

Clinton, NC, Sampson County, Takeoff Minimums and Obstacle DP, Amdt 1.  
 Fayetteville, NC, Fayetteville Regional/Grannis Field, LOC BC RWY 22, Amdt 7.  
 Fayetteville, NC, Fayetteville Regional/Grannis Field, RNAV (GPS) RWY 22, Amdt 3.  
 Fayetteville, NC, Fayetteville Regional/Grannis Field, VOR RWY 22, Amdt 7.  
 Hatteras, NC, Billy Mitchell, Takeoff Minimums and Obstacle DP, Orig.  
 Lincolnton, NC, Lincolnton-Lincoln Rgnl, GPS RWY 5, Orig, CANCELLED.  
 Lincolnton, NC, Lincolnton-Lincoln Rgnl, RNAV (GPS) RWY 5, Orig.  
 Lincolnton, NC, Lincolnton-Lincoln Rgnl, RNAV (GPS) RWY 23, Orig.  
 Teterboro, NJ, Teterboro, RNAV (GPS) Y RWY 6, Amdt 2.  
 Teterboro, NJ, Teterboro, RNAV (RNP) RWY 19, Orig.  
 Teterboro, NJ, Teterboro, RNAV (RNP) Z RWY 6, Orig.  
 Jamestown, TN, Jamestown Muni, Takeoff Minimums and Obstacle DP, Orig.  
 Provo, UT, Provo Muni, RNAV (GPS) RWY 13, Amdt 1A.  
 Green Bay, WI, Austin Straubel Intl, VOR/DME OR TACAN RWY 36, Amdt 10.

**Effective 22 OCT 2009**

Jackson, TN, Mc Kellar-Sipes Rgnl, VOR RWY 2, Amdt 13.  
 Livingston, TN, Livingston Muni, RNAV (GPS) RWY 3, Orig.  
 Livingston, TN, Livingston Muni, RNAV (GPS) RWY 21, Orig.  
 Livingston, TN, Livingston Muni, Takeoff Minimums and Obstacle DP, Amdt 2.  
 Livingston, TN, Livingston Muni, VOR/DME RWY 21, Amdt 5.

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**DEPARTMENT OF LABOR**

**Office of Workers' Compensation Programs**

**20 CFR Part 10**

**RIN 1215-AB66**

**Claims for Compensation; Death Gratuity Under the Federal Employees' Compensation Act**

**AGENCY:** Office of Workers' Compensation Programs, Employment Standards Administration, Labor.

**ACTION:** Interim final rule; request for comments.

**SUMMARY:** This document contains the interim final regulations governing the administration of the death gratuity created by section 1105 of the National Defense Authorization Act for Fiscal Year 2008, Public Law 110-181, by the Department of Labor (Department or DOL). Section 1105 provides a death gratuity payment to eligible survivors of

Federal employees and non-appropriated fund instrumentality employees (NAFI employees) who die of injuries incurred in connection with service with an Armed Force in a contingency operation. Section 1105 amended the Federal Employees' Compensation Act (FECA) to add a new section, designated as section 8102a. The Secretary of Labor has the authority to administer and to decide all questions arising under FECA. 5 U.S.C. 8145. FECA authorizes the Secretary to prescribe rules and regulations necessary for the administration and enforcement of the Act. 5 U.S.C. 8149. The Secretary has delegated the authority provided by 5 U.S.C. 8145 and 8149 to the Assistant Secretary for Employment Standards who then delegated that authority to the Director of the Office of Workers' Compensation Programs (OWCP), who is responsible for the administration and implementation of FECA. 20 CFR 1.1. Thus OWCP will administer the adjudication of claims and the payment of the death gratuity under new section 8102a.

**DATES:** *Effective Date:* This interim final rule is effective on August 18, 2009.

*Applicability date:* This interim final rule applies to all claims filed on or after August 18, 2009. This rule also applies to any claims that are pending before OWCP on August 18, 2009.

*Comments:* The Department invites comments on the interim final rule from interested parties. Comments on the interim final rule must be postmarked by October 19, 2009. Written comments on the new information collection requirements in this rule must be postmarked by October 19, 2009.

**ADDRESSES:** You may submit comments on the interim final rule, identified by Regulatory Information Number (RIN) 1215-AB66, by any ONE of the following methods:

*Federal e-Rulemaking Portal:* The Internet address to submit comments on the rule is <http://www.regulations.gov>. Follow the Web site instructions for submitting comments.

*Mail:* Submit written comments to Shelby Hallmark, Director, Office of Workers' Compensation Programs, Employment Standards Administration, U.S. Department of Labor, Room S-3524, 200 Constitution Avenue, NW., Washington, DC 20210. Because of security measures, mail directed to Washington, DC is sometimes delayed. We will only consider comments postmarked by the U.S. Postal Service or other delivery service on or before the deadline for comments.

*Instructions:* All comments must include the RIN 1215-AB66 for this rulemaking. Receipt of any comments, whether by mail or Internet, will not be acknowledged. Because DOL continues to experience delays in receiving postal mail in the Washington, DC area, commenters are encouraged to submit any comments by mail early.

Comments on the interim final rule will be available for public inspection during normal business hours at the address listed above for mailed comments. Persons who need assistance to review the comments will be provided with appropriate aids such as readers or print magnifiers. Copies of this interim final rule may be obtained in alternative formats (e.g., large print, audiotape or disk) upon request. To schedule an appointment to review the comments and/or to obtain the interim final rule in an alternative format, contact OWCP at 202-693-0031 (this is not a toll-free number).

Written comments on the new information collection requirements described in this interim final rule should be sent 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:** Shelby Hallmark, Director, Office of Workers' Compensation Programs, Employment Standards Administration, U.S. Department of Labor, Room S-3524, 200 Constitution Avenue, NW., Washington, DC 20210, *Telephone:* 202-693-0031 (this is not a toll-free number).

Individuals with hearing or speech impairments may access this telephone number via TTY by calling the toll-free Federal Information Relay Service at 1-800-877-8339.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

The National Defense Authorization Act for Fiscal Year 2008, Public Law 110-181, was enacted on January 28, 2008. Section 1105 of Public Law 110-181 amended the FECA, creating a new section 8102a. The section establishes a new FECA benefit for eligible survivors of Federal employees and NAFI employees who die of injuries incurred in connection with service with an Armed Force in a contingency operation. The new section 8102a states that the United States will pay a death gratuity of up to \$100,000 to those survivors upon receiving official notification of the employee's death.

## II. Administrative Procedure Act Issues

Section 8102a was effective upon enactment of Public Law 110–181, on January 28, 2008. It states that the United States will pay the death gratuity of up to \$100,000 to the eligible survivors “immediately upon receiving official notification” of an employee’s death. The section also contains a retroactive payment provision, stating that the death gratuity will be paid for employees of certain agencies who died on or after October 7, 2001, due to injuries incurred in connection with service with an Armed Force in the theater of operations of Operation Enduring Freedom and Operation Iraqi Freedom. Both the immediate payment provision and the retroactive payment provision strongly suggest that the Department act as quickly as possible to implement section 8102a.

Therefore, the Department believes that the “good cause” exception to APA notice and comment rulemaking applies to this rule. Under that exception, pre-adoption procedures are not required “when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefore in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.” 5 U.S.C. 553(b)(B). DOL cannot adjudicate claims and pay the death gratuity in every potential claim until these regulations are promulgated. The Department believes that the lengthy steps necessary for the usual notice and comment under the APA would be contrary to Congress’ intention that the death gratuity be paid as soon as possible, especially in the case of survivors to whom the retroactive payment provision applies, where the employee may have died years ago.

Publication of a notice of proposed rulemaking in the **Federal Register**, which entails among other things, receipt of, consideration of, and response to comments submitted by interested parties; modification of the proposed rules, if appropriate; and publication in the **Federal Register** would take many months at a minimum, further delaying payment to deserving survivors of employees covered by this benefit. DOL does not believe that the benefits that might be gained from further consideration of these rules outweigh the delay in making payments to survivors as soon as possible, as intended by Congress when it required that these payments be made “immediately upon receiving official notification.” Family members and other survivors left behind by those

brave individuals, who gave their lives in furtherance of the nations’ strategic and vital interests here and abroad, deserve the government’s compassionate response without further delay.

While some initial claims may be paid easily without issuance of a rule interpreting and implementing this new FECA provision, many of the claims covered by this provision require regulatory guidance to adjudicate. Published regulations are the best vehicle to provide authoritative guidance concerning this provision since it incorporates standards and terms quite different from those applicable to many of the requirements for adjudicating workers’ compensation claims under FECA. Accordingly, the Department believes that under 5 U.S.C. 553(b)(B), good cause exists for waiver of notice and comment rulemaking procedures because issuance of proposed rules would be impracticable and contrary to the public interest.

While notice and comment rulemaking is being waived, the Department is interested in comments and advice regarding changes that should be made to these interim regulations. The Department will carefully consider all comments on the regulations contained in this interim final rule postmarked on or before October 19, 2009 and will publish the final regulations with any necessary changes.

Under the APA, substantive rules generally cannot take effect until 30 days after the rule is published in the **Federal Register**. However, section 553(d)(3) of the APA states that agencies may waive this 30-day requirement for “good cause” and establish an earlier effective date. As explained above, the Department believes that there is “good cause” for waiver of the APA requirement for notice and comment rulemaking because it would be impracticable and contrary to the public interest for the Department to fulfill that requirement. Similarly, the Department believes that the “good cause” exception to the 30-day effective date requirement for substantive rules in the APA applies to this rule, because observing this requirement would be both impractical and contrary to the public interest. As noted above, DOL will not be able to adjudicate all claims under new section 8102a until the regulations in this rule are in effect. Since Congress has directed that the United States pay the death gratuity “immediately,” the Department believes that “good cause” exists for waiver of the usual 30-day effective date requirement for substantive rules and

for this rule to become effective immediately upon the date of its publication in the **Federal Register**.

DOL believes that it would be clearly contrary to the public interest and would serve no purpose to delay the effective date of this rule beyond the date of its publication in the **Federal Register**. The thirty day delay would provide no benefit to any party while further delaying DOL’s ability to implement this provision.

