Workers Compensation Assistance

13 July 2023

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Dear Madam / Sir

COMPENSATION FOR OCCUPATIONAL INJURIES AND DISEASES ACT, 130 OF 1993
DRAFT REHABILITATION, REINTEGRATION AND RETURN-TO WORK REGULATIONS FOR PUBLIC COMMENT

We refer to the draft regulations R 3539 published for public comment in Government Gazette No 48787 dated 15 June 2023.

WCA Workers Compensation Assistance submits the enclosed, invited comments in the interests of our client employers, totalling approximately 1,000 organisations which employ approximately 500,000 employees and report approximately 10,000 claims per year to the Compensation Fund.

Because of the services and systems we supply, we also have insight into the challenges of certain exempted employers in the local and provincial spheres of government and our comments may touch on concerns or questions that could arise in these organisations.

In light of the extent of our interest, we will deeply appreciate the opportunity to discuss in person with the regulator the various highlighted points in the submission attached and to have heard our concerns – and to hear the regulator's position – regarding these points. They are marked in yellow highlighting in the enclosed comments and listed below for emphasis and convenience.

<u>Regulations of special concern:</u>

- 2(1) The provisions of these regulations shall not apply to employers who are exempted therefrom by the Director-General.
- **3. Appointment of Employee Health and Wellness Representative**
    - An employer or employer individually liable may appoint or designate an employee as health and wellness representative for their business establishment
- 8 **Obligations of employers and employers Individually liable**

  (1) An employer or employer individually liable must facilitate access to rehabilitation for an occupationally injured or diseased employee's reintegration back into the workplace, and In so doing, the employer or employer individually liable must:

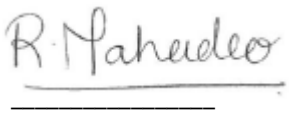
- (e) ensure reporting of all work-related Injuries and occupational diseases to the Fund or Licensee by the employee health and wellness representatives;
- (h) keep rehabilitation and Return-to-Work reports for a period of not less than forty years,
- (i) organise vocational guidance, skills development initiatives, reasonable accommodation, and placement;
- (n) ... modify work areas, ...
- (q) ensure that the employee undergoing rehabilitation can return to their original work where reasonably practicable or, where relevant, and shall for this purpose, reserve the employee's original work or, where appropriate, suitable alternative position until such time where evidence of incapacity has been provided after occupational injury or diagnosis of occupational disease;
- (s) not dismiss an employee based on Incapacity or reduce the rate of their remuneration or alter terms of their employment conditions to a less favourable one as a result of being injured on duty, contracting an occupational disease without reporting such to the chief Inspectorate and the Fund or Licensees in writing stating the reasons for dismissal;

- 9. Obligations of the employee
  - An employee ***must*** report the injury or disease as soon as practicable after the injury or diagnosis to his or her immediate supervisor and/or health and safety representative
- 10. Benefits and costs provided for under rehabilitation

  For the purpose of costs of rehabilitation: -
  - (b) the costs of vocational rehabilitation for employees returned to work, as contemplated in sub-regulation (1), shall be borne by the employer and employer Individually liable, including the costs of and reasonable accommodation
- 13. Reintegration and Return-to-Work policy
  - An employer or employer individually liable must have a reintegration and Return-to-Work policy. The policy must be freely accessible and communicated to all employees in writing, and it must outline the following: -
    - ...
    - provision of reasonable accommodation and Assistive Devices and Technology;
- 26. Non-contracted healthcare service providers for rehabilitation
  - The Fund or Licensee shall not be liable for the healthcare services mentioned in subsection (2) if prior approval had been required but not obtained.

We thank you for the opportunity to submit comments and look forward to the engaging on the issues raised.

