

## **PUBLIC NOTICE**

### **STATE OF WISCONSIN EDUCATIONAL APPROVAL BOARD MEETING**

November 20, 2013  
10:30 a.m.

3rd Floor, Room 324  
201 W. Washington Avenue  
Madison, WI

#### **AGENDA**

Call to Order

Roll Call

Approval of Minutes – September 12, 2013 and September 26, 2013 (Tab 1)

- Oversight of Accredited Schools – Discussion/ACTION (Tab 2)

Adjournment

**Any person who has a qualifying disability as defined by the Americans with Disabilities Act that requires the meeting or materials at the meeting to be in an accessible location or format must contact the EAB staff at (608) 266-1996, 201 W. Washington Avenue, Madison, Wisconsin, at least twenty-four hours prior to the commencement of the meeting so that any necessary arrangements can be made to accommodate each request.**



# EDUCATIONAL APPROVAL BOARD MEETING

Thursday, September 12, 2013  
10:30 a.m.

1<sup>st</sup> Floor Conference Room  
201 West Washington Avenue  
Madison, WI

**Members Present:** Robert Hein, Don Madelung, William Roden

**Members Absent:** Jo Oyama-Miller

**Others Present:** David Dies, Zachery Galin, Linda Heidtman, Blanca James, Mary Ruhland, Patrick Sweeney, *Educational Approval Board*; Anne Murphy, Department of Justice; Terry Craney; Jackie Curtis, Brian Olson, Jennifer Paugh, Herzing University; Joe Heim, University of Wisconsin-LaCrosse; Julie Parker, Marshall Whitcock, Upper Iowa University

The chair of the Educational Approval Board (EAB), Don Madelung, called the meeting to order at 10:30 a.m. Roll call was taken by Mr. Dies and it was established that a quorum was present. A motion (Hein, Madelung) to approve the June 13 & June 21, 2013 board meeting minutes was adopted unanimously.

## BOARD CHAIR'S REMARKS

Mr. Madelung announced the resignation of Katie Thiry, which means the board now has three vacancies. He noted the board would be holding a closed session at the end of the meeting under s.19.85(1)(g), *Wis. Stats.*, for purposes of conferring with legal counsel for the body concerning strategy in pending or threatening litigation. He also stated the board would defer its honoring of four past board members until they arrived. A welcome was extended to new EAB personnel, Mary Ruhland, Operations Program Association and Jessica Sabin, Program and Policy Analyst.

## PUBLIC COMMENT

None.

## BOARD STATUS REPORT

### *Involvement in Postsecondary Education Policy Decisions*

Mr. Dies provided the board with a status update regarding state authorization and a recently released "Dear Colleague" letter. Based on the guidance provided by the U.S. Department of

Education (USDOE), an Executive Order (EO) issued by a Governor would satisfy “other action” under the federal rule requirements. As it relates to a number of Wisconsin institutions, the Governor issued has EO #37 and specifically named them because in-state nonprofit institutions are not regulated by any state agency and as a result they did not meet the federal standards.

#### *Positive Working Relationships and Alliance*

Mr. Dies indicated that the EAB continues to work proactively with a number of different agencies. Information provided in the meeting materials provides examples of how the agency is working with the Board on Nursing (BoN) and organizations like the Wisconsin Hospital Association.

#### *Consumer Protection*

Mr. Dies provided information about an individual who has repeatedly filed complaints with the EAB involving several different institutions that he has attended. Information shared included a letter that summarized the most recent complaint and the nature of the complaint that had been previously closed.

#### *Operational/Administrative Procedures and Policies*

Mr. Dies echoed Mr. Madelung’s enthusiasm about the addition of new EAB staff and is excited about the expertise they bring to the agency. Information regarding EAB’s interagency use agreement with the Department of Veteran Affairs (DVA) was discussed. It was explained by Mr. Dies the agreement contains a provision that allows either party to get out of the agreement after one-half the 5-year agreement period has passed, with a 12-month advance notice by either party. DVA has exercised this provision, which means the EAB will need to vacate current office space no later than December 31, 2014. The EAB is working with the Division of State Facilities at the Department of Administration, which works with state agencies to arrange office space. The EAB has limited input, but is hopeful a suitable alternative will be found.

### **SCHOOL APPROVAL ISSUES**

Mr. Madelung pointed out to all attendees that board meeting materials are generally available on the EAB website the week before each scheduled meeting.

