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# CODE OF FEDERAL REGULATIONS

# Title 5
## Administrative Personnel

Parts 700 to 1199

Revised as of January 1, 2017

Containing a codification of documents
of general applicability and future effect

As of January 1, 2017

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*Cite this Code:* CFR

*To cite the regulations in this volume use title, part and section number. Thus,* 5 CFR 715.201 *refers to title 5, part 715, section 201.*

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Title 1 through Title 16.....as of January 1
Title 17 through Title 27.....as of April 1
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OLIVER A. POTTS,
*Director,*
*Office of the Federal Register.*
*January 1, 2017.*

## THIS TITLE

Title 5—ADMINISTRATIVE PERSONNEL is composed of three volumes. The parts in these volumes are arranged in the following order: Parts 1–699, 700–1199 and part 1200–end. The contents of these volumes represent all current regulations codified under this title of the CFR as of January 1, 2017.

For this volume, Bonnie Fritts was Chief Editor. The Code of Federal Regulations publication program is under the direction of John Hyrum Martinez, assisted by Stephen J. Frattini.

# Title 5—Administrative Personnel

(This book contains parts 700 to 1199)

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NOTE: Title 5 of the United States Code was revised and enacted into positive law by Pub. L. 89–554, Sept. 6, 1966. New citations for obsolete references to sections of 5 U.S.C. appearing in this volume may be found in a redesignation table under Title 5, Government Organization and Employees, United States Code.

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# CHAPTER I—OFFICE OF PERSONNEL MANAGEMENT (CONTINUED)

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715.201 Applicability.
715.202 Resignation.

AUTHORITY: 5 U.S.C. 1302, 3301, 3302, 7301; E.O. 10577, 3 CFR, 1954–1958 Comp., p. 218; E.O. 11222, 3 CFR, 1964–1965 Comp., p. 306.

## Subpart A [Reserved]

## Subpart B—Voluntary Separations

### § 715.201 Applicability.

This subpart applies to separation actions requested by employees in the executive departments and independent establishments of the Federal Government, including Government-owned or controlled corporations, and in those portions of the legislative and judicial branches of the Federal Government and the government of the District of Columbia having positions in the competitive service.

[33 FR 12482, Sept. 4, 1968]

### § 715.202 Resignation.

(a) *General.* An employee is free to resign at any time, to set the effective date of his resignation, and to have his reasons for resigning entered in his official records.

(b) *Withdrawal of resignation.* An agency may permit an employee to withdraw his resignation at any time before it has become effective. An agency may decline a request to withdraw a resignation before its effective date only when the agency has a valid reason and explains that reason to the employee. A valid reason includes, but is not limited to, administrative disruption or the hiring or commitment to hire a replacement. Avoidance of adverse action proceedings is not a valid reason.

[33 FR 12482, Sept. 4, 1968, as amended at 36 FR 9765, May 28, 1971; 38 FR 18446, July 11, 1973; 38 FR 26601, Sept. 24, 1973]

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AUTHORITY: 5 U.S.C. 7201; 42 U.S.C. 2000e, unless otherwise noted.

SOURCE: 44 FR 22031, Apr. 13, 1979, unless otherwise noted.

## Subpart A—Principal Statutory Requirements

### § 720.101 Federal Equal Opportunity Recruitment Program.

This section incorporates the statutory requirements for establishing and conducting an equal opportunity recruitment program consistent with law within the Federal civil service. The policy in 5 U.S.C. 7201(b) reads as follows: ''It is the policy of the United States to insure equal employment opportunities for employees without discrimination because of race, color, religion, sex, or national origin. The President shall use his existing authority to carry out this policy.'' 5 U.S.C. 7201(c) requires under regulations prescribed by the Office of Personnel Management:

''(1) That each Executive agency conduct a continuing program for the recruitment of members of minorities for positions in the agency to carry out the [anti-discrimination] policy set forth in subsection (b) in a manner designed to eliminate underrepresentation of minorities in the various categories of civil service employment within the Federal service, with special efforts directed at recruiting in minority communities, in educational institutions, and from other sources from which minorities can be recruited; and

''(2) That the Office conduct a continuing program of—

''(A) Assistance to agencies in carrying out programs under paragraph (1) of this subsection; and

''(B) Evaluation and oversight of such recruitment programs to determine their effectiveness in eliminating such minority underrepresentation.''

This section and all implementing guidance shall be interpreted consistent with title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000c *et seq*.

[44 FR 22031, Apr. 13, 1979, as amended at 48 FR 193, Jan. 4, 1983]

## Subpart B—Federal Equal Opportunity Recruitment Program

### § 720.201 Regulatory requirements.

This subpart contains the regulations of the Office of Personnel Management which implement the above provisions of title 5, United States Code, and are prescribed by the Office under authority of 5 U.S.C. 7201.

### § 720.202 Definitions.

For the purposes of this subpart:

(a) *Underrepresentation* means a situation in which the number of women or members of a minority group within a category of civil service employment constitutes a lower percentage of the total number of employees within the employment category than the percentage women or the minority constitutes within the civilian labor force of the United States, in accordance with § 720.205 (c) and (d).

(b) *Category of civil service employment* means such groupings of Federal jobs by grades and/or occupations as the Office of Personnel Management deems appropriate within the General Schedule and the prevailing wage systems.

(c) *Minority* refers only to those groups classified as ''minority'' for the purpose of data collection by the Office of Personnel Management and the Equal Employment Opportunity Commission in furtherance of Federal equal employment opportunity policies. The term, ''women,'' includes nonminority as well as minority women.

(d) *Civilian labor force* (CLF) includes all persons 16 years of age and over, except those in the armed forces, who are employed or who are unemployed and seeking work. CLF data are defined by the Bureau of the Census and the Bureau of Labor Statistics and are reported in the most recent decennial or mid-decade census, or current population survey, under title 13 of the United States Code or any other reliable statistical study.

(e) *Recruitment* means the total process by which the Federal Government and the Federal agencies locate, identify and assist in the employment of qualified applicants from underrepresented groups for job openings in categories of employment where underrepresentation has been determined. It includes both innovative internal and external recruitment actions. It is also intended to cover processes designed to prepare qualifiable applicants (those who have the potential but do not presently meet valid qualification requirements) for such job openings through

programs of training, work experience or both.

(f) *Applicant pool* means all types of listings from which selections may be made, including (but not limited to) promotion lists, competitive certificates and inventories of eligibles, applicant supply files, and lists of eligibles for certain noncompetitive appointments.

**§ 720.203 Responsibilities of the Office of Personnel Management.**

(a) The Office of Personnel Management will provide appropriate data to assist Federal agencies in making determinations of underrepresentation. The process for making such determinations is described in sections II and III (c) of the ''Guidelines for the Development of a Federal Recruitment Program to Implement 5 U.S.C. 7201, as amended'' (See appendix to this part). The Office will develop and publish more specific criteria for statistical measurements to be used by individual agencies, and will develop further guidance on—

(1) Agency employment statistics and civilian labor force statistics to be used in making determinations of underrepresentation, on a national, regional or other geographic basis as appropriate;

(2) Groupings of grades and/or other occupational categories to be used in implementing agency programs;

(3) Occupational categories and job series for which expanded external recruitment efforts are most appropriate, and those for which expanded and innovative internal recruitment is appropriate; and

(4) Other factors which may be considered by the agency, in consultation with Office of Personnel Management, to make determinations of underrepresentation and to develop recruitment programs focused on specific occupational categories.

(b) The Office will assist agencies in carrying out their programs by—

(1) Identifying major recruitment sources of women and members of minority groups and providing guidance on internal and external recruitment activities directed toward the solution of specific underrepresentation problem;

(2) Supplementing agency recruitment efforts, utilizing existing networks for dissemination of job information, and involving the participation of minority group and women's organizations where practicable;

(3) Examining existing Federal personnel procedures to identify those which (i) may serve as impediments to innovative internal and external recruitment and (ii) are within the administrative control of the Office or the Federal agencies;

(4) Determining whether applicant pools used in filling jobs in a category of employment where underrepresentation exists include sufficient candidates from any underrepresentated groups, except where the agency controls such pools (see § 720.204(c));

(5) Providing such other support, as the Office deems appropriate.

(c) The Office will monitor and, in conjunction with the personnel management evaluation program of the Office, evaluate agency programs to determine their effectiveness in eliminating underrepresentation.

(d) The Office will work with agencies to develop effective mechanisms for providing information on Federal job opportunities targeted to reach candidates from underrepresented groups.

(e) The Office will conduct a continuing program of guidance and instruction to supplement these regulations.

(f) The Office will coordinate further activities to implement equal opportunity recruitment programs under this subpart with the Equal Employment Opportunity Commission consistent with law, Executive Order 12067, and Reorganization Plan No. 1 of 1978.

**§ 720.204 Agency programs.**

(a) Each Executive agency having positions in the pay systems covered by this program must conduct a continuing program for the recruitment of minorities and women for positions in the agency and its components to carry out the policy of the United States to insure equal employment opportunities without discrimination because of race, color, religion, sex or national origin. The head of each agency must specifically assign responsibility for program

implementation to an appropriate agency official. All agency officials who have responsibility for the program will be evaluated on their effectiveness in carrying it out as part of their periodic performance appraisals.

(b) Programs established under this subpart must be designed to cover recruitment for all positions in pay plans covered by this program including part-time and temporary positions.

(c) Where an agency or the Office of Personnel Management has determined that an applicant pool does not adequately provide for consideration of candidates from any underrepresented group, the agency or agency component must take one or more of the following actions:

(1) Expand or otherwise redirect their recruitment activities in ways designed to increase the number of candidates from underrepresented groups in that applicant pool;

(2) Use selection methods involving other applicant pools which include sufficient numbers of members of underrepresented groups;

(3) Notify the office responsible for administering that applicant pool, and request its reopening of application receipt in support of expanded recruitment activities or certifying from equivalent registers existing in other geographic areas; and/or

(4) Take such other action consistent with law which will contribute to the elimination of underrepresentation in the category of employment involved.

(d) Agencies must notify and seek advice and assistance from the Office of Personnel Management in cases where their equal opportunity recruitment programs are not making measurable progress in eliminating identified underrepresentation in the agency work force.

**§ 720.205 Agency plans.**

(a) Each agency must have an up-to-date equal opportunity recruitment program plan covering recruitment for positions at various organizational levels and geographic locations within the agency. Such plans must be available for review in appropriate offices of the agency and must be submitted to the Office of Personnel Management on request. In accordance with agreement reached between the Office and the Equal Employment Opportunity Commission, such plans must be incorporated in the agency's equal employment opportunity plans required under section 717 of the Civil Rights Act of 1964, as amended, pursuant to regulations and instructions of the Commission, provided they are separable parts of those plans for purposes of review by and submission to the Office of Personnel Management. Agency organizational and geographical components which are required to develop and submit Equal Employment Opportunity plans, under instructions issued by the Equal Employment Opportunity Commission, must also have up-to-date special recruitment program plans. On a determination by the Office of Personnel Management, in consultation with EEOC, that additional component plans are needed to implement an agency's program effectively, the Office will instruct the agency to develop additional plans. Agencies must comply with such instructions.

(b) Agency plans must include annual specific determinations of underrepresentation for each group and must be accompanied by quantifiable indices by which progress toward eliminating underrepresentation can be measured.

(c) Where an agency or agency component is located in a geographical area where the percentage of underrepresented groups in the area civilian labor force is higher than their percentage in the national labor force, the agency or component must base its plans on the higher level of representation in the relevant civilian labor force.

(d) Where an agency or agency component is located in a geographical area where participation of a particular underrepresented group is significantly lower than its participation in the national labor force, the agency or component may, in consultation with the Office of Personnel Management, use the lower percentage in determining underrepresentation. An agency may not use a figure lower than the relevant regional or nationwide labor force percentage where recruitment on a regional or nationwide basis is feasible for particular categories of employment. Factors such as size of

the agency or unit, nature of jobs and their wage or pay scale may be considered in focusing recruitment for various job categories.

(e) In addition to the underrepresentation determinations described in paragraphs (b), (c) and (d) of this section, agency plans must, at a minimum, include:

(1) An assessment of grades or job categories and numbers of jobs in such categories expected to be filled in the current year, and on a longer term basis (based on anticipated turnover, expansion, hiring limits and other relevant factors) identification of those occupational categories and positions suitable for external recruitment, and description of special targeted recruitment programs for such jobs and positions;

(2) A similar assessment for job categories and positions likely to be filled by recruitment from within the agency and/or the Federal civil service system and a description of recruitment programs developed to increase minority and female candidates from internal sources for such positions;

(3) A further assessment of internal availability of candidates from underrepresentated groups for higher job progressions by identifying job-related skills, knowledges and abilities which may be obtained at lower levels in the same or similar occupational series, or through other experience;

(4) A description of methods the agency intends to use to locate and develop minority and female candidates for each category of underrepresentation and an indication of how such methods differ from and expand upon the recruitment activities of the agency prior to establishment of the special recruitment program or the last revision to the agency's plans;

(5) A description of specific, special efforts planned by the agency (or agency component) to recruit in communities, educational institutions, and other likely sources of qualified minority and female candidates;

(6) A description of efforts which will be undertaken by the agency to identify jobs which can be redesigned so as to improve opportunities for minorities and women, including jobs requiring bilingual or bicultural capabilities or not requiring English fluency.

(7) A list of priorities for special recruitment program activities based on agency identification of:

(i) Immediate and longer range job openings for each occupational/grade-level grouping for which underrepresentation has been determined;

(ii) Hiring authorities which may be used to fill such jobs;

(iii) The possible impact of its actions on underrepresentation.

(8) Identification of training and job development programs the agency will use to provide skills, knowledge and abilities to qualify increased numbers of minorities and women for occupational series and grade levels where they are significantly underrepresented.

(9) Identification of problems for which the assistance of the Office of Personnel Management is needed and will be requested.

(f) Equal opportunity recruitment program plans must be consistent with agency Upward Mobility program plans and should be developed with full consideration of the agency's overall recruiting and staffing planning objectives.

(g) All plans required under this subpart must be developed not later than October 1, 1979.

[44 FR 22031, Apr. 13, 1979, as amended at 44 FR 33046, June 8, 1979]

### § 720.206 Selection guidelines.

This subpart sets forth requirements for a recruitment program, not a selection program. Nevertheless, agencies are advised that all selection processes including job qualifications, personnel procedures and criteria must be consistent with the Uniform Guidelines on Employee Selection Procedures (43 FR 38290; August 25, 1978).

### § 720.207 Reports.

(a) Not later than November 1 of each year, agencies must submit an annual report on their equal opportunity recruitment program to the Office of Personnel Management, in a form prescribed by the Office. The Office may require submission of any additional

reports it considers necessary in carrying out its responsibilities under this subpart.

(b) The Office will report to Congress on the implementation and operation of the program on a Governmentwide basis not later than January 31 of each year, as required by law. Such reports will include assessments of agencies progress, or lack of progress, in meeting the objectives of the program.

## Subpart C—Disabled Veterans Affirmative Action Program

AUTHORITY: 5 U.S.C. 7201; 42 U.S.C. 2000e; 38 U.S.C. 101(2), 2011(3), 2014; 5 U.S.C. 3112; 29 U.S.C. 791(b).

SOURCE: 48 FR 193, Jan. 4, 1983, unless otherwise noted.

### § 720.301 Purpose and authority.

This subpart sets forth requirements for agency disabled veteran affirmative action programs (DVAAPs) designed to promote Federal employment and advancement opportunities for qualified disabled veterans. The regulations in this subpart are prescribed pursuant to responsibilities assigned to the Office of Personnel Management (OPM) under 38 U.S.C. 4214, and section 307 of the Civil Service Reform Act of 1978 (5 U.S.C. 3112).

[70 FR 72068, Dec. 1, 2005]

### § 720.302 Definition.

As used in this subpart, the terms *veteran* and *disabled veteran* have the meanings given to these terms in title 38 of the United States Code.

### § 720.303 Agency programs.

(a) *Continuing Programs*. Each Department, agency, and instrumentality in the executive branch, including the U.S. Postal Service and the Postal Rate Commission, shall conduct a continuing affirmative program for the recruitment, hiring, placement, and advancement of disabled veterans.

(b) *Program Responsibility*. The head of each agency shall assign overall program responsibility to an appropriate agency official. The official so designated shall be at a high enough level to ensure effective program administration and the devotion of adequate resources to the program.

(c) *Problem Analysis*. (1) Annually, OPM will provide appropriate data on the employment of disabled veterans to each agency participating in the Central Personnel Data File (CPDF). These data will be taken from CPDF. For DVAAP purposes, CPDF data are considered to be the official record of the status of disabled veteran employment within each participating agency. Each participating agency is responsible for assuring that such records are timely, accurate, and complete.

(2) CPDF data must be analyzed by participating agencies to identify problem areas and deficiencies in the employment and advancement of disabled veterans. (OPM will establish with each agency not participating in CPDF, the nature and extent of data to be used in identifying problems and deficiencies.) Based on this analysis, agencies shall develop methods to improve the recruitment, hiring, placement, and advancement of disabled veterans, or revise or redirect existing methods, as necessary. These methods must then be translated into action items.

### § 720.304 Agency plan.

(a) *Plan Development*. As part of the affirmative action plan it prepares pursuant to section 501(b) of the Rehabilitation Act of 1973 (29 U.S.C. 791 (b)) (''Section 501(b) Plan''), each Department, agency, or instrumentality in the executive branch must have an up-to-date affirmative action plan for the employment and advancement of disabled veterans.

(1) Each agency must review its plan on an annual basis, together with its accomplishments for the previous fiscal year, updated employment data, and any changes in agency mission or structure, and update the plan as necessary. Agency operating components and field installations required to develop separate plans under paragraph (b) of this section, below, must perform the same type of annual review and update of their plans.

(2) Plans shall cover a time period of not less than one year and may cover a longer period if concurrent with the agency's Section 501(b) Plan. Each plan

must specify the period of time it covers.

(3) Initial plans for fiscal year 1983 required under this subpart must be developed by January 30, 1983 and must be in effect on that day.

(b) *Plan Coverage.* (1) Each agency must have an agencywide plan covering all of its operating components and field installations. Agencywide plans shall include instructions assigning specific responsibilities on affirmative actions to be taken by the agency's various operating components and field installations to promote the employment and advancement of disabled veterans. OPM must be informed when headquarters offices require plans at the field or installation level.

(2) Agency operating components and field installations must have a copy of the plan covering them, and must implement their responsibilities under it. OPM may require operating components and field installations to develop separate plans in accordance with program guidance and/or instructions.

(c) *Plan Submission.* Affirmative action plans developed under this section shall be submitted to OPM upon request. The Office of Personnel Management will review a selection of agency plans each fiscal year.

(d) *Plan Certification.* Each agency must certify to OPM by December 1 of each year that it has an up-to-date plan as required by this section. This certification must indicate the date the agency's most recent plan was effective or was last amended.

(e) *Plan Content.* Disabled veteran affirmative action plans shall, at a minimum, contain:

(1) A statement of the agency's policy with regard to the employment and advancement of disabled veterans, especially those who are 30 percent or more disabled.

(2) The name and title of the official assigned overall responsibility for development and implementation of the action plan.

(3) An assessment of the current status of disabled veteran employment within the agency, with emphasis on those veterans who are 30 percent or more disabled.

(4) A description of recruiting methods which will be used to seek out disabled veteran applicants, including special steps to be taken to recruit veterans who are 30 percent or more disabled.

(5) A description of how the agency will provide or improve internal advancement opportunities for disabled veterans.

(6) A description of how the agency will inform its operating components and field installations, on a regular basis, of their responsibilities for employing and advancing disabled veterans.

(7) A description of how the agency will monitor, review, and evaluate its planned efforts, including implementation at operating component and field installation levels during the period covered by the plan.

### § 720.305 Agency accomplishment reports.

(a) Not later than December 1 of each year, agencies must submit an annual accomplishment report on their disabled veterans affirmative action program to the Office of Personnel Management, covering the previous fiscal year.

(b) Agency annual accomplishment reports must describe:

(1) Methods used to recruit and employ disabled veterans, especially those who are 30 percent or more disabled.

(2) Methods used to provide or improve internal advancement opportunities for disabled veterans.

(3) A description of how the activities of major operating components and field installations were monitored, reviewed, and evaluated.

(4) An explanation of the agency's progress in implementing its affirmative action plan during the fiscal year. Where progress has not been shown, the report will cite reasons for the lack of progress, along with specific plans for overcoming cited obstacles to progress.

### § 720.306 Responsibilities of The Office of Personnel Management.

(a) *Program Review.* OPM will monitor agency program implementation through review of agency plans, direct agency contact, review of employment data, and through other appropriate means. As it deems appropriate, OPM

will conduct onsite evaluations of program effectiveness, both at agency headquarters and at field installations or operating components.

(b) *Technical Assistance.* The Office of Personnel Management will provide technical assistance, guidance, instructions, data, and other information as appropriate to supplement and support agency programs for disabled veterans.

(c) *Semiannual Reports.* As provided by 38 U.S.C. 2014(d), OPM will, on at least a semiannual basis, publish reports on Government-wide progress in implementing affirmative action programs for disabled veterans.

(d) *Report to Congress.* As required by 38 U.S.C. 2014(e), OPM will report to Congress each year on the implementation and progress of the program. These reports will include specific assessments of agency progress or lack of progress in meeting the objectives of the program.

[48 FR 193, Jan. 4, 1983, as amended at 66 FR 66711, Dec. 27, 2001]

### § 720.307 Interagency report clearance.

The reports contained in this regulation have been cleared in accordance with FPMR 101–11.11 and assigned interagency report control number 0305–OPM–AN.

## Subparts D–I [Reserved]

## Subpart J—Equal Opportunity Without Regard to Politics or Marital Status

### § 720.901 Equal opportunity without regard to politics or marital status.

(a) *In appointments and position changes.* In determining the merit and fitness of a person for competitive appointment or appointment by noncompetitive action to a position in the competitive service, an appointing officer shall not discriminate on the basis of the person's political affiliations, except when required by statute, or on the basis of marital status

(b) *In adverse actions and termination of probationers.* An agency may not take an adverse action against an employee covered by part 752 of this chapter, not effect the termination of a probationer under part 315 of this chapter, (1) for political reasons, except when required by statute, or (2) because of marital status.

(5 U.S.C. 2301, 2302, 7202, 7203, 7204)

[44 FR 48149, Aug. 17, 1979]

### APPENDIX TO PART 720—GUIDELINES FOR THE DEVELOPMENT OF A FEDERAL RECRUITMENT PROGRAM TO IMPLEMENT 5 U.S.C. SECTION 7201, AS AMENDED[1]

I. *Background Information.* A. In 1964 the Congress adopted a basic anti-discrimination policy for Federal employment, stating:

> It is the policy of the United States to insure equal employment opportunities for employees without discrimination because of race, color, religion, sex or national origin. [5 U.S.C. 7151][2]

In 1978, Congress reaffirmed and amended this policy as part of the Civil Service Reform Act of 1978 [Sec. 310 of Pub. L. 95–454], requiring immediate development of a recruitment program designed to eliminate underrepresentation of minority groups in specific Federal job categories. Section 310 directs the Equal Employment Opportunity Commission:

1. To establish Guidelines proposed to be used for a program designed to eliminate such underrepresentation;

2. To make, in consultation with OPM, initial determinations of underrepresentation which are proposed to be used in this program; and

3. To transmit the determinations made under (2) above to the Executive Agencies, the Office of Personnel Management and the Congress, within 60 days of enactment.

The Office of Personnel Management (OPM)[3] is directed by this amendment:

1. To issue regulations to implement a program under EEOC Guidelines within 180 days after enactment, which shall provide that Executive agencies conduct continuing recruitment programs to carry out the anti-discrimination policy in a manner designed

[1] This section originally was section 701(b) (2nd Proviso) of the Civil Rights Act of 1964 (Pub. L. 88–352, July 2, 1964), codified as 5 U.S.C. 7151. Section 7151 was further amended by section 310 of the Civil Service Reform Act of 1978. This Act also redesignated section 7151 as section 7201, effective January 11, 1979. (Sec. 703(a)(1) of the Act.)

[2] *Ibid.*

[3] This Office was created by Reorganization Plan No. 2, issued pursuant to 5 U.S.C. 901 *et seq.* It will assume personnel management functions of the present Office of Personnel Management on January 1, 1979.

to eliminate underrepresentation in identified categories of civil service;

2. To provide continuing assistance to Federal agencies in carrying out such programs;

3. To conduct a continuing program of evaluation and oversight to determine the effectiveness of such programs;

4. To establish occupational, professional and other groupings within which appropriate recruitment will occur, based upon the determinations of underrepresentation pursuant to these Guidelines; and

5. To report annually to the Congress on this program, not later than January 31 of each year.

Congress further directed that the recruitment program must be administered consistent with provisions of Reorganization Plan No. 1 of 1978.[4]

B. In framing these Guidelines and making its initial determinations of underrepresentation, the Equal Employment Opportunity Commission (Commission) is acting pursuant to its obligations and authority under 5 U.S.C. 7201, as amended; Section 717 of title VII of the Civil Rights Act of 1964, as amended; Reorganization Plan No. 1 of 1978 (issued pursuant to 5 U.S.C. 901 *et seq.*) and Executive Order 12067, issued under this Plan (43 FR 28967, June 30, 1978). This Commission must develop and/or ensure the development of uniform, coherent and effective standards for administration and enforcement of all Federal anti-discrimination and equal employment opportunity laws, policies and programs, and to ensure the elimination of duplication and inconsistency in such programs.

C. A review of the legislative history of Federal equal employment opportunity policy provides further guidance on the scope and nature of determinations and guidelines to be issued for this program.

The basic policy statement on Federal equal employment policy enacted by the Congress in 1964 (5 U.S.C. 7151, redesignated as section 7201) gave the President authority for implementation. Executive Order 11246 (1966), expanded and superseded by Executive Order 11478 (1969) with respect to Federal employment, required Federal agencies to develop affirmative action programs designed to eliminate discrimination and assure equal employment opportunity.

In 1972, Congress found that serious discrimination persisted in Federal employment. It found that minorities and women were significantly absent at higher levels in Federal employment, and severely underrepresented in some Federal agencies and in some geographic areas where they constituted significant proportions of the population. After a detailed review of Federal employment practices and statistics, the Congress concluded that:

The disproportionate distribution of minorities and women throughout the Federal bureaucracy and their exclusion from higher level policy-making and supervisory positions indicates the government's failure to pursue its policy of equal employment opportunity.[5]

Congress found that this exclusion resulted from overt and ''systemic'' discriminatory practices.

These findings, among others, led Congress to extend title VII coverage to Federal employment in Section 717 of the Equal Employment Opportunity Act of 1972.

The Civil Service Reform Act of 1978 clearly states, for the first time, that ''it is the policy of the United States * * * to provide * * * a Federal workforce reflective of the Nation's diversity * * *''[6] The Act establishes in law as the first merit principle that recruitment should be designed to achieve a Federal workforce from ''all segments of society.'' Among the personnel practices prohibited by the Act is discrimination prohibited under title VII of the Civil Rights Act of 1964, as amended.[7] Therefore, the Civil Service Reform Act and its directive for a special recruitment program clearly unite requirements for basic Federal personnel policy with requirements for Federal equal employment policy.

It is clear from the legislative history of Federal equal employment policy that the legal standards of title VII must be applied to Federal employment. Thus, guidelines for a recruitment program designed to eliminate underrepresentation in Federal agency employment must be developed consistent with the framework of affirmative action programs.

D. Guided by the review of the legislative history, and the responsibilities and authorities cited in I(B) of this appendix, the Commission is issuing these Guidelines to provide a framework for development of recruitment program regulations by OPM. The Commission may later provide more detailed guidance, through consultation with OPM, designed to achieve an overall Federal equal employment program which is consistent with, and which effectively implements title VII requirements.

II. *Initial Determinations of Underrepresentation.* A. Pursuant to Section 7201, underrepresentation exists when the percentages of minority and female Federal employees in

[4] *Conference Report on Civil Service Reform Act of 1978,* No. 95–1272, p. 145.

[5] *Legislative History of the Equal Employment Opportunity Act of 1972*, p. 83. See pp. 82–86 and 421–425 for Congressional Findings.

[6] Civil Service Reform Act of 1978, Section 3.

[7] Section 101(a) of the Act, 5 U.S.C. 2301(b)(1) and 2302(b)(1)(A), as amended.

specific grades are less than their percentages in the civilian labor force. ''Minority'' refers only to those groups classified as ''minority'' for the purpose of data collection by the Commission and OPM in furtherance of Federal equal employment opportunity policies. The civilian labor force includes all persons 16 years of age and over except the armed forces, who are employed or seeking employment. Such a determination of underrepresentation is designated in these Guidelines as ''below the Section 7201 level''.

B. The Commission has examined existing data on Federal employment and the civilian labor force and has made initial determinations of underrepresentation of groups by race, national origin and sex in specific grades of the major Federal pay systems, under the legal authorities cited in I(B), of this appendix.

C. The Table which follows shows the grades at which the percentage of each group in the Federal workforce falls below its percentage in the civilian labor force. The table covers four major Federal pay systems which account for more than 95 percent of Federal employees, excluding the Postal Service.[8]

CIVILIAN LABOR FORCE AND FEDERAL EMPLOYMENT GRADES AT WHICH MINORITIES AND WOMEN ARE BELOW THE 7201 LEVEL, BY SELECTED PAY SYSTEMS, AND BY SEX, RACE, AND NATIONAL ORIGIN—1977

| Sex/Race/National Origin | Percent of Civilian Labor Force | Grades Below the 7201 Level | | | |
|---|---|---|---|---|---|
| | | Gen Sched and Equivalent | Non-spvsry Regular Wage | Leader Regular Wage | Spvsry Regular Wage |
| Number of Grades | ..... | 18 | 15 | 15 | 19 |
| Women | 41.0 | 9+ | 2+ | 2+ | All |
| White | 34.0 | 9+ | All | All | All |
| Black | 4.6 | 11+ | 5+ | 5+ | 5+ |
| Hispanic | 1.7 | 6+ | All | 2, 4+ | All |
| AsAm/PacIs | .6 | 1, 10+ | 2+ | 2+ | All |
| AmIn/AlNa | .1 | 13+ | 9+ | 1, 5, 6, 9+ | 4, 9, 11+ |
| Minority Men | 8.9 | 3+ | 13+ | 11, 14+ | 13+ |
| Black | 5.3 | 4, 6+ | 12+ | 11+ | 11+ |
| Hispanic | 2.8 | All | 14+ | 1, 15 | 13–15, 17+ |
| AsAm/PacIs | .7 | 1–8, 10, 16+ | 9, 14+ | 1, 3, 8, 9, 12+ | 1, 3, 8, 9, 17+ |
| AmIn/AlNa | .2 | None | 14 | 1, 13+ | 17+ |

NOTES. 1. Comparable data for white men shown below are for reference.

| White Men | 50.1 | 1–8 | 1–4 | 1–5 | 1–3 |
|---|---|---|---|---|---|

2. + means "and all grades above".
3. Detail may not add to total because of rounding.

Sources: Civilian Labor Force information based on data from the Current Population Survey, Bureau of Labor Statistics, *Employment and Earnings,* Vol. 25, No. 1, January 1978.

Information on grades below 7201 level based on Office of Personnel Management data from *Equal Employment Opportunity Statistics,* November 20, 1977 (publication in process).

D. The initial determinations of underrepresentation were based upon average 1977 labor force data from the Current Population Survey published by the Bureau of Labor Statistics (*Employment and Earnings*, January 1978), and 1977 Federal workforce statistics from *Equal Employment Opportunity Statistics* (publication in process).

The labor force figures are published annually; the Federal employment statistics semiannually. These measures, and any modifications agreed upon by the Commission and OPM, will be updated annually.

Regional and area Federal employment statistics are available from the Office of Personnel Management. The latest reliable local labor force data by race, national origin, and sex is from the 1970 Census. The Commission and OPM will consult on appropriate labor force measures to be used for local analyses.

E. These initial determinations are based upon a preliminary analysis of the data, and may be further refined by the Commission, in consultation with OPM, to include geographic and occupational underrepresentation. It is further recognized that for the purpose of developing regulations, the OPM, in consultation with the Commission, will undertake more specific analyses of data use and applicability necessary to develop programs for the Federal agencies pursuant to Section 7201(a)(2)(C). The OPM may establish criteria for grouping agencies, for treating

[8]The initial determinations are based on data for only those agencies covered by the Civil Service Reform Act of 1978. The Commission will make subsequent determinations on other agencies covered by title VII, e.g. the U.S. Postal Service, TVA, Central Intelligence Agency, Federal Reserve Board.

agency components separately and for grouping grades and pay systems. In addition, OPM may study other available data sources and use other techniques to assure statistically significant findings of underrepresentation. Based upon these studies, OPM may make recommendations to the Commission for future determinations of underrepresentation.

III. *Procedures for Developing Recruitment Programs*. A. The program developed and implemented by OPM under Section 7201 should be designed to result in applicant pools with sufficient qualified members of underrepresented groups. Where the supply of such groups initially appears to be low for specific occupational, professional and other groupings, the program should be designed so that recruitment efforts stimulate interest of underrepresented groups in those occupations where there are realistic projections of Federal employment opportunities.

B. In establishing groupings for determining underrepresentation, OPM should utilize broad occupational categories to the extent possible.

C. The Commission recognizes that OPM's regulations should allow flexibility in development and design of each Federal agency's recruitment program. However, all statistical comparisons must be computed in a manner consistent with the method utilized in II C of this appendix.

The Commission recommends that each agency program meet several minimum requirements. The program should be based on a determination of underrepresentation in the agency's total workforce, in appropriate geographic components; by grade; by broad occupational, professional and other groupings in comparison to the national civilian labor force, according to the criteria developed by OPM under these guidelines.

Where an agency or major component thereof (such as Headquarters and Regional Offices) is located in a geographic area where the percentage of underrepresented groups in the area civilian labor force is *higher* than their percentage in the national labor force, the agency or appropriate component should conduct its recruitment program for that component on the basis of the higher level of representation in the relevant civilian labor force.

Where an agency or major component thereof is located in a geographic area where participation of a particular underrepresented group in the area labor force is significantly *lower* than their participation in the national labor force, such agency or component may, in consultation with OPM, utilize the lower applicable civilian labor force percentage in determining underrepresentation for the component. In no event, however, may the agency utilize a figure lower than the regional or nationwide Section 7201 level for positions where recruitment on a regional or nationwide basis is feasible. Factors such as size of the agency or unit, nature of jobs and their wage or pay scale may be considered to set goals and to justify a recruitment program focused on various job categories.

IV. *Scope of Actions Covered by This Program*. A. ''Recruitment'' under this program is defined as the total process by which the Federal Government and the Federal agencies locate, identify and assist in the employment of qualified or qualifiable applicants from underrepresented groups for job openings in grades and in occupational categories where underrepresentation has been determined. This process should include innovative internal, as well as targeted external, recruitment actions.

B. Prior to developing regulations, the Office should review data on personnel actions and other information, to identify those job categories for which internal recruitment and external recruitment is most appropriate and feasible, and to provide guidance to the Federal agencies for targeting their recruitment programs, based on this information. OPM should advise all agencies that all job qualifications, personnel procedures and criteria must be consistent with the *Uniform Guidelines on Employee Selection Procedures* (43 FR 38290 August 25, 1978) OPM should consider the following in providing guidance to agencies:

1. *External Recruitment Programs*. a. Such programs should focus on grade levels and/or job categories where underrepresentation has been identified and where external recruitment realistically will result in hiring opportunities.

Recruitment programs also should include a review of job functions to determine those jobs that may be better performed by persons who are bicultural and who have bilingual capabilities, and those jobs that can be performed by persons not fluent in English.

b. Where eligibility lists are used for filling jobs, it is recommended that the regulations require, an analysis by race, national origin and sex, to determine whether the list contains sufficient candidates from groups underrepresented in those jobs. OPM should require that where the list does not have such representation, expanded recruitment procedures be designed to assure that members of underrepresented groups qualified to perform the job(s) are included in the pool of applicants from which the selecting official makes the selection. Such expanded recruitment procedures may include additional external recruitment or various actions (such as described in 2. below) to reach members of these groups within the Federal workforce who are qualified or qualifiable for these jobs.

2. *Internal Recruitment Programs*. a. Internal recruitment programs should be designed by agencies to identify currently qualified or

qualifiable persons for job categories and series where underrepresentation prevails, according to the national determinations and the determinations made by each agency under these guidelines.

b. Further, OPM should work with Federal agencies to develop effective mechanisms for providing information on Federal job opportunities, targeted to reach Federal employees from underrepresented groups in all agencies in order to broaden the applicant pool.

V. *Consistency with Reorganization Plan No. 1 of 1978*. A. The Office shall develop regulations and implement this program in consultation with the Commission and with other affected agencies in such manner that their recruitment programs may be incorporated as a consistent and effective element of the agencies' national and regional equal employment opportunity plans. Each agency is required to implement such plans under the direction and guidance of the Commission in accordance with Section 717 of title VII of the Civil Rights Act of 1964, as amended, and Executive Order 12067.

B. Procedures shall be established by OPM and the Commission to assure appropriate consultation in development of the regulations.

C. Pursuant to Reorganization Plan No. 1 and to Executive Order 12067 issued thereunder, the Commission will establish procedures to provide appropriate consultation and review of the program on a continuing basis, to maximize its effectiveness and eliminate any duplication, conflict or inconsistency in requirements for equal opportunity programs in the Federal agencies.

D. In preparing its annual report to the Congress pursuant to the Act, OPM should do so in consultation with the Commission.

[44 FR 22031, Apr. 13, 1979; 44 FR 76747, Dec. 28, 1979]

# PART 723—ENFORCEMENT OF NONDISCRIMINATION ON THE BASIS OF HANDICAP IN PROGRAMS OR ACTIVITIES CONDUCTED BY THE OFFICE OF PERSONNEL MANAGEMENT

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AUTHORITY: 29 U.S.C. 794.

SOURCE: 53 FR 25880, 25885, July 8, 1988, unless otherwise noted.

## § 723.101 Purpose.

The purpose of this regulation is to effectuate section 119 of the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, which amended section 504 of the Rehabilitation Act of 1973 to prohibit discrimination on the basis of handicap in programs or activities conducted by Executive agencies or the United States Postal Service.

## § 723.102 Application.

This regulation (§§ 723.101–723.170) applies to all programs or activities conducted by the agency, except for programs or activities conducted outside the United States that do not involve individuals with handicaps in the United States.

## § 723.103 Definitions.

For purposes of this regulation, the term—

*Assistant Attorney General* means the Assistant Attorney General, Civil Rights Division, United States Department of Justice.

*Auxiliary aids* means services or devices that enable persons with impaired sensory, manual, or speaking skills to have an equal opportunity to participate in, and enjoy the benefits of, programs or activities conducted by the agency. For example, auxiliary aids useful for persons with impaired vision include readers, Brailled materials, audio recordings, and other similar services and devices. Auxiliary aids useful for persons with impaired hearing include telephone handset amplifiers, telephones compatible with hearing aids, telecommunication devices for deaf persons (TDD's), interpreters,

notetakers, written materials, and other similar services and devices.

*Complete complaint* means a written statement that contains the complainant's name and address and describes the agency's alleged discriminatory action in sufficient detail to inform the agency of the nature and date of the alleged violation of section 504. It shall be signed by the complainant or by someone authorized to do so on his or her behalf. Complaints filed on behalf of classes or third parties shall describe or identify (by name, if possible) the alleged victims of discrimination.

*Facility* means all or any portion of buildings, structures, equipment, roads, walks, parking lots, rolling stock or other conveyances, or other real or personal property.

*Historic preservation programs* means programs conducted by the agency that have preservation of historic properties as a primary purpose.

*Historic properties* means those properties that are listed or eligible for listing in the National Register of Historic Places or properties designated as historic under a statute of the appropriate State or local government body.

*Individual with handicaps* means any person who has a physical or mental impairment that substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment.

As used in this definition, the phrase:

(1) *Physical or mental impairment* includes—

(i) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; and endocrine; or

(ii) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. The term *physical or mental impairment* includes, but is not limited to, such diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, and drug addiction and alcoholism.

(2) *Major life activities* includes functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(3) *Has a record of such an impairment* means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(4) *Is regarded as having an impairment* means—

(i) Has a physical or mental impairment that does not substantially limit major life activities but is treated by the agency as constituting such a limitation;

(ii) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or

(iii) Has none of the impairments defined in paragraph (1) of this definition but is treated by the agency as having such an impairment.

*Qualified individual with handicaps* means—

(1) With respect to preschool, elementary, or secondary education services provided by the agency, an individual with handicaps who is a member of a class of persons otherwise entitled by statute, regulation, or agency policy to receive education services from the agency;

(2) With respect to any other agency program or activity under which a person is required to perform services or to achieve a level of accomplishment, an individual with handicaps who meets the essential eligibility requirements and who can achieve the purpose of the program or activity without modifications in the program or activity that the agency can demonstrate would result in a fundamental alteration in its nature;

(3) With respect to any other program or activity, an individual with handicaps who meets the essential eligibility requirements for participation in, or receipt of benefits from, that program or activity; and

(4) *Qualified handicapped person* as that term is defined for purposes of employment in 29 CFR 1613.702(f), which is made applicable to this regulation by § 723.140.

*Section 504* means section 504 of the Rehabilitation Act of 1973 (Pub. L. 93–112, 87 Stat. 394 (29 U.S.C. 794)), as amended by the Rehabilitation Act Amendments of 1974 (Pub. L. 93–516, 88 Stat. 1617); the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978 (Pub. L. 95–602, 92 Stat. 2955); and the Rehabilitation Act Amendments of 1986 (Pub. L. 99–506, 100 Stat. 1810). As used in this regulation, section 504 applies only to programs or activities conducted by Executive agencies and not to federally assisted programs.

*Substantial impairment* means a significant loss of the integrity of finished materials, design quality, or special character resulting from a permanent alteration.

### §§ 723.104–723.109 [Reserved]

### § 723.110 Self-evaluation.

(a) The agency shall, by September 6, 1989, evaluate its current policies and practices, and the effects thereof, that do not or may not meet the requirements of this regulation and, to the extent modification of any such policies and practices is required, the agency shall proceed to make the necessary modifications.

(b) The agency shall provide an opportunity to interested persons, including individuals with handicaps or organizations representing individuals with handicaps, to participate in the self-evaluation process by submitting comments (both oral and written).

(c) The agency shall, for at least three years following completion of the self-evaluation, maintain on file and make available for public inspection:

(1) A description of areas examined and any problems identified; and

(2) A description of any modifications made.

### § 723.111 Notice.

The agency shall make available to employees, applicants, participants, beneficiaries, and other interested persons such information regarding the provisions of this regulation and its applicability to the programs or activities conducted by the agency, and make such information available to them in such manner as the head of the agency finds necessary to apprise such persons of the protections against discrimination assured them by section 504 and this regulation.

### §§ 723.112–723.129 [Reserved]

### § 723.130 General prohibitions against discrimination.

(a) No qualified individual with handicaps shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity conducted by the agency.

(b)(1) The agency, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of handicap—

(i) Deny a qualified individual with handicaps the opportunity to participate in or benefit from the aid, benefit, or service;

(ii) Afford a qualified individual with handicaps an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;

(iii) Provide a qualified individual with handicaps with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others;

(iv) Provide different or separate aid, benefits, or services to individuals with handicaps or to any class of individuals with handicaps than is provided to others unless such action is necessary to provide qualified individuals with handicaps with aid, benefits, or services that are as effective as those provided to others;

(v) Deny a qualified individual with handicaps the opportunity to participate as a member of planning or advisory boards;

(vi) Otherwise limit a qualified individual with handicaps in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving the aid, benefit, or service.

(2) The agency may not deny a qualified individual with handicaps the opportunity to participate in programs or activities that are not separate or different, despite the existence of permissibly separate or different programs or activities.

(3) The agency may not, directly or through contractual or other arrangements, utilize criteria or methods of administration the purpose or effect of which would—

(i) Subject qualified individuals with handicaps to discrimination on the basis of handicap; or

(ii) Defeat or substantially impair accomplishment of the objectives of a program or activity with respect to individuals with handicaps.

(4) The agency may not, in determining the site or location of a facility, make selections the purpose or effect of which would—

(i) Exclude individuals with handicaps from, deny them the benefits of, or otherwise subject them to discrimination under any program or activity conducted by the agency; or

(ii) Defeat or substantially impair the accomplishment of the objectives of a program or activity with respect to individuals with handicaps.

(5) The agency, in the selection of procurement contractors, may not use criteria that subject qualified individuals with handicaps to discrimination on the basis of handicap.

(6) The agency may not administer a licensing or certification program in a manner that subjects qualified individuals with handicaps to discrimination on the basis of handicap, nor may the agency establish requirements for the programs or activities of licensees or certified entities that subject qualified individuals with handicaps to discrimination on the basis of handicap. However, the programs or activities of entities that are licensed or certified by the agency are not, themselves, covered by this regulation.

(c) The exclusion of nonhandicapped persons from the benefits of a program limited by Federal statute or Executive order to individuals with handicaps or the exclusion of a specific class of individuals with handicaps from a program limited by Federal statute or Executive order to a different class of individuals with handicaps is not prohibited by this regulation.

(d) The agency shall administer programs and activities in the most integrated setting appropriate to the needs of qualified individuals with handicaps.

**§§ 723.131–723.139 [Reserved]**

**§ 723.140 Employment.**

No qualified individual with handicaps shall, on the basis of handicap, be subject to discrimination in employment under any program or activity conducted by the agency. The definitions, requirements, and procedures of section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791), as established by the Equal Employment Opportunity Commission in 29 CFR part 1613, shall apply to employment in federally conducted programs or activities.

**§§ 723.141–723.148 [Reserved]**

**§ 723.149 Program accessibility: Discrimination prohibited.**

Except as otherwise provided in § 723.150, no qualified individual with handicaps shall, because the agency's facilities are inaccessible to or unusable by individuals with handicaps, be denied the benefits of, be excluded from participation in, or otherwise be subjected to discrimination under any program or activity conducted by the agency.

**§ 723.150 Program accessibility: Existing facilities.**

(a) *General.* The agency shall operate each program or activity so that the program or activity, when viewed in its entirety, is readily accessible to and usable by individuals with handicaps. This paragraph does not—

(1) Necessarily require the agency to make each of its existing facilities accessible to and usable by individuals with handicaps;

(2) In the case of historic preservation programs, require the agency to take any action that would result in a substantial impairment of significant

historic features of an historic property; or

(3) Require the agency to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens. In those circumstances where agency personnel believe that the proposed action would fundamentally alter the program or activity or would result in undue financial and administrative burdens, the agency has the burden of proving that compliance with § 723.150(a) would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the agency head or his or her designee after considering all agency resources available for use in the funding and operation of the conducted program or activity, and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action would result in such an alteration or such burdens, the agency shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that individuals with handicaps receive the benefits and services of the program or activity.

(b) *Methods*—(1) *General*. The agency may comply with the requirements of this section through such means as redesign of equipment, reassignment of services to accessible buildings, assignment of aides to beneficiaries, home visits, delivery of services at alternate accessible sites, alteration of existing facilities and construction of new facilities, use of accessible rolling stock, or any other methods that result in making its programs or activities readily accessible to and usable by individuals with handicaps. The agency is not required to make structural changes in existing facilities where other methods are effective in achieving compliance with this section. The agency, in making alterations to existing buildings, shall meet accessibility requirements to the extent compelled by the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151–4157), and any regulations implementing it. In choosing among available methods for meeting the requirements of this section, the agency shall give priority to those methods that offer programs and activities to qualified individuals with handicaps in the most integrated setting appropriate.

(2) *Historic preservation programs*. In meeting the requirements of § 723.150(a) in historic preservation programs, the agency shall give priority to methods that provide physical access to individuals with handicaps. In cases where a physical alteration to an historic property is not required because of § 723.150(a) (2) or (3), alternative methods of achieving program accessibility include—

(i) Using audio-visual materials and devices to depict those portions of an historic property that cannot otherwise be made accessible;

(ii) Assigning persons to guide individuals with handicaps into or through portions of historic properties that cannot otherwise be made accessible; or

(iii) Adopting other innovative methods.

(c) *Time period for compliance*. The agency shall comply with the obligations established under this section by November 7, 1988, except that where structural changes in facilities are undertaken, such changes shall be made by September 6, 1991, but in any event as expeditiously as possible.

(d) *Transition plan*. In the event that structural changes to facilities will be undertaken to achieve program accessibility, the agency shall develop, by March 6, 1989, a transition plan setting forth the steps necessary to complete such changes. The agency shall provide an opportunity to interested persons, including individuals with handicaps or organizations representing individuals with handicaps, to participate in the development of the transition plan by submitting comments (both oral and written). A copy of the transition plan shall be made available for public inspection. The plan shall, at a minimum—

(1) Identify physical obstacles in the agency's facilities that limit the accessibility of its programs or activities to individuals with handicaps;

(2) Describe in detail the methods that will be used to make the facilities accessible;

(3) Specify the schedule for taking the steps necessary to achieve compliance with this section and, if the time period of the transition plan is longer than one year, identify steps that will be taken during each year of the transition period; and

(4) Indicate the official responsible for implementation of the plan.

**§ 723.151 Program accessibility: New construction and alterations.**

Each building or part of a building that is constructed or altered by, on behalf of, or for the use of the agency shall be designed, constructed, or altered so as to be readily accessible to and usable by individuals with handicaps. The definitions, requirements, and standards of the Architectural Barriers Act (42 U.S.C. 4151–4157), as established in 41 CFR 101–19.600 to 101–19.607, apply to buildings covered by this section.

**§§ 723.152–723.159 [Reserved]**

**§ 723.160 Communications.**

(a) The agency shall take appropriate steps to ensure effective communication with applicants, participants, personnel of other Federal entities, and members of the public.

(1) The agency shall furnish appropriate auxiliary aids where necessary to afford an individual with handicaps an equal opportunity to participate in, and enjoy the benefits of, a program or activity conducted by the agency.

(i) In determining what type of auxiliary aid is necessary, the agency shall give primary consideration to the requests of the individual with handicaps.

(ii) The agency need not provide individually prescribed devices, readers for personal use or study, or other devices of a personal nature.

(2) Where the agency communicates with applicants and beneficiaries by telephone, telecommunication devices for deaf persons (TDD's) or equally effective telecommunication systems shall be used to communicate with persons with impaired hearing.

(b) The agency shall ensure that interested persons, including persons with impaired vision or hearing, can obtain information as to the existence and location of accessible services, activities, and facilities.

(c) The agency shall provide signage at a primary entrance to each of its inaccessible facilities, directing users to a location at which they can obtain information about accessible facilities. The international symbol for accessibility shall be used at each primary entrance of an accessible facility.

(d) This section does not require the agency to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens. In those circumstances where agency personnel believe that the proposed action would fundamentally alter the program or activity or would result in undue financial and administrative burdens, the agency has the burden of proving that compliance with § 723.160 would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the agency head or his or her designee after considering all agency resources available for use in the funding and operation of the conducted program or activity and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action required to comply with this section would result in such an alteration or such burdens, the agency shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that, to the maximum extent possible, individuals with handicaps receive the benefits and services of the program or activity.

**§§ 723.161–723.169 [Reserved]**

**§ 723.170 Compliance procedures.**

(a) Except as provided in paragraph (b) of this section, this section applies to all allegations of discrimination on the basis of handicap in programs and activities conducted by the agency.

