



E-mail Alert

To: All Virginia Fire Chiefs

From: Virginia Department of Fire Programs
Olufunke T. Owolabi, Policy and Communications Analyst on behalf of
W.G. Shelton, Jr. Executive Director

Date: August 1, 2008

Re: PSOB Proposed Rule

A recent e-mail communication from the National Volunteer Fire Council (NVFC) may have alerted many of you to the proposed regulation for updating the Public Safety Officers' Benefits Program (PSOB). In case you have not had the opportunity to review these changes, we have attached a copy of the document from the Federal Register.

What You Should Know

When reviewing the document, please pay special attention to the amended definition for benefit eligibility as it relates to training exercises. What will the addition of the word "mandatory" mean for Virginia's Fire Service, namely volunteers? Where does this leave firefighters who engage in professional development training that may or may not be required but supports their overall level of preparedness?

Let Your Voice be Heard

If you have comments about this proposed change, please provide your feedback to NVFC contact, Dave Finger at (202) 887-5700 ext. 12 or dfinger@nvfc.org no later than COB Friday, August 8, 2008.

Thank you in advance for your feedback.

scheduled, notice of the date, time, and place of the public hearing will be published in the **Federal Register**.

Drafting Information

The principal authors of these regulations are Michael P. Brewer and Cathy V. Pastor, Office of Division Counsel/Associate Chief Counsel (Tax Exempt and Government Entities). However, other personnel from the IRS and the Treasury Department participated in the development of these regulations.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Proposed Amendments to the Regulations

Accordingly, 26 CFR part 1 is proposed to be amended as follows:

PART 1—INCOME TAXES

Paragraph 1. The authority citation for part 1 continues to read in part as follows:

Authority: 26 U.S.C. 7805 * * *

Par. 2. Section 1.401(a)(9)–1 is amended by adding a new paragraph (d) to A–2 as follows:

§ 1.401(a)(9)–1 Minimum distribution requirement in general.

A–2. * * * (d) *Special rule for governmental plans.* Notwithstanding anything to the contrary in this A–2, a governmental plan (within the meaning of section 414(d)), or an eligible governmental plan described in § 1.457–2(f), is treated as having complied with section 401(a)(9) for all years to which section 401(a)(9) applies to the plan if the plan complies with a reasonable and good faith interpretation of section 401(a)(9).

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§ 1.401(a)(9)–6 [Amended]

Par. 3. Section 1.401(a)(9)–6 is amended by:

1. Removing Q&A–16.
2. Redesignating Q&A–17 as Q&A–16.
3. Removing the word “A–16” and adding “A–15” in the newly-designated A–16.
4. Removing the last sentence of the newly-designated A–16.

Par. 4. Section 1.403(b)–6 is amended by:

1. Revising the last sentence of paragraph (e)(2).
 2. Adding a new paragraph (e)(8).
- The revisions and addition are as follows:

§ 1.403(b)–6 Timing of distributions and benefits.

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(e) Minimum required distributions for eligible plans.

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(2) * * * Consequently, except as otherwise provided in this paragraph (e), the distribution rules in section 401(a)(9) are applied to section 403(b) contracts in accordance with the provisions in § 1.408–8 for purposes of determining required minimum distributions.

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(8) *Special rule for governmental plans.* A section 403(b) contract that is part of a governmental plan (within the meaning of section 414(d)) is treated as having complied with section 401(a)(9) for all years to which section 401(a)(9) applies to the contract, if the contract complies with a reasonable and good faith interpretation of section 401(a)(9).

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Linda E. Stiff,

Deputy Commissioner for Services and Enforcement.

[FR Doc. E8–15740 Filed 7–9–08; 8:45 am]

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DEPARTMENT OF JUSTICE

Office of Justice Programs

28 CFR Part 32

[Docket No. OJP (BJA) 1478]

RIN 1121–AA75

Public Safety Officers' Benefits Program

AGENCY: Office of Justice Programs, Justice.

ACTION: Notice of proposed rulemaking with request for comments.

SUMMARY: The Office of Justice Programs of the U.S. Department of Justice proposes this rule to amend the regulation that implements the Public Safety Officers' Benefits Act and associated or related statutes. Generally speaking, these laws provide financial support to certain public safety officers, or their survivors and families, when such officers die, or become permanently and totally disabled, as a result of line-of-duty injuries, or when they die of heart attacks or strokes sustained within statutorily-specified timeframes of engaging or participating in certain line-of-duty activity. The proposed rule would amend the implementing regulation to reflect internal agency policy and practice,

recent statutory enactments and court decisions, and to make certain technical changes, in order to keep the regulations comprehensive and current.

DATES: Comments must be received by no later than 5 p.m., E.S.T., on September 8, 2008.

ADDRESSES: Please address all comments regarding this proposed rule, by U.S. mail, to: Hope Janke, Counsel to the Director, Bureau of Justice Assistance, Office of Justice Programs, 810 7th Street, NW., Washington, DC 20531; by telefacsimile transmission, to: Hope Janke, Counsel to the Director, at (202) 305–1367. To ensure proper handling, please reference OJP Docket No. 1478 on your correspondence. You may view an electronic version of this proposed rule at <http://www.regulations.gov>, and you may also comment by using the <http://www.regulations.gov> form for this regulation. When submitting comments electronically, you must include OJP Docket No. 1478 in the subject box.

FOR FURTHER INFORMATION CONTACT: Hope Janke, Counsel to the Director, Bureau of Justice Assistance, at (202) 514–6278, or toll-free at 1 (888) 744–6513.

SUPPLEMENTARY INFORMATION:

I. Posting of Public Comments

Please note that all comments received are considered part of the public record and made available for public inspection online at <http://www.regulations.gov>. Such information includes personal identifying information (such as your name, address, etc.) voluntarily submitted by the commenter.

