

reference to temporary regulations and notice of public hearing that appeared in the **Federal Register** on Monday, September 8, 2003, (68 FR 53008), announced that a public hearing was scheduled for December 18, 2003 at 10 a.m., in the auditorium, Internal Revenue Service Building, 1111 Constitution Avenue, NW., Washington, DC. The subject of the public hearing is proposed regulations under sections 168 and 1400L of the Internal Revenue Code.

The public comment period for these regulations expired on November 27, 2003. The notice of proposed rulemaking by cross-reference to temporary regulations and notice of public hearing instructed those interested in testifying at the public hearing to submit a request to speak and an outline of the topics to be addressed. As of Thursday, December 4, 2003, no one has requested to speak. Therefore, the public hearing scheduled for December 18 2003 is cancelled.

**Cynthia E. Grigsby,**

*Acting Chief, Publications and Regulations Branch, Legal Processing Division, Associate Chief Counsel (Procedures and Administration).*

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BILLING CODE 4830-01-P

## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

#### 26 CFR 1

[REG-153319-03]

RIN 1545-BC74

#### **Guidance Under Section 1502; Application of Section 108 to Members of a Consolidated Group**

**AGENCY:** Internal Revenue Service (IRS), Treasury.

**ACTION:** Notice of proposed rulemaking by cross-reference to temporary regulations.

**SUMMARY:** Temporary regulations in the Rules and Regulations section of this issue of the **Federal Register** amend the Income Tax Regulations relating to section 1502. The text of those regulations also serves as the text of these proposed regulations.

**DATES:** Written or electronic comments must be received by January 12, 2004.

**ADDRESSES:** Send submissions to: CC:PA:LPD:PR (REG-153319-03), room 5203, Internal Revenue Service, POB 7604 Ben Franklin Station, Washington, DC 20044. Submissions may be hand delivered Monday through Friday

between the hours of 8 a.m. and 4 p.m. to: CC:PA:LPD:PR (REG-153319-03), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW., Washington, DC. Alternatively, taxpayers may submit comments electronically directly to the IRS Internet site at [www.irs.gov/regs](http://www.irs.gov/regs).

#### **FOR FURTHER INFORMATION CONTACT:**

Concerning the proposed regulations, Amber Renee Cook or Marie C. Milnes-Vasquez at (202) 622-7530; concerning submission of comments, La Nita Van Dyke at (202) 622-7180 (not toll-free numbers).

#### **SUPPLEMENTARY INFORMATION:**

#### **Background and Explanation of Provisions**

Temporary regulations in the Rules and Regulations section of this issue of the **Federal Register** amend 26 CFR part 1 relating to section 1502. The text of the temporary regulations also serves as the text of these proposed regulations. The preamble to the temporary regulations explains the amendments.

#### **Special Analysis**

It has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. Further, it is hereby certified that these regulations will not have a significant economic impact on a substantial number of small entities. This certification is based on the fact that these regulations will primarily affect affiliated groups of corporations that have elected to file consolidated returns, which tend to be larger businesses. Moreover, the number of taxpayers affected and the average burden are minimal. Accordingly, a Regulatory Flexibility Analysis under the Regulatory Flexibility Act (5 U.S.C. chapter 6) is not required. Pursuant to section 7805(f) of the Internal Revenue Code, this notice of proposed rulemaking will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

#### **Comments and Request for a Public Hearing**

Before these proposed regulations are adopted as final regulations, consideration will be given to any written (a signed original and eight (8) copies) or electronic comments that are submitted timely to the IRS. The IRS and Treasury Department specifically request comments on the clarity of the proposed rules and how they may be made easier to understand. All

comments will be available for public inspection and copying. A public hearing will be scheduled if requested in writing by any person that timely submits written comments. If a public hearing is scheduled, notice of the date, time, and place for the hearing will be published in the **Federal Register**.

#### **Drafting Information**

The principal author of these regulations is Marie C. Milnes-Vasquez of the Office of Associate Chief Counsel (Corporate). However, other personnel from the IRS and Treasury Department participated in their development.

#### **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**

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

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

Section 1.1502-28 also issued under 26 U.S.C. 1502. \* \* \*

2. Section 1.1502-28 is added to read as follows:

#### **§ 1.1502-28 Consolidated section 108.**

(The text of this proposed section is the same as the text of § 1.1502-28T published elsewhere in this issue of the **Federal Register**).