Mr. Dies proceeded to inform the board that the EAB had formally wrapped up its efforts regarding the closure of Everest College-Milwaukee. The school is now closed and information has been provided to former students on how to get continuing support by directing them to job centers and an alternative to go to the Chicago campus.

Information provided in the meeting materials included a recent letter from the EAB requesting the school provided certain student records. He noted the EAB had been working with the Department of Justice (DOJ) regarding circumstances surrounding the school’s closure.

Mr. Dies indicated the EAB learned on September 11, 2013 that a final ruling regarding the *Amerstate University vs. EAB* matter had been issued, subsequent to the preparation of board materials. Even though a Final Order and Decision was issued by the court in May, there were a number of issues remanded to the EAB board. At the request of counsel for the board, EAB staff addressed a series of questions raised by the court. The board filed a brief in July responding court. Subsequently, attorneys for Amerstate also filed a brief related to the remanded information.

Ultimately, the court maintained its Final Order and Decision and agreed the sanctions that were imposed by the board to revoke the approval of Amerstate where appropriate; rejecting the school's position that staffing changes within the EAB could somehow allow the agency to use a lesser sanction and in some way monitor them more closely. While the EAB is satisfied with the outcome, there are other appeal options that Amerstate could choose to exercise.

A motion (Roden, Hein) to approve items "A" through "I" of the School Activity Report for the period of June 5 through September 5, 2013, was unanimously approved.

Mr. Hein asked if the board needed to approve items "J" and "K." Mr. Dies explained that the board acts to affirm only the approval related items (e.g., school visits, complaints, school issues, etc.) that are contained in items "A" through "I." Items "J" and "K" pertain to student complaints and schools visits and are provided for informational purposes only.

## **EAB MODERNIZATION BILL**

Mr. Dies reported that the EAB intends to include a number of additional statutory changes related to the bill's enforcement and penalty provisions, which were not substantively changed in previously introduced versions of the bill. In August, the EAB staff met with attorneys from DOJ to help identify changes that would improve existing enforcement and penalty provisions. To a great extent these changes will simply involve creating a better framework of existing provisions. The summary provided in the meeting materials is an overview of the meeting between EAB and DOJ in August.

At the last board meeting, background information was provided to board members, including a narrative explanation of the bill, and a before and after summary of the major sections of the statutes. A second summary document laid out in table format the changes, the structure, and showed how the bill was being realigned. Mr. Dies indicated that the board endorsed moving forward with the modernization legislation at its last meeting. It was agreed that no further board action was necessary.

## **REGULATION OF POSTSECONDARY DISTANCE EDUCATION**

Mr. Madelung, who is also a Midwest Higher Education Compact (MHEC) commissioner, explained that MHEC is part of an effort to establish a State Authorization Reciprocity Agreement (SARA) for online education in all 50 states. This institutionally-led effort is progressing quickly and EAB staff has raised some concerns. At its last meeting, the board

was split on opposing the reciprocity initiative because some members did not feel they had enough information. The board agreed to write a letter to MHEC seeking a response to questions and concerns that had been raised by the national association that represents state higher education regulators.

Mr. Madelung informed audience members that there was both good news and bad news for institutions. The good news is reciprocity would mean a school would only need approval from the (home) state in which it is domiciled, and pay a nominal annual fee of 2, 4 or 6 thousand dollars depending on total enrollment. The bad news is the impact on states such as Wisconsin, which stands to lose not only revenues, but the ability to collect student outcome information. As a result, many Wisconsin-based schools will see their fees increase.

Mr. Madelung indicated that MHEC wants to engage states and regulatory agencies. MHEC still wants states to oversee complaints and other concerns much like they have done in the past. It is unclear if there is an opportunity for the states to charge a fee for out-of-state schools in addition to what schools would have to pay for reciprocity.

Mr. Dies clarified that the fees of the home state would still apply, in addition to the cost of participating in the reciprocity agreement. In addition, while there may be a common application for purposes of SARA, institutions would also need to complete whatever approval processes the home state requires.

For purposes of understanding the fiscal impact of SARA, it is estimated the EAB would lose nearly \$270,000 of revenue, which would consist of \$135,700 from renewal fees and \$134,000 from one-time, fixed revenues related to schools going through the initial approval process. Under the EAB's current fee structure, this lost revenue would be passed on to institutions that will continue to be approved. The result would be renewal fees would more than double.