Yours sincerely



Ms Ravishni Mahadeo

For WCA Workers Compensation Assistance CC

Enclosed: Tabulated comments on draft regulations

No.	Regulation number	Regulation / Wording commented on	Comment	Basis in law for comment
1	1.	Under definition of "Case Manager", "Case Manager" means the health professional appointed by the Compensation Fund or Licensee	1. The definition of "Licensee" is not yet in effect therefore the wording should refer to "Licensee or Mutual Association" to avoid an omission.	1. The sections relating to Licensees (the amended sections 1 and 30) are not yet in effect.
2	1	Definition of "Disability Manager"	It is submitted that the phrase "suitably trained individual" be fully specified.	
3	1	Definition of Frail Care facility: 1. Dependent residual level of functioning. 2. Maximum Medical Improvement (MMI)	1. What is the definition of "dependent residual level of functioning"? 2. Is maximum medical improvement in this regulation identical to maximum medical intervention referred to in the amendment Act?	2. New Section 49A in amended COIDA (see section 31 of the amendment Act)
4	1	The word "clients" in the definition of "Rehabilitation Benefits".	Since the regulations are directed at injured employees as defined in the regulation, the introduction of the word "clients" is confusing. It should be replaced with the words Injured Employee or Employee, consistent with terms that are defined.	Section 1 of COIDA: definition of employee
5	2	2(1) The provisions of these regulations shall not apply to employers who are	1. It is submitted that the Compensation Commissioner should be responsible for this decision.	

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		exempted therefrom by the Director-General.	2. What will be the basis for exemption and how will exemption be obtained. In other words, which types of employers will be exempt (it is presumed that micro enterprises might be exempt)?	
6	3.	**3. Appointment of Employee Health and Wellness Representative** An employer or employer individually liable may appoint or designate an employee as health and wellness representative for their business establishment.	Based on the extensive functions and responsibilities assigned to the Employee Health and Wellness Representative, employers should expressly be permitted to appoint the employee health and wellness representative from outside the employer's establishment. The following wording will therefore be preferred: *An employer or employer individually liable may appoint or designate an employee **or competent person** as **the** health and wellness representative for their business establishment.* */*	
7	5(1)	The employer and healthcare provider shall notify the Compensation Fund or Licensee ***of Injured/diseased employees*** of the need to enrol such employees in the rehabilitation and Return-to-Work programme.	The wording in this regulation is difficult to understand. Consider rewording to read: *The employer and healthcare provider shall notify the Compensation Fund or Licensee of the particulars of Injured/diseased employees who have a need to be enrolled in the rehabilitation and Return-to-Work programme.*	
8	5(2)	5(2) The liability for the injury will be duly accepted by the Fund or Licensee	The meaning is unclear. It seems that it intends to say that enrolment into rehabilitation and return to work programme will be permitted if liability for the accident or disease is accepted by the Compensation Commissioner or Licensee as the case may be. The regulator should draft the wording more clearly or confirm that his interpretation is correct.	
9	5(3)	5(3) The injury is severe and will be classified as a	The wording is unclear and difficult to understand (unless	

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		disability as per the categorised diagnoses of the Compensation Fund or Licensee	read, somehow, with the heading). It appears it must be read with the heading. On this assumption, it must mean that, If the injury is severe and would lead to a disability (as listed by the Compensation Fund or Licensee) the employee must be enrolled. The wording should state this.	
10	6(1)(e)	The Compensation Fund and Licensee may: 1. Found, establish, or subsidise, or assist with the founding, establishment or subsidising of a body, organisation, or scheme whose objects Include one or more of the following: a. ... b. ... c. ... d. ... e. provide appropriate support to stakeholder organisations to ensure that they meet expected goals, objectives and responsibilities in compliance with these regulations;	1. What is meant by "stakeholder organisations"? 2. What requirements will be set down for the enrolment of the envisaged stakeholder organisations?	
11	6(1)	Regulation 6 in its entirety	Comment regarding drafting: The introductory phrase should not be numbered and should read: *The Compensation Fund and Licensee may found, establish, or subsidise, or assist with the founding, establishment or subsidising of a body, organisation, or scheme whose objects Include one or more of the following:* The third-level numbered subregulations can then be brought to second level.	

