BRBS 2 (holding that section 9(e)(1) does not bar application of 10(f) adjustments even if adjusted death benefits amount exceeds deceased employee's actual average weekly wage).

Finally, proposed paragraph (d) addresses LHWCA section 9(e)'s specific limit on death benefits payable when death results from an occupational disease that manifested after the employee retired voluntarily (*i.e.,* he or she did not retire because of disability). In those circumstances, LHWCA section 9(e)(2) provides that ''total weekly benefits shall not exceed one fifty-second part of the employee's average annual earnings during the 52-week period preceding retirement.'' 33 U.S.C. 909(e)(2). Proposed paragraph (d)(1) implements this provision, as well as the general section 6(b) maximum cap, by providing that aggregate death benefits paid during the year of the employee's death must not exceed the lower of that fiscal year's maximum rate *or* one-fifty-second part of the employee's average annual earnings during the 52-weeks preceding retirement. Proposed paragraph (d)(2)(i) provides that each subsequent fiscal year's maximum rate applies to aggregate death benefits because death benefits are subject to the ''currently receiving'' clause. If death benefits in the year of death were paid at one-fifty-second part of the employee's average annual earnings, proposed paragraph (d)(2)(ii) provides that the death benefits payable may be adjusted upward under section 10(f).

The example at proposed paragraph (e)(1) illustrates that the maximum rate applicable at the time of the employee's death applies to death benefits, even when the employee's injury occurred in an earlier fiscal year. Employee A's injury occurred in FY 2013 but he did not die as a result of the injury until FY 2014. His survivor's death benefits for the remainder of the year in which he died are subject to the FY 2014 maximum rate, with subsequent death benefits subject to each subsequent fiscal year's rate.

Paragraph (e)(2)'s example demonstrates how the death-benefits-calculation method for survivors of low-wage earners interfaces with the cap placed on those benefits in some circumstances. In the example, employee B's weekly earnings fell below the national average during the year of her death. Thus, her survivor's death benefits are computed using the higher national average weekly wage. 33 U.S.C. 909(e); *see* proposed § 702.811(a). Because that calculated compensation rate of $331.30 exceeds the employee's actual average weekly wage of $300.00, death benefits are capped at the employee's actual wages, except for section 10(f) adjustments in subsequent fiscal years.

Paragraph (e)(3) sets out an example involving an occupational disease discovered more than one year post-retirement that leads to death. Employee C's compensation during his lifetime is calculated based on the FY 2002 national average weekly wage because his disease manifested then and he had voluntarily retired more than one year earlier. Based on the date of employee C's death, his survivors' death benefits are calculated based on the national average weekly wage for FY 2015. 33 U.S.C. 910(d)(2)(B); 20 CFR 702.604(b). This calculation yields a weekly figure greater than 1/52 part of the employee's last year of earnings. Thus, the total death benefits payable are capped at 1/52 part of the employee's actual earnings, except for section 10(f) adjustments in subsequent fiscal years.

Minimum Rates

20 CFR 702.808 What weekly minimum rates apply to compensation for partial disability?

The LHWCA places no minimum compensation requirements on payments for temporary partial disability or permanent partial disability. Accordingly, proposed § 702.808 simply states that there is no minimum rate for these types of compensation.

20 CFR 702.809 What weekly minimum rates apply to compensation for temporary total disability?

Proposed § 702.809 provides that the minimum rate in effect for the fiscal year on the employee's date of disability applies to all compensation payable for temporary total disability, including compensation payable in subsequent fiscal years. LHWCA section 6(b)(2) generally provides that compensation for total disability cannot fall below 50 percent of the ''applicable'' national average weekly wage unless the employee's actual average weekly wages are less than that amount. In that event, the employee receives his or her average weekly wages as compensation. This rule effectuates the Supreme Court's construction of the ''newly awarded compensation'' clause by applying the minimum rate for the fiscal year the employee's disability begins. *See generally Montoya* v. *Navy Exchange Service Command,* 49 BRBS 51 (2015) (applying *Roberts,* employee entitled to minimum rate in effect on date of disability onset). The date-of-disability fiscal year's minimum rate applies to all temporary total disability compensation payments—including compensation payable for subsequent fiscal years—because section 6(c)'s ''currently receiving'' clause does not apply to compensation for temporary disabilities. *See* 33 U.S.C. 906(c) (national average weekly wage determinations ''with respect to a period shall apply to employees or survivors currently receiving compensation for permanent total disability or death benefits during such period''). Thus, the applicable minimum remains the one in effect on the date of disability.

