

Regulatory Analysis Form

(Completed by Promulgating Agency)

(All Comments submitted on this regulation will appear on IRRC's website)

INDEPENDENT REGULATORY
REVIEW RECEIVED
IRRC

2012 FEB 23 P 12:19

(1) Agency: Department of Labor & Industry

(2) Agency Number:

Identification Number: 12-95

IRRC Number: 2932

(3) PA Code Cite: 34 Pa. Code §§ 231.91-231.99

(4) Food Service Employee Incentive Program

(5) Agency Contacts (List Telephone Number and Email Address):

Primary Contact: Eric Ramsay, (717)787-3681, eramsay@pa.gov

Secondary Contact: Richard C. Lengler, (717)787-4186, rlengler@pa.gov

(6) Type of Rulemaking (check applicable box):

☐ Proposed Regulation

☐ Final Regulation

X Final Omitted Regulation

☐ Emergency Certification Regulation;

☐ Certification by the Governor

☐ Certification by the Attorney General

(7) Briefly explain the regulation in clear and nontechnical language. (100 words or less)

Under the Food Service Employee Incentive Program, new employees in the restaurant and food-service industries and their employers could voluntarily agree to a training program during which the employees would receive a training wage that was not less than the statutory minimum wage. While the employee was being trained, the difference between the employee's training wage and the entry-level wage that the employee was entitled to upon completion of the training period, was to be deposited by the employer into an escrow account. Upon completion of the training program, or the employee's promotion, these escrowed payments were to be remitted to the employee in equal installments over a period equal to the period of training.

This program expired on July 14, 2004, under the express terms of section 5.1(k) of the Minimum Wage Act of 1968 (MWA), 43 P.S. § 333.105a(k). Accordingly, this rulemaking serves merely to rescind now-defunct regulations.

(8) State the statutory authority for the regulation. Include specific statutory citation.

The regulation was adopted under section 3 of the act of December 21, 1998, P.L. 1290, No. 168 (Act 168), an amendment to the MWA, 43 P.S. § 333.105a (note). The authority for its rescission is section 9 of the MWA, 43 P.S. § 333.109, which authorizes the Secretary of Labor & Industry to make and from time to time, revise regulations appropriate to carry out the purposes of the MWA.

(9) Is the regulation mandated by any federal or state law or court order, or federal regulation? Are there any relevant state or federal court decisions? If yes, cite the specific law, case or regulation as well as, any deadlines for action.

No. However, the Food Service Employee Incentive regulations are now defunct or obsolete under the express terms of section 5.1(k) of the MWA, 43 P.S. § 333.105a(k). Indeed, the regulations themselves specifically provide that they will expire, along with section 5.1 of the act on July 14, 2004, unless section 5.1 is extended by the General Assembly (34 Pa. Code § 231.91(b)) – something that has not occurred.

(10) State why the regulation is needed. Explain the compelling public interest that justifies the regulation. Describe who will benefit from the regulation. Quantify the benefits as completely as possible and approximate the number of people who will benefit.

This is simply a rescission of defunct regulations. No one currently benefits or is affected by them.

(11) If data is the basis for this regulation, please provide a description of the data, explain in detail how the data was obtained, and how it meets the acceptability standard for empirical, replicable and testable data that is supported by documentation, statistics, reports, studies or research. Please submit data or supporting materials with the regulatory package. If the material exceeds 50 pages, please provide it in a searchable electronic format or provide a list of citations and internet links that, where possible, can be accessed in a searchable format in lieu of the actual material. If other data was considered but not used, please explain why that data was determined not to be acceptable.

Not applicable.

(12) Describe who and how many people will be adversely affected by the regulation. How are they affected?

This is simply a rescission of defunct regulations. No one currently is affected by them.

(13) List the persons, groups or entities that will be required to comply with the regulation. Approximate the number of people who will be required to comply.

Not applicable as this is simply a rescission of defunct regulations.

(14) Provide a specific estimate of the costs and/or savings to the **regulated community** associated with compliance, including any legal, accounting or consulting procedures which may be required. Explain how the dollar estimates were derived.

Not applicable.

(15) Provide a specific estimate of the costs and/or savings to **local governments** associated with compliance, including any legal, accounting or consulting procedures which may be required. Explain how the dollar estimates were derived.