(b) The agency shall process complaints alleging violations of section 504 with respect to employment according to the procedures established by the Equal Employment Opportunity

Commission in 29 CFR part 1613 pursuant to section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791).

(c) The Assistant Director for Personnel and EEO shall be responsible for coordinating implementation of this section. Complaints may be sent to the Assistant Director for Personnel and EEO, Office of Personnel Management, Room 1479, 1900 E St., NW., Washington, DC 20415.

(d) The agency shall accept and investigate all complete complaints for which it has jurisdiction. All complete complaints must be filed within 180 days of the alleged act of discrimination. The agency may extend this time period for good cause.

(e) If the agency receives a complaint over which it does not have jurisdiction, it shall promptly notify the complainant and shall make reasonable efforts to refer the complaint to the appropriate Government entity.

(f) The agency shall notify the Architectural and Transportation Barriers Compliance Board upon receipt of any complaint alleging that a building or facility that is subject to the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151–4157), is not readily accessible to and usable by individuals with handicaps.

(g) Within 180 days of the receipt of a complete complaint for which it has jurisdiction, the agency shall notify the complainant of the results of the investigation in a letter containing—

(1) Findings of fact and conclusions of law;

(2) A description of a remedy for each violation found; and

(3) A notice of the right to appeal.

(h) Appeals of the findings of fact and conclusions of law or remedies must be filed by the complainant within 90 days of receipt from the agency of the letter required by §723.170(g). The agency may extend this time for good cause.

(i) Timely appeals shall be accepted and processed by the head of the agency.

(j) The head of the agency shall notify the complainant of the results of the appeal within 60 days of the receipt of the request. If the head of the agency determines that additional information is needed from the complainant, he or she shall have 60 days from the date of receipt of the additional information to make his or her determination on the appeal.

(k) The time limits cited in paragraphs (g) and (j) of this section may be extended with the permission of the Assistant Attorney General.

(l) The agency may delegate its authority for conducting complaint investigations to other Federal agencies, except that the authority for making the final determination may not be delegated to another agency.

[53 FR 25880 and 25885, July 8, 1988, as amended at 53 FR 25880, July 8, 1988]

# PART 724—IMPLEMENTATION OF TITLE II OF THE NOTIFICATION AND FEDERAL EMPLOYEE ANTIDISCRIMINATION AND RETALIATION ACT OF 2002

## Subpart A—Reimbursement of Judgment Fund

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AUTHORITY: Sec. 204 of Pub. L. 107–174, 116 Stat. 566; Presidential Memorandum dated July 8, 2003, ''Delegation of Authority Under Section 204(a) of the Notification and Federal Employee Antidiscrimination Act of 2002.''

SOURCE: 71 FR 27187, May 10, 2006, unless otherwise noted.

## Subpart A—Reimbursement of Judgement Fund

### § 724.101 Purpose and scope.

This subpart implements Title II of the Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002 concerning the obligation of Federal agencies to reimburse the Judgment Fund for payments. The regulations describe agency obligations and the procedures for reimbursement and compliance.

### § 724.102 Definitions.

In this part:

*Agency* means an Executive agency as defined in 5 U.S.C. 105, the United States Postal Service, or the Postal Rate Commission;

*Antidiscrimination Laws* refers to 5 U.S.C. 2302(b)(1), 5 U.S.C. 2302(b)(9) as applied to conduct described in 5 U.S.C. 2302(b)(1), 29 U.S.C. 206(d), 29 U.S.C. 631, 29 U.S.C. 633a, 29 U.S.C. 791 and 42 U.S.C. 2000e–16.

*Applicant for Federal employment* means an individual applying for employment in or under a Federal agency;

*Discipline* means any one or a combination of the following actions: reprimand, suspension without pay, reduction in grade or pay, or removal.

*Employee* means an individual employed in or under a Federal agency;

*Former Employee* means an individual formerly employed in or under a Federal agency;

*Judgment Fund* means the Judgment Fund established by 31 U.S.C. 1304;

*No FEAR Act* means the ''Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002;''

*Notice* means the written information provided by Federal agencies about the rights and protections available under Federal Antidiscrimination Laws and Whistleblower Protection Laws.

*Payment*, subject to the following exception, means a disbursement from the Judgment Fund on or after October 1, 2003, to an employee, former employee, or applicant for Federal employment, in accordance with 28 U.S.C. 2414, 2517, 2672, 2677 or with 31 U.S.C. 1304, that involves alleged discriminatory or retaliatory conduct described in 5 U.S.C. 2302(b)(1) and (b)(8) or (b)(9) as applied to conduct described in 5 U.S.C. 2302(b)(1) and/or (b)(8) or conduct described in 29 U.S.C. 206(d), 29 U.S.C. 631, 29 U.S.C. 633a, 29 U.S.C. 791 and 42 U.S.C. 2000e-16. For a proceeding involving more than one disbursement from the Judgment Fund, however, this term shall apply only if the first disbursement occurred on or after October 1, 2003.

*Training* means the process by which Federal agencies instruct their employees regarding the rights and remedies applicable to such employees under the Federal Antidiscrimination Laws and Whistleblower Protection Laws.

*Whistleblower Protection Laws* refers to 5 U.S.C. 2302(b)(8) or 5 U.S.C. 2302(b)(9) as applied to conduct described in 5 U.S.C. 2302(b)(8).

[71 FR 27187, May 10, 2006, as amended at 71 FR 41098, July 20, 2006; 71 FR 78037, Dec. 28, 2006]

### § 724.103 Agency obligations.

A Federal agency (or its successor agency) must reimburse the Judgment Fund for payments covered by the No FEAR Act. Such reimbursement must be made within a reasonable time as described in § 724.104.

### § 724.104 Procedures.

(a) The procedures that agencies must use to reimburse the Judgment Fund are those prescribed by the Financial Management Service (FMS), the Department of the Treasury, in Chapter 3100 of the Treasury Financial Manual. All reimbursements to the Judgment Fund covered by the No FEAR Act are expected to be fully collectible from the agency. FMS will provide written notice to the agency's Chief Financial Officer within 15 business days after payment from the Judgment Fund.

(b) Within 45 business days of receiving the FMS notice, agencies must reimburse the Judgment Fund or contact FMS to make arrangements in writing for reimbursement.

### § 724.105 Compliance.

An agency's failure to reimburse the Judgment Fund, to contact FMS within 45 business days after receipt of an FMS notice for reimbursement under § 724.104 will be recorded on an annual

basis and posted on the FMS Web site. After an agency meets the requirements of § 724.104, the recording will be eliminated no later than the next annual posting process.

### § 724.106 Effective date.

This subpart is effective on October 1, 2003.

## Subpart B—Notification of Rights and Protections and Training

SOURCE: 71 FR 41098, July 20, 2006, unless otherwise noted.

### § 724.201 Purpose and scope.

(a) This subpart implements Title II of the Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002 concerning the obligation of Federal agencies to notify all employees, former employees, and applicants for Federal employment of the rights and protections available to them under the Federal Antidiscrimination Laws and Whistleblower Protection Laws. This subpart also implements Title II concerning the obligation of agencies to train their employees on such rights and remedies. The regulations describe agency obligations and the procedures for written notification and training.

(b) Pursuant to section 205 of the No FEAR Act, neither that Act nor this notice creates, expands or reduces any rights otherwise available to any employee, former employee or applicant under the laws of the United States, including the provisions of law specified in 5 U.S.C. 2302(d).

### § 724.202 Notice obligations.

(a) Each agency must provide notice to all of its employees, former employees, and applicants for Federal employment about the rights and remedies available under the Antidiscrimination Laws and Whistleblower Protection Laws applicable to them.

(b) The notice under this part must be titled, ''No FEAR Act Notice.''

(c) Each agency must provide initial notice within 60 calendar days after September 18, 2006. Thereafter, the notice must be provided by the end of each successive fiscal year and any posted materials must remain in place until replaced or revised.

(d) After the initial notice, each agency must provide the notice to new employees within 90 calendar days of entering on duty.

(e) Each agency must provide the notice to its employees in paper (e.g., letter, poster or brochure) and/or electronic form (e.g., e-mail, internal agency electronic site, or Internet Web site). Each agency must publish the *initial* notice in the FEDERAL REGISTER. Agencies with Internet Web sites must also post the notice on those Web sites, in compliance with section 508 of the Rehabilitation Act of 1973, as amended. For agencies with components that operate Internet Web sites, the notice must be made available by hyperlinks from the Internet Web sites of both the component and the parent agency. An agency may meet its paper and electronic notice obligation to former employees and applicants by publishing the initial notice in the FEDERAL REGISTER and posting the notice on its Internet Web site if it has one.

(f) To the extent required by law and upon request by employees, former employees and applicants, each agency must provide the notice in alternative, accessible formats.

(g) Unless an agency is exempt from the cited statutory provisions, the following is the minimum text to be included in the notice. Each agency may incorporate additional information within the model paragraphs, as appropriate.

MODEL PARAGRAPHS

NO FEAR ACT NOTICE

On May 15, 2002, Congress enacted the ''Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002,'' which is now known as the No FEAR Act. One purpose of the Act is to ''require that Federal agencies be accountable for violations of antidiscrimination and whistleblower protection laws.'' Public Law 107–174, Summary. In support of this purpose, Congress found that ''agencies cannot be run effectively if those agencies practice or tolerate discrimination.'' Public Law 107–174, Title I, General Provisions, section 101(1).

The Act also requires this agency to provide this notice to Federal employees, former Federal employees and applicants for Federal employment to inform you of the rights and protections available to you under

Federal antidiscrimination and whistleblower protection laws.

ANTIDISCRIMINATION LAWS

A Federal agency cannot discriminate against an employee or applicant with respect to the terms, conditions or privileges of employment on the basis of race, color, religion, sex, national origin, age, disability, marital status or political affiliation. Discrimination on these bases is prohibited by one or more of the following statutes: 5 U.S.C. 2302(b)(1), 29 U.S.C. 206(d), 29 U.S.C. 631, 29 U.S.C. 633a, 29 U.S.C. 791 and 42 U.S.C. 2000e–16.

If you believe that you have been the victim of unlawful discrimination on the basis of race, color, religion, sex, national origin or disability, you must contact an Equal Employment Opportunity (EEO) counselor within 45 calendar days of the alleged discriminatory action, or, in the case of a personnel action, within 45 calendar days of the effective date of the action, before you can file a formal complaint of discrimination with your agency. *See, e.g.* 29 CFR 1614. If you believe that you have been the victim of unlawful discrimination on the basis of age, you must either contact an EEO counselor as noted above or give notice of intent to sue to the Equal Employment Opportunity Commission (EEOC) within 180 calendar days of the alleged discriminatory action. If you are alleging discrimination based on marital status or political affiliation, you may file a written complaint with the U.S. Office of Special Counsel (OSC) (*see* contact information below). In the alternative (or in some cases, in addition), you may pursue a discrimination complaint by filing a grievance through your agency's administrative or negotiated grievance procedures, if such procedures apply and are available.

WHISTLEBLOWER PROTECTION LAWS

A Federal employee with authority to take, direct others to take, recommend or approve any personnel action must not use that authority to take or fail to take, or threaten to take or fail to take, a personnel action against an employee or applicant because of disclosure of information by that individual that is reasonably believed to evidence violations of law, rule or regulation; gross mismanagement; gross waste of funds; an abuse of authority; or a substantial and specific danger to public health or safety, unless disclosure of such information is specifically prohibited by law and such information is specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs.

Retaliation against an employee or applicant for making a protected disclosure is prohibited by 5 U.S.C. 2302(b)(8). If you believe that you have been the victim of whistleblower retaliation, you may file a written complaint (Form OSC–11) with the U.S. Office of Special Counsel at 1730 M Street NW., Suite 218, Washington, DC 20036–4505 or online through the OSC Web site—*http://www.osc.gov*.

RETALIATION FOR ENGAGING IN PROTECTED ACTIVITY

A Federal agency cannot retaliate against an employee or applicant because that individual exercises his or her rights under any of the Federal antidiscrimination or whistleblower protection laws listed above. If you believe that you are the victim of retaliation for engaging in protected activity, you must follow, as appropriate, the procedures described in the Antidiscrimination Laws and Whistleblower Protection Laws sections or, if applicable, the administrative or negotiated grievance procedures in order to pursue any legal remedy.

DISCIPLINARY ACTIONS

Under the existing laws, each agency retains the right, where appropriate, to discipline a Federal employee for conduct that is inconsistent with Federal Antidiscrimination and Whistleblower Protection Laws up to and including removal. If OSC has initiated an investigation under 5 U.S.C. 1214, however, according to 5 U.S.C. 1214(f), agencies must seek approval from the Special Counsel to discipline employees for, among other activities, engaging in prohibited retaliation. Nothing in the No FEAR Act alters existing laws or permits an agency to take unfounded disciplinary action against a Federal employee or to violate the procedural rights of a Federal employee who has been accused of discrimination

ADDITIONAL INFORMATION

For further information regarding the No FEAR Act regulations, refer to 5 CFR part 724, as well as the appropriate offices within your agency (e.g., EEO/civil rights office, human resources office or legal office). Additional information regarding Federal antidiscrimination, whistleblower protection and retaliation laws can be found at the EEOC Web site—*http://www.eeoc.gov* and the OSC Web site—*http://www.osc.gov*.

EXISTING RIGHTS UNCHANGED

Pursuant to section 205 of the No FEAR Act, neither the Act nor this notice creates, expands or reduces any rights otherwise available to any employee, former employee or applicant under the laws of the United States, including the provisions of law specified in 5 U.S.C. 2302(d).

### § 724.203 Training obligations.

(a) Each agency must develop a written plan to train all of its employees (including supervisors and managers) about the rights and remedies available under the Antidiscrimination Laws and Whistleblower Protection Laws applicable to them.

(b) Each agency shall have the discretion to develop the instructional materials and method of its training plan. Each agency training plan shall describe:

(1) The instructional materials and method of the training,

(2) The training schedule, and

(3) The means of documenting completion of training.

(c) Each agency may contact EEOC and/or OSC for information and/or assistance regarding the agency's training program. Neither agency, however, shall have authority under this regulation to review or approve an agency's training plan.

(d) Each agency is *encouraged* to implement its training as soon as possible, but *required* to complete the initial training under this subpart for all employees (including supervisors and managers) by December 17, 2006. Thereafter, each agency must train all employees on a training cycle of no longer than every 2 years.

(e) After the initial training is completed, each agency must train new employees as part of its agency orientation program or other training program. Any agency that does not use a new employee orientation program for this purpose must train new employees within 90 calendar days of the new employees' appointment.

## Subpart C—Annual Report

SOURCE: 71 FR 78037, Dec. 28, 2006, unless otherwise noted.

### § 724.301 Purpose and scope.

This subpart implements Title II of the Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002 concerning the obligation of Federal agencies to report on specific topics concerning Federal Antidiscrimination Laws and Whistleblower Protection Laws applicable to them covering employees, former employees, and applicants for Federal employment.

### § 724.302 Reporting obligations.

(a) Except as provided in paragraph (b) of this section, each agency must report no later than 180 calendar days after the end of each fiscal year the following items:

(1) The number of cases in Federal court pending or resolved in each fiscal year and arising under each of the respective provisions of the Federal Antidiscrimination Laws and Whistleblower Protection Laws applicable to them as defined in § 724.102 of subpart A of this part in which an employee, former Federal employee, or applicant alleged a violation(s) of these laws, separating data by the provision(s) of law involved;

(2) In the aggregate, for the cases identified in paragraph (a)(1) of this section and separated by provision(s) of law involved:

(i) The status or disposition (including settlement);

(ii) The amount of money required to be reimbursed to the Judgment Fund by the agency for payments as defined in § 724.102 of subpart A of this part;

(iii) The amount of reimbursement to the Fund for attorney's fees where such fees have been separately designated;

(3) In connection with cases identified in paragraph (a)(1) of this section, the total number of employees in each fiscal year disciplined as defined in § 724.102 of subpart A of this part and the specific nature, e.g., reprimand, etc., of the disciplinary actions taken, separated by the provision(s) of law involved;

(4) The final year-end data about discrimination complaints for each fiscal year that was posted in accordance with Equal Employment Opportunity Regulations at subpart G of title 29 of the Code of Federal Regulations (implementing section 301(c)(1)(B) of the No FEAR Act);

(5) Whether or not in connection with cases in Federal court, the number of employees in each fiscal year disciplined as defined in § 724.102 of subpart A of this part in accordance with any agency policy described in paragraph (a)(6) of this section. The specific

nature, e.g., reprimand, etc., of the disciplinary actions taken must be identified.

(6) A detailed description of the agency's policy for taking disciplinary action against Federal employees for conduct that is inconsistent with Federal Antidiscrimination Laws and Whistleblower Protection Laws or for conduct that constitutes another prohibited personnel practice revealed in connection with agency investigations of alleged violations of these laws;

(7) An analysis of the information provided in paragraphs (a)(1) through (6) of this section in conjunction with data provided to the Equal Employment Opportunity Commission in compliance with 29 CFR part 1614 subpart F of the Code of Federal Regulations. Such analysis must include:

(i) An examination of trends;

(ii) Causal analysis;

(iii) Practical knowledge gained through experience; and

(iv) Any actions planned or taken to improve complaint or civil rights programs of the agency with the goal of eliminating discrimination and retaliation in the workplace;

(8) For each fiscal year, any adjustment needed or made to the budget of the agency to comply with its Judgment Fund reimbursement obligation(s) incurred under § 724.103 of subpart A of this part; and

(9) The agency's written plan developed under § 724.203(a) of subpart B of this part to train its employees.

(b) The first report also must provide information for the data elements in paragraph (a) of this section for each of the five fiscal years preceding the fiscal year on which the first report is based to the extent that such data is available. Under the provisions of the No FEAR Act, the first report was due March 30, 2005 without regard to the status of the regulations. Thereafter, under the provisions of the No FEAR Act, agency reports are due annually on March 30th. Agencies that have submitted their reports before these regulations became final must ensure that they contain data elements 1 through 8 of paragraph (a) of this section and provide any necessary supplemental reports by April 25, 2007. Future reports must include data elements 1 through 9 of paragraph (a) of this section.

(c) Agencies must provide copies of each report to the following:

(1) Speaker of the U.S. House of Representatives;

(2) President Pro Tempore of the U.S. Senate;

(3) Committee on Governmental Affairs, U.S. Senate;

(4) Committee on Government Reform, U.S. House of Representatives;

(5) Each Committee of Congress with jurisdiction relating to the agency;

(6) Chair, Equal Employment Opportunity Commission;

(7) Attorney General; and

(8) Director, U.S. Office of Personnel Management.

## Subpart D—Best Practices

SOURCE: 71 FR 78037, Dec. 28, 2006, unless otherwise noted.

### § 724.401 Purpose and scope.

This subpart implements Title II of the Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002 concerning the obligation of the President or his designee (OPM) to conduct a comprehensive study of best practices in the executive branch for taking disciplinary actions against employees for conduct that is inconsistent with Federal Antidiscrimination and Whistleblower Protection Laws and the obligation to issue advisory guidelines for agencies to follow in taking appropriate disciplinary actions in such circumstances.

### § 724.402 Best practices study.

(a) OPM will conduct a comprehensive study in the executive branch to identify best practices for taking appropriate disciplinary actions against Federal employees for conduct that is inconsistent with Federal Antidiscrimination and Whistleblower Protection Laws.

(b) The comprehensive study will include a review of agencies' discussions of their policies for taking such disciplinary actions as reported under § 724.302 of subpart C of this part.

### § 724.403 Advisory guidelines.

OPM will issue advisory guidelines to Federal agencies incorporating the best practices identified under § 724.402 that agencies may follow to take appropriate disciplinary actions against employees for conduct that is inconsistent with Federal Antidiscrimination Laws and Whistleblower Laws.

### § 724.404 Agency obligations.

(a) Within 30 working days of issuance of the advisory guidelines required by § 724.403, each agency must prepare a written statement describing in detail:

(1) Whether it has adopted the guidelines and if it will fully follow the guidelines;

(2) If such agency has not adopted the guidelines, the reasons for non-adoption; and

(3) If such agency will not fully follow the guidelines, the reasons for the decision not to do so and an explanation of the extent to which the agency will not follow the guidelines.

(b) Each agency's written statement must be provided within the time limit stated in paragraph (a) of this section to the following:

(1) Speaker of the U.S. House of Representatives;

(2) President Pro Tempore of the U.S. Senate;

(3) Chair, Equal Employment Opportunity Commission;

(4) Attorney General; and

(5) Director, U.S. Office of Personnel Management.

## PART 730—NOTIFICATION OF POST-EMPLOYMENT RESTRICTIONS

Sec.

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730.102 Definitions.
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730.104 Notification.
730.105 Savings provision.

AUTHORITY: 5 U.S.C. 7302 and sec. 1125(b) of the National Defense Authorization Act for FY 2004, Pub. L. 108–136, 117 Stat. 1392.

SOURCE: 69 FR 61144, Oct. 15, 2004, unless otherwise noted.

### § 730.101 Purpose.

This part implements 5 U.S.C. 7302, which requires agencies to provide written notice to senior executives and other individuals covered by 18 U.S.C. 207(c)(2)(A)(ii) that they are subject to certain post-employment conflict-of-interest restrictions in 18 U.S.C. 207(c).

### § 730.102 Definitions.

*Agency* means an Executive agency as defined in 5 U.S.C. 105, but does not include the General Accounting Office.

*Senior executive* means a member of the Senior Executive Service (SES).

### § 730.103 Coverage.

(a) The following individuals are subject to the post-employment conflict-of-interest restrictions in 18 U.S.C. 207(c), as amended by section 1125(b)(1) of the National Defense Authorization Act for FY 2004:

(1) Any individual, including a senior executive, who is paid at a rate of basic pay equal to or greater than 86.5 percent of the rate for level II of the Executive Schedule; and

(2) Any individual, including a senior executive, who as of November 23, 2003, was paid at a rate of basic pay, exclusive of any locality-based comparability payments under 5 U.S.C. 5304, equal to or greater than the rate of basic pay for level 5 of the Senior Executive Service on that date (*i.e.*, $134,000). These employees are subject to the post-employment restrictions through November 24, 2005, without regard to any subsequent changes in position or pay.

(b) Nothing in this part affects individuals serving in positions described in 18 U.S.C. 207(c)(2)(A)(i), (iii), (iv), or (v).

### § 730.104 Notification.

(a) Agencies must provide written notification to senior executives and other individuals covered by the amendment to 18 U.S.C. 207(c)(2)(A)(ii) that they are subject to the post-employment conflict-of-interest restrictions in 18 U.S.C. 207, before, or as part of, any personnel action that affects the employee's coverage under 18 U.S.C. 207(c)(1), including when employment or service in a covered position is terminated. A copy of the written notice must be provided simultaneously to the Designated Agency Ethics Official (or his or her delegate). The

written notice must include information on the applicable penalties or injunctions that may be imposed under 18 U.S.C. 216(a), (b), and (c) for violations of the post-employment restrictions in 18 U.S.C. 207(c). The notice also must indicate that employees covered by 18 U.S.C. 207(c) are subject to 18 U.S.C. 207(f), which imposes additional post-employment restrictions on representing, aiding, or advising certain foreign entities.

(b) Notwithstanding paragraph (a) of this section, the post-employment restrictions in 18 U.S.C. 207(c) apply to covered employees without regard to whether they receive written notice from their employing agency.

### § 730.105 Savings provision.

Any post-employment restrictions established under 18 U.S.C. 207 and applicable prior to the first day of the first pay period beginning on or after January 1, 2004, remain in effect.

# PART 731—SUITABILITY

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AUTHORITY: 5 U.S.C. 1302, 3301, 7301; E.O. 10577, 3 CFR, 1954–1958 Comp., p. 218, as amended; E.O. 13467, 3 CFR, 2009 Comp., p. 198; E.O. 13488, 3 CFR, 2010 Comp., p. 189; 5 CFR, parts 1, 2 and 5.

SOURCE: 73 FR 20154, Apr. 15, 2008, unless otherwise noted.

## Subpart A—Scope

### § 731.101 Purpose.

(a) The purpose of this part is to establish criteria and procedures for making determinations of suitability and for taking suitability actions regarding employment in covered positions (as defined in paragraph (b) of this section) pursuant to 5 U.S.C. 3301, E.O. 10577 (3 CFR, 1954–1958 Comp., p. 218), as amended, and 5 CFR 1.1, 2.1(a) and 5.2. Section 3301 of title 5, United States Code, directs consideration of ''age, health, character, knowledge, and ability for the employment sought.'' E.O. 10577 (codified in relevant part at 5 CFR 1.1, 2.1(a) and 5.2) directs OPM to examine ''suitability'' for competitive Federal employment. This part concerns only determinations of ''suitability,'' that is, those determinations based on a person's character or conduct that may have an impact on the integrity or efficiency of the service. Determinations made and actions taken under this part are distinct from objections to eligibles or pass overs of preference eligibles, and OPM's and agencies' decisions on such requests, made under 5 U.S.C. 3318 and 5 CFR 332.406, as well as determinations of eligibility for assignment to, or retention in, sensitive national security positions made under E.O. 10450 (3 CFR,

1949–1953 Comp., p. 936), E.O. 12968, or similar authorities.

(b) *Definitions*. In this part:

*Applicant* means a person who is being considered or has been considered for employment.

*Appointee* means a person who has entered on duty and is in the first year of a subject-to-investigation appointment (as defined in § 731.104).

*Core Duty* means a continuing responsibility that is of particular importance to the relevant covered position or the achievement of an agency's mission.

*Covered position* means a position in the competitive service, a position in the excepted service where the incumbent can be noncompetitively converted to the competitive service, and a career appointment to a position in the Senior Executive Service.

*Days* means calendar days unless otherwise specified in this part.

*Employee* means a person who has completed the first year of a subject-to-investigation appointment.

*Material* means, in reference to a statement, one that is capable of influencing, affects, or has a natural tendency to affect, an official decision even if OPM or an agency does not rely upon it.

*Suitability action* means an outcome described in § 731.203 and may be taken only by OPM or an agency with delegated authority under the procedures in subparts C and D of this part.

*Suitability determination* means a decision by OPM or an agency with delegated authority that a person is suitable or is not suitable for employment in covered positions in the Federal Government or a specific Federal agency.

[73 FR 20154, Apr. 15, 2008, as amended at 73 FR 66492, Nov. 10, 2008]

### § 731.102 Implementation.

(a) An investigation conducted for the purpose of determining suitability under this part may not be used for any other purpose except as provided in a Privacy Act system of records notice published by the agency conducting the investigation.

(b) Under OMB Circular No. A–130 Revised, issued November 20, 2000, agencies are to implement and maintain a program to ensure that adequate protection is provided for all automated information systems. Agency personnel screening programs may be based on procedures developed by OPM. The Computer Security Act of 1987 (Pub. L. 100–235) provides additional requirements for Federal automated information systems.

(c) OPM may set forth policies, procedures, criteria, standards, quality control procedures, and supplementary guidance for the implementation of this part in OPM issuances.

### § 731.103 Delegation to agencies.

(a) Subject to the limitations and requirements of paragraphs (f) and (g) of this section, OPM delegates to the heads of agencies authority for making suitability determinations and taking suitability actions (including limited, agency-specific debarments under § 731.205) in cases involving *applicants* for and *appointees* to covered positions in the agency.

(b) When an agency, acting under delegated authority from OPM, determines that a Governmentwide debarment by OPM under § 731.204(a) may be an appropriate action, it must refer the case to OPM for debarment consideration. Agencies must make these referrals prior to any proposed suitability action, but only after sufficient resolution of the suitability issue(s), through subject contact or investigation, to determine if a Governmentwide debarment appears warranted.

(c) Agencies exercising authority under this part by delegation from OPM must adhere to OPM requirements as stated in this part and OPM's issuances described in § 731.102(c). Agencies must also implement policies and maintain records demonstrating that they employ reasonable methods to ensure adherence to these OPM issuances.

(d) Agencies may begin to determine an applicant's suitability at any time during the hiring process. Because suitability issues may not arise until late in the application/appointment process, it is generally more practical and cost-effective to first ensure that the applicant is eligible for the position, deemed by OPM or a Delegated Examining Unit to be among the best qualified, and/or within reach of selection.

However, in certain circumstances, such as filling law enforcement positions, an agency may choose to initiate a preliminary suitability review at the time of application. Whether or not a person is likely to be eligible for selection, OPM must be informed in all cases where there is evidence of material, intentional false statements, or deception or fraud in examination or appointment, and OPM will take a suitability action where warranted.

(e) When an agency, exercising authority under this part by delegation from OPM, makes a suitability determination or changes a tentative favorable placement decision to an unfavorable decision, based on an OPM report of investigation or upon an investigation conducted pursuant to OPM-delegated authority, the agency must:

(1) Ensure that the records used in making the determination are accurate, relevant, timely, and complete to the extent reasonably necessary to ensure fairness to the person in any determination;

(2) Ensure that all applicable administrative procedural requirements provided by law, the regulations in this part, and OPM issuances as described in § 731.102(c) have been observed;

(3) Consider all available information in reaching its final decision on a suitability determination or suitability action, except information furnished by a non-corroborated confidential source, which may be used only for limited purposes, such as information used to develop a lead or in interrogatories to a subject, if the identity of the source is not compromised in any way; and

(4) Keep any record of the agency suitability determination or action as required by OPM issuances as described in § 731.102(c).

(f) OPM may revoke an agency's delegation to make suitability determinations and take suitability actions under this part if an agency fails to conform to this part or OPM issuances as described in § 731.102(c).

(g) OPM retains jurisdiction to make final determinations and take actions in all suitability cases where there is evidence that there has been a material, intentional false statement, or deception or fraud in examination or appointment. OPM also retains jurisdiction over all suitability cases involving a refusal to furnish testimony as required by § 5.4 of this chapter. Agencies must refer these cases to OPM for suitability determinations and suitability actions under this authority. Although no prior approval is needed, notification to OPM is required if the agency wants to take, or has taken, action under its own authority (5 CFR part 315, 5 CFR part 359, or 5 CFR part 752) in cases involving material, intentional false statement in examination or appointment, or deception or fraud in examination or appointment; or refusal to furnish testimony as required by § 5.4 of this title. In addition, paragraph (a) of this section notwithstanding, OPM may, in its discretion, exercise its jurisdiction under this part in any case it deems necessary.

EFFECTIVE DATE NOTE: At 81 FR 86561, Dec. 1, 2016, § 731.103 was amended by revising paragraph (d), effective Jan. 3, 2017. For the convenience of the user, the revised text is set forth as follows:

**§ 731.103 Delegation to agencies.**

* * * * *

(d)(1) A hiring agency may not make specific inquiries concerning an applicant's criminal or credit background of the sort asked on the OF–306 or other forms used to conduct suitability investigations for Federal employment (*i.e.*, inquiries into an applicant's criminal or adverse credit history) unless the hiring agency has made a conditional offer of employment to the applicant. Agencies may make inquiries into an applicant's Selective Service registration, military service, citizenship status, or previous work history, prior to making a conditional offer of employment to an applicant. However, in certain situations, agencies may have a business need to obtain information about the suitability or background of applicants earlier in the process. If so, agencies must request an exception from the Office of Personnel Management, in accordance with the provisions of 5 CFR part 330 subpart M.

(2) OPM reserves the right to undertake a determination of suitability based upon evidence of falsification or fraud relating to an examination or appointment at any point when information giving rise to such a charge is discovered. OPM must be informed in all cases where there is evidence of material, intentional false statements, or deception or fraud in examination or appointment,

and OPM will take a suitability action where warranted.

* * * * *

**§ 731.104 Appointments subject to investigation.**

(a) To establish a person's suitability for employment, appointments to covered positions identified in § 731.101 require the person to undergo an investigation by OPM or by an agency with delegated authority from OPM to conduct investigations. However, except as provided in paragraph (b)(2), an appointment will not be subject to investigation when the person being appointed has undergone a background investigation and the appointment involves:

(1) Appointment or conversion to an appointment in a covered position if the person has been serving continuously with the agency for at least 1 year in one or more covered positions subject to investigation;

(2) Transfer to a covered position, provided the person has been serving continuously for at least 1 year in a covered position subject to investigation;

(3) Transfer or appointment from an excepted service position that is not a covered position to a covered position, provided the person has been serving continuously for at least 1 year in a position where the person has been determined fit for appointment based on criteria equivalent to the factors provided at 5 CFR 731.202;

(4) Appointment to a covered position from a position as an employee working as a Federal Government contract employee, provided the person has been serving continuously for at least 1 year in a job where a Federal agency determined the contract employee was fit to perform work on the contract based on criteria equivalent to the factors provided at 5 CFR 731.202; or

(5) Appointment to a covered position where there has been a break in service of less than 24 months, and the service immediately preceding the break was in a covered position, an excepted service position, or a contract employee position described in paragraphs (a)(1) to (a)(4) of this section.

(b)(1) Either OPM or an agency with delegated suitability authority may investigate and take a suitability action against an applicant, appointee, or employee in accordance with § 731.105. There is no time limit on the authority of OPM or an agency with delegated suitability authority to conduct the required investigation of an applicant who has been appointed to a position. An employee does not have to serve a new probationary or trial period merely because his or her appointment is subject to investigation under this section. An employee's probationary or trial period is not extended because his or her appointment is subject to investigation under this section.

(2) An appointment to a covered position also will be subject to investigation when:

(i) The covered position requires a higher level of investigation than previously conducted for the person being appointed; or

(ii) An agency obtains new information in connection with the person's appointment that calls into question the person's suitability under § 731.202;

(3) Suitability determinations must be made for all appointments that are subject to investigation.

(c) Positions that are intermittent, seasonal, per diem, or temporary, not to exceed an aggregate of 180 days per year in either a single continuous appointment or series of appointments, do not require a background investigation as described in § 731.106(c)(1). The employing agency, however, must conduct such checks as it deems appropriate to ensure the suitability of the person.

(d) Reinvestigation requirements under § 731.106 for public trust positions are not affected by this section.

(e) For purposes of this section, ''criteria equivalent to the factors provided at 5 CFR 731.202'' are criteria that provide adequate assurance that the person to be appointed, converted to an appointment, or transferred is suitable to be employed in a covered position, as determined by OPM, in issuances under this regulation. A decision by OPM, or by an agency applying guidance from OPM, that a prior fitness determination was not based on criteria equivalent to the factors provided at 5

CFR 731.202, and that a new investigation or adjudication is necessary is not subject to review under section 731.501 of this part.

[73 FR 20154, Apr. 15, 2008, as amended at 73 FR 66492, Nov. 11, 2008; 76 FR 69608, Nov. 9, 2011]

### § 731.105 Authority to take suitability actions.

(a) Neither OPM nor an agency acting under delegated authority may take a suitability action in connection with any application for, or appointment to, a position that is not subject to investigation or check under § 731.104.

(b) OPM may take a suitability action under this part against an *applicant* or *appointee* based on any of the criteria of § 731.202;

(c) Except as limited by § 731.103(g), an agency, exercising delegated authority, may take a suitability action under this part against an *applicant* or *appointee* based on the criteria of § 731.202;

(d) OPM may take a suitability action under this part against an *employee* based on the criteria of § 731.202(b)(3), (4), or (8).

(e) An agency may not take a suitability action against an *employee*. Nothing in this part precludes an agency from taking an adverse action against an employee under the procedures and standards of part 752 of this chapter or terminating a probationary employee under the procedures of part 315 or part 359 of this chapter. An agency must notify OPM to the extent required in § 731.103(g) if it wants to take, or has taken, action under these authorities.

### § 731.106 Designation of public trust positions and investigative requirements.

(a) *Risk designation*. Agency heads must designate every covered position within the agency at a high, moderate, or low risk level as determined by the position's potential for adverse impact to the efficiency or integrity of the service. OPM will provide an example of a risk designation system for agency use in an OPM issuance as described in § 731.102(c).

(b) *Public Trust positions*. Positions at the high or moderate risk levels would normally be designated as ''Public Trust'' positions. Such positions may involve policy making, major program responsibility, public safety and health, law enforcement duties, fiduciary responsibilities or other duties demanding a significant degree of public trust, and positions involving access to or operation or control of financial records, with a significant risk for causing damage or realizing personal gain.

(c) *Investigative requirements*. (1) Persons receiving an appointment made subject to investigation under this part must undergo a background investigation. OPM is authorized to establish minimum investigative requirements correlating to risk levels. Investigations should be initiated before appointment but no later than 14 calendar days after placement in the position.

(2) All positions subject to investigation under this part must also receive a sensitivity designation of Special-Sensitive, Critical-Sensitive, or Noncritical-Sensitive, when appropriate. This designation is complementary to the risk designation, and may have an effect on the position's investigative requirement. Sections 732.201 and 732.202 of this chapter detail the various sensitivity levels and investigative requirements. Procedures for determining investigative requirements for all positions based upon risk and sensitivity will be published in OPM issuances, as described in §§ 731.102(c) and 732.201(b).

(3) If suitability issues develop prior to the required investigation, OPM or the agency may conduct an investigation sufficient to resolve the issues and support a suitability determination or action, if warranted. If the person is appointed, the minimum level of investigation must be conducted as required by paragraph (c)(1) of this section.

(d) *Reinvestigation requirements*. (1) Agencies must ensure that reinvestigations are conducted and a determination made regarding continued employment of persons occupying public trust positions at least once every 5 years. The nature of these reinvestigations and any additional requirements and

parameters will be established in supplemental guidance issued by OPM.

(2) If, prior to the next required reinvestigation, a separate investigation is conducted to determine a person's eligibility (or continued eligibility) for access to classified information or to hold a sensitive position, or as a result of a change in risk level as provided in paragraph (e) of this section, and that investigation meets or exceeds the requirements for a public trust reinvestigation, a new public trust reinvestigation is not required. Such a completed investigation restarts the cycle for a public trust reinvestigation for that person.

(3) Agencies must notify all employees covered by this section of the reinvestigation requirements under this paragraph.

(e) *Risk level changes.* If an employee or appointee experiences a change to a higher position risk level due to promotion, demotion, or reassignment, or the risk level of the employee's or appointee's position is changed to a higher level, the employee or appointee may remain in or encumber the position. Any upgrade in the investigation required for the new risk level should be initiated within 14 calendar days after the promotion, demotion, reassignment or new designation of risk level is final.

(f) *Completed investigations.* Any suitability investigation (or reinvestigation) completed by an agency under paragraphs (d) and (e) of this section must result in a determination by the employing agency of whether the findings of the investigation would justify an action under this part or under another applicable authority, such as part 315, 359, or 752 of this chapter. Section 731.103 addresses whether an agency may take an action under this part, and whether the matter must be referred to OPM for debarment consideration.

[73 FR 20154, Apr. 15, 2008, as amended at 73 FR 66492, Nov. 11, 2008; 76 FR 69608, Nov. 9, 2011]

## Subpart B—Suitability Determinations and Actions

### § 731.201 Standard.

The standard for a suitability action defined in § 731.203 and taken against an applicant, appointee, or employee is that the action will protect the integrity or promote the efficiency of the service.

### § 731.202 Criteria for making suitability determinations.

(a) *General.* OPM, or an agency to which OPM has delegated authority, must base its suitability determination on the presence or absence of one or more of the specific factors (charges) in paragraph (b) of this section.

(b) *Specific factors.* In determining whether a person is suitable for Federal employment, only the following factors will be considered a basis for finding a person unsuitable and taking a suitability action:

(1) Misconduct or negligence in employment;

(2) Criminal or dishonest conduct;

(3) Material, intentional false statement, or deception or fraud in examination or appointment;

(4) Refusal to furnish testimony as required by § 5.4 of this chapter;

(5) Alcohol abuse, without evidence of substantial rehabilitation, of a nature and duration that suggests that the applicant or appointee would be prevented from performing the duties of the position in question, or would constitute a direct threat to the property or safety of the applicant or appointee or others;

(6) Illegal use of narcotics, drugs, or other controlled substances without evidence of substantial rehabilitation;

(7) Knowing and willful engagement in acts or activities designed to overthrow the U.S. Government by force; and

(8) Any statutory or regulatory bar which prevents the lawful employment of the person involved in the position in question.

(c) *Additional considerations.* OPM and agencies must consider any of the following additional considerations to the extent OPM or the relevant agency, in its sole discretion, deems any of them pertinent to the individual case:

(1) The nature of the position for which the person is applying or in which the person is employed;

(2) The nature and seriousness of the conduct;

(3) The circumstances surrounding the conduct;

(4) The recency of the conduct;

(5) The age of the person involved at the time of the conduct;

(6) Contributing societal conditions; and

(7) The absence or presence of rehabilitation or efforts toward rehabilitation.

(d) *Reciprocity*. An agency cannot make a new determination under this section for a person who has already been determined suitable or fit based on character or conduct unless a new investigation is required under § 731.104 or § 731.106, or no new investigation is required but the investigative record on file for the person shows conduct that is incompatible with the core duties of the relevant covered position.

[73 FR 20154, Apr. 15, 2008, as amended at 73 FR 66493, Nov. 11, 2008]

### § 731.203 Suitability actions by OPM and other agencies.

(a) For purposes of this part, a suitability action is one or more of the following:

(1) Cancellation of eligibility;

(2) Removal;

(3) Cancellation of reinstatement eligibility; and

(4) Debarment.

(b) A non-selection, or cancellation of eligibility for a specific position based on an objection to an eligible or pass over of a preference eligible under 5 CFR 332.406, is *not* a suitability action even if it is based on reasons set forth in § 731.202.

(c) A suitability action may be taken against an applicant or an appointee when OPM or an agency exercising delegated authority under this part finds that the applicant or appointee is unsuitable for the reasons cited in § 731.202, subject to the agency limitations of § 731.103(g).

(d) OPM may require that an appointee or an employee be removed on the basis of a material, intentional false statement, deception or fraud in examination or appointment; refusal to furnish testimony as required by § 5.4 of this chapter; or a statutory or regulatory bar which prevents the person's lawful employment.

(e) OPM may cancel any reinstatement eligibility obtained as a result of a material, intentional false statement, deception or fraud in examination or appointment.

(f) An action to remove an appointee or employee *for suitability reasons* under this part is not an action under part 315, 359, or 752 of this chapter. Where behavior covered by this part may also form the basis for an action under parts 315, 359, or 752 of this chapter, an agency may take the action under part 315, 359, or 752 of this chapter, as appropriate, instead of under this part. An agency must notify OPM to the extent required in § 731.103(g) if it wants to take, or has taken, action under these authorities.

(g) Agencies do not need approval from OPM before taking unfavorable suitability actions. However, they are required to report to OPM all unfavorable suitability actions taken under this part within 30 days after they take the action. Also, all actions based on an OPM investigation must be reported to OPM as soon as possible and in no event later than 90 days after receipt of the final report of investigation.

### § 731.204 Debarment by OPM.

(a) When OPM finds a person unsuitable for any reason listed in § 731.202, OPM, in its discretion, may, for a period of not more than 3 years from the date of the unfavorable suitability determination, deny that person examination for, and appointment to, covered positions.

(b) OPM may impose an additional period of debarment following the expiration of a period of OPM or agency debarment, but only after the person again becomes an applicant, appointee, or employee subject to OPM's suitability jurisdiction, and his or her suitability is determined in accordance with the procedures of this part. An additional debarment period may be based in whole or in part on the same conduct on which the previous suitability action was based, when warranted, or new conduct.

(c) OPM, in its sole discretion, determines the duration of any period of debarment imposed under this section.

### § 731.205 Debarment by agencies.

(a) Subject to the provisions of § 731.103, when an agency finds an applicant or appointee unsuitable based upon reasons listed in § 731.202, the agency may, for a period of not more than 3 years from the date of the unfavorable suitability determination, deny that person examination for, and appointment to, either all, or specific covered, positions within that agency.

(b) The agency may impose an additional period of debarment following the expiration of a period of OPM or agency debarment, but only after the person again becomes an applicant or appointee subject to the agency's suitability jurisdiction, and his or her suitability is determined in accordance with the procedures of this part. An additional debarment period may be based in whole or in part on the same conduct on which the previous suitability action was based, when warranted, or new conduct.

(c) The agency, in its sole discretion, determines the duration of any period of debarment imposed under this section.

(d) The agency is responsible for enforcing the period of debarment and taking appropriate action if a person applies for, or is inappropriately appointed to, a position at that agency during the debarment period. This responsibility does not limit OPM's authority to exercise jurisdiction itself and take any action OPM deems appropriate.

### § 731.206 Reporting requirements.

Agencies must report to OPM the level or nature, result, and completion date of each background investigation or reinvestigation, each agency decision based on such investigation or reinvestigation, and any personnel action taken based on such investigation or reinvestigation, as required in OPM issuances.

[76 FR 69608, Nov. 9, 2011]

## Subpart C—OPM Suitability Action Procedures

### § 731.301 Scope.

This subpart covers OPM-initiated suitability actions against an *applicant*, *appointee*, or *employee*.

### § 731.302 Notice of proposed action.

(a) OPM will notify the applicant, appointee, or employee (hereinafter, the ''respondent'') in writing of the proposed action, the charges against the respondent, and the availability of review, upon request, of the materials relied upon. The notice will set forth the specific reasons for the proposed action and state that the respondent has the right to answer the notice in writing. The notice will further inform the respondent of the time limit for the answer as well as the address to which an answer must be made.

(b) The notice will inform the respondent that he or she may be represented by a representative of the respondent's choice and that if the respondent wishes to have such a representative, the respondent must designate the representative in writing.

(c) OPM will serve the notice of proposed action upon the respondent by mail or hand delivery no less than 30 days prior to the effective date of the proposed action to the respondent's last known residence or duty station.

(d) If the respondent encumbers a position covered by this part on the date the notice is served, the respondent is entitled to be retained in a pay status during the notice period.

(e) OPM will send a copy of the notice to any employing agency that is involved.

### § 731.303 Answer.

(a) *Respondent's answer*. A respondent may answer the charges in writing and furnish documentation and/or affidavits in support of the answer. To be timely, a written answer must be submitted no more than 30 days after the date of the notice of proposed action.

(b) *Agency's answer*. An employing agency may also answer the notice of proposed action. The time limit for filing such an answer is 30 days from the

date of the notice. In reaching a decision, OPM will consider any answer the agency makes.

### § 731.304 Decision.

The decision regarding the final suitability action will be in writing, be dated, and inform the respondent of the reasons for the decision and that an unfavorable decision may be appealed in accordance with subpart E of this part. OPM will also notify the respondent's employing agency of its decision. If the decision requires removal, the employing agency must remove the appointee or employee from the rolls within 5 work days of receipt of OPM's final decision.

## Subpart D—Agency Suitability Action Procedures

### § 731.401 Scope.

This subpart covers agency-initiated suitability actions against an *applicant* or *appointee*.

### § 731.402 Notice of proposed action.

(a) The agency must notify the applicant or appointee (hereinafter, the ''respondent'') in writing of the proposed action, the charges against the respondent, and the availability for review, upon request, of the materials relied upon. The notice must set forth the specific reasons for the proposed action and state that the respondent has the right to answer the notice in writing. The notice must further inform the respondent of the time limit for the answer as well as the address to which such answer must be delivered.

(b) The notice must inform the respondent that he or she may be represented by a representative of the respondent's choice and that if the respondent wishes to have such a representative, the respondent must designate the representative in writing.

(c) The agency must serve the notice of proposed action upon the respondent by mail or hand delivery no less than 30 days prior to the effective date of the proposed action to the respondent's last known residence or duty station.

(d) If the respondent is employed in a position covered by this part on the date the notice is served, the respondent is entitled to be retained in a pay status during the notice period.

### § 731.403 Answer.

A respondent may answer the charges in writing and furnish documentation and/or affidavits in support of the answer. To be timely, a written answer must be submitted no more than 30 days after the date of the notice of proposed action.

### § 731.404 Decision.

The decision regarding the final action must be in writing, be dated, and inform the respondent of the reasons for the decision and that an unfavorable decision may be appealed in accordance with subpart E of this part. If the decision requires removal, the employing agency must remove the appointee from the rolls within 5 work days of the agency's decision.

## Subpart E—Appeal to the Merit Systems Protection Board

### § 731.501 Appeal to the Merit Systems Protection Board.

(a) *Appeal to the Merit Systems Protection Board.* When OPM or an agency acting under delegated authority under this part takes a suitability action against a person, that person may appeal the action to the Merit Systems Protection Board (hereinafter ''Board'').

(b) *Decisions by the Merit Systems Protection Board.* (1) If the Board finds that one or more of the charges brought by OPM or an agency against the person is supported by a preponderance of the evidence, regardless of whether all specifications are sustained, it must affirm the suitability determination. The Board must consider the record as a whole and make a finding on each charge and specification in making its decision.

(2) If the Board sustains fewer than all the charges, the Board must remand the case to OPM or the agency to determine whether the suitability action taken is appropriate based on the sustained charge(s). However, the agency must hold in abeyance a decision on remand until the person has exhausted all rights to seek review of the Board's decision, including court review.

(3) Once review is final, OPM or an agency will determine whether the action taken is appropriate based on the sustained charges and this determination will be final without any further appeal to the Board.

(c) *Appeal procedures.* The procedures for filing an appeal with the Board are found at part 1201 of this title.

## Subpart F—Savings Provision

### § 731.601 Savings provision.

No provision of the regulations in this part is to be applied in such a way as to affect any administrative proceeding pending on June 16, 2008. An administrative proceeding is deemed to be pending from the date of the agency or OPM ''notice of proposed action'' described in §§ 731.302 and 731.402.

# PART 732—NATIONAL SECURITY POSITIONS

### Subpart A—Scope

Sec.
732.101 Purpose.
732.102 Definition and applicability.

### Subpart B—Designation and Investigative Requirements

732.201 Sensitivity level designations and investigative requirements.
732.202 Waivers and exceptions to investigative requirements.
732.203 Periodic reinvestigation requirements.

### Subpart C—Due Process and Reporting

732.301 Due process.
732.302 Reporting to OPM.

### Subpart D—Security and Related Determinations

732.401 Reemployment eligibility of certain former Federal employees.

AUTHORITY: 5 U.S.C. 3301, 3302, 7312; 50 U.S.C. 403; E.O. 10450, 3 CFR, 1949–1953 Comp., p. 936.

SOURCE: 56 FR 18654, Apr. 23, 1991, unless otherwise noted.

## Subpart A—Scope

### § 732.101 Purpose.

This part sets forth certain requirements and procedures which each agency shall observe for determining national security positions pursuant to Executive Order 10450—Security Requirements for Government Employment (April 27, 1953), 18 FR 2489, 3 CFR 1949–1953 Comp., p. 936, as amended.

### § 732.102 Definition and applicability.

(a) For purposes of this part, the term ''national security position'' includes:

(1) Those positions that involve activities of the Government that are concerned with the protection of the nation from foreign aggression or espionage, including development of defense plans or policies, intelligence or counterintelligence activities, and related activities concerned with the preservation of the military strength of the United States; and

(2) Positions that require regular use of, or access to, classified information. Procedures and guidance provided in OPM issuances apply.

(b) The requirements of this part apply to competitive service positions, and to Senior Executive Service positions filled by career appointment, within the Executive Branch, and agencies may apply them to excepted service positions within the Executive Branch.

[56 FR 18654, Apr. 23, 1991, as amended at 66 FR 66711, Dec. 27, 2001]

## Subpart B—Designation and Investigative Requirements

### § 732.201 Sensitivity level designations and investigative requirements.

(a) For purposes of this part, the head of each agency shall designate, or cause to be designated, any position within the department or agency the occupant of which could bring about, by virtue of the nature of the position, a material adverse effect on the national security as a sensitive position at one of three sensitivity levels: Special-Sensitive, Critical-Sensitive, or Noncritical-Sensitive.

