Dated: October 30, 2008.

J.O. Fitton,

Captain, U.S. Coast Guard, Captain of the Port Miami, FL.

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DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 9

RIN 2900–AN00

Servicemembers' Group Life Insurance Traumatic Injury Protection Program

AGENCY: Department of Veterans Affairs.

ACTION: Interim final rule.

SUMMARY: The Department of Veterans Affairs (VA) is issuing this interim final rule to amend the Servicemembers' Group Life Insurance traumatic injury protection program (TSGLI) regulations in order to add losses that would be covered under the program and to define terms relevant to these new losses. This rulemaking also clarifies language in and reorganizes existing provisions.

DATES: This interim final rule is effective November 26, 2008. Comments must be received on or before December 26, 2008.

Applicability Date: VA will apply this rule to injuries incurred in Operation Enduring Freedom or Operation Iraqi Freedom on or after October 7, 2001, through and including November 30, 2005, and to all qualifying injuries incurred on or after December 1, 2005.

ADDRESSES: Written comments may be submitted through *http://www.Regulations.gov*; by mail or hand-delivery to Director, Regulations Management (02REG), Department of Veterans Affairs, 810 Vermont Ave., NW., Room 1068, Washington, DC 20420; or by fax to (202) 273–9026. Comments should indicate that they are submitted in response to ''RIN 2900–AN00.'' Copies of comments received will be available for public inspection 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) 461–4902 for an appointment. (This is not a toll-free number.) In addition, during the comment period, comments are available online through the Federal Docket Management System (FDMS) at *http://www.Regulations.gov*.

FOR FURTHER INFORMATION CONTACT: Jeanne King, Attorney-Advisor, Department of Veterans Affairs Regional Office and Insurance Center (310/290B), P.O. Box 8079, Philadelphia, Pennsylvania 19101, (215) 842–2000, ext. 4839. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION: TSGLI was established by Congress in May 2005 to provide monetary assistance to severely injured service members who suffer a loss, such as the loss of a hand, as a direct result of a serious traumatic injury in order to help the member and the member's family through an often long and arduous treatment and rehabilitation period. VA codified regulations to implement TSGLI at 38 CFR 9.1(k)–(q) and 9.20. *See* 70 FR 75940 (Dec. 22, 2005); 72 FR 10362 (Mar. 8, 2007).

VA conducted an extensive review of the TSGLI program at the end of the first year of the program's operation (''Year-One Review'') to ensure that the program was operating effectively and that it was meeting the intent of Congress. The report was published on the VA Web site on July 17, 2008. *http://www.insurance.va.gov/miscellaneous/index.htm*. Many of the amendments made by this interim final rule, particularly the losses that we propose to add to the Schedule of Losses in § 9.20, are derived from the recommendations and findings of the TSGLI Year-One Review.

Congress has expressed its intent to provide TSGLI benefits retroactively. Section 1032(c)(1) of the ''Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005,'' Public Law 109–13, which established the TSGLI program effective December 1, 2005, also provided for the payment of TSGLI benefits to service members who experienced a traumatic injury between October 7, 2001, when Operation Enduring Freedom began, and December 1, 2005, the effective date of section 1032 of Public Law 109–13, if the loss was a direct result of injuries incurred in Operation Enduring Freedom or Operation Iraqi Freedom. VA as well has made its regulations implementing the TSGLI program retroactive. In 2007, VA applied changes to the TSGLI program made by the Veterans' Housing Opportunity and Benefits Improvement Act of 2006, Public Law 109–233, section 501(a)(3), 120 Stat. 397, 413, to claims filed or injuries suffered prior to the date of the change in the law because it was consistent with the objectives of the TSGLI provisions authorizing payments based on injuries preceding the program's creation. 72 FR 10362, 10363 (2007). We believe that the same holds true with regard to the changes made by this rulemaking. Further, because TSGLI is intended to provide a source of income for expenses during periods of treatment and convalescence following a loss due to traumatic injury, we believe the application of these regulations is more directly connected to those persistent circumstances than to the past date on which an injury or loss was incurred or a claim was filed. *Id.* We also note that these regulatory amendments would not have affected conduct prior to the date of publication, nor would the regulations upset any settled expectations in any meaningful way. *See Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 280 (1994); *Princess Cruises, Inc.* v. *United States*, 397 F.3d 1358, 1362–63 (Fed. Cir. 2005). The service member's traumatic injury, the scheduled loss due to the injury, and the resulting economic burdens on the service member were not within any party's control and obviously actions were not taken in reliance on prior regulations. Although application of the regulations will increase the Government's economic burden, we believe the additional burden is countered in this instance by the other considerations discussed above.

We are amending 38 CFR 9.1(b) to provide the current address of the Office of Servicemembers' Group Life Insurance (OSGLI), which is 80 Livingston Avenue, Roseland, New Jersey 07068.

We are moving the definitions from 38 CFR 9.1(k)–(q), which pertain only to TSGLI, to 38 CFR 9.20(e)(6)(vi)–(xii) for purposes of administrative convenience and to make it easier for the public to locate the rules. We are expanding the definition of ''medical professional'' at § 9.20(e)(6)(xii) to include a ''licensed practitioner of the healing arts acting within the scope of his or her practice.'' We have broadened the definition in order to encompass a wider range of licensed medical professionals who are qualified to certify eligibility for TSGLI.

We are revising 38 CFR 9.20(b)(3) to state that the term ''traumatic event'' does not include a medical procedure or a surgical procedure in and of itself. Current § 9.20(b)(3) only refers to a surgical procedure. The revision makes the regulation consistent with VA's current practice of not providing TSGLI payments for an injury that directly results from either a medical or surgical procedure. The publication of this revision to the current rule will not result in any deviation from already established guidelines or processes. Further, the revised definition is consistent with current 38 CFR 9.20(e)(3)(i)(C), which excludes payment for a scheduled loss due to a

traumatic injury caused by either medical treatment or surgical treatment of an illness or disease.