Mr. Madelung asked about how states and institutions will participate in SARA. Mr. Dies responded that a state must first decide if it will participate. If a state elects to participate, then institutions that are domiciled in the state have the option of participating. The cost for an institution to participate will be based on total FTE enrollment – \$2,000 for institutions with under 2,500 students; \$4,000 for institutions with 2,500 to 10,000 students; and, \$6,000 for institutions with under more than 10,000 students.

Mr. Hein mentioned that one of his concerns is that if a student had a complaint it would go to the home state. Mr. Madelung asked about the downside if the EAB or the institutions decided not to participate. Mr. Dies responded that the way SARA would be structured is it would basically preclude Wisconsin from intervening with a complaint from an online student. In addition, he indicated that participation is not an EAB decision, but one the state will make, presumably the Governor or the state's MHEC commissioners.

Mr. Dies explained that a letter to MHEC had been drafted and was included in the meeting materials for review by the board. At its June 2013 meeting, the board acted to send a letter stating the EAB recognizes the importance of consumer protection to the state of Wisconsin and that continued dialogue in consideration of Wisconsin issues for consumer protection be

incorporated into the SARA dialogue and policies that come out of it, and that responses to the questions raised by the national association of higher education regulators be addressed.

Subsequent to the June 2013 board meeting, EAB staff learned of a response to state higher education regulators provided by the Western Interstate Higher Education Compact on behalf of the four regional compacts. Mr. Dies stated he feels the letter did not come close to the kinds of questions that the state regulators were asking.

EAB staff also had an opportunity to meet on September 4, 2013 with Wisconsin's three higher education sectors – UW System, Wisconsin Technical College System, and Wisconsin Association of Independent Colleges and Universities. Mr. Dies noted that it seems all three sectors are supportive of the SARA, which is not surprising given that they represent institutions. All three sectors see this as an advantage because they will not have to worry about how they operate in any of these other states regardless of what they are doing now.

Mr. Dies noted that MHEC has not reached out to the EAB and does not see a need to do so, nor do they want to, because of the way in which SARA is being driven. It is a very institutionally-led initiative and they frankly do not want to have conversations with regulators. His feeling is MHEC is basically end running the EAB at this point.

Mr. Madelung commented that MHEC is holding a November meeting in Omaha, at which time the people selected for the National Coordinating Council (NCC) for SARA will be finalized. He indicated that SARA is moving quickly and is receiving financial support from interested parties. Mr. Dies noted the Lumina Foundation recently awarded a grant of \$2.3 million to support the work of SARA.

Mr. Madelung encouraged all schools take a careful look at the implications of SARA, adding that what looks good on the surface may not end up to be as advantageous for institutions as they think. Mr. Dies pointed out that while the percentage fee increase on all non-SARA institutions will be the same, the impact likely will be felt more by smaller owner-operated institutions. He added that SARA essentially shifts fees from large corporate, accredited, degree-granting entities that operate online in numerous states to smaller owner-operated, non-degree entities that operate within a given state.

Mr. Roden asked what action the board needed to take at the meeting. Mr. Dies responded that he would like the board to make a decision about sending the draft letter to MHEC. A brief discussion occurred.

A motion (Hein, Roden) to send letter to MHEC, was approved unanimously.

## **RECOGNITION OF FORMER BOARD MEMBERS**

Four former members of the EAB board were recognized for their service. Mr. Madelung spoke about the service of Michael Cooney, Terry Craney, Joe Heim and Monica Williams, and presented plaques to Mr. Cooney and Mr. Heim, who were in attendance.

## **CLOSED SESSION – PERCEIVED CONFLICT BETWEEN EAB STATUTES & ADMINISTRATIVE RULES**

A motion (Roden, Hein) to hold a closed session under s.19.85 (1) (c), *Wis. Stats.*, to confer with legal counsel concerning strategy about threatened litigation related to a perceived conflict between the statutes and the administrative rules, s.38.50 (5), *Wis. Stats.*, was approved on a 3-0 roll call vote.

The board entered closed session at 11:20 a.m.

## **ADJOURNMENT**

A motion (Roden, Hein) to adjourn was unanimously approved at 12:23 p.m.

