No. 00-725

In the Supreme Court of the United States

ALOE ENERGY CORPORATION, PETITIONER

v.

KENNETH S. APFEL, COMMISSIONER OF SOCIAL SECURITY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

The Coal Industry Retiree Health Benefit Act of 1992 (Coal Act), 26 U.S.C. 9701 *et seq.*, established the United Mine Workers of America Combined Benefit Fund (Fund) to ensure the continued provision of health-care benefits to retired miners and their dependents who worked under collective bargaining agreements that promised lifetime health-care benefits. For the purpose of calculating premiums to be paid to the Fund to finance those health-care benefits, the Coal Act directs the Commissioner of Social Security to assign responsibility for beneficiaries of the Fund to the "signatory operator" or "related person" of the signatory operator that formerly employed them, if that signatory operator (or related person) is still "in business." 26 U.S.C. 9706(a).

The question presented is whether the Coal Act permits the Commissioner to assign beneficiaries to the successor in interest of a signatory operator that is no longer in business.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is unpublished, but the decision is noted at 225 F.3d 648 (Table). The orders of the district court (Pet. App. 16a-17a, 30a-31a) are unreported, as are the reports and recommendations of the magistrate judge (Pet. App. 18a-29a, 32a-50a).

JURISDICTION

The judgment of the court of appeals was entered on June 20, 2000. On September 8, 2000, Justice Souter entered an order extending the time within which to file a petition for a writ of certiorari to and including November 2, 2000, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Congress enacted the Coal Industry Retiree Health Benefit Act of 1992 (Coal Act or Act), 26 U.S.C. 9701 *et seq.*, in response to a crisis that threatened to deprive more than 100,000 retired coal miners and their dependents of promised lifetime health-care benefits. In the 1980s and 1990s, the financial stability of private multi-employer plans set up by the coal industry to finance those benefits was threatened by increasing health-care costs and the termination of employers' contribution obligations when they switched to non-union employees or left the coal mining business altogether. As more companies stopped contributing to the plans, the remaining contributors were forced to shoulder more of the costs, which in turn led to even more defections and created a downward spiral. See generally *Eastern Enters.* v. *Apfel*, 524 U.S. 498, 504-514 (1998) (plurality opinion).

Congress's objectives in enacting the Coal Act were to "identify persons most responsible for plan liabilities in order to stabilize plan funding and allow for the provision of health care benefits to [coal industry] retirees," to "allow for sufficient operating assets for [coal industry retiree health-care benefit] plans," and to "provide for the continuation of a privately financed self-sufficient program for the delivery of health care benefits to the beneficiaries of such plans." Energy Policy Act of 1992, Pub. L. No. 102-486, § 19142, 106 Stat. 3037. In furtherance of those ends, the Coal Act established the United Mine Workers of America Combined Benefit Fund (Combined Fund or Fund), a private multi-employer health benefit plan. The Combined Fund provides health-care benefits to beneficiaries who, at the time of passage of the Act, were

receiving (or were eligible to receive) benefits from multi-employer plans established by collective bargaining in the coal industry. See 26 U.S.C. 9702, 9703(f). The Combined Fund is financed by premiums paid by the "signatory operator[s]," or "related person[s]" of the signatory operators, that formerly employed the beneficiaries and that remain "in business." 26 U.S.C. 9704, 9706(a). The Act defines "signatory operator" as "a person which is or was a signatory to a coal wage agreement." 26 U.S.C. 9701(c)(1). The particular collective bargaining agreements with the United Mine Workers of America (Union) governing the coal industry that are included within the term "coal wage agreement" are set forth in 26 U.S.C. 9701(b)(1).

b. The Act delegates to the Commissioner of Social Security[1] (Commissioner) the task of assigning eligible beneficiaries to signatory operators or related persons. 26 U.S.C. 9706(a). Assignments are made according to a three-tiered hierarchy.