We are adding a new paragraph at the end of 38 CFR 9.20(d) with regard to the eligibility requirements for a TSGLI payment. The governing statute for the TSGLI program, 38 U.S.C. 1980A(h), states that ''[c]overage for loss resulting from traumatic injury provided under this section shall cease at midnight on the date of the termination of the member's duty status in the uniformed services that established eligibility for Servicemembers' Group Life Insurance.'' New § 9.20(d)(5) specifies that a member would be covered by TSGLI if the member has a traumatic injury prior to midnight on the date of termination, even if the member's scheduled loss does not occur until after the member's termination date. We are making this revision to the regulation because in some cases there is a long period between the date of a member's traumatic injury and the date on which the scheduled loss actually occurs. For example, a member who suffers a severe leg injury from an explosion in service may not undergo amputation of the leg until after separating from service. This amendment to § 9.20(d) would clarify that, under such circumstances, the member would be eligible for TSGLI.

Currently, 38 CFR 9.20(e)(3)(i)(C) provides that TSGLI is not payable if a traumatic injury is caused by medical or surgical treatment of an illness or disease. We are revising that paragraph to explain that TSGLI also is not payable if a traumatic injury is caused by diagnostic procedures or any complications arising from such procedures or from medical or surgical treatment for an illness or disease. The commercial industry's Accidental Death and Dismemberment (AD&D) policies provide a model for the TSGLI program. 70 FR 75940. Under commercial AD&D policies, neither diagnostic complications nor post-surgical complications due to medical or surgical treatment usually constitute a covered loss. We are therefore revising § 9.20(d)(5) to make it consistent with commercial policies. We are also revising § 9.20(e)(3)(i)(C) to explain that TSGLI is not payable if a traumatic injury is caused by preventive medical procedures such as inoculations.

We are amending 38 CFR 9.20(e)(3)(i)(D), which currently excludes payment of TSGLI for a scheduled loss due to a traumatic injury caused by willful use of a controlled substance unless administered or consumed on the advice of a ''medical doctor.'' We are deleting the term ''medical doctor'' and inserting in its place ''medical professional,'' because prescriptions for controlled substances may be dispensed by a caregiver other than a medical doctor (*e.g.*, a nurse practitioner). This revision will clarify that a member who receives a lawful controlled substance from a medical professional who is legally authorized to provide such a controlled substance will be eligible for a TSGLI payment. Also, use of the term ''medical professional'' is consistent with the terminology in the TSGLI procedural guide, *http://www.insurance.va.gov/sgliSite/TSGLI/TSGLI.htm*, and the TSGLI application form.

We are amending 38 CFR 9.20(e)(6) to correct a misstatement concerning the scope of its application. Current 38 CFR 9.20(e)(6) states that the definitions apply ''[f]or purposes of this paragraph (e)(6)—.'' We have corrected this to read, ''For purposes of this section—.''

We also are adding to § 9.20(e)(6) definitions of terms relevant to qualifying losses under the existing TSGLI Schedule of Losses and to other losses that we are adding to that schedule in this rulemaking. Because of the interrelated nature of the definitions and schedule losses, we will discuss the definitions in conjunction with the relevant amendments for each loss.

In the Schedule of Losses, we are making several non-substantive changes that will make it easier to use. These non-substantive changes include moving the schedule from § 9.20(e)(7) to § 9.20(f) and replacing the Roman numerals preceding each loss with Arabic numerals. Another non-substantive change involves the types of losses listed in the schedule. The current schedule lists both single losses (*e.g.*, total and permanent loss of speech) and combinations of losses (*e.g.*, total and permanent loss of speech and loss of thumb and index finger on the same hand). We are removing all losses involving a combination of losses and instead explain how the different individual losses may be combined for purposes of calculating the TSGLI benefit that is payable. For losses listed in paragraphs (f)(1) through (18) of § 9.20, payment may be made for multiple losses resulting from a single traumatic event (except where noted otherwise); however, the total payment amount may not exceed $100,000 for losses resulting from a single traumatic event. Payments for losses listed in paragraphs (f)(19) through (20) of § 9.20 may not be made in addition to payments for losses under paragraphs (f)(1) through (18)—only the higher amount will be paid. The total payment amount may not exceed $100,000 for multiple losses resulting from a single traumatic event.

Payment for total and permanent loss of sight is required by 38 U.S.C. 1980A(b)(1)(A). In § 9.20(e)(6)(xiv), consistent with current VA practice, we are defining ''total and permanent loss of sight,'' which is included in the Schedule of Losses at § 9.20(f)(1), as: (1) Visual acuity in the eye of 20/200 or less (worse) with corrective lenses lasting at least 120 days; (2) visual acuity in the eye of greater than 20/200 with corrective lenses and a visual field of 20 degrees or less lasting at least 120 days; or (3) anatomical loss of the eye. These visual-acuity standards are similar to the eligibility criteria for automobiles and adaptive equipment for certain disabled veterans, 38 U.S.C. 3901(1)(A)(iii), and to the definition of ''blindness'' for purposes of Social Security disability benefits. 42 U.S.C. 1382c(2).

We are incorporating the temporal requirement of ''at least 120 days'' in the definition of ''permanent and total loss of sight'' for the benefit of medical professionals who are responsible for certifying TSGLI eligibility of an injured service member. Staff members at the branches of service who process TSGLI claims reported for purposes of the Year-One Review that medical professionals were sometimes unwilling to certify that loss of sight was ''permanent,'' even when the loss of sight had already existed for a rather lengthy period of time and even when it required substantial rehabilitation on the part of the member, because the member might regain some sight due to surgery (*e.g.*, corneal transplants) at a later date. Year-One Review at 24.

We are combining the losses for total and permanent loss of hearing in one ear and both ears at 38 CFR 9.20(f)(2). We are defining the term ''total and permanent loss of hearing'' at 38 CFR 9.20(e)(6)(xvi) to mean average hearing threshold sensitivity for air conduction of at least 80 decibels that is clinically stable and unlikely to improve and based upon hearing measured at 500, 1000, and 2000 Hertz. According to the American Speech-Language-Hearing Association, a hearing loss is considered ''profound'' if it measures at 80 decibels. *http://www.asha.org/public/hearing/testing/assess.htm*. We are adding this definition to provide an objective standard for determining whether a hearing loss is total and permanent for purposes of TSGLI.