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# EDUCATIONAL APPROVAL BOARD MEETING

Thursday, September 26, 2013  
2:30 p.m.

3rd Floor Conference Room  
201 W. Washington Avenue  
Madison, WI

*Via Teleconference*

**Members Present:** Don Madelung, Robert Hein, William Roden

**Members Absent:** Jo Oyama-Miller

**Others Present:** David Dies, Jessica Sabin, *Educational Approval Board*; Nathan Halbach, *University of Phoenix*

The chair of the Educational Approval Board (EAB), Don Madelung, called the meeting to order at 2:31 p.m.

## **OPEN SESSION**

A motion (Roden, Madelung) to adopt a Statement of Scope to pursue rulemaking concerning a perceived conflict between EAB statutes and administrative rules related to exemptions for accredited schools was approved unanimously.

## **ADJOURNMENT**

A motion (Roden, Hein) to adjourn was unanimously approved at 2:52 p.m.



# **EDUCATIONAL APPROVAL BOARD**

## **BOARD MEETING**

**NOVEMBER 20, 2013**

### **OVERSIGHT OF ACCREDITED SCHOOLS**

#### **SUMMARY**

Questions have been raised about the authority of the Educational Approval Board (EAB) to oversee accredited institutions that serve Wisconsin residents, citing a current statutory provision “exempting” accredited institutions and an administrative code definition of a “recognized accrediting body”.

#### **BACKGROUND**

Under Wis. Stat. § 38.50 (1)(e)8., “[s]chools accredited by accrediting agencies recognized by the board” are not subject to EAB oversight. At the same time, under EAB’s administrative rules definitional section, Wis. Admin. Code § EAB 1.01, subsection (19m) defines “[r]ecognized accrediting body” as “a regional, national, or specialized accrediting agency recognized by the U.S. department of education...”

Although the statutory provision was passed by the legislature prior to and independently from the definitional rule promulgated by the EAB, and thus should not be subject to the administrative rule definition, several accredited institutions have challenged the EAB’s policy of not exempting them from oversight and are claiming that they are not subject to EAB approval.

Despite having authority to exempt institutions accredited by certain accreditors, the EAB has chosen not to delegate its statutory oversight authority to accrediting agencies. In fact, the EAB has proposed eliminating the statutory provision because of the confusion that it has created. While this issue has come up in the past, the EAB’s explanation has never been challenged.

The first institution to challenge this explanation arose out of a complaint involving a complaint received by the EAB from a former student at the institution. Following an initial inquiry by the institution and an explanation by the EAB, outside counsel contacted the EAB, at which time assistance from the Department of Justice (DOJ) in preparing a response was requested.

Because counsel for the institution threatened to seek a declaratory court judgment, the EAB in consultation with DOJ, agreed not to enforce the approval requirement provision for the institution until such time as the ambiguous statutory and administrative rule language is clarified through the proposed legislation. Following the EAB’s decision, a number of other

institutions have now raised the same issue, including one other currently approved institution.

The conflict between the statutes and administrative code would be remedied by the EAB's modernization legislation that it has pursued during the past seven years, which proposes to repeal the statutory language "exempting" accredited schools since the board has never delegated its regulation and consumer protection authority to an accreditor.

Because a more immediate solution was necessary given the increased awareness of this issue, the EAB board held a meeting on September 26 and gave its approval to pursue an administrative rule change to clarify the EAB's intent through both the emergency and permanent rule-making process.

The administrative rule-making process requires agencies to prepare a Statement of Scope stating the purpose and intent of the proposed rule. In addition, before any work on the rule is started, the Governor must approve the Statement of Scope.

The EAB submitted a Statement of Scope (attached) to the Governor on September 26. After several weeks passed, the EAB made inquiry with the Governor's Office about the status of its Statement of Scope, which resulted in a meeting on October 18 between EAB staff and the Governor's Office; specifically the Deputy Chief of Staff and the Deputy Chief Legal Counsel.

Despite a positive meeting about the proposed rule that clarified several misunderstandings, the EAB was informed on October 29 that the Statement of Scope to pursue an emergency and permanent rule amending the definition of a "Recognized Accrediting Body" was not being approved.

Although the Statement of Scope has not been officially denied, the Governor's Office indicated they believe the issue of regulating out-of-state institutions is significant and one that the Legislature should consider before proceeding with any rule-making. Given that any proposed rule changes ultimately would need legislative approval, it was suggested the EAB talk with legislators.