The Commissioner must first seek to assign a beneficiary to the "signatory operator" (or "related person") that remains "in business," signed a collective bargaining agreement with the Union in 1978 or later, and was the most recent signatory operator to employ the miner in the coal industry for at least two years. 26 U.S.C. 9706(a)(1). The Act specifies that "a person shall be

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[1] Many references in the legislative record are to the Department of Health and Human Services, which at the time included the Social Security Administration. In 1995, the Social Security Administration became an independent agency within the Executive Branch, and the Commissioner of Social Security assumed the duties of the Secretary of Health and Human Services under the Coal Act. See Social Security Independence and Program Improvements Act of 1994, Pub. L. No. 103-296, § 108(h)(9)(A), 108 Stat. 1487.

considered to be in business if such person conducts or derives revenue from any business activity, whether or not in the coal industry." 26 U.S.C. 9701(c)(7).

If an assignment of a particular beneficiary cannot be made under the first tier, the Commissioner must then attempt to assign the beneficiary to the signatory operator (or its related person) that remains "in business," signed a collective bargaining agreement with the Union in 1978 or later, and was the most recent signatory operator to employ the miner in the coal industry for any period of time. 26 U.S.C. 9706(a)(2).

If an assignment cannot be made under the first or second tiers, the Commissioner must then seek to assign the beneficiary to the signatory operator (or its related person) that remains "in business" and employed the miner in the coal industry for a longer period of time than any other signatory operator prior to the effective date of the 1978 collective bargaining agreement. 26 U.S.C. 9706(a)(3).[2]

If an assignment cannot be made under any of the three tiers, then the beneficiary is considered "unassigned," and his health-care benefits are funded with certain funds transferred from interest earned on the Abandoned Mine Reclamation Fund established by the Surface Mining Control and Reclamation Act, see 26 U.S.C. 9705(b), or, if that source of funds is ex-

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[2] In *Eastern Enterprises*, this Court struck down as unconstitutional an application of the third tier under which the Commissioner assigned a beneficiary to a coal mine operator that had not signed a collective bargaining agreement with the Union in 1974 or later. See 524 U.S. at 504 (plurality opinion); *id.* at 539 (opinion of Kennedy, J., concurring in the judgment and dissenting in part). The *Eastern Enterprises* decision is not directly relevant to this case, which does not involve assignments made under the third tier.

hausted or unavailable, from an additional premium imposed in a *pro rata* fashion on all signatory operators to which retired miners have been assigned. 26 U.S.C. 9704(d). Congress understood that a principal cause of the financial instability of the multi-employer plans in existence before the Combined Fund was the problem of retirees whose employers had terminated their contribution obligations, and so it intended that the number of unassigned beneficiaries under the Coal Act be kept to "an absolute minimum." 138 Cong. Rec. 34,003 (1992) (technical explanation by Sen. Wallop).

Because the Commissioner must determine whether a beneficiary can be assigned to either a signatory operator *or* any related person to a signatory operator under the first tier before proceeding to the second tier, and then to a signatory operator in the second tier before proceeding to the third, the concept of "related person" is fundamental to the operation of the Act. The Act sets forth the following explication of the kinds of relationships between entities that shall lead the Commissioner to consider an entity to be a "related person" to a signatory operator:

> A person shall be considered to be a related person to a signatory operator if that person is—
>
> (i) a member of the controlled group of corporaions (within the meaning of [26 U.S.C.] 52(a)) which includes such signatory operator;
>
> (ii) a trade or business which is under common control (as determined under [26 U.S.C.] 52(b)) with such signatory operator; or
>
> (iii) any other person who is identified as having a partnership interest or joint venture

> with a signatory operator in a business within the coal industry, but only if such business employed eligible beneficiaries, except that this clause shall not apply to a person whose only interest is as a limited partner.
>
> A related person shall also include a successor in interest of any person described in clause (i), (ii), or (iii).

26 U.S.C. 9701(c)(2)(A).

Although Congress expressly provided for assignments to be made to the successor in interest to a person "related" to the signatory operator, the Coal Act does not state *in haec verba* that an assignment may be made to a direct successor in interest to the signatory itself. The Commissioner has concluded, however, that in light of the text, structure, and purposes of the Coal Act, Congress intended to reach those successors as well. See Social Security Administration Supplemental Coal Act Review Instructions No. 4 (July 1995); App., *infra*, 1a-12a. The Commissioner has, in addition, concluded that a business should be deemed a successor in interest to a signatory operator or other related person if it has, through purchase, merger, or other transaction, acquired substantial assets from the signatory operator or its related person, if it continues running the same operation in the same location, and if it uses many of the same employees who worked for the former owner. *Id.* at 4a.

c. When the Commissioner assigns a Combined Fund beneficiary to a signatory operator or related person, he so notifies the assigned operator, 26 U.S.C. 9706(e)(2), which then has 30 days to request "detailed information as to the work history of the beneficiary and the basis of the assignment," 26 U.S.C. 9706(f)(1).