(b) Investigative requirements for each sensitivity level are provided in OPM issuances.

[56 FR 18654, Apr. 23, 1991, as amended at 66 FR 66711, Dec. 27, 2001]

### § 732.202 Waivers and exceptions to investigative requirements.

(a) *Waivers*—(1) *General*. A waiver of the preappointment investigative requirement contained in section 3(b) of Executive Order 10450 for employment in a sensitive national security position may be made only for a limited period: (i) In case of emergency if the head of the department or agency concerned finds that such action is necessary in the national interest; and (ii) when such finding is made a part of the records of the department or agency.

(2) *Specific waiver requirements*. (i) The preappointment investigative requirement may not be waived for appointment to positions designated Special-Sensitive under this part.

(ii) For positions designated Critical-Sensitive under this part, the records of the department or agency required by § 732.202(a)(1) of this part shall show what decision was made on obtaining prewaiver checks, as follows: (A) The nature of the emergency precluded obtaining prewaiver checks; or (B) checks were initiated but not all responses were received within 5 days; or (C) checks made and favorably completed are listed.

(iii) The waiver restriction is optional for positions designated Noncritical-Sensitive under this part.

(iv) When waiver is authorized, the required investigation must be initiated within 14 days of placement of the individual in the position.

(b) *Exceptions to investigative requirements*. (1) Pursuant to section 3(a) of E.O. 10450, the following positions are exempt from the investigative requirements of E.O. 10450, providing that the employing agency conducts such checks as it deems appropriate to insure that the employment or retention of individuals in these positions is clearly consistent with the interests of the national security:

(i) Positions that are intermittent, seasonal, per diem, or temporary, not to exceed an aggregate of 180 days in either a single continuous appointment or series of appointments; or

(ii) Positions filled by aliens employed outside the United States.

(2) Other positions that OPM, in its discretion, deems appropriate may be made exempt based on a written request to OPM by the agency head in whose department or agency the positions are located.

### § 732.203 Periodic reinvestigation requirements.

The incumbent of each position designated Special-Sensitive or Critical-Sensitive under this part shall be subject to periodic reinvestigation of a scope prescribed by OPM 5 years after placement, and at least once each succeeding 5 years. The employing agency will use the results of such periodic reinvestigation to determine whether the continued employment of the individual in a sensitive position is clearly consistent with the interests of the national security.

## Subpart C—Due Process and Reporting

### § 732.301 Due process.

When an agency makes an adjudicative decision under this part based on an OPM investigation, or when an agency, as a result of information in an OPM investigation, changes a tentative favorable placement or clearance decision to an unfavorable decision, the agency must:

(a) Insure that the records used in making the decision are accurate, relevant, timely, and complete to the extent reasonably necessary to assure fairness to the individual in any determination.

(b) Comply with all applicable administrative due process requirements, as provided by law, rule, or regulation.

(c) At a minimum, provide the individual concerned:

(1) Notice of the specific reason(s) for the decision; and

(2) An opportunity to respond; and

(3) Notice of appeal rights, if any.

(d) Consider all available information in reaching its final decision.

(e) Keep any record of the agency action required by OPM as published in its issuances.

[56 FR 18654, Apr. 23, 1991, as amended at 66 FR 66711, Dec. 27, 2001]

### § 732.302 Reporting to OPM.

(a) In accordance with section 9(a) of E.O. 10450, each agency conducting an investigation under E.O. 10450 is required to notify OPM when the investigation is initiated.

(b) In accordance with section 14(c) of E.O. 10450, agencies shall report to OPM the action taken with respect to individuals investigated pursuant to E.O. 10450 as soon as possible and in no event later than 90 days after receipt of the final report of investigation.

## Subpart D—Security and Related Determinations

### § 732.401 Reemployment eligibility of certain former Federal employees.

(a) *Request.* A former employee who was terminated, or who resigned while charges were pending, from a department or agency of the Government under a statute or executive order authorizing termination in the interest of national security or on grounds relating to loyalty, and authorizing OPM to determine the eligibility for employment in another department or agency of the Government, may request OPM in writing to determine whether the individual is eligible for employment in another department or agency of the Government.

(b) *Action by OPM.* (1) OPM shall determine, and will notify the former employee, after appropriate consideration of the case, including such investigation as it considers necessary, whether the individual may be employed in another department or agency of the Government.

(2) If a former Federal employee found ineligible under this section has had an opportunity to comment on the reasons for the action, or has furnished them to OPM or to the former employing agency, OPM may cancel the reinstatement eligibility if the eligibility resulted from the last Federal employment and was obtained through fraud, and OPM may prescribe a period of debarment not to exceed 3 years.

# PART 733—POLITICAL ACTIVITY—FEDERAL EMPLOYEES RESIDING IN DESIGNATED LOCALITIES

Sec.
733.101 Definitions.
733.102 Exclusion of employees in the Criminal Division and National Security Division of the United States Department of Justice.
733.103 Permitted political activities—employees who reside in designated localities.
733.104 Prohibited political activities—employees who reside in designated localities.
733.105 Permitted political activities—employees who reside in designated localities and are employed in certain agencies and positions.
733.106 Prohibited political activities—employees who reside in designated localities and are employed in certain agencies and positions.
733.107 Designated localities.

AUTHORITY: 5 U.S.C. 7325.d.

SOURCE: 63 FR 4558, Jan. 30, 1998, unless otherwise noted.

### § 733.101 Definitions.

In this part:

*Accept* means to come into possession of something from a person officially on behalf of a candidate, a campaign, a political party, or a partisan political group, but does not include ministerial activities which precede or follow this official act.

*Candidate* means an individual who seeks nomination or election to any elective office whether or not the person is elected. An individual is deemed to be a candidate if the individual has received political contributions or made expenditures or has consented to another person receiving contributions or making expenditures with a view to bringing about the individual's nomination or election.

*Campaign* means all acts done by a candidate and his or her adherents to obtain a majority or plurality of the votes to be cast toward a nomination or in an election.

*Election* includes a primary, special, runoff, or general election.

*Employee* means:

Any individual (other than the President, the Vice President, or a member of the uniformed services) employed or holding office in—

(1) An Executive agency other than the General Accounting Office;

(2) A position within the competitive service which is not in an Executive agency; or

(3) The United States Postal Service or the Postal Rate Commission.

*On Duty* means the period when an employee is:

(1) In a pay status other than paid leave, compensatory time off, credit hours, time off as an incentive award, or excused or authorized absence (including leave without pay); or

(2) Representing any agency or instrumentality of the United States Government in an official capacity.

*Partisan* when used as an adjective means related to a political party.

*Partisan political group* means any committee, club, or other organization which is affiliated with a political party or candidate for public office in a partisan election, or organized for a partisan purpose, or which engages in partisan political activity.

*Partisan political office* means any office for which any candidate is nominated or elected as representing a party any of whose candidates for Presidential elector received votes in the last preceding election at which Presidential electors were selected, but does not include any office or position within a political party or affiliated organization.

*Person* means an individual; a State, local, or foreign government; or a corporation and the subsidiaries it controls, company, association, firm, partnership, society, joint stock company, or any other organization or institution, including any officer, employee, or agent of such person or entity.

*Political activity* means an activity directed toward the success or failure of a political party, candidate for partisan political office, or partisan political group.

*Political contribution* means any gift, subscription, loan, advance, or deposit of money or anything of value, made for any political purpose.

(1) A political contribution includes:

(i) Any contract, promise, or agreement, express or implied, whether or not legally enforceable, to make a contribution for any political purpose;

(ii) Any payment by any person, other than a candidate or a political party or affiliated organization, of compensation for the personal services of another person which are rendered to any candidate or political party or affiliated organization without charge for any political purpose; and

(iii) The provision of personal services, paid or unpaid, for any political purpose.

(2) A political contribution does not include the value of services provided without compensation by any individual who volunteers on behalf of any candidate, campaign, political party, or partisan political group.

*Political management* means the direction or supervision of a partisan political group or campaign for partisan political office.

*Political party* means a national political party, a State political party, or an affiliated organization.

*Political purpose* means an objective of promoting or opposing a political party, candidate for partisan political office, or partisan political group.

*Receive* means to come into possession of something from a person officially on behalf of a candidate, a campaign, a political party, or a partisan political group, but does not include ministerial activities which precede or follow this official act.

*Room or building occupied in the discharge of official duties by an individual employed or holding office in the Government of the United States or any agency thereof* includes, but is not limited to:

(1) Any Federally owned space (including, but not limited to, ''public buildings'' as defined in 40 U.S.C. 612(1)) or Federally leased space in which Federal employees perform official duties on a regular basis;

(2) Public areas as defined in 40 U.S.C. 490(a)(17) and 41 CFR 101–20.003 of buildings under the custody and control of the General Services Administration.

(3) A room or building occupied in the discharge of official duties by an individual employed or holding office in the Government of the United

States or any agency thereof does not include rooms in the White House, or in the residence of the Vice President, which are part of the Residence area or which are not regularly used solely in the discharge of official duties.

*Solicit* means to request expressly of another person that he or she contribute something to a candidate, a campaign, a political party, or partisan political group.

*Subordinate* refers to the relationship between two employees when one employee is under the supervisory authority, control or administrative direction of the other employee.

*Uniformed services* means uniformed services as defined in 5 U.S.C. 2101(3).

[63 FR 4558, Jan. 30, 1998, as amended at 79 FR 25485, May 5, 2014]

### § 733.102 Exclusion of employees in the Criminal Division and National Security Division of the United States Department of Justice.

Employees in the Criminal Division and National Security Division in the Department of Justice (except employees appointed by the President by and with the advice and consent of the Senate) specifically are excluded from coverage under the provisions of this part.

[79 FR 25485, May 5, 2014]

### § 733.103 Permitted political activities—employees who reside in designated localities.

(a) This section does not apply to an individual who is employed in an agency or position described in § 733.105(a), unless that individual has been appointed by the President, by and with the advice and consent of the Senate.

(b) Employees who reside in a municipality or political subdivision designated by OPM under § 733.107 may:

(1) Run as independent candidates for election to partisan political office in elections for local office in the municipality or political subdivision;

(2) Solicit, accept, or receive a political contribution as, or on behalf of, an independent candidate for partisan political office in elections for local office in the municipality or political subdivision;

(3) Accept or receive a political contribution on behalf of an individual who is a candidate for local partisan political office and who represents a political party;

(4) Solicit, accept, or receive uncompensated volunteer services as an independent candidate, or on behalf of an independent candidate, for local partisan political office, in connection with the local elections of the municipality or subdivision; and

(5) Solicit, accept, or receive uncompensated volunteer services on behalf of an individual who is a candidate for local partisan political office and who represents a political party.

### § 733.104 Prohibited political activities—employees who reside in designated localities.

(a) This section does not apply to an individual who is employed in an agency or position described in § 733.105(a), unless that individual has been appointed by the President, by and with the advice and consent of the Senate.

(b) Employees who reside in a municipality or political subdivision designated by OPM under § 733.107 may not:

(1) Run as the representative of a political party for local partisan political office;

(2) Solicit a political contribution on behalf of an individual who is a candidate for local partisan political office and who represents a political party;

(3) Knowingly solicit a political contribution from any Federal employee, except as permitted under 5 U.S.C. 7323(a)(2)(A)–(C).

(4) Accept or receive a political contribution from a subordinate; or

(5) Solicit, accept, or receive uncompensated volunteer services from a subordinate for any political purpose.

(c) An employee covered under this section may not participate in political activities:

(1) While he or she is on duty:

(2) While he or she is wearing a uniform, badge, or insignia that identifies the employing agency or instrumentality or the position of the employee;

(3) While he or she is in any room or building occupied in the discharge of official duties by an individual employed or holding office in the Government of the United States or any agency or instrumentality thereof; or

(4) While using a Government-owned or leased vehicle or while using a privately owned vehicle in the discharge of official duties.

(d) An employee described in 5 U.S.C. 7324(b)(2) may participate in political activity otherwise prohibited by § 733.104(c) if the costs associated with that political activity are not paid for by money derived from the Treasury of the United States.

(e) Candidacy for, and service in, a partisan political office shall not result in neglect of, or interference with, the performance of the duties of the employee or create a conflict, or apparent conflict, of interest.

### § 733.105 Permitted political activities—employees who reside in designated localities and are employed in certain agencies and positions.

(a) This section applied to employees who reside in designated localities and are employed in the following agencies or positions:

(1) The Federal Election Commission;

(2) The Election Assistance Commission;

(3) The Federal Bureau of Investigation;

(4) The Secret Service;

(5) The Central Intelligence Agency;

(6) The National Security Council;

(7) The National Security Agency;

(8) The Defense Intelligence Agency;

(9) The Merit Systems Protection Board;

(10) The Office of Special Counsel;

(11) The Office of Criminal Investigation of the Internal Revenue Service.

(12) The Office of Investigative Programs of the United States Customs Service;

(13) The Office of Law Enforcement of the Bureau of Alcohol, Tobacco, and Firearms;

(14) The National Geospatial-Intelligence Agency;

(15) The Office of the Director of National Intelligence;

(16) Career Senior Executive Service positions described in 5 U.S.C. 3132(a)(4);

(17) Administrative Law Judge positions described in 5 U.S.C. 5372;

(18) Contract Appeals Board Member positions described in 5 U.S.C. 5372a; or

(19) Administrative Appeals Judge positions described in 5 U.S.C. 5732b.

(b) This section does not apply to individuals who have been appointed by the President by and with the advice and consent of the Senate, even though they are employed in the agencies and positions described in paragraph (a) of this section.

(c) Employees who are covered under this section and who reside in a municipality or political subdivision designated by OPM under § 733.107 may:

(1) Run as independent candidates for election to partisan political office in elections for local office in the municipality or political subdivision;

(2) Solicit, accept, or receive a political contribution as, or on behalf of, an independent candidate for partisan political office in elections for local office in the municipality or political subdivision;

(3) Solicit, accept, or receive uncompensated volunteer services as, or on behalf of, an independent candidate for partisan political office in elections for office in the municipality or subdivision; and

(4) Take an active part in other political activities associated with elections for local partisan political office and in managing the campaigns of candidates for election to local partisan political office in the municipality or political subdivision, but only as an independent candidate or on behalf of, or in opposition to, an independent candidate.

[63 FR 4558, Jan. 30, 1998, as amended at 79 FR 25485, May 5, 2014]

### § 733.106 Prohibited political activities—employees who reside designated localities and are employed in certain agencies and positions.

(a) This section does not apply to individuals who have been appointed by the President, by and with the advice and consent of the Senate, even though they are employed in the agencies and positions described in § 733.105(a).

(b) Employees who are employed in the agencies and positions described in § 733.105(a), and who reside in a municipality or political subdivision designated by OPM under § 733.107, may not:

(1) Run as the representative of a political party for local partisan political office;

(2) Solicit, accept, or receive a political contribution on behalf of an individual who is a candidate for local partisan political office and who represents a political party;

(3) Knowingly solicit a political contribution from any Federal employee;

(4) Accept or receive a political contribution from a subordinate;

(5) Solicit, accept, or receive uncompensated volunteer services on behalf of an individual who is a candidate for local partisan political office and who represents a political party;

(6) Solicit, accept, or receive uncompensated volunteer services from a subordinate for any political purpose; or

(7) Take an active part in other political activities associated with elections for local partisan political office, when such participation occurs on behalf of a political party, partisan political group, or a candidate for local partisan political office who represents a political party.

(c) An employee covered under this section may not participate in political activities:

(1) While he or she is on duty:

(2) While he or she is wearing a uniform, badge, or insignia that identifies the employing agency or instrumentality or the position of the employee;

(3) While he or she is in any room or building occupied in the discharge of official duties by an individual employed or holding office in the Government of the United States or any agency or instrumentality thereof; or

(4) While using a Government-owned or leased vehicle or while using a privately owned vehicle in the discharge of official duties.

(d) Candidacy for, and service in, or partisan political office shall not result in neglect of, or interference with, the performance of the duties of the employee or create a conflict, or apparent conflict, of interest.

### § 733.107 Designated localities.

(a) When OPM determines that, because of special or unusual circumstances, it is in the domestic interest of employees to participate in local elections, OPM may specify as a designated locality:

(1) The District of Columbia,

(2) A municipality or political subdivision in Maryland or Virginia and in the immediate vicinity of the District of Columbia, or

(3) A municipality in which the majority of voters are employed by the Government of the United States.

(b) Information as to the documentation required to support a request for designation is furnished by the General Counsel of OPM on request.

(c) The following municipalities and political subdivisions have been designated, effective on the day specified:

IN MARYLAND

Annapolis (May 16, 1941).
Anne Arundel County (March 14, 1973).
Berwyn Heights (June 15, 1944).
Bethesda (Feb. 17, 1943).
Bladensburg (April 20, 1942).
Bowie (April 11, 1952).
Brentwood (Sept. 26, 1940).
Calvert County (June 18, 1992).
Capitol Heights (Nov. 12, 1940).
Cheverly (Dec. 18, 1940).
Chevy Chase, section 3 (Oct. 8, 1940).
Chevy Chase, section 4 (Oct. 2, 1940).
Chevy Chase View (Feb. 26, 1941).
Chevy Chase Village, Town of (March 4, 1941).
College Park (June 13, 1945).
Cottage City (Jan. 15, 1941).
District Heights (Nov. 2, 1940).
Edmonston (Oct. 24, 1940).
Fairmont Heights (Oct. 24, 1940).
Forest Heights (April 22, 1949).
Frederick County (May 31, 1991).
Garrett Park (Oct. 2, 1940).
Glenarden (May 21, 1941).
Glen Echo (Oct. 22, 1940).
Greenbelt (Oct. 4, 1940).
Howard County (April 25, 1974).
Hyattsville (Sept. 20, 1940).
Kensington (Nov. 8, 1940).
Landover Hills (May 5, 1945).
Martin's Additions, Village of (Feb. 13, 1941).
Montgomery County (April 30, 1964).
Morningside (May 19, 1949).
Mount Rainier (Nov. 22, 1940).
New Carrollton (July 7, 1981).
North Beach (Sept. 20, 1940).
North Brentwood (May 6, 1941).
North Chevy Chase (July 22, 1942).
Northwest Park (Feb. 17, 1943).
Prince George's County (June 19, 1962).
Riverdale (Sept. 26, 1940).
Rockville (April 15, 1948).
St. Mary's County (March 2, 1998).
Seat Pleasant (Aug. 31, 1942).
Somerset (Nov. 22, 1940).
Takoma Park (Oct. 22, 1940).
University Park (Jan. 18, 1941).
Washington Grove (April 5, 1941).

IN VIRGINIA

Alexandria (April 15, 1941).
Arlington County (Sept. 9, 1940).
Clifton (July 14, 1941).
Fairfax, City of (Feb. 9, 1954).
Fairfax County (Nov. 10, 1949).
Falls Church (June 6, 1941).
Fauquier County
Herndon (April 7, 1945).
King George County (June 6, 2012).
Loudoun County (Oct. 1, 1971).
Manassas (Jan. 8, 1980).
Manassas Park (March 4, 1980).
Portsmouth (Feb. 27, 1958).
Prince William County (Feb. 14, 1967).
Spotsylvania County (March 2, 1998).
Stafford County (Nov. 2, 1979).
Vienna (March 18, 1946).

OTHER MUNICIPALITIES

Anchorage, Alaska (Dec. 29, 1947).
Benicia, Calif. (Feb. 20, 1948).
Bremerton, Wash. (Feb. 27, 1946).
Centerville, Ga. (Sept. 16, 1971).
Crane, Ind. (Aug. 3, 1967).
District of Columbia
Elmer City, Wash. (Oct. 28, 1947).
Huachuca City, Ariz. (April 9, 1959).
New Johnsonville, Tenn. (April 26, 1956).
Norris, Tenn. (May 6, 1959).
Port Orchard, Wash. (Feb. 27, 1946).
Sierra Vista, Ariz. (Oct. 5, 1955).
Warner Robins, Ga. (March 19, 1948).

[63 FR 4558, Jan. 30, 1998, as amended at 73 FR 28026, May 15, 2008; 77 FR 26660, May 7, 2012; 78 FR 66826, Nov. 7, 2013; 79 FR 25485, May 5, 2014]

# PART 734—POLITICAL ACTIVITIES OF FEDERAL EMPLOYEES

## Subpart A—General Provisions

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734.102 Jurisdiction.
734.103 Multicandidate political committees of Federal labor organizations and Federal employee organizations.
734.104 Restriction of political activity.

## Subpart B—Permitted Activities

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734.306 Participation in political activities while on duty, in uniform, in any room or building occupied in the discharge of official duties, or using a Federal vehicle.
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734.501 Permitted and prohibited activities.
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734.503 Allocation and reimbursement of costs associated with political activities.
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### Subpart F—Employees Who Work on an Irregular or Occasional Basis

734.601 Employees who work on an irregular or occasional basis.

### Subpart G—Related Statutes and Executive Orders

734.701 General.
734.702 Related statutes and Executive orders.

AUTHORITY: 5 U.S.C. 1103, 1104, 7325; Reorganization Plan No. 2 of 1978, 92 Stat. 3783, 3 CFR 1978 Comp. p. 323; and E.O. 12107, 3 CFR 1978 Comp. p. 264.

SOURCE: 59 FR 48769, Sept. 23, 1994, unless otherwise noted.

## Subpart A—General Provisions

### § 734.101 Definitions.

For the purposes of this part:

*Accept* means to come into possession of something from a person officially on behalf of a candidate, a campaign, a political party, or a partisan political group, but does not include ministerial activities which precede or follow this official act.

*Candidate* means an individual who seeks nomination or election to any elective office whether or not the person is elected. An individual is deemed to be a candidate if the individual has received political contributions or made expenditures or has consented to another person receiving contributions or making expenditures with a view to bringing about the individual's nomination or election.

*Campaign* means all acts done by a candidate and his or her adherents to obtain a majority or plurality of the votes to be cast toward a nomination or in an election.

*Election* includes a primary, special, runoff, or general election.

*Employee* means any individual (other than the President, Vice President, or a member of the uniformed services) employed or holding office in—

(1) An Executive agency other than the General Accounting Office;

(2) A position within the competitive service which is not in an Executive agency; or

(3) The United States Postal Service or the Postal Rate Commission.

*Employing office* shall have the meaning given by the head of each agency or instrumentality of the United States Government covered by this part. Each agency or instrumentality shall provide notice identifying the appropriate employing offices within it through internal agency notice procedures.

*Federal employee organization* means any lawful nonprofit organization, association, society, or club composed of Federal employees.

*Federal labor organization* means an organization defined in 5 U.S.C. 7103(a)(4).

*Multicandidate political committee* means an organization defined in 2 U.S.C. 441a(a)(4).

*Nonpartisan election* means—

(1) An election in which none of the candidates is to be nominated or elected as representing a political party any of whose candidates for Presidential elector received votes in the last preceding election at which Presidential electors were selected; or

(2) An election involving a question or issue which is not specifically identified with a political party, such as a constitutional amendment, referendum, approval of a municipal ordinance, or any question or issue of a similar character.

*Occasional* means occurring infrequently, at irregular intervals, and according to no fixed or certain scheme; acting or serving for the occasion or only on particular occasions.

*Office* means the U.S. Office of Personnel Management.

*On Duty* means the time period when an employee is:

(1) In a pay status other than paid leave, compensatory time off, credit hours, time off as an incentive award, or excused or authorized absence (including leave without pay); or

(2) Representing any agency or instrumentality of the United States Government in an official capacity.

*Partisan* when used as an adjective means related to a political party.

*Partisan political group* means any committee, club, or other organization which is affiliated with a political party or candidate for public office in a partisan election, or organized for a partisan purpose, or which engages in partisan political activity.

*Partisan political office* means any office for which any candidate is nominated or elected as representing a party any of whose candidates for Presidential elector received votes in the last preceding election at which Presidential electors were selected, but does not include any office or position within a political party or affiliated organization.

*Person* means an individual; a State, local, or foreign government; or a corporation and subsidiaries it controls, company, association, firm, partnership, society, joint stock company, or any other organization or institution, including any officer, employee, or agent of such person or entity.

*Political Action Committee* means any committee, association, or organization (whether or not incorporated) which accepts contributions or makes expenditures for the purpose of influencing, or attempting to influence, the nomination or election of one or more individuals to Federal, State, or local elective public office.

*Political activity* means an activity directed toward the success or failure of a political party, candidate for partisan political office, or partisan political group.

*Political contribution* means any gift, subscription, loan, advance, or deposit of money or anything of value, made for any political purpose.

(a) A political contribution includes:

(1) Any contract, promise, or agreement, express or implied, whether or not legally enforceable, to make a contribution for any political purpose;

(2) Any payment by any person, other than a candidate or a political party or affiliated organization, of compensation for the personal services of another person which are rendered to any candidate or political party or affiliated organization without charge for any political purpose; and

(3) The provision of personal services, paid or unpaid, for any political purpose.

(b) A political contribution does not include the value of services provided without compensation by any individual who volunteers on behalf of any candidate, campaign, political party, or partisan political group.

*Political management* means the direction or supervision of a partisan political group or campaign for partisan political office.

*Political party* means a national political party, a State political party, or an affiliated organization.

*Political purpose* means an objective of promoting or opposing a political party, candidate for partisan political office, or partisan political group.

*Receive* means to come into possession of something from a person officially on behalf of a candidate, a campaign, a political party, or a partisan political group, but does not include ministerial activities which precede or follow this official act.

*Recurrent* means occurring frequently, or periodically on a regular basis.

*Room or building occupied in the discharge of official duties by an individual employed or holding office in the Government of the United States or any agency thereof* includes, but is not limited to:

(1) Any Federally owned space (including, but not limited to, ''public buildings'' as defined in 40 U.S.C. 612(1)) or Federally leased space in which Federal employees perform official duties on a regular basis;

(2) Public areas as defined in 40 U.S.C. 490(a)(17) and 41 CFR 101–20.003 of buildings under the custody and control of the General Services Administration.

(3) A room or building occupied in the discharge of official duties by an individual employed or holding office in the Government of the United States or any agency thereof does not include rooms in the White House, or in the residence of the Vice President, which are part of the Residence area or which are not regularly used solely in the discharge of official duties.

*Solicit* means to request expressly of another person that he or she contribute something to a candidate, a campaign, a political party, or partisan political group.

*Subordinate* refers to the relationship between two employees when one employee is under the supervisory authority, control or administrative direction of the other employee.

*Uniformed services* means uniformed services as defined in 5 U.S.C. 2101(3).

[59 FR 48769, Sept. 23, 1994, as amended at 61 FR 35099, July 5, 1996; 79 FR 25485, May 5, 2014]

### § 734.102 Jurisdiction.

(a) The United States Office of Special Counsel has exclusive authority to investigate allegations of political activity prohibited by the Hatch Act Reform Amendments of 1993, as implemented by 5 CFR part 734, prosecute alleged violations before the United States Merit Systems Protection Board, and render advisory opinions concerning the applicability of 5 CFR part 734 to the political activity of Federal employees. (5 U.S.C. 1212 and 1216). Advice concerning the Hatch Act Reform Amendments may be requested from the Office of Special Counsel:

(1) By letter addressed to the Office of Special Counsel at 1730 M Street NW., Suite 218, Washington, DC 20036–4505;

(2) By telephone on (202) 254–3650, or (1–800) 854–2824;

(3) By fax on (202) 254–3700; or

(4) By email at *Hatchact@osc.gov*.

(b) The Merit Systems Protection Board has exclusive authority to determine whether a violation of the Hatch Act Reform Amendments of 1993, as implemented by 5 CFR part 734, has occurred and to impose a penalty of removal, reduction-in-grade, debarment from Federal employment for a period not to exceed 5 years, suspension, reprimand, or an assessment of a civil penalty not to exceed $1,000, for violation of the political activity restrictions regulated by this part. (5 U.S.C. 1204 and 7326).

(c) The Office of Personnel Management is authorized to issue regulations describing the political activities which are permitted and prohibited under the Hatch Act Reform Amendments of 1993. (5 U.S.C. 1103, 1104, 7325; Reorganization Plan No. 2 of 1978, 92 Stat. 3783, 3 CFR 1978 Comp. p. 323; and E.O. 12107, 3 CFR 1978 Comp. p. 264.)

[59 FR 48769, Sept. 23, 1994, as amended at 61 FR 35100, July 5, 1996; 79 FR 25485, May 5, 2014]

### § 734.103 Multicandidate political committees of Federal labor organizations and Federal employee organizations.

(a) In order to qualify under this part, each multicandidate political committee of a Federal labor organization must provide to the Office the following:

(1) Information verifying that the multicandidate political committee is a multicandidate political committee as defined by 2 U.S.C. 441a(a)(4);

(2) Information identifying the Federal labor organization to which the multicandidate political committee is connected; and

(3) Information that identifies the Federal labor organization as a labor organization defined at 5 U.S.C. 7103(4).

(b) In order to qualify under this part, each multicandidate political committee of a Federal employee organization must provide to the Office the following:

(1) Information verifying that the multicandidate political committee is a multicandidate political committee as defined in 2 U.S.C. 441a(a)(4);

(2) Information identifying the Federal employee organization to which the multicandidate political committee is connected; and

(3) Information indicating that the multicandidate political committee was in existence as of October 6, 1993.

### § 734.104 Restriction of political activity.

No further proscriptions or restrictions may be imposed upon employees covered under this regulation except:

(a) Employees who are appointed by the President by and with the advice and consent of the Senate;

(b) Employees who are appointed by the President;

(c) Non-career senior executive service members;

(d) Schedule C employees, 5 CFR 213.3301, 213.3302; and

(e) Any other employees who serve at the pleasure of the President.

## Subpart B—Permitted Activities

### § 734.201 Exclusion from coverage.

This subpart does not apply to employees in the agencies and positions described in subpart D of this part.

### § 734.202 Permitted activities.

Employees may take an active part in political activities, including political management and political campaigns, to the extent not expressly prohibited by law and this part.

### § 734.203 Participation in nonpartisan activities.

An employee may:

(a) Express his or her opinion privately and publicly on political subjects;

(b) Be politically active in connection with a question which is not specifically identified with a political party, such as a constitutional amendment, referendum, approval of a municipal ordinance or any other question or issue of a similar character;

(c) Participate in the nonpartisan activities of a civic, community, social, labor, or professional organization, or of a similar organization; and

(d) Participate fully in public affairs, except as prohibited by other Federal law, in a manner which does not compromise his or her efficiency or integrity as an employee or the neutrality, efficiency, or integrity of the agency or instrumentality of the United States Government in which he or she is employed.

[59 FR 48769, Sept. 23, 1994, as amended at 61 FR 35100, July 5, 1996; 79 FR 25485, May 5, 2014]

### § 734.204 Participation in political organizations.

An employee may:

(a) Be a member of a political party or other political group and participate in its activities;

(b) Serve as an officer of a political party or other political group, a member of a national, State, or local committee of a political party, an officer or member of a committee of a political group, or be a candidate for any of these positions;

(c) Attend and participate fully in the business of nominating caucuses of political parties;

(d) Organize or reorganize a political party organization or political group; and

(e) Participate in a political convention, rally, or other political gathering.

(f) Serve as a delegate, alternate, or proxy to a political party convention.

*Example 1:* An employee of the Department of Education may serve as a delegate, alternate, or proxy to a State or national party convention.

*Example 2:* A noncareer member of the Senior Executive Service, or other employee covered under this subpart, may serve as a vice-president of a political action committee, as long as the duties of the office do not involve personal solicitation, acceptance, or receipt of political contributions. Ministerial activities which precede or follow the official acceptance and receipt, such as handling, disbursing, or accounting for contributions are not covered under the definitions of *accept* and *receive* in § 734.101. Sections 734.208 and 734.303 describe in detail permitted and prohibited activities which are related to fundraising.

*Example 3:* An employee of the Federal Communications Commission may make motions or place a name in nomination at a nominating caucus.

*Example 4:* An employee of the Department of the Interior may serve as an officer of a candidate's campaign committee as long as he does not personally solicit, accept, or receive political contributions. Sections 734.208 and 734.303 of this part describe in detail permitted and prohibited activities which are related to fundraising.

[59 FR 48769, Sept. 23, 1994, as amended at 61 FR 35100, July 5, 1996]

### § 734.205 Participation in political campaigns.

Subject to the prohibitions in § 734.306, an employee may:

(a) Display pictures, signs, stickers, badges, or buttons associated with political parties, candidates for partisan political office, or partisan political groups, as long as these items are displayed in accordance with the provisions of § 734.306 of subpart C of this part;

(b) Initiate or circulate a nominating petition for a candidate for partisan political office;

(c) Canvass for votes in support of or in opposition to a partisan political

candidate or a candidate for political party office;

(d) Endorse or oppose a partisan political candidate or a candidate for political party office in a political advertisement, broadcast, campaign literature, or similar material;

(e) Address a convention, caucus, rally, or similar gathering of a political party or political group in support of or in opposition to a partisan political candidate or a candidate for political party office; and

(f) Take an active part in managing the political campaign of a partisan political candidate or a candidate for political party office.

*Example 1:* An employee of the Environmental Protection Agency may broadcast endorsements for a partisan political candidate via a public address system attached to his or her private automobile.

*Example 2:* An employee of the Department of Interior may canvass voters by telephone on behalf of a political party or partisan political candidate.

*Example 3:* An employee of the Department of Agriculture may stand outside of polling places on election day and hand out brochures on behalf of a partisan political candidate or political party.

*Example 4:* An employee may appear in a television or radio broadcast which endorses a partisan political candidate and is sponsored by the candidate's campaign committee, a political party, or a partisan political group.

*Example 5:* An independent contractor is not covered by this part and may display a political button while performing the duties for which he or she is contracted.

*Example 6:* An employee of the Department of Commerce who is on official travel may take annual leave in the morning to give an address at a breakfast for a candidate for partisan political office.

*Example 7:* An employee may manage the political campaign of a candidate for public office including supervising paid and unpaid campaign workers.

*Example 8:* While not on duty, a Federal employee may distribute campaign leaflets by hand to homes or parked cars even though the leaflet may contain information concerning where to send contributions among other factual material about a partisan political candidate. However, should a member of the public stop the employee and request further information about contributions, the employee should refer that request to another campaign worker who is not a Federal employee.

*Example 9:* An employee may place in his or her front yard a sign or banner supporting a partisan political candidate.

[59 FR 48769, Sept. 23, 1994, as amended at 61 FR 35100, July 5, 1996]

### § 734.206 Participation in elections.

An employee may:

(a) Register and vote in any election;

(b) Act as recorder, watcher, challenger, or similar officer at polling places;

(c) Serve as an election judge or clerk, or in a similar position; and

(d) Drive voters to polling places for a partisan political candidate, partisan political group, or political party.

*Example:* An employee may drive voters to polling places in a privately owned vehicle, but not in a Government-owned or leased vehicle.

### § 734.207 Candidacy for public office.

An employee may:

(a) Run as an independent candidate in a partisan election covered by 5 CFR part 733; and

(b) Run as a candidate in a nonpartisan election.

*Example 1:* An employee who is a candidate for public office in a nonpartisan election is not barred by the Hatch Act from soliciting, accepting, or receiving political contributions for his or her own campaign; however, such solicitation, acceptance, or receipt must comply with part 2635 of this title as well as any other directives that may apply, e.g., The Federal Property Management Regulations in 41 CFR chapter 101.

### § 734.208 Participation in fundraising.

(a) An employee may make a political contribution to a political party, political group, campaign committee of a candidate for public office in a partisan election and multicandidate political committee of a Federal labor or Federal employee organization.

(b) Subject to the prohibitions stated in section 734.303, an employee may—

(1) Attend a political fundraiser;

(2) Accept and receive political contributions in a partisan election described in 5 CFR part 733;

(3) Solicit, accept, or receive uncompensated volunteer services from any individual; and

(4) Solicit, accept, or receive political contributions, as long as:

(i) The person who is solicited for a political contribution belongs to the same Federal labor organization, or Federal employee organization, as the employee who solicits, accepts, or receives the contribution;

(ii) The person who is solicited for a political contribution is not a subordinate employee; and

(iii) The request is for a contribution to the multicandidate political committee of a Federal labor organization or to the multicandidate political committee of a Federal employee organization in existence on October 6, 1993.

(c) Subject to the provisions of § 734.306, an employee may make a financial contribution to a political action committee through a voluntary allotment made under § 550.311(b) of this chapter, if the head of the employee's agency permits agency employees to make such allotments to political action committees.

(d) An employee who is covered under this subpart and is a payroll official in an agency where employees are permitted to make allotments to political action committees may process the completed direct deposit forms for voluntary allotments which have been made to such committees under section 550.311(b) of this title.

*Example 1:* An GS–12 employee of the Department of Treasury who belongs to the same Federal employee organization as a GS–5 employee of the Department of Treasury may solicit a contribution for the multicandidate political committee when she is not on duty as long as the GS–5 employee is not under the supervisory authority of the GS–12 employee.

*Example 2:* An employee of the National Park Service may give a speech or keynote address at a political fundraiser when he is not on duty, as long as the employee does not solicit political contributions, as prohibited in § 734.303(b) of this part.

*Example 3:* An employee's name may appear on an invitation to a political fundraiser as a guest speaker as long as the reference in no way suggests that the employee solicits or encourages contributions, as prohibited in § 734.303 of this part and described in example 2 thereunder. However, the employee's official title may not appear on invitations to any political fundraiser, except that an employee who is ordinarily addressed using a general term of address, such as ''The Honorable,'' may use or permit the use of that term of address for such purposes.

*Example 4:* When an employee of the Department of Transportation is not on duty, he or she may engage in activities which do not require personal solicitations of contributions, such as organizing mail or phone solicitations for political contributions. Activities such as stuffing envelopes with requests for political contributions also are permitted. However, he or she may not sign the solicitation letter unless the solicitation is for the contribution of uncompensated volunteer services of individuals who are not subordinate employees. An employee may not knowingly send to his or her subordinate employees a letter soliciting the contribution of their uncompensated services. However, he or she may sign a letter that solicits contributions of uncompensated volunteer services as part of a general mass mailing that might reach a subordinate employee, as long as the mass mailing is not specifically targeted to his or her subordinate employees.

*Example 5:* An employee who is not on duty may participate in a phone bank soliciting the uncompensated services of individuals. However, an employee may not make phone solicitations for political contributions even anonymously.

*Example 6:* An employee of the Department of Agriculture who is on official travel and is not in a pay status nor officially representing the Department may write invitations in his hotel room to a meet-the-candidate reception which he plans to hold in his home.

*Example 7:* An employee may serve as an officer or chairperson of a political fundraising organization or committee as long as he or she does not personally solicit, accept, or receive political contributions. For example, the employee may organize or manage fundraising activities as long as he or she does not violate the above prohibition.

*Example 8:* The head of a cabinet-level department may contribute one of her worn-out cowboy boots to the campaign committee of a Senatorial candidate to be auctioned off in a fundraising raffle for the benefit of the candidate's campaign.

*Example 9:* An employee may help organize a fundraiser including supplying names for the invitation list as long as he or she does not personally solicit, accept, or receive contributions.

*Example 10:* An employee on travel may engage in political activity when he or she is not on duty without taking annual leave.

*Example 11:* A Federal employee may solicit, accept, or receive the uncompensated volunteer services of any individual, except a subordinate employee, to work on behalf of a partisan political candidate or organization. However, such solicitation, acceptance, or receipt must comply with part 2635 of this title as well as any other directives that may

apply, e.g., the Federal Property Management Regulations in 41 CFR chapter 101. Further, Federal employees are subject to criminal anti-coercion provisions found at 18 U.S.C. 610.

*Example 12:* An employee who desires to make a financial contribution to a political action committee through a voluntary allotment personally may obtain blank direct deposit forms from his or her payroll office. However, he or she may not complete the form while he or she is on duty, on Federal property, or in a Federally owned or leased vehicle. Moreover, he or she may not personally deliver his or her completed form, or the completed form of another employee, to the payroll office. However, the employee may mail his or her direct deposit form to his or her agency payroll office.

*Example 13:* Employees who are permitted to solicit, accept, or receive political contributions under the circumstances described in § 734.208(b)(4) may not solicit, accept, or receive such contributions either while they are on duty, or while they are on Federal premises, or both.

[59 FR 48769, Sept. 23, 1994, as amended at 61 FR 35100, July 5, 1996]

## Subpart C—Prohibited Activities

### § 734.301 Exclusion from coverage.

This subpart does not apply to employees in the agencies and positions described in subpart D of this part.

### § 734.302 Use of official authority; prohibition.

(a) An employee may not use his or her official authority or influence for the purpose of interfering with or affecting the result of an election.

(b) Activities prohibited by paragraph (a) of this section include, but are not limited to:

(1) Using his or her official title while participating in political activity;

(2) Using his or her authority to coerce any person to participate in political activity; and

(3) Soliciting, accepting, or receiving uncompensated individual volunteer services from a subordinate for any political purpose.

*Example 1:* An employee who signs a letter seeking uncompensated volunteer services from individuals may not identify himself or herself by using his or her official title. However, the employee may use a general form of address, such as ''The Honorable.''

*Example 2:* A noncareer member of the Senior Executive Service, or another employee covered by this subpart, may not ask his or her subordinate employees to provide uncompensated individual volunteer services for a political party, partisan political group, or candidate for partisan political office. Moreover, he or she may not accept or receive such services from a subordinate employee who offers to donate them.

*Example 3:* An employee may not require any person to contribute to a partisan political campaign in order to win a Federal contract:

[61 FR 35100, July 5, 1996]

### § 734.303 Fundraising.

An employee may not knowingly:

(a) Personally solicit, accept or receive a political contribution from another person, except under the circumstances specified in § 734.208(b);

(b) Personally solicit political contributions in a speech or keynote address given at a fundraiser;

(c) Allow his or her official title to be used in connection with fundraising activities; or

(d) Solicit, accept, or receive uncompensated volunteer services from an individual who is a subordinate.

*Example 1:* An employee may not host a fundraiser at his or her home. However, a spouse who is not covered under this part may host such a fundraiser and the employee may attend. The employee may not personally solicit contributions to the fundraiser. Moreover, the employee may not accept, or receive political contributions, except under the circumstances stated in § 734.208(b).

*Example 2:* An employee's name may not appear on an invitation to a fundraiser as a sponsor of the fundraiser, or as a point of contact for the fundraiser.

*Example 3:* An employee may not ask a subordinate employee to volunteer on behalf of a partisan political campaign.

*Example 4:* An employee may not call the personnel office of a business or corporation and request that the corporation or business provide volunteers or services for a campaign. However, an employee may call an individual who works for a business or corporation and request that specific individual's services for a campaign.

### § 734.304 Candidacy for public office.

An employee may not run for the nomination or as a candidate for election to partisan political office, except as specified in § 734.207.

### § 734.305 Soliciting or discouraging the political participation of certain persons.

(a) An employee may not knowingly solicit or discourage the participation in any political activity of any person who has an application for any compensation grant, contract, ruling, license, permit, or certificate pending before the employee's employing office.

(b) An employee may not knowingly solicit or discourage the participation in any political activity of any person who is the subject of, or a participant in, an ongoing audit, investigation, or enforcement action being carried out by the employee's employing office.

(c) Each agency or instrumentality of the United States shall determine when a matter is pending and ongoing within employing offices of the agency or instrumentality for the purposes of this part.

[59 FR 48769, Sept. 23, 1994, as amended at 79 FR 25486, May 5, 2014]

### § 734.306 Participation in political activities while on duty, in uniform, in any room or building occupied in the discharge of official duties, or using a Federal vehicle.

(a) An employee may not participate in political activities subject to the provisions of subpart E of this part:

(1) While he or she is on duty;

(2) While he or she is wearing a uniform, badge, insignia, or other similar item that identifies the employing agency or instrumentality or the position of the employee;

(3) While he or she is in any room or building occupied in the discharge of official duties by an individual employed or holding office in the Government of the United States or any agency or instrumentality thereof; or

(4) While using a Government-owned or leased vehicle or while using a privately-owned vehicle in the discharge of official duties.

(b) The prohibitions in paragraph (a) of this section do not apply to employees covered under subpart E of this part.

*Example 1:* While on leave without pay, an employee is not subject to the prohibition in § 734.306(a)(1) because he or she is not on duty. However, while on leave without pay, the employee remains subject to the other prohibitions in subpart C.

*Example 2:* A Postal Service employee who uses her private vehicle to deliver mail may place a political bumper sticker on the vehicle, as long as she covers the bumper sticker while she is on duty.

*Example 3:* An employee who uses his or her privately owned vehicle on a recurrent basis for official business may place a partisan political bumper sticker on the vehicle, as long as he or she covers the bumper sticker while the vehicle is being used for official duties.

*Example 4:* An employee who uses his or her privately owned vehicle on official business, must cover any partisan political bumper sticker while the vehicle is being used for official duties, if the vehicle is clearly identified as being on official business.

*Example 5:* A noncareer member of the Senior Executive Service, or any other employee covered by this subpart, who uses his or her privately owned vehicle only on an occasional basis to drive to another Federal agency for a meeting, or to take a training course, is not required to cover a partisan political bumper sticker on his or her vehicle.

*Example 6:* An employee may not place a partisan political bumper sticker on any Government owned or Government leased vehicle.

*Example 7:* An employee may place a bumper sticker on his or her privately owned vehicle and park his or her vehicle in a parking lot of an agency or instrumentality of the United States Government or in a non-Federal facility for which the employee receives a subsidy from his or her employing agency or instrumentality.

*Example 8:* When an agency or instrumentality of the United States Government leases offices in a commercial building and that building includes the headquarters of a candidate for partisan political office, an employee of that agency or instrumentality may do volunteer work, when he or she is not on duty, at the candidate's headquarters and in other areas of the building that have not been leased by the Government.

*Example 9:* A Government agency or instrumentality leases all of the space in a commercial building; employees may not participate in political activity in the public areas of the leased building.

*Example 10:* An employee of the National Aeronautics and Space Administration (NASA) may not engage in political activities while wearing a NASA flight patch, NASA twenty-year pin or anything with an official NASA insignia.

*Example 11:* If a political event begins while an employee is on duty and continues into the time when he or she is not on duty, the employee must wait until he or she is not on duty to attend the event. Alternatively, an

employee may request annual leave to attend the political event when it begins.

*Example 12:* Officials of labor organizations who have been given official time to perform representational duties are on duty.

*Example 13:* An employee may stuff envelopes for a mailing on behalf of a candidate for partisan political office while the employee is sitting in the park during his or her lunch period if he or she is not considered to be on duty during his or her lunch period.

*Example 14:* An employee who works at home may engage in political activities at home when he or she is not in a pay status or representing the Government in an official capacity.

*Example 15:* An employee who is appointed by the President by and with the advice and consent of the Senate (PAS) may attend a political event with any non-PAS employee whose official duties do not require accompanying the PAS as long as the non-PAS employee is not on duty.

*Example 16:* A noncareer member of the Senior Executive Service, or any other employee covered by this subpart, may not wear partisan political buttons or display partisan political pictures, signs, stickers, or badges while he or she is on duty or at his or her place of work.

*Example 17:* An employee may not engage in political activity in the cafeteria of a Federal building, even if the cafeteria is in space leased by a contractor.

*Example 18:* An employee who contributes financially to a political action committee through a voluntary allotment made under § 550.311(b) of this title may not complete the direct deposit forms while he or she is on duty, in a ''room or building'' defined in § 734.101 or in a Federally owned or leased vehicle.

*Example 19:* An employee who contributes financially to a political action committee through a voluntary allotment may not personally deliver his or her completed direct deposit form, or the completed direct deposit form of another employee, to the payroll employees who would process or administer such forms. However, the employee may mail his or her direct deposit form to his or her agency payroll office.

[59 FR 48769, Sept. 23, 1994, as amended at 61 FR 35101, July 5, 1996]

### § 734.307 Campaigning for a spouse or family member.

An employee covered under this subpart who is the spouse or family member of either a candidate for partisan political office, candidate for political party office, or candidate for public office in a nonpartisan election, is subject to the same prohibitions as other employees covered under this subpart.

*Example 1:* An employee who is married to a candidate for partisan political office may attend a fundraiser for his or her spouse, stand in the receiving line, sit at the head table, and urge others to vote for his or her spouse. However, the employee may not personally solicit, accept, or receive contributions of money or the paid or unpaid services of a business or corporation, or sell or collect money for tickets to the fundraiser.

*Example 2:* An employee who is the daughter of a candidate for partisan political office may appear in a family photograph which is printed in a campaign flier. She may distribute fliers at a campaign rally as long as she does not personally solicit contributions.

*Example 3:* An employee who is married to a candidate for political partisan political office may appear with her spouse in a political advertisement or a broadcast, and urge others to vote for her spouse, as long as the employee does not personally solicit political contributions.

[59 FR 48769, Sept. 23, 1994, as amended at 61 FR 35101, July 5, 1996]

## Subpart D—Employees in Certain Agencies and Positions

### § 734.401 Coverage.

(a) This subpart applies to employees in the following agencies and positions:

(1) The Federal Election Commission;

(2) The Election Assistance Commission;

(3) The Federal Bureau of Investigation;

(4) The Secret Service;

(5) The Central Intelligence Agency;

(6) The National Security Council;

(7) The National Security Agency;

(8) The Defense Intelligence Agency;

(9) The Merit Systems Protection Board;

(10) The Office of Special Counsel;

(11) The Office of Criminal Investigation of the Internal Revenue Service.

(12) The Office of Investigative Programs of the United States Customs Service;

(13) The Office of Law Enforcement of the Bureau of Alcohol, Tobacco, and Firearms;

(14) The Criminal Division of the Department of Justice;

(15) The National Security Division of the Department of Justice;

(16) The National Geospatial-Intelligence Agency;

(17) The Office of the Director of National Intelligence;

(18) Career Senior Executive Service positions described in 5 U.S.C. 3132(a)(4);

(19) Administrative Law Judge positions described in 5 U.S.C. 5372;

(20) Contract Appeals Board Member positions described in 5 U.S.C. 5372a; or

(21) Administrative Appeals Judge positions described in 5 U.S.C. 5732b.

(b) Employees appointed by the President by and with the advice and consent of the Senate in the agencies and positions described in paragraph (a) of this section are excluded from coverage under this subpart.

(c) All employees covered under this subpart are free to engage in political activity to the widest extent consistent with the restrictions imposed by law and this subpart.

[59 FR 48769, Sept. 23, 1994, as amended at 61 FR 35101, July 5, 1996; 79 FR 25486, May 5, 2014]

### § 734.402 Expression of an employee's individual opinion.

Each employee covered under this subpart retains the right to participate in any of the following political activities, as long as such activity is not performed in concert with a political party, partisan political group, or a candidate for partisan political office:

(a) Express his or her opinion as an individual privately and publicly on political subjects and candidates;

(b) Display a political picture, sign, sticker, badge, or button, as long as these items are displayed in accordance with the provisions of § 734.406;

(c) Sign a political petition as an individual;

(d) Be politically active in connection with a question which is not specifically identified with a political party, such as a constitutional amendment, referendum, approval of a municipal ordinance, or any other question or issue of a similar character; and

(e) Otherwise participate fully in public affairs, except as prohibited by other Federal law, in a manner which does not compromise his or her efficiency or integrity as an employee or the neutrality, efficiency, or integrity of the agency or instrumentality of the United States Government in which he or she is employed.

*Example 1:* An employee may purchase air time on a radio or television station to endorse a partisan political candidate. However, he or she may not endorse such a candidate in a commercial or program which is sponsored by the candidate's campaign committee, a political party, or a partisan political group.