Not applicable.

(16) Provide a specific estimate of the costs and/or savings to **state government** associated with the implementation of the regulation, including any legal, accounting, or consulting procedures which may be required. Explain how the dollar estimates were derived.

Not applicable.

(17) In the table below, provide an estimate of the fiscal savings and costs associated with implementation and compliance for the regulated community, local government, and state government for the current year and five subsequent years. **NOT APPLICABLE.**

	Current FY Year	FY +1 Year	FY +2 Year	FY +3 Year	FY +4 Year	FY +5 Year
SAVINGS:	\$	\$	\$	\$	\$	\$
Regulated Community	N/A					
Local Government	N/A					
State Government	N/A					
Total Savings	N/A					
COSTS:	N/A					
Regulated Community	N/A					
Local Government	N/A					
State Government	N/A					
Total Costs	N/A					
REVENUE LOSSES:	N/A					

Regulated Community						
Local Government						
State Government						
Total Revenue Losses						

(17a) Provide the past three year expenditure history for programs affected by the regulation.

Program	FY -3	FY -2	FY -1	Current FY
N/A	\$3,272,376	\$3,247,903	\$3,328,419	\$3,560,091 *

** These amounts reflect the budget for the Department's Bureau of Labor Law Compliance. There have been no expenditures for the Food Service Employee Incentive Program in any of these FYs.*

(18) Explain how the benefits of the regulation outweigh any cost and adverse effects.

The regulations have expired and are no longer in effect.

(19) Describe the communications with and input from the public and any advisory council/group in the development and drafting of the regulation. List the specific persons and/or groups who were involved.

Not applicable.

(20) Include a description of any alternative regulatory provisions which have been considered and rejected and a statement that the least burdensome acceptable alternative has been selected.

The objectives of the Food Service Employee Incentive Program could still be achieved by employers simply offering retrospective pay increases as incentives if the employees remain in their employ for a set duration. This was true even at the time of adoption of the regulations. However, the Department was under a statutory mandate to adopt regulations to implement the program. That mandate has since lapsed.

(21) Are there any provisions that are more stringent than federal standards? If yes, identify the specific provisions and the compelling Pennsylvania interest that demands stronger regulations.

Not applicable.

(22) How does this regulation compare with those of other states? How will this affect Pennsylvania's ability to compete with other states?

Not applicable. Pennsylvania appears to have been the only state to legislatively adopt a food service employee incentive program.

(23) Will the regulation affect any other regulations of the promulgating agency or other state agencies?
If yes, explain and provide specific citations.

No. Although the Wage Payment and Collection Law, 43 P.S. §§ 260.1-260.12, was referenced as an enforcement mechanism, in both Act 168 and the regulations, neither that law nor the remaining provisions of the MWA are affected by the repeal of the section 231.91-231.99.

(24) Submit a statement of legal, accounting or consulting procedures and additional reporting, recordkeeping or other paperwork, including copies of forms or reports, which will be required for implementation of the regulation and an explanation of measures which have been taken to minimize these requirements.

None required.

(25) Please list any special provisions which have been developed to meet the particular needs of affected groups or persons including, but not limited to, minorities, elderly, small businesses, and farmers.

Not applicable.

(26) Include a schedule for review of the regulation including:

- A. The date by which the agency must receive public comments: n/a
- B. The date or dates on which public meetings or hearings will be held: n/a
- C. The expected date of promulgation of the proposed regulation as a final-form regulation: n/a
- D. The expected effective date of the final-form regulation: immediate
- E. The date by which compliance with the final-form regulation will be required: n/a
- F. The date by which required permits, licenses or other approvals must be obtained: n/a

(27) Provide the schedule for continual review of the regulation.

The Department's Bureau of Labor Law Compliance enforcements and investigates complaints under the MWA, and therefore, continually reviews the unaffected provisions of the MWA. The Department also has periodically consulted the Minimum Wage Advisory Board. There has been no apparent call to revive the Food Service Employee Incentive Program.

CDL-1

FACE SHEET
FOR FILING DOCUMENTS
WITH THE LEGISLATIVE REFERENCE
BUREAU

(Pursuant to Commonwealth Documents Law)

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DO NOT WRITE IN THIS SPACE

Copy below is hereby approved as to
form and legality. Attorney General

By _____
(Deputy Attorney General)

Date of Approval

→ Check if applicable.
Copy not approved. Objections
attached.