## III. Overview of the Regulations

In enacting section 1105 of Public Law 110–181, Congress created a new FECA benefit of a death gratuity up to \$100,000 for survivors of employees who die of injuries incurred in connection with their service with an Armed Force in a contingency operation. DOL has determined for equitable reasons that every death gratuity will be paid in the amount of \$100,000. (The \$100,000 gratuity is offset by other death gratuities that have been paid for the same death.) These regulations will further define which deaths qualify for the payment of the death gratuity. The regulations will also describe the processes that OWCP will use so that claimants who are survivors and alternate beneficiaries of deceased employees will receive payment of the death gratuity as intended by Congress. Finally, the regulations will explain how OWCP will apply the statutory offset provision for each death gratuity payment.

### *20 CFR Part 10, Subpart J*

#### Section 10.900

The death gratuity is payable to claimants who are survivors or designated beneficiaries of “an employee who dies of injuries incurred in connection with the employee’s service with an Armed Force in a contingency operation.” Section 8102a. Section 10.900 adopts the same definition of “Armed Force” as found in 10 U.S.C. 101(a)(4): “‘armed forces’ means the Army, Navy, Air Force, Marine Corps, and Coast Guard.”

Subsection 10.900(b) explains that the death gratuity payment in section 8102a is a FECA benefit, as defined by section 10.5(a) of part 10. Because Congress enacted the death gratuity as section 8102a in the FECA, all the provisions and definitions in the FECA and in parts 10 and 25 are applicable to the death gratuity unless otherwise specified in section 8102a and these regulations. The FECA provisions applicable to the death gratuity include, for example, the timeliness provisions for filing a claim in section 8122 of the FECA, the

definition of injury in section 8101(5) of the FECA, and the various administrative provisions applicable to a FECA claim.

Pursuant to section 8137 of FECA and the applicable regulations, OWCP is required to pay an employee suffering a FECA covered injury who is neither a citizen of the United States nor a resident of the United States or Canada the lesser of workers' compensation benefits under FECA or local law. Since the new death gratuity payment is a FECA benefit, it will be included in that determination and thus will not be payable to such an employee where it is determined that the local law applicable to such employee provides a lesser benefit than that available under FECA.

#### Section 10.901

Section 10.901 restates Congress' definition of "employee" in new section 8102a. For purposes of the death gratuity, the term "employee" has the meaning as stated in section 8101(1) of the FECA and also includes NAFI employees as defined in section 1587(a)(1) of Title 10 of the United States Code.

#### Section 10.902

The death gratuity is payable to survivors and other designated beneficiaries of employees who die of injuries incurred in connection with their service with an Armed Force in a contingency operation. Section 10.902 clarifies that every such eligible death that occurs after the date of the enactment of Public Law 110-181 qualifies for the death gratuity.

#### Section 10.903

Section 10.903 implements the retroactivity provision contained in new section 8102a. The statute gives "the Secretary concerned" discretion to apply the death gratuity retroactively to employee deaths that occurred on or after October 7, 2001, and before the date of enactment of section 8102a, if the deaths resulted from injuries incurred in connection with an employee's service with an Armed Force in the theater of operations of Operation Enduring Freedom or Operation Iraqi Freedom. New section 8102a does not further define "Secretary concerned" nor does it indicate any limits on the discretion of the "Secretary concerned" to apply the death gratuity retroactively. The Department interprets the "Secretary concerned" to mean the Secretary in charge of the employing agency of an employee who died in the circumstances specified in new section 8102a. The administration of any agency

or non-appropriated fund instrumentality not headed by a Secretary will be considered "the Secretary concerned" for purposes of this provision.

Furthermore, in order to promote efficiency in the administration of this benefit and to provide equal treatment and clear guidance to all covered employees and beneficiaries, DOL has requested that employing agencies whose employees are potentially covered by this new benefit make a determination concerning retroactive coverage in time for this rule to reflect that determination and inform all survivors of employees who died as a result of covered injuries during the retroactive period whether they are entitled to benefits pursuant to this provision.

DOL engaged in an extensive outreach effort to determine whether any agencies desired to exclude survivors of employees who died as a result of covered injuries during the retroactive period. This effort included sending a letter to the Chief Human Capital Officer (or equivalent) of every Federal agency (as well as the Department of Defense on behalf of nonappropriated fund instrumentality employees) notifying them of the procedure for informing DOL of their decision concerning retroactive coverage. To minimize the burden on agencies, no action was requested of agencies wishing to have their employees included in retroactive coverage. The letter requested that agencies wishing to opt out of such coverage send a letter to DOL stating their desire to opt out of retroactive coverage. In addition to sending these individual letters, DOL distributed copies of the letter at the quarterly interagency FECA meeting held on June 9 attended by agency human resource staff, posted a notice on its website informing agencies of their options concerning retroactive coverage, and emailed workers' compensation contacts at each Federal agency notifying them of the web posting. No agencies chose to opt out of retroactive coverage. Accordingly, new section 8102a of FECA will apply retroactively to all employees covered by section 10.903.

#### Section 10.904

New section 8102a is a FECA benefit, and under FECA, the term "injuries" includes occupational diseases in addition to traumatic injuries. Section 10.904 explains that the death gratuity is applicable to employee deaths due to occupational diseases incurred in connection with the employee's service with an Armed Force in a contingency operation.

#### Section 10.905

Section 10.905 states that if an employee dies of injuries incurred in connection with his or her service with an Armed Force in a contingency operation, the death will qualify for the death gratuity regardless of how long after that injury the employee dies. As with other FECA death benefits, there is no requirement that the employee's death occur within a certain time period after an injury to qualify for the death gratuity benefit. While the death gratuity for members of the Armed Forces, codified at 10 U.S.C. 1475-1480, requires that the death of a member of the Armed Forces occur within 120 days after discharge to qualify for that gratuity, *see* 10 U.S.C. 1476, new section 8102a contains no similar statutory requirement.

#### Section 10.906

Section 10.906 explains the definitions applicable to survivors for purposes of the death gratuity. Many of these terms are specifically defined in section 1105 of Public Law 110-181. These statutory definitions of survivors in new section 8102a differ from the existing definitions of the same terms in the FECA at 5 U.S.C. 8101. The definitions in section 8102a and in section 10.906 are solely applicable to subpart J and do not alter any existing definitions of the same terms in any other subpart of Part 10. Thus in certain circumstances the survivors eligible for payment of the death gratuity under new section 8102a will differ from the survivors eligible for compensation for the death of Federal employees under section 8133 of FECA.

The text of section 8102a that defines the terms applicable to survivors is a duplication of the former 10 U.S.C. 1477, which defines eligible survivors for the death gratuity paid to members of the Armed Forces who die from injuries incurred during active duty or inactive duty training. 10 U.S.C. 1475-1480. 10 U.S.C. 1477 was originally enacted on September 2, 1958. *See* Public Law 85-861, 72 Stat. 1452, 1453 (1958). Its language remained unchanged until it was amended by section 645 of the National Defense Authorization Act for Fiscal Year 2008 (Pub. L. 110-181). Congress used the definitions in the original section 1477 for the death gratuity in new section 8102a.

Subsection 10.906(a)(1) defines "surviving spouse" as "the person who was legally married to the deceased employee at the time of his or her death." Subsection 10.906(a)(1) adopts the definition of "surviving spouse"

from the Department of the Navy regulations applicable to the original 10 U.S.C. 1477. The Navy regulations were first promulgated in September 1959, and the definition of "surviving spouse" remained unchanged throughout the life of the original 10 U.S.C. 1477. Since Congress duplicated the original section 1477 for the death gratuity in new section 8102a, subsection 10.906(a)(1) adopts the Navy regulation's long-standing definition of "surviving spouse."

Subsection 10.906(a)(2) states the definition of "children" given in new section 8102a. Unlike the FECA definition of "child" at 5 U.S.C. 8101(9), section 8102a defines "children" to mean all of the employee's natural children, adopted children, and some stepchildren without regard to the child's age, marital status, or dependency on the employee. Section 8102a includes stepchildren in the definition of "children" if the stepchild was part of the employee's household at the time of the employee's death. Subsection 10.906(a)(2)(A) defines "household" for this purpose. The definition limits eligible stepchildren to those who were sharing a household with the employee pursuant to a written custody agreement or who were actually sharing a home for the majority of the time. For a natural child who is an illegitimate child of a male employee to be considered an eligible survivor of that employee, the child must satisfy one of the four criteria listed in section 10.906(a)(2)(B). These criteria are specifically contained in new section 8102a.

Subsection 10.906(a)(3) states the definition of "parents." New section 8102a states that parents include fathers and mothers through adoption and persons who stood *in loco parentis* to the employee for a period of not less than one year at any time before the person became an employee. Subsection 10.906(a)(3)(A) explains that a person stood *in loco parentis* to an employee when the person assumed the status of parent toward the employee. A person will be considered to stand *in loco parentis* when the person takes a child of another into his or her home and treats the child as a member of his or her family, providing parental supervision, support, and education as if the child were his or her own child. New section 8102a mandates that only one father and one mother, or their counterparts *in loco parentis* may be recognized in any case and that preference will be given to those who exercise a parental relationship on the date, or most nearly before the date, on which the decedent became an

employee. These requirements are stated at subsection 10.906(a)(3)(B–C).

#### Section 10.907

Section 10.907 states the order of precedence OWCP will use to determine which survivors will receive payment of the death gratuity under this subpart. This order of precedence is explicitly provided by new section 8102a. The third place in the order of precedence is taken by an employee's parents, brothers, or sisters, as designated by the employee, if the employee before his or her death completes a survivor designation according to the procedures described in section 10.909. If the employee does not complete any such survivor designation, the order of precedence will move directly to the employee's parents in equal shares, followed by the employee's siblings in equal shares.

#### Section 10.908

In addition to the survivor designation mentioned in subsection 10.907(c), section 10.908 explains that an employee before his or her death can designate an alternate beneficiary or beneficiaries to receive up to 50 percent of the death gratuity. The alternate beneficiary designation is separate from the order of precedence. For example, an employee may designate an alternate beneficiary to receive 50% of the death gratuity payment. If that employee's death qualifies for the death gratuity, and the employee is survived by his spouse, the employee's spouse will receive 50% of the death gratuity and the designated alternate beneficiary will receive 50%. The alternate beneficiary can be any person, including anyone named in the order of precedence, but it must be an actual living person rather than a trust or corporation or other legal entity. The procedure to designate an alternate beneficiary is discussed in section 10.909.