In § 9.20(e)(6)(xv), we are defining the term ''total and permanent loss of speech,'' used in § 9.20(f)(3), as ''organic loss of speech or the ability to express oneself, both by voice and whisper,

through normal organs for speech, notwithstanding the use of an artificial appliance to simulate speech.'' The loss of speech must be clinically stable and unlikely to improve in order to be compensable. We are adding this objective definition to assist the medical professionals who evaluate injured service members for purposes of entitlement to TSGLI.

We are adding uniplegia as a qualifying loss for TSGLI at § 9.20(f)(7) and defining ''uniplegia'' at 38 CFR 9.20(e)(6)(iv) as ''the complete and irreversible paralysis of one limb of the body.'' The Year-One Review states that research shows that the impact of rehabilitation and recovery for uniplegia is similar to the rehabilitation and recovery from severance of a hand or foot, which Congress included as a scheduled loss under 38 U.S.C. 1980A(b)(1)(B). Year-One Review at 24. The AD&D policies of the commercial sector, upon which TSGLI was modeled, also often cover uniplegia. We are therefore including uniplegia as a scheduled loss for purposes of TSGLI. Because uniplegia involves paralysis of one limb only, and is therefore less severe a loss than paralysis that involves more than one limb, and because of the reported similar effect of the amputation of one hand or foot, the payment for this loss is $50,000, which is the amount of TSGLI payable for amputation of one hand or one foot. However, we note in the Schedule that a payment for uniplegia cannot be combined with the payments for amputation or limb salvage, as the initial payment for the uniplegia loss provides payment to the service member during the rehabilitation period.

We are adding a definition of ''complete and irreversible paralysis'' to aid in understanding the definitions of quadriplegia, paraplegia, hemiplegia, and uniplegia. ''Complete and irreversible paralysis'' is defined in § 9.20(e)(6)(v) as total loss of voluntary movement resulting from damage to the spinal cord or associated nerves, or to the brain, that is deemed clinically stable and unlikely to improve.

In § 9.20(e)(6)(xvii) and (f)(8), we are expanding TSGLI coverage from third degree or worse burns covering at least 30 percent of the body or 30 percent of the face to second degree or worse burns covering at least 20 percent of a service member's body or at least 20 percent of the face. Although 38 U.S.C. 1980A(b)(1)(G) states that the Schedule of Losses prescribed by the Secretary of Veterans Affairs must include ''[b]urns greater than second degree, covering 30 percent of the body or 30 percent of the face,'' the statute also authorizes the Secretary of Veterans Affairs to prescribe additional losses by regulation. We therefore believe that VA has authority to add other kinds of burns to the TSGLI Schedule of Losses.

Second degree burns, also called partial thickness burns, are less severe than third degree burns, also called full thickness burns. Nevertheless, burn specialists at Brooke Army Medical Center and VA physicians indicated that a second degree burn to at least 20 percent of the face or body would be considered to be a severe burn. Year-One Review at 26. They also reported that patients with second degree burns require as much rehabilitation as those with third degree burns. *Id.* We are therefore providing a TSGLI payment of $100,000 for second degree burns or worse covering at least 20 percent of the body or at least 20 percent of the face. The definition of burns in § 9.20(e)(6)(xvii) states explicitly that the body includes the face and head. The percentage of the body burned will be determined by using the Rule of Nines, which is a chart dividing the body surface into areas, each of which represents 9 percent, or another method for estimating the extent of a member's burns that is generally accepted within the medical profession.

We are replacing the phrase ''loss of'' hand or foot in the schedule with ''amputation of,'' and we define ''amputation'' in § 9.20(e)(6)(xx) to mean ''severance or removal of a limb or part of a limb resulting from trauma or surgery.'' We also explain that, ''[a]n amputation *above* a joint means a severance or removal that is *closer to the body than the specified joint is.*'' (Emphasis added.)

TSGLI coverage under the schedule will be expanded with respect to amputation of part of a limb. For amputation of part of the hand, we are adding at § 9.20(f)(10) amputation of the thumb or the other four fingers at or above the metacarpophalangeal joint, for which $50,000 in TSGLI is payable. For amputation of part of the foot, we are adding at § 9.20(f)(12) amputation at or above the metatarsophalangeal joints of all toes on one foot, for which the TSGLI payment is $50,000, and at § 9.20(f)(13) amputation of the big toe or the four other toes, for which the TSGLI payment is $25,000.

We are expanding both the hand and foot scheduled losses because the TSGLI Year-One Review Team found that there have been cases of significant injuries involving loss of part of a hand or foot that did not qualify for payment under the current TSGLI Schedule of Losses. Year-One Review at 25. Currently, the schedule provides a payment for loss of an entire hand or foot or for loss of an index finger and thumb of the same hand. Interviews and medical research indicated that amputations involving four fingers on one hand, a thumb, four toes on one foot, or a big toe required at least short-term rehabilitation. *Id.* Interviews with the branches of service TSGLI administrative office staff, as well as staff at National Naval Medical Center, Walter Reed Army Medical Center, and Brooke Army Medical Center all documented the significance of these losses. *Id.* The medical literature affirms the key role that the thumb and other fingers play in activities of daily living that require grasping and other fine motor skills. *Id.* The toes function similarly in terms of balance and propulsion for walking. *Id.* Additionally, many AD&D policies in the commercial sector now typically include coverage for loss of fingers and toes. *Id.*

We are adding limb salvage of an arm or leg to the Schedule of Losses at § 9.20(f)(14) and (15) and defining the term '' limb salvage'' at § 9.20(e)(6)(xix) as ''a series of operations designed to save an arm or leg with all of its associated parts rather than amputate it.'' Eligibility for TSGLI based on salvage of an arm or leg will require a surgeon's certification that the option of amputation of the limb was a medically justified alternative to salvage and that the service member chose to pursue salvage. The TSGLI payment for salvage of an arm or leg is $50,000, the same amount payable under the schedule for loss of a hand or foot. According to the Year-One Review, surgeons at the National Naval Medical Center and Brooke Army Medical Center stated that limb salvage requires more significant rehabilitation than an amputation. Year-One Review at 25–26. These medical professionals also raised the issue that providing a TSGLI payment for amputations but not limb salvage could create a monetary incentive that would unintentionally encourage a service member to proceed with amputation rather than attempt to save the limb. *Id.* By adding limb salvage as a covered loss, the TSGLI program will obviate this possibility and also recognize the severity of the rehabilitation that members undergo when they elect to pursue limb salvage.