Copy below is hereby certified to be a true and correct
copy of a document issued, prescribed or promulgated
by:

Department of Labor & Industry

(AGENCY)

DOCUMENT/FISCAL NOTE NO. 12-95

DATE OF ADOPTION: _____

BY: Julia K. Hearthway
TITLE: Secretary of Labor & Industry
(EXECUTIVE OFFICER, CHAIRMAN OR
SECRETARY)

Copy below is hereby approved as to form and
legality. Executive or Independent Agencies

BY: Megan L. Consedine
FEB 14 2012

DATE OF APPROVAL

(DEPUTY GENERAL COUNSEL)
(~~CHIEF COUNSEL, INDEPENDENT AGENCY~~)
(STRIKE INAPPLICABLE TITLE)

→ Check if applicable. No Attorney General
approval or objection within 30 days after
submission.

FINAL OMITTED REGULATION

LABOR AND INDUSTRY

PART XII

34 PA. CODE CHAPTER 231, SECTIONS 231.91-231.99

MINIMUM WAGE

FOOD EMPLOYEE INCENTIVE PROGRAM

[34 Pa. Code §§ 231.91-231.99]

FINAL OMITTED REGULATION

LABOR AND INDUSTRY

PART XII

34 PA. CODE CHAPTER 231, SECTIONS 231.91-231.99

MINIMUM WAGE

FOOD EMPLOYEE INCENTIVE PROGRAM

[34 Pa. Code §§ 231.91-231.99]

The Department of Labor and Industry (Department), under the authority set forth in section 9 of the Minimum Wage Act of 1968 (MWA), act of January 17, 1968, P.L. 11, No. 5 *as amended*, 43 P.S. § 333.109 (relating to enforcement/rules and regulations), hereby rescinds 34 Pa. Code §§ 231.91 – 231.99 (Food Service Employee Incentive Program), as set forth in Annex A. This rulemaking is submitted as a final rulemaking with proposed rulemaking omitted under section 204(3) of the act of July 31, 1968, P. L. 769, No. 240, 45 P. S. § 1204(3), known as the Commonwealth Documents Law (CDL). The statutory authority, under which these regulations were adopted, expired on July 14, 2004, 43 P.S. § 333.105a(k); 34 Pa. Code § 231.91(b), and has not been renewed. Therefore, notice of the rulemaking is deemed to be unnecessary, impractical and not contrary to the public interest.

Purpose of Regulations

The purpose of sections 231.91-231.99 was to implement the Food Service Employee Incentive Program, established by section 5.1 of the MWA, 43 P.S. § 333.105a. Section 5.1 was added to the MWA by the act of December 21, 1998, P.L. 1290, No. 168 § 2. The Food Service Employee Incentive Program was to take effect on the Department's adoption of implementing regulations. However, the statutory amendment creating this program, also provided, that section 5.1 was to "expire three years after the date on which it takes effect." 43 P.S. § 333.105a(k). The Department adopted sections 231.91-231.99, effective July 14, 2001, 31 Pa.B. 3765 (July 14, 2001), but explicitly stated in section 231.91(b) that "[t]his section and §§ 231.92—231.99 will expire, along with section 5.1 of the [MWA] on July 14, 2004, unless section 5.1 is extended by the General Assembly." Section 5.1 of the MWA has not been extended. Therefore, sections 231.91-231.99 of the MWA's regulations are obsolete.

Purpose of Final-Omitted Rulemaking

The purpose of this final-omitted rulemaking is to rescind sections 231.91-231.99 in light of the expiration of section 5.1 of the MWA. Under the Food Service Employee Incentive Program, authorized by section 5.1, new employees in the restaurant and food-service industries and their employers could voluntarily agree to a training program during which the employees would receive a training wage that was not less than the statutory

minimum wage. While the employees were being trained, the difference between their training wages and the employers' entry-level wages was to be deposited into an escrow account, and upon completion of the training program, or the employees' promotion, these escrow payments were to be remitted to the employees in equal installments over a period equal to the period of training. The employees covered under these regulations were dishwashers, bus-persons, servers, sales staff, cooks, hostesses/hosts and cashiers.