**Mark E. Matthews,**

*Deputy Commissioner for Services and Enforcement.*

[FR Doc. 03-30637 Filed 12-10-03; 8:45 am]

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## DEPARTMENT OF VETERANS AFFAIRS

### 38 CFR Parts 19 and 20

RIN 2900-AL77

#### **Board of Veterans' Appeals: Obtaining Evidence and Curing Procedural Defects**

**AGENCY:** Department of Veterans Affairs.  
**ACTION:** Proposed rule.

**SUMMARY:** The Department of Veterans Affairs proposes to amend the Appeals Regulations and Rules of Practice of the Board of Veterans' Appeals (Board) by removing the Board's authority to develop evidence for initial consideration. Under its current Appeals Regulations and Rules of

Practice, the Board is permitted to obtain evidence, clarify the evidence, cure a procedural defect, or perform any other action essential for a proper appellate decision in any appeal properly before it without having to remand the appeal to the agency of original jurisdiction. Some of the regulatory provisions governing this practice were recently invalidated by the United States Court of Appeals for the Federal Circuit. By way of this rulemaking, we propose removing the invalidated portions of the Board's development regulations and changing those regulations to provide that, with certain exceptions, the Board will remand a case to the agency of original jurisdiction when there is a need to obtain evidence, clarify the evidence, correct a procedural defect, or take any other action deemed essential for a proper appellate decision. We also propose to amend the definition of "agency of original jurisdiction," add a new provision that allows the Board to consider additional evidence without having to refer it to the agency of original jurisdiction for consideration in the first instance when this procedural right is waived by the appellant or the appellant's representative, and make other related changes and technical corrections to certain Appeals Regulations and Rules of Practice. The intended effect of this amendment is to make these regulations comply with a recent court decision.

**DATES:** Comments must be received on or before January 12, 2004.

**ADDRESSES:** Mail or hand-deliver written comments to: Director, Regulations Management (00REG1), Department of Veterans Affairs, 810 Vermont Avenue, NW., Room 1064, Washington, DC 20420; or fax comments to (202) 273-9026; or e-mail comments to [OGCRegulations@mail.va.gov](mailto:OGCRegulations@mail.va.gov). Comments should indicate that they are submitted in response to "RIN 2900-AL77." All written comments will be available for public inspection at the above address in the Office of Regulation Policy and Management, Room 1063B, between the hours of 8 a.m. and 4:30 p.m., Monday through Friday (except holidays). Please call (202) 273-9515 for an appointment.

**FOR FURTHER INFORMATION CONTACT:** Steven L. Keller, Senior Deputy Vice Chairman, Board of Veterans' Appeals (01C), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202-565-5978).

**SUPPLEMENTARY INFORMATION:** The Board of Veterans' Appeals (Board or BVA) is the component of Department of Veterans Affairs (VA) in Washington,

DC, that decides appeals from denials of claims for veterans' benefits. An agency of original jurisdiction (AOJ), typically one of VA's 57 regional offices, makes the initial decision on a claim and subsequent decisions if VA receives additional evidence. A claimant who is dissatisfied with an AOJ's decision may appeal to the Board. After a claimant perfects an appeal to the Board, the AOJ certifies the appeal to the Board and transfers the record to the Board, so that the Board can decide the appeal.

While considering an appeal, a BVA veterans law judge, or panel of veterans law judges, sometimes discovers that more evidence is needed, that the current evidence must be clarified, or that a procedural defect must be cured for the appeal to be properly decided. Prior to regulatory changes effective in February 2002, if the Board determined that additional evidence needed to be obtained, current evidence clarified, or a procedural defect cured for the appeal to be properly decided, the case, pursuant to 38 CFR 19.9 (2001), generally had to be remanded to the AOJ to perform the needed action. In addition, any pertinent evidence submitted by the appellant or representative that was accepted by the Board, as well as any such evidence referred to the Board by the AOJ under 38 CFR 19.37(b), was required to be referred to the AOJ for review and preparation of a Supplemental Statement of the Case, unless this procedural right was waived by the appellant or representative, or unless the Board determined that the benefit or benefits to which the evidence related could be allowed on appeal without such referral. 38 CFR 20.1304(c) (2001).