We are adding facial reconstruction to the Schedule of Losses at § 9.20(f)(16). Consultation with medical experts in the field of oral and maxillofacial surgery during the Year-One Review indicated that 20–25 percent of all injuries to members serving in Operation Enduring Freedom/Operation Iraqi Freedom occur to the head, face,

and neck. Year-One Review at 29. The experts also opined that these injuries are significantly more severe than in the civilian world because they often result in severe functional losses, including impairment in areas such as eating, breathing, digestion, vision, and salivation that require significant recovery and rehabilitation but do not result in a loss of the member's ability to carry out activities of daily living that would be covered in the current Schedule of Losses. *Id.* New § 9.20(f)(16) provides a graduated scale of payments for facial reconstruction, starting at $25,000, with a maximum payment of $75,000. The amount of the payment for facial reconstruction is based on the location and severity of the injury. The regulation, however, excludes TSGLI for relatively minor injuries to the face, such as the loss of the tip of the nose, because TSGLI is intended for traumatic injuries that require complex surgeries and rehabilitation, as evidenced by the losses prescribed at 38 U.S.C. 1980A(b)(1).

In § 9.20(e)(6)(xviii), we are defining ''coma,'' as used in § 9.20(f)(17) to mean ''a state of profound unconsciousness that is measured at a Glasgow Coma Score of 8 or less.'' The Glasgow Coma Score is a neurological scale comprised of the combined score on tests of a patient's eye, verbal, and motor responses and ranges between 3 (indicating deep unconsciousness) and 15 (widely awake). *http://www.unc.edu/~rowlett/units/scales/glasgow.htm*. The scale is applicable to acute medical and trauma patients and is also used for chronic conditions. *http://www.bt.cdc.gov/masscasualties/gscale.asp*. Use of the Glasgow Coma Score will provide a reliable, objective way of assessing the conscious state of a service member.

We are adding to the schedule at § 9.20(f)(18) and (20) a $25,000 TSGLI payment for hospitalization due to traumatic brain injury (TBI) or other traumatic injury (OTI) if the service member's TBI or OTI results in 15 consecutive days of inpatient hospitalization, and we define ''hospitalization'' in § 9.20(e)(6)(xiii) to mean an inpatient stay in a facility that is: (1) Accredited by the Joint Commission or its predecessor, the Joint Commission on Accreditation of Healthcare Organizations (JCAHO), or accredited or approved by a program of the qualified governmental unit in which such institution is located if the Secretary of Health and Human Services has found that the accreditation or comparable approval standards of such qualified governmental unit are essentially equivalent to those of the Joint Commission or JCAHO; (2) used primarily to provide, by or under the supervision of physicians, to inpatients' diagnostic services and therapeutic services for medical diagnosis, treatment, and care of injured, disabled, or sick persons; (3) requires every patient to be under the care and supervision of a physician; and (4) provides 24-hour nursing services rendered or supervised by a registered professional nurse and has a licensed practical nurse or registered nurse on duty at all times. The definition of hospitalization also includes any Armed Forces medical facility that is authorized to provide inpatient and/or ambulatory care to eligible service members. The definition is intended to exclude facilities that do not provide traditional hospital-level care unless the limitation on the level of care is a result of military necessity. The requisite consecutive 15-day hospitalization period includes the dates on which the member is transported from the injury site to a facility described above, admitted to the facility, transferred between such facilities, and discharged from the facility.

A service member is not entitled to receive both a TSGLI payment for a 15-day hospitalization due to TBI under § 9.20(f)(18) and a $25,000 TSGLI payment for TBI that causes the inability to perform at least two activities of daily living under § 9.20(f)(17). Also, a service member is not entitled to receive both a TSGLI payment for a 15-day hospitalization due to OTI under § 9.20(f)(20) and a $25,000 payment for a traumatic injury causing the inability to perform at least two activities of daily living under § 9.20(f)(19).

By adding this loss, we will allow injured service members whose inability to perform activities of daily living cannot be documented in the early stages following their traumatic injury to nonetheless establish the consequences of the injury via easily obtainable information regarding the length of their hospital stay. We also believe that establishing this scheduled loss will result in more consistent decisions and more rapid payments in cases involving TBI. In considering the Schedule of Losses award for TBI, we considered not only the length of the loss of the activities of daily living, but the fact that there was an underlying injury to the brain.

Hospitalization for 15 consecutive days or more in today's health care environment generally indicates a rather severe injury. Such a severe injury usually requires the member's family or other caregivers to assist the member in their recovery.

In 38 CFR 9.20(h)(1)(i), (ii), and (iii) and (2) we refer to an ''Application for TSGLI Benefits Form,'' rather than the ''Certification of Traumatic Injury Protection Form,'' in order to conform to the current name of the document. In 38 CFR 9.20(h)(1)(ii) we are adding ''agent'' in order to broaden the types of persons who may receive a TSGLI payment on behalf of a member, and we are changing ''attorney in fact'' to ''attorney.''

We are amending 38 CFR 9.20(h)(1)(ii) and 38 CFR 9.20(j) to implement 38 U.S.C. 1980A(k), which provides:

> The Secretary [of the appropriate branch of service], in consultation with the Secretary [of Veterans Affairs], shall develop a process for the designation of a fiduciary or trustee of a member of the uniformed services who is insured against traumatic injury under [the TSGLI program]. The fiduciary or trustee so designated would receive a payment for a qualifying loss under [the TSGLI program] if the member is medically incapacitated (as determined pursuant to regulations prescribed by the Secretary [of the appropriate branch of service] in consultation with the Secretary [of Veterans Affairs]) or experiencing an extended loss of consciousness.