This final-omitted rulemaking will not affect any person or entity as both the underlying statutory authorization and implementing regulations have been defunct for more than seven years. Moreover, the objectives of the Food Service Employee Incentive Program can still be achieved by employers offering employees retrospective pay increases if they remain in the employers' employ for a set duration.

Fiscal Impact

Implementation of this final-omitted rulemaking will not result in the expenditure of additional funds by the Commonwealth or local municipalities.

Sunset Provisions

The Department is not establishing a sunset date to revisit this final-omitted rulemaking, since this rule-making is occasioned by a sunset date in the underlying statutory authority for the regulations.

Contact Person

The contact person for this final-omitted rulemaking is Eric Ramsay, Acting Director, Bureau of Labor Law Compliance, 1301 Labor & Industry Building, 651 Boas St., Harrisburg, PA 17121, (717) 787-3681, eramsay@pa.gov.

Regulatory Review

Under section 5.1(c) of the Regulatory Review Act (71 P. S. § 745.5a(c)), on 2/23/12, the Department submitted a copy of the final-omitted rulemaking and a copy of a Regulatory Analysis Form to the Independent Regulatory Review Commission (IRRC) and to the Chairpersons of the House Labor Relations Committee and Senate Labor and Industry Committee. On the same date, the regulations were submitted to the Office of Attorney General for review and approval under the Commonwealth Attorneys Act (71 P. S. §§ 732-101-732-506). A copy of the Regulatory Analysis Form is available to the public upon request.

Under section 5.1(j.2) of the Regulatory Review Act, on _____, the final-omitted rulemaking was (deemed) approved by the House and Senate Committees. Under

section 5.1(e) of the Regulatory Review Act, IRRC met on _____, and approved the final-omitted rulemaking.

Findings

The Department finds that:

(1) The proposed rulemaking procedures in sections 201 and 202 of the CDL (45 P. S. §§ 1201 and 1202) are unnecessary because this final-omitted rulemaking rescinds obsolete regulations.

(2) There is good cause to forego public notice of the intention to rescind 34 Pa. Code §§ 231.91 – 231.99 because notice of the amendments under the circumstances is unnecessary, impractical and not contrary to the public interest under section 204 of the CDL.

(3) Public comment cannot change the fact that the regulations are obsolete.

Order

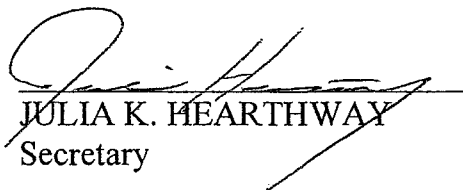
The Department orders that:

(a) The regulations of the Department, 34 Pa. Code Chapter 231, are amended by deleting §§ 231.91-231.99, as set forth in Annex A.

(b) The Secretary of the Department shall submit this order and Annex A to the Office of General Counsel and the Office of Attorney General for approval as to legality and form as required by law.

(c) The Secretary shall certify this order and Annex A and deposit the same with the Legislative Reference Bureau as required by law.

(d) This order shall take effect upon publication in the Pennsylvania Bulletin.


JULIA K. HEATHWAY
Secretary

Annex "A"

TITLE 34. LABOR AND INDUSTRY
PART XII
CHAPTER 231.
MINIMUM WAGE
(RESERVED)
~~FOOD EMPLOYEE INCENTIVE PROGRAM~~

~~§§ 231.91 – 231.99. (Reserved).~~

~~§231.91. Authority and effective date.~~

~~(a) This section and §§231.92 – 231.99 set forth the rules governing the Food Service Incentive Employee Program for participating restaurant and food service operations employers and their employees in this Commonwealth under section 5.1 of the Minimum Wage Act of 1968 (act) (43 P. S. §333.105a).~~

~~(b) This section and §§231.92 – 231.99 will expire, along with section 5.1 of the act on July 14, 2004, unless section 5.1 is extended by the General Assembly.~~

~~(c) Under section 5.1(j) of the act (43 P. S. §333.105a(j)), a claim arising under the Food Service Employee Incentive Program provisions shall be brought under the Wage Payment and Collection Law (43 P. S. §§260.1 – 260.12).~~