If you wish to submit personal identifying information (such as your name, address, etc.) as part of your comment, but do not wish it to be posted online, you must include the phrase “Personal Identifying Information” in the first paragraph of your comment. You must also locate all the personal identifying information you do not want posted online in the first paragraph of your comment and identify what information you want redacted.

If you wish to submit confidential business information as part of your comment but do not wish it to be posted online, you must include the phrase “Confidential Business Information” in the first paragraph of your comment. You must also prominently identify confidential business information to be redacted within the comment. If a comment has so much confidential business information that it cannot be effectively redacted, all or part of that

comment may not be posted on <http://www.regulations.gov>.

Personal identifying information identified and located as set forth above will be placed in the agency's public docket file, but not posted online. Confidential business information identified and located as set forth above will not be placed in the public docket file. If you wish to inspect the agency's public docket file in person by appointment, please see the **FOR FURTHER INFORMATION CONTACT** paragraph.

II. Background

The Public Safety Officers' Benefits (PSOB) Program (established pursuant not only the Public Safety Officers' Benefits Act of 1976 proper, but also to certain associated or related statutes, enacted in 2001) is administered by the Bureau of Justice Assistance (BJA) of the Office of Justice Programs, U.S. Department of Justice. The PSOB Program provides a one-time financial payment to the statutorily-eligible survivors of public safety officers who die as the direct and proximate result of (actual or presumed) traumatic injuries sustained in the line of duty, as well as educational assistance for certain of those survivors. Alternatively, the PSOB Program provides a one-time financial payment to public safety officers themselves who are permanently and totally disabled as the direct result of catastrophic injuries sustained in the line of duty, as well as educational assistance for their spouses and certain of their children. BJA is prepared to pay, as expeditiously as possible, every eligible claim relating to an officer, according to the requirements of the law.

Pursuant to 42 U.S.C. 3796c(a), 3796(a) & (b), 3796d-3(a) & (b), and 3782(a) (each of which expressly authorizes the issuance of regulations), on August 10, 2006, BJA promulgated a final rule that comprehensively revised the implementing regulatory structure for the program, a revision largely precipitated by the Hometown Heroes Survivors Benefits Act (HHSBA) of 2003, Public Law 108-182, discussed at greater length below. Since that final rule went into effect on September 11, 2006, one statutory provision (section 6 (div. B, tit. II, Public Safety Officers Benefits heading proviso), Public Law 110-161, 121 Stat 1912) directly affecting the program has been signed into law (December 26, 2007); additionally, the U.S. Court of Appeals for the Federal Circuit has issued four opinions to date applying the PSOB program statute (*Hawkins v. United States*, 469 F.3d 993 (2006); *Cassella v.*

United States, 469 F.3d 1376 (2006); *Amber-Messick v. United States*, 483 F.3d 1316 (2007), *cert. denied*, __ U.S. __, 128 S.Ct. 648 (2007); *Groff v. United States*, 493 F.3d 1343 (2007), *cert. denied*, __ U.S. __, 128 S.Ct. 1219 (2008)), and four opinions relating to the program have been issued by the Court of Federal Claims (*Hillensbeck v. United States*, 74 Fed. Cl. 477 (2006); *White ex rel. Roberts v. United States*, 74 Fed. Cl. 769 (2006) (appeal pending in the Federal Circuit); *Dawson v. United States*, 75 Fed. Cl. 53 (2007); *Winuk v. United States*, 77 Fed. Cl. 207 (2007)).

As an overarching matter, the main impetus for the present proposed rule is the desire to keep the PSOB regulation as useful and reflective of program practice as possible. The PSOB rule (prior to the 2006 overhaul) had largely become disconnected from the reality of how the program was actually being implemented, resulting in a regulation which was, generously, not very useful. The 2006 comprehensive revision of the PSOB rule sought to address this. However, the sheer scope of any comprehensive revision to a program's implementing regulation make it all-but inevitable that at least some changes (occasioned by the discovery—in the back-and-forth of actually working under the new regulation—of previously unnoticed flaws, gaps, or ambiguities) will be called for, after sufficient time for reflection and discernment. In the case of the 2006 revisions to the PSOB program regulation, this general rule applies with even more force, as a result of the novel incorporation therein of the conceptually- and factually-different bases for coverage established by the HHSBA.

The implementation of the presumption created by the HHSBA—BJA has now processed nearly 200 cases since September 11, 2006, when the implementing regulations went into effect—has revealed several substantive and procedural shortcomings in the current rule that will be fixed in this proposed rule. (For example, the current definition of heart attack, while commonly accepted, is too narrow to capture some types of sudden cardiac-related deaths suffered by public safety officers. In addition, the PSOB Office's approach to the term "routine" has changed and it would be helpful to have the regulation reflect this.) Over the last year and a half, from the experience gleaned from processing, reviewing, and determining these cases, and from the myriad public and private comments it has received (both in the context of specific claims, and more broadly), BJA's understanding of the contours of the HHSBA (and thus its interpretations

of provisions of that statute, and the practical rules it has developed for working under it) has matured.

Concrete (but by no means exhaustive) indicators of this maturation are the two policy memoranda issued by the Director of the BJA on October 2, 2007, relating to "Nonroutine stressful or strenuous physical activity," and to "Competent Medical Evidence to the Contrary," respectively, which established certain practical internal guidelines for the processing and determination of particular issues arising in claims under the HHSBA. This proposed rule would incorporate in the body of the regulation those current agency practices and rules, as appropriate for incorporation into a regulation of this kind (*see, e.g.*, the proposed new definition of "Routine" (from paragraphs 1 & 2 of the "Nonroutine" policy memorandum); proposed new § 32.5(i) (from paragraph 2 of the "Nonroutine policy memorandum"; proposed new § 32.14(c) (from paragraphs 1 & 2 of the "Competent Medical Evidence" policy memorandum); and the proposed use of the term "Extrinsic circumstances" (to underscore the notion—which informs paragraph 2 of the "Competent Medical Evidence" policy memorandum—that the mere presence of cardio-vascular disease/risk factors is not dispositive in analysis of what may be "competent medical evidence to the contrary" under the HHSBA)). In the case of the two October 2, 2007 policy memoranda—which remain in full force under this rule—the intention is to codify agency practice under the memoranda. Changes in terminology or phrasing should not be construed to carry any practical significance. And the fact that not all provisions of these two policy memoranda are incorporated in the rule's text (primarily because such provisions are not appropriate as regulations (*e.g.*, those involving purely internal administrative guidance)) should not be understood to reflect any policy change.