In order to address a growing backlog of claims awaiting decision at VA's Regional Offices and to provide more expeditious processing of appeals, VA modified provisions of its Appeals Regulations and the Board's Rules of Practice to permit the Board to develop the record or cure procedural defects itself without remanding the appeal to the AOJ, and without having to obtain the appellant's waiver. These changes, which most significantly involved the amendment of 38 CFR 19.9 and 20.1304, were published in the **Federal Register** as final amendments on January 23, 2002, 67 FR 3099 (2002), with an effective date of February 22, 2002.

Under the changes made to 38 CFR 19.9 at that time, the Board was still permitted to remand a case needing further development, but no longer was required to do so. Additionally, under the new 38 CFR 19.9(a)(2)(ii), if the Board decided to provide the appellant with the notice required by 38 U.S.C.

5103(a) and/or 38 CFR 3.159(b)(1) (evidence required to substantiate a claim), the appellant would have 30 days to respond to the notice and furnish the requested evidence. Evidence submitted after the Board's decision, but before the expiration of the one-year period following the notice, would be referred to the AOJ for due consideration. 38 CFR 19.31 and 20.1304 also were revised to facilitate the development that could be undertaken at the Board.

A number of petitions challenging the 2002 revisions made to 38 CFR 19.9, 19.31, 20.903 and 20.1304 were filed with the United States Court of Appeals for the Federal Circuit (Federal Circuit). On May 1, 2003, the Federal Circuit issued a decision in *Disabled American Veterans v. Secretary of Veterans Affairs*, 327 F.3d 1339 (Fed. Cir. 2003), that invalidated 38 CFR 19.9(a)(2), and 19.9(a)(2)(ii). The Court concluded that the changes made to § 19.9(a)(2) were contrary to 38 U.S.C. 7104(a) because, if the Board obtained new evidence and rendered a decision on the basis of such evidence without obtaining a waiver from the claimant, such action would deprive the claimant of "one review on appeal" of the additional evidence.

On May 21, 2003, the VA Office of the General Counsel (OGC) issued a precedential opinion addressing the impact and effect of the Federal Circuit's decision in *Disabled American Veterans* on the authority of the Board to develop evidence with respect to cases pending before the Board on appeal. In pertinent part, the OGC found that the Court's decision does not prohibit the Board from developing evidence in a case on appeal before the Board, provided that the Board first obtains the appellant's waiver of initial consideration of such evidence by the agency of original jurisdiction. VAOPGCPREC 1-2003 (May 21, 2003).

Although the authority found in VAOPGCPREC 1-2003 still exists, it has been decided that, given its resources and experience, the Veterans Benefits Administration (VBA) is the most appropriate organization within the Department of Veterans Affairs to shoulder responsibility for developing most types of evidence and correcting procedural deficiencies in cases that have been appealed to the BVA. Therefore, in order to remove the two regulatory provisions invalidated by the Federal Circuit, and to effectuate the decision that the development of most types of evidence and correction of procedural deficiencies should be accomplished by VBA, VA proposes to amend 38 CFR 19.9 to require the Board to remand a case to the AOJ if it is found

that further evidence, clarification of the evidence, or correction of a procedural defect is needed. The currently existing exceptions to this requirement that are contained in 38 CFR 19.9(b) are being retained. These exceptions were in effect prior to the 2002 changes made to § 19.9, and one—the Board's consideration of a change in law without the necessity of a remand to the AOJ—was specifically upheld as being a valid provision by the Federal Circuit in the *Disabled American Veterans* decision. A new remand exception also is being added to reflect, as further discussed below, the addition of § 20.1304(c). That new provision will provide appellants with the option of waiving initial consideration by the AOJ of evidence referred to, or received by, the Board.