#### Section 10.909

Section 10.909 discusses the procedure by which an employee may make a survivor designation under subsection 10.907(c) or an alternate beneficiary designation under section 10.908. Subsection 10.909(a) explains that designation form CA-40, Designation of a Recipient of the Death Gratuity Payment under Section 1105 of Public Law 110-181, must be used to make both types of designations. The designation form may be completed at any time before the employee's death, regardless of the time of injury. The form will not be valid unless it is signed by the employee and it is received and signed prior to the death of the

employee by the supervisor of the employee or by another official of the employing agency authorized to do so. This requirement is intended to ensure that all designation forms are authentic.

When making a survivor designation under subsection 10.907(c), an employee may designate any combination of any of his or her parents, brothers, or sisters to occupy the third space in the order of precedence under section 10.907. Subsection 10.909(c) explains that if the employee designates any of his or her parents, brothers, or sisters under the survivor designation provision in subsection 10.907(c), but the designation fails to specify what percent of the death gratuity each designated survivor should receive, DOL will honor the designation by disbursing the death gratuity to each designated survivor in equal shares, if the persons in the third place of the order of precedence are entitled to receive payment for a particular employee.

Subsection 10.909(d) explains that unlike the survivor designation, if an employee makes an alternate beneficiary designation but fails to indicate the percentage to be paid to the alternate beneficiary, the designation to that person will be invalid. The alternate beneficiary designation is treated differently from the survivor designation because the entitlement of any alternate beneficiaries to a portion of the death gratuity is not as clear as the survivors' entitlement, because the survivors are named in the order of precedence. Therefore, an employee must fully complete designation form CA-40, specifying an alternate beneficiary's name and what percentage of the gratuity he or she should receive, to ensure that OWCP can honor the designation. Additionally, new section 8102a requires that designations to alternate beneficiaries be in 10 percent increments, up to the maximum of 50 percent. Therefore, no more than five alternate beneficiaries may be designated.

Subsection 10.909(b) states that any paper executed prior to the effective date of this regulation that specifies an alternate beneficiary of the death gratuity payment will serve as a valid designation as long as it is in writing, was completed before the employee's death, was signed by the employee, and was signed prior to the death of the employee by the supervisor of the employee or by another official of the employing agency authorized to do so. DOL acknowledges that employees who have already suffered fatal injuries incurred while performing work in contingency operations did not have

access to designation form CA-40. DOL will honor designations made by these employees as long as the document used to make the designation includes all the assurances of authenticity that are required of form CA-40.

#### Section 10.910

Section 10.910 explains what happens if a person entitled to a portion of the death gratuity payment dies after the death of the covered employee but before receiving his or her portion of the death gratuity. Since the statute provides that, “[i]f a person entitled to all or a portion of a death gratuity under paragraph (1) or (4) dies before the person receives the death gratuity, it shall be paid to the living survivor next in the order prescribed by paragraph (1),” the death gratuity is not inheritable. 5 U.S.C. 8102a(d)(5). These provisions are not applicable to an individual potentially eligible to receive all or a portion of a death gratuity because of family relationship or designation who dies prior to the death of a covered employee because that person was never “entitled to all or a portion of a death gratuity.”

Accordingly, subsection 10.910(a) states that if a person who is entitled to all or a portion of the death gratuity due to his or her place in the order of precedence in section 10.907 dies after the death of the covered employee but before receiving payment, that portion will be paid to the living survivor(s) otherwise eligible according to the order of precedence. For example, an employee has no living spouse but has three children. If the employee dies, his three children would be entitled to equal shares of the death gratuity according to the order of precedence. If one of those children dies after the employee dies but before receiving payment, that portion of the death gratuity would be paid to the next person in the statutory order of preference, the surviving parents. If there is no other entitled beneficiary, that portion of the gratuity will not be paid.

Subsection 10.910(b) explains that if a survivor designated according to subsection 10.907(c) dies after the death of the covered employee but before receiving a portion of the death gratuity to which he or she is entitled, the portion will be paid to the next living survivor in the statutory order of precedence. For example, an employee with no spouse and no children designates under subsection 10.907(c) that her mother receive 50 percent of the death gratuity, her older brother receive 30 percent, and her two younger sisters receive 10 percent each. One of the

sisters dies before receiving payment. That 10 percent designation would pass to the next living survivor according to the order of precedence; in this case, that would be the surviving parents pursuant to section 8102a(d)(1)(D). Assuming that the employee's father was alive, he would receive 5% and the employee's mother would receive 55%. If the employee's mother is the only surviving parent, she would receive a total of 60 percent of the death gratuity.

Subsection 10.910(c) explains what happens if a person designated as an alternate beneficiary under section 10.908 dies after the death of the covered employee but before receiving payment of his or her designated portion of the death gratuity. If the designated alternate beneficiary dies after the death of the covered employee but before receiving payment, the designation will have no effect. Pursuant to section 8102a(d)(5), the portion designated to be paid to that person will be paid according to the statutory order of precedence listed in section 10.907.

Subsection 10.910(d) clarifies that if there are no living eligible survivors or alternate beneficiaries, the death gratuity will not be paid.

#### Section 10.911

Section 10.911 explains how the death gratuity payment process is initiated. Subsection 10.911(a) explains that there are two ways to initiate the process. The employing agency may initiate the death gratuity payment process by filing form CA-42, Official Notice of Employee's Death For Purposes of FECA Section 8102a Death Gratuity, with OWCP, which notifies OWCP of the employee's death. A claimant may also initiate the death gratuity payment process by filing a claim with OWCP to receive the death gratuity payment. Regardless of how the payment process is initiated, both filings must occur for OWCP to pay the death gratuity. If the payment process is initiated by the employing agency filing notification of the employee's death, each claimant must then file a claim with OWCP to receive payment of the gratuity. Each claimant must file a claim so that OWCP has the correct contact information for each claimant and proof of each claimant's status as an eligible beneficiary of the death gratuity payment. Alternatively, if a claimant initiates the death gratuity payment process by filing a claim, the employing agency must then complete the death notification form CA-42 and file it with OWCP. Additional claimants must also complete their own claim forms.

Subsection 10.911(b) outlines what will happen when the employing agency files death notification form CA-42. First of all, an employing agency must notify OWCP immediately upon learning of any employee's death that may be eligible for benefits under this subpart. With this notification, the agency must submit to OWCP any designation forms (form CA-40) completed by the employee. Finally, the agency must also provide to OWCP as much information as possible about any living survivors or alternate beneficiaries of which the agency is aware. When OWCP receives all this information from the employing agency, OWCP will contact any living survivors or alternate beneficiaries it is able to identify and provide to them the death gratuity claim form CA-41, Claim For Benefits Under FECA Section 8102a Death Gratuity, with information explaining how to file a claim.

Subsection 10.911(c) explains a claimant's responsibilities when filing a claim for the death gratuity payment, and it states what will happen when OWCP receives that claim. A claimant may use form CA-41 to file a claim for the death gratuity. The claimant must provide any information that he or she has about any other beneficiaries who may be entitled to the death gratuity payment, including the Social Security Numbers of those other beneficiaries, if known, and all known contact information. The claimant must also disclose the Social Security Number of the deceased employee and identify the agency that employed the deceased employee when he or she incurred the injury that caused his or her death, if the claimant knows this information. Upon receiving the information from the claimant, OWCP will contact the employing agency to notify it that it must complete and submit the death notification form CA-42 for the employee. OWCP will also contact any other living survivors or alternate beneficiaries it is able to identify and provide to them the death gratuity claim form CA-41 with information explaining how to file a claim.

Subsection 10.911(d) explains the responsibilities of an employing agency if a claimant submits a claim for the death gratuity to the agency rather than to OWCP. In this instance, the agency must promptly transmit the claim to OWCP. This includes any claim forms CA-41 that the agency receives and any other claims or papers submitted to the agency which appear to claim compensation on account of the employee's death.

## Section 10.912

Section 10.912 describes the requirements to establish a claim for the death gratuity payment, which are also described on claim form CA-41. Just as in all claims for compensation under the FECA, the claimant bears the burden of proof to establish each one of these elements. (*See, e.g.*, 20 CFR 10.115.) Although the employing agency will often provide much of the required information when it completes the death notification form CA-42, the claimant bears the ultimate burden of proof. The evidence required in this subpart must stand up to the same requirements as evidence submitted to establish other FECA compensation claims: the evidence should be in writing, and it must be reliable, probative, and substantial. (*See id.*)

The first requirement that the claimant must establish is that the claim for the death gratuity was filed within the time limits specified by the FECA, as prescribed in 5 U.S.C. 8122 and in this part. This will be evaluated exactly as it is for all other claims for FECA compensation. Subsection 10.912(a) clarifies that the timeliness of a death gratuity claim will be measured from the date the claimant filed a claim, not the date the employing agency submitted death notification form CA-42.

Subsection 10.912(b) gives the second requirement for a death gratuity claim: the claimant must establish that the deceased employee was in fact an employee of the United States or a NAFI employee at the time he or she incurred the injury or disease that caused his or her death. Again, this is the same requirement as in all other claims for compensation under the FECA.

Subsection 10.912(c) states that the claimant must establish that the employee suffered an injury or disease and that the employee's death was causally related to that injury or disease. Causation will be evaluated as it is in other FECA claims. The death certificate of the employee must be provided. Although the employing agency will often provide the death certificate and other needed medical documentation, OWCP may request from the claimant any additional documentation needed to establish the claim.

Subsection 10.912(d) describes the requirement that sets the death gratuity payment apart from other FECA benefits: the claimant must establish that the deceased employee incurred the fatal injury or disease "in connection with the employee's service with an Armed Force in a contingency operation." This is the requirement that

defines the scope of coverage for the death gratuity payment, as stated in the text of new section 8102a. Subsection 10.912(d) explains and defines the terms contained in that statutory language.