For example, one of the guidance letters notes that a response to an emergency call "shall presumptively be treated as non-routine." This proposed rule would treat such a response as "prima facie evidence" that the action was non-routine. The sole purpose for the change from a "presumption" to "prima facie evidence" is to conform with terminology used in the regulations; there will be no change in practice from the standard reflected in the guidance. As another example, the guidance provides that the determination of an activity's "routineness" should be informed less

by the frequency with which it may be performed than by its stressful or strenuous character. This concept is reflected in the proposed regulation, with language indicating that the frequency with which an activity is performed shall not be the deciding factor in determining whether an activity is "routine." What is not reflected in the proposed regulation is the guidance's follow-up observation that although "domestic disturbance" calls may occur with some frequency in the law-enforcement context, typically they occasion considerable stress, given the many and serious unknowns associated with encountering often highly-emotionally charged (and often violent) individuals, on their own territory, and under circumstances where the mere presence of law-enforcement officers well may be perceived as intrusive and insulting. Omission of this example from the regulation should not be construed to reflect a change in the Department's application of the term "non-routine"; the sole reason for not including this example in the regulation is that it seemed more suitable for a guidance document than for a formal regulation.

The Department invites comment on whether the proposed rule successfully codifies the policies enunciated in the guidance memoranda issued on October 2, 2007.

In sum, this rule now is being proposed—(1) to conform the regulation to the statutory change (which, among other things, confers exclusive jurisdiction over judicial appeals (and "related matters") on the Court of Appeals for the Federal Circuit, removing it from the Court of Federal Claims); (2) to incorporate (so as to increase programmatic transparency) into the body of the regulation certain statutory and regulatory interpretations (many relating to the HHSBA; e.g., relating to official training programs) that currently inform BJA's claim determinations under the program, in keeping with the holdings of the Federal Circuit in *Amber-Messick* and *Groff* that such interpretations already have "the force of law"; and (3) to make certain refining, clarifying, conforming, or technical changes to the regulation so as to—(a) correct language that would or might have had the unintended effect of making the regulation more restrictive than the statute, (b) make the regulation more clearly consonant with the four Federal Circuit holdings listed above and the Federal Claims holding in *Dawson*, (c) remove ambiguities in the regulation, (d) conform the rules applicable to death-benefit claims where the HHSBA presumption does not

apply, and the rules applicable to those where it does, more closely together (and thus counter any suggestion that claims under the HHSBA really are not "regular" PSOB death-benefit claims), (e) eliminate language in the regulation that merely is repetitive of statutory provisions, (f) counter unsatisfactory Court of Federal Claims constructions of the program statutes and implementing regulations, and (g) enhance programmatic and administrative efficiency.

Although many of the changes proposed in the rule are important (mainly for reasons of programmatic transparency and efficiency of claims processing), very few actually are substantive in character; e.g., very few of the proposed provisions would alter the determination of a claim. The proposed substantive changes to the regulation—whose general tendency would be to make it somewhat easier for affected claimants to establish their claims—are the following:

- Definition of *Authorized commuting* in § 32.3: The proposed rule would add two circumstances (not currently encompassed) to the bases for line-of-duty coverage: Specifically, travel in response to a specific request by the employer to perform public safety activity would be treated the same as travel in response to a fire-, rescue-, or police emergency currently is; and travel between work sites would be treated the same as travel between home and work currently is.

- Definition of *Biological* in § 32.3: The proposed rule would provide a simplified evidentiary mechanism for determination of beneficiary status under certain circumstances relating to filial or parental status.

- Definition of *Heart attack* in § 32.3: The proposed rule would expand this definition to cover other cardiac events—beyond myocardial infarctions and sudden cardiac arrests (the only two circumstances currently covered)—caused by pathological conditions of the heart or coronary arteries.

- Definition of *Injury date* in § 32.3: The proposed rule would make this definition applicable (for purposes of determining beneficiaries) to claims covered by the HHSBA, where the injuries are statutorily presumed; under the proposed rule, beneficiaries under these claims would be able—for the first time—to receive the advantages of this definition.

- Definition of *Line of duty activity or action* in § 32.3: The proposed rule would expand this definition to cover situations where "secondary-function" law-enforcement officers, -firefighters, and -members of rescue squads or

ambulance crews, take part as trainers in official training programs; currently, only participants who are trainees are covered.

- Definition of *Voluntary intoxication at the time of death or catastrophic injury* in § 32.3: The proposed rule would provide additional evidentiary mechanisms for evaluating potentially-disqualifying facts relating to whether or not a public safety officer was intoxicated at the time of death or catastrophic injury.

- § 32.5(c) & (h): The proposed rule would provide for simplified authentication of certain evidence during the administrative claims process and would (by establishing a kind of regulatory presumption relating to endorsement of representations made in connection with their claims) eliminate the need for claimants to provide certain paperwork otherwise necessary to establish the legal sufficiency of their claims.

- § 32.6(a): The proposed rule would provide a simplified evidentiary mechanism for determination of beneficiary status under certain circumstances relating to spousal status.

- § 32.15(d): The proposed rule would eliminate the current prerequisite certification requirement (requiring that the public agency certify as to the factual circumstances of the death and that all benefits available from the agency for similarly situated officers were paid) under certain circumstances where the presumption established by the HHSBA is applicable.