VA also proposes to revise the definition of “agency of original jurisdiction,” as set forth in 38 CFR 20.3(a), to mean “the Department of Veterans Affairs activity or administration, that is, the Veterans Benefits Administration, Veterans Health Administration, or National Cemetery Administration, that made the initial determination on a claim.” This change is being made to broaden the definition of AOJ so that it is not limited to a particular office within one of the VA activities and administrations, including the office that made the initial determination on a claim. The term “activity” comes from the definition of agency of original jurisdiction included in 38 U.S.C. 7105(b)(1). The purpose of this change is to provide the Administrations, particularly VBA, with the requisite flexibility to process remanded appeals in the most efficient and effective manner possible by reassigning work to different offices as deemed appropriate by management. See *The Veterans' Benefits Improvements Act of 1994*, Public Law 103–446, sections 302, 108 Stat. 4645, 4658 (1994), 38 U.S.C.A. 5101 (West 2003) (Historical and Statutory Notes). This will enable VBA to use its available resources to complete any necessary development and readjudication of a remanded appeal at the most appropriate location.

Additionally, VA proposes to re-promulgate former § 20.1304(c) in substantially the same form as it existed prior to the 2002 regulatory amendments and its removal at that time from the Board's Rules of Practice. Under certain circumstances pertinent evidence may be submitted directly to and accepted by the Board, or may be referred to the Board by the AOJ pursuant to 38 CFR 19.37(b). Unless the Board determines that the benefit or

benefits to which the evidence relates may be fully allowed on appeal, and hence there is no possibility of prejudice to the appellant, such newly received evidence must be referred to the AOJ for initial review. Under the proposed revision, such referral will not be required when the appellant or the appellant's representative waives the procedural right to have the newly submitted evidence considered by the AOJ in the first instance. Allowing an appellant to affirmatively waive initial AOJ consideration of newly submitted evidence will reduce the need for Board remands whenever new pertinent evidence is received and considered by the Board in the first instance. In turn, this proposed change will allow for the faster processing of the claims of individual appellants, as well as the processing of appeals at both the AOJ and Board levels, due to the reduction in the number of cases that otherwise would require remand.

Several technical corrections also are being made to 38 CFR 20.1304 to reflect the redesignation of current paragraph (c) as paragraph (d), and the addition of the new paragraph (c) discussed above. In addition, the redesignated paragraph (d) is being amended to reflect that a waiver, in accordance with new paragraph (c) of this section, of initial AOJ consideration of pertinent evidence received by the Board must be obtained from each claimant when a simultaneously contested claim is involved. The purpose of this change is to fully protect the procedural rights of all of the parties involved in a simultaneously contested claim.

This proposed rulemaking also would make several minor amendments and technical corrections to the rules affected by this rulemaking. In addition to the above amendments, we propose revising 38 CFR 19.9 to change the title of “Board Member” to “Veterans Law Judge.” On February 10, 2003, 38 CFR 19.2 was revised to allow the use of the title “Veterans Law Judge” as an alternative to “Member of the Board.” 68 FR 6621 (2003). The change in language in § 19.9 is being proposed to conform to the new § 19.2.

An amendment is being proposed to 38 CFR 19.38, “Action by agency of original jurisdiction when remand received,” to remove the requirement that the AOJ must notify the Board as to the action it has taken on a remanded case. Prior to the Veterans Appeal Control and Locator System (VACOLS) becoming the Department's sole computer appeals tracking system, the AOJs were required to keep the Board informed of the status of Board remand cases. Such action is no longer needed,

however, because VACOLS is now the sole appeals tracking system within the Department for both the Board and the AOJs, and any final action taken on a case by the AOJ will be reflected in VACOLS. It is the responsibility of the AOJs to return remanded cases to the Board that are not fully granted by the AOJ on remand. The Board does not have any jurisdiction to take further action on a remanded matter until it is returned by the AOJ. This amendment will make the regulation conform to current practice.

Three changes are being proposed to 38 CFR 20.903, “Notification of evidence secured and law to be considered by the Board and opportunity for response.” Section 20.903(a) currently provides that, if the Board requests a legal or medical opinion, both the appellant and the appellant's representative will be notified of the request, but when the opinion is received a copy of the opinion is only provided to the representative or to the appellant, but not to both. Except in circumstances governed by 38 U.S.C. 5701(b)(1), where disclosure of an opinion could possibly be injurious to the physical or mental health of a claimant, it makes no sense to provide an appellant with a copy of an opinion request, but not with a copy of the opinion that is obtained in response to that request. Accordingly, we propose amending § 20.903(a) to state that the Board will furnish a copy of any legal or medical opinion obtained to both the appellant and the appellant's representative, if any. This change will ensure that the appellant is fully informed about and aware of any such opinions obtained by the Board.