## **DISCUSSION**

The Governor's action creates a dilemma for the EAB. While two institutions approved by the EAB have been informed that the agency will not enforce its approval requirements, the EAB has not responded to several other institutions that have made similar inquiries about the exemption provision.

At the same time, the EAB receives daily inquiries from out-of-state institutions that wish to comply with the approval requirements, but have not raised questions about the exemption language. There also are a number of institutions that are at various stages of the approval process, including some that have already submitted fees.

### *State Authorization*

The EAB's exemption "based on accreditation" is in direct conflict with the U.S. Department of Education (USDOE) requirements pertaining to state authorization for institutions receiving Title IV financial aid. Under 34 CFR 600.9(a), institutions that achieve state approval based on their accreditation status would not be eligible to receive federal financial aid.

Specifically, "[i]f the legal entity is established by a State as a business or a nonprofit charitable organization and not specifically as an educational institution, the State must have a separate procedure to approve or license the entity by name to operate programs beyond secondary education, including programs leading to a degree or certificate. For an institution authorized under these circumstances, ***the State may not exempt the entity from the State's approval or licensure requirements based on accreditation***, years in operation, or other comparable exemption." (emphasis added)

While the federal rule would appear to address the exemption question, the specific provision of the rule that required distance education programs to get permission to operate from every state in which they enroll students was overturned in court on procedural grounds and is not currently being enforced. Therefore, while accredited institutions with a physical presence in the state must be EAB-approved, out-of-state (exclusively) online institutions are not currently subject to the federal requirement that they be properly authorized by respective states.

### *Reciprocity*

As previously discussed, the State Authorization Reciprocity Agreement (SARA) will limit state regulation for all accredited, degree-granting institutions offering programs via distance learning. Under the proposal, out-of-state colleges and universities that offer online programs to Wisconsin residents would no longer be required to obtain EAB approval, if the institutions and their respective home states of domicile participate in SARA.

If the state of Wisconsin chooses to participate in SARA, it will have the same effect as exempting out-of-state institutions on the basis of being accredited. While the state's participation in SARA remains unclear, it also could be a year or more before participation by institutions would fully take effect.

### *Renewal Fees*

At its December meeting, one of the things the EAB board will do is set the renewal fee multiplier that determines the second portion of the annual renewal fee schools will pay (due by March 2014). The policy question pertaining to the EAB's treatment of out-of-state institutions needs to be addressed before the multiplier can be set. If the EAB is faced with the reality of no longer approving the 75+ out-of-state institutions, it will have a significant impact on the multiplier calculation and the renewal fees that remaining approved schools will pay.

## **RECOMMENDATION**

Given the EAB's fundamental purpose to protect consumers and its position that non-public institutions that choose to serve Wisconsin residents should be overseen, the EAB should maintain the status quo regarding the oversight of accredited institutions. However, given the uncertainties related to whether or not Wisconsin will participate in a State Authorization Reciprocity Agreement (SARA) through the four regional higher education compacts, it is recommended that the EAB suspend approving any new out-of state institutions until a decision is made. In addition, the EAB would continue to approve institutions that are currently in the process of seeking approval.

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# STATEMENT OF SCOPE

## Educational Approval Board

Rule No.: TBD

Relating to: EAB Recognition of Accrediting Agencies

Rule Type: Emergency and Permanent

### 1. Finding/nature of emergency (Emergency Rule only):

Several postsecondary educational institutions have questioned the authority of the Educational Approval Board (EAB) to oversee their institutions that serve Wisconsin residents, citing a statutory provision “exempting” them from EAB approval because they are otherwise accredited. This problem stems from the misapplication of the definition in Wis. Administrative Code EAB 1.01(19m) of a “recognized accrediting body” to Wis. Stat. § 38.50 (1)(e)(8).

An emergency rule is necessary to allow the EAB to continue to have oversight of these institutions that serve students, to protect the welfare of students who attend these institutions until a permanent rule can be adopted or a statutory change is made, as well as to ensure that these institutions are maintaining compliance with federal requirements pertaining to the receipt of federal Title IV financial aid.