Section 602 of title 37, United States Code, authorizes the Secretary of a military department to designate a person to receive amounts due a member ''who is mentally incapable of managing his affairs * * * without the appointment in judicial proceedings of a committee, guardian, or other legal representative.'' In § 9.20(j)(2) we are adding a new paragraph that provides that, if a member does not have a guardian or agent (also known as ''attorney-in-fact'') who is authorized to act as the member's legal representative, then a trustee appointed under 37 U.S.C. 602 may be authorized to receive a TSGLI payment on behalf of the member and is also obligated to render a full accounting of any disbursements made from the TSGLI benefit in accordance with Department of Defense regulations implementing section 602. *See* 37 U.S.C. 603. In order to achieve Congress' obvious intent in enacting 38 U.S.C. 1980A(k) of providing TSGLI to legally incapacitated service members and their families who are entitled to the payment as soon as possible, we are amending 38 CFR 9.20(h)(1)(ii) to provide that a military trustee may apply for and receive TSGLI on behalf of a legally incapacitated member.

Administrative Procedure Act

In accordance with 5 U.S.C. 553(b)(3)(B), the Secretary of Veterans Affairs finds that there is good cause to

dispense with the opportunity for prior notice and opportunity for public comment with respect to this rule, which explains how the TSGLI program will be amended. The Secretary finds that it is impracticable to delay this regulation for the purpose of soliciting prior public comment because service members and their families need the payment provided by TSGLI as soon as possible following a traumatic injury in order to reduce the financial burden that results from the severe losses covered by the schedule. The amendments would be applied retroactively for losses previously not covered that result from injuries that occurred on or after October 1, 2001. As a result, we estimate that approximately 1640 service members who were not previously eligible for TSGLI would now be entitled to a payment under these amended rules and are in need of these payments as soon as possible. For these reasons, the Secretary of Veterans Affairs is issuing this rule as an interim final rule. The Secretary of Veterans Affairs will consider and address comments that are received within 30 days of the date this interim final rule is published in the **Federal Register**.

Unfunded Mandates

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before issuing any rule that may result in an expenditure by State, local, and tribal governments, in the aggregate, or by the private sector of $100 million or more (adjusted annually for inflation) in any given year. This rule would have no such effect on State, local, and tribal governments or the private sector.

Paperwork Reduction Act

OMB assigns a control number for each collection of information it approves. Except for emergency approvals under 44 U.S.C. 3507(j), VA may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. This interim final rule expands the collection of information under the Paperwork Reduction Act (44 U.S.C. 3501–3521) (the Act). Accordingly, under section 3507(d) of the Act, VA will submit a copy of the amended TSGLI form (titled Application for TSGLI Benefits Form) to OMB for its review of the collections of information concurrent with the publication of this interim final rule.

Executive Order 12866

Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity). The Executive Order classifies a ''significant regulatory action,'' requiring review by the Office of Management and Budget (OMB) unless OMB waives such review, as any regulatory action that is likely to result in a rule that may: (1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

The economic, interagency, budgetary, legal, and policy implications of this proposed rule have been examined, and it has been determined to be a significant regulatory action under the Executive Order 12866.

Regulatory Flexibility Act

The Secretary of Veterans Affairs hereby certifies that this interim final rule will 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 *et seq.* This interim final rule will directly affect only individuals and will not directly affect small entities. Therefore, pursuant to 5 U.S.C. 605(b), this amendment is exempt from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

Catalog of Federal Domestic Assistance Number and Title

The Catalog of Federal Domestic Assistance Program number and title for this regulation is 64.103, Life Insurance for Veterans.

List of Subjects in Part 9

Life insurance, Military personnel, Veterans.

Approved: October 10, 2008.

James B. Peake,

Secretary of Veterans Affairs.

■ For the reasons stated in the preamble, the Department of Veterans Affairs is amending 38 CFR part 9 as follows:

PART 9—SERVICEMEMBERS' GROUP LIFE INSURANCE AND VETERANS' GROUP LIFE INSURANCE

■ 1. The authority citation for part 9 is revised to read as follows:

Authority: 38 U.S.C. 501, 1965–1980A, unless otherwise noted.

■ 2. Section 9.1 is amended by:
■ a. Revising paragraph (b).
■ b. Removing paragraphs (k) through (q).

The revision reads as follows:

§ 9.1 Definitions.

* * * * *

(b) The term *administrative office* means the Office of Servicemembers' Group Life Insurance, located at 80 Livingston Avenue, Roseland, New Jersey 07068.

* * * * *

■ 3. Section 9.20 is amended by:
■ a. Revising paragraph (b)(3).
■ b. Adding paragraph (d)(5).
■ c. Revising paragraphs (e)(3)(i)(C) and (D).
■ d. Removing paragraph (e)(5)(ii) and redesignating paragraph (e)(5)(iii) as new paragraph (e)(5)(ii).
■ e. Revising paragraphs (e)(6)(i) through (iii).
■ f Adding paragraphs (e)(6)(iv), through (xx).
■ g. Removing paragraph (e)(7).
■ h. Redesignating paragraphs (f) through (j) as (g) through (k), respectively.
■ i. Adding new paragraph (f).
■ j. Revising newly designated paragraph (h).
■ k. Revising newly designated paragraph (j)(1).
■ l. Redesignating newly redesignated paragraph (j)(2) as (j)(3) and adding a new paragraph (j)(2).
■ m. Revising the authority citation.

The revisions and additions read as follows:

§ 9.20 Traumatic injury protection.

* * * * *

(b) * * *

(3) A traumatic event does not include a medical or surgical procedure in and of itself.

* * * * *

(d) * * *

(5) You must suffer a traumatic injury before midnight on the date of termination of your duty status in the

uniformed services that established eligibility for Servicemembers' Group Life Insurance. For purposes of this section, the scheduled loss may occur after the date of termination of your duty status in the uniformed services that established eligibility for Servicemembers' Group Life Insurance.