- § 32.42(c): The proposed rule would eliminate a potential trap for unwary disability claimants by removing a redundant filing requirement.

As is evident, the majority of the changes tend to make it easier for claimants to establish their claims (see the definitions of *Authorized commuting* and *Heart attack* for example). The rest of the changes are generally proposed in order more accurately to give notice to claimants, through the regulations, as to BJA's current practice in determining claims (see the definitions of *Designation on file*, *Official training program*, and *Routine*, for example). Many of the changes are simply grammatical and syntactical changes, but are still important for the sake of clarity and usefulness of the document.

II. Regulatory Certifications

Regulatory Flexibility Act

The Office of Justice Programs, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed this regulation and by

approving it certifies that this regulation will not have a significant economic impact on a substantial number of small entities for the following reasons: This proposed rule addresses Federal agency procedures; furthermore, this proposed rule makes amendments to clarify existing regulations and agency practice concerning death, disability, and education payments and assistance to eligible public safety officers and their survivors and does nothing to increase the financial burden on any small entities.

Executive Order 12866

This proposed rule has been drafted and reviewed in accordance with Executive Order No. 12866 (Regulatory Planning and Review), § 1(b), Principles of Regulation. The costs of implementing this proposed rule are minimal. The only costs to OJP consist of appropriated funds, and the benefits of the proposed rule far exceed the costs. As discussed in more detail in the "Background" section above, all of the substantive regulatory changes in this proposed rule tend to relieve unnecessary burdens and restrictions placed on claimants by the current rule. The non-substantive changes largely incorporate existing law and clarify the regulation so that it reflects current agency practice. The rest of the changes are grammatical and syntactical.

The Office of Justice Programs has determined that this proposed rule is a "significant regulatory action" under Executive Order No. 12866 (Regulatory Planning and Review), section 3(f), and accordingly this proposed rule has been reviewed by the Office of Management and Budget.

Executive Order 13132

This proposed rule will not have substantial direct effects on the States, on the relationship between the national government and the States, or on distribution of power and responsibilities among the various levels of government. The PSOB Act provides benefits to individuals and does not impose any special or unique requirements on States or localities. Therefore, in accordance with Executive Order No. 13132, it is determined that this proposed rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

Executive Order 12988—Civil Justice Reform

This proposed rule meets the applicable standards set forth in §§ 3(a) & (b)(2) of Executive Order No. 12988.

Unfunded Mandates Reform Act of 1995

This proposed rule will not result in the expenditure by State, local and tribal governments, in the aggregate, or by the private sector, of \$100,000,000 or more in any one year, and it will not significantly or uniquely affect small governments. The PSOB Act is a federal benefits program that provides benefits directly to qualifying individuals. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Small Business Regulatory Enforcement Fairness Act of 1996

This proposed rule is not a major rule as defined by section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996. This proposed rule will not result in an annual effect on the economy of \$100,000,000 or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

Paperwork Reduction Act

This proposed rule contains no new information collection or record-keeping requirements under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501, *et seq.*).

List of Subjects in 28 CFR Part 32

Administrative practice and procedure, Claims, Disability benefits, Education, Emergency medical services, Firefighters, Law enforcement officers, Reporting and recordkeeping requirements, Rescue squad.

Accordingly, for the reasons set forth in the preamble, part 32 of chapter I of Title 28 of the Code of Federal Regulations is proposed to be amended as follows:

PART 32—PUBLIC SAFETY OFFICERS' DEATH, DISABILITY, AND EDUCATIONAL ASSISTANCE BENEFIT CLAIMS

1. Revise the authority citation for part 32 to read as follows:

Authority: 42 U.S.C. ch. 46, subch. XII; 42 U.S.C. 3782(a), 3787, 3788, 3791(a), 3793(a)(4) & (b), 3795a, 3796c-1, 3796c-2; sec. 1601, title XI, Pub. L. 90-351, 82 Stat. 239; secs. 4 through 6, Pub. L. 94-430, 90 Stat. 1348; secs. 1 and 2, Pub. L. 107-37, 115 Stat. 219.

2. Revise § 32.0 to read as follows:

§ 32.0 Scope of part.

This part implements the Act, which, as a general matter, authorizes the payment of three different legal gratuities:

- (a) Death benefits;
- (b) Disability benefits; and
- (c) Educational assistance benefits.

3. Amend § 32.3 as follows:

a. Amend the definition of "Act" as follows:

i. Remove "section 5 thereof (rule of construction and severability)" and add in its place "sections 4 through 6 thereof (payment in advance of appropriations, rule of construction and severability, and effective date and applicability)".

ii. Remove "sections 611 and 612" and add its place "section 611".

iii. Remove "all three" and add in its place "both".

iv. Remove "in connection with terrorist attacks)" and add in its place "in connection, respectively, with the terrorist attacks of Sept. 11, 2001, or with terrorist attacks, if any, occurring after Oct. 26, 2001)".

v. Add "as well as the proviso under the Public Safety Officers Benefits heading in title II of division B of section 6 of Public Law 110-161" before the final period.

b. Amend the definition of "Authorized commuting" as follows:

i. In the introductory text, add "(not being described in the Act, at 42 U.S.C. 3796a(1), and not being a frolic or detour)" after "travel".

ii. In paragraph (1), remove "responding to a fire, rescue" and add in its place "responding (as authorized) to a fire-, rescue-,", and add "or to a particular and extraordinary request (by the public agency he serves) for that specific officer to perform public safety activity, within his line of duty" after "emergency".

iii. In paragraph (2), add "or between any such authorized or required situs and another" after "serves)".

c. Amend the definition of "Determination" by removing "or", the third place it occurs, and by adding "or any recommendation under § 32.54(c)(3)" before the final period.

d. Amend the introductory text in the definition of "Divorce" by removing "a living individual" and adding in its place "an individual", and by removing "individual, the spouse" and adding in its place "individual (and while that individual is living), the spouse".