Subsection 10.912(d)(1) explains the definition of "contingency operation." Section 8102a defines "contingency operation" as having "the meaning given to that term in section 1482a(c) of Title 10 of the United States Code." Section 1482a(c) states, "The term 'contingency operation' includes humanitarian operation, peacekeeping operations, and similar operations." There is a more narrow definition of "contingency operation" in section 101 of Title 10, which is the definitions section of Title 10, but Congress chose the broader definition of "contingency operation" contained in section 1482a(c) for purposes of the death gratuity payment. (DOL notes that Congress chose the narrower definition of "contingency operation" in section 585 of the National Defense Authorization Act for Fiscal Year 2008.) Therefore, subsection 10.912(d)(1) explains the definitions of all the different types of "contingency operations" that are included in section 1482a(c), including the basic "contingency operation," a "humanitarian operation," and a "peacekeeping operation." The definitions of all three of these different types of operations are included in the definition of "contingency operation" for purposes of this subpart. "Similar operations" are also included and will be determined by OWCP on a case-by-case basis.

Subsection 10.912(d)(1)(A) quotes the definition of "contingency operation" from 10 U.S.C. 101(a)(13). The first part of this definition of "contingency operation" is "military operation that is designated by the Secretary of Defense as an operation in which members of the Armed Forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing military force." The second part of this definition includes any military operation that results in the call or order to active duty of members of the uniformed services during a war or national emergency declared by the President or Congress. The definition provides a list of different authorizing statutes under which the call to active duty may occur, including statutes that would apply to military operations that would take place within the United States. Therefore, a "contingency operation" under the definition at 10 U.S.C. 101(a)(13) may take place either

within the United States or outside the United States.

Subsection 10.912(d)(1)(B) provides the definition of "humanitarian operation" and "peacekeeping operation" as stated in 10 U.S.C. 2302(8). A "humanitarian operation" is "a military operation in support of the provision of humanitarian or foreign disaster assistance," and a "peacekeeping operation" is "a military operation \* \* \* in support of a peacekeeping operation under chapter VI or VII of the Charter of the United Nations." Subsection 10.912(d)(1)(C) further defines "humanitarian assistance" as the definition provided in 10 U.S.C. 401(e).

All of these definitions have been quoted directly from Title 10. New section 8102a clearly intends the definition of "contingency operation" for purposes of this death gratuity to have the same meaning as the term has for the Armed Forces. Therefore, DOL adopted the definitions given to all the different types of "contingency operations" from Title 10, which governs the Armed Forces.

Subsection 10.912(d)(2) clarifies that a "contingency operation" may take place within the United States or abroad. Although the Armed Forces rarely conduct contingency operations in the United States, none of the above definitions of "contingency operation" exclude that possibility. However, subsection 10.912(d)(2) also explains that operations of the National Guard are only considered "contingency operations" for purposes of this subpart when the President, the Secretary of the Army, or the Secretary of the Air Force calls the members of the National Guard into service. The National Guard is made up of the Army National Guard and the Air National Guard, and both are reserve components of the Armed Forces. (*See* 10 U.S.C. 101(c).) Members of the National Guard can be activated by the President, or by the Secretaries of the Army or the Air Force. Although members of the National Guard can be called into service by the Governor of a state, these operations of the National Guard will not be considered "contingency operations" under this subpart and therefore the death gratuity is not applicable to service with the National Guard in these Governor-led operations.

Subsection 10.912(d)(3) states that a claim for a death gratuity must show that the employee incurred the injury or disease while in the performance of duty as that phrase is defined for the purposes of otherwise awarding benefits under the FECA. This requirement is suggested by the statutory language "in

connection with the employee's service," and it is also consistent with the award of other FECA compensation.

In addition to showing that the employee was in the performance of duty when he or she incurred injury, a claimant must show that the employee's service was related to an Armed Force's contingency operation to qualify for the death gratuity. The death gratuity is not meant for every employee who dies from an injury incurred while in the performance of duty. Only those employees whose service is related to a contingency operation are covered. Subsections 10.912(d)(4) and (5) explain the evidentiary burden that a claimant must satisfy to show this relation. Subsection 10.912(d)(4) states the evidentiary standard for claims regarding a fatal injury incurred by an employee serving outside the United States: if an employee incurs injury while in the performance of duty serving outside the United States in the same region in which an Armed Force is conducting a contingency operation, OWCP will find that the injury or disease satisfies the requirement that it was incurred "in connection with the employee's service with an Armed Force in a contingency operation," unless there is conclusive evidence that the employee's service was not supporting the Armed Force's operation. The subsection also clarifies that OWCP considers service in economic or social development projects, such as service on Provincial Reconstruction Teams, in a region in which an Armed Force is conducting a contingency operation to be supporting the Armed Force's operation.

The evidentiary burden here recognizes that if an employee is serving outside the United States in the same region in which an Armed Force is conducting a contingency operation, the employee's service is apt to be related to that contingency operation, because the United States governmental activities in the region will of necessity be closely coordinated with the Armed Force's operation. Additionally, activities of covered employees in these areas will be seen as relating to the ongoing contingency operation by the affected populace, and hostilities may be directed at the employees because of that perception. OWCP also recognizes the difficulties involved in accessing and providing evidence regarding the circumstances of an employee's service in a foreign country. Accordingly, OWCP will find that the employee's service in a foreign country is related to a contingency operation if the service is being performed in the same region as

that operation, unless OWCP receives conclusive evidence to the contrary.

An illustration for example is as follows: a tsunami hits the southern portion of Country Q in Southeast Asia, causing massive devastation. The United States military mobilizes members of the Armed Forces in a humanitarian operation to provide aid to the affected area. An Army helicopter dispatched to deliver supplies crashes into an aid station on the coast, killing two Department of State employees working at the military aid station. OWCP receives death notification form CA-42 describing the employees' deaths, stating that at the time of their deaths they were serving as translators at the aid station at the site of the tsunami. The two Department of State employees' deaths will qualify for the death gratuity. An employee of the Department of Agriculture was vacationing at one of the hotels destroyed by the tsunami, and she dies. Her death would not qualify for the death gratuity because she was not in the performance of duty. On the same day, the Consul General of the Consulate in the far northern part of Country Q is killed in a car accident while traveling from his office to a meeting in the middle of the day. Because of the humanitarian operation being conducted in southern Country Q, the Department of State files form CA-42, notifying OWCP of the Consul's death. (All employers must file form CA-42 for any employee's death that may be eligible for benefits under this subpart. See subsections 10.911(b) and 10.914(a).) However, on the form, State describes the circumstances of the Consul's death, submitting evidence that the meeting the Consul was attending was regarding data security procedures in the Consul's office. If OWCP receives a claim for the death gratuity, OWCP will evaluate the evidence provided by the Department of State and determine whether the purpose of the Consul's meeting had any relation to the tsunami contingency operation, and determine whether northern Country Q is in the same region as the operation. If the evidence was conclusive that the meeting had no relation to the contingency operation, or that the scope of the operation was strictly limited to southern Country Q, OWCP will deny the claim for the death gratuity.

Subsection 10.912(d)(5) explains that a claim based on the death of an employee who was serving within the United States when he or she incurred injury must positively establish that the employee's service was supporting a contingency operation of an Armed

Force. The claimant bears a different evidentiary burden to show that an employee's service within the United States was related to a contingency operation of an Armed Force. This is because federal employees and NAFI employees routinely perform service within the United States, and it is not reasonable to infer, from their mere presence in a covered region while in the performance of duty, that their service is in support of a domestic contingency operation. In the rare event that an Armed Force is conducting a contingency operation within the United States, the claimant must supply evidence to show that the employee's service was actually supporting the contingency operation rather than simply being tangentially related to a situation in which an Armed Force was somehow involved.

An illustration follows: the President activates a number of National Guard troops in Operation Blue, aimed at stopping illegal immigration from Mexico to the United States. Some of the troops are deployed in McAllen, Texas. On the fourth day of Operation Blue, a mail carrier in McAllen is killed in a car accident while delivering mail. If the mail carrier's surviving spouse files a claim for the death gratuity, he would have to provide evidence to show how the mail carrier's routine duties were supporting the National Guard's operation. If the claim did not contain evidence that her service was supporting the operation, her death would not qualify for the death gratuity. On the same day, a National Guardsman and an employee of the Department of Homeland Security are killed in a construction accident while in the performance of duty building a fence at the border. If survivors of the Homeland Security employee file a claim for the death gratuity, they would need to provide evidence that the employee's work was supporting the National Guard's operation. If they provided sufficient evidence, OWCP will accept the claim.

Section 10.912(e) states the final requirement for a claim for the death gratuity: a claimant must establish his or her relationship to the deceased employee, so that OWCP can determine which survivors are eligible to receive the death gratuity payment under the order of precedence in section 10.907. The documentation required is described in the instructions to claim form CA-41. This requirement is similar to the documentation required to establish eligibility for FECA death benefits under 5 U.S.C. 8133.

### Section 10.913

Section 10.913 contains examples of situations that OWCP considers to clearly qualify for the death gratuity payment. If an employee incurred injury while serving under the direction or supervision of an official of an Armed Force conducting a contingency operation, or while riding with members of an Armed Force in a vehicle or other conveyance deployed to further an Armed Force's objectives in a contingency operation, the employee's service is clearly related to the Armed Force's contingency operation. If the employee's death results from injuries incurred in either of these situations, the death will qualify for the death gratuity. This in no way is meant to signify that the employee was performing a combat mission, an entirely different legal and factual standard, which could impact benefits payable under insurance policies.

OWCP believes that these examples will assist employing agencies and claimants in understanding the death gratuity payment. However, numerous other situations may also qualify for the death gratuity payment, which OWCP will determine on a case-by-case basis.

### Section 10.914

The death gratuity payment is an unusual extension of the FECA, because it only applies to a certain group of employees—those employees whose deaths result from injuries incurred “in connection with the employee's service with an Armed Force in a contingency operation.” Because an employing agency will have direct access to most of the information needed to determine whether its employee was injured “in connection with” his or her service “with an Armed Force in a contingency operation,” and most claimants will not have access to that information, employing agencies have significant responsibilities in the death gratuity claim process. Section 10.914 lists the responsibilities of the employing agency.