(e)* * *

(3) * * *

(i) * * *

(C) Diagnostic procedures, preventive medical procedures such as inoculations, medical or surgical treatment for an illness or disease, or any complications arising from such procedures or treatment;

(D) Willful use of an illegal substance or a controlled substance unless administered or consumed on the advice of a medical professional; or

* * * * *

(6) *Definitions.* For purposes of this section—

(i) The term *quadriplegia* means the complete and irreversible paralysis of all four limbs.

(ii) The term *paraplegia* means the complete and irreversible paralysis of both lower limbs.

(iii) The term *hemiplegia* means the complete and irreversible paralysis of the upper and lower limbs on one side of the body.

(iv) The term *uniplegia* means the complete and irreversible paralysis of one limb of the body.

(v) The term *complete and irreversible paralysis* means total loss of voluntary movement resulting from damage to the spinal cord or associated nerves, or to the brain, that is deemed clinically stable and unlikely to improve.

(vi) The term *inability to carry out activities of daily living* means the inability to independently perform at least two of the six following functions:

(A) Bathing.

(B) Continence.

(C) Dressing.

(D) Eating.

(E) Toileting.

(F) Transferring in or out of a bed or chair with or without equipment.

(vii) The term *pyogenic infection* means a pus-producing infection.

(viii) The term *contaminated substance* means food or water made unfit for consumption by humans because of the presence of chemicals, radioactive elements, bacteria, or organisms.

(ix) The term *chemical weapon* means chemical substances intended to kill, seriously injure, or incapacitate humans through their physiological effects.

(x) The term *biological weapon* means biological agents or microorganisms intended to kill, seriously injure, or incapacitate humans through their physiological effects.

(xi) The term *radiological weapon* means radioactive materials or radiation-producing devices intended to kill, seriously injure, or incapacitate humans through their physiological effects.

(xii) The term *medical professional* means a licensed practitioner of the healing arts acting within the scope of his or her practice. Some examples include a licensed physician, optometrist, nurse practitioner, registered nurse, physician assistant, or audiologist.

(xiii) The term *hospitalization* means an inpatient stay in a facility that is:

(A)(*1*) Accredited by the Joint Commission or its predecessor, the Joint Commission on Accreditation of Healthcare Organizations (JCAHO), or accredited or approved by a program of the qualified governmental unit in which such institution is located if the Secretary of Health and Human Services has found that the accreditation or comparable approval standards of such qualified governmental unit are essentially equivalent to those of the Joint Commission or JCAHO;

(*2*) Used primarily to provide, by or under the supervision of physicians, to inpatients diagnostic services and therapeutic services for medical diagnosis, treatment, and care of injured, disabled, or sick persons;

(*3*) Requires every patient to be under the care and supervision of a physician; and

(*4*) Provides 24-hour nursing services rendered or supervised by a registered professional nurse and has a licensed practical nurse or registered nurse on duty at all times; or

(B) Any Armed Forces medical facility that is authorized to provide inpatient and/or ambulatory care to eligible service members.

(xiv) The term *total and permanent loss of sight* means:

(A) Visual acuity in the eye of 20/200 or less (worse) with corrective lenses lasting at least 120 days;

(B) Visual acuity in the eye of greater (better) than 20/200 with corrective lenses and a visual field of 20 degrees or less lasting at least 120 days; or

(C) Anatomical loss of the eye.

(xv) The term *total and permanent loss of speech* means organic loss of speech or the ability to express oneself, both by voice and whisper, through normal organs for speech, notwithstanding the use of an artificial appliance to simulate speech. Loss of speech must be clinically stable and unlikely to improve.

(xvi) The term *total and permanent loss of hearing* means average hearing threshold sensitivity for air conduction of at least 80 decibels, based on hearing acuity measured at 500, 1,000, and 2,000 Hertz, that is clinically stable and unlikely to improve.

(xvii) The term *burns* means 2nd degree (partial thickness) or worse burns covering at least 20 percent of the body, including the face and head, or 20 percent of the face alone. Percentage of the body burned may be measured using the Rule of Nines or any means generally accepted within the medical profession.

(xviii) The term *coma* means a state of profound unconsciousness that is measured at a Glasgow Coma Score of 8 or less.

(xix) The term *limb salvage* means a series of operations designed to save an arm or leg with all of its associated parts rather than amputate it. For purposes of this section, a surgeon must certify that the option of amputation of the limb(s) was a medically justified alternative to salvage, and the patient chose to pursue salvage.

(xx) The term *amputation* means the severance or removal of a limb or part of a limb resulting from trauma or surgery. An amputation *above* a joint means a severance or removal that is closer to the body than the specified joint is.

* * * * *

(f) Schedule of Losses.

For losses listed in paragraphs (f)(1) through (18) of this section, multiple losses resulting from a single traumatic event may be combined for purposes of a single payment (except where noted otherwise); however, the total payment amount may not exceed $100,000 for losses resulting from a single traumatic event.

Payments for losses listed in paragraphs (f)(19) through (20) of this section may not be made in addition to payments for losses under paragraphs (f)(1) through (18)—only the higher amount will be paid. The total payment amount may not exceed $100,000 for losses resulting from a single traumatic event.

If the loss is—	**Then the amount payable for that loss is—**
(1) Total and permanent loss of sight: ▪ For each eye	$50,000
(2) Total and permanent loss of hearing: ▪ For one ear ▪ For both ears	 $25,000 $100,000
(3) Total and permanent loss of speech	$50,000
(4) Quadriplegia	$100,000
(5) Hemiplegia	$100,000
(6) Paraplegia	$100,000
(7) Uniplegia: ▪ For each limb* **Note: Payment for uniplegia of arm cannot be combined with loss 9, 10, or 14 for the same arm. Payment of uniplegia of leg cannot be combined with loss 11, 12, 13, or 15 for the same leg*	$50,000
(8) Burns	$100,000
(9) Amputation of a hand at or above the wrist: ▪ For each hand* **Note: Payment for loss 9 cannot be made in addition to payment for loss 10 for the same hand.*	$50,000
(10) Amputation at or above the metacarpophalangeal joint(s) of either the thumb or the other 4 fingers on 1 hand: ▪ For each hand* **Note: Payment for loss of the thumb cannot be made in addition to payment for loss of the other 4 fingers for the same hand.*	$50,000