After receiving that information, the assigned operator has an additional 30 days to request review of the assignment decision. 26 U.S.C. 9706(f)(2). If, on review, the Commissioner determines that an assignment was incorrect, he rescinds the assignment and reviews the beneficiary's record to determine whether the beneficiary should be assigned to another operator. 26 U.S.C. 9706(f)(3)(A). If the Commissioner determines that there was no error in the assignment, he so notifies the assigned operator. 26 U.S.C. 9706(f)(3)(B).

2. The 11 retired miners at issue in this case all worked for Boich Mining Company (Boich I), a business that, before 1984, was owned and operated by Michael M. Boich as a sole proprietorship. Pet App. 3a-4a, 35a n.1. In 1984, after the 11 miners had left the employ of Boich I, Michael Boich transferred all of the business's assets and liabilities (with exceptions not relevant here) to a newly formed corporation also known as Boich Mining Company (Boich II). In exchange for that transfer, Michael Boich received all of the shares of Boich II. *Id.* at 3a, 37a-38a. In 1986, an affiliate of petitioner Aloe Energy Corporation (Aloe) purchased all the shares of Boich II, and in 1996, Boich II was merged into Aloe. *Id.* at 3a.

In a series of decisions rendered between 1993 and 1997, the Commissioner assigned responsibility for the 11 miners to Boich II, as the successor in interest to Boich I. See Pet. App. 4a. The company sought further administrative review of the assignments, arguing, *inter alia*, that the Commissioner was not authorized under the Coal Act to assign retired miners to the successor of a signatory operator when the signatory

operator is no longer "in business." See *id.* at 32a-40a.[3] The Commissioner reaffirmed the assignments, finding nothing in the language of the Coal Act that would prevent assigning retired miners to their employer's successor. See *id.* at 4a-5a, 33a, 35a, 37a-38a.

3. Petitioner then filed a complaint in the district court, challenging the Commissioner's assignments. Petitioner argued centrally that the Coal Act does not authorize the Commissioner to assign responsibility for a miner to the direct successor in interest of the signatory operator that actually employed the miners. Petitioner argued that, although the Coal Act expressly defines "related person" to include successors in interest of corporations that are themselves related to signatory operators (such as other corporations within the same controlled group, see 26 U.S.C. 9701(c)(2)(A)), it does not expressly provide for the assignment of retired miners to a successor in interest to the signatory operator itself.

The district court granted the Commissioner's motion for summary judgment with regard to the issue of assignment to successors. See Pet. App. 30a-31a. Adopting the Report and Recommendation of a magistrate judge (see *id.* at 32a-50a), the district court agreed (*id.* at 38a-40a) with the reasoning and conclusion of the District of Columbia Circuit in *R.G. Johnson Co.* v. *Apfel*, 172 F.3d 890, 894-896 (1999), which held that the Coal Act authorizes the Commissioner to treat the

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[3] Petitioner also argued that the Commissioner was required to assign the miners to Mr. Boich personally, because he remained "in business." See Pet. 9 n.6. The court of appeals rejected that argument, Pet. App. 9a-12a, and petitioner has not renewed it in this Court.

direct successor in interest to a signatory operator as a "related person" to whom an assignment may be made.

4. The court of appeals affirmed in an unpublished decision.[4] Pet. App. 1a-13a. Like the district court, the court of appeals adopted the reasoning and conclusion of the *R.G. Johnson* decision, and held that the Coal Act authorizes the Commissioner to assign Combined Fund beneficiaries to the successor in interest of a signatory operator if the signatory operator is no longer in business. See Pet. App. 7a-8a. The court noted that the *R.G. Johnson* court had found this "successor in interest" issue to present "one of those rare cases in which the literal application of a statute will produce a result demonstrably at odds with the intentions of the drafters." *Id.* at 8a (internal quotation marks omitted). The court also remarked that unless Section 9701(c)(2)(A), defining "related person," is construed to permit the assignment of eligible beneficiaries to the successor of a signatory operator, "Congress' aim to create stable and self-sufficient retirement plans by identifying the parties most responsible would be eviscerated." *Ibid.*[5]

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[4] The court of appeals subsequently denied the government's motion for publication of the decision.