First, subsection 10.914(a) explains that the employing agency must provide as much information as possible about the circumstances of the employee's injury, especially the employee's assigned duties at the time of the injury. An agency fulfills this requirement by completely filling out the death notification form CA-42 and submitting it to OWCP. The agency must also complete the form as promptly as possible upon learning of an employee's death, so that OWCP can disburse the death gratuity payment as soon as possible.

If a claimant submits a claim form CA-41 or any other paper appearing to claim compensation to the employing agency, the agency must promptly transmit that claim to OWCP, as stated in subsection 10.914(b).

Subsection 10.914(c) explains an essential responsibility of the employing agency: the agency must maintain any designation forms (forms CA-40) or other papers appearing to make designations under sections 10.907(c) or 10.908 in the employee's official personnel file. The forms should be signed by the employee and by a representative of the agency. The agency must transmit any such designations to OWCP when it submits the death notification form CA-42 to OWCP.

Subsection 10.914(d) states the responsibility of an employing agency when a survivor is claiming the death gratuity based on his or her status as an illegitimate child of a deceased male employee. New section 8102a lists four different ways an illegitimate child of a male decedent can prove that he or she is eligible to receive the death gratuity. Those have been quoted in section 10.906(a)(2)(B) of this subpart. One method of proving eligibility is for the claimant to show that he or she has proved “by evidence satisfactory to the employing agency” to be a natural child of the decedent. Therefore, if OWCP cannot determine whether the claimant qualifies as a child of the decedent according to any of the other three methods listed, OWCP may request the employing agency to determine whether the claimant has provided sufficient evidence to show that he or she is a child of the decedent. In that situation, it is the employing agency's responsibility to evaluate the evidence and transmit its determination promptly to OWCP.

Because of the offset provision that is discussed in greater detail below in section 10.916, an employing agency must notify OWCP of any other death gratuity payments under any other law of the United States for which an employee's death qualifies and any other death gratuity payments that have been paid based on the employee's death. This responsibility is stated in subsection 10.914(e).

Finally, subsection 10.914(f) clarifies that non-appropriated fund instrumentalities have the same responsibilities under this subpart as any other employing agency.

### Section 10.915

Section 10.915 lists the responsibilities of OWCP in the death gratuity payment process. At the initiation of the process, OWCP will

prompt the employing agency to submit the death notification form CA-42 if the agency has not done so, or OWCP will identify living potential claimants and provide them with claim forms CA-41 with instructions on how to file a claim for the death gratuity payment. OWCP will then review all the information provided by the claimant and employing agency to determine whether the claim satisfies all the requirements listed in section 10.912. If the information is not sufficient to satisfy those requirements, OWCP will notify the claimant of additional evidence needed. The claimant will then be allowed at least 30 days to submit additional evidence. OWCP may also request more information from the employing agency. Finally, if the claim satisfies all the required elements, OWCP will calculate the amount of the death gratuity payment and pay the beneficiaries as soon as possible after accepting the claim.

### Section 10.916

Section 10.916 explains how OWCP will calculate the amount of the death gratuity. DOL has determined for equitable reasons that every death gratuity will be paid in the amount of \$100,000. Subsection 10.916(a) explains that the death gratuity payment for each employee death is equal to \$100,000 minus the amount of any death gratuity payments that have been paid under any other law of the United States based on that same death. The Conference Report language for section 8102a makes clear that Congress intended the offset provision in new section 8102a to apply only to other death gratuity payments and not to other federal benefits such as compensation for death under section 8133 of the FECA, retirement benefits under chapter 84 of Title 5, life insurance benefits under chapter 87 of Title 5, or any other federal benefit. See Conference Report for the National Defense Authorization Act for Fiscal Year 2008, H.R. Rep. No. 110-477, at 1008-09 (2007). A death gratuity payment is a payment in the nature of a gift, beyond reimbursement for death expenses, relocation costs, or other similar death benefits. Subsection 10.916(a) clarifies that funeral expenses under 5 U.S.C. 8134 and the death benefits provided to an employee's survivors under 5 U.S.C. 8133 are not death gratuity payments, and they therefore have no effect on the amount of the death gratuity under this subpart.

Subsection 10.916(b) gives a list of examples of death gratuity payments that would affect the amount of the death gratuity under this subpart. This list is not exclusive, but it is meant to



name the most common death gratuity statutes for ease of reference and to provide examples of those payments that would be considered death gratuity payments.

Subsection 10.916(c) clarifies that the total amount of the death gratuity payment will be calculated before it is disbursed to the employee's various survivors or alternate beneficiaries. Therefore, after it has accepted a claim for the death gratuity, OWCP first subtracts the amount of any other death gratuities that have already been paid based on the same death. After the total amount of the death gratuity for the particular employee has been calculated, OWCP will then disburse the payment according to the order of precedence and any designations that the employee may have completed. Subsection 10.916(c) provides three examples to illustrate this process.

#### IV. Administrative Requirements for the Rulemaking

##### *Executive Order 12866*

This regulatory action constitutes a "significant" rule within the meaning of Executive Order 12866 in that any executive agency could be required to participate in the development of claims for benefits under this regulatory action. The Department believes, however, that this regulatory action will not have a significant economic impact on the economy, or any person or organization subject to the changes, in that the annual amount of benefits paid under this section is expected to be approximately one million dollars. The changes have been reviewed by the Office of Management and Budget for consistency with the President's priorities and the principles set forth in Executive Order 12866.

##### *Regulatory Flexibility Act of 1980*

This rule has been reviewed in accordance with the Regulatory Flexibility Act of 1980, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. 601-612. The Department has concluded that the rule does not involve regulatory and informational requirements regarding businesses, organizations, and governmental jurisdictions subject to regulation.

##### *Paperwork Reduction Act (PRA)*

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. 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 set forth in §§ 10.909, 10.911, 10.912, 10.914 and 10.915, and they relate to information required to be submitted by claimants and the employing agencies as part of the claims adjudication process. To implement these new collections, the Department is proposing to create three new forms (*see* sections A through C below).

The Department would like to solicit comments to:

(1) Evaluate whether the collection of information is 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 estimate of the burden of the collection 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 collection 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.

A. Designation of a Recipient of the Death Gratuity Payment Under Section 1105 of Public Law 110-181 (Form CA-40)

*Summary:* New section 8102a allows people covered by that section to designate an alternative order of payment of the death gratuity amongst family members and to designate an alternative person to receive no more than 50% of the death gratuity payment. Form CA-40 provides the means to make such designations. Form CA-40 asks the person covered to provide an alternative order of payment, including each designee's address, relationship to the person covered, and the percentage amount to be given to that designee. Form CA-40 also allows the person covered the opportunity to designate an additional person to receive a percentage of the death gratuity, and asks the person covered to provide that designee's address and the percentage to be given to that designee (up to the statutory maximum of 50%). All employees who complete this form will be required to sign and date this form. The form must also be signed by the appropriate official of the employing establishment to establish a valid designation.

*Need:* Pursuant to section 8102a, which allows for designations, this form is necessary for an accurate record of such designation, and for an accurate payment to the appropriate designees in the event of a covered claim.

*Respondents and frequency of response:* While not every covered employee will file such a designation, the Department anticipates that those employees who are routinely deployed in support of a contingency operation may file as many as three Form CA-40s over the course of their employment. According to the report of the Subcommittee on Oversight and Investigations of the House Armed Service Committee, "Deploying Federal Civilians to the Battlefield, April 2008," there have been "nearly 10,000 federal civilian employees" deployed to Iraq and Afghanistan over the past seven years, averaging 1,400 annually. Utilizing this number, as well as considering there will be additional federal civilian employees domestically and abroad whose agencies may request them to complete the designation form, the OWCP estimates that 2,600 designation forms will be filed annually.

*Estimated total annual burden:* The time required to review instructions, search existing data sources, gather the data needed, and complete and review each Form CA-40 is estimated to take an average of 15 minutes per covered employee. The Department estimates that there will be 2,600 such filings a year, for a total annual burden of 650 hours.

B. Claim For Benefits Under FECA Section 8102a Death Gratuity (Form CA-41)

*Summary:* The claims adjudication process begins with a requirement that a claimant file a written claim for benefits with the Department on or after July 31, 2001. The "Claim For Benefits Under FECA Section 8102a Death Gratuity" (Form CA-41) is used to initiate this process and to insure that OWCP has the basic factual information necessary to process the claim, including the identities of the eligible beneficiaries of the covered employee. OWCP may also require claimants to provide factual information in support of any responses made on Form CA-41. All claimants will be required to swear or affirm that the information provided on the Form CA-41 is true.

*Need:* Pursuant to section 8102a, a claim for benefits is necessary to initiate the payment process and to provide the information necessary to pay the survivors of the covered employee.

*Respondents and frequency of response:* The Office of Workers'

Compensation Programs (OWCP) has been tracking federal civilian injuries and deaths resulting from incidents or exposures arising in Iraq since March 2004. Through the end of FY 2008, there have been 220 claims accepted for injuries or exposures sustained in Iraq. Of those 220 accepted claims, 14 have been claims arising from the death of the Federal civilian employee.

OWCP also has been tracking Federal civilian injuries and deaths resulting from incidents or exposures arising in Afghanistan, but only since October, 2007. Through the end of FY 2008, there have been 25 claims accepted for injuries or exposures sustained in Afghanistan and only 1 of those claims was for the death of the employee.

Based upon these data, OWCP projects about 10 death claims per year as an upper limit estimate. Assuming each claim is paid at the maximum allowable rate, this would result in expenditures of \$1 million or less annually. It is important to note, however, that the projection is based on a very limited amount of data and that a single significant event could result in substantially higher than projected expenditures. Accordingly, as it is estimated that each claim will have an average of 2.5 claimants, it is estimated that 25 claimants annually will file one Form CA-41

*Estimated total annual burden:* The time required to review instructions, search existing data sources, gather the data needed, and complete and review each Form CA-41 is estimated to take an average of 15 minutes per claimant for a total annual burden of 6.25 hours.

#### C. Official Notice of Employee's Death for Purposes of FECA Section 8102a Death Gratuity (Form CA-42)

*Summary:* Section 8102a provides that payment under that section is to be made immediately upon "official" notice of a covered employee's death. Form CA-42 provides the means for the employing agency to provide the official notice to OWCP. Form CA-42 asks the employing agency to provide OWCP the necessary information regarding the employee's death. Form CA-42 further requires the employing agency to provide OWCP with the death certificate of that employee. Form CA-42 also requires that the employing agency certify that the employee was a covered employee under Section 8102a and to forward information about survivors and designated alternate beneficiaries.