(11) Amputation of a foot at or above the ankle: ▪ For each foot* **Note: Payment for loss 11 cannot be made in addition to payments for losses 12 or 13 for the same foot.*	$50,000
(12) Amputation at or above the metatarsophalangeal joints of all toes on 1 foot: ▪ For each foot* **Note: Payment for loss 12 cannot be made in addition to payments for loss 13 for the same foot.*	$50,000
(13) Amputation at or above the metatarsophalangeal joint(s) of either the big toe, or the other 4 toes on 1 foot: ▪ For each foot	$25,000
(14) Limb salvage of arm: ▪ For each arm* **Note: Payment for loss 14 cannot be made in addition to payments for losses 9 or 10 for the same arm.*	$50,000
(15) Limb salvage of leg: ▪ For each leg* **Note: Payment for loss 15 cannot be made in addition to payments for losses 11, 12 or 13 for the same leg.*	$50,000
(16) Facial Reconstruction:	
▪ **Jaw** – surgery to correct discontinuity loss of the upper or lower jaw	$75,000
▪ **Nose** – surgery to correct discontinuity loss of 50% or more of the cartilaginous nose	$50,000
▪ **Lips** – surgery to correct discontinuity loss of 50% or more of the upper or lower lip - For one lip - For both lips	 $50,000 $75,000
▪ **Eyes** – surgery to correct discontinuity loss of 30% or more of the periorbita - For each eye	 $25,000
▪ **Facial Tissue** – surgery to correct discontinuity loss of the tissue in 50% or more of any of the following facial subunits: forehead, temple, zygomatic, mandibular, infraorbital or chin. - For each facial subunit *Note 1: Losses due to facial reconstruction may be combined with each other, but the maximum benefit for facial reconstruction may not exceed $75,000.* *Note 2: Any injury or combination of losses under facial reconstruction may also be combined with other losses in paragraphs 9.20(f)(1)-(18) and treated as one loss, provided that all losses are the result of a single traumatic event. However, the total payment amount may not exceed $100,000.*	 $25,000
(17) Coma from traumatic injury AND/OR Traumatic Brain Injury resulting in inability to perform at least 2 Activities of Daily Living (ADL)	

▪ at 15th consecutive day of coma or ADL loss*	$25,000
▪ at 30th consecutive day of coma or ADL loss*	an additional $25,000
▪ at 60th consecutive day of coma or ADL loss*	an additional $25,000
▪ at 90th consecutive day of coma or ADL loss*	an additional $25,000
**Note: Duration of coma and inability to perform ADLs includes date of onset of coma or inability to perform ADLs and the first date on which member is no longer in a coma or is able to perform ADLs.*	
(18) Hospitalization due to traumatic brain injury*	
▪ at 15th consecutive day of hospitalization**	$25,000
**Note: Payment for hospitalization replaces the first payment period in loss 17.*	
***Note: Duration of hospitalization includes dates on which member is transported from the injury site to a facility described in § 9.20(e)(6)(xiii), admitted to the facility, transferred between facilities, and discharged from the facility.*	
(19) Traumatic injury, other than traumatic brain injury, resulting in inability to perform at least 2 Activities of Daily Living (ADL)	
▪ at 30th consecutive day of ADL loss*	$25,000
▪ at 60th consecutive day of ADL loss*	an additional $25,000
▪ at 90th consecutive day of ADL loss*	an additional $25,000
▪ at 120th consecutive day of ADL loss*	an additional $25,000
**Note: Duration of inability to perform ADLs includes date of onset of inability to perform ADLs and the first date on which member is able to perform ADLs.*	
(20) Hospitalization due to traumatic injury other than traumatic brain injury*	
▪ at 15th consecutive day of hospitalization**	$25,000
**Note: Payment for hospitalization replaces the first payment period in loss 19.*	
***Note: Duration of hospitalization includes dates on which member is transported from the injury site to a facility described in § 9.20(e)(6)(xiii), admitted to the facility, transferred between facilities, and discharged from the facility.*	

* * * * *

(h) *How does a member make a claim for traumatic injury protection benefits?* (1)(i) A member who believes he or she qualifies for traumatic injury protection benefits must complete Part A of the Application for TSGLI Benefits Form and sign the form.

(ii) If a member is unable to sign the Application for TSGLI Benefits Form due to the member's physical or mental incapacity, the form must be signed by the member's guardian; if none, the member's agent or attorney acting under a valid Power of Attorney; if none, the member's military trustee.

(iii) If a member suffered a scheduled loss as a direct result of the traumatic injury, survived seven full days from the date of the traumatic event, and then died before the maximum benefit for which the service member qualifies is paid, the beneficiary or beneficiaries of the member's Servicemembers' Group Life Insurance policy should complete an Application for TSGLI Benefits Form.

(2) If a member seeks traumatic injury protection benefits for a scheduled loss occurring after submission of a completed Application for TSGLI Benefits Form for a different scheduled loss, the member must submit a completed Application for TSGLI Benefits Form for the new scheduled loss and for each scheduled loss that occurs thereafter and for each increment of a scheduled loss that occurs thereafter. For example, if a member seeks traumatic injury protection benefits for a scheduled loss due to coma from traumatic injury and/or the inability to carry out activities of daily living due to traumatic brain injury (§ 9.20(f)(17)), or the inability to carry out activities of daily living due to loss directly resulting from a traumatic injury other than an injury to the brain (§ 9.20(f)(19)), a completed Application for TSGLI Benefits Form must be submitted for each increment of time for which TSGLI is payable. Also, for example, if a service member suffers a scheduled loss due to a coma, a completed Application for TSGLI

Benefits Form should be filed after the 15th consecutive day that the member is in the coma, for which $25,000 is payable. If the member remains in a coma for another 15 days, another completed Application for TSGLI Benefits Form should be submitted and another $25,000 will be paid.