*Example 2:* An employee may address a political convention or rally but not on behalf, or at the request of, a political party, partisan political group, or an individual who is running for the nomination or as a candidate for election to partisan political office.

*Example 3:* An employee may print at her own expense one thousand fliers which state her personal opinion that a partisan political candidate is the best suited for the job. She may distribute the fliers at a shopping mall on the weekend. However, she may not distribute fliers printed by the candidate's campaign committee, a political party, or a partisan political group.

*Example 4:* An employee may place in his or her yard a sign supporting a candidate for partisan political office.

*Example 5:* An employee may stand outside of a political party convention with a homemade sign which states his or her individual opinion that one of the candidates for nomination is the best qualified candidate.

*Example 6:* An employee, including a career SES employee, may wear a button with a partisan political theme when the employee is not on duty or at his or her place of work.

[59 FR 48769, Sept. 23, 1994, as amended at 61 FR 35101, July 5, 1996]

### § 734.403 Participation in elections.

Each employee covered under this subpart retains the right to:

(a) Register and vote in any election;

(b) Take an active part, as a candidate or in support of a candidate, in a nonpartisan election; and

(c) Serve as an election judge or clerk, or in a similar position, to perform nonpartisan duties as prescribed by State or local law.

### § 734.404 Participation in political organizations.

(a) Each employee covered under this subpart retains the right to:

(1) Participate in the nonpartisan activities of a civic, community, social, labor, or professional organization, or of a similar organization;

(2) Be a member of a political party or other partisan political group and participate in its activities to the extent consistent with other Federal law;

(3) Attend a political convention, rally, fund-raising function, or other political gathering; and

(4) Make a financial contribution to a political party, partisan political group, or to the campaign committee of a candidate for partisan political office.

(b) Subject to the provisions in § 734.406, an employee covered under this subpart may make a financial contribution to a political action committee through a voluntary allotment made under § 550.311(b) of this chapter if the head of the employee's agency permits agency employees to make such allotments to political action committees.

(c) An employee who is covered under this subpart and is a payroll official in an agency where employees are permitted to make allotments to political action committees may process the completed direct deposit forms for voluntary allotments which have been made to such committees under § 550.311(b) of this chapter.

*Example 1:* An employee, or a noncareer SES employee who is subject to subpart D of part 734, may attend a political convention or rally solely as a spectator. However, the employee and noncareer SES employee may not participate in demonstrations or parades which are sponsored by a political party, a partisan political group, or an individual who is running for nomination to be a candidate for partisan political office.

*Example 2:* An employee may attend a political party's annual barbecue, but he or she may not organize, distribute invitations to, or sell tickets to the barbecue.

*Example 3:* An employee who desires to contribute to a political action committee through an allotment personally may obtain blank direct deposit forms from his or her payroll office. The employee may not complete the direct deposit form while he or she is on duty, on Federal property, or in a Federally owned or leased vehicle. The employee also may not personally deliver his or her completed direct deposit form, or the completed direct deposit form of another employee, to his or her payroll office. However, the employee may mail the completed form to his or her agency payroll office.

[61 FR 35101, July 5, 1996]

### § 734.405 Campaigning for a spouse or family member.

An employee covered under this subpart who is the spouse or family member of either a candidate for partisan political office, or a candidate for political party office, may appear in photographs of the candidate's family which might appear in a political advertisement, a broadcast, campaign literature, or similar material. A spouse or a family member who is covered by the Hatch Act Reform Amendments also may attend political functions with the candidate. However, the spouse or family member may not distribute campaign literature or solicit, accept, or receive political contributions.

*Example 1:* An employee who is the spouse of a candidate for partisan political office may stand in the receiving line and sit at the head table during a political dinner honoring the spouse.

*Example 2:* An employee who is the daughter of a candidate for partisan political office may appear in a family photograph which is printed in a campaign flier, but she may not distribute the flier at a campaign rally.

### § 734.406 Participation in political activities while on duty, in uniform, in any room or building occupied in the discharge of official duties, or using a Federal vehicle; prohibition.

(a) An employee covered under this subpart may not participate in political activities:

(1) While he or she is on duty;

(2) While he or she is wearing a uniform, badge, or insignia that identifies the employing agency or instrumentality or the position of the employee;

(3) While he or she is in any room or building occupied in the discharge of official duties by an individual employed or holding office in the Government of the United States or any agency or instrumentality thereof; or

(4) While using a Government-owned or leased vehicle or while using a privately owned vehicle in the discharge of official duties.

*Example 1:* An employee who uses his or her privately owned vehicle on a recurrent basis for official business may place a bumper sticker on the vehicle, as long as he or she covers the bumper sticker while the vehicle is being used for official duties.

*Example 2:* An employee who uses his or her privately owned vehicle on official business, must cover any partisan political bumper

sticker while the vehicle is being used for official duties, if the vehicle is clearly identified as being on official business.

*Example 3:* An employee or career SES employee who uses his or her privately owned vehicle only on an occasional basis to drive to another Federal agency for a meeting, or to take a training course, if not required to cover a partisan political bumper sticker on his or her vehicle.

*Example 4:* An employee may not place a partisan political bumper sticker on any Government owned or Government leased vehicle.

*Example 5:* An employee may place a bumper sticker on his or her privately owned vehicle and park the vehicle in a parking lot of an agency or instrumentality of the United States Government or in a non-Federal facility for which the employee receives a subsidy from his or her employing agency or instrumentality.

*Example 6:* An employee, or noncareer SES employee who is subject to subpart D of this part 734, may not wear partisan political buttons or display partisan political pictures, signs, stickers, or badges while he or she is on duty or at his or her place of work.

*Example 7:* An employee who contributes financially to a political action committee through a voluntary allotment made under § 550.311(b) of this title may not complete the direct deposit forms while he or she is on duty, in a ''room or building'' defined in § 734.101, or in a Federally owned or leased vehicle.

*Example 8:* An employee who contributes financially to a political action committee may not personally deliver his or her completed direct deposit form, or the completed direct deposit form of another employee, to the payroll employees who would process or administer such forms. However, the employee may mail his or her direct deposit form to his or her agency payroll office.

(b) [Reserved]

[59 FR 48769, Sept. 23, 1994, as amended at 61 FR 35102, July 5, 1996]

### § 734.407 Use of official authority; prohibition.

An employee covered under this subpart may not use his or her official authority or influence for the purpose of interfering with or affecting the result of an election.

### § 734.408 Participation in political management and political campaigning; prohibitions.

An employee covered under this subpart may not take an active part in political management or in a political campaign, except as permitted by subpart D of this part.

[61 FR 35102, July 5, 1996]

### § 734.409 Participation in political organizations; prohibitions.

An employee covered under this subpart may not:

(a) Serve as an officer of a political party, a member of a national, State, or local committee of a political party, an officer or member of a committee of a partisan political group, or be a candidate for any of these positions;

(b) Organize or reorganize a political party organization or partisan political group;

(c) Serve as a delegate, alternate, or proxy to a political party convention; and

(d) Address a convention, caucus, rally, or similar gathering of a political party or partisan political group in support of or in opposition to a candidate for partisan political office or political party office, if such address is done in concert with such a candidate, political party, or partisan political group.

### § 734.410 Participation in political fundraising; prohibitions.

An employee covered under this subpart may not:

(a) Solicit, accept, or receive political contributions; or

(b) Organize, sell tickets to, promote, or actively participate in a fundraising activity of a candidate for partisan political office or of a political party, or partisan political group.

### § 734.411 Participation in political campaigning; prohibitions.

An employee covered under this subpart may not:

(a) Take an active part in managing the political campaign of a candidate for partisan political office or a candidate for political party office;

(b) Campaign for partisan political office;

(c) Canvass for votes in support of or in opposition to a candidate for partisan political office or a candidate for political party office, if such canvassing is done in concert with such a candidate, or of a political party, or partisan political group;

(d) Endorse or oppose a candidate for partisan political office or a candidate for political party office in a political advertisement, broadcast, campaign literature, or similar material if such endorsement or opposition is done in concert with such a candidate, political party, or partisan political group;

(e) Initiate or circulate a partisan nominating petition.

### § 734.412 Participation in elections; prohibitions.

An employee covered under this subpart may not:

(a) Be a candidate for partisan political office;

(b) Act as recorder, watcher, challenger, or similar officer at polling places in concert with a political party, partisan political group, or a candidate for partisan political office;

(c) Drive voters to polling places in concert with a political party, partisan political group, or a candidate for partisan political office.

[59 FR 48769, Sept. 23, 1994, as amended at 61 FR 35102, July 5, 1996]

### § 734.413 Employees of the Federal Election Commission; prohibitions.

(a) An employee of the Federal Election Commission may not request or receive from, or give to, an employee, a Member of Congress, or an officer of a uniformed service a political contribution.

(b) This section does not cover employee of the Federal Election Commission who are appointed by the President by and with the advice and consent of the Senate.

## Subpart E—Special Provisions for Certain Presidential Appointees and Employees Paid from the Appropriation for the Executive Office of the President

### § 734.501 Permitted and prohibited activities.

Except as otherwise specified in this part 734, employees who are appointed by the President by and with the advice and consent of the Senate are subject to the provisions of subparts B and C of this part.

### § 734.502 Participation in political activity while on duty, in uniform, in any room or building occupied in the discharge of official duties, or using a Federal vehicle.

(a) This section applies to an employee:

(1) The duties and responsibilities of whose position continue outside normal duty hours and while away from the normal duty post; and

(2) Who is—

(i) An employee paid from an appropriation for the Executive Office of President; or

(ii) An employee appointed by the President by and with the advice and consent of the Senate whose position is located within the United States, who determines policies to be pursued by the United States in relations with foreign powers or in the nationwide administration of Federal laws;

(b) For the purposes of this subpart, normal duty hours and normal duty post will be determined by the head of each agency or instrumentality of the United States.

(c) An employee described in paragraph (a) of this section may participate, subject to any restrictions that may be imposed in accordance with § 734.104, in political activities:

(1) While he or she is on duty;

(2) While he or she is wearing a uniform, badge, or insignia that identifies the agency or instrumentality of the United States Government or the position of the employee;

(3) While he or she is in any room or building occupied in the discharge of official duties by an individual employed or holding office in the Government of the United States or any agency or instrumentality thereof; or

(4) While using a Government-owned or leased vehicle or while using a privately-owned vehicle in the discharge of official duties.

(d) An employee, to whom subpart E of this part does not apply, who is not on duty may participate in political activities in rooms of the White House or the Residence of the Vice President which are part of the Residence area or which are not regularly used solely in the discharge of official duties.

*Example 1:* An Inspector General is appointed under the Inspector General Act of

1978, as amended. According to section 3(c) of that Act, he or she does not qualify as an employee who determines policies to be pursued by the United States in the nationwide administration of Federal laws. therefore, he or she may not participate in political activities while on duty, while wearing a uniform, badge, or insignia that identifies his or her office or position, while in any room or building occupied in the discharge of official duties, or while using a Government-owned or leased vehicle or while using a privately-owned vehicle in the discharge of official duties.

*Example 2:* An employee who is covered by this subpart and wears a uniform as an incident of her office may wear the uniform while she is giving a speech at a political fundraiser.

*Example 3:* The head of an executive department may hold a partisan political meeting or host a reception which is not a fundraiser in his conference room during normal business hours.

*Example 4:* An employee accompanies the Secretary of Transportation to a political party convention as part of the Secretary's security or administrative detail. The employee is considered to be on duty while protecting or performing official duties for the Secretary regardless of the nature of the function that the Secretary is attending.

*Example 5:* An American Ambassador overseas obtains authorization from the Department of State to depart post in order to take a vacation away from post. During the period she is authorized to be on vacation away from post, she is not considered to be on duty for the purpose of the Hatch Act Reform Amendments and may engage in any political activity permitted under the Hatch Act Reform Amendments of 1993.

[59 FR 48769, Sept. 23, 1994, as amended at 61 FR 35102, July 5, 1996; 79 FR 25486, May 5, 2014]

### § 734.503 Allocation and reimbursement of costs associated with political activities.

(a) The costs associated with the political activities described in § 733.502(c) of this chapter may not be paid for by money derived from the Treasury of the United States. Costs associated with a political activity are deemed not to be paid for by money derived from the Treasury of the United States if the Treasury is reimbursed for the costs within a reasonable period of time.

(b) For the purposes of this section, costs associated with a political activity do not include any costs that the Government would have or have incurred regardless of whether the activity was political. Examples of such costs are:

(1) The compensation of the employee described in § 734.502(a);

(2) The value of any office or other real property owned or leased by the Government;

(3) The compensation and expenses of any Government employee that is required in the performance of his or her duties to accompany or assist the person engaging in the political activity; and

(4) The cost of special security arrangements for the person engaging in the political activity, including special transportation vehicles or methods.

(c)(1) An employee covered under this subpart must apportion the costs of mixed travel based on the time spent on political activities and the time spent performing official duties. Prorating the cost of travel involves determining the ''total activity time'' which is the amount of time actually spent by the employee in meetings, receptions, rallies, and similar activities. Time spent in actual travel, private study, or rest and recreation is not included in the computation of the ''total activity time''. The proration of the cost then is determined based on how the ''total activity time'' was spent. The formula is as follows:

Time spent in official meetings, receptions, etc. + Time spent in political meetings, receptions, rallies = Total activity time

Time spent in official activity ÷ Total activity time = Percentage of trip that is official

Time spent in political activity ÷ Total activity time = Percentage of trip that is political

The percentage figure that represents the political portion of the trip is then multiplied by the amount that would be reimbursed to the Government if all of the travel was political. The product of that calculation represents the amount to be paid by the political entity or organization.

(2) The allocation method must be applied to all of the relevant costs of mixed travel.

(3) Expenses that are associated specifically with a political activity and not with any official activity must be

treated as political, and expenses associated specifically with an official activity and not with any political activity must be treated as official.

(4) In allocating the costs of travel other than air travel, the allocation formula should be applied to any Government maximum for that type of expenditure.

(5) The determination of the proper amount of allocation must be based on the facts and circumstances involved.

(6) In the event that a minor, clearly incidental percentage of the activity of a mixed trip is devoted to either official or political activity, e.g. less than 3%, the entire trip should be treated as if it was wholly of the type represented by the substantial figure. The balance should be treated as *de minimis* and need not be reimbursed as political or charged as official.

(d) For any cost of a political activity of an employee that is required to be reported to the Federal Election Commission under the Federal Election Campaign Act (FECA) or the Presidential Election Campaign Fund Act (PECFA), the employee shall use the same method of allocation as used under the FECA or PECFA and regulations thereunder in lieu of the allocation method in paragraph (c) of this section.

*Example 1:* The Secretary, an employee described by section 7324(b)(2) of title 5 of the United States Code, holds a catered political activity (other than a fundraiser) in her office. Her security detail attends the reception as part of their duty to provide security for her. The Secretary will not be in violation of the Hatch Act Reform Amendments if the costs of her office, her compensation, and her security detail are not reimbursed to the Treasury. A violation of the Hatch Act Amendments occurs if Government funds, including reception or discretionary funds, are used to cater the political activity, unless the Treasury is reimbursed for the cost of the catering within a reasonable time.

*Example 2:* There should be no allocation between official and political funds for a sound system rented for a single event.

*Example 3:* If on a mixed trip a Government employee is only entitled to $26 per diem for food on a wholly official trip and the trip is 50% political and 50% official, the Government share would be 50% of $26, not 50% of the actual amount spent.

*Example 4:* The President is transported by special motorcade to and from the site of the political event. The expense of the motorcade is for special security arrangements. Thus, it would not be a violation of the Hatch Act Reform Amendments if the costs of the security arrangements, including the cost of the motorcade, are not reimbursed to the Treasury.

### § 734.504 Contributions to political action committees through voluntary payroll allotments prohibited.

An employee described in § 734.502(a) may not financially contribute to a political action committee through a voluntary allotment made under § 550.311(b) of this title.

[61 FR 35102, July 5, 1996]

## Subpart F—Employees Who Work on An Irregular or Occasional Basis

### § 734.601 Employees who work on an irregular or occasional basis.

An employee who works on an irregular or occasional basis or is a special Government employee as defined in 18 U.S.C. 202(a) is subject to the provisions of the applicable subpart of this part when he or she is on duty.

*Example:* An employee appointed to a special commission or task force who does not have a regular tour of duty may run as a partisan political candidate, but may actively campaign only when he or she is not on duty.

## Subpart G—Related Statutes and Executive Orders

### § 734.701 General.

In addition to the provisions regulating political activity set forth in subparts A through G of this part, there are a number of statutes and Executive orders that establish standards to which the political activity of an employee, a Federal labor organization, a Federal employee organization, and a multicandidate political committee must conform. The list set forth in § 734.702 references some of the more significant of those statutes. It is not comprehensive and includes only references to statutes of general applicability.

### § 734.702 Related statutes and Executive orders.

(a) The prohibition against offering anything of value in consideration of

the use or promise of use of influence to procure appointive office (18 U.S.C. 210).

(b) The prohibition against solicitation or acceptance of anything of value to obtain public office for another (18 U.S.C. 211).

(c) The prohibition against intimidating, threatening, or coercing voters in Federal elections (18 U.S.C. 594).

(d) The prohibition against use of official authority to interfere with a Federal election by a person employed in any administrative position by the United States in connection with any activity financed in whole or in part by Federal funds (18 U.S.C. 595).

(e) The prohibition against the promise of employment, compensation, or benefits from Federal funds in exchange for political activity (18 U.S.C. 600).

(f) The prohibition against the deprivation of or threat of deprivation of employment in exchange for political contributions (18 U.S.C. 601).

(g) The prohibition against soliciting political contributions (18 U.S.C. 602).

(h) The prohibition against making certain political contributions (18 U.S.C. 603).

(i) The prohibition against soliciting or receiving assessments, subscriptions, or contributions for political purposes from persons on Federal relief or work relief (18 U.S.C. 604).

(j) The prohibition against disclosing and receiving lists or names of persons on relief for political purposes (18 U.S.C. 605).

(k) The prohibition against intimidating employees to give or withhold a political contribution (18 U.S.C. 606).

(l) The prohibition against soliciting political contributions in navy yards, forts, or arsenals (18 U.S.C. 607).

(m) The prohibition against coercing employees of the Federal Government to engage in, or not to engage in, any political activity (18 U.S.C. 610).

(n) The prohibition against certain personnel practices (5 U.S.C. 2302).

(o) The prohibition against making, requesting, considering, or accepting political recommendations (5 U.S.C. 3303).

(p) The prohibitions against misuse of a Government vehicle (31 U.S.C. 1344).

(q) The requirements and prohibitions stated in the Federal Election Campaign Act (2 U.S.C. 431–455).

(r) The prohibitions against soliciting for gifts to superiors, giving donations for such gifts, and accepting gifts from employees who receive a lower rate of pay (5 U.S.C. 7351).

(s) The prohibitions against soliciting or accepting things of value from specified persons (5 U.S.C. 7353).

(t) The prohibitions and requirements stated in the Ethics in Government Act of 1978 (5 U.S.C. App.) and Executive Order 12674 (54 FR 15159–15162; 3 CFR 1989 Comp. 215–218) as modified by Executive Order 12731 (55 FR 42547–42550; 3 CFR 1990 Comp. 306–311).

# PART 735—EMPLOYEE RESPONSIBILITIES AND CONDUCT

## Subpart A—General Provisions

Sec.
735.101 Definitions.
735.102 What are the grounds for disciplinary action?
735.103 What other regulations pertain to employee conduct?

## Subpart B—Standards of Conduct

735.201 What are the restrictions on gambling?
735.202 What are the restrictions on conduct that safeguard the examination process?
735.203 What are the restrictions on conduct prejudicial to the Government?

AUTHORITY: 5 U.S.C. 7301; E.O. 12674, 54 FR 15159, 3 CFR, 1989 Comp., p. 215, as modified by E.O. 12731, 55 FR 42547, 3 CFR, 1990 Comp., p. 306.

SOURCE: 71 FR 46073, Aug. 11, 2006, unless otherwise noted.

EDITORIAL NOTE: Part 1001, added to this chapter at 31 FR 873, Jan. 22, 1966 and revised at 32 FR 11113, Aug. 1, 1967, 36 FR 6874, Apr. 9, 1971, 61 FR 36996, July 16, 1996, and 71 FR 43345, Aug. 1, 2006, supplements this part 735.

## Subpart A—General Provisions

### § 735.101 Definitions.

In this part:

*Agency* means an Executive agency (other than the Government Accountability Office) as defined by 5 U.S.C. 105, the Postal Service, and the Postal Rate Commission.

*Employee* means any officer or employee of an agency, including a special Government employee, but does not include a member of the uniformed services.

*Government* means the United States Government.

*Special Government employee* means an officer or employee specified in 18 U.S.C. 202(a) except one who is employed in the legislative branch or by the District of Columbia.

*Uniformed services* has the meaning given that term by 5 U.S.C. 2101(3).

### § 735.102 What are the grounds for disciplinary action?

An employee's violation of any of the regulations in subpart B of this part may be cause for disciplinary action by the employee's agency, which may be in addition to any penalty prescribed by law.

### § 735.103 What other regulations pertain to employee conduct?

In addition to the standards of conduct in subpart B of this part, an employee shall comply with the standards of ethical conduct in 5 CFR part 2635, as well as any supplemental regulation issued by the employee's agency under 5 CFR 2635.105. An employee's violation of those regulations may cause the employee's agency to take disciplinary action, or corrective action as that term is used in 5 CFR part 2635. Such disciplinary action or corrective action may be in addition to any penalty prescribed by law.

## Subpart B—Standards of Conduct

### § 735.201 What are the restrictions on gambling?

(a) While on Government-owned or leased property or on duty for the Government, an employee shall not conduct or participate in any gambling activity, including operating a gambling device, conducting a lottery or pool, participating in a game for money or property, or selling or purchasing a numbers slip or ticket.

(b) This section does not preclude activities:

(1) Necessitated by an employee's official duties; or

(2) Occurring under section 7 of Executive Order 12353 and similar agency-approved activities.

### § 735.202 What are the restrictions on conduct that safeguard the examination process?

(a) An employee shall not, with or without compensation, teach, lecture, or write for the purpose of the preparation of a person or class of persons for an examination of the Office of Personnel Management (OPM) or other agency to which examining authority has been delegated, or Board of Examiners for the Foreign Service that depends on information obtained as a result of the employee's Government employment.

(b) This section does not preclude the preparation described in paragraph (a) of this section if:

(1) The information upon which the preparation is based has been made available to the general public or will be made available on request; or

(2) Such preparation is authorized in writing by the Director of OPM, or his or her designee, or by the head of an agency to which examining authority had been delegated, or his or her designee, or by the Director General of the Foreign Service, or his or her designee, as applicable.

### § 735.203 What are the restrictions on conduct prejudicial to the Government?

An employee shall not engage in criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct, or other conduct prejudicial to the Government.

# PART 736—PERSONNEL INVESTIGATIONS

## Subpart A—Scope

Sec.
736.101 Purpose and definitions.
736.102 Notice to investigative sources.
736.103 Protecting the identity of a source.
736.104 Public availability of investigative files.

## Subpart B—Investigative Requirements

736.201 Responsibilities of OPM and other Federal agencies.

AUTHORITY: Pub. L. 93–579; (5 U.S.C. 552a).

SOURCE: 56 FR 18655, Apr. 23, 1991, unless otherwise noted.

## Subpart A—Scope

### § 736.101 Purpose and definitions.

(a) *Purpose*. The purpose of this part is to specify certain requirements for personnel investigations conducted by OPM, and for those conducted under delegated authority from OPM. The requirements of this part apply to suitability and national security investigations conducted under parts 731 and 732 of this chapter; they also apply to investigations to determine eligibility or qualifications not covered in parts 731 and 732 of this chapter. The requirements of this part apply to employees in the civil service of the Executive Branch and to persons performing contract, voluntary or indirect services for the Federal Government, as set forth in subsection (b) below.

(b) *Definitions*. For the purposes of this part, (1) *Federal employment* includes the following range of services performed for the Federal government: (i) All employment in the competitive or excepted service or the Senior Executive Service in the Executive Branch; (ii) appointments, salaried or unsalaried, to Federal Advisory Committees or to membership agencies; (iii) cooperative work assignments in which the individual has access to Federal materials such as examination booklets, or performs service for, or under supervision of, a Federal agency while being paid by another organization such as a State or local government; (iv) volunteer arrangements in which the individual performs service for, or under the supervision of, a Federal agency; and (v) volunteer or other arrangements in which the individual represents the United States Government or any agency thereof.

(2) *Agency* means any authority of the Government of the United States, whether or not it is within or subject to review by another agency, and includes any executive department, military department, Government corporation, Government-controlled corporation, or other establishment in the executive branch of the Government, or any independent regulatory agency.

(3) *Personnel investigation* means an investigation conducted by written or telephone inquiries or through personal contacts to determine the suitability, eligibility, or qualifications of individuals for Federal employment, for work on Federal contracts, or for access to classified information or restricted areas.

### § 736.102 Notice to investigative sources.

(a) The agency investigator will notify the source from whom information is requested, whether in person or by telephone, of the purpose for which the information is being sought and of the uses that may be made of the information. The interviewing agent must notify each person interviewed and each custodian of records contacted that all information provided, including the record source's identity, may be disclosed upon the request of the subject of the investigation.

(b) The interviewing agent may grant a pledge to keep confidential the identity of an information source upon specific request by the source. In addition, the agent has discretion to offer the source a pledge of confidentiality where the agent believes that such a pledge is necessary to obtain information pertinent to the investigation. A pledge of confidentiality may not be assumed by the source. The interviewing agent may not suggest to a source that the source request confidentiality.

(c) Where information is requested by written inquiry, the form, instructions, or correspondence used by an agency will include: (1) Notification that all information furnished by the source, including the source's identity, except for custodians of law enforcement or educational records, may be disclosed upon the request of the subject of the investigation; and (2) Space for the information source to request a pledge that the source's identity will not be disclosed to the subject of the investigation; or (3) An offer to make special arrangements to obtain significant information which the source feels unable to furnish without a promise that the source's identity will be kept confidential.

(d) A pledge of confidentiality, if granted, extends only to the identity of the source, and to any information furnished by the source that would reveal the identity of the source.

**§ 736.103 Protecting the identity of a source.**

When a source is granted a promise that the source's identity will be kept confidential, the investigative agency and all other agencies that receive information obtained under the promise are required to take all reasonable precautions to protect the source's identity. Each agency will prepare for its investigators and agents implementing instructions consistent with this part.

**§ 736.104 Public availability of investigative files.**

(a) Investigative files are records subject to the Privacy Act and the Freedom of Information Act and are made available to requesters in accordance with the provisions of those Acts.

(b) Requests for investigative records are to be submitted to the Office of Personnel Management, Federal Investigations Processing Center, FOI/PA, Boyers, Pennsylvania 16018.

## Subpart B—Investigative Requirements

**§ 736.201 Responsibilities of OPM and other Federal agencies.**

(a) Unless provided otherwise by law, the investigation of persons entering or employed in the competitive service, or by career appointment in the Senior Executive Service, is the responsibility of OPM.

(b) Requests for delegated investigating authority. Agencies may request delegated authority from OPM to conduct or contract out investigations of persons entering or employed in the competitive service or by career appointment in the Senior Executive Service. Such requests shall be made in writing by agency heads, or designees, and specify the reason(s) for the request.

(c) Timing of investigations. Investigations required for positions must be initiated within 14 days of placement in the position except for: Positions designated Critical-Sensitive under part 732 of this chapter must be completed preplacement, or post-placement with approval of a waiver in accordance with § 732.202(a) of this chapter; and for positions designated Special-Sensitive under part 732 of this chapter must be completed preplacement.

# PART 752—ADVERSE ACTIONS

### Subpart A [Reserved]

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752.606 Agency records.

AUTHORITY: 5 U.S.C. 7504, 7514, and 7543.

SOURCE: 74 FR 63532, Dec. 4, 2009, unless otherwise noted.

## Subpart A [Reserved]

## Subpart B—Regulatory Requirements for Suspension for 14 Days or Less

**§ 752.201 Coverage.**

(a) *Adverse actions covered.* This subpart covers suspension for 14 days or less.

(b) *Employees covered.* This subpart covers:

(1) An employee in the competitive service who has completed a probationary or trial period;

(2) An employee in the competitive service serving in an appointment which requires no probationary or trial period, and who has completed 1 year of current continuous employment in the same or similar positions under other than a temporary appointment limited to 1 year or less;

(3) An employee with competitive status who occupies a position under Schedule B of part 213 of this chapter;

(4) An employee who was in the competitive service at the time his or her position was first listed under Schedule A, B, or C of the excepted service and still occupies that position;

(5) An employee of the Department of Veterans Affairs appointed under section 7401(3) of title 38, United States Code; and

(6) An employee of the Government Printing Office.

(c) *Exclusions.* This subpart does not apply to a suspension for 14 days or less:

(1) Of an administrative law judge under 5 U.S.C. 7521;

(2) Taken for national security reasons under 5 U.S.C. 7532;

(3) Taken under any other provision of law which excepts the action from subchapter I, chapter 75, of title 5, U.S. Code;

(4) Of a reemployed annuitant; or

(5) Of a National Guard Technician.

(d) *Definitions.* In this subpart—

*Current continuous employment* means a period of employment immediately preceding a suspension action without a break in Federal civilian employment of a workday.

*Day* means a calendar day.

*Similar positions* means positions in which the duties performed are similar in nature and character and require substantially the same or similar qualifications, so that the incumbent could be interchanged between the positions without significant training or undue interruption to the work.

*Suspension* means the placing of an employee, for disciplinary reasons, in a temporary status without duties and pay.

**§ 752.202 Standard for action.**

(a) An agency may take action under this subpart for such cause as will promote the efficiency of the service as set forth in 5 U.S.C. 7503(a).

(b) An agency may not take a suspension against an employee on the basis of any reason prohibited by 5 U.S.C. 2302.

**§ 752.203 Procedures.**

(a) *Statutory entitlements.* An employee under this subpart whose suspension is proposed under this subpart is entitled to the procedures provided in 5 U.S.C. 7503(b).

(b) *Notice of proposed action.* The notice must state the specific reason(s) for the proposed action, and inform the employee of his or her right to review the material which is relied on to support the reasons for action given in the notice.

(c) *Employee's answer.* The employee must be given a reasonable time, but not less than 24 hours, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer.

(d) *Representation.* An employee covered by this subpart is entitled to be represented by an attorney or other representative. An agency may disallow as an employee's representative an individual whose activities as representative would cause a conflict of interest or position, or an employee of the agency whose release from his or her official position would give rise to unreasonable costs or whose priority work assignments preclude his or her release.

(e) *Agency decision.* (1) In arriving at its decision, the agency will consider only the reasons specified in the notice of proposed action and any answer of the employee or his or her representative, or both, made to a designated official.

(2) The agency must specify in writing the reason(s) for the decision and advise the employee of any grievance rights under paragraph (f) of this section. The agency must deliver the notice of decision to the employee on or before the effective date of the action.

(f) *Grievances*. The employee may file a grievance through an agency administrative grievance system (if applicable) or, if the suspension falls within the coverage of an applicable negotiated grievance procedure, an employee in an exclusive bargaining unit may file a grievance only under that procedure. Sections 7114(a)(5) and 7121(b)(1)(C) of title 5, U.S. Code, and the terms of any collective bargaining agreement, govern representation for employees in an exclusive bargaining unit who grieve a suspension under this subpart through the negotiated grievance procedure.

(g) *Agency records*. The agency must maintain copies of, and will furnish to the Merit Systems Protection Board and to the employee upon their request, the following documents:

(1) Notice of the proposed action;

(2) Employee's written reply, if any;

(3) Summary of the employee's oral reply, if any;

(4) Notice of decision; and

(5) Any order effecting the suspension, together with any supporting material.

## Subpart C [Reserved]

## Subpart D—Regulatory Requirements for Removal, Suspension for More Than 14 Days, Reduction in Grade or Pay, or Furlough for 30 Days or Less

### § 752.401 Coverage.

(a) *Adverse actions covered*. This subpart applies to the following actions:

(1) Removals;

(2) Suspensions for more than 14 days, including indefinite suspensions;

(3) Reductions in grade;

(4) Reductions in pay; and

(5) Furloughs of 30 days or less.

(b) *Actions excluded*. This subpart does not apply to:

(1) An action imposed by the Merit Systems Protection Board under the authority of 5 U.S.C. 1215;

(2) The reduction in grade of a supervisor or manager who has not completed the probationary period under 5 U.S.C. 3321(a)(2) if such a reduction is to the grade held immediately before becoming a supervisor or manager;

(3) A reduction-in-force action under 5 U.S.C. 3502;

(4) A reduction in grade or removal under 5 U.S.C. 4303;

(5) An action against an administrative law judge under 5 U.S.C. 7521;

(6) A suspension or removal under 5 U.S.C. 7532;

(7) Actions taken under any other provision of law which excepts the action from subchapter II of chapter 75 of title 5, United States Code;

(8) Action that entitles an employee to grade retention under part 536 of this chapter, and an action to terminate this entitlement;

(9) A voluntary action by the employee;

(10) Action taken or directed by the Office of Personnel Management under part 731 of this chapter;

(11) Termination of appointment on the expiration date specified as a basic condition of employment at the time the appointment was made;

(12) Action that terminates a temporary or term promotion and returns the employee to the position from which temporarily promoted, or to a different position of equivalent grade and pay, if the agency informed the employee that it was to be of limited duration;

(13) Cancellation of a promotion to a position not classified prior to the promotion;

(14) Placement of an employee serving on an intermittent or seasonal basis in a temporary nonduty, nonpay status in accordance with conditions established at the time of appointment; or

(15) Reduction of an employee's rate of basic pay from a rate that is contrary to law or regulation, including a reduction necessary to comply with the amendments made by Public Law 108–411, regarding pay-setting under the General Schedule and Federal Wage System and regulations implementing those amendments.

(c) *Employees covered*. This subpart covers:

(1) A career or career conditional employee in the competitive service who is not serving a probationary or trial period;

(2) An employee in the competitive service who has completed 1 year of

current continuous service under other than a temporary appointment limited to 1 year or less;

(3) An employee in the excepted service who is a preference eligible in an Executive agency as defined at section 105 of title 5, United States Code, the U.S. Postal Service, or the Postal Regulatory Commission and who has completed 1 year of current continuous service in the same or similar positions;

(4) A Postal Service employee covered by Public Law 100–90 who has completed 1 year of current continuous service in the same or similar positions and who is either a supervisory or management employee or an employee engaged in personnel work in other than a purely nonconfidential clerical capacity;

(5) An employee in the excepted service who is a nonpreference eligible in an Executive agency as defined at section 105 of title, 5, United States Code, and who has completed 2 years of current continuous service in the same or similar positions under other than a temporary appointment limited to 2 years or less;

(6) An employee with competitive status who occupies a position in Schedule B of part 213 of this chapter;

(7) An employee who was in the competitive service at the time his or her position was first listed under Schedule A, B, or C of the excepted service and who still occupies that position;

(8) An employee of the Department of Veterans Affairs appointed under section 7401(3) of title 38, United States Code; and

(9) An employee of the Government Printing Office.

(d) *Employees excluded*. This subpart does not apply to:

(1) An employee whose appointment is made by and with the advice and consent of the Senate;

(2) An employee whose position has been determined to be of a confidential, policy-determining, policy-making, or policy-advocating character by the President for a position that the President has excepted from the competitive service; the Office of Personnel Management for a position that the Office has excepted from the competitive service (Schedule C); or the President or the head of an agency for a position excepted from the competitive service by statute;

(3) A Presidential appointee;

(4) A reemployed annuitant;

(5) A technician in the National Guard described in section 8337(h)(1) of title 5, United States Code, who is employed under section 709(a) of title 32, United States Code;

(6) A Foreign Service member as described in section 103 of the Foreign Service Act of 1980;

(7) An employee of the Central Intelligence Agency or the Government Accountability Office;

(8) An employee of the Veterans Health Administration (Department of Veterans Affairs) in a position which has been excluded from the competitive service by or under a provision of title 38, United States Code, unless the employee was appointed to the position under section 7401(3) of title 38, United States Code;

(9) A nonpreference eligible employee with the U.S. Postal Service, the Postal Regulatory Commission, the Panama Canal Commission, the Tennessee Valley Authority, the Federal Bureau of Investigation, the National Security Agency, the Defense Intelligence Agency, or any other intelligence component of the Department of Defense (as defined in section 1614 of title 10, United States Code), or an intelligence activity of a military department covered under subchapter I of chapter 83 of title 10, United States Code;

(10) An employee described in section 5102(c)(11) of title 5, United States Code, who is an alien or noncitizen occupying a position outside the United States;

(11) A nonpreference eligible employee serving a probationary or trial period under an initial appointment in the excepted service pending conversion to the competitive service, unless he or she meets the requirements of paragraph (c)(5) of this section;

(12) An employee whose agency or position has been excluded from the appointing provisions of title 5, United States Code, by separate statutory authority in the absence of any provision to place the employee within the coverage of chapter 75 of title 5, United States Code; and

(13) An employee in the competitive service serving a probationary or trial period, unless he or she meets the requirements of paragraph (c)(2) of this section.

### § 752.402 Definitions.

In this subpart—

*Current continuous employment* means a period of employment or service immediately preceding an adverse action without a break in Federal civilian employment of a workday.

*Day* means a calendar day.

*Furlough* means the placing of an employee in a temporary status without duties and pay because of lack of work or funds or other nondisciplinary reasons.

*Grade* means a level of classification under a position classification system.

*Indefinite suspension* means the placing of an employee in a temporary status without duties and pay pending investigation, inquiry, or further agency action. The indefinite suspension continues for an indeterminate period of time and ends with the occurrence of the pending conditions set forth in the notice of action which may include the completion of any subsequent administrative action.

*Pay* means the rate of basic pay fixed by law or administrative action for the position held by the employee, that is, the rate of pay before any deductions and exclusive of additional pay of any kind.

*Similar positions* means positions in which the duties performed are similar in nature and character and require substantially the same or similar qualifications, so that the incumbent could be interchanged between the positions without significant training or undue interruption to the work.

*Suspension* means the placing of an employee, for disciplinary reasons, in a temporary status without duties and pay for more than 14 days.

### § 752.403 Standard for action.

(a) An agency may take an adverse action, including a performance-based adverse action or an indefinite suspension, under this subpart only for such cause as will promote the efficiency of the service.

(b) An agency may not take an adverse action against an employee on the basis of any reason prohibited by 5 U.S.C. 2302.

### § 752.404 Procedures.

(a) *Statutory entitlements*. An employee against whom action is proposed under this subpart is entitled to the procedures provided in 5 U.S.C. 7513(b).

(b) *Notice of proposed action*. (1) An employee against whom an action is proposed is entitled to at least 30 days' advance written notice unless there is an exception pursuant to paragraph (d) of this section. The notice must state the specific reason(s) for the proposed action, and inform the employee of his or her right to review the material which is relied on to support the reasons for action given in the notice.

(2) When some but not all employees in a given competitive level are being furloughed, the notice of proposed action must state the basis for selecting a particular employee for furlough, as well as the reasons for the furlough.

(3) Under ordinary circumstances, an employee whose removal or suspension, including indefinite suspension, has been proposed will remain in a duty status in his or her regular position during the advance notice period. In those rare circumstances where the agency determines that the employee's continued presence in the workplace during the notice period may pose a threat to the employee or others, result in loss of or damage to Government property, or otherwise jeopardize legitimate Government interests, the agency may elect one or a combination of the following alternatives:

(i) Assigning the employee to duties where he or she is no longer a threat to safety, the agency mission, or to Government property;

(ii) Allowing the employee to take leave, or carrying him or her in an appropriate leave status (annual, sick, leave without pay, or absence without leave) if the employee has absented himself or herself from the worksite without requesting leave;

(iii) Curtailing the notice period when the agency can invoke the provisions of paragraph (d)(1) of this section; or

(iv) Placing the employee in a paid, nonduty status for such time as is necessary to effect the action.

(c) *Employee's answer*. (1) An employee may answer orally and in writing except as provided in paragraph (c)(2) of this section. The agency must give the employee a reasonable amount of official time to review the material relied on to support its proposed action, to prepare an answer orally and in writing, and to secure affidavits, if the employee is in an active duty status. The agency may require the employee to furnish any answer to the proposed action, and affidavits and other documentary evidence in support of the answer, within such time as would be reasonable, but not less than 7 days.

(2) The agency will designate an official to hear the employee's oral answer who has authority either to make or recommend a final decision on the proposed adverse action. The right to answer orally in person does not include the right to a formal hearing with examination of witnesses unless the agency provides for such hearing in its regulations. Under 5 U.S.C. 7513(c), the agency may, in its regulations, provide a hearing in place of or in addition to the opportunity for written and oral answer.

(3) If the employee wishes the agency to consider any medical condition which may contribute to a conduct, performance, or leave problem, the employee must be given a reasonable time to furnish medical documentation (as defined in § 339.104 of this chapter) of the condition. Whenever possible, the employee will supply such documentation within the time limits allowed for an answer.

(d) *Exceptions*. (1) Section 7513(b) of title 5, U.S. Code, authorizes an exception to the 30 days' advance written notice when the agency has reasonable cause to believe that the employee has committed a crime for which a sentence of imprisonment may be imposed and is proposing a removal or suspension, including indefinite suspension. This notice exception is commonly referred to as the ''crime provision.'' This provision may be invoked even in the absence of judicial action.

(2) The advance written notice and opportunity to answer are not required for furlough without pay due to unforeseeable circumstances, such as sudden breakdowns in equipment, acts of God, or sudden emergencies requiring immediate curtailment of activities.

(e) *Representation*. Section 7513(b)(3) of title 5, U.S. Code, provides that an employee covered by this part is entitled to be represented by an attorney or other representative. An agency may disallow as an employee's representative an individual whose activities as representative would cause a conflict of interest or position, or an employee of the agency whose release from his or her official position would give rise to unreasonable costs or whose priority work assignments preclude his or her release.

(f) *Agency review of medical information*. When medical information is supplied by the employee pursuant to paragraph (c)(3) of this section, the agency may, if authorized, require a medical examination under the criteria of § 339.301 of this chapter, or otherwise, at its option, offer a medical examination in accordance with the criteria of § 339.302 of this chapter. If the employee has the requisite years of service under the Civil Service Retirement System or the Federal Employees' Retirement System, the agency must provide information concerning disability retirement. The agency must be aware of the affirmative obligations of the provisions of 29 CFR 1614.203, which require reasonable accommodation of a qualified individual with a disability.

(g) *Agency decision*. (1) In arriving at its decision, the agency will consider only the reasons specified in the notice of proposed action and any answer of the employee or his or her representative, or both, made to a designated official and any medical documentation reviewed under paragraph (f) of this section.

(2) The notice must specify in writing the reasons for the decision and advise the employee of any appeal or grievance rights under § 752.405 of this part. The agency must deliver the notice of decision to the employee on or before the effective date of the action.

(h) *Applications for disability retirement*. Section 831.1204(e) of this chapter

provides that an employee's application for disability retirement need not delay any other appropriate personnel action. Section 831.1205 and § 844.202 of this chapter set forth the basis under which an agency must file an application for disability retirement on behalf of an employee.

### § 752.405 Appeal and grievance rights.

(a) *Appeal rights.* Under the provisions of 5 U.S.C. 7513(d), an employee against whom an action is taken under this subpart is entitled to appeal to the Merit Systems Protection Board.

(b) *Grievance rights.* As provided at 5 U.S.C. 7121(e)(1), if a matter covered by this subpart falls within the coverage of an applicable negotiated grievance procedure, an employee may elect to file a grievance under that procedure or appeal to the Merit Systems Protection Board under 5 U.S.C. 7701, but not both. Sections 7114(a)(5) and 7121(b)(1)(C) of title 5, U.S. Code, and the terms of an applicable collective bargaining agreement, govern representation for employees in an exclusive bargaining unit who grieve a matter under this subpart through the negotiated grievance procedure.

### § 752.406 Agency records.

The agency must maintain copies of, and will furnish to the Merit Systems Protection Board and to the employee upon his or her request, the following documents:

(a) Notice of the proposed action;

(b) Employee's written reply, if any;

(c) Summary of the employee's oral reply, if any;

(d) Notice of decision; and

(e) Any order effecting the action, together with any supporting material.

## Subpart E [Reserved]

## Subpart F—Regulatory Requirements for Taking Adverse Action Under the Senior Executive Service

### § 752.601 Coverage.

(a) *Adverse actions covered.* This subpart applies to suspensions for more than 14 days and removals from the civil service as set forth in 5 U.S.C. 7542.

(b) *Actions excluded.* (1) An agency may not take a suspension action of 14 days or less.

(2) This subpart does not apply to actions taken under 5 U.S.C. 1215, 3592, 3595, or 7532.

(c) *Employees covered.* This subpart covers the following appointees:

(1) A career appointee—

(i) Who has completed the probationary period in the Senior Executive Service;

(ii) Who is not required to serve a probationary period in the Senior Executive Service; or

(iii) Who was covered under 5 U.S.C. 7511 immediately before appointment to the Senior Executive Service.

(2) A limited term or limited emergency appointee—

(i) Who received the limited appointment without a break in service in the same agency as the one in which the employee held a career or career-conditional appointment (or an appointment of equivalent tenure as determined by the Office of Personnel Management) in a permanent civil service position outside the Senior Executive Service; and

(ii) Who was covered under 5 U.S.C. 7511 immediately before appointment to the Senior Executive Service.

(d) *Employees excluded.* This subpart does not cover an appointee who is serving as a reemployed annuitant.

### § 752.602 Definitions.

In this subpart—

*Career appointee*, *limited term appointee*, and *limited emergency appointee* have the meaning given in 5 U.S.C. 3132(a).

*Day* means calendar day.

*Suspension* has the meaning given in 5 U.S.C. 7501(2).

### § 752.603 Standard for action.

(a) An agency may take an adverse action under this subpart only for reasons of misconduct, neglect of duty, malfeasance, or failure to accept a directed reassignment or to accompany a position in a transfer of function.

(b) An agency may not take an adverse action under this subpart on the

basis of any reason prohibited by 5 U.S.C. 2302.

**§ 752.604 Procedures.**

(a) *Statutory entitlements.* An appointee against whom action is proposed under this subpart is entitled to the procedures provided in 5 U.S.C. 7543(b).

(b) *Notice of proposed action.* (1) An appointee against whom an action is proposed is entitled to at least 30 days' advance written notice unless there is an exception pursuant to paragraph (d) of this section. The notice must state the specific reason(s) for the proposed action, and inform the appointee of his or her right to review the material that is relied on to support the reasons for action given in the notice.

(2) Under ordinary circumstances, an appointee whose removal has been proposed will remain in a duty status in his or her regular position during the advance notice period. In those rare circumstances where the agency determines that the appointee's continued presence in the work place during the notice period may pose a threat to the appointee or others, result in loss of or damage to Government property, or otherwise jeopardize legitimate Government interests, the agency may elect one or a combination of the following alternatives:

(i) Assigning the appointee to duties where he or she is no longer a threat to safety, the agency mission, or Government property;

(ii) Allowing the appointee to take leave, or carrying him or her in an appropriate leave status (annual, sick, leave without pay, or absence without leave) if the appointee has absented himself or herself from the worksite without requesting leave;

(iii) Curtailing the notice period when the agency can invoke the provisions of paragraph (d) of this section; or

(iv) Placing the appointee in a paid, nonduty status for such time as is necessary to effect the action.

(c) *Appointee's answer.* (1) The appointee may answer orally and in writing except as provided in paragraph (c)(2) of this section. The agency must give the appointee a reasonable amount of official time to review the material relied on to support its proposed action, to prepare an answer orally and in writing, and to secure affidavits, if the appointee is in an active duty status. The agency may require the appointee to furnish any answer to the proposed action, and affidavits and other documentary evidence in support of the answer, within such time as would be reasonable, but not less than 7 days.

(2) The agency will designate an official to hear the appointee's oral answer who has authority either to make or to recommend a final decision on the proposed adverse action. The right to answer orally in person does not include the right to a formal hearing with examination of witnesses unless the agency provides for such hearing in its regulations. Under 5 U.S.C. 7543(c), the agency may in its regulations provide a hearing in place of or in addition to the opportunity for written and oral answer.

(3) If the appointee wishes the agency to consider any medical condition that may have affected the basis for the adverse action, the appointee must be given reasonable time to furnish medical documentation (as defined in § 339.104 of this chapter) of the condition. Whenever possible, the appointee will supply such documentation within the time limits allowed for an answer.

(d) *Exception.* Section 7543(b)(1) of title 5, U.S. Code, authorizes an exception to the 30 days' advance written notice when the agency has reasonable cause to believe that the appointee has committed a crime for which a sentence of imprisonment may be imposed and is proposing a removal or suspension. This notice exception is commonly referred to as the ''crime provision.'' This provision may be invoked even in the absence of judicial action.

(e) *Representation.* Section 7543(b)(3) of title 5, U.S. Code, provides that an appointee covered by this part is entitled to be represented by an attorney or other representative. An agency may disallow as an appointee's representative an individual whose activities as representative would cause a conflict of interest or position, or an employee of the agency whose release from his or her official position would give rise to unreasonable costs or

whose priority work assignments preclude his or her release.

(f) *Agency review of medical information*. When medical information is supplied by the appointee pursuant to paragraph (c)(3) of this section, the agency may, if authorized, require a medical examination under the criteria of § 339.301 of this chapter, or otherwise, at its option, offer a medical examination in accordance with the criteria of § 339.302 of this chapter. If the appointee has the requisite years of service under the Civil Service Retirement System or the Federal Employees' Retirement System, the agency must provide information concerning disability retirement. The agency must be aware of the affirmative obligations of the provisions of 29 CFR 1614.203, which require reasonable accommodation of a qualified individual with a disability.

(g) *Agency decision*. (1) In arriving at its decision, the agency will consider only the reasons specified in the notice of proposed action and any answer of the appointee or the appointee's representative, or both, made to a designated official and any medical documentation reviewed under paragraph (f) of this section.

(2) The notice must specify in writing the reasons for the decision and advise the appointee of any appeal rights under § 752.605 of this part. The agency must deliver the notice of decision to the appointee on or before the effective date of the action.

(h) *Applications for disability retirement*. Section 831.1204(e) of this chapter provides that an appointee's application for disability retirement need not delay any other appropriate personnel action. Section 831.1205 and § 844.202 of this chapter set forth the basis under which an agency must file an application for disability retirement on behalf of an appointee.

### § 752.605 Appeal rights.

(a) Under 5 U.S.C. 7543(d), a career appointee against whom an action is taken under this subpart is entitled to appeal to the Merit Systems Protection Board.

(b) A limited term or limited emergency appointee who is covered under § 752.601(c)(2) also may appeal an action taken under this subpart to the Merit Systems Protection Board.

### § 752.606 Agency records.

The agency must maintain copies of, and will furnish to the Merit Systems Protection Board and to the appointee upon his or her request, the following documents:

(a) Notice of the proposed action;

(b) Appointee's written reply, if any;

(c) Summary of the appointee's oral reply, if any;

(d) Notice of decision; and

(e) Any order effecting the action, together with any supporting material.

## PART 754 [RESERVED]

## PART 771—AGENCY ADMINISTRATIVE GRIEVANCE SYSTEM

AUTHORITY: 5 U.S.C. 1302, 3301, 3302, 7301; E.O. 9830, 3 CFR 1945–1948 Comp., pp. 606–624; E.O. 11222, 3 CFR 1964–1969 Comp., p. 306.