*Need:* As section 8102a provides that payment must be made following official notice of the death of a covered employee, Form CA-42 is necessary to

provide the means to submit the official notice to OWCP.

*Respondents and frequency of response:* As discussed above, it is estimated that 10 Form CA-42 notices will be filed annually.

*Estimated total annual burden:* The time required to review instructions, search existing data sources, gather the data needed, and complete and review each Form CA-42 is estimated to take an average of 20 minutes per form for a total annual burden of 3.33 hours.

#### *The National Environmental Policy Act of 1969*

The Department certifies that this rule has been assessed in accordance with the requirements of the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.* (NEPA). The Department concludes that NEPA requirements do not apply to this rulemaking because this rule includes no provisions impacting the maintenance, preservation, or enhancement of a healthful environment.

#### *Federal Regulations and Policies on Families*

The Department has reviewed this rule in accordance with the requirements of section 654 of the Treasury and General Government Appropriations Act of 1999, 5 U.S.C. 601 note. These regulations were not found to have a potential negative affect on family well-being as it is defined thereunder.

#### *Executive Order 13045: Protection of Children from Environmental Health Risks and Safety Risks*

The Department certifies that this rule has been assessed regarding environmental health risks and safety risks that may disproportionately affect children. These regulations were not found to have a potential negative affect on the health or safety of children.

#### *Unfunded Mandates Reform Act of 1995 and Executive Order 13132*

The Department has reviewed this rule in accordance with the requirements of Exec. Order No. 13132, 64 FR 43225 (Aug. 10, 1999), and the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1501 *et seq.*, and has found no potential or 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. As there is no Federal mandate contained herein that could result in increased expenditures by State, local, or tribal

governments or by the private sector, the Department has not prepared a budgetary impact statement.

#### *Executive Order 13175: Consultation and Coordination with Indian Tribal Governments*

The Department has reviewed this rule in accordance with Exec. Order 13,175, 65 FR 67249 (Nov. 9, 2000), and has determined that it does not have "tribal implications." The rule does not "have substantial direct effects on one or more Indian tribes, on the relationship between the Federal government and Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes."

#### *Executive Order 12630: Governmental Actions and Interference With Constitutionally Protected Property Rights*

The Department has reviewed this rule in accordance with Exec. Order 12630, 53 FR 8859 (Mar. 15, 1988), and has determined that it does not contain any "policies that have takings implications" in regard to the "licensing, permitting, or other condition requirements or limitations on private property use, or that require dedications or exactions from owners of private property."

#### *Executive Order 13211: Energy Supply, Distribution, or Use*

The Department has reviewed this regulation and has determined that the provisions of Exec. Order 13211, 66 FR 28355 (May 18, 2001), are not applicable as there are no direct or implied effects on energy supply, distribution, or use.

#### *The Privacy Act of 1974, 5 U.S.C. 552a, as Amended*

While claims filed under section 8102a of the FECA will be a separate claim file and bear a separate claim number from any other FECA claim file maintained on the covered employee, the collection and release of these files will be conducted under the provisions of the Privacy Act and the published systems of record notices for FECA claims files. Therefore, the Department has determined that this rule will require a minor revision of the current Privacy Act System of Records, DOL/GOVT-1, Office of Workers' Compensation Programs, Federal Employees' Compensation Act File, 67 FR 16826 (April 8, 2002).

#### *Clarity of This Regulation*

Executive Order 12866, 58 Fed. Reg. 51735 (September 30, 1993), and the President's memorandum of June 1,

1998, require each agency to write all rules in plain language. The Department invites comments on how to make this rule easier to understand.

#### List of Subjects in 20 CFR Part 10

Administrative practice and procedure, Claims, Death gratuity, Government employees, Labor, Workers' compensation, NAFL.

■ For the reasons set forth in the preamble, 20 CFR part 10 is amended by adding subpart J, consisting of §§ 10.900 through 10.916, to read as follows:

#### Subpart J—Death Gratuity

Sec.

- 10.900 What is the death gratuity under this subpart?
- 10.901 Which employees are covered under this subpart?
- 10.902 Does every employee's death due to injuries incurred in connection with his or her service with an Armed Force in a contingency operation qualify for the death gratuity?
- 10.903 Is the death gratuity payment applicable retroactively?
- 10.904 Does a death as a result of occupational disease qualify for payment of the death gratuity?
- 10.905 If an employee incurs a covered injury in connection with his or her service with an Armed Force in a contingency operation but does not die of the injury until years later, does the death qualify for payment of the death gratuity?
- 10.906 What special statutory definitions apply to survivors under this subpart?
- 10.907 What order of precedence will OWCP use to determine which survivors are entitled to receive the death gratuity payment under this subpart?
- 10.908 Can an employee designate alternate beneficiaries to receive a portion of the death gratuity payment?
- 10.909 How does an employee designate a variation in the order or percentage of gratuity payable to survivors and how does the employee designate alternate beneficiaries?
- 10.910 What if a person entitled to a portion of the death gratuity payment dies after the death of the covered employee but before receiving his or her portion of the death gratuity?
- 10.911 How is the death gratuity payment process initiated?
- 10.912 What is required to establish a claim for the death gratuity payment?
- 10.913 In what situations will OWCP consider that an employee incurred injury in connection with his or her service with an Armed Force in a contingency operation?
- 10.914 What are the responsibilities of the employing agency in the death gratuity payment process?
- 10.915 What are the responsibilities of OWCP in the death gratuity payment process?
- 10.916 How is the amount of the death gratuity calculated?

Authority: 5 U.S.C. 8102a.

#### Subpart J—Death Gratuity

##### § 10.900 What is the death gratuity under this subpart?

(a) The death gratuity authorized by 5 U.S.C. 8102a and payable pursuant to the provisions of this subpart is a payment to a claimant who is an eligible survivor (as defined in §§ 10.906 and 10.907) or a designated alternate beneficiary (as defined in §§ 10.908 and 10.909) of an employee who dies of injuries incurred in connection with the employee's service with an Armed Force in a contingency operation. This payment was authorized by section 1105 of Public Law 110-181 (2008). For the purposes of this subchapter, the term "Armed Force" means the Army, Navy, Air Force, Marine Corps, and Coast Guard.

(b) This death gratuity payment is a FECA benefit, as defined by § 10.5(a) of this part. All the provisions and definitions in this part apply to claims for payment under this subpart unless otherwise specified.

##### § 10.901 Which employees are covered under this subpart?

For purposes of this subpart, the term "employee" means all employees defined in 5 U.S.C. 8101 and § 10.5(h) of this part and all non-appropriated fund instrumentality employees as defined in section 1587(a)(1) of title 10 of the United States Code.

##### § 10.902 Does every employee's death due to injuries incurred in connection with his or her service with an Armed Force in a contingency operation qualify for the death gratuity?

Yes. All such deaths that occur on or after January 28, 2008 (the date of enactment of Public Law 110-181 (2008)) qualify for the death gratuity administered by this subpart.

##### § 10.903 Is the death gratuity payment applicable retroactively?

An employee's death qualifies for the death gratuity if the employee died on or after October 7, 2001, and before January 28, 2008, if the death was a result of injuries incurred in connection with the employee's service with an Armed Force in the theater of operations of Operation Enduring Freedom or Operation Iraqi Freedom.

##### § 10.904 Does a death as a result of occupational disease qualify for payment of the death gratuity?

Yes—throughout this subpart, the word "injury" is defined as it is in 5 U.S.C. 8101(5), which includes a disease proximately caused by employment. If an employee's death results from an occupational disease incurred in

connection with the employee's service in a contingency operation, the death qualifies for payment of the death gratuity under this subpart.

##### § 10.905 If an employee incurs a covered injury in connection with his or her service with an Armed Force in a contingency operation but does not die of the injury until years later, does the death qualify for payment of the death gratuity?

Yes—as long as the employee's death is a result of injuries incurred in connection with the employee's service with an Armed Force in a contingency operation, the death qualifies for the death gratuity of this subpart regardless of how long after the injury the employee's death occurs.

##### § 10.906 What special statutory definitions apply to survivors under this subpart?

For the purposes of paying the death gratuity to eligible survivors under this subpart, OWCP will use the following definitions:

(a) "Surviving spouse" means the person who was legally married to the deceased employee at the time of his or her death.

(b) "Children" means, without regard to age or marital status, the deceased employee's natural children and adopted children. It also includes any stepchildren who were a part of the decedent's household at the time of death.

(1) A stepchild will be considered part of the decedent's household if the decedent and the stepchild share the same principal place of abode in the year prior to the decedent's death. The decedent and stepchild will be considered as part of the same household notwithstanding temporary absences due to special circumstances such as illness, education, business travel, vacation travel, military service, or a written custody agreement under which the stepchild is absent from the employee's household for less than 180 days of the year.

(2) A natural child who is an illegitimate child of a male decedent is included in the definition of "children" under this subpart if:

- (i) The child has been acknowledged in writing signed by the decedent;
  - (ii) The child has been judicially determined, before the decedent's death, to be his child;
  - (iii) The child has been otherwise proved, by evidence satisfactory to the employing agency, to be the decedent's child; or
  - (iv) The decedent had been judicially ordered to contribute to the child's support.
- (c) "Parent" or "parents" mean the deceased employee's natural father and

mother or father and mother through adoption. It also includes persons who stood *in loco parentis* to the decedent for a period of not less than one year at any time before the decedent became an employee.

(1) A person stood *in loco parentis* when the person assumed the status of parent toward the deceased employee. (Any person who takes a child of another into his or her home and treats the child as a member of his her family, providing parental supervision, support, and education as if the child were his or her own child, will be considered to stand *in loco parentis*.)

(2) Only one father and one mother, or their counterparts *in loco parentis*, may be recognized in any case.

(3) Preference will be given to those who exercised a parental relationship on the date, or most nearly before the date, on which the decedent became an employee.

(d) "Brother" and "sister" mean any person, without regard to age or marital status, who is a natural brother or sister of the decedent, a half-brother or half-sister, or a brother or sister through adoption. Step-brothers or step-sisters of the decedent are not considered a "brother" or a "sister."