The second change being proposed to § 20.903 relates to paragraph (b). If, pursuant to 38 CFR 19.9(a) or 19.37(b), the Board obtains pertinent evidence that was not submitted by the appellant or appellant's representative, Rule 903(b) currently provides that the Board must notify the appellant and the appellant's representative, if any, of the evidence obtained by furnishing a copy of such evidence, and providing a period of 60 days for response, which may include the submission of relevant evidence or argument. With certain exceptions covered elsewhere in the regulations, the AOJ, rather than the Board, will be developing evidence for initial consideration. Consequently, it is being proposed that Rule 903(b) be removed as a result of this change in practice.

The third and final change being proposed to § 20.903 relates to paragraph (c), which is being redesignated as paragraph (b) in light of

the proposed removal of Rule 903(b). A cross-reference is being added to the first sentence to make reference to § 19.9(b)(2) as the source of the Board's authority to consider, in the first instance, law not already considered by the AOJ.

#### Comment Period

Section 6(a)(1) of Executive Order 12866 indicates that, in most cases, a comment period for proposed regulations should be "not less than 60 days." However, for this rulemaking we have provided a comment period of 30 days for the following reasons. First, this rulemaking primarily concerns rules of agency procedure or practice, which are not subject to the Administrative Procedure Act's general requirement of publication for notice and comment. Second, prompt issuance of the proposed amendments is necessary to remove those provisions of our current rules regarding the development of claims on appeal that were invalidated by the United States Court of Appeal for the Federal Circuit in *Disabled American Veterans v. Secretary of Veterans Affairs*, 9 327 F. 3d 1339 (Fed. Cir. 2003). Third, and finally, the proposed amendments facilitate the processing of claims remanded from the Board by providing flexibility to VBA in deciding where those remands can best be handled. In that regard, it is important for the final rule to be published expeditiously in order to ensure the efficient and effective processing of appeals under valid regulations.

#### Unfunded Mandates

The Unfunded Mandates Reform Act requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before developing any rule that may result in an expenditure by State, local, or tribal governments, in the aggregate, or by the private sector of \$100 million or more in any given year. This proposed rule would have no consequential effect on State, local, or tribal governments, or the private sector.

#### Paperwork Reduction Act

This document contains no provisions constituting a collection of information under the Paperwork Reduction Act (44 U.S.C. 3501–3521).

#### Executive Order 12866

This regulatory amendment has been reviewed by the Office of Management and Budget under the provisions of Executive Order 12866.

#### Regulatory Flexibility Act

The Secretary hereby certifies that this proposed rule would not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601–612. This proposed rule would affect only VA beneficiaries and would not affect small businesses. Therefore, pursuant to 5 U.S.C. 605(b), this proposed rule is exempt from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

#### List of Subjects in 38 CFR Parts 19 and 20

Administrative practice and procedure, Claims, Veterans.

Approved: October 30, 2003.

**Anthony J. Principi,**

*Secretary of Veterans Affairs.*

For the reasons set out in the preamble, 38 CFR parts 19 and 20 are proposed to be amended as set forth below:

#### PART 19—BOARD OF VETERANS' APPEALS: APPEALS REGULATIONS

1. The authority citation for part 19 continues to read as follows:

**Authority:** 38 U.S.C. 501(a), unless otherwise noted.

#### Subpart A—Operation of the Board of Veterans' Appeals

2. Section 19.9 is amended by revising paragraphs (a) and (b) to read as follows:

##### § 19.9 Remand for further development.

(a) *General.* If further evidence, clarification of the evidence, correction of a procedural defect, or any other action is essential for a proper appellate decision, a Veterans Law Judge or panel of Veterans Law Judges shall remand the case to the agency of original jurisdiction, specifying the action to be undertaken.