Proposed paragraph (b)'s example demonstrates how the minimum rate provision works when the employee's calculated compensation rate falls below it. In the example, employee A's calculated compensation rate for FY 2014 (the year of his injury) is $333.34 per week. That number falls below the FY 2014 minimum rate of $336.67. Thus, employee A's compensation is raised to the minimum rate. Although his temporary total disability continues into FY 2015, his rate remains tied to the FY 2014 minimum because neither section 6(c)'s ''currently receiving'' clause nor section 10(f)'s adjustments apply to compensation for temporary disabilities. *See* 33 U.S.C. 906(c), 910(f).

20 CFR 702.810 What weekly minimum rates apply to compensation for permanent total disability?

Proposed § 702.810(a) provides that the lower of the minimum rate in effect on the date of disability *or* the employee's actual average weekly wage on that date sets the floor below which compensation may not fall. This rule implements LHWCA section 6(b)(2)'s direction that compensation for total disability be no less than 50 percent of the ''applicable'' national average weekly wage unless the employee's actual average weekly wages are less than that amount. In that event, the employee receives his or her average weekly wages as compensation. By using the date of disability to describe the applicable fiscal year's minimum rate, paragraph (a) also implements section 6(c)'s ''newly awarded'' clause.

Proposed paragraph (b) describes how the minimum applies in subsequent fiscal years. It sets the minimum compensation level at the lower of the minimum rate for each subsequent fiscal year or the employee's actual average weekly wages on the date of disability. By applying subsequent fiscal years' minimum rates, the regulation implements section 6(c)'s ''currently receiving'' clause.

Proposed paragraph (c)'s example shows how this regulation applies when a low-wage earner suffers a permanent total disability. Because his calculated compensation rate for the fiscal year in which he first became disabled (in the example, FY 2003) was below the applicable fiscal year minimum rate, and his actual weekly wages were above the fiscal year minimum, he is compensated at the minimum rate. But in subsequent fiscal years, when the minimum rises above the employee's actual average weekly wages at the time of disability, he receives his actual wages in compensation, subject in following years to section 10(f) adjustments.

20 CFR 702.811 What weekly minimum rates apply to death benefits?

Rather than applying weekly minimum rates like those used for temporary total or permanent total disability compensation—specified amounts below which compensation may not fall—section 9(e) of the Act, 33 U.S.C. 909(e), uses a different mechanism to ensure a minimum compensation level for an employee's survivors. Section 9(e) does this by using the national average weekly wage calculated by the Department under section 6(b) as a proxy to compute death benefits when the deceased employee's actual weekly wage falls below the national average. *See* 33 U.S.C. 902(19) (defining national average weekly wage for LHWCA purposes). Using the national average weekly wage ensures that death benefits will be paid at a minimal level. Proposed paragraph (a) sets out this procedure by providing that the average weekly wage used to compute death benefits is the greater of the employee's actual wages or the national average. The regulation also provides that the applicable national average weekly wage is the one in effect when the employee died, which is when a survivor's right to benefits first arises. *See generally Ingalls Shipbuilding,* 519 U.S. at 257–58 (survivors seeking death benefits cannot satisfy prerequisites prior to employee's death); *Travelers Insurance,* 634 F.2d at 846 (section 9 ''cause of action for death benefits certainly does not arise until [employee's] death''). Paragraph (b) adds that the weekly minimum rate, as that phrase is used in this subpart, does not apply to death benefits.