### § 771.101 Continuation of Grievance Systems.

Each administrative grievance system in operation as of October 11, 1995, that has been established under former regulations under this part must remain in effect until the system is either modified by the agency or replaced with another dispute resolution process.

[60 FR 47040, Sept. 11, 1995]

## PART 772—INTERIM RELIEF

### Subpart A—General

Sec.
772.101 Basic authority.
772.102 Interim personnel actions.

AUTHORITY: 5 U.S.C. 1302, 3301, 3302, and 7301; Pub. L. 101–12.

SOURCE: 57 FR 3712, Jan. 31, 1992, unless otherwise noted.

## Subpart A—General

### § 772.101 Basic authority.

This part establishes a mechanism for agencies to provide interim relief to employees and applicants for employment who prevail in an initial decision

issued by the Merit Systems Protection Board (MSPB) as required by the *Whistleblower Protection Act of 1989*, Pub. L. 101–12 (codified at 5 U.S.C. 7701(b)(2)(A)). The interim relief provisions of the law are applicable whether or not alleged reprisal for whistleblowing is at issue in an appeal to MSPB.

**§ 772.102 Interim personnel actions.**

When an employee or applicant for employment appeals an action to MSPB and the appeal results in an initial decision by an MSPB administrative judge granting interim relief under 5 U.S.C. 7701(b)(2)(A) and a petition for review of the initial decision is filed (or will be filed) with the full Board under 5 U.S.C. 7701(e)(1)(A), the agency shall provide the relief ordered in the initial decision by taking an interim personnel action subject to the following terms:

(a) Interim personnel actions shall be made effective upon the date of issuance of the initial decision and must be initiated on or before the date of a petition for review by the agency or within a reasonable period after the date it becomes aware of a petition for review by the appellant;

(b) The relief provided by interim personnel actions shall end:

(1) When the full Board issues a final decision on a petition for review filed by an applicant for employment, employee, and/or agency under 5 U.S.C. 7701(e)(1)(A),

(2) When the initial decision becomes final pursuant to an action of the full Board or pursuant to a decision by an applicant for employment, employee, and/or agency to withdraw (or change intentions to file) any petition for review filed under 5 U.S.C. 7701(e)(1)(A), or

(3) When the applicant for employment or employee requests or reaches agreement with the agency that the interim relief ordered in the initial decision be cancelled;

(c) Interim relief shall entitle the applicant for employment or employee to the same compensation and benefits he or she would receive if the relief effected had not been on an interim basis except as provided in paragraph (f) of this section;

(d) An interim personnel action shall not be taken if the MSPB administrative judge, pursuant to 5 U.S.C. 7701(b)(2)(A)(i), determines that granting interim relief is not appropriate;

(e) An interim personnel action under this part shall not entitle the applicant for employment or employee to an award of back pay or attorney fees.

[57 FR 3712, Jan. 31, 1992, as amended at 59 FR 36353, July 18, 1994; 59 FR 65704, Dec. 21, 1994]

# PART 792—FEDERAL EMPLOYEES' HEALTH, COUNSELING, AND WORK/LIFE PROGRAMS

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AUTHORITY: 5 U.S.C. 7361–7363; Sec. 643, Pub. L. 106–58, 113 Stat. 477; 40 U.S.C. 590(g).

## Subpart A—Alcoholism and Drug Abuse Programs and Services for Federal Civilian Employees

**§ 792.101 Statutory requirements.**

Sections 7361 and 7362 of title 5, United States Code, provide that the Office of Personnel Management is responsible for developing and maintaining, in cooperation with the Secretary of the Department of Health and Human Services and with other agencies, appropriate prevention, treatment, and rehabilitation programs and

services for Federal civilian employees with alcohol and drug abuse problems. To the extent feasible, agencies are encouraged to extend services to families (including domestic partners and their children) of alcohol and/or drug abusing employees and to employees who have family members (including domestic partners and their children) who have alcohol and/or drug problems. Such programs and services should make optimal use of existing Government facilities, services, and skills.

[77 FR 42907, July 20, 2012]

### § 792.102 General.

It is the policy of the Federal Government to offer appropriate prevention, treatment, and rehabilitation programs and services for Federal civilian employees with alcohol and drug problems. Short-term counseling or referral, or offers thereof, constitute the appropriate prevention, treatment, and rehabilitation programs and services for alcohol abuse, alcoholism, and drug abuse required under subchapter VI of chapter 73 of title 5, United States Code. Federal agencies must establish programs to assist employees with these problems in accordance with that subchapter.

[77 FR 42907, July 20, 2012]

### § 792.103 Coverage.

This part applies to all positions in Executive agencies as defined in section 105 of title 5 of the United States Code, and to those positions in the legislative and judicial branch of the Federal Government which are in the competitive service.

[49 FR 27921, July 9, 1984]

### § 792.104 Responsibilities of the Office of Personnel Management.

OPM shall provide overall leadership for the Government-wide alcoholism and drug abuse program in cooperation with the Secretary of Health and Human Services. To accomplish this, OPM shall develop and issue policy and program guidance, provide technical assistance to agencies, and determine the overall effectiveness of the Government-wide program, as well as those programs at individual agencies, based on program information required of agencies.

[49 FR 27921, July 9, 1984]

### § 792.105 Agency responsibilities.

(a) Agencies shall establish and administer programs through which practitioners who are knowledgeable in counseling and referral services can offer and provide employees who have alcohol and/or drug problems short-term counseling and/or referrals for long-term counseling or treatment.

(b) Agencies must issue internal instructions implementing the requirements of 5 U.S.C. 7361–7363 and this subpart.

(c) Whenever a manager/supervisor becomes aware that a Federal employee's use of alcohol and/or drugs may be contributing to a performance or conduct deficiency, the manager/supervisor shall recommend counseling and refer the employee to the agency counseling program. If an employee fails to participate in any rehabilitative program or, having participated, the employee fails to bring conduct or performance up to satisfactory level, the agency shall evaluate the employee accordingly and initiate an appropriate performance-based or adverse action.

(d) As requested, agencies shall annually submit a report to OPM on their counseling activities for the past fiscal year at a time, and in a manner, set by OPM.

[49 FR 27921, July 9, 1984, as amended at 50 FR 16692, Apr. 29, 1985; 77 FR 42908, July 20, 2012]

## Subpart B—Agency Use of Appropriated Funds for Child Care Costs for Lower Income Employees

SOURCE: 77 FR 42908, July 20, 2012, unless otherwise noted.

### § 792.201 Purpose.

The purpose of this subpart is to implement section 590(g) of title 40, United States Code, which permits an Executive agency to use appropriated funds to improve the affordability of child care for lower-income employees. The law applies to child care in the

United States and in overseas locations. Employees can benefit from reduced child care rates at Federal child care centers, non-Federal child care centers, and in family child care homes.

**§ 792.202 Definitions.**

In this subpart—

*Child* means a child who bears any of the following relationships to an employee, the employee's spouse, or the employee's domestic partner:

(1) A biological child;

(2) An adopted child;

(3) A stepchild;

(4) A foster child;

(5) A child for whom a judicial determination of support has been obtained; or

(6) A child to whose support the employee, the employee's spouse, or the employee's domestic partner makes regular and substantial contributions.

*Child care provider* means an individual or entity providing child care services for which Federal employees' families are eligible. The provider must be licensed or regulated, and the provider's services can be provided in a Federally-sponsored child care center, a non-Federal center, or a family child care home.

*Child care subsidy program* means the program established by an agency in using appropriated funds, as provided in this subpart, to assist lower-income employees with child care costs. The program can include such activities as determining which employees receive a subsidy and the size of their subsidies; distributing agency funds to participating providers; and tracking and reporting information to OPM such as total cost and employee use of the program.

*Disabled child* means a child who is unable to care for himself or herself because of a physical or mental condition as determined by a physician or licensed or certified psychologist.

*Domestic partner* means a person in a domestic partnership with an employee of the same sex.

*Domestic partnership* means a committed relationship between two adults of the same sex in which the partners—

(1) Are each other's sole domestic partner and intend to remain so indefinitely;

(2) Maintain a common residence, and intend to continue to do so (or would maintain a common residence but for an assignment abroad or other employment-related, financial, or similar obstacle);

(3) Are at least 18 years of age and mentally competent to consent to a contract;

(4) Share responsibility for a significant measure of each other's financial obligations;

(5) Are not married or joined in a civil union to anyone else;

(6) Are not the domestic partner of anyone else;

(7) Are not related in a way that, if they were of opposite sex, would prohibit legal marriage in the U.S. jurisdiction in which the domestic partnership was formed;

(8) Are willing to certify, if required by the agency, that they understand that willful falsification of any documentation required to establish that an individual is in a domestic partnership may lead to disciplinary action and the recovery of the cost of benefits received related to such falsification, as well as constitute a criminal violation under 18 U.S.C. 1001, and that the method for securing such certification, if required, will be determined by the agency; and

(9) Are willing promptly to disclose, if required by the agency, any dissolution or material change in the status of the domestic partnership.

*Employee* means an employee as defined in section 2105 of title 5, United States Code.

*Executive agency* means an Executive agency as defined in 5 U.S.C. 105 but does not include the Government Accountability Office.

*Federally-sponsored child care center* means a child care center located in a building or space that is owned or leased by the Federal Government.

*OPM* means the U.S. Office of Personnel Management.

**§ 792.203 Child care subsidy programs; eligibility.**

(a)(1) An Executive agency may establish a child care subsidy program in

which the agency uses appropriated funds, in accordance with this subpart, to assist lower-income employees of the agency with their child care costs. The assistance may be provided for both full-time and part-time child care, and may include before-and-after-school programs and daytime summer programs.

(2) Two or more agencies may pool their funds to establish a child care subsidy program for the benefit of employees who are served by a Federally-sponsored child care center in a multi-tenant facility.

(3)(i) Except as provided under paragraph (a)(3)(ii) of this section, an agency may impose restrictions on the use of appropriated funds for its child care subsidy program based on consideration of employees' needs, its own staffing needs, the local availability of child care, and other factors as determined by the agency. For example, an agency may decide to restrict eligibility for subsidies to—

(A) Full-time permanent employees;

(B) Employees using an agency on-site child care center;

(C) Employees using full-time child care; or

(D) Employees using child care in specific locations.

(ii) An agency may not limit the payment of subsidies to accredited child care providers.

(b) Subject to any restrictions applicable under paragraph (a)(3)(i) of this section, an employee who qualifies as a lower-income employee under the agency's child care subsidy program is eligible to receive a child care subsidy for the care of each child under age 13 or, in the case of a disabled child, under age 18.

### § 792.204 Agency responsibilities; reporting requirement.

(a) Before funds may be obligated as provided in this subpart, an agency intending to initiate a child care subsidy program must provide notice to the Subcommittees on Financial Services and General Government of the House and Senate Appropriations Committees, as well as to OPM.

(b) Agencies must notify the committees referred to in paragraph (a) of this section and OPM annually of their intention to provide child care subsidies. Funds may be obligated immediately after the notifications have been made.

(c) Agencies are responsible for tracking the utilization of their funds and reporting the results to OPM at such time and in such manner as OPM prescribes.

[77 FR 42908, July 20, 2012, as amended at 80 FR 75786, Dec. 4, 2015]

### § 792.205 Administration of child care subsidy programs.

(a) An agency may administer its child care subsidy program directly or by contract with another entity, using procedures prescribed under the Federal Acquisition Regulations. Regardless of what entity administers the program, the Federal agency is responsible for establishing how eligibility and subsidy amounts will be determined.

(b) An agency contract must specify that any unexpended funds will be returned to the agency after the contract is completed.

### § 792.206 Payment of subsidies.

(a) Payment of child care subsidies must be made directly to child care providers, unless one of the following exceptions applies:

(1) In overseas locations, the agency may pay the employee if the provider deals only in foreign currency.

(2) In unique circumstances, an agency may obtain written permission from OPM to pay the employee directly.

(b) An agency may make advance payments to a child care provider in certain circumstances, such as when the provider requires payment up to one month in advance of rendering services. An agency may not make advance payments for more than one month before the employee receives child care services except where an agency has contracted with another entity to administer the child care subsidy program, in which case the agency may advance payments to the entity administering the program as long as the requirements in § 792.205(b) are met.

# PART 831—RETIREMENT

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AUTHORITY: 5 U.S.C. 8347; Sec. 831.102 also issued under 5 U.S.C. 8334; Sec. 831.106 also issued under 5 U.S.C. 552a; Sec. 831.108 also issued under 5 U.S.C. 8336(d)(2); Sec. 831.114 also issued under 5 U.S.C. 8336(d)(2), and Sec. 1313(b)(5) of Pub. L. 107–296, 116 Stat. 2135; Sec. 831.201(b)(1) also issued under 5 U.S.C. 8347(g); Sec. 831.201(b)(6) also issued under 5 U.S.C. 7701(b)(2); Sec. 831.201(g) also issued under Secs. 11202(f), 11232(e), and 11246(b) of Pub. L. 105–33, 111 Stat. 251; Sec. 831.201(g) also issued under Secs. 7(b) and (e) of Pub. L. 105–274, 112 Stat. 2419; Sec. 831.201(i) also issued under Secs. 3 and 7(c) of Pub. L. 105–274, 112 Stat. 2419; Sec. 831.204 also issued under Sec. 102(e) of Pub. L. 104–8, 109 Stat. 102, as amended by Sec. 153 of Pub. L. 104–134, 110 Stat. 1321; Sec. 831.205 also issued under Sec. 2207 of Pub. L. 106–265, 114 Stat. 784; Sec. 831.206 also issued under Sec. 1622(b) of Pub. L. 104–106, 110 Stat. 515; Sec. 831.301 also issued under Sec. 2203 of Pub. L. 106–265, 114 Stat. 780; Sec. 831.303 also issued under 5 U.S.C. 8334(d)(2) and Sec. 2203 of Pub. L. 106–235, 114 Stat. 780; Sec. 831.502 also issued under 5 U.S.C. 8337, and under Sec. 1(3), E.O. 11228, 3 CFR 1965–1965 Comp. p. 317; Sec. 831.663 also issued under 5 U.S.C. 8339(j) and (k)(2); Secs. 831.663 and 831.664 also issued under Sec. 11004(c)(2) of Pub. L. 103–66, 107 Stat. 412; Sec. 831.682 also issued under Sec. 201(d) of Pub. L. 99–251, 100 Stat. 23; Sec. 831.912 also issued under Sec. 636 of Appendix C to Pub. L. 106–554, 114 Stat. 2763A–164; Subpart P also issued under Sec. 535(d) of Title V of Division E of Pub. L. 110–161, 121 Stat. 2042; Subpart Q also issued under 5 U.S.C. 8336a; Subpart V also issued under 5 U.S.C. 8343a and Sec. 6001 of Pub. L. 100–203, 101 Stat. 1330–275; Sec. 831.2203 also issued under Sec. 7001(a)(4) of Public Law 101–508, 104 Stat. 1388–328.

SOURCE: 33 FR 12498, Sept. 4, 1968, unless otherwise noted.

## Subpart A—Administration and General Provisions

### § 831.101 Administration.

(a) OPM has charge of the adjudication of all claims arising under subchapter III of chapter 83 of title 5, United States Code, and of all matters directly or indirectly concerned with these adjudications.

(b) In the adjudication of claims arising under subchapter III of chapter 83 of title 5, United States Code, OPM shall consider and take appropriate action on counterclaims filed by the Government as set-offs against amounts in the Civil Service Retirement and Disability Fund.

(c) For purposes of this part, the term ''Associate Director'' means the Associate Director for Compensation in OPM.

[33 FR 12498, Sept. 4, 1968, as amended at 34 FR 17617, Oct. 31, 1969]

### § 831.102 Basic records.

Every Federal department, agency, corporation or branch, whether executive, legislative, or judicial, and the District of Columbia Government (included in this part collectively in the term department or agency) having employees or Members of Congress (hereinafter referred to in this part as Members) subject to subchapter III of chapter 83 of title 5, United States Code, shall initiate and maintain retirement accounts for those employees and Members as prescribed by OPM issuances.

[33 FR 12498, Sept. 4, 1968, as amended at 66 FR 66711, Dec. 27, 2001]

### § 831.103 Evidence.

(a) Standard Form 2806 (Individual Retirement Record) is the basic record for action on all claims for annuity or refund, and those pertaining to deceased employees, deceased Members, or deceased annuitants.

(b) When the records of the department or agency concerned are lost, destroyed, or incomplete, the department or agency shall request the General Accounting Office, through OPM, to furnish the data that it considers necessary for a proper determination of the rights of the claimant. When an official record cannot develop the required information, the department, agency, or OPM should request inferior or secondary evidence which is then admissible.

### § 831.104 Application.

(a) Except as provided in paragraph (b) of this section, applications under subchapter III of chapter 83 of title 5, United States Code, shall be filed with OPM and shall be on forms prescribed by OPM.

(b) Applications to make deposit for military service shall be filed in accordance with subpart U of this part.

[48 FR 38783, Aug. 26, 1983]

### § 831.105 Computation of interest.

(a) The computation of interest is on the basis of 30 days to the month. Interest is computed for the actual calendar time involved in each case, but whenever applicable the rule of average applies.

(b) Interest is allowed on current deductions and deposits at the rate of 4 percent per year to December 31, 1947, and 3 percent per year thereafter, compounded annually, to December 31, 1956. After December 31, 1956, except as provided below, interest is allowed at the rate of 3 percent per year, compounded annually, to date of final separation or transfer to a position that is not covered by the retirement system. After December 31, 1956, interest is not allowed:

(1) When an employee has one year or less of covered service,

(2) For any fractional part of a month in the total service, or

(3) For more than five years' civilian service.

(c) Interest at the rate of 3 percent per year through December 31, 1984, and, thereafter, at the yearly rate determined by the Secretary of Treasury, compounded annually, is allowed on voluntary contributions during periods of employment and, after the employee or Member has completed at least 5 years' civilian service, during periods of separation until the beginning date

of annuity or death, whichever is earlier. For refund purposes, however, interest on voluntary contributions terminates on the date of the employee's or Member's final separation or on the date of the employee's or Member's last transfer to a position in which he or she is not subject to subchapter III of chapter 83 of title 5, United States Code

(d) For noncontributory service performed before October 1, 1982, and for redeposits of refunds paid on an application received by either the individual's employing agency or OPM before October 1, 1982, interest at the rate of 4 percent per year to December 31, 1947, and at the rate of 3 percent per year thereafter, compounded annually, is charged. Interest is charged on the outstanding balance of a deposit from the midpoint of each service period for which deposit is involved; interest is charged on the outstanding balance of a refund from the date the refund was paid. Interest is charged to the date of deposit or commencing date of annuity, whichever is earlier, except that interest is not charged for any period of separation from the service which began before October 1, 1956.

(e) For noncontributory service performed on or after October 1, 1982, and for redeposits of refunds paid on an application received by the individual's employing agency or OPM on or after October 1, 1982, interest is charged at the rate of 3 percent per year through December 31, 1984, and, thereafter, at the yearly rate determined by the Secretary of Treasury, compounded annually. Interest is charged on the outstanding balance of a deposit from the midpoint of each service period for which deposit is involved; interest is charged on the outstanding balance of a refund from the date the refund was paid. Interest is charged to the date of deposit.

(f) No interest is charged on a deposit for military service if that deposit is made before October 1, 1984, or within 2 years of the date that an individual first becomes an employee or Member under the civil service retirement system, whichever is later. When interest is charged on a deposit for military service, it is charged on the outstanding balance at the rate of 3 percent per year, compounded annually, from October 1, 1984, or 2 years from the date the individual first becomes an employee or Member, whichever is later, through December 31, 1984, and thereafter at the yearly rate determined by the Secretary of the Treasury.

(g) For calendar year 1985 and for each subsequent calendar year, OPM will publish a notice in the FEDERAL REGISTER to notify the public of the interest rate that will be in effect during that calendar year.

(h) Interest under §§ 831.631, 831.632, 831.682, and 831.684 is compounded annually and accrued monthly.

(1) The initial interest on each monthly difference between the reduced annuity rate and the annuity rate actually paid equals the amount of the monthly difference times the difference between (i) 1.06 raised to the power whose numerator is the number of months between the date when the monthly difference in annuity rates occurred and the date when the initial interest is computed and whose denominator is 12; and (ii) 1.

(2) The total initial interest due is the sum of all of the initial interest on each monthly difference computed in accordance with paragraph (h)(1) of this section.

(3) Additional interest on any uncollected balance will be compounded annually and accrued monthly. The additional interest due each month equals the remaining balance due times the difference between (i) 1.06 raised to the 1/12th power; and (ii) 1.

(i)(1) When an individual's civilian service involves several deposit and/or redeposit periods, OPM will normally use the following order of precedence in applying each installment payment against the full amount due:

(i) Redeposits of refunds paid on applications received by the individual's employing agency or OPM on or after October 1, 1982;

(ii) Redeposits of refunds paid on applications received by the individual's employing agency or OPM before October 1, 1982;

(iii) Deposits for noncontributory civilian service performed on or after October 1, 1982; and

(iv) Deposits for noncontributory service performed before October 1, 1982.

(2) If an individual specifically requests a different order of precedence, that request will be honored.

(j) Interest under § 831.662 is compounded annually and accrued monthly.

(1) The initial interest on each monthly difference between the reduced annuity rate and the annuity rate actually paid equals the amount of the monthly difference times the difference between—

(i) The sum of one plus the interest rate set under § 831.105(g) raised to the power whose numerator is the number of months between the date when the monthly difference in annuity rates occurred and the date when the initial interest is computed and whose denominator is 12; and

(ii) 1.

(2) The total initial interest due is the sum of all of the initial interest on each monthly difference computed in accordance with paragraph (j)(1) of this section.

[33 FR 12498, Sept. 4, 1968, as amended at 47 FR 43637, Oct. 1, 1982; 48 FR 38783, Aug. 26, 1983; 51 FR 31931, Sept. 8, 1986; 52 FR 32287, Aug. 27, 1987; 55 FR 9099, Mar. 12, 1990; 58 FR 52880, Oct. 13, 1993]

### § 831.106 Disclosure of information.

(a)(1) The Office has in its possession or under its control records containing the following types of information:

(i) Documentation of Federal service subject to the Civil Service Retirement System.

(ii) Documentation of service credit and refund claims made under the Civil Service Retirement System.

(iii) Retirement and death claims files, including documents supporting the retirement application, health benefits and life insurance eligibility, medical records supporting disability claims, and designations of beneficiaries.

(iv) Claims review and correspondence files pertaining to benefits under the Federal Employees Health Benefits Program.

(v) Suitability determination files on applicants for Federal employment found unsuitable for employment on medical grounds.

(vi) Documentation of claims made for life insurance and health benefits by annuitants under a Federal Government retirement system other than the Civil Service Retirement System.

(vii) Documentation of voluntary contributions made by eligible individuals.

(viii) Health Unit medical records for OPM employees.

(2) These records may be disclosed to the individual to whom the information pertains, or with prior written consent of the individual to any agency or other person, *except* that medical evidence about which a prudent physician would hesitate to inform the individual, will be disclosed only to a licensed physician designated in writing for that purpose by the individual or by his or her representative.

(3) Civil service retirement records will be disclosed consistent with the provisions of the Privacy Act of 1974 (5 U.S.C. 552a), including, but not limited to, disclosures.

(i) Pursuant to a routine use promulgated for such records and printed in the Office's annual publication of notices of systems of records, except that;

(ii) A beneficiary designated in accordance with the provisions of the Civil Service Retirement law (5 U.S.C. 8342(b)) shall, during the lifetime of the designator, be disclosed to the designator only, at his or her signed, written request. Such beneficiary designations that may appear in records being disclosed must be removed before access to a record is permitted. If information pertaining to a designation of beneficiary is specifically asked for by a court of competent jurisdiction, it may be released to the court, but with a written notice that it is released under protest.

(4) Except as provided in paragraphs (a)(2) and (a)(3) of this section, the Office shall not disclose information from the files, records, reports, or other papers and documents pertaining to a claim filed with the Office, whether potential, pending, or adjudicated. This information is deemed privileged and confidential.

(b) On written request the Office shall return, to the person entitled to

them, certificates of discharges, adoption papers, marriage certificates, decrees of divorce, letters testamentary or of administration, when they are no longer needed in the settlement of the claim. If papers returned constitute part of the material and essential evidence in a claim, the Office shall retain in the file photo or other copies of them or of the parts which appear to be of evidential value.

[47 FR 12937, Mar. 26, 1982]

### § 831.107 Computation of time.

In computing a period of time prescribed by this part, the day of the action or event after which the designated period of time begins to run is not included. The last day of the period is included unless it is a Saturday, a Sunday, or a legal holiday; in this event, the period runs until the end of the next day which is not a Saturday, a Sunday, or a legal holiday.

[33 FR 12498, Sept. 4, 1968. Redesignated at 44 FR 37889, June 29, 1979]

### § 831.109 Initial decision and reconsideration.

(a) *Who may file.* Except as noted in paragraph (b) of this section any individual or agency whose rights or interests under the Civil Service Retirement System are affected by an initial decision of the Office of Personnel Management (OPM) may request OPM to review its initial decision.

(b) *Actions covered elsewhere.* (1) A request for reconsideration of termination of annuity payments under 5 U.S.C. 8311–22 shall be made in accordance with the procedures set out in subpart K of this part.

(2) A request for reconsideration of a decision to collect a debt will be made in accordance with § 831.1304(b).

(c) *Initial decision.* A decision shall be considered an initial decision when rendered by OPM in writing and stating the right to reconsideration.

(d) *Reconsideration.* A request for reconsideration must be in writing, must include the individual's name, address, date of birth and claim number, if applicable, and must state the basis for the request.

(e) *Time limits on reconsideration.* (1) A request for reconsideration must be received by OPM within 30 calendar days from the date of the original decision.

(2) The representative of the Associate Director for Compensation responsible for reconsiderations may extend the time limit for filing when the individual shows that he/she was not notified of the time limit and was not otherwise aware of it, or that he/she was prevented by circumstances beyond his/her control from making the request within the time limit.

(f) *Final decision.* (1) After reconsideration, the Associate Director's representative shall issue a final decision which shall be in writing, shall fully set forth the findings and conclusions of the reconsideration, and shall contain notice of the right to request an appeal provided in § 831.110. Copies of the final decision shall be sent to the individual, to any competing claimants and, where applicable, to the agency.

(2) OPM may issue a final decision providing the opportunity to appeal under § 831.110 rather than an opportunity to request reconsideration under paragraph (c) of this section. Such a decision must be in writing and state the right to appeal under § 831.110.

(g) *Competing claimants.* (1) When a competing claimant files a request for reconsideration under this section, the other competing claimants shall be notified of the request and given an opportunity to submit written substantiation of their claim.

(2) When a determination in favor of one claimant would affect another claimant, all claimants concerned will be notified of that decision and those adversely affected will be given an opportunity to request reconsideration. OPM shall not execute its decision until the time limit for requesting reconsideration has expired. If reconsideration has been requested, OPM shall take no action after the reconsideration decision is rendered until the time limit to appeal has expired.

[45 FR 23632, Apr. 8, 1980, as amended at 49 FR 1330, Jan. 11, 1984; 50 FR 34664, Aug. 27, 1985; 62 FR 22873, Apr. 28, 1997]

### § 831.110 Appeals.

*Appeals to MSPB.* Except as noted in this paragraph, an individual or agency whose rights or interests under the

Civil Service Retirement System (Subchapter III of chapter 83, title 5, United States Code) are affected by a final decision of the representative of the Associate Director for Compensation, Office of Personnel Management, may request the Merit Systems Protection Board to review such decision in accord with procedures prescribed by the Board. Decisions of OPM and the Associate Director for Compensation made in accord with the procedures referenced in § 831.109(b)(1) are made under subchapter II of chapter 83, title 5, United States Code. Such decisions are not appealable to the Merit Systems Protection Board under 5 U.S.C. 8347(d).

[44 FR 37890, June 29, 1979, as amended at 45 FR 23633, Apr. 8, 1980; 48 FR 38784, Aug. 26, 1983]

### § 831.111 Employee deductions and agency contributions.

(a) *Agency share.* When an agency fails to withhold some or all of an employee deduction under 5 U.S.C. 8334(a) for any pay period, the agency is still responsible for submitting the correct agency contribution to OPM. The agency must submit as the agency share, a payment equal to the amount that would have been submitted if the error had not been made (or a payment equal to the difference between the amount already submitted as the agency share and the amount that should have been submitted). The payment should be submitted to OPM in the manner currently prescribed for the transmission of withholdings and contributions as soon as possible, but not later than provided by standards established by OPM.

(b) *Employee share.* (1) If, through administrative error, an agency did not withhold any of the employee deductions required by 5 U.S.C. 8334(a) for any pay period, the employee may, at his or her option—

(i) Request the agency that employed him or her when the error was made to correct his or her records and arrange to pay any resulting overpayment of pay to the agency (unless it is waived by the agency); or

(ii) Pay the deposit plus any applicable interest (under certain conditions, the deposit may be made at any time until the final adjudication of his or her application for retirement) directly to OPM by submitting SF 2803; or

(iii) Have the period of service treated like the nondeduction service described in § 831.303.

(2) When the agency withholds part of the required employee deductions for any pay period, the balance must be submitted to OPM in the manner currently prescribed for the transmission of withholdings and contributions as soon as possible, but not later than provided by standards established by OPM. The agency must correct its error. The employee does not have the option to pay a deposit directly to OPM when partial deductions have been withheld.

(3) If the agency waives the employee's repayment of the salary overpayment that resulted from the administrative error, the agency must also submit (in addition to the agency contribution) the employee's share of the unpaid contributions to OPM in the manner currently prescribed for the transmission of withholdings and contributions.

[53 FR 35295, Sept. 13, 1988, as amended at 66 FR 66711, Dec. 27, 2001]

### § 831.112 Definitions of employee.

(a) *Determinations involving an employee's ability to make a deposit or redeposit.* A person may make a deposit or redeposit under section 8334 of title 5, United States Code, if he or she is an ''employee.'' For purposes of this paragraph, an *employee* is—

(1) A person currently employed in a position subject to the civil service retirement law; or

(2) A former employee (whose annuity has not been finally adjudicated) who retains civil service retirement annuity rights based on a separation from a position in which retirement deductions were properly withheld and remain (or have been redeposited in whole or in part) in the Civil Service Retirement and Disability Fund.

(b) *Determinations involving the payment of survivor benefits at an employee's or former employee's death.* To determine entitlement to survivor benefits, OPM

establishes whether the deceased individual was an ''employee'' or a ''retiree'' on the date of death. If the decedent was an ''employee'' on the date of death, survivor benefits are paid as though the individual died in service. If the decedent was a ''retiree'' on the date of death, survivor benefits are only paid as provided in the individual's election, provided it was properly made. However, if a former employee was eligible only for a deferred annuity at age 62, survivor benefits are only paid if the individual was a ''retiree'' on the date of death. For purposes of this paragraph—

(1) *Employee* is a person—

(i) Who had not been separated from service prior to his or her death, even if he or she had applied for retirement (for example, an applicant for disability annuity) and the application had been approved; or

(ii) Whose death occurs before the commencing date of annuity, even though separation has occurred.

(2) *Retiree* or *annuitant* is a person—

(i) Who has been separated from service and met all the requirements to receive an annuity including having filed an application for the annuity prior to his or her death; and

(ii) Whose death occurs on or after the commencing date of annuity.

(c) *Determinations involving the requirement of spousal consent for elections of alternative annuity and survivor annuity benefits.* Spousal consent is required as specified in §§ 831.614 and 831.2203(c), if the employee/annuitant is married on the commencing date of annuity, regardless of whether that date is before or after the date of separation from service.

[56 FR 45883, Sept. 9, 1991, as amended at 58 FR 52880, Oct. 13, 1993]

### § 831.113 Payments to children.

For purposes of section 8345(e) of title 5, United States Code, persons who have attained age 18 are considered adults regardless of the age of majority in the jurisdiction in which they reside.

[56 FR 45884, Sept. 9, 1991]

### § 831.114 Voluntary early retirement-substantial delayering, reorganization, reduction in force, transfer of function, or other workforce restructuring.

(a) A *specific designee* is defined as a senior official within an agency who has been specifically designated to sign requests for voluntary early retirement authority under a designation from the head of the agency. Examples include a Chief Human Capital Officer, an Assistant Secretary for Administration, a Director of Human Resources Management, or other official.

(b) An agency's request for voluntary early retirement authority must be signed by the head of the agency or by a specific designee.

(c) The request must contain the following information:

(1) Identification of the agency or specified component(s) for which the authority is being requested;

(2) Reasons why the agency needs voluntary early retirement authority. This must include a detailed summary of the agency's personnel and/or budgetary situation that will result in an excess of personnel because of a substantial delayering, reorganization, reduction in force, transfer of function, or other workforce restructuring or reshaping, consistent with agency human capital goals;

(3) The date on which the agency expects to effect the substantial delayering, reorganization, reduction in force, transfer of function, or other workforce restructuring or reshaping;

(4) The time period during which the agency plans to offer voluntary early retirement;

(5) The total number of non-temporary employees in the agency (or specified component(s));

(6) The total number of non-temporary employees in the agency (or specified component(s)) who may be involuntarily separated, downgraded, transferred, or reassigned as a result of the substantial delayering, reorganization, reduction in force, transfer of function, or other workforce restructuring or reshaping;

(7) The total number of employees in the agency (or specified component(s)) who are eligible for voluntary early retirement;

(8) An estimate of the total number of employees in the agency (or specified component(s)) who are expected to retire early during the period covered by the request for voluntary early retirement authority; and

(9) A description of the types of personnel actions anticipated as a result of the agency's need for voluntary early retirement authority. Examples include separations, transfers, reassignments, and downgradings.

(d) OPM will evaluate a request for voluntary early retirement based on:

(1) A specific request to OPM from the agency for voluntary early retirement authority;

(2) A voluntary separation incentive payment implementation plan, as discussed in part 576, subpart A, of this chapter, which must outline the intended use of the incentive payments and voluntary early retirement; or

(3) The agency's human capital plan, which must outline its intended use of voluntary separation incentive payments and voluntary early retirement authority, and the changes in organizational structure it expects to make as the result of projected separations and early retirements.

(e) Regardless of the method used, the request must include all of the information required by paragraph (c) of this section.

(f) OPM may approve an agency's request for voluntary early retirement authority to cover the entire period of the substantial delayering, reorganization, reduction in force, transfer of function, or other workforce restructuring or reshaping described by the agency, or the initial portion of that period with a requirement for subsequent information and justification if the period covers multiple years.

(g) After OPM approves an agency's request, the agency must immediately notify OPM of any subsequent changes in the conditions that served as the basis for the approval of the voluntary early retirement authority. Depending upon the circumstances involved, OPM will modify the authority as necessary to better suit the agency's needs.

(h) The agency may further limit voluntary early retirement offers based on:

(1) An established opening and closing date for the acceptance of applications that is announced to employees at the time of the offer; or

(2) The acceptance of a specified number of applications for voluntary early retirement, provided that, at the time of the offer, the agency notified employees that it retained the right to limit the number of voluntary early retirements.

(i) Within the timeframe specified for its approved voluntary early retirement authority, the agency may subsequently establish a new or revised closing date, or reduce or increase the number of early retirement applications it will accept, if management's downsizing and/or reshaping needs change. If the agency issues a revised closing date, or a revised number of applications to be accepted, the new date or number of applications must be announced to the same group of employees included in the original announcement. If the agency issues a new window period with a new closing date, or a new instance of a specific number of applications to be accepted, the new window period or number of applications to be accepted may be announced to a different group of employees as long as they are covered by the approved voluntary early retirement authority.

(j) Chapter 43 of title 38, United States Code, requires that agencies treat employees on military duty, for all practical purposes, as though they were still on the job. Further, employees are not to be disadvantaged because of their military service. In accordance with these provisions, employees on military duty who would otherwise be eligible for an offer of voluntary early retirement will have 30 days following their return to duty to either accept or reject an offer of voluntary early retirement. This will be true even if the voluntary early retirement authority provided by OPM has expired.

(k) An employee who separates from the service voluntarily after completing 25 years of service, or becoming age 50 and completing 20 years of service, is entitled to an annuity if, on the date of separation, the employee:

(1) Is serving in a position covered by a voluntary early retirement offer; and

(2) Meets the following conditions which are covered in 5 U.S.C. 8336(d)(2):

(i) Has been employed continuously, by the agency in which the employee is serving, for at least the 31-day period ending on the date on which such agency requests the determination referred to in section 831.114(b);

(ii) Is serving under an appointment that is not time limited;

(iii) Has not been duly notified that such employee is to be involuntarily separated for misconduct or unacceptable performance;

(iv) Is separated from the service voluntarily during a period in which, as determined by the Office of Personnel Management (upon request of the agency) under regulations prescribed by the Office:

(A) Such agency (or, if applicable, the component in which the employee is serving) is undergoing substantial delayering, substantial reorganization, substantial reductions in force, substantial transfer of function, or other substantial workforce restructuring (or shaping);

(B) A significant percentage of employees serving in such agency (or component) are likely to be separated or subject to an immediate reduction in the rate of basic pay (without regard to subchapter VI of chapter 53, or comparable provisions); or

(C) Identified as being in positions which are becoming surplus or excess to the agency's future ability to carry out its mission effectively; and

(v) As determined by the agency under regulations prescribed by the Office, is within the scope of the offer of voluntary early retirement, which may be made based on the following criteria:

(A) 1 or more organizational units;

(B) 1 or more occupational series or levels;

(C) 1 or more geographical locations;

(D) Specific periods;

(E) Skills, knowledge, or other factors related to a position; or

(F) Any appropriate combination of such factors.

(l) Agencies are responsible for ensuring that employees are not coerced into voluntary early retirement. If an agency finds any instances of coercion, it must take appropriate corrective action.

(m) Except as provided in paragraph (j) of this section, an agency may not offer or process voluntary early retirements beyond the stated expiration date of a voluntary early retirement authority or offer early retirements to employees who are not within the scope of the voluntary early retirement authority approved by OPM.

(n) OPM may terminate a voluntary early retirement authority if it determines that the condition(s) that formed the basis for the approval of the authority no longer exist.

(o) OPM may amend, limit, or terminate a voluntary early retirement authority to ensure that the requirements of this subpart are properly being followed.

[69 FR 33278, June 15, 2004, as amended at 69 FR 50265, Aug. 16, 2004; 80 FR 75786, Dec. 4, 2015]

### § 831.115 Garnishment of CSRS payments.

CSRS payments are not subject to execution, levy, attachment, garnishment or other legal process except as expressly provided by Federal law.

[76 FR 9961, Feb. 23, 2011]

### § 831.116 Garnishment of payments after disbursement.

(a) Payments that are covered by 5 U.S.C. 8346(a) and made by direct deposit are subject to 31 CFR part 212, Garnishment of Accounts Containing Federal Benefit Payments.

(b) This section may be amended only by a rulemaking issued jointly by the Department of the Treasury and the agencies defined as a ''benefit agency'' in 31 CFR 212.3.

[76 FR 9961, Feb. 23, 2011]

## Subpart B—Coverage

### § 831.201 Exclusions from retirement coverage.

(a) The following groups of employees in the executive branch of the Government are excluded from subchapter III of chapter 83 of title 5, United States Code:

(1) Employees serving under appointments limited to one year or less, except annuitants appointed by the President to fill unexpired terms of office on or after January 1, 1976.

(2) Intermittent employees—non-full-time employees without a prearranged regular tour of duty.

(3) Employees whose salary, pay, or compensation on an annual basis is $12 a year or less.

(4) Member or patient employees in Government hospitals or homes.

(5) Employees paid on a piecework basis, except those whose work schedule provides for regular or full-time service.

(6) Intermittent alien employees engaged on work outside the continental limits of the United States.

(7) Employees serving under temporary appointments pending establishment of registers, or pending final determination of eligibility for permanent appointment.

(8) Officers in Charge, clerks in fourth-class post offices, substitute rural carriers, and special-delivery messengers at second- third-, and fourth-class post offices.

(9) Consular agents appointed under authority of section 551 of the Foreign Service Act of 1946 (22 U.S.C. 951).

(10) Employees serving under emergency-indefinite appointments not exceeding 5 years.

(11) United States citizens given ''overseas limited appointments.''

(12) Employees serving under nonpermanent appointments made pursuant to section 1 of Executive Order 10180 of November 13, 1950.

(13) Employees serving under nonpermanent appointments, designated as indefinite, made after January 23, 1955, the effective date of the repeal of Executive Order 10180.

(14) Employees serving under term appointments.

(15) Temporary employees of the Census Bureau employed under temporary limited appointments exceeding 1 year.

(16) Employees serving under limited term, limited emergency and noncareer (designated as indefinite) appointments in the Senior Executive Service.

(17) Health care employees of the National Health Service Corps serving under appointments limited to four years or less in health manpower shortage areas.

(b) Paragraph (a) of this section does not deny retirement coverage when:

(1) Employment in an excluded category follows employment subject to subchapter III of chapter 83 of title 5, United States Code, without a break in service or after a separation from service of 3 days or less, except in the case of:

(i) An alien employee whose duty station is located in a foreign country; or

(ii) An employee hired by the Census Bureau under a temporary, intermittent appointment to perform decennial census duties.

(2) The employee receives a career or career-conditional appointment under part 315 of this chapter;

(3) The employee is granted competitive status under legislation, Executive order, or civil service rules and regulations, while he or she is serving in a position in the competitive service; or

(4) The employee is granted merit status under 35 CFR chapter I, subchapter E;

(5) The appointment meets the definition of a provisional appointment contained in §§ 316.401 and 316.403 of this chapter;

(6) The employee receives an interim appointment under § 772.102 of this chapter and was covered by CSRS at the time of the separation for which interim relief is required.

(c) Members of the following boards and commissions of the government of the District of Columbia appointed on or after August 13, 1960, are excluded from subchapter III of chapter 83 of title 5, United States Code, except that this exclusion does not operate in the case of a member serving on August 13, 1960, who is reappointed on expiration of term without a break in service or after a separation from service of 3 days or less:

Board of Accountancy.
Board of Examiners and Registrars of Architects.
Board of Barber Examiners.
Boxing Commission.
Board of Cosmetology.
Board of Dental Examiners.
Electrical Board.
Commission on Licensure to Practice the Healing Arts.
Board of Examiners in the Basic Sciences.

Board of Examiners in Medicine and Osteopathy.
Motion Picture Operators' Board.
Nurses' Examining Board.
Board of Optometry.
Board of Pharmacy.
Plumbing Board.
Board of Podiatry Examiners.
Board of Registration for Professional Engineers.
Real Estate Commission.
Refrigeration and Air Conditioning Board.
Steam and Other Operating Engineers' Board.
Undertakers' Committee.
Board of Examiners of Veterinarian Medicine.

(d) The following groups of employees of the government of the District of Columbia, appointed on or after October 1, 1965, are excluded from subchapter III of chapter 83 of title 5, United States Code:

(1) Employees serving under appointments limited to one year or less, except temporary teachers of the District of Columbia public school system.

(2) Intermittent employees—non-full-time employees without a prearranged regular tour of duty.

(3) Employees whose pay on an annual basis is $12.00 per year or less.

(4) Patient or inmate employees in District Government hospitals, homes or penal institutions.

(5) Employees paid on a contract or fee basis.

(6) Employees paid on a piecework basis, except those whose work schedule provides for regular or full-time service.

(7) Employees serving under temporary appointments pending establishment of registers, or pending final determination of eligibility for permanent appointment.

(e) Paragraph (d) of this section does not deny retirement coverage when (1) employment in an excluded category follows employment subject to subchapter III of chapter 83 of title 5, United States Code, without a break in service or after a separation from service of 3 days or less, or (2) the employee is granted competitive status under legislation, Executive order, or the Civil Service rules and regulations, while he is serving in a position in the competitive service.

(f) Also excluded are any temporary employees, appointed for one year or less, by the government of the District of Columbia under any program or project established pursuant to the Economic Opportunity Act of 1964 (42 U.S.C. 2701 *et seq.*), and summer trainees employed by the Government of the District of Columbia in furtherance of the President's Youth Opportunity Campaign.

(g) Individuals first employed by the government of the District of Columbia on or after October 1, 1987, in a position subject to subchapter III of chapter 83 of title 5, United States Code, are excluded from such subchapter, except:

(1) Employees of St. Elizabeths Hospital who were covered under subchapter III of chapter 83 of title 5, United States Code, before October 1, 1987, appointed by the District of Columbia government on October 1, 1987, as provided in section 6 of Pub. L. 98–621, and deemed employed by the District of Columbia government before October 1, 1987, under section 109 of Pub. L. 100–238;

(2) Effective on and after October 1, 1997, the effective date of section 11246 of Pub. L. 105–33, 111 stat. 251, nonjudicial employees of the District of Columbia Courts employed in a position which is not excluded from CSRS under the provisions of this section;

(3) Effective on and after April 1, 1999, the effective date of section 7(e) of Pub. L. 105–274, 112 Stat. 2419, employees of the Public Defender Service of the District of Columbia employed in a position which is not excluded from CSRS under the provisions of this section;

(4) The District of Columbia Department of Corrections Trustee, authorized by section 11202 of Pub. L. 105–33, 111 Stat. 251, and an employee of the Trustee if the Trustee or employee is a former Federal employee appointed with a break in service of 3 days or less, and in the case of an employee of the Trustee is employed in a position which is not excluded from CSRS under the provisions of this section;

(5) The District of Columbia Pretrial Services, Parole, Adult Probation and Offender Supervision Trustee, authorized by section 11232 of Pub. L. 105–33, 111 Stat. 251, as amended by section 7(b) of Pub. L. 105–274, 112 Stat. 2419,

and an employee of the Trustee, if the Trustee or employee is a former Federal employee appointed with a break in service of 3 days or less, and, in the case of an employee of the Trustee, is employed in a position which is not excluded from CSRS under the provisions of this section, and;

(6) Subject to an election under § 831.204, employees of the District of Columbia Financial Responsibility and Management Assistance Authority.

(h) Employees who have elected coverage under another retirement system in accordance with part 847 of this chapter are excluded from subchapter III of chapter 83 of title 5, United States Code, during that and all subsequent periods of service (including service as a reemployed annuitant).

(i)(1) A former employee of the District of Columbia who is appointed in a Federal position by the Department of Justice, or by the Court Services and Offender Supervision Agency established by section 11233(a) of Pub. L. 105–33, 111 Stat. 251, as amended by section 7(c) of Pub. L. 105–274, 112 Stat. 2419, is excluded from CSRS beginning on the date of the Federal appointment, if the employee elects to continue coverage under a retirement system for employees of the District of Columbia under section 3 of Pub. L. 105–274, 112 Stat. 2419, and if the following conditions are met:

(i) The employee is hired by the Department of Justice or by the Court Services and Offender Supervision Agency during the period beginning August 5, 1997, and ending 1 year after the date on which the Lorton Correctional Complex is closed, or 1 year after the date on which the Court Services and Offender Supervision Agency assumes its duties, whichever is later; and

(ii) The employee elects to continue coverage under a retirement system for employees of the District of Columbia no later than June 1, 1999 or 60 days after the date of the Federal appointment, whichever is later.

(2) An individual's election to continue coverage under a retirement system for employees of the District of Columbia remains in effect until the individual separates from service with the Department of Justice or the Court Services and Offender Supervision Agency.

[33 FR 12498, Sept. 4, 1968, as amended at 45 FR 24856, Apr. 11, 1980; 45 FR 46782, July 11, 1980; 47 FR 2285, Jan. 15, 1982; 48 FR 38784, Aug. 26, 1983; 51 FR 23037, June 25, 1986; 52 FR 38220, Oct. 15, 1987; 53 FR 42936, Oct. 25, 1988; 56 FR 4930, Feb. 7, 1991; 56 FR 10142, Mar. 11, 1991; 57 FR 3713, Jan. 31, 1992; 61 FR 41720, Aug. 9, 1996; 62 FR 50996, Sept. 30, 1997; 63 FR 9402, Feb. 25, 1998; 64 FR 15288, Mar. 31, 1999]

### § 831.202 Continuation of coverage for food service employees of the House of Representatives.

(a) Congressional employees who provide food service operations for the House of Representatives can elect to continue their retirement coverage under subchapter III of chapter 83 of title 5, United States Code, when such food service operations are transferred to a private contractor. These regulations also apply to any successor contractors.

(b) *Eligibility requirements.* To be eligible for continuation of retirement coverage, an employee must:

(1) Be a Congressional employee (as defined in section 2107 of title 5, United States Code), other than an employee of the Architect of the Capitol, engaged in providing food service operations for the House of Representatives under the administrative control of the Architect of the Capitol;

(2) Be subject to subchapter III of chapter 83 of title 5, United States Code;

(3) Elect to remain covered under civil service retirement provisions no later than the day before the date on which the food service operations transfer from the House of Representatives to a private contractor; and

(4) Become employed to provide food services under contract without a break in service. A ''break in service'' means a separation from employment of at least three calendar days.

(c) *Employee deductions.* An employee who elects to continue coverage under title 5 retirement provisions is deemed to consent to deductions from his or her basic pay for the Civil Service Retirement and Disability Fund in the amount determined in accordance with 5 U.S.C. 8334(k). The employer providing the food services under contract must, in accordance with procedures

established by OPM, pay into the Civil Service Retirement and Disability Fund the amounts deducted from an employee's pay.

(d) *Employer contributions.* The employer providing food services under contract must, in accordance with procedures established by OPM, pay into the Civil Service Retirement and Disability Fund amounts equal to any agency contributions that would be required if the individual were a Congressional employee covered by the Civil Service Retirement System.

[52 FR 5069, Feb. 19, 1987, and 53 FR 10055, Mar. 29, 1988. Redesignated at 53 FR 10055, Mar. 29, 1988]

### § 831.203 Continuation of coverage for employees of the Metropolitan Washington Airports Authority.

(a) Permanent Federal Aviation Administration employees assigned to Washington National Airport or Dulles International Airport who elect to transfer to the Metropolitan Washington Airports Authority, retain their retirement coverage under subchapter III of chapter 83 of title 5, United States Code.

(b) *Eligibility requirements.* To be eligible for continuation of retirement coverage, an employee must (1) be a permanent Federal Aviation Administration employee assigned to the Metropolitan Washington Airports who elects to transfer to the Airports Authority; (2) be subject to subchapter III chapter 83 of title 5 United States Code on the day before the date the lease takes effect; and (3) become continually employed by the Airports Authority without a break in service. A ''break in service'' means a separation from employment of at least 3 calendar days.

(c) *Employee deductions.* Employees of the Airports Authority who have continuing coverage under title 5 retirement provisions are deemed to consent to deductions from their basic pay for the Civil Service Retirement and Disability Fund. The amounts deducted will be the same as if the employees were still employed by the Federal Government. The Airports Authority must, in accordance with procedures established by OPM, pay into the Civil Service Retirement and Disability Fund the amounts deducted from an employee's pay.

(d) *Employer contributions.* The Airports Authority must, in accordance with procedures established by OPM, pay into the Civil Service Retirement and Disability Fund amounts equal to any agency contributions that would be required for employees covered by the Civil Service Retirement System.

(e) *Sick leave.* An employee who retires, or dies leaving a survivor entitled to an annuity, from the Airports Authority within the 5 year period beginning on the date the lease takes effect will be permitted to credit unused sick leave in his or her annuity computation. After the 5 year period, use of unused sick leave in the annuity computation will be permitted if the employee is under a formal leave system as defined in § 831.302.