~~(d) Any employee, labor organization or party to whom wages are payable under the Food Service Employee Incentive Program may request the Secretary, or an authorized representative, to take an assignment in trust and to bring legal action to collect the wages, as provided by section 9.1 of the Wage Payment and Collection Law (43 P. S. §260.9a).~~

~~§231.92. Eligibility.~~

~~(a) The Food Service Employee Incentive Program is a voluntary program open to new employees of employers engaged as restaurant and food service operations in this Commonwealth.~~

~~(b) A participating employee shall work a minimum of 20 hours a week.~~

~~§231.93. Amount of training wage.~~

~~(a) The amount of the training wage paid to participants in the Food Service Employee Incentive Program shall be established and agreed to in writing by the employee and the employer.~~

~~(b) The training wage cannot be less than the minimum wage established by The Minimum Wage Act of 1968 (43 P. S. §§333.101-33.115).~~

~~(c) The employer may use tip credits toward satisfying the minimum wage for tipped employees, as provided for in section 3(d) of The Minimum Wage Act of 1968 (43 P. S. §333.103(d)).~~

~~§231.94. Length of training period.~~

~~The training periods shall be at least, but not more than, the following:~~

<i>Job Title</i>	<i>Training Period</i>
Dishwashers	2-4 weeks
Bus Persons	2-4 weeks
Servers	2-12 weeks
Sales Staff	2-6 weeks
Cooks	4-12 weeks
Hostess/Host/Cashier	4-12 weeks

~~§231.95. Employee incentive account.~~

~~(a) The employer shall maintain at least one escrow or restricted account designated as an Employee Incentive Account (Account) in accordance with section 5.1 of the Minimum Wage Act of 1968 (43 P. S. §333.105a).~~

~~(b) The employer shall deposit sums consisting of no less than the difference between the training wage and the entry level wage into the Account on each regular payday during the training period. The employer shall credit the deposit in the name of each participating employee.~~

~~(c) Funds in the Account shall be the property of the employer until the employer is required to make payments to the employee. Funds in the Account are nontransferable and nonassignable.~~

-
(d) ~~The employer shall maintain complete, detailed payroll records. The records shall include a listing of all deposits and withdrawals from the Account.~~

-
(e) ~~The employer shall maintain the records at the place of employment or at a central recordkeeping office within or outside this Commonwealth. The employer shall maintain these records for 3 years in accordance with §231.31 (relating to contents of record).~~

-
(f) ~~Access to records maintained by the employer under this section shall be provided to the Department's representatives within 7 days following written or verbal notice by the Secretary or an authorized representative.~~

-
§231.96. Writing required.

(a) ~~The employer shall provide written notification to the employee prior to the commencement of the training program of the following:~~

(1) ~~The training wage and the starting date of training.~~

-
(2) ~~The length of the training period and the position for which the employee is being trained.~~

-
(3) ~~The entry level wage which the employee will receive upon completion of the training period.~~

-
(4) ~~The financial institution where the employer maintains the Food Service Employee Incentive Account.~~

-
(5) ~~The installment payment schedule to be following after the employee completes the training period, provided that the employer shall revise this schedule with the employee's written consent when the employee is promoted prior to completion of the training period.~~

(b) ~~The employer shall obtain a signed acknowledgement that the employee has read and understands the written notification.~~

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(c) ~~The employer shall maintain a copy of the signed acknowledgement for 3 years, along with other records required to be kept under §§231.31—231.35.~~

-
(d) ~~The Department will prepare a recommended notification and acknowledgement form that an employer may use. The Department will make these forms available on its Internet website and by electronic mail, facsimile transmission or regular mail, upon request.~~

~~§231.97. Training.~~

~~(a) The employer shall provide an employee with the usual and customary training associated with the position for which the employee was hired.~~

~~(b) The employer shall be responsible for all training costs, whether incurred by the employer or employee.~~

~~§231.98. Completion of training.~~

~~(a) After an employee completes the training period or is promoted, the employer shall pay all funds credited to the employee in the Food Service Employee Incentive Account (Account). Payment shall be made in equal installments over a period of time equal to the length of the training period. These installment payments shall be paid to the employee, in addition to employee's entry level wage, until the employee has received the full amount credited to the employee in the Account.~~

~~(b) The employer shall pay funds credited to employees in the Account, within 30 days of separation, to employees who are separated from the employer under any of the following conditions:~~