No.	Regulation number	Regulation / Wording commented on	Comment	Basis in law for comment
12	8(1)(a) to (c)	8. Obligations of employers and employers Individually liable (1) An employer or employer individually liable must facilitate access to rehabilitation for an occupationally injured or diseased employee's reintegration back into the workplace, and In so doing, the employer or employer individually liable must: - (a) provide and maintain, as far as reasonably practicable, a working environment that Is safe and without risk to the health and safety of their employees; (b) Identify, assess, evaluate, and mitigate occupational hazards; (c) take all reasonable steps that are necessary under the circumstances to ensure that employees at work receive prompt first aid treatment in case of Injury or emergency;	The occupational health and safety legislation places specific and extensive obligations on employers in this regard. There appears little sense to repeat these provisions in the Compensation Act's regulations, especially when this regulation provides for an offence for non-compliance – and where infringement is addressed in more comprehensive and meaningful detail in our OHS legislation.	
13	8(1)(e)	8 **Obligations of employers and employers Individually liable** (1) An employer or employer individually liable must facilitate access to rehabilitation for an occupationally injured or diseased employee's reintegration back into the workplace, and In so doing, the employer or employer individually liable must: (e) ensure reporting of all work-related Injuries and occupational diseases to the Fund or Licensee by the employee health and wellness representatives;	1. How must this be applied in relation to section 39(1)? Does it mean that, unless an employer is exempt from the regulation, only the employee health and wellness representative may report accidents? 2. If so, what is the Fund's position in respect of accidents reported by designated people who are not the employer's employee health and wellness representative? Does it expose the employer to an offence under this regulation but not under COIDA section 39(8)?	COIDA s 39(1)
14	8(1)(f) – (g)	(f) establish and maintain a system of rehabilitation and Return-to-Work reporting	To ensure compliance, the Fund must publish the prescribed reports (and required data)	

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		for all employees exposed to occupational injuries and diseases; (g) submit the reporting data to the Fund or Licensee in the prescribed manner on an annual basis;	before promulgating lest all employers fail to record the information or report in the prescribed manner and expose themselves to a fine or penalty referred to in regulation 27(1).	
15	8(1)(h)	(h) keep rehabilitation and Return-to-Work reports for a period of not less than forty years,	It is respectfully submitted that, if the CF requires these records to be kept for this period and, because it is known that many employers will not exist for that period, the regulations should provide for the CF also maintaining these records for the required period.	
16	8(1)(i)	(i) organise vocational guidance, skills development initiatives, reasonable accommodation, and placement;	1. This sub-regulation highlights the importance of stipulating which employers will be exempt from these obligations since very small enterprises will probably not be able to meet this requirement. 2. Are the costs for these interventions to be recovered from the Compensation Fund and, if so, how?	
17	8(1)(k)	(k) develop and implement a workplace rehabilitation and Return-to-Work policy and programme in compliance with these regulations and relevant legislation;	1. Employers and providers of these programmes will need to know what the requirements are for approval of programmes since compliance may entitle assessment rate reductions under the revised s85(3). 2. Employers will be interested to know what the rate reduction policies will be.	The amended section 85(3) states that: ... *if the employer is participating in the rehabilitation of employees as prescribed, the Commissioner may give such employer a rebate on any assessment paid or payable by him or her.*
18	8(1)(m)	(m) provide reasonable, transitional or temporary work to allow the Injured employee to work safely in the Return-to-Work process,	Light duty is firmly established in the policies and in the legislation (refer to COIDA section 47(2) and the prescribed Resumption Report WCl6 form. It is submitted that little is achieved by repeating it in the draft regulations.	COIDA Section 47(2)
19	8(1)(n)	(n) ... modify work areas, ...	1. Is the employer entitled under the regulations to a rebate or a refund for costs that will be incurred for modifying work areas to accommodate employees permanently disabled?	