[5] In a footnote (Pet. App. 8a n.5), the court of appeals also observed that it might have been able to uphold the assignment of the 11 miners to Boich II under a narrower "same entity" or "alter ego" theory, as "the only real difference between Mr. Boich's sole proprietorship and [Boich II] as a corporation was a technical change of form." The court did not resolve the case on that basis, however, because it stated that that argument had been raised by the government for the first time on appeal, and so instead it upheld the district court's determination that the Commissioner had properly assigned the miners to Boich II under the broader, successorship theory. *Ibid.*

DISCUSSION

The court of appeals in this case correctly upheld the Commissioner of Social Security's determination that the Coal Act permits the Commissioner to assign responsibility for a miner's health-care benefits to the direct successor in interest of a signatory operator that employed the miner, when that signatory operator itself is no longer in business. In view of the circuit conflict on that question and its importance in the administration of the Coal Act, however, we suggest that the Court grant the petition for a writ of certiorari in this case.

Although the court of appeals' decision is unpublished, it expressly adopts the reasoning and holding of the District of Columbia Circuit's published decision in *R.G. Johnson Co.* v. *Apfel*, 172 F.3d 890, 894-896 (1999), which also upheld a decision by the Commissioner to assign responsibility for a retired miner's benefits to the direct successor in interest of the signatory operator that employed the miner. Subsequently, the Fourth Circuit rejected the *R.G. Johnson* court's reasoning and holding, and reached a contrary conclusion in its published decision in *Sigmon Coal Co.* v. *Apfel*, 226 F.3d 291 (2000).[6] In *Sigmon*, the Fourth Circuit held that the Coal Act does not permit the Commissioner to assign responsibility for a retired miner's benefits to the direct successor of a signatory operator. *Id.* at 303-309.[7]

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[6] The First Circuit had reached the same conclusion as the Fourth Circuit in *Eastern Enterprises* v. *Chater*, 110 F.3d 150, 154-155 (1997), which this Court reversed on other grounds in *Eastern Enterprises* v. *Apfel*, 524 U.S. 498 (1998).

[7] The Fourth Circuit denied the government's petition for rehearing and rehearing en banc in *Sigmon*. The Acting Solicitor General has authorized the filing of a petition for a writ of certio-

There is therefore a conflict among the circuits, reflected in published decisions, as to whether the Commissioner may assign responsibility for a miner's health-care benefits under the Coal Act to the direct successor in interest of the signatory operator that employed the miner. That question is of substantial importance to the proper operation of the Coal Act. Congress expressly declared in the Coal Act that one of its purposes is "to identify persons most responsible for plan liabilities in order to stabilize plan funding and allow for the provision of health care benefits to" retirees and their dependents. Energy Policy Act of 1992, Pub. L. No. 102-486, § 19142(a)(2), 106 Stat. 3037. Congress also enacted the "related person" provisions of the Coal Act because it was aware that the coal industry had been marked by frequently shifting corporate forms, and it did not want signatory operators to avoid responsibility through corporate reorganization. See 138 Cong. Rec. 34,002 (1992) (technical explanation of Sen. Wallop) ("[B]ecause of complex corporate structures which are often found in the coal industry, the number of entities made jointly and severally liable for a signatory operator's obligations under the definition of related persons is intentionally very broad."). Congress therefore anticipated that direct successors in interest of signatory operators could be responsible for the health-care benefits of miners when their employers were no longer in business. See *ibid.* (explanation of Sen. Wallop) (Act's definition of "related person" includes "in specific instances successors to the collective bargaining agreement obligations of a signatory opera-

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rari seeking review of the decision of the Fourth Circuit in *Sigmon*. That petition is currently due to be filed in this Court by February 13, 2001.

tor"); *id.* at 34,033 (remarks of Sen. Rockefeller) ("The term 'signatory operator,' as defined in new section 9701(c)(1), includes a successor in interest of such operator.").