[52 FR 19125, May 21, 1987, and 53 FR 10055, Mar. 29, 1988. Redesignated at 53 FR 10055, Mar. 29, 1988]

### § 831.204 Elections of retirement coverage under the District of Columbia Financial Responsibility and Management Assistance Act of 1995.

(a) *Who may elect*—(1) *General rule.* Any individual appointed by the District of Columbia Financial Responsibility and Management Assistance Authority (the Authority) in a position not excluded from CSRS coverage under § 831.201 may elect to be deemed a Federal employee for CSRS purposes unless the employee has elected to participate in a retirement, health or life insurance program offered by the District of Columbia.

(2) *Exception.* A former Federal employee being appointed by the Authority on or after October 26, 1996, no more than 3 days (not counting District of Columbia holidays) after separation from Federal employment cannot elect to be deemed a Federal employee for CSRS purposes unless the election was made before separation from Federal employment.

(b) *Opportunity to elect FERS.* An individual who elects CSRS under paragraph (a) of this section after a break of more than 3 days between Federal service and employment with the Authority may elect FERS in accordance with 5 CFR 846.201(b)(ii).

(c) *Procedure for making an election.* The Authority or the agency providing administrative support services to the Authority (Administrative Support Agency) must establish a procedure for notifying employees of their election rights and for accepting elections.

(d) *Time limit for making an election.* (1) An election under paragraph (a)(1) of this section must be made within 30 days after the employee receives the notice under paragraph (c) of this section.

(2) The Authority or its Administrative Support Agency will waive the time limit under paragraph (d)(1) of this section upon a showing that—

(i) The employee was not advised of the time limit and was not otherwise aware of it; or

(ii) Circumstances beyond the control of the employee prevented him or her from making a timely election and the employee thereafter acted with due diligence in making the election.

(e) *Effect of an election.* (1) An election under paragraph (a) of this section is effective on the commencing date of the employee's service with the Authority.

(2) An individual who makes an election under paragraph (a) of this section is ineligible, during the period of employment covered by that election, to participate in any retirement system for employees of the government of the District of Columbia.

(f) *Irrevocability.* An election under paragraph (a) of this section becomes irrevocable when received by the Authority or its Administrative Support Agency.

(g) *Employee deductions.* The Authority or its Administrative Support Agency must withhold, from the pay of an employee of the District of Columbia Financial Responsibility and Assistance Authority who has elected to be deemed a Federal employee for CSRS purposes, an amount equal to the percentage withheld from Federal employees' pay for periods of service covered by CSRS and, in accordance with procedures established by OPM, pay into the Civil Service Retirement and Disability Fund the amounts deducted from an employee's pay.

(h) *Employer contributions.* The District of Columbia Financial Responsibility and Assistance Authority must, in accordance with procedures established by OPM, pay into the Civil Service Retirement and Disability Fund amounts equal to any agency contributions required under CSRS.

[61 FR 58458, Nov. 15, 1996]

### § 831.205 CSRS coverage determinations to be approved by OPM.

If an agency determines that an employee is CSRS-covered, the agency must submit its determination to OPM for written approval. This requirement does not apply if the employee has been employed in Federal service with CSRS coverage within the preceding 365 days.

[66 FR 15608, Mar. 19, 2001]

### § 831.206 Continuation of coverage for former Federal employees of the Civilian Marksmanship Program.

(a) A Federal employee who—

(1) Was covered under CSRS;

(2) Was employed by the Department of Defense to support the Civilian Marksmanship Program as of the day before the date of the transfer of the Program to the Corporation for the Promotion of Rifle Practice and Firearms Safety; and

(3) Was offered and accepted employment by the Corporation as part of the transition described in section 1612(d) of Public Law 104–106, 110 Stat. 517—remains covered by CSRS during continuous employment with the Corporation unless the individual files an election under paragraph (c) of this section. Such a covered individual is treated as if he or she were a Federal employee for purposes of this part, and of any other part within this title relating to CSRS. The individual is entitled to the benefits of, and is subject to all conditions under, CSRS on the same basis as if the individual were an employee of the Federal Government.

(b) Cessation of employment with the Corporation for any period terminates eligibility for coverage under CSRS during any subsequent employment by the Corporation.

(c) An individual described by paragraph (a) of this section may at any time file an election to terminate continued coverage under the Federal benefits described in § 1622(a) of Public

Law 104–106, 110 Stat. 521. Such an election must be in writing and filed with the Corporation. It takes effect immediately when received by the Corporation. The election applies to all Federal benefits described by § 1622(a) of Public Law 104–106, 110 Stat. 521, and is irrevocable. Upon receipt of an election, the Corporation must transmit the election to OPM with the individual's retirement records.

(d) The Corporation must withhold from the pay of an individual described by paragraph (a) of this section an amount equal to the percentage withheld from the pay of a Federal employee for periods of service covered by CSRS and, in accordance with procedures established by OPM, pay into the Civil Service Retirement and Disability Fund the amounts deducted from the individual's pay.

(e) The Corporation must, in accordance with procedures established by OPM, pay into the Civil Service Retirement and Disability Fund amounts equal to any agency contributions required under CSRS.

[74 FR 66565, Dec. 16, 2009]

## Subpart C—Credit for Service

### § 831.301 Military service.

(a) *Service of an individual who first became an employee or Member under the civil service retirement system before October 1, 1982.* A period of honorable active service after December 31, 1956, in the Army, Navy, Marine Corps, Air Force, or Coast Guard of the United States, or, after June 30, 1960, in the Regular Corps or Reserve Corps of the Public Health Service, or, after June 30, 1961, as a commissioned officer of the National Oceanic and Atmospheric Administration (formerly Coast and Geodetic Survey and Environmental Science Services Administration), performed before the date of separation on which civil service annuity entitlement is based shall be included in the computation of the annuity provided—

(1) The employee or Member has completed 5 years' (18 months' for survivors of employees or Members who die in service) civilian service;

(2) The employee or Member is not receiving military retired pay awarded for reasons other than (i) service-connected disability incurred in combat with an enemy of the United States, (ii) service-connected disability caused by an instrumentality of war and incurred in line of duty during a period of war (as that term is used in chapter 11 of title 38, United States Code), or (iii) under chapter 67 of title 10, United States Code; and

(3)(i) The employee, Member, or survivor is not entitled, or upon application would not be entitled, to monthly old-age or survivors benefits under § 202 of the Social Security Act (41 U.S.C. 402) based on the individual's wages or self-employment income, or

(ii) For an employee, Member, or survivor who is entitled, or upon application would be entitled, to monthly old-age or survivors benefits under section 202 of the Social Security Act (41 U.S.C. 402) based on the individual's wages or self-employment income, the employee, Member, or survivor has completed a deposit in accordance with subpart U of this part, or the annuity has been reduced under § 831.303(d), for each full period of such military service performed after December 1956. If a deposit has not been completed or the annuity has not been reduced under § 831.303(d), periods of military service performed after December 31, 1956 (other than periods of military service covered by military leave with pay from a civilian position), are excluded from credit from and after the first day of the month in which the individual (or survivor) becomes entitled, or upon proper application would be entitled, to Social Security benefits under section 202. Military service performed prior to January 1957 is included in the computation of the annuity regardless of whether a deposit is made for service after December 31, 1956.

(ii) For an employee, Member, or survivor who is entitled, or upon application would be entitled, to monthly old-age or survivors benefits under § 202 of the Social Security Act (41 U.S.C. 402) based on the individual's wages or self-employment income, the employee, Member, or survivor has completed a deposit in accordance with subpart U of this part, for each full period of such military service performed after December 1956.

If a deposit has not been completed, periods of military service performed after December 31, 1956 (other than periods of military service covered by military leave with pay from a civilian position), are excluded from credit from and after the first day of the month in which the individual (or survivor) becomes entitled, or upon proper application would be entitled, to Social Security benefits under § 202. Military service performed prior to January 1957 is included in the computation of the annuity regardless of whether a deposit is made for service after December 31, 1956.

(b) *Service of an individual who first becomes an employee or Member under the civil service retirement system on or after October 1, 1982.* A period of honorable active service after December 31, 1956, in the Army, Navy, Marine Corps, Air Force, or Coast Guard of the United States, or, after June 30, 1960, in the Regular Corps or Reserve Corps of the Public Health Service, or, after June 30, 1961, as a commissioned officer of the National Oceanic and Atmospheric Administration (formerly Coast and Geodetic Survey and Environmental Science Services Administration), performed before the date of separation on which civil service annuity entitlement is based shall be included in the computation of the annuity provided—

(1) The employee or Member has completed 5 years' (18 months' for survivors of employees or Members who die in service) civilian service;

(2) The employee or Member is not receiving military retired pay awarded for reasons other than (i) service-connected disability incurred in combat with an enemy of the United States, (ii) service-connected disability caused by an instrumentality of war and incurred in line of duty during a period of war (as that term is used in chapter 11 of title 38, United States Code), or (iii) under chapter 67 of title 10, United States Code; and

(3) The employee, Member, or survivor has completed a deposit in an amount equal to 7 percent of his or her basic pay under section 204 of title 37, United States Code, (plus interest, if any) or the annuity has been reduced under § 831.303(d), for each full period of such military service performed after December 1956. Military service performed prior to January 1957 is included in the computation of the annuity regardless of whether a deposit is made for service after December 31. 1956.

(c) *Military retirees and recipients of Veterans Administration benefits.* An employee or Member applying for annuity, who otherwise meets all conditions for receiving credit for military service, but who is in receipt of retired or retainer pay which bars credit for military service, may elect to waive the retired or retainer pay and have the military service added to civilian service for annuity computation purposes. An applicant for disability retirement, who is receiving a Veterans Administration pension or compensation in lieu of military retired or retainer pay, may elect to waive the retired or retainer pay and renounce the Veterans Administration pension or compensation and have the military service added to civilian service for annuity computation purposes.

(d) *Widow(er)s and former spouses entitled to annuity based on the service of employees or Members who die in service*—(1) *Military service is included unless the widow(er) or former spouse elects otherwise.* Effective April 25, 1987, unless a widow(er) or former spouse of an employee or Member who dies—on or after that date—before being separated from service files a written election to the contrary, his or her annuity will include credit for periods of military service (subject to the provisions of paragraphs (a) and (b) of this section) that would ordinarily be excluded from the computation of the employee's or Member's annuity under 5 U.S.C. 8332(c)(2).

(2) *Reduction by the amount of survivor benefits payable based on the military service.* (i) In paragraph (d)(2)(ii) of this section, ''survivor benefits under a retirement system for members of the uniformed services'' means survivor benefits before any offsets for benefits payable from another Federal benefit system except for those payable under title II of the Social Security Act. The amount of the survivor benefit to be deducted will be the amount payable to the current or former spouse and attributable to the decedent's retired or

retainer pay for the period of military service to be included in the CSRS survivor annuity. However, the survivor benefit will never be reduced below the amount payable based on the civilian service alone.

(ii) OPM will obtain information on the amount of any monthly survivor benefits payable to each applicant for CSRS current or former spouse annuity. OPM will reduce the CSRS survivor annuity by the monthly military survivor benefit on its commencing date. OPM will not make a subsequent adjustment unless it is necessary to increase or decrease the CSRS survivor benefit because of a change in the amount of military survivor benefits attributable to the period of service or a change in the period of military service to be included in the CSRS annuity when the survivor annuitant becomes eligible for benefits under title II of the Social Security Act.

(3) *Widow(er)s or former spouses of employees or Members who die on or after April 25, 1987—election not to be included.* OPM will accept a written election from a widow(er) or former spouse who does not wish to be covered by § 831.301(d) provided it is postmarked within the period ending 30 calendar days after the date of the first regular monthly annuity payment.

(4) *Widow(er)s or former spouses of employees or Members who die before April 25, 1987—application to OPM for credit.* Widow(er)s or former spouses of employees or Members who died before April 25, 1987, must apply to OPM in writing to have credit for military service included in the survivor annuity computation. If the survivor annuity is increased by including credit for the military service, the increase will be effective on the first of the month following the 60th calendar day after the date the written application for inclusion of the military service is received in OPM.

[48 FR 38784, Aug. 26, 1983, as amended at 51 FR 31931, Sept. 8, 1986; 52 FR 10026, Mar. 30, 1987; 53 FR 6555, Mar. 2, 1988; 66 FR 15608, Mar. 19, 2001]

### § 831.302 Unused sick leave.

(a) For annuity computation purposes, the service of an employee who retires on immediate annuity or dies leaving a survivor entitled to annuity is increased by the days of unused sick leave to his credit under a formal leave system.

(b) An immediate annuity is one which begins to accrue not later than 1 month after the employee is separated.

(c) A formal leave system is one which is provided by law or regulation or operates under written rules specifying a group or class of employees to which it applies and the rate at which sick leave is earned.

(d) In general, 8 hours of unused sick leave increases total services by 1 day. In cases where more or less than 8 hours of sick leave would be charged for a day's absence, total service is increased by the number of days in the period between the date of separation and the date that the unused sick leave would have expired had the employee used it (except that holidays falling within the period are treated as work days, and no additional leave credit is earned for that period).

(e) If an employee's tour of duty changes from part time to full time or full time to part time within 180 days before retirement, the credit for unused sick leave is computed as though no change had occurred.

[34 FR 17617, Oct. 31, 1969]

### § 831.303 Civilian service.

(a) *Periods of civilian service performed before October 1, 1982, for which retirement deductions have not been taken.* Periods of creditable civilian service performed by an employee or Member after July 31, 1920, but before October 1, 1982, for which retirement deductions have not been taken shall be included in determining length of service to compute annuity under subchapter III of chapter 83 of title 5, United States Code; however, if the employee, Member, or survivor does not elect either to complete the deposit describes by section 8334(c) of title 5, United States Code, or to eliminate the service from annuity computation, his or her annuity is reduced by 10 percent of the amount which should have been deposited (plus interest) for the period of noncontributory service.

(b) *Periods of service for which refunded deductions have not been redeposited, and periods of civilian service performed on or after October 1, 1982, for which retirement deductions have not been taken.* Except as provided in paragraph (c) of this section, a period of service for which refunded deductions have not been redeposited, and a period of creditable civilian service performed by an employee or Member on or after October 1, 1982, for which retirement deductions have not been taken, shall be included in determining length of service to compute the annuity under subchapter III of chapter 83 of title 5, United States Code, only if—

(1) The employee or Member subsequently becomes eligible for an annuity payable under subchapter III of chapter 83 of title 5, United States Code; and

(2) The employee, Member, or survivor makes a deposit (or redeposit) for the full period of service. If more than one distinct period of service is covered by a single refund, the periods of service covered by that refund are considered to be single full periods of service. However, in all other instances, a distinct period of nondeduction civilian service (i.e., a period of nondeduction service that is not interrupted by a break in service of more than three days) and a distinct period of redeposit civilian service (i.e., a period of redeposit service that is not interrupted by a break in service of more than three days) are considered as separate full periods of service, even when they are immediately consecutive. A period of nondeduction service which begins before October 1, 1982, and ends on or after that date is also considered two full periods of service: one ending on September 30, 1982, and the other beginning on October 1, 1982.

(c)(1)(i) An employee or Member whose retirement is based on a separation before October 28, 2009, and who has not completed payment of a redeposit for refunded deductions based on a period of service that ended before October 1, 1990, will receive credit for that service in computing the nondisability annuity for which the individual is eligible under subchapter III of chapter 83 of title 5, United States Code, provided the nondisability annuity commences after December 1, 1990; and

(ii) An employee or Member whose retirement is based on a separation on or after October 28, 2009, and who has not completed payment of a redeposit for refunded deductions based on a period of service that ended before March 1, 1991, will receive credit for that service in computing the nondisability annuity for which the individual is eligible under subchapter III of chapter 83 of title 5, United States Code.

(2) The beginning monthly rate of annuity payable to a retiree whose annuity includes service credited in accordance with paragraph (c)(1) of this section will be reduced by an amount equal to the redeposit owed, or unpaid balance thereof, divided by the present value factor for the retiree's attained age (in full years) at the time of retirement. The reduced monthly rate will then be rounded down to the next lower dollar amount and becomes the rate of annuity payable.

(3) For the purpose of paragraph (b)(2) of this section, the terms ''present value factor'' and ''time of retirement'' have the same meaning as in § 831.2202.

(d)(1) *Civilian and military service of an individual affected by an erroneous retirement coverage determination.* An employee or survivor who owed a deposit under section 8411(c)(1)(B) or 8411(f) of title 5, United States Code (FERS rules) for:

(i) Civilian service that was not subject to retirement deductions, or

(ii) Military service performed after December 31, 1956, will receive credit for the service without payment of the deposit if, because of an erroneous retirement coverage determination, the service is subsequently credited under chapter 83 of title 5, United States Code (CSRS rules).

(2)(i) The beginning monthly rate of annuity payable to a retiree whose annuity includes service credited under paragraph (d)(1) of this section and service creditable under CSRS rules that would not be creditable under FERS rules is reduced by an amount equal to the CSRS deposit owed, or unpaid balance thereof, divided by the present value factor for the retiree's

age (in full years) at the time of retirement. The result is rounded to the next highest dollar amount, and is the monthly actuarial reduction amount.

(ii)(A) The beginning monthly rate of annuity payable to a survivor whose annuity includes service credited under paragraph (d)(1) of this section is reduced by an amount equal to the CSRS deposit owed, or unpaid balance thereof, divided by the present value factor for the survivor's age (in full years) at the time of death. The result is rounded to the next highest dollar amount, and is the monthly actuarial reduction amount.

(B) The survivor annuity is not reduced if the employee annuity was reduced under paragraph (d)(2)(i) of this section.

(3) For the purpose of paragraph (d)(2) of this section, the terms ''present value factor'' and ''time of retirement'' have the same meaning as in § 831.2202 of this chapter.

[48 FR 38785, Aug. 26, 1983, as amended at 56 FR 6550, Feb. 19, 1991; 66 FR 15608, Mar. 19, 2001; 79 FR 46618, Aug. 8, 2014]

### § 831.304 Service with the Cadet Nurse Corps during World War II.

(a) *Definitions and special usages.* In this section—

(1) *Basic pay* is computed at the rate of $15 per month for the first 9 months of study; $20 per month for the 10th through the 21st month of study; and $30 per month for any month in excess of 21.

(2) *Cadet Nurse Corps service* means any student or graduate nurse training, in a non-Federal institution, as a participant in a plan approved under section 2 of the Act of June 15, 1943 (57 Stat. 153).

(3) *CSRS* means the Civil Service Retirement System.

(b) *Conditions for creditability.* As provided by Pub. L. 99–638, an individual who performed service with the Cadet Nurse Corps is entitled to credit under CSRS if—

(1) The service as a participant in the Corps totaled 2 years or more;

(2) The individual submits an application for service credit to OPM no later than January 10, 1988;

(3) The individual is employed by the Federal Government in a position subject to CSRS at the time he or she applies to OPM for service credit; and

(4) The individual makes a deposit for the service before separating from the Federal Government for retirement purposes. Contrary to the policy ''deeming'' the deposit to be made for alternative annuity computation purposes, these deposits must be physically in the possession of the individual's employing agency before his or her separation for retirement purposes.

(c) *Processing the application for service credit.* Upon receiving an application requesting credit for service with the Cadet Nurse Corps, OPM will determine whether all conditions for creditability have been met, compute the deposit (including any interest) as specified by sections 8334(e) (2) and (3) of title 5, United States Code, based upon the appropriate percentage of basic pay that would have been deducted from the individual's pay at the time the service was performed, and advise the agency and the employee of the total amount of the deposit due.

(d) *Agency collection and submission of deposit.* (1) The individual's employing agency must establish a deposit account showing the total amount due and a payment schedule (unless deposit is made in one lump sum), and record the date and amount of each payment.

(2) If the individual cannot make payment in one lump sum, the employing agency must accept installment payments (by allotments or otherwise). However, the employing agency is not required to accept individual checks in amounts less than $50.

(3) If the employee dies before completing the deposit, the surviving spouse may elect to complete the payment to the employing agency in one lump sum; however, the surviving spouse will not be able to initiate an application for such service credit.

(4) Payments received by the employing agency must be remitted to OPM immediately for deposit to the Civil Service Retirement and Disability Fund.

(5) Once the employee's deposit has been paid in full or closed out, the employing agency must submit the documentation pertaining to the deposit to

OPM in accordance with published instructions.

[52 FR 43047, Nov. 9, 1987]

### § 831.305 Service with a nonappropriated fund instrumentality after June 18, 1952, but before January 1, 1966.

(a) *Definitions and special usages.* In this section—

(1) *Service in a nonappropriated fund instrumentality* is any service performed by an employee that involved conducting arts and crafts, drama, music, library, service (i.e., recreation) club, youth activities, sports or recreation programs (including any outdoor recreation programs) for personnel of the armed forces. Service is not creditable if it was performed in programs other than those specifically named in this subsection.

(2) *Certification by the head of a nonappropriated fund instrumentality* can also be certification by the National Personnel Records Center or by an official of another Federal agency having possession of records that will verify an individual's service.

(3) *CSRS* means the Civil Service Retirement System.

(b) *Conditions for creditability.* Pursuant to Pub. L. 99–638 and provided the same period of service has not been used to obtain annuity payable from a nonappropriated fund retirement plan, an individual who performed service in a nonappropriated fund instrumentality is entitled to credit under CSRS if—

(1) The service was performed after June 18, 1952, but before January 1, 1966; and

(2) The individual was employed in a position subject to CSRS on November 9, 1986.

(c) *Deposit for service is not necessary.* It is not necessary for an individual to make a deposit for service performed with a nonappropriated fund instrumentality to receive credit for such service. However, if the individual does not elect to make a deposit, his or her annuity is reduced by 10 percent of the amount that should have been deposited for the period of service (including any interest) as specified by sections 8334(e) (2) and (3) of title 5, United States Code. When an employee elects an alternative annuity and also elects to make the deposit, OPM will deem the deposit to be made for purposes of computing the alternative annuity.

(d) *Crediting other service in a nonappropriated fund instrumentality.* Service not creditable under this section may become creditable for retirement eligibility purposes under the provisions outlined in 5 CFR part 847, subpart H.

[52 FR 43048, Nov. 9, 1987, as amended at 68 FR 2178, Jan. 16, 2003]

### § 831.306 Service as a National Guard technician before January 1, 1969.

(a) *Definitions.* In this section—(1) *Service as a National Guard technician* is service performed under section 709 of title 32, United States Code (or under a prior corresponding provision of law) before January 1, 1969.

(2) *CSRS* means the Civil Service Retirement System.

(b) *Conditions for crediting service to CSRS employees after November 5, 1990.* An employee subject to CSRS retirement deductions whose only service as a National Guard technician was performed prior to January 1, 1969, is entitled to credit under CSRS if—

(1) The individual submits to OPM an application for service credit in a form prescribed by OPM;

(2) The individual is employed by the Federal Government in a position subject to CSRS retirement deductions after November 5, 1990; and

(3) The individual completes the deposit for the service through normal service credit channels before final adjudication of his or her application for retirement or has the deposit deemed made when he or she elects the alternative form of annuity.

(c) *Processing the CSRS employee's application for service credit.* (1) If an employee described in paragraph (b) of this section makes an application for service credit, OPM will determine whether all conditions for creditability have been met, compute the deposit and send the employee notice of the payment required and the procedures for submitting the payments to OPM.

(2) The deposit will be computed based on—

(i) The appropriate percentage of basic pay that would have been deducted from the individual's pay at the time the service was performed; and

(ii) Interest at the rate of 3 percent per year computed as specified by section 8334(e)(2) of title 5, United States Code, until the date the deposit is paid.

(d) *Conditions for crediting service to CSRS annuitants and former Federal employees who separated after December 31, 1968, and before November 6, 1990*—(1) *Former Federal employees.* Former Federal employees who were subject to CSRS retirement deductions and separated after December 31, 1968, but before November 6, 1990, with title to a deferred annuity, may make a deposit for pre-1969 National Guard technician service provided they—

(i) Submit a written service credit application for the pre-1969 National Guard technician service to OPM before November 6, 1991; and

(ii) Complete a deposit for the additional service in a lump sum or in installment payments of $50 or more. Payments must be completed before their retirement claim is finally adjudicated, unless the deposit is deemed made when they elect an alternative form of annuity.

(2) *Annuitants and survivors.* Individuals who were entitled to receive an immediate annuity (or survivor annuity benefits) as of November 6, 1990, may make a deposit for pre-1969 National Guard technician service provided they—

(i) Submit a written application for service credit to OPM before November 6, 1991; and

(ii) Complete a deposit for the additional service in a lump sum or in equal monthly annuity installments to be completed within 24 months of the date of the complete written application.

(3) To determine the commencing date of the deposit installment payment period for annuitants and survivors, the ''date of application'' will be considered to be the first day of the second month beginning after OPM receives a complete written application from the individual.

(4) To be a complete application, the individual's written request for pre-1969 National Guard technician service credit must also include a certification of the dates of employment and the rates of pay received by the individual during the employment period. The individual may obtain certification of his or her service from the Adjutant General of the State in which the service was performed.

(e) *Processing annuitants', survivors' or former employees' applications for service credit*—(1) *OPM determines creditable service.* OPM will determine whether all conditions for crediting the additional service have been met, compute the amount of the deposit, and notify the individual.

(2) *Computing the deposit.* The deposit will be computed based on—

(i) The appropriate percentage of basic pay that would have been deducted from the individual's pay at the time the service was performed; and

(ii) Interest at the rate of 3 percent per year as specified by section 8334(e)(2) of title 5, United States Code, to—

(A) The midpoint of the 24-month installment period or if paid in a lump sum, the date payment is made if the individual is an annuitant or survivor; or

(B) The date the deposit is paid or the commencing date of annuity, whichever comes first, if the individual is a former employee.

(3) *Individuals who are annuitants or survivors as of November 6, 1990.* (i) OPM will notify annuitants and survivors of the amount of the deposit and give them a proposed installment schedule for paying the deposit from monthly annuity payments. The proposed installment payments will consist of equal monthly payments that will not exceed a period 24 months from the date a complete written application is received by OPM.

(ii) The annuitant or survivor may allow the installments to be deducted from his or her annuity as proposed or make payment in a lump sum within 30 days from the date of the notice.

(iii) Increased annuity payments will begin to accrue the first day of the month after OPM receives a complete written application.

(iv) If an annuitant dies before completing the deposit installment payments, the remaining installments will

be deducted as established for the annuitant, from benefits payable to the survivor annuitant (but not if the only survivor benefit is payable to a child or children of the deceased), if any. If no survivor annuity is payable, OPM may collect the balance of the deposit from any lump-sum benefits payable or the decedent's estate, if any.

(4) *Former employees who separated after December 31, 1968, but before November 6, 1990.* A former employee with title to a deferred annuity that commences after November 6, 1990, will be billed for the amount of the deposit due and informed of the procedures for sending payments to OPM. If payment is to be made in installments, each payment must be at least $50 and the total deposit due must be completed before final adjudication of the retirement claim, unless the deposit is deemed made when he or she elects an alternative form of annuity.

[56 FR 6554, Feb. 19, 1991, as amended at 56 FR 55595, Oct. 29, 1991; 56 FR 67467, Dec. 31, 1991]

### § 831.307 Contract service.

Contract service with the United States will only be included in the computation of, or used to establish title to, an annuity under subchapter III of chapter 83 of title 5, United States Code, if—

(a) The employing agency exercised an explicit statutory authority to appoint an individual into the civil service by contract; or

(b) The head of the agency which was party to the contract, based on a timely-filed application, in accordance with section 110 of Public Law 100–238, and the regulations promulgated by OPM pursuant to that statute, certifies that the agency intended that an individual be considered as having been appointed to a position in which (s)he would have been subject to subchapter III of chapter 83 of title 5, United States Code, and deposit has been paid in accordance with OPM's regulations.

[55 FR 53135, Dec. 27, 1990]

## Subpart D—Voluntary Contributions

SOURCE: 56 FR 43863, Sept. 5, 1991, unless otherwise noted.

### § 831.401 Purpose and scope.

This subpart describes the procedures that employees and Members must follow in making voluntary contributions under the Civil Service Retirement System (CSRS). This subpart also describes the procedures that the Office of Personnel Management (OPM) will follow in accepting voluntary contributions, crediting interest on voluntary contribution accounts, and paying benefits based on voluntary contributions.

### § 831.402 Definitions.

In this subpart:

*Applicant for retirement* means a person who is currently eligible to retire under CSRS on an immediate or deferred annuity, and who has filed an application to retire, other than an application for phased retirement status, that has not been finally adjudicated.

*Balance* means the amount of voluntary contributions deposited and not previously withdrawn, plus earned interest on those voluntary contributions, less any amount paid as additional annuities (including any amount paid as survivor annuity) based on the voluntary contributions.

*CSRS* means the Civil Service Retirement System as described in subchapter III of chapter 83 of title 5, United States Code.

*Eligible individual* means a person eligible to make voluntary contributions under § 831.403.

*Full retirement status* means the status of a phased retiree who has ceased employment and is entitled, upon application, to a composite retirement annuity.

*Phased retiree* means a retirement-eligible employee who—

(1) Has entered phased retirement status under subpart Q of this part; and

(2) Has not entered full retirement status.

*Voluntary contributions* means contributions to the Civil Service Retirement and Disability Fund under section 8343 of title 5, United States Code.

[56 FR 43863, Sept. 5, 1991, as amended at 79 FR 46618, Aug. 8, 2014]

### § 831.403 Eligibility to make voluntary contributions.

(a) Voluntary contributions may be made only by—

(1) Employees (including phased retirees) or Members currently subject to CSRS, and

(2) Applicants for retirement, including phased retirees who apply for full retirement status under subpart Q of this part.

(b) Voluntary contributions may not be accepted from an employee, Member, or applicant for retirement who—

(1) Has not deposited amounts covering all creditable civilian service performed by him or her; or

(2) Has previously received a refund of voluntary contributions and who has not been reemployed subject to CSRS after a separation of more than 3 calendar days.

(c) An employee or Member covered by the Federal Employees Retirement System (FERS), including an employee or Member who elected to transfer or was automatically placed in FERS, may not open a voluntary contributions account or make additional contributions to an existing voluntary contribution account.

[56 FR 43863, Sept. 5, 1991, as amended at 79 FR 46619, Aug. 8, 2014]

### § 831.404 Procedure for making voluntary contributions.

(a) To make voluntary contributions to the Civil Service Retirement and Disability Fund, an eligible individual must first apply on a form prescribed by OPM. OPM will establish a voluntary contribution account for each eligible individual who elects to make voluntary contributions and notify the individual that a voluntary contribution account has been established. An eligible individual may not make voluntary contributions until notified by OPM that an account has been so established.

(b) After receiving notice from OPM under paragraph (a) of this section, an eligible individual may forward voluntary contributions to the Office of Personnel Management, at the address designated for that purpose. Voluntary contributions must be in the amount of $25 or multiples thereof, by money order, draft, or check payable to OPM.

(c) The total voluntary contributions made by an employee or Member may not exceed, as of the date any contribution is received, 10 percent of the aggregate basic pay received by the eligible individual.

(1) Employees are responsible for not exceeding the 10 percent limit.

(2) When the employee retires or withdraws the voluntary contributions, OPM will check to determine whether the 10 percent limit has been exceeded.

(3) If the total of voluntary contributions received from the employee exceeds the 10 percent limit, OPM will refund without interest any amount that exceeds the 10 percent limit.

### § 831.405 Interest on voluntary contributions.

(a) Interest on voluntary contributions is computed under § 831.105.

(b) Voluntary contributions begin to earn interest on the date deposited by OPM.

(c) Except as provided in paragraph (d) of this section, voluntary contributions stop earning interest on the earliest of—

(1) The date when OPM authorizes payment to the individual of the balance as a withdrawal (831.406);

(2) The date when the employee or Member separates or transfers to a position not subject to CSRS or FERS; or

(3) The date when the employee transfers to a retirement system other than CSRS or FERS.

(d) If an employee separates with entitlement to a deferred annuity and either dies without withdrawing his or her voluntary contributions or uses his or her voluntary contributions to purchase additional annuity, voluntary contributions stop earning interest on the earlier of—

(1) The date the former employee or Member dies; or

(2) The commencing date of the former employee's or Member's deferred annuity.

### § 831.406 Withdrawal of voluntary contributions.

(a) Before receiving additional annuity payments based on the voluntary contributions, a person who has made voluntary contributions may withdraw the balance while still an employee or Member, or after separation.

(b) A person entitled to payment of lump-sum benefits under the CSRS order for precedence set forth in section 8342(c) of title 5, United States Code, is entitled to payment of the balance, if any, on the death of—

(1) An employee or Member;

(2) A separated employee or Member who has not retired;

(3) A retiree, unless a survivor benefit is payable based on an election under § 831.407; or

(4) A person receiving a survivor annuity based on voluntary contributions.

### § 831.407 Purchase of additional annuity.

(a) At the time of retirement CSRS (or under FERS, if transferred from CSRS), a person may use the balance of a voluntary contribution account to purchase one of the following types of additional annuity:

(1) Annuity without survivor benefit; or

(2) Reduced annuity payable during the life of the employee or Member with one-half of the reduced annuity to be payable after his or her death to a person, named at time of retirement, during the life of the named person.

(b) Any natural person may be designated as survivor under paragraph (a)(2) of this section.

(c) If the applicant for retirement elects an annuity without survivor benefit, each $100 credited to his or her voluntary contribution account, including interest, purchases an additional annuity at the rate of $7 per year, plus 20 cents for each full year, if any, he or she is over age 55 at date of retirement.

(d) If the applicant for retirement elects an annuity with survivor benefit, each $100 credited to his or her voluntary contribution account, including interest, purchases an additional annuity at the rate of $7 per year, plus 20 cents for each full year, if any, he or she is over age 55 at date of retirement, multiplied by the following percentage:

(1) Ninety percent of such amount if the named person is the same age or older than the applicant for retirement, or is less than 5 years younger than the applicant for retirement;

(2) Eighty-five percent if the named person is 5 but less than 10 years younger;

(3) Eighty percent if the named person is 10 but less than 15 years younger;

(4) Seventy-five percent if the named person is 15 but less than 20 years younger;

(5) Seventy percent if the named person is 20 but less than 25 years younger;

(6) Sixty-five percent if the named person is 25 but less than 30 years younger; and

(7) Sixty percent if the named person is 30 or more years younger.

## Subpart E—Eligibility for Retirement

### § 831.501 Time for filing application.

An employee or Member who is eligible for retirement must file a retirement application with his or her agency. A former employee or Member who is eligible for retirement must file a retirement application with OPM. The application should not be filed more than 60 days before becoming eligible for benefits. If the application is for disability retirement, the applicant and the employing agency should refer to subpart L of this part. If the application is for phased retirement status, the employee and the employing agency should refer to subpart Q of this part.

[79 FR 46619, Aug. 8, 2014]

### § 831.502 Automatic separation; exemption.

(a) When an employee meets the requirements for age retirement on any day within a month, he is subject to automatic separation at the end of that month. The department or agency shall notify the employee of the automatic separation at least 60 days in advance of the separation. If the department or agency fails through error to give timely notice, the employee may

not be separated without his consent until the end of the month in which the notice expires.

(b) The head of the agency, when in his or her judgment the public interest so requires, may exempt a law enforcement officer, firefighter, nuclear materials courier, or customs and border protection officer from automatic separation until that employee becomes 60 years of age.

(c) The Secretary of Transportation and the Secretary of Defense, under such regulations as each may prescribe, may exempt an air traffic controller having exceptional skills and experience as a controller from automatic separation until that controller becomes 61 years of age.

(d) When a department or agency lacks authority and wishes to secure an exemption from automatic separation for one of its employees other than a Presidential appointee, beyond the age(s) provided by statute, i.e., age 60 for a law enforcement officer, firefighter, nuclear materials courier, or customs and border protection officer, and age 61 for an air traffic controller, the department or agency head shall submit a recommendation to that effect to OPM.

(1) The recommendation shall contain:

(i) A statement that the employee is willing to remain in service;

(ii) A statement of facts tending to establish that his/her retention would be in the public interest;

(iii) The period for which the exemption is desired, which period may not exceed 1 year; and,

(iv) The reasons why the simpler method of retiring the employee and immediately reemploying him or her is not being used.

(2) The recommendation shall be accompanied by a medical certificate showing the physical fitness of the employee to perform his or her work.

(e) OPM may approve an exemption only before the automatic separation date applicable to the employee. For this reason, the department or agency shall forward the recommendation to OPM at least 30 days before this separation date.

[76 FR 41997, July 18, 2011]

**§ 831.503 Retirement based on involuntary separation.**

(a) *General.* An employee who would otherwise be eligible for retirement based on involuntary separation from the service is not entitled to an annuity under section 8336(d)(1) of title 5, United States Code, if the employee has declined a reasonable offer of another position.

(b) *Criteria for reasonable offer.* For the purposes of determining entitlement to annuity based on such involuntary separation, the offer of a position must meet all of the following conditions to be considered a reasonable offer:

(1) The offer must be made in writing;

(2) The employee must meet established qualification requirements; and

(3) The offered position must be—

(i) In the employee's agency, including an agency to which the employee with his or her function is transferred in a transfer of functions between agencies;

(ii) Within the employee's commuting area as defined in § 831.1202 of this part, unless geographic mobility is a condition of the employee's employment;

(iii) Of the same tenure and work schedule; and

(iv) Not lower than the equivalent of two grades or pay levels below the employee's current grade or pay level, without consideration of the employee's eligibility to retain his or her current grade or pay under part 536 of this chapter or other authority. In movements between pay schedules or pay systems, the comparison rate of the grade or pay level that is two grades below that of the current position will be compared with the comparison rate of the grade or pay level of the offered position. For this purpose, ''comparison rate'' has the meaning given that term in § 536.103 of this chapter, except paragraph (2) of that definition should be used for the purpose of comparing grade or levels of work in making reasonable offer determinations in all situations not covered by paragraph (1) of that definition.

[48 FR 38786, Aug. 26, 1983. Redesignated and amended at 58 FR 49179, Sept. 22, 1993; 70 FR 31315, May 31, 2005; 73 FR 66156, Nov. 7, 2008]

## Subpart F—Survivor Annuities

SOURCE: 50 FR 20070, May 13, 1985, unless otherwise noted.

ORGANIZATION AND STRUCTURE OF REGULATIONS ON SURVIVOR ANNUITIES

### § 831.601 Purpose and scope.

(a) This subpart explains the annuity benefits payable in the event of the death of employees, retirees, and Members; the actions that employees, retirees, Members, and their current spouses, former spouses, and eligible children must take to qualify for survivor annuities; and the types of evidence required to demonstrate entitlement to provide survivor annuities or qualify for survivor annuities.

(b) Unless otherwise specified, this subpart, except §§ 831.682 and 831.683 and the provisions relating to children's survivor annuities, only applies to employees and Members who retire under a provision of law that permits election of a reduced annuity to provide a survivor annuity.

[55 FR 9099, Mar. 12, 1990, as amended at 58 FR 52880, Oct. 13, 1993]

### § 831.602 Relation to other regulations.

(a) Part 838 of this chapter contains information about former spouses' entitlement to survivor annuities based on provisions in court orders or court-approved property settlement agreements.

(b) Subpart T of this part contains information about entitlement to lump-sum death benefits.

(c) Parts 870, 871, 872 and 873 of this chapter contain information about coverage under the Federal Employees' Group Life Insurance Program.

(d) Part 890 of this chapter contains information about coverage under the Federal Employees Health Benefits Program.

(e) Section 831.109 contains information about the administrative review rights available to a person who has been denied a survivor annuity or an opportunity to make an election under this subpart.

(f) Subparts C and U of this part contain information about service credit deposits by survivors of employees or Members.

[50 FR 20070, May 13, 1985, as amended at 51 FR 31931, Sept. 8, 1986; 58 FR 43493, Aug. 17, 1993]

### § 831.603 Definitions.

As used in this subpart—

*CSRS* means subchapter III of chapter 83 of title 5, United States Code.

*Current spouse* means a living person who is married to the employee, Member, or retiree at the time of the employee's, Member's, or retiree's death.

*Current spouse annuity* means a recurring benefit under CSRS that is payable (after the employee's, Member's, or retiree's death) to a current spouse who meets the requirements of § 831.642.

*Deposit* means a deposit required by the Civil Service Retirement Spouse Equity Act of 1984, Pub. L. 98–615, 98 Stat. 3195. *Deposit*, as used in this subpart does not include a service credit deposit or redeposit under sections 8334(c) or (d) of title 5, United States Code.

*First regular monthly payment* means the first annuity check payable on a recurring basis (other than an estimated payment or an adjustment check) after OPM has initially adjudicated the regular rate of annuity payable under CSRS and has paid the annuity accrued since the time of retirement. The ''first regular monthly payment'' is generally preceded by estimated payments before the claim can be adjudicated and by an adjustment check (including the difference between the estimated rate and the initially adjudicated rate).

*Former spouse* means a living person who was married for at least 9 months to an employee, Member, or retiree who performed at least 18 months of creditable service in a position covered by CSRS and whose marriage to the employee was terminated prior to the death of the employee, Member, or retiree. Except in §§ 831.682 and 831.683, *former spouse* includes only persons who were married to an employee or Member on or after May 7, 1985, or who were the spouse of a retiree who retired on or after May 7, 1985, regardless of the date of termination of the marriage.

*Former spouse annuity* means a recurring benefit under CSRS that is payable to a former spouse after the employee's, Member's, or retiree's death.

*Fully reduced annuity* means the recurring payments under CSRS received by a retiree who has elected the maximum allowable reduction in annuity to provide a current spouse annuity and/or a former spouse annuity or annuities.

*Insurable interest annuity* means the recurring payments under CSRS to a retiree who has elected a reduction in annuity to provide a survivor annuity to a person with an insurable interest in the retiree.

*Marriage* means a marriage recognized in law or equity under the whole law of the jurisdiction with the most significant interest in the marital status of the employee, Member, or retiree unless the law of that jurisdiction is contrary to the public policy of the United States. If a jurisdiction would recognize more than one marriage in law or equity, the Office of Personnel Management (OPM) will recognize only one marriage, but will defer to the local courts to determine which marriage should be recognized.

*Member* means a Member of Congress.

*Net annuity* means the net annuity as defined in § 838.103 of this chapter.

*Partially reduced annuity* means the recurring payments under CSRS to a retiree who has elected less than the maximum allowable reduction in annuity to provide a current spouse annuity or a former spouse annuity.

*Present value factor* means the amount of money (earning interest at an assumed rate) required at the time of retirement to fund an annuity that starts out at the rate of $1 a month and is payable in monthly installments for the annuitant's lifetime based on mortality rates for non-disability annuitants under the Civil Service Retirement System; and increases each year at an assumed rate of inflation. Interest, mortality, and inflation rates used in computing the present value are those used by the Board of Actuaries of the Civil Service Retirement System for valuation of the System, based on dynamic assumptions. The present value factors are unisex factors obtained by averaging six distinct present value factors, weighted by the total dollar value of annuities typically paid to new retirees at each age.

*Qualifying court order* means a court order that awards a former spouse annuity and that satisfies the requirements of section 8341(h) of title 5, United States Code, for awarding a former spouse annuity.

*Retiree* means a former employee or Member who is receiving recurring payments under CSRS based on service by the employee or Member. ''Retiree,'' as used in this subpart, does not include a current spouse, former spouse, child, or person with an insurable interest receiving a survivor annuity.

*Self-only annuity* means the recurring unreduced payments under CSRS to a retiree with no survivor annuity to anyone.

*Time of retirement* means the effective commencing date for a retired employee's or Member's annuity.

[50 FR 20070, May 13, 1985, as amended at 51 FR 31931, Sept. 8, 1986; 57 FR 33597, July 29, 1992; 58 FR 52880, Oct. 13, 1993]

ELECTIONS AT THE TIME OF RETIREMENT

### § 831.611 Election at time of retirement of fully reduced annuity to provide a current spouse annuity.

(a) A married employee or Member retiring under CSRS will receive a fully reduced annuity to provide a current spouse annuity unless—

(1) The employee or Member, with the consent of the current spouse, elects a self-only annuity, a partially reduced annuity, or a fully reduced annuity to provide a former spouse annuity, in accordance with § 831.612(b) or § 831.614; or

(2) The employee or Member elects a self-only annuity, a partially reduced annuity or a fully reduced annuity to provide a former spouse annuity, and current spousal consent is waived in accordance with § 831.608.

(b) Qualifying court orders that award former spouse annuities prevent payment of current spouse annuities to the extent necessary to comply with the court order and § 831.614.

(c) The maximum rate of a current spouse annuity is 55 percent of the rate of the retiring employee's or Member's self-only annuity if the employee or

Member is retiring based on a separation from a position under CSRS on or after October 11, 1962. The maximum rate of a current spouse annuity is 50 percent of the rate of the retiring employee's or Member's self-only annuity if the employee or Member is retiring based on a separation from a position covered under CSRS between September 30, 1956, and October 11, 1962.

(d)(1) The amount of the reduction to provide a current spouse annuity equals 2½ percent of the first $3600 of the designated survivor base plus 10 percent of the portion of the designated survivor base which exceeds $3600, if—

(i) The employee's or Member's separation on which the retirement is based was on or after October 11, 1962; or

(ii) The reduction is to provide a current spouse annuity (under § 831.631) for a spouse acquired after retirement.

(2) The amount of the reduction to provide a current spouse annuity under this section for former employees or Members whose retirement is based on separations before October 11, 1962, equals 2½ percent of the first $2400 of the designated survivor base plus 10 percent of the portion of the designated survivor base which exceeds $2400.

[50 FR 20070, May 13, 1985, as amended at 51 FR 31931, Sept. 8, 1986; 58 FR 52880, Oct. 13, 1993. Redesignated at 58 FR 52882, Oct. 13, 1993]

### § 831.612 Election at time of retirement of a fully reduced annuity or a partially reduced annuity to provide a former spouse annuity.

(a) An unmarried employee or Member retiring under CSRS may elect a fully reduced annuity or a partially reduced annuity to provide a former spouse annuity or annuities.

(b) A married employee or Member retiring under CSRS may elect a fully reduced annuity or a partially reduced annuity to provide a former spouse annuity or annuities instead of a fully reduced annuity to provide a current spouse annuity, if the current spouse consents to the election in accordance with § 831.614 or spousal consent is waived in accordance with § 831.618.

(c) An election under paragraph (a) or (b) of this section is void to the extent that it—

(1) Conflicts with a qualifying court order; or

(2) Would cause the total of current spouse annuities and former spouse annuities payable based on the employee's or Member's service to exceed 55 percent (or 50 percent if based on a separation before October 11, 1962) of the self-only annuity to which the employee or Member would be entitled.

(d) Any reduction in an annuity to provide a former spouse annuity will terminate on the first day of the month after the former spouse remarries before age 55 or dies, or the former spouse's eligibility for a former spouse annuity terminates under the terms of a qualifying court order, unless—

(1) The retiree elects, within 2 years after the former spouse's death or remarriage, to continue the reduction to provide or increase a former spouse annuity for another former spouse, or to provide or increase a current spouse annuity; or

(2) A qualifying court order requires the retiree to provide another former spouse annuity.

(e) The maximum rate of a former spouse annuity under this section or § 831.632 is 55 percent of the rate of the retiring employee's or Member's self-only annuity if the employee or Member is retiring based on a separation from a position under CSRS on or after October 11, 1962. The maximum rate of a former spouse annuity under this section or § 831.632 is 50 percent of the rate of the retiring employee's or Member's self-only annuity if the employee or Member is retiring based on a separation from a position covered under CSRS between September 30, 1956, and October 11, 1962.

(f)(1) The amount of the reduction to provide one or more former spouse annuities or a combination of a current spouse annuity and one or more former spouse annuities under this section equals 2½ percent of the first $3600 of the total designated survivor base plus 10 percent of the portion of the total designated survivor base which exceeds $3600, if—

(i) The employee's or Member's separation on which the retirement is based was on or after October 11, 1962; or

(ii) The reduction is to provide a former spouse annuity (under § 831.632)

for a former spouse from whom the employee or Member was divorced after retirement.

(2) The amount of the reduction to provide one or more former spouse annuities or a combination of a current spouse annuity and one or more former spouse annuities under this section for employees or Members whose retirement is based on separations before October 11, 1962, equals 2½ percent of the first $2400 of the total designated survivor base plus 10 percent of the portion of the total designated survivor base which exceeds $2400.

[50 FR 20070, May 13, 1985, as amended at 51 FR 31931, Sept. 8, 1986; 55 FR 9100, Mar. 12, 1990; 58 FR 52880, Oct. 13, 1993. Redesignated at 58 FR 52882, Oct. 13, 1993]

### § 831.613 Election of insurable interest annuity.

(a) At the time of retirement, an employee or Member in good health, who is applying for a non-disability annuity, may elect an insurable interest annuity. Spousal consent is not required, but an election under this section does not exempt a married employee or Member from the provisions of § 831.611(a).

(b) An insurable interest annuity may be elected by an employee or Member electing a fully reduced annuity or a partially reduced annuity to provide a current spouse annuity or a former spouse annuity or annuities.

(c)(1) In the case of a married employee or Member, an election under this section may not be made on behalf of a current spouse unless that current spouse has consented to an election not to provide a current spouse annuity in accordance with § 831.611(a)(1).

(2) A consent (to an election not to provide a current spouse annuity in accordance with § 831.611(a)(1)) required by paragraph (c)(1) of this section to be eligible to be the beneficiary of an insurable interest annuity is cancelled if—

(i) The retiree fails to qualify to receive the insurable interest annuity; or

(ii) The retiree changes his or her election to receive an insurable interest annuity under § 831.621; or

(iii) The retiree elects a fully or partially reduced annuity to provide a current spouse annuity under § 831.685.

(3) An election of a partially reduced annuity under § 831.622(b) or § 831.685 to provide a current spouse annuity for a current spouse who is the beneficiary of an insurable interest annuity is void unless the spouse consents to the election.

(4) If a retiree who had elected an insurable interest annuity to benefit a current spouse elects a fully reduced annuity to provide a current spouse annuity (or, with the consent of the current spouse, a partially reduced annuity to provide a current spouse annuity) under § 831.622(b) or § 831.685, the election of the insurable interest annuity is cancelled.

(5)(i) A retiring employee or Member may not elect a fully reduced annuity or a partially reduced annuity to provide a former spouse annuity and an insurable interest annuity to benefit the same former spouse.

(ii) If a retiring employee or Member who is required by court order to provide a former spouse annuity elects an insurable interest annuity to benefit the former spouse with the court-ordered entitlement—

(A) If the benefit based on the election is greater than or equal to the benefit based on the court order, the election of the insurable interest annuity will satisfy the requirements of the court order as long as the insurable interest annuity continues.

(B) If the benefit based on the election is less than the benefit based on the court order, the election of the insurable interest annuity is void.

(iii) An election under § 831.632 of a fully reduced annuity or a partially reduced annuity to benefit a former spouse by a retiree who elected and continues to receive an insurable interest annuity to benefit that former spouse is void.

(d) To elect an insurable interest annuity, an employee or Member must indicate the intention to make the election on the application for retirement; submit evidence to demonstrate that he or she is in good health; and arrange and pay for the medical examination that shows that he or she is in good health. A report of the medical examination, signed and dated by a licensed physician, must be furnished to OPM

on such forms and at such time and place as OPM may prescribe.

(e) An insurable interest annuity may be elected to provide a survivor benefit only for a person who has an insurable interest in the retiring employee or Member.