III. Statutory Authority

Section 39(a) of the LHWCA, 33 U.S.C. 939(a), authorizes the Secretary of Labor to prescribe rules and regulations necessary for the administration of the Act.

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

This rulemaking would impose no new collections of information.

V. Executive Orders 12866 and 13563 (Regulatory Planning and Review)

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. The Department has considered this proposed rule with these principles in mind and has concluded that the regulated community will benefit from this regulation.

This proposed rule will benefit the parties by providing them with greater guidance on applying the Act's maximum and minimum compensation provisions and section 10(f) adjustments in determining the amount of disability compensation or death benefits payable. By clarifying how these provisions apply, the rule will also promote consistency so that similarly situated claimants receive similar compensation or death benefits. In addition, the rule will benefit the regulated community by forestalling further litigation over the ''currently receiving'' clause, which neither the Supreme Court nor several circuit courts have yet construed. Indeed, the absence of regulations implementing these statutory provisions led to much of the litigation described above. *See supra* Sections I. B. and C.

The Department also sees no countervailing burden—economic or otherwise—other than those imposed by the statute itself that would counsel against promulgating this rule.

Finally, because this is not a ''significant regulatory action'' within the meaning of Executive Order 12866, the Office of Management and Budget has not reviewed it prior to publication.

VI. 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.

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

The Regulatory Flexibility Act of 1980, as amended (5 U.S.C. 601 *et seq.*), requires an agency to prepare a regulatory flexibility analysis 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 analysis or certification available for public comment.

The Department has determined that a regulatory flexibility analysis under the RFA is not required for this rulemaking. While many longshore employers are small entities within the meaning of the RFA, *see generally* 77 FR 19471–72 (March 30, 2012), this rule, if adopted in final, will not have a significant economic impact on them. The proposed rules reflect current payment practices and thus impose no new costs on employers or their insurance carriers. As explained above, the proposed rules mainly codify case law interpreting how the Act's maximum and minimum provisions work; the rules are based primarily on the Supreme Court's controlling decision in *Roberts,* the Ninth and Eleventh Circuits' decisions in *Roberts* and *Boroski,* and the Benefits Review Board's decisions in *Reposky* and *Lake.*

With one small exception, these decisions comport with the Director's longstanding interpretation and application of the maximum and minimum compensation provisions. That exception involved cases in which the employee's disability was initially something less than permanent total—temporary total, permanent partial, or temporary partial—and in a later fiscal year became permanently totally disabling. Prior to the Ninth Circuit's decision in *Roberts,* the Department took the view that the employee would have remained at the maximum rate in effect on the date of disability until the next October 1. On that October 1, his compensation rate would be determined by applying section 10(f) to increase his maximum rate by the same percentage as the increase to the national average weekly wage. But the Ninth Circuit held that the employee need not wait until the next October 1 and is instead immediately subject to the maximum rate in effect on the day he or she becomes permanently totally disabled under section 6(c)'s ''currently receiving'' clause. *Roberts,* 625 F.3d at 1208–09. The Department has been following the Ninth Circuit's construction of the statute since 2012, and the regulations reflect this construction as well.

Based on these facts, the Department certifies that this rule will not have a significant economic impact on a substantial number of small entities. Thus, a regulatory flexibility analysis is not required. The Department invites comments from members of the public who believe the regulations will have a significant economic impact on a substantial number of small longshore employers or insurers. The Department has provided the Chief Counsel for Advocacy of the Small Business Administration with a copy of this certification. *See* 5 U.S.C. 605.

XIII. 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.

IX. Executive Order 12988 (Civil Justice Reform)

This proposed rule meets the applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

List of Subjects in 20 CFR Part 702

Administrative practice and procedure, Claims, Longshore and harbor workers, Maximum compensation rates, Minimum compensation rates, Workers' compensation.