(b) *Exceptions.* A remand to the agency of original jurisdiction is not necessary for the purposes of:

(1) Clarifying a procedural matter before the Board, including the appellant's choice of representative before the Board, the issues on appeal, or requests for a hearing before the Board;

(2) Consideration of an appeal, in accordance with § 20.903(b) of this chapter, with respect to law not already considered by the agency of original jurisdiction. This includes, but is not limited to, statutes, regulations, and court decisions; or

(3) Reviewing additional evidence received by the Board, if, pursuant to

§ 20.1304(c) of this chapter, the appellant or the appellant's representative waives the right to initial consideration by the agency of original jurisdiction, or if the Board determines that the benefit or benefits to which the evidence relates may be fully allowed on appeal.

\* \* \* \* \*

#### Subpart B—Appeals Processing by Agency of Original Jurisdiction

##### § 19.38 [Amended]

3. Section 19.38 is amended by removing "the Board and" from the third sentence.

#### PART 20—BOARD OF VETERANS' APPEALS: RULES OF PRACTICE

4. The authority citation for part 20 continues to read as follows:

**Authority:** 38 U.S.C. 501(a) and as noted in specific sections.

5. Section 20.3 is amended by revising paragraph (a) to read as follows:

##### § 20.3 Rule 3. Definitions.

\* \* \* \* \*

(a) *Agency of original jurisdiction* means the Department of Veterans Affairs activity or administration, that is, the Veterans Benefits Administration, Veterans Health Administration, or National Cemetery Administration, that made the initial determination on a claim.

\* \* \* \* \*

6. Section 20.903 is amended by:

- Revising the second sentence in paragraph (a);
- Removing paragraph (b);
- Redesignating paragraph (c) as paragraph (b); and
- Revising the first sentence in newly redesignated paragraph (b).

The revisions read as follows:

##### § 20.903 Rule 903. Notification of evidence secured and law to be considered by the Board and opportunity for response.

(a) \* \* \* When the Board receives the opinion, it will furnish a copy of the opinion to the appellant, subject to the limitations provided in 38 U.S.C. 5701(b)(1), and to the appellant's representative, if any. \* \* \*

(b) \* \* \* If, pursuant to § 19.9(b)(2) of this chapter, the Board intends to consider law not already considered by the agency of original jurisdiction and such consideration could result in denial of the appeal, the Board will notify the appellant and his or her representative, if any, of its intent to do so and that such consideration in the first instance by the Board could result in denial of the appeal. \* \* \*

7. Section 20.1304 is amended by:

a. In paragraphs (a) and (b)(1)(ii), removing “paragraph (c)” from each, and adding, in each place, “paragraph (d)”.

b. In paragraph (b)(2), removing “paragraph (b) or (c)” each place it appears, and adding, in each place, “paragraph (a) or (b)”.

c. Redesignating paragraph (c) as paragraph (d).

d. Adding new paragraph (c).

e. In newly designated paragraph (d), adding a new sentence immediately after “additional evidence in rebuttal.”

The additions read as follows:

**§ 20.1304 Rule 1304. Request for change in representation, request for personal hearing, or submission of additional evidence following certification of an appeal to the Board of Veterans' Appeals.**

\* \* \* \* \*

(c) *Consideration of additional evidence by the Board or by the agency of original jurisdiction.* Any pertinent evidence submitted by the appellant or representative which is accepted by the Board under the provisions of this section, or is submitted by the appellant or representative in response to a § 20.903 of this part, notification, as well as any such evidence referred to the Board by the agency of original jurisdiction under § 19.37(b) of this chapter, must be referred to the agency of original jurisdiction for review, unless this procedural right is waived by the appellant or representative, or unless the Board determines that the benefit or benefits to which the evidence relates may be fully allowed on appeal without such referral. Such a waiver must be in writing or, if a hearing on appeal is conducted, the waiver must be formally and clearly entered on the record orally at the time of the hearing. Evidence is not pertinent if it does not relate to or have a bearing on the appellate issue or issues.

(d) \* \* \* For matters over which the Board does not have original jurisdiction, a waiver of initial agency of original jurisdiction consideration of pertinent additional evidence received by the Board must be obtained from each claimant in accordance with paragraph (c) of this section. \* \* \*

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BILLING CODE 8320-01-P

## POSTAL SERVICE

### 39 CFR Part 111

#### Required Number of Pieces Increased for 5-Digit and 5-Digit Scheme Packages of Low-Weight Standard Mail Flats

**AGENCY:** Postal Service.

**ACTION:** Proposed rule.

**SUMMARY:** The Postal Service proposes amending *Domestic Mail Manual* (DMM) standards by raising the minimum number of pieces at which required 5-digit and optional 5-digit scheme presort destination packages may be prepared in a Standard Mail job consisting of flat-size pieces that weigh no more than 5 ounces (0.3125 pound) and measure no more than 3/4 inch thick. The maximum thickness permitted for nonautomation flats under DMM C050.3.0 and flats prepared in 5-digit scheme presort destination packages under DMM L007 is 3/4 inch.