### 2. Detailed description of the objective of the proposed rule:

Under the definition of “schools” contained in Wis. Stat. § 38.50 (1)(e)8., “[s]chools accredited by accrediting agencies recognized by the board” are not subject to EAB oversight. At the same time, Wis. Admin. Code § EAB 1.01(19m) defines “[r]ecognized accrediting body” as “a regional, national, or specialized accrediting agency recognized by the U.S. department of education...”

Although the statutory provision was passed by the legislature prior to and independently from the definitional rule promulgated by the EAB, and thus should not be subject to the administrative rule definition, several accredited institutions have challenged the EAB’s policy of not exempting them from oversight and are claiming that they are not subject to EAB approval. To protect the welfare of Wisconsin students who attend these institutions, the EAB seeks to revise Wis. Admin. Code § EAB 1.01 (19m) to clarify that this administrative rule definition does not exempt these schools from EAB oversight.

In addition, granting approval solely on the basis of accreditation by an accrediting body other than the EAB, as these institutions are arguing is permitted under s.38.50 (1)(e)(8), Wis. Stats., is in direct conflict with federal requirements pertaining to state authorization for institutions receiving federal Title IV financial aid.

Under U.S. Department of Education (USDOE) provisions contained in 34 CFR 600.9(a), institutions that achieve state approval based on their accreditation status would not be eligible to receive federal financial aid. Specifically, “[i]f the legal entity is established by a State as a business or a nonprofit charitable organization and not specifically as an educational institution, the State must have a separate procedure to approve or license the entity by name to operate programs beyond secondary education, including programs leading to a degree or certificate. For an institution authorized under these circumstances, **the State may not exempt the entity from the State’s approval or licensure requirements based on accreditation**, years in operation, or other comparable exemption.”<sup>1</sup> (emphasis added) In addition, to be compliant with the federal regulations on state authorization, institutions would have to provide for a complaint process consistent with 34 CFR 600.9(a)(1).

<sup>1</sup> Source: <http://www.ifap.ed.gov/eannouncements/110110PubFinalRulesforTitlveIVStudentAidPrgrms.html>

**3. Description of the existing policies relevant to the rule, new policies proposed to be included in the rule, and an analysis of policy alternatives:**

Under existing policy, the EAB does not exempt institutions from oversight based on accreditation from an accrediting agency recognized by USDOE. Whereas the statutory language dates back to the 1970s, the administrative code provision was promulgated in 2003 with the intent of it being limited in its application to the administrative rule provisions for reducing surety bonds and fees, as permitted under EAB 4.06(1)(c) and 4.10(1)(d)4., respectively.

Despite having the authority to exempt accredited institutions from the need to be approved by the EAB, the EAB has chosen not to delegate its statutory authority to recognized accreditors. No new policies will be introduced in the rule revision. The current regulatory policies will continue to be enforced and be more clearly defined.

**4. Detailed explanation of statutory authority for the rule (including the statutory citation and language):**

The EAB's statutory rulemaking authority is contained in Section 38.50 (3), Wis. Stats. The specific language is provided below.

38.50 (3) RULE-MAKING POWER. The board shall promulgate rules and establish standards necessary to administer this section.

**5. Estimate of amount of time that state employees will spend developing the rule and of other resources necessary to develop the rule:**

Employees may spend up to 50 hours developing the rule.

**6. List with description of all entities that may be affected by the proposed rule:**

This rule will only affect accredited private postsecondary institutions seeking EAB authorization to operate in the state and enroll Wisconsin students.

**7. Summary and preliminary comparison with any existing or proposed federal regulation that is intended to address the activities to be regulated by the proposed rule:**

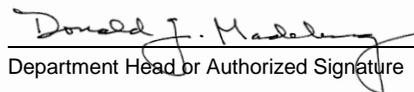
The rule proposal does not violate or conflict with federal regulations. In fact, granting approval solely on the basis of accreditation, as may be currently permitted under s.38.50 (1)(e)(8), Wis. Stats., is in direct conflict with guidance provided by the USDOE regarding new requirements pertaining to state authorization for institutions receiving federal Title IV financial aid.

**8. Anticipated economic impact of implementing the rule (note if the rule is likely to have a significant economic impact on small businesses):**

There is no anticipated economic impact on small businesses. The EAB simply seeks to more clearly define its current rules. There would be no change in the current regulatory policy.

**Contact Person:**

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Department Head or Authorized Signature

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September 26, 2013  
Date Submitted