For the reasons set forth in the preamble, the Department of Labor proposes to amend 20 CFR part 702 as follows:

PART 702—ADMINISTRATION AND PROCEDURE

■ 1. The authority citation for part 702 is revised to read as follows:

Authority: 5 U.S.C. 301, and 8171 *et seq.;* 33 U.S.C. 901 *et seq.;* 42 U.S.C. 1651 *et seq.;* 43 U.S.C. 1333; Reorganization Plan No. 6 of 1950, 15 FR 3174, 64 Stat. 1263; Secretary's Order 10–2009, 74 FR 58834.

■ 2. In part 702, add subparts G and H as follows:

Subpart G—Section 10(f) Adjustments

Sec.

702.701 What is an annual section 10(f) adjustment and how is it calculated?

Subpart H—Maximum and Minimum Compensation Rates

General

Sec.

702.801 Scope and intent of this subpart.
702.802 Applicability of this subpart.
702.803 Definitions.
702.804 What are the weekly maximum and minimum rates for each fiscal year and how are they calculated?

Maximum Rates

Sec.

702.805 What weekly maximum rates apply to compensation for permanent partial disability, temporary total disability, and temporary partial disability?
702.806 What weekly maximum rates apply to compensation for permanent total disability?
702.807 What weekly maximum rates apply to death benefits?

Minimum Rates

Sec.

702.808 What weekly minimum rates apply to compensation for partial disability?
702.809 What weekly minimum rates apply to compensation for temporary total disability?
702.810 What weekly minimum rates apply to compensation for permanent total disability?
702.811 What weekly minimum rates apply to death benefits?

Subpart G—Section 10(f) Adjustments

§ 702.701 What is an annual section 10(f) adjustment and how is it calculated?

(a) Claimants receiving compensation for permanent total disability or death benefits are entitled to section 10(f) adjustments each fiscal year. A section 10(f) adjustment cannot decrease the compensation or death benefits payable to any claimant.

(b) The section 10(f) adjustment for a given fiscal year is the lower of:

(1) The percentage by which the new fiscal year's national average weekly wage exceeds the prior fiscal year's national average weekly wage as determined by the Department (*see* § 702.804(b)); or

(2) 5 percent.

(c) Section 10(f) percentage increases are applied each October 1 to the amount of compensation or death benefits payable in the prior fiscal year.

(d) In applying section 10(f) adjustments—

(1) Calculations are rounded to the nearest dollar; and

(2) No adjustment is made if the calculated amount is less than one dollar.

(e) A section 10(f) adjustment must not increase a claimant's weekly compensation or death benefits beyond the applicable fiscal year's maximum rate.

(f) Section 10(f) adjustments do not apply to compensation for temporary or partial disability.

Subpart H—Maximum and Minimum Compensation Rates

General

§ 702.801 Scope and intent of this subpart.

(a) This subpart implements the Act's provisions that affect the maximum and minimum rates of compensation and death benefits payable to employees and survivors. These statutory provisions include sections 6(b) and (c), and 9(e). 33 U.S.C. 906(b), (c); 909(e). It is intended that these statutory provisions be construed as provided in this subpart.

(b) These regulations implement section 6(c), 33 U.S.C. 906(c), based on the following concepts:

(1) An employee is ''newly awarded compensation'' when he or she first becomes disabled due to an injury;

(2) A survivor is ''newly awarded compensation'' on the date the employee died; and

(3) An employee or survivor is ''currently receiving compensation'' when compensation for permanent total disability or death benefits is payable, regardless of when payment is actually made.

§ 702.802 Applicability of this subpart.

(a) This subpart applies to all compensation and death benefits paid under the Act with the following exceptions:

(1) Amounts payable under an approved settlement (*see* 33 U.S.C. 908(i));

(2) Amounts paid for an employee's death to the Special Fund (*see* 33 U.S.C. 944(c)(1));

(3) Any payments for medical expenses (*see* 33 U.S.C. 907); and

(4) Any other lump sum payment of compensation or death benefits, including aggregate death benefits paid when a survivor remarries (*see* 33 U.S.C. 909(b)) or aggregate compensation paid under a commutation (*see* 33 U.S.C. 909(g)).