e. Amend the definition of "Eligible payee" as follows:

i. In paragraph (1), remove "A beneficiary" and add in its place "An individual (other than the officer)".

ii. In paragraph (2), remove "A beneficiary" and add in its place "An individual".

f. Amend paragraph (2) of the definition of "Fire protection" and paragraph (1)(ii) of the definition of "Firefighter", respectively, by removing "Hazardous-materials emergency" and adding in its place "Hazardous-material".

g. Amend the definition of "Fire, rescue, or police emergency", by removing "Fire, rescue," in the term defined, and adding in its place "Fire-, rescue-,".

h. Amend the definition of "Hazardous-materials emergency response", by removing "Hazardous-materials emergency" in the term defined, and adding in its place "Hazardous-material".

i. Revise the definition of "Heart attack" to read as set forth below.

j. Amend the definition of "Injury" by adding "directly and proximately" after "body".

k. Amend the introductory text in the definition of "Injury date" by adding "—Except with respect to claims under the Act, at 42 U.S.C. 3796(k) (where, for purposes of determining beneficiaries under the Act, at 42 U.S.C. 3796(a), it generally means the time of the heart attack or stroke referred to in the Act, at 42 U.S.C. 3796(k)(2), injury date" before "means".

l. Amend the introductory text in the definition of "Intentional misconduct" by removing "Except with respect to voluntary intoxication at the time of death or catastrophic injury, a" and adding in its place "A".

m. Revise paragraph (3) of the definition of "Law enforcement" to read as set forth below.

n. Amend the definition of "Line of duty activity or action" as follows:

i. In paragraph (1)(i) and the introductory text of paragraph (1)(ii), respectively, remove "law enforcement, fire protection, rescue activity, or the provision of emergency medical services" and add in its place "public safety activity".

ii. In paragraphs (1)(i) and (1)(ii)(A), respectively, remove "to be so" and add in its place "to have been so", add "at the time performed" before "(or, at" and remove "to be such" and add in its place "to have been such".

iii. In paragraph (1)(i), remove "training programs" and add in its place "official training programs of his public agency".

iv. In paragraphs (1)(ii)(B), (2), (3)(i), and (3)(ii), respectively, remove "as such" and add in its place "to have been such at the time performed", and remove "to be such" and add in its place "to have been such".

v. In paragraph (1)(ii)(B), remove "law enforcement, providing fire protection,

engaging in rescue activity, or providing emergency medical services, or training for one of the foregoing" and add in its place "public safety activity, or taking part (as a trainer or trainee) in an official training program of his public agency for such activity".

vi. In paragraph (3)(ii), remove "fire, rescue," and add in its place "fire-, rescue-,".

o. Amend the definition of "Occupational disease" by adding "(including an ailment or condition of the body)" after "disease".

p. Amend paragraph (2) of the definition of "Posthumous child" by removing "Not alive at" and adding in its place "Deceased at or before".

q. Amend paragraph (1) of the definition of "Qualified beneficiary", by adding "final agency" before "determination".

r. Add "wound, condition, cardiac-event," after "disability," the three places it occurs in the definition of "Substantial factor".

s. Amend the definition of "Voluntary intoxication at the time of death or catastrophic injury" as follows:

i. In the introductory text, add ", as shown by any commonly-accepted tissue, -fluid, or -breath test or by other competent evidence" before the colon.

ii. In paragraph (2), remove "a disturbance of mental or physical faculties resulting from their introduction into the body of a public safety officer, as evidenced by the presence therein, as of the injury date—" and add in its place "intoxication as defined in the Act, at 42 U.S.C. 3796b(5), as evidenced by the presence (as of the injury date) in the body of the public safety officer—".

t. Add the following definitions in alphabetical order:

§ 32.3 Definitions.

* * * * *

Biological means genetic, but does not include circumstances where the genetic donation (under the laws of the jurisdiction where the offspring is conceived) does not (as of the time of such conception) legally confer parental rights and obligations.

* * * * *

Certification means a formal assertion of a fact (or facts), in a writing that is—

- (1) Expressly intended to be relied upon by the PSOB determining official in connection with the determination of a claim specifically identified therein;
(2) Expressly directed to the PSOB determining official;

(3) Legally subject to the provisions of 18 U.S.C. 1001 (false statements) and 1621 (perjury), and 28 U.S.C. 1746 (declarations under penalty of perjury),

and expressly declares the same to be so;

(4) Executed by a natural person with knowledge of the fact (or facts) asserted and with legal authority to execute the writing (such as to make the assertion legally that of the certifying party), and expressly declares the same (as to knowledge and authority) to be so;

(5) In such form as the Director may prescribe from time to time;

(6) True, complete, and accurate (or, at a minimum, not known or believed by the PSOB determining official to contain any material falsehood, incompleteness, or inaccuracy); and

(7) Unambiguous, precise, and unequivocal, in the judgment of the PSOB determining official, as to any fact asserted, any matter otherwise certified, acknowledged, indicated, or declared, and any provision of this definition.

Certification described in the Act, at 42 U.S.C. 3796c-1 or Public Law 107-37, means a certification, acknowledging all the matter specified in § 32.5(f)(1) and (2)—

(1) In which the fact (or facts) asserted is the matter specified in § 32.5(f)(3);

(2) That expressly indicates that all of the terms used in making the assertion described in paragraph (1) of this definition (or used in connection with such assertion) are within the meaning of the Act, at 42 U.S.C. 3796c-1 or Public Law 107-37, and of this part; and

(3) That otherwise satisfies the provisions of the Act, at 42 U.S.C. 3796c-1 or Public Law 107-37, and of this part.

* * * * *

Commonly accepted means generally agreed upon within the medical profession.

Consequences of an injury that permanently prevent an individual from performing any gainful work means an injury whose consequences permanently prevent an individual from performing any gainful work.