(1) An insurable interest is presumed to exist with—

(i) The current spouse;

(ii) The current same-sex domestic partner;

(iii) A blood or adopted relative closer than first cousins;

(iv) A former spouse;

(v) A former same-sex domestic partner;

(vi) A person to whom the employee or Member is engaged to be married, or a person with whom the employee or Member has agreed to enter into a same-sex domestic partnership;

(vii) A person with whom the employee or Member is living in a relationship that would constitute a common-law marriage in jurisdictions recognizing common-law marriages;

(2) For purposes of this section, the term ''same-sex domestic partner'' means a person in a domestic partnership with an employee or annuitant of the same sex and the term ''domestic partnership'' is defined as a committed relationship between two adults, of the same sex, in which the partners—

(i) Are each other's sole domestic partner and intend to remain so indefinitely;

(ii) Maintain a common residence, and intend to continue to do so (or would maintain a common residence but for an assignment abroad or other employment-related, financial, or similar obstacle);

(iii) Are at least 18 years of age and mentally competent to consent to contract;

(iv) Share responsibility for a significant measure of each other's financial obligations;

(v) Are not married or joined in a civil union to anyone else;

(vi) Are not the domestic partner of anyone else;

(vii) Are not related in a way that, if they were of opposite sex, would prohibit legal marriage in the U.S. jurisdiction in which the domestic partnership was formed; and

(viii) Are willing to certify, if required by OPM, that they understand that willful falsification of any documentation required to establish that an individual is in a domestic partnership may lead to disciplinary action and the recovery of the cost of benefits received related to such falsification, as well as constitute a criminal violation under 18 U.S.C. 1001.

(3) When an insurable interest is not presumed, the employee or Member must submit affidavits from one or more persons with personal knowledge of the named beneficiary's insurable interest in the employee or Member. The affidavits must set forth the relationship, if any, between the named beneficiary and the employee or Member, the extent to which the named beneficiary is dependent on the employee or Member, and the reasons why the named beneficiary might reasonably expect to derive financial benefit from the continued life of the employee or Member.

(4) The employee or Member may be required to submit documentary evidence to establish the named beneficiary's date of birth.

(f) After receipt of all required evidence to support an election of an insurable interest annuity, OPM will notify the employee or Member of initial monthly annuity rates with and without the election of an insurable interest annuity and the initial rate payable to the named beneficiary. No election of an insurable interest annuity is effective unless the employee or Member confirms the election in writing, dies, or becomes incompetent no later than 60 days after the date of the notice described in this paragraph.

(g) (1) When an employee or Member elects both an insurable interest annuity and a fully reduced annuity or a partially reduced annuity to provide a current spouse annuity and/or a former spouse annuity or annuities, each reduction is computed based on the self-only annuity computation. The combined reduction may exceed the maximum 40 percent reduction in the retired employee's or Member's annuity permitted under section 8339(k)(1) of title 5, United States Code, applicable to insurable interest annuities.

(2) The rate of annuity paid to the beneficiary of an insurable interest election, when the employee or Member also elected a fully reduced annuity or a partially reduced annuity, equals 55 (or 50 percent if based on a separation before October 11, 1962) percent of the rate of annuity after the insurable interest reduction. The additional reduction to provide a current spouse annuity or a former spouse annuity is not considered in determining the rate of annuity paid to the beneficiary of the insurable interest election.

(h)(1) Except as provided in § 831.612(d), if a retiree who is receiving a fully reduced annuity or a partially reduced annuity to provide a former spouse annuity has also elected an insurable interest annuity to benefit a current spouse and if the eligible former spouse remarries before age 55, dies, or loses eligibility under the terms of the court order, and no other former spouse is entitled to a survivor annuity based on an election made in accordance with § 831.632 or a qualifying court order, the retiree may elect, within 2 years after the former spouse's remarriage, death, or loss of eligibility under the terms of the court order, to convert the insurable interest annuity to a fully reduced annuity to provide a current spouse annuity, effective on the first day of the month following the event causing the former spouse to lose eligibility.

(2) An election under paragraph (h)(1) of this section cancels any consent not to receive a current spouse annuity required by paragraph (c) of this section for the current spouse to be eligible for an annuity under this section.

(3) When a former spouse receiving an annuity under section 8341(h) of title 5, United States Code, loses eligibility to that annuity, a beneficiary of an insurable interest annuity who was the current spouse at both the time of the retiree's retirement and death may, within 2 years after the former spouse's death, remarriage, or loss of eligibility under the terms of the court order, elect to receive a current spouse annuity instead of the annuity he or she had been receiving. The election is effective on the first day of the month following the event causing the former spouse to lose eligibility.

(i) Upon the death of the current spouse, a retiree whose annuity is reduced to provide both a current spouse annuity and an insurable interest benefit for a former spouse is not permitted to convert the insurable interest annuity to a reduced annuity to provide a former spouse annuity.

(j) An employee or Member may name only one natural person as the named beneficiary of an insurable interest annuity. OPM will not accept the designation of contingent beneficiaries and such a designation is void.

(k)(1) An election under this section is prospectively voided by an election of a reduced annuity to provide a current spouse annuity under § 831.631 that would benefit the same person.

(2)(i) If the spouse is not the beneficiary of the election under this section, a retiree may prospectively void an election under this section at the time the retiree elects a reduced annuity to provide a current spouse annuity under § 831.631.

(ii) A retiree's election to void an election under paragraph (k)(2)(i) of this section must be filed at the same time as the election under § 831.631.

(3) An annuity reduction under this section terminates on the first day of the month after the beneficiary of the insurable interest annuity dies.

[50 FR 20070, May 13, 1985, as amended at 51 FR 31931, Sept. 8, 1986; 52 FR 10216, Mar. 31, 1987; 55 FR 9100, Mar. 12, 1990; 58 FR 52880, Oct. 13, 1993. Redesignated at 58 FR 52882, Oct. 13, 1993, as amended at 66 FR 66711, Dec. 27, 2001; 77 FR 42911, July 20, 2012]

### § 831.614 Election of a self-only annuity or partially reduced annuity by married employees and Members.

(a) A married employee may not elect a self-only annuity or a partially reduced annuity to provide a current spouse annuity without the consent of the current spouse or a waiver of spousal consent by OPM in accordance with § 831.618.

(b) Evidence of spousal consent or a request for waiver of spousal consent must be filed on a form prescribed by OPM.

(c) The form will require that a notary public or other official authorized to administer oaths certify that the

current spouse presented identification, gave consent, signed or marked the form, and acknowledged that the consent was given freely in the notary's or official's presence.

(d) The form described in paragraph (c) of this section may be executed before a notary public, an official authorized by the law of the jurisdiction where executed to administer oaths, or an OPM employee designated for that purpose by the Associate Director.

[50 FR 20070, May 13, 1985, as amended at 55 FR 9100, Mar. 12, 1990; 58 FR 52880, Oct. 13, 1993. Redesignated at 58 FR 52882, Oct. 13, 1993]

### § 831.615 [Reserved]

### § 831.616 Elections by previously retired retiree with new title to an annuity.

(a) A reemployed retiree (after 5 or more years of reemployed annuitant service) who elects a redetermined annuity under section 8344 of title 5, United States Code, is subject to §§ 831.611 through 831.622 at the time of the redetermination.

(b) A disability retiree who recovers from disability or is restored to earning capacity is subject to §§ 831.611 through 622 at the time that he or she retires under section 8336 or 8338 of title 5, United States Code.

(c) A retiree who is dropped from the retirement rolls and subsequently gains a new annuity right by fulfilling the requirements of section 8333(b) of title 5, United States Code, is subject to §§ 831.611 through 831.622 when he or she retires under that new annuity right.

[50 FR 20070, May 13, 1985, as amended at 58 FR 52881, Oct. 13, 1993. Redesignated at 58 FR 52882, Oct. 13, 1993]

### § 831.617 [Reserved]

### § 831.618 Waiver of spousal consent requirement.

(a) The spousal consent requirement will be waived upon a showing that the spouse's whereabouts cannot be determined. A request for waiver on this basis must be accompanied by—

(1) A judicial determination that the spouse's whereabouts cannot be determined; or

(2) (i) Affidavits by the employee or Member and two other persons, at least one of whom is not related to the employee or Member, attesting to the inability to locate the current spouse and stating the efforts made to locate the spouse; and

(ii) Documentary corroboration such as tax returns filed separately or newspaper stories about the spouse's disappearance.

(b) The spousal consent requirement will be waived based on exceptional circumstances if the employee or Member presents a judicial determination finding that—

(1) The case before the court involves a Federal employee who is in the process of retiring from Federal employment and the spouse of that employee;

(2) The nonemployee spouse has been given notice and an opportunity to be heard concerning this order;

(3) The court has considered sections 8339(j)(1) of title 5, United States Code, and this section as they relate to waiver of the spousal consent requirement for a married Federal employee to elect an annuity without a reduction to provide a survivor benefit to a spouse at retirement; and

(4) The court finds that exceptional circumstances exist justifying waiver of the nonemployee spouse's consent.

[50 FR 20070, May 13, 1985, as amended at 51 FR 31932, Sept. 8, 1986; 55 FR 9100, Mar. 12, 1990. Redesignated at 58 FR 52882, Oct. 13, 1993]

### § 831.619 Marital status at time of retirement.

An employee or Member is unmarried at the time of retirement for all purposes under this subpart only if the employee or Member was unmarried on the date that the annuity begins to accrue.

[50 FR 20070, May 13, 1985. Redesignated at 58 FR 52882, Oct. 13, 1993]

## CHANGES OF SURVIVOR ELECTIONS

### § 831.621 Changes of election before final adjudication.

An employee or Member may name a new survivor or change his election of type of annuity if, not later than 30 days after the date of the first regular monthly payment, the named survivor

dies or the employee or Member files with OPM a new written election. All required evidence of spousal consent or justification for waiver of spousal consent, if applicable, must accompany any new written election under this section.

[50 FR 20070, May 13, 1985. Redesignated at 58 FR 52882, Oct. 13, 1993]

### § 831.622 Changes of election after final adjudication.

(a) Except as provided in section 8339 (j) or (k) of title 5, United States Code, or §§ 831.682, 831.684, 831.685, or paragraph (b) of this section, an employee or Member may not revoke or change the election or name another survivor later than 30 days after the date of the first regular monthly payment.

(b)(1) Except as provided in § 831.613 and paragraphs (b)(2) and (b)(3) of this section, a retiree who was married at the time of retirement and has elected a self-only annuity, or a partially reduced annuity to provide a current spouse annuity, or a fully reduced annuity or a partially reduced annuity to provide a former spouse annuity, or an insurable interest annuity may elect, no later than 18 months after the time of retirement, an annuity reduction or an increased annuity reduction to provide a current spouse annuity.

(2) A current spouse annuity based on an election under paragraph (b)(1) of this section cannot be paid if it will, when combined with any former spouse annuity or annuities that are required by court order, exceed the maximum survivor annuity permitted under § 831.641.

(3) To make an election under paragraph (b)(1) of this section, the retiree must pay, in full, a deposit determined under § 831.662, plus interest, at the rate provided under § 831.105(g), no later than 18 months after the time of retirement.

(4) If a retiree makes an election under paragraph (b)(1) of this section and is prevented from paying the deposit within the 18-month time limit because OPM did not send him or her a notice of the amount of the deposit at least 30 days before the time limit expires, the time limit for making the deposit will be extended to 30 days after OPM sends the notice of the amount of the deposit.

(5) An election under paragraph (b)(1) of this section, cancels any spousal consent under § 831.611 to the extent of the election.

(6) An election under paragraph (b)(1) of this section is void unless it is filed with OPM before the retiree dies.

(7) If a retiree who had elected a fully reduced annuity or a partially reduced annuity to provide a former spouse annuity or former spouse annuities makes an election under paragraph (b)(1) of this section which would cause the combined current spouse annuity and former spouse annuity (or annuities) to exceed the maximum allowed under § 831.641, the former spouse annuity (or annuities) must be reduced to not exceed the maximum allowable under § 831.641.

[51 FR 31932, Sept. 8, 1986, as amended at 58 FR 52881, Oct. 13, 1993. Redesignated at 58 FR 52882, Oct. 13, 1993]

## POST-RETIREMENT ELECTIONS

### § 831.631 Post-retirement election of fully reduced annuity or partially reduced annuity to provide a current spouse annuity.

(a) Except as provided in paragraph (c) of this section, in cases of retirees who retired before May 7, 1985, and married after retirement but before February 27, 1986:

(1) A retiree who was unmarried at the time of retirement may elect, within 1 year after a post-retirement marriage, a fully reduced annuity or a partially reduced annuity to provide a current spouse annuity.

(2) A retiree who was married and elected a fully reduced annuity or a partially reduced annuity at the time of retirement may elect, within 1 year after a postretirement marriage, to provide a current spouse annuity. If a retiree elects a fully reduced annuity or a partially reduced annuity under this paragraph, the election must equal the election made at the time of retirement.

(3) The reduction under paragraphs (a)(1) or (a)(2) of this section commences on the first day of the month beginning 1 year after the date of the post-retirement marriage.

(b) Except as provided in paragraph (c) of this section, in cases involving retirees who retired on or after May 7, 1985, or married on or after February 27, 1986—

(1) A retiree who was unmarried at the time of retirement may elect, within 2 years after a post-retirement marriage, a fully reduced annuity or a partially reduced annuity to provide a current spouse annuity.

(2) A retiree who was married at the time of retirement may elect, within 2 years after a post-retirement marriage—

(i) A fully reduced annuity or a partially reduced annuity to provide a current spouse annuity if—

(A) The retiree was awarded a fully reduced annuity under § 831.611 at the time of retirement; or

(B) The election at the time of retirement was made with a waiver of spousal consent in accordance with § 831.618; or

(C) The marriage at the time of retirement was to a person other than the spouse who would receive a current spouse annuity based on the post-retirement election; or

(ii) A partially reduced annuity to provide a current spouse annuity no greater than the current spouse annuity elected for the current spouse at retirement if—

(A) The retiree elected a partially reduced annuity under § 831.614 at the time of retirement;

(B) The election at the time of retirement was made with spousal consent in accordance with § 831.614; and

(C) The marriage at the time of retirement was to the same person who would receive a current spouse annuity based on the post-retirement election.

(3)(i) Except as provided in paragraph (b)(3)(ii) or (b)(4) of this section, a retiree making an election under this section must deposit an amount equal to the difference between the amount of annuity actually paid to the retiree and the amount of annuity that would have been paid if the reduction elected under paragraphs (b)(1) or (b)(2) of this section had been in effect continuously since the time of retirement, plus 6 percent annual interest, computed under § 831.105, from the date when each difference occurred.

(ii) An election under this section may be made without deposit, if that election prospectively voids an election of an insurable interest annuity.

(4)(i) An election under this section is irrevocable when received by OPM.

(ii) An election under this section is effective when the marriage duration requirements of § 831.642 are satisfied.

(iii) If an election under paragraph (b)(1) or (b)(2) of this section does not become effective, no deposit under paragraph (b)(3) of this section is required.

(iv) If payment of the deposit under paragraph (b)(3) of this section is not required because the election never became effective and if some or all of the deposit has been paid, the amount paid will be returned to the retiree, or, if the retiree has died, to the person who would be entitled to any lump-sum benefits under the order of precedence in section 8342 of title 5, United States Code.

(5) Any reduction in an annuity to provide a current spouse annuity will terminate effective on the first day of the month after the marriage to the current spouse ends, unless—

(i) The retiree elects, within 2 years after a divorce terminates the marriage, to continue the reduction to provide for a former spouse annuity; or

(ii) A qualifying court order requires the retiree to provide a former spouse annuity.

(c)(1) Qualifying court orders prevent payment of current spouse annuities to the extent necessary to comply with the court order and § 831.641.

(2) If an election under this section causes the total of all current and former spouse annuities provided by a qualifying court order or elected under § 831.612, § 831.632, or this section to exceed the maximum survivor annuity permitted under § 831.641, OPM will accept the election but will pay the portion in excess of the maximum only when permitted by § 831.641(c).

(d) The amount of the reduction to provide a current spouse annuity under this section equals 2½ percent of the first $3600 of the designated survivor base plus 10 percent of the portion of

the designated survivor base which exceeds $3600.

[55 FR 9101, Mar. 12, 1990, as amended at 56 FR 16263, Apr. 22, 1991; 58 FR 52881, Oct. 13, 1993. Redesignated at 58 FR 52882, Oct. 13, 1993]

### § 831.632 Post-retirement election of fully reduced annuity or partially reduced annuity to provide a former spouse annuity.

(a)(1) Except as provided in paragraphs (b) and (c) of this section, when the marriage of a retiree who retired on or after May 7, 1985, terminates after retirement, he or she may elect in writing a fully reduced annuity or a partially reduced annuity to provide a former spouse annuity. Such an election must be filed with OPM within 2 years after the retiree's marriage to the former spouse terminates.

(2) Except as provided in paragraphs (b) and (c) of this section, a retiree who retired before May 7, 1985, and whose marriage was terminated on or after May 7, 1985, may elect in writing a fully reduced annuity or a partially reduced annuity to provide a former spouse annuity if the retiree while married to the former spouse had elected, prior to May 7, 1985, a reduced annuity to provide a current spouse annuity for that spouse. Such an election must be filed with OPM within 2 years after the retiree's marriage to the former spouse terminates.

(3) Except as provided in paragraphs (b) and (c) of this section, a retiree who retired on or after May 7, 1985, and before February 27, 1986, and whose marriage terminated before May 7, 1985, may elect in writing a fully reduced annuity or a partially reduced annuity to provide a former spouse annuity. Such an election must be made no later than February 27, 1988.

(b)(1) Qualifying court orders prevent payment of former spouse annuities to the extent necessary to comply with the court order and § 831.641.

(2) A retiree who elects a fully or partially reduced annuity to provide a former spouse annuity may not elect to provide a former spouse annuity in an amount that either—

(i) Is smaller than the amount required by a qualifying court order; or

(ii) Would cause the sum of all current and former spouse annuities based on a retiree's elections under §§ 831.611, 831.612, 831.631 and this section to exceed 55 percent of the rate of the retiree's self-only annuity if the retiree's retirement was based on a separation from a position under CSRS on or after October 11, 1962, or 50 percent of the rate of the retiree's self-only annuity if the retiree's retirement was based on a separation from a position under CSRS before October 11, 1962.

(3) An election under this section is void—

(i) In the case of a married retiree, if the current spouse does not consent to the election on a form as described in § 831.614(c) and spousal consent is not waived by OPM in accordance with § 831.618; or

(ii) To the extent that it provides a former spouse annuity for the spouse who was married to the retiree at the time of retirement in an amount that is inconsistent with any joint designation or waiver made at the time of retirement under § 831.611 (a)(1) or (a)(2); or

(iii) In the case of an election under paragraph (a)(2) of this section, to the extent that it provides a former spouse annuity that exceeds the proportion of the retiree's annuity to which the former spouse would have been entitled as a current spouse annuity as of May 7, 1985.

(c) An election under this section is not permitted unless the retiree agrees to deposit the amount equal to the difference between the amount of annuity actually paid to the retiree and the amount of annuity that would have been paid if the reduction elected under paragraph (a) of this section had been in effect continuously since the time of retirement, plus 6 percent annual interest, computed under § 831.105, from the date when each difference occurred.

(d) Any reduction in an annuity to provide a former spouse annuity will terminate on the first day of the month after the former spouse remarries before age 55 or dies, or the former spouse's eligibility for a former spouse annuity terminates under the terms of a qualifying court order, unless—

(1) The retiree elects, within 2 years after the event causing the former spouse to lose eligibility, to continue the reduction to provide or increase a former spouse annuity for another former spouse, or to provide or increase a current spouse annuity; or

(2) A qualifying court order requires the retiree to provide another former spouse annuity.

(e)(1) The amount of the reduction to provide one or more former spouse annuities or a combination of a current spouse annuity and one or more former spouse annuities under this section equals 2½ percent of the first $3600 of the total designated survivor base plus 10 percent of the portion of the total designated survivor base which exceeds $3600, if—

(i) The employee's or Member's separation on which the retirement is based was on or after October 11, 1962; or

(ii) The reduction is to provide a former spouse annuity (under § 831.632) for a former spouse whom the employee or Member married after retirement.

(2) The amount of the reduction to provide one or more former spouse annuities or a combination of a current spouse annuity and one or more former spouse annuities under this section for employees or Members whose retirement is based on separations before October 11, 1962, equals 2½ percent of the first $2400 of the total designated survivor base plus 10 percent of the portion of the total designated survivor base which exceeds $2400.

[50 FR 20070, May 13, 1985, as amended at 51 FR 31932, Sept. 8, 1986; 52 FR 3209, Feb. 3, 1987; 55 FR 9100, Mar. 12, 1990; 56 FR 16262, Apr. 22, 1991; 58 FR 52881, Oct. 13, 1993. Redesignated at 58 FR 52882, Oct. 13, 1993]

ELIGIBILITY

### § 831.641 Division of a survivor annuity.

(a) Except as provided in §§ 831.682 and 831.683, the maximum combined total of all current and former spouse annuities (not including any benefits based on an election of an insurable interest annuity) payable based on the service of a former employee or Member equals 55 percent (or 50 percent if based on a separation before October 11, 1962) of the rate of the self-only annuity that otherwise would have been paid to the employee, Member, or retiree.

(b) By using the elections available under this subpart or to comply with a court order under subpart Q, a survivor annuity may be divided into a combination of former spouse annuities and a current spouse annuity so long as the aggregate total of current and former spouse annuities does not exceed the maximum limitation in paragraph (a) of this section.

(c) Upon termination of former spouse annuity payments because of death or remarriage of the former spouse, or by operation of a court order, the current spouse will be entitled to a current spouse annuity or an increased current spouse annuity if—

(1) The employee or Member died while employed in a position covered under CSRS; or

(2) The current spouse was married to the employee or Member continuously from the time of retirement and did not consent to an election not to provide a current spouse annuity; or

(3) The current spouse married a retiree after retirement and the retiree elected, under § 831.631, to provide a current spouse annuity for that spouse in the event that the former spouse annuity payments terminate.

[50 FR 20070, May 13, 1985, as amended at 51 FR 31933, Sept. 8, 1986; 58 FR 52881, Oct. 13, 1993. Redesignated at 58 FR 52282, Oct. 13, 1993]

### § 831.642 Marriage duration requirements.

(a) The surviving spouse of a retiree who retired on or after May 7, 1985, or of a retiree who retired before May 7, 1985, but married that surviving spouse on or after November 8, 1984, or of an employee or Member who dies while serving in a position covered by CSRS on or after May 7, 1985, or of an employee or Member who died while serving in a position covered by CSRS before May 7, 1985, but married that surviving spouse on or after November 8, 1984, can qualify for a current spouse annuity only if—

(1) The surviving spouse and the employee, Member, or retiree had been

married for at least 9 months, as explained in paragraph (b) of this section; or

(2) A child was born of the marriage, as explained in paragraph (c) of this section; or

(3) The death of the employee, Member, or retiree was accidental as explained in paragraph (d) of this section.

(b) For satisfying the 9-month marriage requirement of paragraph (a)(1) of this section, the aggregate time of all marriages between the spouse applying for a current spouse annuity and the employee, Member, or retiree is included.

(c) For satisfying the child-born-of-the-marriage requirement of paragraph (a)(2) of this section, any child, including a posthumous child, born to the spouse and the employee, Member, or retiree is included. This includes a child born out of wedlock or of a prior marriage between the same parties.

(d)(1) A death is accidental if it results from homicide or from bodily injuries incurred solely through violent, external, and accidental means. The term ''accidental'' does not include a death—

(i) Caused wholly or partially, directly or indirectly, by disease or bodily or mental infirmity, or by medical or surgical treatment or diagnosis thereof; or

(ii) Caused wholly or partially, directly, or indirectly, by ptomaine, by bacterial infection, except only septic infection of and through a visible wound sustained solely through violent, external, and accidental means; or

(iii) Caused wholly or partially, directly or indirectly, by hernia, no matter how or when sustained; or

(iv) Caused by or the result of intentional self-destruction or intentionally self-inflicted injury, while sane or insane; or

(v) Caused by or as a result of the self-administration or illegal or illegally obtained drugs.

(2) A State judicial or administrative adjudication of the cause of death for criminal or insurance purposes is conclusive evidence of whether a death is accidental.

(3) A death certificate showing the cause of death as accident or homicide is *prima facie* evidence that the death was accidental.

[50 FR 20070, May 13, 1985; 50 FR 21031, May 22, 1985, as amended at 51 FR 31933, Sept. 8, 1986; 56 FR 16263, Apr. 22, 1991. Redesignated at 58 FR 52882, Oct. 13, 1993]

### § 831.643 Time for filing applications for death benefits.

(a) A survivor of a deceased employee, Member, or retiree, may file an application for annuity, personally or through a representative, at any time within 30 years after the death of the employee, Member, or retiree.

(b) A former spouse claiming eligibility for an annuity based on § 831.683 may file an application at any time between November 8, 1984 and May 7, 1989. Within this period, the date that the first correspondence indicating a desire to file a claim is received by OPM will be treated as the application date for meeting timeliness deadlines and determining the commencing date of the survivor annuity under § 831.683 if the former spouse is eligible on that date.

[55 FR 9102, Mar. 12, 1990, as amended at 58 FR 52881, Oct. 13, 1993. Redesignated at 58 FR 52882, Oct. 13, 1993]

### § 831.644 Remarriage.

(a)(1) If a recipient of a current spouse annuity remarried before November 8, 1984, the current spouse annuity terminates on the last day of the month before the recipient remarried before attaining age 60.

(2) If a recipient of a current spouse annuity remarries on or after November 8, 1984, a current spouse annuity terminates on the last day of the month before the recipient remarries before attaining age 55.

(b) A former spouse annuity or eligibility for a future former spouse annuity terminates on the last day of the month before the month in which the former spouse remarries before attaining age 55.

(c) If a current spouse annuity is terminated because of remarriage of the recipient, the annuity is reinstated on the day of the termination of the remarriage by death, annulment, or divorce if—

(1) The surviving spouse elects to receive this annuity instead of a survivor

benefit to which he or she may be entitled, under CSRS or another retirement system for Government employees, by reason of the remarriage; and

(2) Any lump sum paid on termination of the annuity is repaid (in a single payment or by withholding payment of the annuity until the amount of the lump sum has accrued).

(d) (1) If present or future entitlement to a former spouse annuity is terminated because of remarriage before age 55, the entitlement will not be reinstated upon termination of the remarriage by death or divorce.

(2) If present or future entitlement to a former spouse annuity is terminated because of remarriage before age 55, the entitlement will not be reinstated upon annulment of the remarriage unless—

(i) The decree of annulment states that the marriage is without legal effect retroactively from the marriage's inception; and

(ii) The former spouse's entitlement is based on section 4(b)(1)(B) or section (4)(b)(4) of Pub. L. 98–615.

(3) If a retiree who is receiving a reduced annuity to provide a former spouse annuity and who has remarried that former spouse (before the former spouse attained age 55) dies, the retiree will be deemed to have elected to continue the reduction to provide a current spouse annuity unless the retiree requests (or has requested) in writing that OPM terminate the reduction.

[50 FR 20070, May 13, 1985, as amended at 51 FR 31935, Sept. 8, 1986. Redesignated at 58 FR 52882, Oct. 13, 1993, as amended at 60 FR 14202, Mar. 16, 1995]

### § 831.645 Elections between survivor annuities.

(a) A current spouse annuity cannot be reinstated under § 831.644 unless—

(1) The surviving spouse elects to receive the reinstated current spouse annuity instead of any other payments (except any accrued but unpaid annuity and any unpaid employee contributions) to which he or she may be entitled under CSRS, or any other retirement system for Government employees, by reason of the remarriage; and

(2) Any lump sum paid on termination of the annuity is returned to the Civil Service Retirement and Disability Fund.

(b) A current spouse is entitled to a current spouse annuity based on an election under § 831.631 only upon electing this current spouse annuity instead of any other payments (except any accrued but unpaid annuity and any unpaid employee contributions) to which he or she may be entitled under CSRS, or any other retirement system for Government employees.

(c) A former spouse who marries a retiree is entitled to a former spouse annuity based on an election by that retiree under § 831.632, or § 831.682, or a qualifying court order terminating that marriage to that retiree only upon electing this former spouse annuity instead of any other payments (except any accrued but unpaid annuity and any unpaid employee contributions) to which he or she may be entitled under CSRS, or any other retirement system for Government employees.

(d) As used in this section, ''any other retirement system for Government employees'' does not include Survivor Benefit Payments from a military retirement system or social security benefits.

[55 FR 9103, Mar. 12, 1990, as amended at 58 FR 52881, Oct. 13, 1993. Redesignated at 58 FR 52882, Oct. 13, 1993]

## PAYMENT OF SURVIVOR ANNUITIES

### § 831.651 Commencing and terminating dates of survivor annuities.

(a) Except as provided in paragraph (b) of this section, current spouse annuities, former spouse annuities, children's survivor annuities, and survivor annuities for beneficiaries of insurable interest annuities under CSRS begin to accrue on the day after death of the employee, Member, or retiree.

(b)(1) A current spouse annuity begins to accrue—

(i) Upon attainment of age 50 when, under section 12 of the Civil Service Retirement Act Amendments of February 29, 1948, the annuity is deferred until age 50; or

(ii) Upon OPM's receipt of a claim for an annuity authorized for unremarried widows and widowers by section 2 of the Civil Service Retirement Act

Amendments of June 25, 1958, 72 Stat. 218.

(2) A former spouse annuity begins to accrue—

(i) For annuities under § 831.683, on the later of the day after date of death of the retiree or the first day of the second month after the date the application for annuity is received in OPM; or

(ii) For annuities when a former spouse annuity is authorized by court order under section 8341(h) of title 5, United States Code, on the later of the day after the date of death of the employee, Member, or retiree or the first day of the second month after the court order awarding the former spouse annuity and the supporting documentation required by § 838.721 or § 838.1005 of this chapter are received in OPM.

(c) A survivor annuity terminates at the end of the month preceding death or any other terminating event.

(d) A current spouse annuity terminated for reasons other than death may be restored under conditions defined in sections 8341(e)(2) and 8341(g) of title 5, United States Code.

(e) A survivor annuity accrues on a daily basis, one-thirtieth of the monthly rate constituting the daily rate. An annuity does not accrue for the 31st day of any month, except in the initial month if the survivor's (of a deceased employee) annuity commences on the 31st day. For accrual purposes, the last day of a 28-day month constitutes 3 days and the last day of a 29-day month constitutes 2 days.

(f) Initial cost-of-living increases on current and former spouse annuities, and annuities to beneficiaries of insurable interest annuities are prorated under section 8340(c) of title 5, United States Code.

[50 FR 20070, May 13, 1985, as amended at 51 FR 31933, Sept. 8, 1986; 55 FR 9102, Mar. 12, 1990; 57 FR 33597, July 29, 1992; 58 FR 52881, Oct. 13, 1993. Redesignated at 58 FR 52882, Oct. 13, 1993]

SURVIVOR ELECTION DEPOSITS

### § 831.661 Deposits not subject to waiver.

(a) The deposits required to elect fully or partially reduced annuities under §§ 831.622, 831.631, 831.632, 831.682, 831.684, or 831.685 are not annuity overpayments and their collection is not subject to waiver. They are subject to reconsideration only to determine whether the amount has been correctly computed.

(b) [Reserved]

[50 FR 20070, May 13, 1985, as amended at 51 FR 31935, Sept. 8, 1986; 57 FR 33597, July 29, 1992; 58 FR 52881, Oct. 13, 1993. Redesignated and amended at 58 FR 52882, Oct. 13, 1993]

### § 831.662 Deposits required to change an election after final adjudication.

The amount of the deposit required under § 831.622 or § 831.685 equals the sum of the monthly differences between the annuity paid to the retiree and the annuity that would have been paid if the additional annuity reduction elected under § 831.622 or § 831.685 had been in effect since the time of retirement, plus 24.5 percent of the increase in the designated base (computed as of the time of retirement) on which the survivor annuity is calculated.

[51 FR 31935, Sept. 8, 1986, as amended at 58 FR 52881, Oct. 13, 1993. Redesignated and amended at 58 FR 52882, Oct. 13, 1993]

### § 831.663 Actuarial reduction in annuity of retirees who make post-retirement elections to provide a current spouse annuity or a former spouse annuity.

(a) *Applicability of this section.* This section applies to all retirees who are required to pay deposits under § 831.631 or § 831.632 and have not paid any portion of the deposit prior to October 1, 1993, or from annuity accruing before that date.

(b) *Other methods of payment not available.* Retirees described in paragraph (a) of this section must have a permanent annuity reduction computed under paragraph (d) of this section.

(c) *Commencing date of the reduction.* A reduction under this section commences on the same date as the annuity reduction under § 831.631 or § 831.632.

(d) *Computing the amount of the reduction.* The annuity reduction under this section is equal to the lesser of—

(1) The amount of the deposit under § 831.631 or § 831.632 divided by the present value factor for the retiree's

age on the commencing date of the reduction under paragraph (c) of this section (plus any previous reduction(s) in the retiree's annuity required under this section § 831.664); or

(2) Twenty-five percent of the rate of the retiree's self-only annuity on the commencing date of the reduction under paragraph (c) of this section.

(e) *Termination of the reduction.* (1) The reduction under this section terminates on the date that the retiree dies.

(2) If payment of a retiree's annuity is suspended or terminated and later reinstated, or if a new annuity becomes payable, OPM will increase the amount of the original reduction computed under paragraph (d) of this section by any cost-of-living adjustments under section 8340 of title 5, United States Code, occurring between the commencing date of the original reduction and the commencing date of the reinstated or new annuity (but the adjusted reduction may not exceed 25 percent of the rate of the reinstated or new self-only annuity).

[58 FR 52882, Oct. 13, 1993]

### § 831.664 Post-retirement survivor election deposits that were partially paid before October 1, 1993.

(a) *Applicability of this section.* This section applies to all retirees who are required to pay deposits under § 831.631, § 831.632, § 831.682, or § 831.684 and have paid some portion (but not all) of the deposit prior to October 1, 1993, or from annuity accruing before that date.

(b) *Other methods of payment not available.* Retirees described in paragraph (a) of this section must have a permanent annuity reduction computed under paragraph (d) of this section.

(c) *Commencing date of the reduction.* A reduction under this section commences on October 1, 1993.

(d) *Computing the amount of the reduction.* The annuity reduction under this section is equal to the lesser of—

(1) The amount of the principal balance remaining to be paid on October 1, 1993, divided by the present value factor for the retiree's age on October 1, 1993; or

(2) Twenty-five percent of the rate of the retiree's self-only annuity on October 1, 1993.

(e) *Termination of the reduction.* (1) The reduction under this section terminates on the date that the retiree dies.

(2) If payment of a retiree's annuity is suspended or terminated and later reinstated, or if a new annuity becomes payable, OPM will increase the amount of the original reduction computed under paragraph (d) of this section by any cost-of-living adjustments under section 8340 of title 5, United States Code, occurring between the commencing date of the original reduction and the commencing date of the reinstated or new annuity (but the adjustment reduction may not exceed 25 percent of the rate of the reinstated or new self-only annuity).

[58 FR 52883, Oct. 13, 1993]

### § 831.665 Payment of deposits under § 831.631, § 831.632, § 831.682, or § 831.684 under pre-October 1, 1993, law or when the retiree has died prior to October 1, 1993.

(a) If a retiree fails to make a deposit required under § 831.682 or § 831.684 within 60 days after the date of the notice required by § 831.682(e) or § 831.684(c), the deposit will be collected by offset from his or her annuity in installments equal to 25 percent of the retiree's net annuity (as defined in § 838.103 of this chapter).

(b) If a retiree fails to make a deposit required by § 831.631 or § 831.632 within 2 years after the date of the post-retirement marriage or divorce, the deposit will be collected by offset from his or her annuity in installments equal to 25 percent of the retiree's net annuity (as defined in § 838.103 of this chapter).

(c) If a retiree dies before a deposit required under §§ 831.631, 831.632, 831.682, or 831.684 is fully made, the deposit will be collected from the survivor annuity (for which the election required the deposit) before any payments of the survivor annuity are made.

[50 FR 20070, May 13, 1985, as amended at 51 FR 31935, Sept. 8, 1986; 57 FR 33597, July 29, 1992; 58 FR 52881, Oct. 13, 1993. Redesignated and amended at 58 FR 52882, Oct. 13, 1993]

CHILDREN'S ANNUITIES

**§ 831.671 Proof of eligibility for a child's annuity.**

(a) *Proof of paternity.* (1) A judicial determination of parentage conclusively establishes the paternity of a child.

(2) Except as provided in paragraph (a)(1) of this section, a child born to the wife of a married person is presumed to be the child of the wife's husband. This presumption may be rebutted only by clear and convincing evidence that the husband is not the father of the child.

(3) When paternity is not established under paragraph (a)(1) or (a)(2) of this section, paternity is determined by a preponderance of the credible evidence as defined in § 1201.56(c)(2) of this title.

(b) *Proof of adoption.* (1) An adopted child is—

(i) A child adopted by the employee or retiree before the death of the employee or retiree; or

(ii) A child who lived with the employee or retiree and for whom a petition for adoption was filed by the employee or retiree and who is adopted by the current spouse of the employee or retiree after the death of the employee or retiree.

(2) The only acceptable evidence to prove status as an adopted child under paragraph (b)(1)(i) of this section is a copy of the judicial decree of adoption.

(3) The only acceptable evidence to prove status as an adopted child under paragraph (b)(1)(ii) of this section is copies of—

(i) The petition for adoption filed by the employee or retiree (clearly showing the date filed); and

(ii) The judicial decree of adoption.

(c) *Dependency.* To be eligible for survivor annuity benefits, a child must have been dependent on the employee or retiree at the time of the employee's or retiree's death.

(d) *Proof of dependency.* (1) A child is presumed to have been dependent on the deceased employee or retiree if he or she is—

(i) A legitimate child; or

(ii) An adopted child; or

(iii) A stepchild or recognized natural child who lived with the employee or retiree in a regular parent-child relationship at the time of the employee's or retiree's death; or

(iv) A recognized natural child for whom a judicial determination of support was obtained; or

(v) A recognized natural child to whose support the employee or retiree made regular and substantial contributions.

(2) The following are examples of proofs of regular and substantial support. More than one of the following proofs may be required to show support of a child who did not live with the employee or retiree in a regular parent-child relationship and for whom a judicial determination of support was not obtained.

(i) Evidence of eligibility as a dependent child for benefits under other State or Federal programs;

(ii) Proof of inclusion of the child as a dependent on the decedent's income tax returns for the years immediately before the employee's or retiree's death;

(iii) Cancelled checks, money orders, or receipts for periodic payments received from the employee or retiree for or on behalf of the child;

(iv) Evidence of goods or services that shows regular contributions of considerable value;

(v) Proof of coverage of the child as a family member under the employee's or retiree's Federal Employees Health Benefits enrollment; and

(vi) Other proof of a similar nature that OPM may find to be sufficient to demonstrate support or parentage.

(3) Survivor benefits may be denied—

(i) If evidence shows that the deceased employee or retiree did not recognize the claimant as his or her own despite a willingness to support the child; or

(ii) If evidence casts doubt upon the parentage of the claimant, despite the deceased employee's or retiree's recognition and support of the child.

[55 FR 9102, Mar. 12, 1990, as amended at 58 FR 43493, Aug. 17, 1993. Redesignated at 58 FR 52882, Oct. 13, 1993]

**§ 831.672 Annuity for a child age 18 to 22 during full-time school attendance.**

(a) *General requirements for an annuity*. (1) For a child age 18 to 22 to be eligible to receive an annuity as a full-time student, the child must also meet all other requirements applicable to qualify for an annuity by a child who has not attained age 18.

(2) In addition to the requirements of paragraph (a)(1) of this section, OPM must receive certification, in a form prescribed by OPM, that the child is regularly pursuing a full-time course of study in an accredited institution.

(b) *Full-time course of study*. (1) Generally, a full-time course of study is a noncorrespondence course which, if successfully completed, will lead to completion of the education within the period generally accepted as minimum for completion, by a full-time day student, of the academic or training program concerned.

(2) A certification by an accredited institution that the student's workload is sufficient to constitute a full-time course of study for the program in which the student is enrolled is prima facie evidence that the student is pursuing a full-time course of study.

(c) *Certification of school attendance*. (1) OPM may periodically request the recipient of a child's annuity payments to furnish certification of school attendance. The certification must be completed in the form prescribed by OPM.

(2) If OPM requests the recipient of a child's annuity payments to provide a self-certification of school attendance, the recipient must complete and sign the certification form.

(3) If OPM requests the recipient of a child's annuity payments to provide a certification by the school, the certification must be signed by an official who is either in charge of the school or in charge of the school's records. OPM will not accept certification forms signed by instructors, counselors, aides, roommates, or others not in charge of the school or the records.

(i) If the educational institution is above the high school level, the certification must be signed by the president or chancellor, vice president or vice chancellor, dean or assistant dean, registrar or administrator, assistant registrar or assistant administrator, or the equivalent.

(ii) If the educational institution is at the high school level, the certification must be signed by the superintendent of schools, assistant superintendent of schools, principal, vice principal, assistant principal, or the equivalent.

(iii) If the educational institution is a technical or trade school, the certification must be signed by the president, vice president, director, assistant director, or the equivalent.

(4) OPM will accept a facsimile signature of a school official only if it is accompanied by a raised seal of the institution or other evidence clearly demonstrating the authenticity of the certification and making unauthorized use of the signature stamp unlikely.

(d) *Continuation of annuity during interim breaks*. A child's annuity continues during interim breaks between school years if the following conditions are satisfied:

(1) The student must have been a full-time student at the end of the school term immediately before the break.

(2) The break between the end of the last term of full-time attendance and the return to full-time attendance must not exceed 5 months. (See § 831.107, concerning calculation of this time period.)

(3) The recipient of a child's annuity payments must show that the student has a bona fide intent to return to school as a full-time student immediately after the break. The full-time certification for the prior term and the certification (in a form prescribed by OPM) by the recipient of a child's annuity payments that the student intends to return to school (immediately after the break) as a full-time student constitute prima facie evidence of a bona fide intent to return to school.

(e) *Benefits after age 22*. (1) A student's eligibility for a child's annuity terminates based on reaching age 22 on—

(i) June 30 of the calendar year of the child's 22nd birthday if the child's birthday is before July 1; or

(ii) The last day of the month before the child's 22nd birthday if the child's

birthday occurs after June 30 but before September 1 of the calendar year; or

(iii) June 30 of the year after the one in which the child attains age 22 if the child's birthday is after August 31 of the calendar year.

(2)(i) An otherwise eligible child who becomes a full-time student after his or her 22nd birthday but before the date the annuity terminates under paragraph (e)(1) of this section is eligible for annuity while he or she is a full-time student until the termination date under paragraph (e)(1) of this section.

(ii) An otherwise eligible child who is a full-time student, and whose parent dies after the child's 22nd birthday but before the date the annuity terminates under paragraph (e)(1) of this section, is eligible for annuity while he or she is a full-time student after the death of the parent until the termination date under paragraph (e)(1) of this section.

[58 FR 32052, June 8, 1993. Redesignated at 58 FR 52882, Oct. 13, 1993]

### § 831.673 Rates of child annuities.

(a) (1) The rate of annuity payable to a child survivor whose annuity commenced before February 27, 1986, is computed in accordance with the law in effect on the date when the annuity began to accrue, unless the rate of annuity is recomputed under paragraph (e) of this section on or after February 27, 1986.

(2) The rate of annuity payable to a child survivor whose annuity commenced on or after February 27, 1986, or was recomputed under paragraph (e) of this section on or after February 27, 1986, is computed under paragraph (b), (c), or (d) of this section.

(b) Except as provided in paragraph (a) of this section, the rate of annuity of a child survivor is computed under section 8341(e)(2) (i) through (iii) of title 5, United States Code, with adjustments in accordance with section 8340 of title 5, United States Code, when the deceased employee, Member or annuitant was never married to a natural or adoptive parent of that surviving child of the former employee or Member.

(c) Except as provided in paragraphs (a) and (b) of this section, the rate of annuity payable to a child survivor is computed under section 8341(e)(2) (A) through (C) of title 5, United States Code, with adjustments in accordance with section 8340 of title 5, United States Code, whenever a deceased employee, Member, or retiree is survived by a natural or adoptive parent of that surviving child of the employee, Member, or retiree.

(d) Except as provided in paragraph (a) of this section, the rate of annuity payable to a child survivor is computed under section 8341(e)(2) (i) through (iii) of title 5, United States Code, with adjustments in accordance with section 8340 of title 5, United States Code, when the deceased employee, Member, or retiree is not survived by a natural or adoptive parent of that surviving child of the former employee or Member.

(e) On the death of a natural or adoptive parent or termination of the annuity of a child, the annuity of any other child or children is recomputed and paid as though the parent or child had not survived the former employee or Member.

[51 FR 31933, Sept. 8, 1986. Redesignated at 58 FR 52882, Oct. 13, 1993]

## REGULATIONS PERTAINING TO NONCODIFIED STATUTES

### § 831.681 Annual notice required by Public Law 95-317.

At least once every 12 consecutive months, OPM will send a notice to all retirees to inform them about the survivor annuity elections available to them, under sections 8339(j), 8339(k)(2), and 8339(o) of title 5, United States Code.

[56 FR 16263, Apr. 22, 1991, as amended at 58 FR 43493, Aug. 17, 1993. Redesignated at 58 FR 52882, Oct. 13, 1993]

### § 831.682 Election by a retiree who retired before May 7, 1985, to provide a former spouse annuity.

(a) A retiree who retired before May 7, 1985, including a retiree receiving a fully reduced annuity to provide a current spouse annuity, may elect a fully reduced annuity or a partially reduced annuity to provide a former spouse annuity.

(b) The election should be made by letter addressed to OPM. The election must—

(1) Be in writing; and

(2) Agree to pay any deposit due under paragraph (c) of this section; and

(3) Be signed by the retiree; and

(4) Be filed with OPM before September 8, 1987.

(c)(1)(i) If a retiree who is receiving an insurable interest annuity elects a fully reduced annuity or a partially reduced annuity under this section to benefit the same person, the insurable interest annuity terminates. A retiree who is receiving an insurable interest annuity at the time that an annuity is elected under this section does not owe any further deposit.

(ii) If a retiree who had been receiving an insurable interest annuity, which was terminated to elect a reduced annuity to provide a current spouse annuity for a spouse acquired after retirement, elects to provide a former spouse annuity for a former spouse who was the beneficiary of the insurable interest annuity, the retiree must deposit an amount equal to the sum of the monthly differences between the self-only annuity and a fully reduced annuity or partially reduced annuity (with the same base as elected to provide the former spouse annuity) from the date the insurable interest annuity terminated, plus 6 percent annual interest, computed under § 831.105, from the date to which each monthly difference is attributable.

(2) A retiree who elects a fully reduced annuity or a partially reduced annuity under this section, to provide a former spouse annuity for a former spouse for whom the retiree had elected (during the marriage to that former spouse) a reduced annuity to provide a current spouse annuity, must deposit an amount equal to the sum of the monthly differences between the self-only annuity and the amount of annuity that would have been in effect had a fully reduced annuity or partially reduced annuity (with the same base as elected to provide the former spouse annuity) been in effect continuously since the time of retirement, plus 6 percent annual interest, computed under § 831.105, from the date to which each monthly difference is attributable, except that the retiree will not be charged for any period during which the survivor reduction was in effect for that former spouse.

(3) A retiree who elects a fully reduced annuity or a partially reduced annuity under this section, and is not covered under paragraph (c)(1) or (c)(2) of this section, must deposit an amount equal to the sum of the monthly difference between the self-only annuity and a fully reduced annuity or a partially reduced annuity (with the same base as elected to provide the former spouse annuity) since the time of retirement, plus 6 percent annual interest, computed under § 831.105, from the date to which each monthly difference is attributable.

(d) If a retiree who is receiving a fully reduced annuity or a partially reduced annuity to provide a current spouse annuity elects a fully reduced annuity or a partially reduced annuity under this section to provide a former spouse annuity, the annuity will be reduced separately to provide for the current and former spouse annuities. Each separate reduction will be computed based on the self-only annuity, and the separate reductions are cumulative.

(e)(1) In response to a retiree's inquiry about providing a former spouse annuity under this section, OPM will send an application form. The application form will include a notice to retirees that filing the application constitutes an official election which cannot be revoked after 30 days after the annuity check in which the annuity reduction first appears.

(2) If the retiree returns the application electing a fully reduced annuity or a partially reduced annuity under this section, OPM will notify the retiree of—

(i) The rate of the fully reduced annuity or partially reduced annuity; and

(ii) The rate of the potential former spouse annuity; and

(iii) The amount of the deposit, including interest, that is due as of the date that the annuity reduction is scheduled to begin; and

(iv) The amount and duration of installment payments if no deposit is made.

(3) The notice under paragraph (e)(2) of this section will advise the retiree

that the deposit will be collected in installments under § 831.665, unless lump-sum payment is made within 60 days from the date of the notice.

(4) OPM will reduce the annuity and begin collection of the deposit in installments effective with the first check payable more than 60 days after the date on the notice required under paragraph (e)(2) of this section.

(f)(1) A retiree who made an election under this section prior to September 9, 1986 may modify that election by designating a lesser portion of the retiree's annuity be used as the base for the annuity reduction and the former spouse annuity.

(2) Any modification under paragraph (f)(1) of this section must be in writing and received in OPM no later than the date provided for applications in paragraph (b)(4) of this section.

(g) The annuity reduction resulting in a fully reduced annuity or partially reduced annuity to provide a former spouse annuity under this section terminates on the first day of the month after the former spouse remarries before age 55 or dies.

(h) A former spouse is eligible to receive only one survivor annuity based on the service of one employee or Member.

(i) If a former spouse is entitled to a former spouse annuity based on an election under this section, but absent that election would have been entitled to a former spouse annuity under § 831.683 (i.e., filed a timely application as well as meeting all other requirements), the amount of the former spouse annuity payable will equal 55 percent of the annuity of the retiree on whose service the survivor annuity is based.

[50 FR 20070, May 13, 1985, as amended at 51 FR 31934, Sept. 8, 1986; 55 FR 9102, Mar. 12, 1990; 56 FR 16263, Apr. 22, 1991; 58 FR 52881, Oct. 13, 1993. Redesignated at 58 FR 52882, Oct. 13, 1993]

### § 831.683 Annuities for former spouses of employees or Members retired before May 7, 1985.

(a)(1) The former spouse of a retiree who retired before May 7, 1985 (or of an employee or Member who died before May 7, 1985, was employed in a position covered by CSRS at the time of death, and was eligible to retire at the time of death), is entitled, after the death of the retiree, employee, or Member, to a survivor annuity equal to 55 percent of the self-only annuity of the retiree on whose service the survivor annuity is based if the former spouse, at the time of application, meets all of the following requirements:

(i) The former spouse's marriage to the retiree, employee, or Member was dissolved after September 14, 1978, and before May 8, 1987. The date of dissolution of a marriage is the date when the marriage between the former spouse and the retiree, employee, or Member ended under the law of the jurisdiction that terminated the marriage, rather than the date when restrictions on remarriage ended. The date of entry of the decree terminating the marriage will be rebuttably presumed to be the date when the marriage was dissolved.

(ii) The former spouse was married to the retiree, employee, or Member for at least 10 years of the retiree's, employee's, or Member's creditable service. Creditability of service is determined in accordance with section 8332 of title 5, United States Code, and subpart C of this part.

(iii) The former spouse has not remarried before reaching age 55.

(iv) The former spouse applies to OPM for a survivor annuity, in accordance with paragraph (b) of this section and § 831.643(b), before May 8, 1989.