(b) The rules in this subpart governing minimum disability compensation and death benefits do not apply to claims arising under the Defense Base Act, 42 U.S.C. 1651 (*see* 42 U.S.C. 1652(a); 20 CFR 704.103).

§ 702.803 Definitions.

The following definitions apply to this subpart:

(a) Calculated compensation rate means the amount of weekly compensation for total disability or death that a claimant would be entitled to if there were no maximum rates, minimum rates, or section 10(f) adjustments.

(b) Date of disability

(1) Except as provided in paragraph (b)(2), the date of disability is the date on which the employee first became incapable, because of an injury, of earning the same wages the employee was receiving at the time of the injury.

(2) Exceptions:

(i) For scheduled permanent partial disability benefits under 33 U.S.C. 908(c)(1)–(20) that are not preceded by a permanent total, temporary total, or temporary partial disability resulting from the same injury, the date of disability is the date on which the employee first becomes permanently impaired by the injury to the scheduled member.

(ii) For an occupational disease that does not immediately result in disability, the date of disability is the date on which the employee becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between his or her employment, the disease, and the disability.

(iii) For any disability lasting 14 or fewer days, the date of disability is 4 days after the date on which the employee first became incapable, because of an injury, of earning the same wages the employee was receiving at the time of the injury.

(c) Fiscal year or FY means the period from October 1 of a calendar year until September 30 of the following calendar year.

(d) Maximum rate means the maximum weekly compensation rate calculated by the Department for a given fiscal year as described in § 702.804(b).

(e) Minimum rate means the minimum weekly compensation rate calculated by the Department for a given fiscal year as described in § 702.804(c).

(f) Section 10(f) adjustment means the annual increase that certain claimants receiving compensation for permanent total disability or death are entitled to each fiscal year under 33 U.S.C. 910(f) and as calculated by the Department as described in § 702.701(b).

§ 702.804 What are the weekly maximum and minimum rates for each fiscal year and how are they calculated?

(a) For each fiscal year, the Department must determine a weekly maximum and minimum compensation rate. These amounts are called the maximum and minimum rates in this subchapter. In combination with other factors, these rates are used to determine compensation payments under the Act.

(b) The maximum compensation rate in effect for a given fiscal year is 200% of the national average weekly earnings of production or nonsupervisory workers on private, nonagricultural payrolls, as calculated by the Department, for the first three quarters of the preceding fiscal year.

(c) The minimum compensation rate in effect for a given fiscal year is 50% of the national average weekly earnings of production or nonsupervisory workers on private, nonagricultural payrolls, as calculated by the Department, for the first three quarters of the preceding fiscal year.

Maximum Rates

§ 702.805 What weekly maximum rates apply to compensation for permanent partial disability, temporary total disability, and temporary partial disability?

(a) The maximum rate in effect on the date of disability applies to all compensation payable for permanent partial disability, temporary partial disability, and temporary total disability.

(b) Examples:

(1) Employee *A* suffers a covered workplace injury on April 1, 2000, is temporarily totally disabled from that day through June 4, 2002, and is

thereafter permanently partially disabled. All compensation payable for *A's* disability is subject to the FY 2000 maximum rate.

(2) Employee *B* suffers a covered workplace injury on August 25, 2010, and is temporarily totally disabled until September 25, 2010, when he returns to work. On January 3, 2011, he again becomes temporarily totally disabled from the same injury. He ceases work and is unable to return until November 22, 2012. All compensation payable for *B's* disability is subject to the FY 2010 maximum rate.

(3) Employee *C* retires on May 6, 2011. She discovers on November 10, 2012, that she has a compensable occupational disease. All compensation payable for *C's* occupational disease is subject to the FY 2013 maximum rate. *See* § 702.601(b) (occupational diseases discovered post-retirement are compensated as permanent partial disabilities).