No.	Regulation number	Regulation / Wording commented on	Comment	Basis in law for comment
			2. Are there any other laws that come into play when an employer makes special provision for employing workers with special needs or disabilities?	
20	8(1)(p)	(p) consult with all relevant stakeholders to resolve difficulties at the workplace that impact the outcomes of the rehabilitation and Return-to-Work programme;	This appears to be a wide and onerous obligation. Will the burden on micro and small companies be taken into account when determining exemptions from the provisions?	
21	8(1)(q)	(q) ensure that the employee undergoing rehabilitation can return to their original work where reasonably practicable or, where relevant, and shall for this purpose, reserve the employee's original work or, where appropriate, suitable alternative position until such time where evidence of incapacity has been provided after occupational injury or diagnosis of occupational disease;	1. Whilst most employers will do their best to ensure continuity, it is respectfully submitted that the Compensation Fund should set down guidelines for what is considered "reasonably practicable" to avoid prejudice to employees on the one hand or employers on the other. 2. BCEA sets down bases for unfair dismissal. Are these to be the guides? If so, is it necessary to repeat them or their spirit in the regulations?	Basic Conditions of Employment Act (BCEA), 75 of 1997
22	8(1)(s)	(s) not dismiss an employee based on Incapacity or reduce the rate of their remuneration or alter terms of their employment conditions to a less favourable one as a result of being injured on duty, contracting an occupational disease without reporting such to the chief Inspectorate and the Fund or Licensees in writing stating the reasons for dismissal;	1. There is no reference to the manner of such a report and whether the report must be ratified before dismissal is possible. 2. For how long after the employee has returned to work will the employer be obliged to submit this report? 3. Will an obligation to report lie with the employer if the employee absconds? 4. If the answer to 3. Is "no", what will be the situation if a dispute arises and the employee takes the stance that he/she has been dismissed and the employer hold the view that the employee absconded (such disputes being the subject matter of prevailing, non-COIDA labour legislation)	Basic Conditions of Employment Act (BCEA), 75 of 1997 Labour Relations Act (LRA), 66 of 1995
22	8(1)(t)	(t) notify the Compensation Commissioner in the prescribed manner about the resumption of duty or	On behalf of affected employers, it must be submitted that the Fund pays insufficient attention to the existing Resumption	

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		inability to retain employees after all efforts have been made to preserve the employment of the injured or diseased employee;	Reports. Additional reporting when an employee resumes work will burden the Fund even further and weaken the already slim chances of a Resumption Report being acted upon. This issue requires urgent institutional attention.	
23	8(1)(u) and (v)	(u) for purposes of sub-regulation (a), (b), (c), the provisions of occupational Health and Safety Act no 85 of 1993, as amended from time to time, shall apply and (v) for purposes of sub-regulation (s), the provisions of the labour relations act 66 of 1995 shall apply as amended from time to time.	If the legislation referred to exists, why is it necessary to repeat it in the regulation?	
24	9.	**9. Obligations of the employee** An employee ***must***: (a) report the injury or disease as soon as practicable after the injury or diagnosis to his or her immediate supervisor and/or health and safety representative	The more relevant and correct wording is provided in section 38 as quoted alongside. It is submitted that it is confusing to the public and incorrect to impose regulations that clash and overlap with already established sections in legislation (in this case section 38 of the COIDA).	Section 38 reads as follows: ***38. Notice of accident by employee to employer*** *1) Written or verbal notice of an accident shall, as soon as possible after such accident happened, be given by or on behalf of the employee concerned to the employer, and notice of the accident may also be given as soon as possible to the commissioner in the prescribed manner.* *(2) Failure to give notice to an employer as required in subsection (1) shall not bar a right to compensation if it is proved that the employer had knowledge of the accident from any other source at or about the time of the accident.* *(3) Subject to section 43, failure to give notice to an employer as required in subsection (I), or any*

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				error or inaccuracy in such notice, shall not bar a right to compensation if in the opinion of the Director-General- *(a) the compensation fund or the employer or mutual association concerned, as the case may be, is not or would not be seriously prejudiced by such failure, error or inaccuracy if notice is then given or the error or inaccuracy is corrected;* *(b) such failure, error or inaccuracy was caused by an oversight, absence from the Republic or other reasonable cause*
25	9(e)	accept an offer of reasonable accommodation, duties and assistive devices and technology where this is part of an agreed Return-to-Work plan.	We do not believe that the obligation referred to alongside should apply only if part of an agreed Return to Work plan – it should apply whenever reasonable.	Are the BCEA and LRA silent on these issues? If not, the provisions in the BCEA should not be repeated in the regulations.
26	10(2)(b)	**10. Benefits and costs provided for under rehabilitation** ... (2) For the purpose of costs of rehabilitation: - ... (b) the costs of vocational rehabilitation for employees returned to work, as contemplated in sub-regulation (1), shall be borne by the employer and employer Individually liable, including the costs of and reasonable accommodation.	1. Claims costs for client employers of WCA Workers Compensation Assistance typically represent about 20% of the assessments they pay yet they receive no recognition thereof by way of rebates under section 85(3) or discounts under 85(1). 2. This subregulation adds a further burden to employers with no tangible scope for recovering the costs directly or indirectly - by way of a section 85(3) rebate (which was last awarded for the period 2001 – 2003 – twenty years ago!). 3. The proposed amendment to section 85(3), which should give employers some respite, is applied entirely at the Commissioner's discretion. This therefore renders it unacceptable as a means for reimbursing employers for the costs of	Refer to the existing