The Commissioner's authority to assign beneficiaries of the Combined Fund to an out-of-business signatory operator's successor in interest is implicated in many assignment decisions.[8] The Fourth Circuit's conclusion that no such authority exists could significantly undermine Congress's determination that corporate entities closely related to the signatory operator should be responsible for the signatory operator's obligations, and could also jeopardize the Fund's financial stability. If the Commissioner may not assign responsibility for a signatory operator's employees to a direct successor in interest of that signatory, he will be required to assign responsibility to entities that are more distantly related to the signatory operator, such as successors in interest of other corporations within the same control group (which, petitioner acknowledges, would be a proper assignment under the Coal Act). If no such entities exist, then the Commissioner must deem the beneficiaries to be "unassigned," in which case their health-care benefits must be financed by transfers from the Abandoned Mine Reclamation Fund or (if those transfers are insufficient) contributions from other former signatory

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[8] We have been informed by the Social Security Administration (SSA) that about 16,500 beneficiaries have been assigned to entities deemed "related" to an original signatory operator under the Coal Act's "related person" provisions. Although the SSA has not conducted a manual search of its records to determine how many of those "related person" assignments were made on the basis of a direct-successorship, the SSA believes that direct-successor assignments constitute a substantial proportion of those assignments.

operators, which did not employ them. Those possibilities are contrary to Congress's intent that financial responsibility for miners' benefits be placed on those entities most responsible for plan liabilities.

Accordingly, in light of the conflict between published decisions of the courts of appeals and the importance of the issue presented, the petition for a writ of certiorari should be granted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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FEBRUARY 2001

APPENDIX

FURNISHING EARNINGS INFORMATION
July 1995

SUPPLEMENTAL COAL ACT REVIEW INSTRUCTIONS #4
July 1995

These instructions reflect the current policy, and are to be used in conjunction with POMS RM T01402ff and Supplemental Coal Act Review Instructions #1, #2 and #3.

A. DETERMINING THE ASSIGNEE WHEN THE SIGNATORY OPERATOR IS INACTIVE

Coal Act assignments, whenever possible, are made to the signatory operator that employed the miner in the coal industry. However when this is not possible because the signatory operator is inactive, then consider the following when determining the correct assignee.

1. If the signatory operator, or its "alter ego" (see Section B. below) is inactive;

Then make the assignment to the active person (company) related to the signatory operator that employed the miner in the coal industry (see Section C. below).

2. If the related person (company) is inactive;

Then make the assignment to the active "successor/ successor-in-interest" ("successor") to:

a. a related person of the signatory operator; or if none

b. the signatory operator that employed the miner in the coal industry.

(See Section D. below.)

B. AN "ALTER EGO"

An "alter ego" is created when the same person(s) (company) controls the assets of a company following a *technical* change of identity or structure without any real change in ownership or management (e.g., the "alter ego" is, or stands in the place of, the signatory operator).

A business reorganization may have the appearance of creating a "successor" company when, in fact, there is no change in ownership. Therefore, the new company is merely an "alter ego" of the predecessor company.

Examples of an "alter ego" are:

- A sole proprietor who incorporates a business, but continues to control its operations.

- A company which changes its name, but continues to operate as before.

For assignment purposes under the Coal Act, treat an "alter ego" the same as you would treat its predecessor (e.g., as if there had been no change in ownership).

C. A "RELATED PERSON"

For purposes of the Coal Act, a "related person" (company) is a company that is:

- a member of a controlled group of corporations which includes the signatory operator; or
- a trade or business which is under common control with the signatory operator; or
- any other person who has a partnership interest (other than as a limited partner) or joint venture with a signatory operator in a business in the coal industry, if that business employed eligible miners.

In addition, the relationship had to have been in effect as of July 20, 1992 or, if earlier, the time immediately before the coal operator went out of business.

NOTE: A related person can also include a "successor" to one of the above entities, or a "successor" to the signatory operator.

D. A "SUCCESSOR" OR "SUCCESSOR-IN-INTEREST"

Addendum to POMS RM T01402.051, and Supplemental Coal Act Review Instructions # 3, Section O.

NOTE: This is a change-of-position on "successor company" policy, and is effective with decisions made on or after March 20, 1995.

Although there is a provision in the Coal Act for assignments to "successors" and "successors-in-

interest" to "related persons," the Coal Act does not specifically provide for assignments to "successors" or "successors-in-interest" to signatory operators. However, the Coal Act does permit assignments to "successors" and "successors-in-interest" to *defunct* (inactive) signatory operators.