§ 702.806 What weekly maximum rates apply to compensation for permanent total disability?

(a) The maximum rate in effect on the date that the employee became totally and permanently disabled applies to all compensation payable for permanent total disability during that fiscal year.

(b) For all periods the employee is permanently and totally disabled in subsequent fiscal years, the weekly compensation payable is subject to each subsequent year's maximum rate.

(c) If a claimant is receiving compensation for permanent total disability at the maximum rate for the current fiscal year, but the next fiscal year's maximum rate will be higher than the claimant's calculated compensation rate, the claimant's compensation for the next fiscal year will increase by the amount of the 10(f) adjustment, subject to the maximum rate for the next fiscal year.

(d) Examples:

(1) Employee *A* suffers a covered workplace injury on April 1, 2000, and is permanently and totally disabled from that date forward. *A's* compensation for the period from April 1, 2000, until September 30, 2000, is subject to the FY 2000 maximum rate. Beginning October 1, 2000, *A's* compensation for FY 2001 is subject to the FY 2001 maximum rate, compensation for FY 2002 is subject to the FY 2002 maximum rate, *etc.*

(2) Employee *B* suffers a covered workplace injury on April 1, 2000, is temporarily totally disabled from that day through June 3, 2002, and is thereafter permanently totally disabled. *B's* compensation for the period from April 1, 2000, through June 3, 2002, is subject to the FY 2000 maximum rate (*see* § 702.805(a)). B's compensation for the period from June 4, 2002, through September 30, 2002, is subject to the FY 2002 maximum rate. Beginning October 1, 2002, *B's* compensation for FY 2003 is subject to the FY 2003 maximum rate, compensation for FY 2004 is subject to the FY 2004 maximum rate, *etc.*

(3) Employee *C* suffers a covered workplace injury in FY 2009 and is permanently totally disabled from that day forward. He was earning $1,950.00 a week when he was injured, making his calculated compensation rate $1,300.00 ($1,950.00 × 2 ÷ 3). His calculated compensation rate exceeds the maximum rate from FY 2009–2012; thus, his compensation is limited to each year's maximum rate. In FY 2013, *C's* calculated compensation rate of $1,300.00 is, for the first time, less than the FY 2013 maximum rate of $1,325.18. Applying the FY 2013 2.31% section 10(f) adjustment to *C's* FY 2012 compensation rate of $1,295.20 results in a compensation rate of $1,325.00 ($1,295.20 × .0231 = $29.92 (rounded to the nearest cent); $1,295.20 + $29.92 = $1,325.12, rounded to the nearest dollar). This amount falls just below the FY 2013 maximum rate of $1,325.18. Thus, *C's* benefit rate for FY 2013 is $1,325.00, and is not limited by the maximum rate.

§ 702.807 What weekly maximum rates apply to death benefits?

(a) The maximum rate in effect on the date that the employee died applies to all death benefits payable during that fiscal year.

(b) Aggregate weekly death benefits paid to all eligible survivors during the fiscal year in which the employee died must not exceed the lower of—

(1) The maximum rate for that fiscal year; or

(2) The employee's average weekly wages.

(c) For subsequent fiscal years—

(1) Aggregate weekly death benefits paid during each subsequent fiscal year are subject to each subsequent year's maximum rate.

(2) If death benefits were paid in the first year at the employee's full average weekly wage under paragraph (b)(2), the aggregate weekly death benefits paid for each subsequent year may not exceed the current benefit rate plus the subsequent year's section 10(f) adjustment (*see* § 702.701).

(d) Post-retirement occupational diseases. Notwithstanding paragraphs (a)–(c), if an employee's death results from an occupational disease where the date of disability occurred after the employee voluntarily retired—

(1) Aggregate weekly death benefits paid to all eligible survivors during the fiscal year in which the employee died must not exceed the lower of:

(i) The maximum rate for that fiscal year; or

(ii) One fifty-second part of the employee's average annual earnings during the 52-week period preceding retirement.