**§ 10.907 What order of precedence will OWCP use to determine which survivors are entitled to receive the death gratuity payment under this subpart?**

If OWCP determines that an employee's death qualifies for the death gratuity, the FECA provides that the death gratuity payment will be disbursed to the living survivor(s) highest on the following list:

- (a) The employee's surviving spouse.
- (b) The employee's children, in equal shares.
- (c) The employee's parents, brothers, and sisters, or any combination of them, if designated by the employee pursuant to the designation procedures in § 10.909.
- (d) The employee's parents, in equal shares.
- (e) The employee's brothers and sisters, in equal shares.

**§ 10.908 Can an employee designate alternate beneficiaries to receive a portion of the death gratuity payment?**

An employee may designate another person or persons to receive not more than 50 percent of the death gratuity payment pursuant to the designation procedures in § 10.909. Only living persons, rather than trusts, corporations or other legal entities, may be designated under this subsection. The balance of the death gratuity will be paid according to the order of precedence described in § 10.907.

**§ 10.909 How does an employee designate a variation in the order or percentage of gratuity payable to survivors and how does the employee designate alternate beneficiaries?**

(a) Form CA-40 must be used to make a variation in the order or percentages of survivors under § 10.907 and/or to make an alternate beneficiary designation under § 10.908. A designation may be made at any time before the employee's death, regardless of the time of injury. The form will not be valid unless it is signed by the employee and received and signed prior to the death of the employee by the supervisor of the employee or by another official of the employing agency authorized to do so.

(b) Alternatively, any paper executed prior to the effective date of this regulation that specifies an alternate beneficiary of the death gratuity payment will serve as a valid designation if it is in writing, completed before the employee's death, signed by the employee, and signed prior to the death of the employee by the supervisor of the employee or by another official of the employing agency authorized to do so.

(c) If an employee makes a survivor designation under § 10.907(c), but does not designate the portions to be received by each designated survivor, the death gratuity will be disbursed to the survivors in equal shares.

(d) An alternate beneficiary designation made under § 10.908 must indicate the percentage of the death gratuity, in 10 percent increments up to the maximum of 50 percent, that the designated person(s) will receive. No more than five alternate beneficiaries may be designated. If the designation fails to indicate the percentage to be paid to an alternate beneficiary, the designation to that person will be invalid.

**§ 10.910 What if a person entitled to a portion of the death gratuity payment dies after the death of the covered employee but before receiving his or her portion of the death gratuity?**

(a) If a person entitled to all or a portion of the death gratuity due to the order of precedence for survivors in § 10.907 dies after the death of the covered employee but before the person receives the death gratuity, the portion will be paid to the living survivors otherwise eligible according to the order of precedence prescribed in that subsection.

(b) If a survivor designated under the survivor designation provision in § 10.907(c) dies after the death of the covered employee but before receiving his or her portion of the death gratuity,

the survivor's designated portion will be paid to the next living survivors according to the order of precedence.

(c) If a person designated as an alternate beneficiary under § 10.908 dies after the death of the covered employee but before the person receives his or her designated portion of the death gratuity, the designation to that person will have no effect. The portion designated to that person will be paid according to the order of precedence prescribed in § 10.907.

(d) If there are no living survivors or alternate beneficiaries, the death gratuity will not be paid.

**§ 10.911 How is the death gratuity payment process initiated?**

(a) Either the employing agency or a living claimant (survivor or alternate beneficiary) may initiate the death gratuity payment process. If the death gratuity payment process is initiated by the employing agency notifying OWCP of the employee's death, each claimant must file a claim with OWCP in order to receive payment of the death gratuity. The legal representative or guardian of any minor child may file on the child's behalf. Alternatively, if a claimant initiates the death gratuity payment process by filing a claim, the employing agency must complete a death notification form and submit it to OWCP. Other claimants must also file a claim for their portion of the death gratuity.

(b) The employing agency must notify OWCP immediately upon learning of an employee's death that may be eligible for benefits under this subpart, by submitting form CA-42 to OWCP. The agency must also submit to OWCP any designation forms completed by the employee, and the agency must provide as much information as possible about any living survivors or alternate beneficiaries of which the agency is aware.

(1) OWCP will then contact any living survivor(s) or alternate beneficiary(ies) it is able to identify.

(2) OWCP will furnish claim form CA-41 to any identified survivor(s) or alternate beneficiary(ies) and OWCP will provide information to them explaining how to file a claim for the death gratuity.

(c) Alternatively, any claimant may file a claim for death gratuity benefits with OWCP. Form CA-41 may be used for this purpose. The claimant will be required to provide any information that he or she has regarding any other beneficiaries who may be entitled to the death gratuity payment. The claimant must disclose, in addition to the Social Security number (SSN) of the deceased

employee, the SSNs (if known) and all known contact information of all other possible claimants who may be eligible to receive the death gratuity payment. The claimant must also identify, if known, the agency that employed the deceased employee when he or she incurred the injury that caused his or her death. OWCP will then contact the employing agency and notify the agency that it must complete and submit form CA-42 for the employee. OWCP will also contact any other living survivor(s) or alternate beneficiary(ies) it is able to identify, furnish to them claim form CA-41, and provide information explaining how to file a claim for the death gratuity.

(d) If a claimant submits a claim for the death gratuity to an employing agency, the agency must promptly transmit the claim to OWCP. This includes both claim forms CA-41 and any other claim or paper submitted which appears to claim compensation on account of the employee's death.

**§ 10.912 What is required to establish a claim for the death gratuity payment?**

Claim form CA-41 describes the basic requirements. Much of the required information will be provided by the employing agency when it completes notification form CA-42. However, the claimant bears the burden of proof to ensure that OWCP has the evidence needed to establish the claim. OWCP may send any request for additional evidence to the claimant and to his or her representative, if any. Evidence should be submitted in writing. The evidence submitted must be reliable, probative, and substantial. Each claim for the death gratuity must establish the following before OWCP can pay the gratuity:

(a) That the claim was filed within the time limits specified by the FECA, as prescribed in 5 U.S.C. 8122 and this part. Timeliness is based on the date that the claimant filed the claim for the death gratuity under § 10.911, not the date the employing agency submitted form CA-42.

(b) That the injured person, at the time he or she incurred the injury or disease, was an employee of the United States as defined in 5 U.S.C. 8101(1) and § 10.5(h) of this part, or a non-appropriated fund instrumentality employee, as defined in 10 U.S.C. 1587(a)(1).

(c) That the injury or disease occurred and that the employee's death was causally related to that injury or disease. The death certificate of the employee must be provided. Often, the employing agency will provide the death certificate and any needed medical

documentation. OWCP may request from the claimant any additional documentation that may be needed to establish the claim.

(d) That the employee incurred the injury or disease in connection with the employee's service with an Armed Force in a contingency operation. This will be determined from evidence provided by the employing agency or otherwise obtained by OWCP and from any evidence provided by the claimant.

(1) Section 8102a defines "contingency operation" to include humanitarian operations, peacekeeping operations, and similar operations. ("Similar operations" will be determined by OWCP.)

(i) A "contingency operation" is defined by 10 U.S.C. 101(a)(13) as a military operation that—

(A) Is designated by the Secretary of Defense as an operation in which members of the Armed Forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing military force; or

(B) Results in the call or order to, or retention on, active duty of members of the uniformed services under section 688, 12301(a), 12302, 12304, 12305, or 12406 of [Title 10], chapter 15 of [Title 10], or any other provision of law during a war or during a national emergency declared by the President or Congress.

(ii) A "humanitarian or peacekeeping operation" is defined by 10 U.S.C. 2302(8) as a military operation in support of the provision of humanitarian or foreign disaster assistance or in support of a peacekeeping operation under chapter VI or VII of the Charter of the United Nations. The term does not include routine training, force rotation, or stationing.

(iii) "Humanitarian assistance" is defined by 10 U.S.C. 401(e) to mean medical, surgical, dental, and veterinary care provided in areas of a country that are rural or are underserved by medical, surgical, dental, and veterinary professionals, respectively, including education, training, and technical assistance related to the care provided; construction of rudimentary surface transportation systems; well drilling and construction of basic sanitation facilities; rudimentary construction and repair of public facilities.

(2) A contingency operation may take place within the United States or abroad. However, operations of the National Guard are only considered "contingency operations" for purposes of this subpart when the President, Secretary of the Army, or Secretary of the Air Force calls the members of the

National Guard into service. A "contingency operation" does not include operations of the National Guard when called into service by a Governor of a State.

(3) To show that the injury or disease was incurred "in connection with" the employee's service with an Armed Force in a contingency operation, the claim must show that the employee incurred the injury or disease while in the performance of duty as that phrase is defined for the purposes of otherwise awarding benefits under FECA.

(4) (i) When the contingency operation occurs outside of the United States, OWCP will find that an employee's injury or disease was incurred "in connection with" the employee's service with an Armed Force in a contingency operation if the employee incurred the injury or disease while performing assignments in the same region as the operation, unless there is conclusive evidence that the employee's service was not supporting the Armed Force's operation.

(ii) Economic or social development projects, including service on Provincial Reconstruction Teams, undertaken by covered employees in regions where an Armed Force is engaged in a contingency operation will be considered to be supporting the Armed Force's operation.

(5) To show that an employee's injury or disease was incurred "in connection with" the employee's service with an Armed Force in a contingency operation, the claimant will be required to establish that the employee's service was supporting the Armed Force's operation. The death gratuity does not cover federal employees who are performing service within the United States that is not supporting activity being performed by an Armed Force.

(e) The claimant must establish his or her relationship to the deceased employee so that OWCP can determine whether the claimant is the survivor entitled to receive the death gratuity payment according to the order of precedence prescribed in § 10.907.

**§ 10.913 In what situations will OWCP consider that an employee incurred injury in connection with his or her service with an Armed Force in a contingency operation?**

(a) OWCP will consider that an employee incurred injury in connection with service with an Armed Force in a contingency operation if:

(1) The employee incurred injury while serving under the direction or supervision of an official of an Armed Force conducting a contingency operation; or

(2) The employee incurred injury while riding with members of an Armed Force in a vehicle or other conveyance deployed to further an Armed Force's objectives in a contingency operation.