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			such interventions. Surely the purpose of the Compensation Fund is to release employers from the burden of all of the costs (not just some of the costs) associated with workplace accidents? 4. It is therefore unacceptable that the Compensation Fund should consider further burdening employers without offering an equitable and concomitant refund. The regulations should therefore not only provide for refunds but should also place on the administration key performance thresholds for effecting the refunds (or rebates – in the worst case scenario).	
27	10(4)	Notwithstanding sub-regulation (3), the Commissioner may adjust any compensation benefits to a level or levels deemed equitable if the affected employee resumes work or disablement improves or deteriorates based on a rehabilitation plan developed in terms of this regulation.	The wording of this regulation is difficult to understand and should be re-formulated.	
28	11(1)(a)	**11. The Compensation Fund, Licensee, employers or employer Individually liable may require assessments and rehabilitation plans** (1) Before providing clinical, vocational or social rehabilitation to an employee under the Act, the Fund, Licensee, employer or employer Individually liable, as the case may be, may require the employee to: — (a) undergo any assessment, Including assessment of present and likely capabilities for the purposes of rehabilitation; and	Who will bear the costs of the assessments? Is this addressed in regulation 12(2): *For the purpose of preparing an individual treatment or rehabilitation plan, the Fund or Licensee may require an employee to be assessed by a healthcare provider* ***at the cost of the Fund or Licensee***. If so, the overlap should be addressed and one of the regulations updated or edited to refer to the other.	

No.	Regulation number	Regulation / Wording commented on	Comment	Basis in law for comment
29	13	13. **Reintegration and Return-to-Work policy**	All but the most sophisticated of employers should be exempt from having to keep a policy referred to in this section.	
30	13(1)(b)	(1) An employer or employer individually liable must have a reintegration and Return-to-Work policy. The policy must be freely accessible and communicated to all employees in writing, and it must outline the following: - (a) ... (b) provision of reasonable accommodation and Assistive Devices and Technology;	1. Does "accommodation" refer to the employer "acting in an accommodating way" to make allowances for an employee's disablement or is it "lodging"? 2. The specialised expertise and knowledge to devise a policy of any detail as required will be beyond the capacity of almost all employers. 3. The provision of assistive devices is the area of expertise of healthcare experts, not of employers. The employer has no role to play in the provision of assistive devices and technology or the setting down of a policy in this regard. 4. Is it therefore expected that these policies will have to formulated by agents external to the employer?	
31	17(1)	**17. Obligations of Employee Health and Wellness representatives** (1) An employer shall be responsible for identifying employee health and wellness representatives who will act as liaison officers between the Fund or Licensee, the injured or diseased employee and the medical and rehabilitation service providers.	It is submitted that most employers will not have the capacity to identify such a person from within their ranks and will find the need to appoint such people from outside their organisation. The regulation should state that the employer may appoint external specialists to this position.	
32	18(2).	Approved rehabilitation healthcare providers who are registered under the relevant statutory councils.	This is not a sentence or an obligation. It must be re-worded.	
33	19.	19. **Obligations of rehabilitation service providers**	It is respectfully submitted that the regulation should not purport dictate the roles of healthcare professionals, which is the ambit of the Health Professions Act 56 of 1974	Health Professions Act 56 of 1974