~~(1) Involuntary termination prior to completion of the training period for reasons other than willful misconduct.~~

~~(2) Voluntary termination of employment after promotion or completion of the training period.~~

~~(3) Involuntary separation from employment after promotion or completion of the training period without regard to cause.~~

~~§231.99. Forfeiture of escrowed funds.~~

~~(a) An employee who voluntarily terminates employment with the employer prior to completion of the training period forfeits all funds credited to the employee in the Food Service Employee Incentive Account (Account).~~

~~(b) An employee terminated from employment for willful misconduct, as that term is used in the Unemployment Compensation Law (43 P. S. §§751 — 914), prior to completion of the training period forfeits all funds credited to the employee in the Account.~~

~~(c) When investigating claims and complaints regarding payments or forfeitures of funds in the Account, the Department may rely upon any final adjudication issued under the~~

~~Unemployment Compensation Law regarding the nature of the employee's separation or whether the separation was for willful misconduct.~~



COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF LABOR AND INDUSTRY
HARRISBURG, PENNSYLVANIA 17120

THE SECRETARY

February 23, 2012

The Honorable Silvan B. Lutkewitte, III
Chairman, Independent Regulatory Review Commission
333 Market Street, 14th Floor
Harrisburg, PA 17101

**Re: Final Omitted Regulation
Department of Labor and Industry
Minimum Wage
Food Service Employee Incentive Program 12-95**

Dear Chairman Lutkewitte:

Enclosed is a final-omitted rulemaking package consisting of a face sheet, preamble, annex A and regulatory analysis form. The Department of Labor & Industry is submitting this rulemaking to rescind obsolete regulations promulgated under a 1998 amendment to the Minimum Wage Act. 43 P.S. §333.105a(note). The statutory authority for these regulations automatically expired three years after they were adopted in 2001. 43 P.S. §333.105a(k).

Comments, suggestions or questions should be directed to Eric Ramsay, Acting Director of Labor Law Compliance, 13th Floor, Labor and Industry Building, 651 Boas Street, Harrisburg, PA 17121; Telephone: (717)705-5969; Fax: (717) 787-0517. The email address is: eramsay@pa.gov.

The Department's staff will provide your staff with any assistance required to facilitate your review of this proposal.

Sincerely,

A handwritten signature in dark ink, appearing to read "Julia H.", followed by a long horizontal stroke.

Julia Hearthway
Secretary

cc w/enclosure:

Arthur F. McNulty, Chief Counsel
J. Scott Robinette, Deputy Secretary
David Greineder, Director of Legislative Affairs
Gwen Dando, Executive Policy Specialist
Eric Ramsay, Acting Director
Richard Lengler, Deputy Chief Counsel

**TRANSMITTAL SHEET FOR REGULATIONS SUBJECT TO THE
REGULATORY REVIEW ACT**

I.D. NUMBER: 12-75950610

SUBJECT: MINIMUM WAGE, FOOD EMPLOYEE INCENTIVE PROGRAM

AGENCY: DEPARTMENT OF LABOR AND INDUSTRY

TYPE OF REGULATION

Proposed Regulation

Final Regulation

X Final Regulation with Notice of Proposed Rulemaking Omitted

120-day Emergency Certification of the Attorney General

120-day Emergency Certification of the Governor

Delivery of Tolled Regulation

a. With Revisions

b. Without Revisions

2012 FEB 23 P 12:20

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IRRC

FILING OF REGULATION

DATE

SIGNATURE

DESIGNATION

HOUSE COMMITTEE ON LABOR & INDUSTRY

MAJORITY CHAIRMAN Ron Miller

MINORITY CHAIRMAN William F. Keller

SENATE COMMITTEE ON LABOR & INDUSTRY

MAJORITY CHAIRMAN John R. Gordner

MINORITY CHAIRMAN Christine M. Tartaglione

INDEPENDENT REGULATORY REVIEW COMMISSION

ATTORNEY GENERAL

LEGISLATIVE REFERENCE BUREAU

2/23/12 Dawn McEnroe

2-23-12 Willy A. Miller

2-23-12 W. R. Gordner

2/23/12 Elizabeth A. Tartaglione

2/23/12 K. Cooper

2/23/12 M. Mummert