* * * * *

(j) *Who will be paid the traumatic injury protection benefit?* The injured member who suffered a scheduled loss will be paid the traumatic injury protection benefit in accordance with title 38 U.S.C. 1980A except under the following circumstances:

(1) If a member is legally incapacitated, the member's guardian or agent or attorney acting under a valid Power of Attorney will be paid the benefit on behalf of the member.

(2) If no guardian, agent, or attorney is authorized to act as the member's legal representative, a military trustee who has been appointed under the authority of 37 U.S.C. 602 will be paid the benefit on behalf of the member. The military trustee will report the receipt of the traumatic injury benefit payment and any disbursements from that payment to the Department of Defense.

* * * * *

(Authority: 37 U.S.C. 602, 603; 38 U.S.C. 501(a), 1980A)

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POSTAL REGULATORY COMMISSION

39 CFR Part 3020

[Docket Nos. MC2009–6 and CP2009–7; Order No. 138]

Administrative Practice and Procedure, Postal Service

AGENCY: Postal Regulatory Commission.

ACTION: Final rule.

SUMMARY: The Commission is adding Express Mail & Priority Mail to the Competitive Product List. This action is consistent with changes in a recent law governing postal operations and a recent Postal Service request. Republication of the lists of market dominant and competitive products is also consistent with new requirements in the law.

DATES: Effective November 26, 2008.

ADDRESSES: Submit comments electronically via the Commission's Filing Online system at *http://www.prc.gov*.

FOR FURTHER INFORMATION CONTACT: Stephen L. Sharfman, General Counsel, 202–789–6820 and *stephen.sharfman@prc.gov*.

SUPPLEMENTARY INFORMATION: *Regulatory History*, 73 FR 66077 (November 6, 2008).

The Postal Service seeks to add a new product identified as Express Mail & Priority Mail Contract 1 to the Competitive Product List. For the reasons discussed below, the Commission approves the Request.

I. Background

On October 27, 2008, the Postal Service filed a formal request pursuant to 39 U.S.C. 3642 and 39 CFR 3020.30 *et seq.* to add Express Mail & Priority Mail Contract 1 to the Competitive Product List.[1] The Postal Service asserts that the Express Mail & Priority Mail Contract 1 product is a competitive product ''not of general applicability'' within the meaning of 39 U.S.C. 3632(b)(3). This Request has been assigned Docket No. MC2009–6.

The Postal Service contemporaneously filed a contract related to the proposed new product pursuant to 39 U.S.C. 3632(b)(3) and 39 CFR 3015.5. The contract has been assigned Docket No. CP2009–7.

In support of its Request, the Postal Service filed the following materials: (1) A redacted version of the Governors' Decision authorizing the new product which also includes an analysis of Express Mail & Priority Mail Contract 1 and certification of the Governors' vote;[2] (2) a redacted version of the contract which, among other things, provides that the contract will expire 3 years from the effective date, which is proposed to be 1 day after the Commission issues all regulatory approvals;[3] (3) requested changes in the Mail Classification Schedule product list;[4] (4) a Statement of Supporting Justification as required by 39 CFR 3020.32;[5] and (5) certification of compliance with 39 U.S.C. 3633(a).[6]

In the Statement of Supporting Justification, Kim Parks, Manager, Sales and Communications, Expedited Shipping, asserts that the service to be provided under the contract will cover its attributable costs, make a positive contribution to coverage of institutional costs, and will increase contribution toward the requisite 5.5 percent of the Postal Service's total institutional costs. Request, Attachment D, at 1. W. Ashley Lyons, Manager, Corporate Financial Planning, Finance Department, certifies that the contract complies with 39 U.S.C. 3633(a). *See id.* Attachment E.

The Postal Service filed much of the supporting materials, including the unredacted Governors' Decision and the unredacted Express Mail & Priority Mail contract, under seal. In its Request, the Postal Service maintains that the contract and related financial information, including the customer's name and the accompanying analyses that provide prices, terms, conditions, and financial projections, should remain confidential. *Id.* at 2–3.

In Order No. 125, the Commission gave notice of the two dockets, appointed a public representative, and provided the public with an opportunity to comment.[7] The Postal Service filed supplemental materials on November 19, 2008.[8]

II. Comments

Comments were filed by the Public Representative.[9] No filings were submitted by other interested parties. The Public Representative Comments focus principally on the adequacy of cost coverage, appropriate classification of the product, and overall transparency.[10] Public Representative Comments at 2–3.

The Public Representative does not see a substantial risk for this particular contract, but does raise concerns regarding mailing profiles that he says warrant close attention when evaluating this and similar agreements.[11] The Public Representative believes that the proposed Express Mail & Priority Mail Contract 1 product is appropriately classified as competitive. After reviewing the cost savings measures underlying this contract, the Public Representative determines that the

[1] Request of the United States Postal Service to Add Express Mail & Priority Mail Contract 1 to Competitive Product List and Notice of Establishment of Rates and Class Not of General Applicability, October 27, 2008 (Request).

[2] Attachment A to the Request. The analysis that accompanies the Governors' Decision notes, among other things, that the contract is not risk free, but concludes that the risks are manageable.

[3] Attachment B to the Request.

[4] Attachment C to the Request.

[5] Attachment D to the Request.

[6] Attachment E to the Request.

[7] PRC Order No. 125, Notice and Order Concerning Express Mail & Priority Mail Contract 1 Negotiated Service Agreement, October 31, 2008 (Order No. 125).

[8] United States Postal Service Notice of Filing Under Seal of Additional Information Regarding Financial Analysis, November 19, 2008.

[9] Public Representative Comments in Response to Order No. 125, November 10, 2008 (Public Representative Comments).

[10] With respect to transparency, the Public Representative concludes that ''[t]he Postal Service should be commended for proceeding diligently toward accommodating transparency concerns.'' *Id.* at 10.

[11] *Id.* at 3–4. The specific areas of concern identified by the Public Representative are whether mailer-specific projected volumes are sufficiently reliable, whether cost impacts of mailer-specific shape and weight profiles are sufficiently acknowledged, whether seasonal effects are taken into account, and whether package density has been considered. *Id.* at 7–9.