(2) For subsequent fiscal years—

(i) Aggregate weekly death benefits paid during each subsequent fiscal year are subject to each subsequent year's maximum rate.

(ii) If death benefits were paid in the first year at 1/52 part of the employee's average annual earnings prior to retirement under paragraph (d)(1)(ii), the aggregate weekly death benefits paid for each subsequent year may not exceed the current benefit rate plus the subsequent year's section 10(f) adjustment (*see* § 702.701).

(e) Examples:

(1) Employee *A* suffers a covered workplace injury on May 1, 2013, and is permanently and totally disabled from that date until August 1, 2014, when he dies due to the injury. He has one eligible survivor and his average weekly wage at the time of injury was $3,000.00. The calculated compensation rate for *A's* survivor is $1,500.00 (*i.e.,* 50% of *A's* average weekly wage). *A's* weekly survivor's benefits for the period from August 2, 2014, to September 30, 2014, are limited to the FY 2014 maximum rate of $1,346.68. Beginning October 1, 2014, *A's* survivor's benefits for FY 2015 are subject to the FY 2015 maximum rate, benefits for FY 2016 are subject to the FY 2016 maximum rate, *etc.*

(2) Employee *B* suffers a covered workplace injury and dies on December 1, 2012. She has one eligible survivor and her average weekly wage was $300.00. Because *B's* average weekly wage of $300.00 falls below the FY 2013 national average weekly wage of $662.59, death benefits are calculated at 50% of that national average wage (*see* 33 U.S.C. 909(e)). This yields a calculated compensation rate of $331.30. But because this rate exceeds *B's* actual average weekly wages, weekly death benefits payable during FY 2013 are limited to $300.00. In FY 2014, *B's* survivor is entitled to a 1.62% section 10(f) adjustment, resulting in weekly death benefits of $305.00 ($300.00 × .0162 = $4.86; $300.00 + $4.86 = $304.86, rounded to the nearest dollar). *B's* survivor would continue to receive section 10(f) adjustments in subsequent fiscal years.

(3) Employee *C* retired on February 1, 1998. During his last year of employment, he earned $23,000. He discovers on April 15, 2002, that he has a compensable occupational disease resulting in a 50% permanent impairment. *See* § 702.601(b). Because he retired more than one year before this date, his payrate for calculating compensation is the FY 2002 national average weekly wage, or $483.04. *See* § 702.603(b). He is entitled to weekly compensation of $161.01 ($483.04 × 2 ÷ 3 × 50%). *C* dies from the disease on June 1, 2015, leaving two survivors. The payrate for calculating death benefits is the FY 2015 national average weekly wage, or $688.51. *See* § 702.604(b). The survivors' aggregate calculated compensation rate is $459.01 ($688.51 × 2 ÷ 3). But because compensation cannot exceed 1/52 part of *C's* last year of earnings, aggregate weekly death benefits payable for FY 2015 are limited to $442.31 ($23,000 ÷ 52). For FY 2016, *C's* survivors are entitled to a 2.10% section 10(f) adjustment resulting in weekly death benefits of $452.00 ($442.31 × 021 = $9.29 (rounded to the nearest cent); $442.31 + $9.29 = $451.60, rounded to the nearest dollar). *C's* survivors would continue to receive section 10(f) adjustments in subsequent fiscal years.

Minimum Rates

§ 702.808 What weekly minimum rates apply to compensation for partial disability?

There is no minimum rate for compensation paid for partial disability, whether temporary or permanent.

§ 702.809 What weekly minimum rates apply to compensation for temporary total disability?

(a) The minimum compensation payable for temporary total disability is the lower of:

(1) The minimum rate in effect on the date of disability, or

(2) The employee's average weekly wage on the date of disability.