Under current standards, mailers have the option to prepare 5-digit and 5-digit scheme presort destination packages (collectively referred to in this proposed rule as 5-digit packages) of flat-size pieces not more than 3/4 inch thick, regardless of weight, whenever there are as few as 10 pieces to the same 5-digit ZIP Code or the same 5-digit scheme destination in DMM L007. Under those same standards, mailers must prepare such packages when there are 17 or more pieces to these destinations. If a mailer selects an optional minimum 5-digit package size from 10 to 16 pieces, that same size must be used consistently throughout the mailing job for all 5-digit packages.

Under the proposed changes, for Standard Mail mailings of flat-size pieces that weigh no more than 5 ounces, mailers would be required to prepare 5-digit packages whenever there are 15 or more pieces to a destination. Mailers would not be permitted to prepare such pieces in 5-digit packages when there are fewer than 15 pieces to a 5-digit ZIP Code or optional 5-digit scheme destination. For mailings of pieces that weigh more than 5 ounces, mailers would be required to prepare 5-digit packages whenever there are 10 or more pieces to a destination.

**DATES:** Comments must be received on or before January 12, 2004.

**ADDRESSES:** Send written comments to the Manager, Mailing Standards, ATTN: Neil Berger, U.S. Postal Service, 1735 North Lynn Street, Room 3025, Arlington, VA 22209-6038. Written comments may be submitted via fax to 703-292-4058. Copies of all written

comments will be available for inspection and photocopying between 9 a.m. and 4 p.m., Monday through Friday, at Postal Service Headquarters Library, 475 L'Enfant Plaza, SW., Room 11800, Washington, DC 20260-1540.

**FOR FURTHER INFORMATION CONTACT:** Cheryl Beller, Product Redesign, at (703) 292-3747; or Neil Berger, Mailing Standards, at (703) 292-3645.

**SUPPLEMENTARY INFORMATION:** Effective September 5, 2002, DMM M610 for nonautomation rate Standard Mail flats, DMM M820 for automation rate Standard Mail flats, and DMM 950 for advanced preparation options of Standard Mail flat-size pieces were revised to allow mailers to select a number from 10 to 17 as the minimum number of pieces at which 5-digit packages are prepared in a Standard Mail job of flat-size pieces no more than 3/4 inch thick, without regard to the weight of the individual pieces. Prior to that date, mailers were required to prepare 5-digit packages whenever there were 10 or more pieces to a destination. Effective January 9, 2003, mailing standards in the DMM were amended to permit the preparation of optional 5-digit scheme packages (DMM L007) using the same flexible minimum of 10 to 17 pieces. Under the current standards, mailers may prepare 5-digit (and 5-digit scheme) packages with as few as 10 pieces.

#### Increased Processing Efficiencies

The Postal Service adopted the current optional 5-digit package minimum (optional with 10 to 16 pieces, required with 17 pieces) based in large part on an examination of the productivities and piece processing efficiencies of the automated flat sorting machine (AFSM) 100, which can handle flat-size pieces up to 3/4 inch thick.

Initial analysis of piece, package, and container handling costs indicates that the appropriate minimum for 5-digit packages of Standard Mail flat-size pieces is, on average, above 10 pieces, and that the minimum could be increased for flats likely to be processed on the AFSM 100. AFSM 100-compatible flats are limited to flat-size pieces measuring no more than 12 inches high, 15 inches long, and 3/4 inch thick. Increasing the minimum for 5-digit packages could help reduce overall Postal Service processing costs with the additional AFSM 100 piece handlings for pieces moving from 5-digit to 3-digit packages more than offset by reduced package handling costs. Package handling costs include processing the packages, either on a small parcel and bundle sorter (SPBS) or manually, and