* * * * *

Direct and proximate cause—Except as may be provided in the Act, at 42 U.S.C. 3796(k), something directly and proximately causes a wound, condition, or cardiac-event, if it is a substantial factor in bringing the wound, condition, or cardiac-event about.

* * * * *

Emergency response activity means response to a fire-, rescue-, or police emergency.

* * * * *

Employment in a civilian capacity refers to status as a civilian, rather than to the performance of civilian functions.

* * * * *

Heart attack means—

(1) A myocardial infarction; or
 (2) A cardiac-event (*i.e.*, cessation, interruption, arrest, or other similar disturbance of heart function), not included in paragraph (1) of this definition, that is—

(i) Acute; and

(ii) Directly and proximately caused by a pathology (or pathological condition) of the heart or the coronary arteries.

* * * * *

Law enforcement * * *

(3) Prison security activity; and

* * * * *

Official training program of a public agency means a program—

(1) That is officially sponsored, -conducted, or -authorized by the public agency; and

(2) Whose purpose is to train public safety officers in (or to improve their skills in), specific activity or actions encompassed within their respective lines of duty.

* * * * *

Prison security activity means correctional or detention activity (in a prison or other detention or confinement facility) of individuals who are alleged or found to have violated the criminal laws.

* * * * *

Public safety activity means any of the following:

(1) Law enforcement;

(2) Fire protection;

(3) Rescue activity; or

(4) The provision of emergency medical services.

* * * * *

4. Amend § 32.5 as follows:

a. Amend paragraph (c) as follows:

i. Add “301 (presumptions),” before “401”.

ii. Remove “1008” and add in its place “1007”.

iii. Add “, *mutatis mutandis*,” after “apply”.

iv. Add “No extrinsic evidence of authenticity as a condition precedent to admissibility shall be required with respect to any document purporting to bear the signature of an expert engaged by the BJA.” after the period.

b. Amend paragraph (d) as follows:

i. In paragraph (d)(1)(ii), remove “or” at the end.

ii. In paragraph (d)(2)(ii), remove the period at the end and add in its place “; or”.

c. Amend paragraph (f) as follows:

i. In paragraph (f)(1)(ii), add “and” after “agency;”.

ii. In paragraph (f)(1)(iii)(E), remove “and” after the semi-colon.

iii. Redesignate paragraph (f)(1)(iv) as paragraph (f)(3), remove “Killed”

therein and add in its place “That the public safety officer was killed”, and remove “; and” therein and add in its place “, and that such injury was sustained in connection with public safety activity (or otherwise with efforts described in the Act, at 42 U.S.C. 3796c–1 or Pub. L. 107–37) related to a terrorist attack (under the former statute) or to the terrorist attacks of September 11, 2001 (under the latter statute).”.

iv. In paragraph (f)(2), remove “That” and add in its place “Of the public agency’s acknowledgment that”, remove the final period, and add “; and” at the end.

d. add paragraphs (d)(3), (g), (h), and (i), to read as follows:

§ 32.5 Evidence.

* * * * *

(d) * * *

(3) A claimant under subpart B or C of this part fails or refuses to apply for the benefits, if any, described in § 32.15(a)(1)(i) or § 32.25(a)(1)(i), respectively.

* * * * *

(g) In determining a claim, the PSOB determining official shall have, in addition to the hearing-examiner powers specified at 42 U.S.C. 3787 (hold hearings, issue subpoenas, administer oaths, examine witnesses, and receive evidence), and to the authorities specified at 42 U.S.C. 3788(b)–(d) (use of experts, consultants, other government resources) and in this part, the authority otherwise and in any reasonable manner to conduct his own inquiries, as appropriate.

(h) Acceptance of payment (by a payee (or on his behalf)) shall constitute *prima facie* evidence that the payee (or the pay agent)—

(1) Endorses as his own (to the best of his knowledge and belief) the statements and representations made, and the evidence and information provided, pursuant to the claim; and

(2) Is aware (in connection with the claim) of no—

(i) Fraud;

(ii) Concealment or withholding of evidence or information;

(iii) False, incomplete, or inaccurate statements or representations;

(iv) Mistake, wrongdoing, or deception; or

(v) Violation of 18 U.S.C. 287 (false, fictitious, or fraudulent claims), 1001 (false statements), 1621 (perjury), or 42 U.S.C. 3795a (falsification or concealment of facts).

(i) A public safety officer’s response to an emergency call from his public agency for him to perform public safety activity shall constitute *prima facie*

evidence of such response’s non-routine character.

§ 32.6 [Amended]

5. Amend § 32.6 as follows:

a. In paragraph (a), add the following at the end: “If more than one should qualify, payment shall be made to the one with whom the officer considered himself, as of the injury date, to have the closest relationship, except that the individual (if any) who was a member of the officer’s household (as of such date) shall be presumed rebuttably to be such one, unless legal proceedings (by the officer against such member, or vice versa) shall have been pending then in any court.”.

b. In paragraph (d)(1), remove “or inaccurate statements” and add in its place “, incomplete, or inaccurate statements or representations”.

§§ 32.12 and 32.22 [Amended]

6. Amend §§ 32.12(a)(2) and 32.22(a)(2), respectively, by removing “the receipt or denial of any benefits” and adding in its place “a final determination of entitlement to receive, or of denial of, the benefits, if any,”.

§§ 32.12, 32.22, 32.32, 32.42, and 32.52 [Amended]

7. Amend §§ 32.12(b), 32.22(b), 32.32(c), 32.42(b), and 32.52(b), respectively, by adding “documentary, electronic, video, or other non-physical” after “supporting”.