(b) Example: Employee *A* suffers a covered workplace injury on May 6, 2014. He is temporarily totally disabled until November 6, 2015, when he returns to work. His average weekly wages at the time of disability were $500.00. Because his calculated compensation rate (*i.e.,* 66 and ⅔% of $500.00, or $333.34) is lower than the $336.67 FY 2014 minimum rate, *A's* compensation is raised to $336.67 for the entire period of his disability.

§ 702.810 What weekly minimum rates apply to compensation for permanent total disability?

(a) The weekly minimum compensation payable for the fiscal year in which the employee became permanently and totally disabled is the lower of:

(1) The minimum rate in effect on the date of disability, or

(2) The employee's average weekly wage on the date of disability.

(b) For all periods the employee is permanently and totally disabled in subsequent fiscal years, the weekly minimum compensation payable is the lower of:

(1) Each subsequent fiscal year's minimum rate, or

(2) The employee's average weekly wage on the date of disability.

(c) Example: Employee *A* suffers a covered workplace injury on April 1, 2003, and is permanently totally disabled from that day forward. He was earning $250.00 a week when he was injured. His calculated compensation rate is $166.67 ($250 × 2 ÷ 3). The FY 2003 minimum rate is $249.14. Because *A's* calculated compensation rate is below the FY 2003 minimum rate, and his actual weekly wage is above that rate, he is entitled to compensation at the minimum rate of $249.14 from April 1, 2003, to September 30, 2003. The FY 2004 minimum rate is $257.70. Because *A's* actual weekly wages on the date of disability are lower than the FY 2004 minimum rate, *A's* minimum weekly compensation rate for FY 2004 is $250.00. His weekly compensation rate for FY 2004, however, is higher because of a section 10(f) adjustment. For FY 2004, *A's* compensation rate is increased by a 3.44% section 10(f) adjustment, raising his compensation level to $258.00 ($249.14 × .0344 = $8.57; $249.14 + $8.57 = $257.71, rounded to the nearest dollar).

§ 702.811 What weekly minimum rates apply to death benefits?

(a) The average weekly wage used to compute death benefits is the greater of—

(1) The deceased employee's average weekly wages; or

(2) The national average weekly wage in effect at the time of the employee's death.

(b) The weekly minimum rate does not apply to death benefits.

Leonard J. Howie III,

Director, Office of Workers' Compensation Programs.

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DEPARTMENT OF THE INTERIOR

National Indian Gaming Commission

25 CFR Part 515

RIN 3141–AA65

Privacy Act Procedures

AGENCY: National Indian Gaming Commission, Department of the Interior.

ACTION: Notice of proposed rulemaking.

SUMMARY: The purpose of this document is to propose amendments to the procedures followed by the National Indian Gaming Commission (Commission) when processing a request under the Privacy Act of 1974. The proposed amendments make the following changes to the current regulations. These changes will serve to update certain Commission information, streamline how the Commission processes its Privacy Act requests, and aligns those processes with its procedures for processing Freedom of Information Act requests.

DATES: Written comments on this proposed rule must be received on or before October 11, 2016.

ADDRESSES: Comments may be mailed to Attn: National Indian Gaming Commission, FOIA/PA Officer, C/O Department of the Interior, 1849 C Street NW., Mail Stop #1621, Washington, DC 20240 or faxed to (202) 632–7066 (this is not a toll free number). Comments may be inspected between 9:00 a.m. and noon and between 2:00 p.m. and 5:00 p.m., Monday through Friday, at 90 K Street NE., Washington, DC 20002. Comments may also be submitted electronically at *www.regulations.gov* or emailed to *pacomments@nigc.gov.*

FOR FURTHER INFORMATION CONTACT: Andrew Mendoza at (202) 632–7003 or by fax (202) 632–7066 (these numbers are not toll free).

SUPPLEMENTARY INFORMATION:

I. Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal.

II. Background

The Indian Gaming Regulatory Act (IGRA), enacted on October 17, 1988, established the National Indian Gaming Commission. Congress enacted the Privacy Act in 1974 (Pub. L. 93–579, 5