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		(1) Approved rehabilitation providers are responsible for the following: - (a) performing professional duties only in the field where they have been educated and trained and where they have gained experience and professional competence, taking into account the extent and limits of such professional expertise;		
34	20(8)	**20. Obligations of the Clinical vocational rehabilitation practitioners** Approved Clinical vocational rehabilitation practitioners must, within their scope of practice, work with the Fund, Licensee, employer and all relevant stakeholders within the employment relationship and shall be responsible for the following: - ... (8) providing Assistive Devices and Technology prescriptions in accordance with the guidelines published in the Gazette annually	Is this the recognised role of Clinical vocational rehabilitation practitioners?	
35	20(9)	9. avoiding over-servicing of patients by following appropriate peer-reviewed guidelines and clinical governance procedures for the treatment and servicing of patients;	The undertone of suggestion probably flies in the face of the standards taken for granted for behaviour of healthcare practitioners set down in the relevant legislation. The peer review process and sanction probably overlap provisions of more pertinent legislation?	Health Professions Act 56 of 1974
36	21.	**21. Obligations of treating healthcare practitioners**	It is submitted that the regulations referring to the conduct, professionalism and ethics of medical practitioners should be omitted since they are likely to be addressed more completely in the relevant legislation.	Health Professions Act 56 of 1974

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37	23.	**23. Roles and obligations of Rehabilitation Facilities**	Seem to overlap with ethical standards that are likely to be set down elsewhere.	
38	24.	**24. Assessment of employers participating in a rehabilitation programme** (1) Subject to the provisions of section 85, the Commissioner may assess the employers participating in the Return-to-Work programme at a lower rate as he or she may deem necessary,	The drafters have introduced the notion of ***necessity*** in this regulation – which is not mentioned in COIDA section 85(3) (as it is to be amended). It is respectfully submitted that, unless the proposed section adds value by stipulating the scorecard (or the basis or notion of a scorecard) for the envisaged rate discount, this regulation should be omitted for the potential confusion it may cause. Note, further, that all employers are required (unless exempt therefrom) to participate in these programmes. **Does this mean that all employers must receive a rebate**?	Section 85(3) as recently amended that "… if the employer is participating in the rehabilitation of employees as prescribed, the Commissioner may give such employer a rebate on any assessment paid or payable".
39	25(1)(c)	supplying, maintaining and repairing Assistive Devices and Technology, which has been issued In accordance with the guidelines and costs as published annually in the Gazette;	Grammar error: "has" should be "have"	
40	26(1)(c)	26. **Non-contracted healthcare service providers for rehabilitation** (1) The Fund or Licensee shall be liable to pay a non-contracted healthcare provider or any person who paid such a healthcare provider the costs of healthcare services provided to an occupational injured and diseased person, provided that: - … (c) subject to section 23 of the Act, the Fund or Licensee shall only be liable for healthcare services available and received in the Republic and medical reports compiled in the Republic,	There is no need to repeat the provisions of section 23 or to refer to it since it prevails in any event.	

No.	Regulation number	Regulation / Wording commented on	Comment	Basis in law for comment
41	26(2), 26(3)	(2) The Fund or Licensee may, in the manner set out in the gazetted and regulated procedures, require Its prior approval in respect of non-emergency healthcare services. (3) The Fund or Licensee shall not be liable for the healthcare services mentioned in subsection (2) if prior approval had been required but not obtained.	The CF should take into consideration the possibility of delays in providing pre-authorisation and the danger of its consequences. It should therefore lay down alternative courses of action in the event that a life-threatening or otherwise harmful delay occurs.	
42	27(1)	**27. Penalties for Non-Compliance** (1) An employer or employer individually liable who fails to comply with the provisions of these regulations shall be liable to a fine or penalty as determined by the Commissioner.	The quantum of or basis for the fine should be stipulated. In regulation 9, the employee is obliged to (he or she "must") report to the employee health and wellness representative but there are no consequences in the regulation for non-compliance. In several regulations, obligations or prohibitions are placed are placed rehabilitation service providers or institutions but these do not carry consequences for non-compliance. It is therefore submitted that either: - Consequences must be established for failure to comply in these instances; or - The obligations or prohibitions should be removed from the regulations. Repercussions for the state's failure to meet service delivery standards should be set without requiring affected parties to resort to the courts.	
43	Several	A note regarding numbering.	If there is only one introductory paragraph, the introductory paragraph should not be numbered and only the sub-paragraphs should be numbered. In some cases the drafters have done this correctly (see	

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			regulation 20), and in others not (see most of the rest).	