Based on the above, "successors" and "successors-in-interest" are another type of "related person," and are to be treated as a "related person" for purposes of making assignments under the Coal Act. (Also see Section D.2. below.)

1. A "successor" (this includes the "successor-in-interest") is one who:

- by purchase, merger, consolidation, or other means of transfer, acquires substantial assets from another; AND
- continues running the same operation in the same location as the former owner with little or no interruption; AND
- uses many of the same employees who worked for the former owner.

NOTE: The difference between a "successor" and an "alter ego" is that with the former there is an actual change in ownership.

2. "Successors" are the lowest priority (last resort) among "related persons" of a signatory. Therefore, do *not* assign miners to a "successor" if the signatory operator is still in *any kind* of business at the time the assignment is made, or if there is a "related person" as defined in Section C. above.

3. If the signatory is inactive, but has both a "successor" and a non-successor "related person" (company) that are still active;

Then make the assignment(s) to the non-successor "related person" (company).

E. ASSIGNING TO THE "SUCCESSOR TO THE SUCCESSOR"

A "successor" to a signatory operator may also have a "successor." In fact, there can be a series of such "successors."

EXAMPLE: Company A sold its mining operation to Company G which continues the operation at the same site using most of the same employees. Company G is the "successor" to Company A. Company G then sells the mining operation to Company H which continues the operation at the same site using most of the same employees.

Based on this example, Company H is the "successor" to Company G's mining operation.

For assignment purposes (and using the above example), if Company A is "out of business," but Company G is "in business," then the miners who worked for Company A can be assigned to Company G as the "successor" to Company A. However, if both Company A and Company G are "out of business," then the miners who worked for Company A can be assigned to Company H (the "successor to the successor" of Company A).

F. ASSUMPTIONS REGARDING "SUCCESSORS"

For assignment purposes, assume that inactive signatory operators do *not* have "successors" or "successors-in-interest," absent information to the contrary. However, if a "successor" or "successor-in-interest" issue is raised, and it is pertinent to the reassignment/review decision, request scouting from OCRO (e.g., obtain microfilm of the original wage reports for the inactive signatory and the "successor") to determine whether most of the former owner's employees were employed by the purchaser.

Other evidence of "successor relationships" can be found in State corporation records, remarks on the paper pre-1978 signatory list, and records maintained by the Fund.

G. EXAMPLES OF "SUCCESSOR" RELATIONSHIPS

EXAMPLE 1: Company W sold its mining operation to Company X. Company X continues the mining operation at the same site using most of the same employees that Company W had used. Company W goes "out of business."

Based on this example:

- Company X is the "successor" to Company W, and is assignable for any eligible miners employed by Company W; AND

- Company W is *not* assignable under the Coal Act because it is "not in business."

EXAMPLE 2: Company W sold its mining operation at Mine A to Company X. Company X continues the mining operation at the same site using most of the same employees that Company W had used. Company W continues mining operations at Mine B and Mine C.

Based on this example:

- Company X is the "successor" to Company W's mining operation at Mine A; BUT

- Company W remains assignable under the Coal Act because it is "in business."

EXAMPLE 3: Same as in Example 2, except Company W sold its Mine B mining operation to Company Y and its Mine C mining operation to Company Z. Company W then goes "out of business." Companies X, Y and Z continue the mining operations at the respective sites, and use most of the same employees that Company W had used.

Based on this example:

- Company X is the "successor" to Company W's mining operations at Mine A, and is assignable for any eligible miners employed by Company W at Mine A;

- Company Y is the "successor" to Company W's mining operation at Mine B, and is assignable for any eligible miners employed by Company W at Mine B;

- Company Z is the "successor" to Company W's mining operation at Mine C and is assignable for

any eligible miners employed by Company W at Mine C; AND

- Company W is *not* assignable under the Coal Act because it is "not in business."

EXAMPLE 4: Company D (a pre-78 signatory) reorganized and created a new company within its organization (Company J). Company J (a 1978 and later signatory) conducted mining operations at a different site, and hired different employees. Company D remained "in business" but sold Company J to Company T on January 9, 1990. Company T continued the mining operation at the same site using most of the same employees that Company J used. Company J goes "out of business."