8. Amend § 32.13 as follows:

a. Amend the definitions of “*Beneficiary of a life insurance policy of a public safety officer*” and “*Beneficiary under the Act, at 42 U.S.C. 3796(a)(4)(A)*”, respectively as follows:

i. In the introductory text, add “or otherwise un-terminated” after “law”.

ii. In the introductory text of paragraph (1), remove “—not having taken place as of such date of death—” and “when scheduled”.

iii. In paragraph (1)(i), remove “The alteration in schedule was” and add in its place “It did not take place”.

b. In paragraph (2) of the definition of “*Beneficiary of a life insurance policy of a public safety officer*”, remove “individual)” and add in its place “spouse (or purported spouse))”.

c. Amend the definition of “*Circumstances other than engagement or participation*” as follows:

i. Remove the term defined, “*Circumstances other than engagement or participation*” and add in its place “*Extrinsic circumstances*”.

ii. Redesignate the definition to the appropriate place, in alphabetical order, in this section, as set forth below.

d. Remove the definition of “*Commonly accepted*”.

e. Amend the definition of "Competent medical evidence to the contrary" to remove "circumstances other than any engagement or participation described in the Act, at 42 U.S.C. 3796(k)(1)" and add in its place "extrinsic circumstances".

f. Amend the definition of "Engagement in a situation" as follows:

i. Remove "Engagement in a situation—A public safety officer is engaged in a situation only" in the introductory text and add in its place "Engagement in a situation involving law enforcement, fire suppression, rescue, hazardous material response, emergency medical services, prison security, disaster relief, or other emergency response activity—A public safety officer is so engaged only".

ii. Remove "hazardous-materials" in paragraph (1)(iii) and add in its place "hazardous-material".

iii. Remove "or" at the end of paragraph (1)(v).

iv. Remove "responding to a fire, rescue, or police emergency" in paragraph (1)(vii) and add in its place "engaging in emergency response activity".

v. In paragraph (2), remove "to be in" and add in its place "to have been in", add "at the time of such engagement" before the first "(or", and remove "so to be" and add in its place "so to have been".

g. Amend paragraph (2) of the definition of "Most recently executed life insurance policy of a public safety officer" by removing "in effect" and adding in its place "unrevoked (by such officer or by operation of law) or otherwise unterminated".

h. Amend the definition of "Participation in a training exercise" by removing "if it is a formal part of an official training program whose purpose is to train public safety officers in, prepare them for, or improve their skills in, particular activity or actions encompassed with their respective lines of duty." in the introductory text and adding in its place "when actually taking formal part in a mandatory, structured activity within an official training program of his public agency."

i. Amend the definition of "Public safety agency, organization, or unit" by removing "organization, or unit" in the term defined, and adding in its place "-organization, or -unit".

j. Add the following definitions in alphabetical order:

§ 32.13 Definitions.

* * * * *

Designation on file—A designation of beneficiary under the Act, at 42 U.S.C. 3796(a)(4)(A), is on file with a public

safety agency, -organization, or -unit, only if it is deposited with the same by the public safety officer making the designation, for it to maintain with its personnel or similar records pertaining to him.

* * * * *

Extrinsic circumstances means—

- (1) An event or events; or
(2) An intentional risky behavior or intentional risky behaviors.

Life insurance policy on file—A life insurance policy is on file with a public safety agency, -organization, or -unit, only if—

- (1) It is issued through (or on behalf of) the same; or
(2) The original (or a copy) of one of the following is deposited with the same by the public safety officer whose life is insured under the policy, for it to maintain with its personnel or similar records pertaining to him:
(i) The policy (itself);
(ii) The declarations page or -statement from the policy's issuer;
(iii) A certificate of insurance (for group policies);
(iv) Any instrument whose execution constitutes the execution of a life insurance policy; or
(v) The substantial equivalent of any of the foregoing.

* * * * *

Routine—Neither of the following shall be the decisive factor in determining whether an activity shall be understood to be performed as a matter of routine:

- (1) Being described by a public agency as being routine or ordinary; or
(2) The frequency with which it may be performed.

* * * * *

9. Amend § 32.14 by adding a paragraph (c) to read as follows:

§ 32.14 PSOB Office determination.

* * * * *

(c) In connection with the determination of the existence of competent medical evidence to the contrary, pursuant to a filed claim—

- (1) Where there is an affirmative suggestion under paragraph (c)(2) of this section, which indicates the existence of a potential ground for denial of the claim, the PSOB Office shall serve the claimant with notice thereof, to request that he file such documentary, electronic, video, or other non-physical evidence (such as medical-history records, as appropriate) and legal arguments in support of his claim as he may wish to provide;
(2) There is an affirmative suggestion within the meaning of paragraph (c)(1) of this section, where the evidence

before the PSOB Office affirmatively suggests that—

(i) The public safety officer actually knew or should have known that he had cardio-vascular disease risk factors and appears to have worsened or aggravated the same through his own intentional and reckless behavior (as opposed to where the evidence affirmatively suggests merely that cardio-vascular disease risk factors were present); or

(ii) It is more likely than not that a public safety officer's heart attack or stroke was imminent; and

(3) The PSOB Office shall not request medical history records to supplement a filed claim, unless the criteria in paragraphs (c)(1) and (2) of this section are satisfied; and

(4) Any mitigating evidence provided under paragraph (c) of this section will be considered by the PSOB Office.

10. Amend § 32.15 as follows:

a. In paragraph (a)(1), remove "paragraph (b)" and add in its place "paragraphs (b) and (d)".

b. In paragraph (b), remove "paragraph (a)(1)" and add in its place "paragraphs (a)(1) and (d)".

c. In the introductory text of paragraph (c), add "for purposes of this section" after "complete".

d. Add a paragraph (d) to read as follows:

§ 32.15 Prerequisite certification.

* * * * *

(d) Subject to paragraphs (b) and (c) of this section, if the Director finds that the conditions specified in the Act, at 42 U.S.C. 3796(k), are satisfied with respect to a particular public safety officer's death, and that no circumstance specified in the Act, at 42 U.S.C. 3796a(1), (2), or (3), applies with respect thereto—

(1) The certification as to death, described in paragraph (a)(1) of this section, shall not be required; and

(2) The certification as to benefits, described in paragraph (a)(1)(ii) of this section, shall be deemed complete for purposes of this section if it—

(i) Describes the public agency's understanding of the circumstances (including such causes of which it may be aware) of the officer's death; and

(ii) States that, in connection with deaths occurring under the circumstances described in paragraph (d)(2)(i) of this section, the public agency is not legally authorized to pay any benefits described in paragraph (a)(1)(i) of this section.