(b) An employee may incur injury in connection with service with an Armed Force in a contingency operation in situations other than those listed above. Additional situations will be determined by OWCP on a case-by-case basis.

**§ 10.914 What are the responsibilities of the employing agency in the death gratuity payment process?**

Because some of the information needed to establish a claim under this subpart will not be readily available to the claimants, the employing agency of the deceased employee has significant responsibilities in the death gratuity claim process. These responsibilities are as follows:

(a) The agency must completely fill out form CA-42 immediately upon learning of an employee's death that may be eligible for benefits under this subpart. The agency must complete form CA-42 as promptly as possible if notified by OWCP that a survivor filed a claim based on the employee's death. The agency should provide as much information as possible regarding the circumstances of the employee's injury and his or her assigned duties at the time of the injury, so that OWCP can determine whether the injury was incurred in the performance of duty and whether the employee was performing service in connection with an Armed Force in a contingency operation at the time.

(b) The employing agency must promptly transmit any form CA-41's received from claimants to OWCP. The employer must also promptly transmit to OWCP any other claim or paper submitted that appears to claim compensation on account of the employee's death.

(c) The employing agency must maintain any designations completed by the employee and signed by a representative of the agency in the employee's official personnel file or a related system of records. The agency must forward any such forms to OWCP if the agency submits form CA-42 notifying OWCP of the employee's death. The agency must also forward any other paper signed by the employee and employing agency that appears to make designations of the death gratuity.

(d) If requested by OWCP, the employing agency must determine whether a survivor, who is claiming the death gratuity based on his or her status as an illegitimate child of a deceased

male employee, has offered satisfactory evidence to show that he or she is in fact the employee's child.

(e) The employing agency must notify OWCP of any other death gratuity payments under any other law of the United States for which the employee's death qualifies. The employing agency also must notify OWCP of any other death gratuity payments that have been paid based on the employee's death.

(f) Non-appropriated fund instrumentalities must fulfill the same requirements under this subpart as any other employing agency.

**§ 10.915 What are the responsibilities of OWCP in the death gratuity payment process?**

(a) If the death gratuity payment process is initiated by the employing agency's submission of form CA-42, OWCP will identify living potential claimants. OWCP will make a reasonable effort to provide claim form CA-41's to any known potential claimants and provide instructions on how to file a claim for the death gratuity payment.

(b) If the death gratuity payment process is initiated by a claimant's submission of a claim, OWCP will contact the employing agency and prompt it to submit form CA-42. OWCP will then review the information provided by both the claim and form CA-42, and OWCP will attempt to identify all living survivors or alternate beneficiaries who may be eligible for payment of the gratuity.

(c) If OWCP determines that the evidence is not sufficient to meet the claimant's burden of proof, OWCP will notify the claimant of the additional evidence needed. The claimant will be allowed at least 30 days to submit the additional evidence required. OWCP may also request additional information from the employing agency.

(d) OWCP will review the information provided by the claimant and information provided by the employing agency to determine whether the claim satisfies all the requirements listed in § 10.912.

(e) OWCP will calculate the amount of the death gratuity payment and pay the beneficiaries as soon as possible after accepting the claim.

**§ 10.916 How is the amount of the death gratuity calculated?**

The death gratuity payment under this subpart equals \$100,000 minus the amount of any death gratuity payments that have been paid under any other law of the United States based on the same death. A death gratuity payment is a payment in the nature of a gift, beyond

reimbursement for death and funeral expenses, relocation costs, or other similar death benefits. Only other death gratuity payments will reduce the amount of the death gratuity provided in this subpart. For this reason, death benefits provided to the same employee's survivors such as those under 5 U.S.C. 8133 as well as benefits paid under 5 U.S.C. 8134 are not death gratuity payments, and therefore have no effect on the amount of the death gratuity provided under this subpart.

(a) A payment provided under section 413 of the Foreign Service Act of 1980 (22 U.S.C. 3973), is a death gratuity payment, and if a deceased employee's survivors received that payment for the employee's death, the amount of the death gratuity paid to the survivors under this subpart would be reduced by the amount of the Foreign Service Act death gratuity. Other death gratuities that would affect the calculation of the amount payable include but are not limited to: the gratuity provision in section 1603 of the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Hurricane Recovery, 2006 (Pub. L. 109-234, June 15, 2006); the \$10,000 death gratuity to the personal representative of civilian employees, at Title VI, Section 651 of the Omnibus Consolidated Appropriations Act of 1996 (Pub. L. 104-208, September 30, 1996); the death gratuity for members of the Armed Forces or any employee of the Department of Defense dying outside the United States while assigned to intelligence duties, at 10 U.S.C. 1489; and the death gratuity for employees of the Central Intelligence Agency, at 50 U.S.C. 403k.

(b) The amount of the death gratuity under this section will be calculated before it is disbursed to the employee's survivors or alternate beneficiaries, by taking into account any death gratuities paid by the time of disbursement. Therefore, any designations made by the employee under § 10.909 are only applicable to the amount of the death gratuity as described in paragraph (a) of this section. The following examples are intended to provide guidance in this administration of this subpart.

(1) *Example One.* An employee's survivors are entitled to the Foreign Service Act death gratuity; the employee's spouse received payment in the amount of \$80,000 under that Act. A death gratuity is also payable under FECA; the amount of the FECA death gratuity that is payable is a total of \$20,000. That employee, using Form CA-40 had designated 50% of the death gratuity under this subpart to be paid to his neighbor John Smith who is still

living. So, 50% of the death gratuity will be paid to his spouse and the remaining 50% of the death gratuity paid under this subpart would be paid to John Smith. This means the surviving spouse will receive \$10,000 and John Smith will receive \$10,000.

(2) *Example Two.* Employee dies in circumstances that would qualify her for payment of the gratuity under this subpart; her agency has paid the \$10,000 death gratuity pursuant to Public Law 104-208. The employee had not completed any designation form. The FECA death gratuity is reduced by the \$10,000 death gratuity and employee's spouse receives \$90,000.

(3) *Example Three.* An employee of the Foreign Service whose annual salary is \$75,000 dies in circumstances that would qualify for payment of both the Foreign Service Act death gratuity and the death gratuity under this subpart. Before his death, the employee designated that 40% of the death gratuity under this subpart be paid to his cousin Jane Smith, pursuant to the alternate beneficiary designation provision at section 10.908 and that 10% be paid to his uncle John Doe who has since died. At the time of his death, the employee had no surviving spouse, children, parents, or siblings. Therefore, the Foreign Service Act death gratuity will not be paid, because no eligible survivors according to the Foreign Service Act provision exist. The death gratuity under this subpart would equal \$100,000, because no other death gratuity has been paid, and Jane would receive \$40,000 according to the employee's designation. As John Doe is deceased, no death gratuity may be paid pursuant to the designation of a share of the death gratuity to him.

Signed at Washington, DC, this 29th day of July 2009.

**Shelby S. Hallmark,**

*Acting Assistant Secretary for Employment Standards Administration.*

[FR Doc. E9-18523 Filed 8-17-09; 8:45 am]

**BILLING CODE 4510-CF-P**

**DEPARTMENT OF HEALTH AND HUMAN SERVICES**

**Food and Drug Administration**

**21 CFR Part 558**

[Docket No. FDA-2009-N-0665]

**New Animal Drugs for Use in Animal Feeds; Semduramicin; Virginiamycin**

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Final rule.

**SUMMARY:** The Food and Drug Administration (FDA) is amending the animal drug regulations to reflect approval of an original new animal drug application (NADA) filed by Phibro Animal Health. The NADA provides for use of single-ingredient Type A medicated articles containing semduramicin (as semduramicin sodium biomass) and virginiamycin to manufacture 2-way combination drug Type C medicated feeds for use in broiler chickens.

**DATES:** This rule is effective August 18, 2009.

**FOR FURTHER INFORMATION CONTACT:** Timothy Schell, Center for Veterinary Medicine (HFV-128), Food and Drug Administration, 7500 Standish Pl., Rockville, MD 20855, 240-276-8116, e-mail: *timothy.schell@fda.hhs.gov*.

**SUPPLEMENTARY INFORMATION:** Phibro Animal Health, 65 Challenger Rd., 3d floor, Ridgefield Park, NJ 07660, filed NADA 141-289 that provides for the use of AVIAX II (semduramicin sodium biomass) and STAFAC (virginiamycin) Type A medicated articles to manufacture 2-way combination drug Type C medicated feeds for broiler chickens. The NADA is approved as of July 13, 2009, and the regulations are amended in 21 CFR 558.555 to reflect the approval.

In accordance with the freedom of information provisions of 21 CFR part 20 and 21 CFR 514.11(e)(2)(ii), a

summary of safety and effectiveness data and information submitted to support approval of this application may be seen in the Division of Dockets Management (HFA-305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852, between 9 a.m. and 4 p.m., Monday through Friday.

The agency has determined under 21 CFR 25.33 that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

This rule does not meet the definition of "rule" in 5 U.S.C. 804(3)(A) because it is a rule of "particular applicability." Therefore, it is not subject to the congressional review requirements in 5 U.S.C. 801-808.

**List of Subjects in 21 CFR Part 558**

Animal drugs, Animal feeds.

■ Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs and redelegated to the Center for Veterinary Medicine, 21 CFR part 558 is amended as follows:

**PART 558—NEW ANIMAL DRUGS FOR USE IN ANIMAL FEEDS**

■ 1. The authority citation for 21 CFR part 558 continues to read as follows:

**Authority:** 21 U.S.C. 360b, 371.

■ 2. In § 558.555, add paragraphs (e)(2) through (e)(4) to read as follows:

**§ 558.555 Semduramicin.**

\* \* \* \* \*

(e) \* \* \*

Semduramicin in grams per ton	Combination in grams per ton	Indications for use	Limitations	Sponsor
*	*	*	*	*
(2) 22.7	Virginiamycin 5	Broiler chickens: As in paragraph (e)(1) of this section; for increased rate of weight gain and improved feed efficiency.	Feed continuously as sole ration. Withdraw 1 day before slaughter. Do not feed to laying hens. Virginiamycin provided by No. 066104 in § 510.600(c) of this chapter.	066104