Based on this example:

- Company T is the "successor" to Company J, and is assignable under the Coal Act (priority #1) for those miners it and/or Company J employed;

- Company D is assignable under the Coal Act (priority #3) for those miners it employed; AND

- Company J is not assignable under the Coal Act because it went "out of business."

EXAMPLE 5: Same as Example 4, except Company J was sold to Company T on December 2, 1992.

Based on this example:

- Company D and Company J are related persons under the Coal Act;

- Company D is assignable under the Coal Act (priority #3) for those miners it and/or Company J employed;

- Company T (the "successor" company) is not assignable under the Coal Act because Company D (the related company) is "in business;"

- Company J is not assignable under the Coal Act because it went "out of business."

EXAMPLE 6: Company R (a pre-78 signatory) had both mining and non-mining operations. Company R reorganized all of its non-mining operations under one sister corporation (Company QR), and its mining operations under another sister corporation (Company SR). Thereafter, Company R ceased to exist in its original corporate form. Aside from this change in corporate structure, Company QR and Company SR continued to operate under the same ownership and management as Company R. Company SR became a 1978 and later signatory. Both Company QR and SR remain "in business." Based on this example:

- Companies QR and Company SR did *not* create "successor" relationships to Company R; AND

- Company R's reorganization constitutes a continuation of the same operations; AND

- Both Company QR and Company SR are the "alter ego" of Company R.

Therefore, covered work for Company R and Company SR would be assigned to Company SR for purposes of making assignments under the Coal Act.

NOTE: The non-mining operation (Company QR) is not considered for purposes of Coal Act assignments unless Company SR is "out of business" at the time an assignment(s) is made.

H. PRIVATE AGREEMENTS BETWEEN SELLER AND BUYER

SSA is not bound, for Coal Act assignment purposes, by any private agreement between the seller and the buyer of coal mining assets as to the reimbursements to be made to the seller for past liabilities. That is, if the buyer of the coal mining assets agrees to indemnify (assume responsibility for) or reimburse the seller for employee/retirement costs, this does not mean that the assignment should be made to the buyer instead of the seller.

I. STATUS OF THE SELLER AFTER THE SALE

The status of the seller after the sale of its mining operation/assets determines whether it is assignable under the Coal Act.

1. If the seller (or a related company) remains "in business," AND has the highest priority for assignment;

Then make the assignment to the seller (or the related company).

2. If the seller (and any related companies) is "out of business," AND sold all of its assets to the buyer;

Then evaluate the purchase agreement, and the other evidence, to determine whether the sale created

a "successor" relationship with the buyer; AND make the assignment based on your determination.

J. DETERMINING WHERE TO MAIL NEW NOTICES OF ASSIGNMENT

Several assigned operators have already authorized, in writing, representatives to act on their behalf in administrative matters under the Coal Act. Based on these authorizations, we have mailed requested earnings records (and the basis for the assignments), Coal Act review decisions and/or correspondence to these authorized representatives. However, the authorizations already in file:

- were received before any additional assignments were made;
- are based on current reviews; and
- pertain to the administrative review process only.

Therefore, mail all new notices of assignment to the assigned operator.

EXCEPTION: See Section J.2. below.

* * * * *

months of the time SSA sent the notice of assignment;

Then reopen and reverse the decision, and use the language provided in Supplemental Coal Act Review Instructions #3, Section X, Exhibit 2, item 6.

b. If the evidence does not clearly reflect that our records are in error AND the decision to reopen is

made after 12 months of the time SSA sent the notice of assignment;

Then deny the request to reopen, and affirm the decision. (Use the language provided in Supplemental Coal Act Review Instructions #3, Section X, Exhibit 2, item 6.)

6. Assignee Alleges a "Successor Relationship" is Involved

Reopen and change the assignment/review decision if the assignee requests a reopening based on a "successor relationship" as clarified in Section D above—provided the assignment would have been made to the "successor" company under this clarification.

Also, reopen and change the assignment if you determine that a "successor relationship" is involved, AND the assignment would have been made to a "successor" company under this clarification.

NOTE: A "successor relationship" includes "successors" and "successors-in-interest."

M. UNDELIVERABLES

It is SSA's role to make assignments and review decisions, and to mail the appropriate notices to the assignees. It is the Fund's role to bill the assignees and collect the premiums.