11. Amend § 32.16 by adding a paragraph (c) to read as follows:

§ 32.16 Payment.

* * * * *

(c) If more than one individual should qualify for payment—

(1) Under the Act, at 42 U.S.C. 3796(a)(4)(1), payment shall be made to each of them in equal shares, except that, if the designation itself should manifest a different distribution, payment shall be made to each of them in shares in accordance with such distribution; or

(2) Under the Act, at 42 U.S.C. 3796(a)(4)(2), payment shall be made to each of them in equal shares.

§ 32.29 [Amended]

12. Amend § 32.29(a)(1)(ii) by removing “The” and adding in its place “Consistent with § 32.42(c), the”.

§ 32.41 [Amended]

13. Amend § 32.41 by adding “, and of claims remanded (or matters referred) under § 32.54(c)” before the final period.

14. Amend § 32.42 as follows:

a. In the introductory text of paragraph (a), remove “Unless” and add in its place “Subject to paragraph (c) of this section, and unless”.

b. Add a paragraph (c) to read as follows:

§ 32.42 Time for filing request for determination.

* * * * *

(c) The timely filing of a motion for reconsideration under § 32.28(a) shall be deemed to constitute a timely filing, under paragraph (a) of this section, of a request for determination with respect to any grounds described in § 32.29(a)(1)(ii) that may be applicable.

§ 32.43 [Amended]

15. Amend § 32.43(b) by adding “(or upon remand or referral)” after “determination”.

§ 32.45 [Amended]

16. Amend § 32.45(a) by removing “At” and adding in its place “Except with respect to a remand or referral, at”.

17. Amend § 32.54 by adding paragraph (c) to read as follows:

§ 32.54 Director determination.

* * * * *

(c) With respect to any claim before him, the Director, as appropriate, may—

(1) Remand the same to the PSOB Office, or to a Hearing Officer;

(2) Vacate any related determination under this part; or

(3) Refer any related matters to a Hearing Officer (as a special master), to recommend factual findings and dispositions in connection therewith.

§ 32.55 [Amended]

18. Amend § 32.55(a) by removing “under 28 U.S.C. 1491(a) (claims against

the United States)” and adding in its place “pursuant to the Act, at 42 U.S.C. 3796c–2”.

Dated: July 7, 2008.

Jeffrey L. Sedgwick,

Acting Assistant Attorney General.

[FR Doc. E8–15730 Filed 7–9–08; 8:45 am]

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DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[FWS–R8–ES–2008–0067; 1111–FY08–MO–B2]

Endangered and Threatened Wildlife and Plants; 90-Day Finding on a Petition To Reclassify the Delta Smelt (*Hypomesus transpacificus*) From Threatened to Endangered

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of 90-day petition finding and initiation of status review.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), announce a 90-day finding on a petition to reclassify the delta smelt (*Hypomesus transpacificus*) from threatened to endangered under the Endangered Species Act of 1973, as amended (Act). We find that the petition presents substantial scientific or commercial information indicating that reclassification of the delta smelt from threatened to endangered may be warranted. Therefore, we are initiating a status review to determine if reclassifying this species as endangered under the Act is warranted. To ensure that the status review is comprehensive, we are soliciting scientific and commercial data and other information regarding this species.

DATES: To allow us adequate time to conduct this review, we request that information be submitted to us on or before September 8, 2008.

ADDRESSES: You may submit information by one of the following methods:

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

• *U.S. mail or hand-delivery:* Public Comments Processing, Attn: FWS–R8–ES–2008–0067, Division of Policy and Directives Management, U.S. Fish and Wildlife Service, 4401 N. Fairfax Drive, Suite 222, Arlington, VA 22203. We will not accept e-mail or faxes. We will post all information at <http://www.regulations.gov>. This generally

means that we will post any personal information you provide us (see the Information Solicited section below for more details).

FOR FURTHER INFORMATION CONTACT:

Susan Moore, Sacramento Fish and Wildlife Office, 2800 Cottage Way, W–2605, Sacramento, CA 95825; telephone 916–414–6600; facsimile 916–414–6712. If you use a telecommunications device for the deaf (TDD), call the Federal Information Relay Service at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Information Solicited

When we make a finding that substantial information is presented to indicate that listing, delisting, or reclassifying a species may be warranted, we are required to promptly commence a review of the status of the species. To ensure that the status review is complete and based on the best available scientific and commercial information, we are soliciting information concerning the status of the delta smelt. We request information from the public, other concerned governmental agencies, Native American tribes, the scientific community, industry, or any other interested parties concerning the status of the delta smelt, including but not limited to information on:

(1) The effects of potential threat factors that are the basis for a listing determination under section 4(a) of the Act (16 U.S.C. 1531 *et seq.*), which are:

(a) Present or threatened destruction, modification, or curtailment of the species' habitat or range;

(b) Overutilization for commercial, recreational, scientific, or educational purposes;

(c) Disease or predation;

(d) The inadequacy of existing regulatory mechanisms; or

(e) Other natural or manmade factors affecting its continued existence.

(2) Population abundance, distribution, trends, and dynamics; habitat selection and trends; food habits; and effects of disease, competition, and predation on delta smelt.

(3) The effects of climate change, sea level change, and change in water temperatures on the distribution and abundance of delta smelt and their principal prey.

(4) The effects of other potential threat factors, including water diversions in the Sacramento-San Joaquin River Delta (Delta), contaminants, invasive species, and changes of the distribution and abundance of delta smelt and their principal prey.

(5) Management programs for delta smelt conservation, including mitigation