(v) The former spouse is at least 50 years old on May 7, 1987, and when filing the application.

(2) A former spouse who is not eligible for an annuity under paragraph (a)(1) of this section and who is the former spouse of a retiree who retired before May 7, 1985 (or of an employee or Member who died before May 7, 1985, was employed in a position covered by CSRS at the time of death, and was eligible to retire at the time of death), is entitled, after the death of the retiree, employee, or Member, to a survivor annuity equal to 55 percent of the self-only annuity of the retiree on whose service the survivor annuity is based if the former spouse, at the time of application, meets all of the following requirements:

(i) The former spouse was married to the retiree, employee, or Member for at

least 10 years of the retiree's, employee's, or Member's creditable service. Creditability of service is determined in accordance with section 8332 of title 5, United States Code, and subpart C of this part.

(ii) The former spouse has not remarried after September 14, 1978, before reaching age 55.

(iii) The former spouse applies to OPM for a survivor annuity, in accordance with paragraph (b) of this section and § 831.643(b), before May 8, 1989.

(iv) The former spouse is at least 50 years old on May 7, 1987, and when filing the application.

(v) No current spouse, other former spouse, or insurable interest designee is receiving or has been designated to receive a survivor annuity based on the service of the employee, Member, or retiree.

(3) If two or more eligible former spouses of a retiree, employee, or Member apply for annuities under paragraph (a)(2) of this section based on the service of the same retiree, employee, or Member, and neither meets the requirements of paragraph (a)(1) of this section, the former spouse whose application OPM receives first is entitled to the annuity.

(b)(1) Application must be filed on the form prescribed for that purpose by OPM. The application form will require the former spouse to certify under the penalty provided by section 1001 of title 18, United States Code, that he or she meets the requirements listed in paragraph (a) of this section.

(2) In addition to the application form required in paragraph (b)(1) of this section, the former spouse must submit proof of his or her age and the date when the marriage to the retiree commenced, and a certified copy of the divorce decree terminating the marriage to the retiree.

(3)(i) Former spouses applying for benefits under this section must meet the requirements of paragraph (a) of this section at the time of application.

(ii) An annuity under this section terminates on the last day of the month before the former spouse remarries before age 55 or dies, except that a remarriage before September 15, 1978, does not cause termination of a former spouse annuity under this section. A former spouse who is receiving a former spouse annuity under this section must notify OPM within 30 days after he or she remarries before age 55.

(c) Survivor annuities payable under this section commence on the later of the day after the date of death of the retiree or the first day of the second month after the application is filed under § 831.643(b).

(d) Cost-of-living adjustments under section 8340 of title 5, United States Code, are applicable to annuities payable under this section.

(e) If a former spouse is eligible for a former spouse annuity under this section and another current spouse annuity or former spouse annuity (under the Civil Service Retirement System or the Federal Employees Retirement System) resulting from the death of the same retiree, the annuity under this section will be paid instead of the other current spouse annuity or former spouse annuity.

[50 FR 20070, May 13, 1985, as amended at 51 FR 31933, Sept. 8, 1986; 55 FR 9103, Mar. 12, 1990; 56 FR 16263, Apr. 22, 1991; 58 FR 52881, Oct. 13, 1993. Redesignated at 58 FR 52882, Oct. 13, 1993]

### § 831.684 Second chance elections to provide survivor benefits.

(a) A married retiree who retired before May 7, 1985, and is not currently receiving a fully or partially reduced annuity to provide a current spouse annuity may elect a fully or partially reduced annuity to provide a current spouse annuity for a spouse acquired after retirement if the following conditions are met:

(1) (i) The retiree was married at the time of retirement and did not elect a survivor annuity at that time; or

(ii) The retiree failed to elect a fully or partially reduced annuity within 1 year after a post-retirement marriage that occurred before November 8, 1984, and the retiree attempted to elect a fully or partially reduced annuity after the time limit expired and that request was disallowed as untimely.

(2) The retiree applies for a fully or partially reduced annuity under this section before November 9, 1985.

(3) The retiree agrees to pay the amount due under paragraph (d) of this section.

(b) Applications must be filed on the form prescribed by OPM, except filing the form is excused when the retiree dies before filing the required form if:

(1) The retiree made a written request, after November 8, 1984, to elect a fully or partially reduced annuity under this section, and

(2) The retiree was denied the opportunity to file the required form because the retiree, without fault, did not receive the form in sufficient time for the retiree to be reasonably expected to complete the form before death.

(c)(1) In response to a retiree's inquiry about providing a current spouse annuity under this section, OPM will send an application form. This application will include instructions to assist the retiree in estimating the amount of reduction in the annuity to provide the current spouse annuity and the amount of the required deposit. The application form will include a notice to retirees that filing the application constitutes an official election which cannot be revoked after 30 days after the annuity check in which the annuity reduction first appears.

(2) If the retiree returns the application electing a fully or partially reduced annuity under this section, OPM will notify the retiree of—

(i) The rate of the fully reduced annuity; and

(ii) The rate of the potential current spouse annuity; and

(iii) The amount of the deposit, including interest, that is due as of the date that the annuity reduction is scheduled to begin; and

(iv) The amount and duration of installment payments if no deposit is made.

(3) The notice under paragraph (c)(2) of this section will advise the retiree that the deposit will be collected in installments under § 831.665, unless lump-sum payment is made within 60 days from the date of this notice.

(4) OPM will reduce the annuity and begin collection of the deposit in installments effective with the first check payable more than 60 days after the date on the notice required under paragraph (c)(2) of this section.

(d) The retiree must state on the application form whether the application is made under paragraph (a)(1)(i) of this section or paragraph (a)(1)(ii) of this section. If the application is made under paragraph (a)(1)(ii) of this section, the retiree must prove that he or she had attempted to elect a fully reduced annuity and that OPM rejected that application because it was filed too late. The proof must consist of a copy of OPM's letter rejecting the previous election as untimely filed or an affidavit swearing or affirming that he or she made an untimely application which OPM rejected. The affidavit is sufficient documentation to provide proof of the retiree's attempt to elect a reduced annuity, unless the record contains convincing evidence to rebut the certification.

(e) A retiree who elects to provide a current spouse annuity under this section must agree to pay a deposit equal to the difference between the amount of annuity actually paid to the retiree and the amount of annuity that would have been paid if a fully reduced annuity were being paid continuously since the time of retirement, plus 6 percent annual interest, computed under § 831.105, from the date when each difference occurred.

(f) The rate of a survivor annuity under this section will be computed under the laws in effect at the time of the retiree's separation from the Federal service.

[50 FR 20070, May 13, 1985, as amended at 51 FR 31935, Sept. 8, 1986; 58 FR 52881, Oct. 13, 1993. Redesignated at 58 FR 52882, Oct. 13, 1993]

### § 831.685 Changes in elections to provide a current spouse annuity by a retiree who retired before May 28, 1986.

(a) Except as provided in § 831.613 and paragraphs (b) and (c) of this section, a retiree who retired before May 28, 1986, was married at the time of retirement, and at the time of retirement did not elect a fully reduced annuity to provide a current spouse annuity may elect a fully reduced annuity or a greater partially reduced annuity to provide a current spouse annuity.

(b)(1) An election under paragraph (a) of this section may be made only by a retiree who is married to the same spouse to whom the retiree was married at the time of retirement.

(2) A current spouse annuity based on an election under paragraph (a) of this section cannot be paid if it will, when combined with any former spouse annuity or annuities that are required by court order, exceed the maximum survivor annuity permitted under § 831.641.

(3)(i) Except as provided in paragraph (b)(4) of this section, to make an election under paragraph (a) of this section, the retiree must pay the deposit computed under § 831.662, in full, no later than November 28, 1987.

(ii) Except as provided in paragraph (b)(4) of this section, failure to pay the deposit, in full, before November 29, 1987, voids an election made under paragraph (a) of this section.

(4) If a retiree makes an election under paragraph (a) of this section and is prevented from paying the deposit within the 18-month time limit because OPM did not send him or her a notice of the amount of the deposit at least 30 days before the time limit expires, the time limit for making the deposit will be extended to 30 days after OPM sends the notice of the amount of the deposit.

(5) For a retiree whose annuity commenced on or after May 7, 1985, an election under paragraph (a) of this section cancels any spouse consent under § 831.611 to the extent of the election.

(c) If a retiree who had elected a fully reduced annuity or a partially reduced annuity to provide a former spouse annuity makes an election under paragraph (a) of this section that would cause the combined current spouse annuity and former spouse annuity (or annuities) to exceed the maximum allowed under § 831.641, the former spouse annuity (or annuities) must be reduced to conform with that allowed under § 831.641.

(d) An election under paragraph (a) of this section is void unless it is filed with OPM before the retiree dies.

[51 FR 31935, Sept. 8, 1986, as amended at 55 FR 9103, Mar. 12, 1990; 58 FR 52881, Oct. 13, 1993. Redesignated at 58 FR 52882, Oct. 13, 1993]

## Subpart G—Computation of Annuities

### § 831.701 Effective dates of annuities.

(a) Except as provided in paragraphs (b) through (d) of this section, an annuity of an employee or Member commences on the first day of the month after—

(1) Separation from the service; or

(2) Pay ceases and the service and age requirements for title to annuity are met, if earlier than the date of separation.

(b) An annuity of—

(1) An employee involuntarily separated from service (except by removal for cause on charges of misconduct or delinquency) and eligible for an immediate annuity based on that involuntary separation;

(2) An employee or Member retiring due to a disability; and

(3) An employee or Member retiring after serving three days or less in the month of retirement—shall commence on the day after separation from the service or the day after pay ceases and the service and age or disability requirements for title to annuity are met.

(c) An annuity granted under section 8338, title 5, United States Code, commences on the appropriate birthday of the employee or Member.

(d) A phased retirement annuity and a composite retirement annuity granted to an employee under section 8336a of title 5, United States Code, and defined under § 831.1702, commences as provided in subpart Q of this part.

(e) Survivor annuities commence as provided in § 831.651.

(f) Except as provided in § 831.502, annuity terminates on the date of death or on the date of any other terminating event in each case when OPM terminates the annuity.

(g) Annuity accrues on a daily basis, one-thirtieth of the monthly rate constituting the daily rate. Annuity does not accrue for the thirty-first day of any month, except in the initial month if the employee's annuity commences on the 31st of a 31-day month. For accrual purposes, the last day of a 28-day month constitutes 3 days and the last

day of a 29-day month constitutes 2 days.

[48 FR 38786, Aug. 26, 1983, as amended at 51 FR 31936, Sept. 8, 1986; 58 FR 52881, Oct. 13, 1993; 79 FR 46619, Aug. 8, 2014]

### § 831.702 Adjustment of annuities.

(a)(1) An annuity which includes creditable National Guard technician service performed prior to January 1, 1969, shall be reduced by the portion of any benefits under any State retirement system to which an annuitant is entitled (or on proper application would be entitled) for any month in which the annuitant is eligible for State benefits based on the same pre-1969, service.

(2) Any cost-of-living increases in the State benefit shall require a corresponding deduction in the civil service annuity.

(3) Any cost-of-living increase to a civil service annuity shall apply to the gross annuity before deduction for benefits under any State retirement system.

(b) In the adjudication of claims arising under subchapter III of chapter 83 of title 5, United States Code, OPM shall take appropriate action to obtain the data that it considers necessary to assure the proper annuity deduction. Upon request by OPM, an annuitant shall promptly submit this data.

[48 FR 38786, Aug. 26, 1983]

### § 831.703 Computation of annuities for part-time service.

(a) *Purpose*. The computational method in this section shall be used to determine the annuity for an employee who has part-time service on or after April 7, 1986.

(b) *Definitions*. In this section—

*Full-time service* means service performed by an employee who has—

(1) An officially established recurring basic workweek consisting of 40 hours within the employee's administrative workweek (as established under § 610.111 of this chapter or similar authority);

(2) An officially established recurring basic work requirement of 80 hours per biweekly pay period (as established for employees with a flexible or compressed work schedule under 5 U.S.C. chapter 61, subchapter II, or similar authority);

(3) For a firefighter covered by 5 U.S.C. 5545b(b) who does not have a 40-hour basic workweek, a regular tour of duty averaging at least 106 hours per biweekly pay period; or

(4) A work schedule that is considered to be full-time by express provision of law, including a work schedule established for certain nurses under 38 U.S.C. 7456 or 7456A that is considered by law to be a full-time schedule for all purposes.

*Intermittent service* means any actual service performed with no prescheduled regular tour of duty.

*Part-time service* means any actual service performed on a less than full-time basis, by an individual whose appointment describes a regularly scheduled tour of duty, and any period of time credited as non pay status time under 5 U.S.C. 8332(f), which follows a period of part-time service without any intervening period of actual service other than part-time service. This definition is not limited to part-time career employment because it includes part-time temporary employment as well.

*Post-April 6, 1986 average pay* means the largest annual rate resulting from averaging, over any period of 3 consecutive years of creditable service, the annual rate of basic pay that would be payable for full-time service by an employee during that period, with each rate weighted by the time it was in effect, except that for periods of service before April 7, 1986, the actual rate of basic pay based on the employee's established tour of duty, if different, is used in the computation. The rates of pay included in the computation for intermittent service or temporary service performed on a full-time basis are the actual rates of basic pay during those periods of creditable service.

*Pre-April 7, 1986, average pay* means the largest annual rate resulting from averaging, over any period of 3 consecutive years of creditable service, an employee's actual rates of basic pay during that period, with each rate weighted by the time it was in effect.

*Proration factor* means a fraction expressed as a percentage rounded to the nearest percent. The numerator is the

sum of the number of hours the employee actually worked during part-time service, and the denominator is the sum of the number of hours that a full-time employee would be schedule to work during the same period of service included in the numerator. If an employee has creditable service in addition to part-time service (full-time service, intermittent service, or temporary service performed on a full-time basis), such service must be included in the numerator and denominator of the fraction. In general, this is done by including the number of days of such intermittent service, multiplied by 8, and the number of weeks of such temporary service or full-time service, multiplied by 40 in both the numerator and the denominator. The additional credit for unused sick leave under 5 U.S.C. 8339(m) is not included in the fraction.

*Temporary service* means service under an appointment limited to one year or less, exclusive of intermittent service.

(c) *Pre-April 7, 1986, basic annuity*. The partial annuity for pre-April 7, 1986, service is computed in accordance with 5 U.S.C. 8339 using the pre-April 7, 1986, average pay and length of service (increased by the unused sick leave credit at time of retirement) prior to April 7, 1986.

(d) *Post-April 6, 1986, basic annuity*. The partial annuity for post-April 6, 1986, service is computed in accordance with 5 U.S.C. 8339 using the post-April 6, 1986, average pay and length of service after April 6, 1986. This amount is then multiplied by the proration factor.

(e) *Combined basic annuity*. The combined basic annuity is equal to the sum of the partial annuity amounts computed under paragraphs (c) and (d). This amount is the yearly rate of annuity (on which the monthly rate is based) before reductions for retirement before age 55; pre-October 1, 1982, nondeduction service and survivor benefits; or the reduction for an alternative annuity under section 204 of Pub. L 99–335.

(f) *Limitations*. The use of the post-April 6, 1986, average pay is limited to the purposes stated in this section. It may not be used as the basis for computing:

(1) The 80-percent limit on annuity under 5 U.S.C. 8339(f);

(2) The minimum annuity amount under 5 U.S.C. 8339(e) (concerning air traffic controller annuity) or 5 U.S.C. 8339(g) (concerning disability annuity); or

(3) A supplemental annuity under 5 U.S.C. 8344(a).

[52 FR 22434, June 12, 1987, as amended at 79 FR 46619, Aug. 8, 2014]

### § 831.704 Annuities including credit for service with a nonappropriated fund instrumentality.

(a) An annuity that includes credit for service with a nonappropriated fund instrumentality performed after December 31, 1965, based on an election under 5 CFR part 847, subpart D, is computed under 5 CFR part 847, subpart F.

(b) An annuity that includes credit for service with a nonappropriated fund instrumentality based on an election under 5 CFR part 847, subpart H, is computed under 5 CFR part 847, subpart I.

[68 FR 2178, Jan. 16, 2003]

## Subpart H—Nuclear Materials Couriers

SOURCE: 65 FR 2522, Jan. 18, 2000, unless otherwise noted.

### § 831.801 Applicability and purpose.

(a) This subpart contains regulations of the Office of Personnel Management (OPM) to supplement 5 U.S.C. 8336(c), which establishes special retirement eligibility for nuclear materials couriers employed under the Civil Service Retirement System; 5 U.S.C. 8334(a)(1) and (c), pertaining to deductions, contributions, and deposits; 5 U.S.C. 8335(b), pertaining to mandatory retirement; and 5 U.S.C. 8339(d), pertaining to computation of annuity.

(b) The regulations in this subpart are issued pursuant to the authority given to OPM in 5 U.S.C. 8347 to prescribe regulations to carry out 5 U.S.C., chapter 83, subchapter III, and in 5 U.S.C. 1104 to delegate authority

for personnel management to the heads of agencies.

**§ 831.802 Definitions.**

In this subpart—

*Agency head* means the Secretary of Energy. For purposes of this subpart, *agency head* is also deemed to include the designated representative of the Secretary of Energy, except that the designated representative must be a department headquarters-level official who reports directly to the Secretary of Energy, or to the Deputy Secretary of Energy, and who is the sole such representative for the entire department.

*Nuclear materials courier* means an employee of the Department of Energy, the duties of whose position are primarily to transport, and provide armed escort and protection during transit of, nuclear weapons, nuclear weapon components, strategic quantities of special nuclear materials or other materials related to national security, including an employee engaged in this activity who is transferred directly to a supervisory or administrative position within the same Department of Energy organization, after performing this activity for at least 3 years. (See 5 U.S.C. 8331(27).)

*Primary duties* are those duties of a position that—

(1)(i) Are paramount in influence or weight; that is, constitute the basic reasons for the existence of the position;

(ii) Occupy a substantial portion of the individual's working time over a typical work cycle; and

(iii) Are assigned on a regular and recurring basis.

(2) Duties that are of an emergency, incidental, or temporary nature cannot be considered *primary* even if they meet the substantial portion of time criterion. In general, if an employee spends an average of at least 50 percent of his or her time performing a duty or group of duties, they are his or her primary duties.

*Primary position* means a position that is in an organization of the Department of Energy and whose primary duties are to transport, and provide armed escort and protection during transit of, nuclear weapons, nuclear weapon components, strategic quantities of special nuclear materials or other materials related to national security.

*Secondary position* means a position that:

(1) Is clearly in the nuclear materials transportation field;

(2) Is in an organization of the Department of Energy having a nuclear materials transportation mission; and

(3) Is either—

(i) Supervisory; i.e., a position whose primary duties are as a first-level supervisor of nuclear materials couriers in primary positions; or

(ii) Administrative; i.e., an executive, managerial, technical, semiprofessional, or professional position for which experience in a primary nuclear materials courier position is a prerequisite.

**§ 831.803 Conditions for coverage in primary positions.**

(a) An employee's service in a position that has been determined by the Secretary of the Department of Energy to be a primary nuclear materials courier position is covered under the provisions of 5 U.S.C. 8336(c).

(b) An employee who is not in a primary position, nor covered while in a secondary position, and who is detailed or temporarily promoted to a primary position is not covered under the provisions of 5 U.S.C. 8336(c).

**§ 831.804 Conditions for coverage in secondary positions.**

(a) An employee's service in a position that has been determined by the Secretary of the Department of Energy to be a secondary nuclear materials courier position following 3 years of service in a primary nuclear materials courier position is covered under the provisions of 5 U.S.C. 8336(c) if all of the following criteria are met:

(1) The employee is transferred directly (*i.e.*, without a break in service exceeding 3 days) from a primary position to a secondary position; and

(2) If applicable, the employee has been continuously employed in secondary positions since transferring from a primary position without a break in service exceeding 3 days, except that a break in employment in secondary positions which begins with

an involuntary separation (not for cause), within the meaning of 5 U.S.C. 8336(d)(1), is not considered in determining whether the service in secondary positions is continuous for this purpose.

(b) An employee who is not in a primary position, nor covered while in a secondary position, and who is detailed or temporarily promoted to a secondary position is not covered under the provisions of 5 U.S.C. 8336(c).

### § 831.805 Evidence.

(a) The Secretary of Energy's determination under § 831.803 that a position is a primary position must be based solely on the official position description of the position in question, and any other official description of duties and qualifications. The official documentation for the position must establish that it satisfies the requirements defined in § 831.802.

(b) A determination under § 831.804 must be based on the official position description and any other evidence deemed appropriate by the agency head for making the determination.

(c) If an employee is in a position not subject to the one-half percent higher withholding rate of 5 U.S.C. 8334(a)(1), and the employee does not, within 6 months after entering the position or after any significant change in the position, formally and in writing seek a determination from the employing agency that his or her service is properly covered by the higher withholding rate, the agency head's determination that the service was not so covered at the time of the service is presumed to be correct. This presumption may be rebutted by a preponderance of the evidence that the employee was unaware of his or her status or was prevented by cause beyond his or her control from requesting that the official status be changed at the time the service was performed.

### § 831.806 Requests from individuals.

(a) An employee who requests credit for service under 5 U.S.C. 8336(c) bears the burden of proof with respect to that service, and must provide the employing agency with all pertinent information regarding duties performed.

(b) An employee who is currently serving in a position that has not been approved as a primary or secondary position, but who believes that his or her service is creditable as service in a primary or secondary position may request the agency head to determine whether or not the employee's current service should be credited and, if it qualifies, whether it should be credited as service in a primary or secondary position. A written request for current service must be made within 6 months after entering the position or after any significant change in the position.

(c) A current or former employee (or the survivor of a former employee) who believes that a period of past service in an unapproved position qualifies as service in a primary or secondary position and meets the conditions for credit may request the agency head to determine whether or not the employee's past service should be credited and, if it qualifies, whether it should be credited as service in a primary or secondary position. A written request for past service must be made no later than December 31, 2000.

(d) The agency head may extend the time limit for filing under paragraph (b) or (c) of this section when, in the judgment of such agency head, the individual shows that he or she was prevented by circumstances beyond his or her control from making the request within the time limit.

### § 831.807 Withholdings and contributions.

(a) During the service covered under the conditions established by § 831.803 and § 831.804, the Department of Energy will deduct and withhold from the employee's base pay the amount required under 5 U.S.C. 8334(a) for such positions and submit that amount, together with agency contributions required by 5 U.S.C. 8334(a), to OPM in accordance with payroll office instructions issued by OPM.

(b) If the correct withholdings and/or Government contributions are not submitted to OPM for any reason whatsoever, including cases in which it is finally determined that past service of a

current or former employee was subject to the higher deduction and Government contribution rates, the Department of Energy must correct the error by submitting the correct amounts (including both employee and agency shares) to OPM as soon as possible. Even if the Department of Energy waives collection of the overpayment of pay under any waiver authority that may be available for this purpose, such as 5 U.S.C. 5584, or otherwise fails to collect the debt, the correct amount must still be submitted to OPM without delay as soon as possible.

(c) Upon proper application from an employee, former employee or eligible survivor of a former employee, the Department of Energy will pay a refund of erroneous additional withholdings for service that is found not to have been covered service. If an individual has paid to OPM a deposit or redeposit, including the additional amount required for covered service, and the deposit or redeposit is later determined to be erroneous because the service was not covered service, OPM will pay the refund, upon proper application, to the individual, without interest.

(d) The additional employee withholding and agency contribution for covered or creditable service properly made as required under 5 U.S.C. 8334(a)(1) or deposited under 5 U.S.C. 8334(c) are not separately refundable, even in the event that the employee or his or her survivor does not qualify for a special annuity computation under 5 U.S.C. 8339(d).

(e) While an employee who does not hold a primary or secondary position is detailed or temporarily promoted to a primary or secondary position, the additional withholdings and agency contributions will not be made. While an employee who does hold a primary or secondary position is detailed or temporarily promoted to a position which is not a primary or secondary position, the additional withholdings and agency contributions will continue to be made.

### § 831.808 Mandatory separation.

(a) Effective on and after October 17, 1999, the mandatory separation provisions of 5 U.S.C. 8335(b) apply to all nuclear materials couriers in primary and secondary positions. A mandatory separation under 5 U.S.C. 8335(b) is not an adverse action under part 752 of this chapter or a removal action under part 359 of this chapter. Section 831.502 provides the procedures for requesting an exemption from mandatory separation.

(b) In the event an employee is separated mandatorily under 5 U.S.C. 8335(b), or is separated for optional retirement under 5 U.S.C. 8336(c), and OPM finds that all or part of the minimum service required for entitlement to immediate annuity was in a position which did not meet the requirements of a primary or secondary position and the conditions set forth in this subpart, such separation will be considered erroneous.

### § 831.809 Reemployment.

An employee who has been mandatorily separated under 5 U.S.C. 8335(b) is not barred from reemployment in any position except a primary position after age 60. Service by a reemployed annuitant is not covered by the provisions of 5 U.S.C. 8336(c).

### § 831.810 Review of decisions.

The following decisions may be appealed to the Merit Systems Protection Board under procedures prescribed by the Board:

(a) The final decision of the Department of Energy issued to an employee, former employee, or survivor as the result of a request for determination filed under § 831.806; and

(b) The final decision of the Department of Energy that a break in service referred to in § 831.804(a)(2) did not begin with an involuntary separation within the meaning of 5 U.S.C. 8336(d)(1).

### § 831.811 Oversight of coverage determinations.

(a) Upon deciding that a position is a nuclear materials courier position, the agency head must notify OPM (Attention: Associate Director for Retirement and Insurance) stating the title of each position, the number of incumbents, and whether the position is primary or secondary. The Director of OPM retains the authority to revoke the agency head's determination that a position is a primary or secondary position, or that an individual's service in any

other position is creditable under 5 U.S.C. 8336(c).

(b) The Department of Energy must establish a file containing each coverage determination made by the agency head under § 831.803 and § 831.804, and all background material used in making the determination.

(c) Upon request by OPM, the Department of Energy will make available the entire coverage determination file for OPM to audit to ensure compliance with the provisions of this subpart.

(d) Upon request by OPM, the Department of Energy must submit to OPM a list of all covered positions and any other pertinent information requested.

## Subpart I—Law Enforcement Officers and Firefighters

SOURCE: 58 FR 64367, Dec. 7, 1993, unless otherwise noted.

### § 831.901 Applicability and purpose.

(a) This subpart contains regulations of the Office of Personnel Management (OPM) to supplement 5 U.S.C. 8336(c), which establishes special retirement eligibility for law enforcement officers and firefighters employed under the Civil Service Retirement System; 5 U.S.C. 8331(3) (C) and (D), pertaining to basic pay; 5 U.S.C. 8334(a) (1) and (c), pertaining to deductions, contributions, and deposits; 5 U.S.C. 8335(b), pertaining to mandatory retirement; and 5 U.S.C. 8339(d), pertaining to computation of annuity.

(b) The regulations in this subpart are issued pursuant to the authority given to OPM in 5 U.S.C. 8347 to prescribe regulations to carry out subchapter III of chapter 83 of title 5 of the United States Code, and in 5 U.S.C. 1104 to delegate authority for personnel management to the heads of agencies.

### § 831.902 Definitions.

In this subpart—

*Agency head* means, for the executive branch agencies, the head of an executive agency as defined in 5 U.S.C. 105; for the legislative branch, the Secretary of the Senate, the Clerk of the House of Representatives, or the head of any other legislative branch agency; for the judicial branch, the Director of the Administrative Office of the U.S. Courts; for the Postal Service, the Postmaster General; and for any other independent establishment that is an entity of the Federal Government, the head of the establishment. For the purpose of an approval of coverage under this subpart, *agency head* is also deemed to include the designated representative of the head of an executive department as defined in 5 U.S.C. 101, except that the designated representative must be a department headquarters-level official who reports directly to the executive department head, or to the deputy department head, and who is the sole such representative for the entire department. For the purpose of a denial of coverage under this subpart, *agency head* is also deemed to include the designated representative of the *agency head*, as defined in the first sentence of this definition, at any level within the agency.

*Detention duties* means duties that require frequent direct contact in the detention, direction, supervision, inspection, training, employment, care, transportation, or rehabilitation of individuals suspected or convicted of offenses against the criminal laws of the United States or the District of Columbia or offenses against the punitive articles of the Uniform Code of Military Justice (10 U.S.C. chapter 47). (See 5 U.S.C. 8331(20).)

*Firefighter* means an employee, whose duties are *primarily* to perform work directly connected with the control and extinguishment of fires or the maintenance and use of firefighting apparatus and equipment. Also included in this definition is an employee engaged in this activity who is transferred to a supervisory or administrative position. (See 5 U.S.C. 8331(21).) An employee whose primary duties are the performance of routine fire prevention inspection is excluded from this definition.

*Frequent direct contact* means personal, immediate, and regularly-assigned contact with detainees while performing detention duties, which is repeated and continual over a typical work cycle.

*Law enforcement officer* means an employee, the duties of whose position are *primarily* the investigation, apprehension, or detention of individuals suspected or convicted of offenses against

the criminal laws of the United States, including an employee engaged in this activity who is transferred to a supervisory or administrative position. (See 5 U.S.C. 8331(20).) The definition does not include an employee whose primary duties involve maintaining law and order, protecting life and property, guarding against or inspecting for violations of law, or investigating persons other than persons who are suspected or convicted of offenses against the criminal laws of the United States.

*Primary duties* are those duties of a position that—

(1) (i) Are paramount in influence or weight; that is, constitute the basic reasons for the existence of the position;

(ii) Occupy a substantial portion of the individual's working time over a typical work cycle; and

(iii) Are assigned on a regular and recurring basis.

(2) Duties that are of an emergency, incidental, or temporary nature cannot be considered ''primary'' even if they meet the substantial portion of time criterion. In general, if an employee spends an average of at least 50 percent of his or her time performing a duty or group of duties, they are his or her primary duties.

*Primary position* means a position whose primary duties are:

(1) To perform work directly connected with controlling and extinguishing fires or maintaining and using firefighter apparatus and equipment; or

(2) Investigation, apprehension, or detention of individuals suspected or convicted of offenses against the criminal laws of the United States.

*Secondary position* means a position that:

(1) Is clearly in the law enforcement or firefighting field;

(2) Is in an organization having a law enforcement or firefighting mission; and

(3) Is either—

(i) Supervisory; i.e., a position whose primary duties are as a first-level supervisor of law enforcement officers or firefighters in primary positions; or

(ii) Administrative; i.e., an executive, managerial, technical, semiprofessional, or professional position for which experience in a primary law enforcement or firefighting position, or equivalent experience outside the Federal government, is a prerequisite.

[58 FR 64367, Dec. 7, 1993, as amended at 60 FR 3339, Jan. 17, 1995; 66 FR 38524, July 25, 2001; 70 FR 42253, July 22, 2005]

### § 831.903 Conditions for coverage in primary positions.

(a) An employee's service in a position that has been determined by the employing agency head to be a primary law enforcement officer or firefighter position is covered under the provisions of 5 U.S.C. 8336(c).

(b) An employee who is not in a primary position, nor covered while in a secondary position, and who is detailed or temporarily promoted to a primary position is not covered under the provisions of 5 U.S.C. 8336(C)

### § 831.904 Conditions for coverage in secondary positions.

(a) An employee's service in a position that has been determined by the employing agency head to be a secondary law enforcement officer or firefighter position is covered under the provisions of 5 U.S.C. 8336(c) if all of the following criteria are met:

(1) The employee is transferred directly (i.e., without a break in service exceeding 3 days) from a primary position to a secondary position; and

(2) If applicable, the employee has been continuously employed in secondary positions since transferring from a primary position without a break in service exceeding 3 days, except that a break in employment in secondary positions which begins with an involuntary separation (not for cause), within the meaning of 8336(d)(1) of title 5, United States Code, is not considered in determining whether the service in secondary positions is continuous for this purpose.

(b) This requirement for continuous employment in a secondary position applies only to voluntary breaks in service beginning after January 19, 1988.

(c) An employee who is not in a primary position, nor covered while in a secondary position, and who is detailed

or temporarily promoted to a secondary position is not covered under the provisions of 5 U.S.C. 8336(c).

(d) The service of an employee who is in a position on January 19, 1988, that has been approved as a secondary position under this subpart will continue to be covered under the provisions of 5 U.S.C. 8336(c) as long as the employee remains in that position without a voluntary break in service, and coverage is not revoked by OPM under § 831.911, or by the agency head.

**§ 831.905 Evidence.**

(a) An agency head's determination that a position is a primary position must be based solely on the official position description of the position in question, and any other official description of duties and qualifications. The official documentation for the position must establish that it satisfies the requirements defined in § 831.902.

(b) A determination under § 831.904 must be based on the official position description and any other evidence deemed appropriate by the agency head for making the determination.

**§ 831.906 Requests from individuals.**

(a) An employee who requests credit for service under 5 U.S.C. 8336(c) bears the burden of proof with respect to that service, and must provide the employing agency with all pertinent information regarding duties performed, including—

(1) For law enforcement officers, a list of the provisions of Federal criminal law the incumbent is responsible for enforcing and arrests made; and

(2) For firefighters, number of fires fought, names of fires fought, dates of fires, and position occupied while on firefighting duty.

(b) An employee who is currently serving in a position that has not been approved as a primary or secondary position, but who believes that his or her service is creditable as service in a primary or secondary position may request the agency head to determine whether or not the employee's service should be credited and, if it qualifies, whether it should be a primary or secondary position.

(c) A current or former employee (or the survivor of a former employee) who believes that a period of past service in an unapproved position qualifies as service in a primary or secondary position and meets the conditions for credit must follow the procedure in paragraph (b) of this section. Except as provided in paragraph (d) of this section, the request must be made to the agency where the claimed service was performed.

(d) For a current or former employee seeking credit under 5 U.S.C. 8336(c) for service performed at an agency that is no longer in existence, and for which there is no successor agency, OPM will accept, directly from the current or former employee (or the survivor of a former employee), a request for a determination as to whether a period of past service qualifies as service in a primary or secondary position and meets the conditions for credit.

(e) Coverage in a position or credit for past service will not be granted for a period greater than 1 year prior to the date that the request from an individual is received under paragraphs (b), (c), or (d) of this section by the employing agency, the agency where past service was performed, or OPM.

(f) An agency head, in the case of a request filed under paragraph (b) or (c) of this section, or OPM, in the case of request filed under paragraph (d) of this section, may extend the time limit for filing when, in the judgment of such agency head or OPM, the individual shows that he or she was prevented by circumstances beyond his or her control from making the request within the time limit.

**§ 831.907 Withholdings and contributions.**

(a) During the service covered under the conditions established by § 831.903 and § 831.904, the employing agency will deduct and withhold from the employee's base pay the amount required under 5 U.S.C. 8334(a) for such positions and submit that amount, together with agency contributions required by 5 U.S.C. 8334(a), to OPM in accordance with payroll office instructions issued by OPM.

(b) If the correct withholdings and/or Government contributions are not submitted to OPM for any reason whatsoever, including cases in which it is finally determined that past service of a current or former employee was subject to the higher deduction and Government contribution rates, the employing agency must correct the error by submitting the correct amounts (including both employee and agency shares) to OPM as soon as possible. Even if the agency waives collection of the overpayment of pay under any waiver authority that may be available for this purpose, such as 5 U.S.C. 5584, or otherwise fails to collect the debt, the correct amount must still be submitted to OPM without delay as soon as possible.

(c) Upon proper application from an employee, former employee or eligible survivor of a former employee, an employing agency or former employing agency will pay a refund of erroneous additional withholdings for service that is found not to have been covered service. If an individual has paid to OPM a deposit or redeposit, including the additional amount required for covered service, and the deposit or redeposit is later determined to be erroneous because the service was not covered service, OPM will pay the refund, upon proper application, to the individual, without interest.

(d) The additional employee withholding and agency contribution for covered or creditable service properly made as required under 5 U.S.C. 8334(a)(1) or deposited under 5 U.S.C. 8334(c) are not separately refundable, even in the event that the employee or his or her survivor does not qualify for a special annuity computation under 5 U.S.C. 8339(d).

(e) While an employee who does not hold a primary or secondary position is detailed or temporarily promoted to a primary or secondary position, the additional withholdings and agency contributions will not be made. While an employee who does hold a primary or secondary position is detailed or temporarily promoted to a position which is not a primary or secondary position, the additional withholdings and agency contributions will continue to be made.

[58 FR 64367, Dec. 7, 1993, as amended at 60 FR 3339, Jan. 17, 1995]

### § 831.908 Mandatory separation.

(a) The mandatory separation provisions of 5 U.S.C. 8335(b) apply to all law enforcement officers and firefighters in primary and secondary positions. A mandatory separation under section 8335(b) is not an adverse action under part 752 of this chapter or a removal action under part 359 of this chapter. Section 831.502 provides the procedures for requesting an exemption from mandatory separation.

(b) In the event an employee is separated mandatorily under 5 U.S.C. 8335(b), or is separated for optional retirement under 5 U.S.C. 8336(c), and OPM finds that all or part of the minimum service required for entitlement to immediate annuity was in a position which did not meet the requirements of a primary or secondary position and the conditions set forth in this subpart, such separation will be considered erroneous.

[58 FR 64367, Dec. 7, 1993, as amended at 66 FR 38524, July 25, 2001]

### § 831.909 Reemployment.

An employee who has been mandatorily separated under 5 U.S.C. 8335(b) is not barred from reemployment in any position except a primary position after age 60. Service by a reemployed annuitant is not covered by the provisions of 5 U.S.C. 8336(c).

### § 831.910 Review of decisions.

(a) The final decision of an agency head or OPM issued to an employee, former employee, or survivor as the result of a request for determination filed under § 831.906 may be appealed to the Merit Systems Protection Board under procedures prescribed by the Board.

(b) The final decision of an agency head that a break in service referred to in § 831.904(a)(2) did not begin with an involuntary separation within the meaning of 5 U.S.C. 8336(d)(1) may be

appealed to the Merit Systems Protection Board under procedures prescribed by the Board.

[66 FR 38524, July 25, 2001]

### § 831.911 Oversight of coverage determinations.

(a) Upon deciding that a position is a law enforcement officer or firefighter position, each agency head must notify OPM (Attention: Associate Director for Retirement and Insurance) stating the title of each position, the number of incumbents, and whether the position is primary or secondary. The Director of OPM retains the authority to revoke an agency head's determination that a position is a primary or secondary position, or that an individual's service in any other position is creditable under 5 U.S.C. 8336(c).

(b) Each agency must establish a file containing each coverage determination made by an agency head under § 831.903 and § 831.904, and all background material used in making the determination.

(c) Upon request by OPM, the agency will make available the entire coverage determination file for OPM to audit to ensure compliance with the provisions of this subpart.

(d) Upon request by OPM, an agency must submit to OPM a list of all covered positions and any other pertinent information requested.

(e) A coverage determination issued by OPM or its predecessor, the Civil Service Commission, will not be reopened by an employing agency, unless the agency head determines that new and material evidence is available that, despite due diligence, was not available before the decision was issued.

REGULATIONS PERTAINING TO NONCODIFIED STATUTES

### § 831.912 Elections to be deemed a law enforcement officer for retirement purposes by certain police officers employed by the Metropolitan Washington Airports Authority (MWAA).

(a) *Who may elect.* Metropolitan Washington Airports Authority (MWAA) police officers employed as members of the MWAA police force as of December 21, 2000, who are covered by the provisions of the Civil Service Retirement System by 49 U.S.C. 49107(b) may elect to be deemed a law enforcement officer for retirement purposes and have past service as a member of the MWAA and Federal Aviation Administration police forces credited as law enforcement officer service.

(b) *Procedure for making an election.* Elections by an MWAA police officer to be treated as a law enforcement officer for retirement purposes must be made in writing to the MWAA and filed in the employee's personnel file in accordance with procedures established by OPM in consultation with the MWAA.

(c) *Time limit for making an election.* An election under paragraph (a) of this section must be made either before the MWAA police officer separates from service with the MWAA or July 25, 2002.

(d) *Effect of an election.* An election under paragraph (a) of this section is effective on the beginning of the first pay period following the date of the MWAA police officer's election.

(e) *Irrevocability.* An election under paragraph (a) of this section becomes irrevocable when received by the MWAA.

(f) *Employee payment for past service.* (1) An MWAA police officer making an election under this section must pay an amount equal to the difference between law enforcement officer retirement deductions and retirement deductions actually paid by the police officer for the police officer's past police officer service with the Metropolitan Washington Airports Authority and Federal Aviation Administration. The amount paid under this paragraph shall be computed with interest in accordance with 5 U.S.C. 8334(e) and paid to the MWAA prior to separation.

(2) Starting with the effective date under paragraph (d) of this section, the MWAA must make deductions and withholdings from the electing MWAA police officer's base pay in accordance with 5 CFR 831.907.

(g) *Employer contributions.* (1) Upon the police officer's payment for past service credit under paragraph (f) of this section, the MWAA must, in accordance with procedures established

by OPM, pay into the Civil Service Retirement and Disability Fund the additional agency retirement contribution amounts required for the police officer's past service, plus interest.

(2) Starting with the effective date under paragraph (d) of this section, the MWAA must make agency contributions for the electing police officer in accordance with 5 CFR 831.907.

(h) *Mandatory Separation.* (1) An MWAA police officer who elects to be treated as a law enforcement officer for CSRS retirement purposes is subject to the mandatory separation provisions of 5 U.S.C. 8335(b) and 5 CFR 831.502(a).

(2) The President and Chief Operating Officer of the MWAA is deemed to be the head of an agency for the purpose of exempting an MWAA police officer from mandatory separation in accordance with the provisions of 5 U.S.C. 8335(b) and 5 CFR 831.502.

(i) *Reemployment.* An MWAA police officer who has been mandatorily separated under 5 U.S.C. 8335(b) is not barred from reemployment after age 60 in any position except a CSRS primary or secondary law enforcement officer position or a FERS rigorous law or secondary enforcement officer position. Service by a reemployed former MWAA police officer who retired under 5 U.S.C. 8336(c) is not covered by the provisions of 5 U.S.C. 8336(c).

[66 FR 38524, July 25, 2001]

## Subpart J—CSRS Offset

SOURCE: 57 FR 38743, Aug. 27, 1992, unless otherwise noted.

### § 831.1001 Purpose.

This subpart sets forth the provisions concerning employees and Members who are simultaneously covered by the Old Age, Survivors, and Disability Insurance (OASDI) tax and the Civil Service Retirement System (CSRS). Except as provided under this subpart, these employees and Members are treated the same as other covered employees and Members under the CSRS.

### § 831.1002 Definitions.

*Contribution and benefit base* means the contribution and benefit base in effect with respect to the tax year involved, as determined under section 230 of the Social Security Act (42 U.S.C. 430).

*CSRS* means the Civil Service Retirement System established under subchapter III of chapter 83 of title 5, United States Code.

*Employee* means an employee subject to CSRS.

*Federal service* means service covered under CSRS and subject to the OASDI tax by operation of section 101 of Public Law 98–21 (42 U.S.C. 410(a)). *Federal service* does not include—

(1) Service performed before January 1, 1984;

(2) Service subject to the OASDI tax only (that is, no simultaneous CSRS deductions), except in the case of an employee or Member who elected not to have any CSRS deductions withheld from salary pursuant to section 208(a)(1)(A) of Public Law 98–168, 97 Stat. 1111, or section 2206(b) of Public Law 98–369, 98 Stat. 1059, (relating to certain senior officials; and

(3) Service subject to the full rate of CSRS deductions (7, 7½, or 8 percent) and the OASDI tax, pursuant to an election under section 208(a)(1)(B) of Public Law 98–168, 97 Stat. 1111, except in the case of an employee or Member who elects to become subject to this subpart under section 301(b) of Public Law 99–335, 100 Stat. 599.

*Federal wages* means basic pay, as defined under 5 U.S.C. 8331(4), of an employee or Member performing Federal service.

*Member* means a Member of Congress as defined by 5 U.S.C. 8331(2).

*OASDI tax* means, with respect to Federal wages, the Old Age, Survivors, and Disability Insurance tax imposed under section 3101(a) of the Internal Revenue Code of 1986 (31 U.S.C. 3101(a)).

### § 831.1003 Deductions from pay.

(a) Except as otherwise provided in this section, the employing agency, the Secretary of the Senate, or the Clerk of the House of Representatives must withhold 7 percent of an employee's Federal wages to cover both the OASDI tax and the CSRS deduction. The difference between the OASDI tax and the full amount withheld under this paragraph is the CSRS deduction.

(b) For a Congressional employee as defined by 5 U.S.C. 2107 and a law enforcement officer or firefighter as defined by 5 U.S.C. 8331, the appropriate percentage under paragraph (a) of this section is 7½ percent.

(c) For a Member, a judge of the United States Court of Military Appeals, a United States magistrate, and a bankruptcy judge as defined by 5 U.S.C. 8331(22), the appropriate percentage under paragraph (a) of this section is 8 percent.

(d) For any amount of Federal wages paid after reaching the contribution and benefit base calculated including all wages, but before reaching the contribution and benefit base calculated using only Federal wages, the amount withheld under this section is the difference between 7, 7½, or 8 percent, as appropriate, and the OASDI tax rate, even though the Federal wages in question are not subject to the OASDI tax.

(e) For any amount of Federal wages paid after reaching the contribution and benefit base calculated on the basis of Federal wages only, the full percentage required under paragraph (a), (b), or (c) of this section (7, 7½, or 8 percent) must be withheld from Federal wages.

### § 831.1004 Agency contributions.

The employing agency, the Secretary of the Senate, and the Clerk of the House of Representatives must submit to OPM, in accordance with instructions issued by OPM, a contribution to the CSRS equal to the amount required to be contributed for the employee or Member under 5 U.S.C. 8334(a)(1) as if the employee or Member were not subject to the OASDI tax.

### § 831.1005 Offset from nondisability annuity.

(a) OPM will reduce the annuity of an individual who has performed Federal service, if the individual is entitled, or on proper application would be entitled, to old-age benefits under title II of the Social Security Act.

(b) The reduction required under paragraph (a) of this section is effective on the 1st day of the month during which the employee—

(1) Is entitled to an annuity under CSRS; and

(2) Is entitled, or on proper application would be entitled, to old-age benefits under title II of the Social Security Act.

(c) Subject to paragraphs (d) and (e) of this section, the amount of the reduction required under paragraph (a) of this section is the lesser of—

(1) The difference between—

(i) The Social Security old-age benefit for the month referred to in paragraph (b) of this section; and

(ii) The old-age benefit that would be payable to the individual for the month referred to in paragraph (b) of this section, excluding all wages from Federal service, and assuming the annuitant was fully insured (as defined by section 215(a) of the Social Security Act (42 U.S.C. 414(a)); or

(2) The product of—

(i) The old-age benefit to which the individual is entitled or would, on proper application, be entitled; and

(ii) A fraction—

(A) The numerator of which is the annuitant's total Federal service, rounded to the nearest whole number of years not exceeding 40 years; and

(B) The denominator of which is 40.

(d) Cost-of-living adjustments under 5 U.S.C. 8340 occurring after the effective date of the reduction required under paragraph (a) of this section will be based on only the annuity remaining after reduction under this subpart.

(e) The amounts for paragraphs (c)(1)(i), (c)(1)(ii), and (c)(2)(i) of this section are computed without regard to subsections (b) through (l) of section 203 of the Social Security Act (42 U.S.C. 403) (relating to reductions in Social Security benefits), and without applying the provisions of the second sentence of section 215(a)(7)(B)(i) or section 214(d)(5)(ii) of the Social Security Act (42 U.S.C. 415(a)(7)(B)(i) or 415(d)(5)(ii) (relating to part of the computation of the Social Security windfall elimination provisions).

(f) OPM will accept the determination of the Social Security Administration, submitted in a form prescribed by OPM, concerning entitlement to Social Security benefits and the date thereof.

**§ 831.1006 Offset from disability or survivor annuity.**

(a) OPM will reduce the disability annuity (an annuity under 5 U.S.C. 8337) of an individual who performed Federal service, if the individual is (or would on proper application be) entitled to disability payments under section 223 of the Social Security Act (42 U.S.C. 423).

(b)(1) Before an application for disability retirement under 5 U.S.C. 8337 can be finally approved in the case of an employee who has Federal service, the applicant must provide OPM with—

(i) Satisfactory evidence that the applicant has filed an application for disability insurance benefits under section 223 of the Social Security Act; or

(ii) An official statement from the Social Security Administration that the individual is not insured for disability insurance benefits as defined in section 223(c)(1) of the Social Security Act.

(2) A disability retirement application under 5 U.S.C. 8337 will be dismissed when OPM is notified by the Social Security Administration that the application referred to in paragraph (b)(1)(i) of this section has been withdrawn unless the evidence described in paragraph (b)(1)(ii) of this section has been provided.

(c) OPM will reduce a survivor annuity (an annuity under 5 U.S.C. 8341) based on the service of an individual who performed Federal service, if the survivor annuitant is entitled, or on proper application would be entitled, to survivor benefits under section 202 (d), (e), or (f) (relating to children's, widow's, and widowers' benefits, respectively) of the Social Security Act (42 U.S.C. 202 (d), (e), or (f)).

(d) The reduction required under paragraphs (a) and (c) of this section begins (or is reinstated) on the 1st day of the month during which the disability or survivor annuitant—

(1) Is entitled to disability or survivor annuity under CSRS; and

(2) Is entitled, or on proper application would be entitled, to disability or survivor benefits under the Social Security Act provisions mentioned in paragraphs (a) and (c) of this section, respectively.

(e) The reduction under paragraphs (a) and (c) of this section will be computed and adjusted in a manner consistent with the provisions of § 831.1005(c) through (e).

(f) A reduction under paragraph (a) or (c) of this section stops on the date entitlement to the disability or survivor benefits under title II of the Social Security Act terminates. In the case of a disability or survivor annuitant who has not made proper application for the Social Security benefit, the reduction under paragraph (a) or (c) of this section stops on the date entitlement to such disability or survivor benefits would otherwise terminate. If a Social Security benefit is reduced under any provision of the Social Security Act, even if reduced to zero, entitlement to that benefit is not considered to have terminated.

(g) OPM will accept the determination or certification of the Social Security Administration, submitted in a form prescribed by OPM, concerning entitlement to Social Security disability or survivor benefits and the beginning and ending dates thereof.

(h) If a disability annuitant who is not entitled to disability benefits under title II of the Social Security Act subsequently becomes entitled to old-age benefits under the Social Security Act, a reduction under § 831.1005 will begin on the 1st day of the month during which the annuitant becomes entitled, or on proper application would be entitled, to Social Security old-age insurance benefits.

## Subpart K—Prohibition on Payments of Annuities

**§ 831.1101 Scope.**

This subpart prescribes the procedures to be followed in determining whether payment of an annuity under subchapter III of chapter 83 of title 5, United States Code, is prohibited by subchapter II of that chapter.

**§ 831.1102 Definitions.**

As used in this subpart, ''annuitant'' means an individual who, on the basis of his service, or as a survivor annuitant, has met all the requirements of subchapter III of chapter 83 of title 5,

United States Code, for title to an annuity and has filed claim therefor.

### § 831.1104 Notice.

When the Associate Director determines that subchapter II of chapter 83 of title 5, United States Code, appears to prohibit payment of annuity, he shall notify the annuitant in writing of his intention to withhold payment of the annuity. The notice shall set forth the reasons for this determination. The notice may be served by registered or certified mail and shall inform the annuitant that he is entitled to submit an answer and request a hearing.

[34 FR 17618, Oct. 31, 1969]

### § 831.1105 Answer; request for hearing.

(a) The annuitant has 30 calendar days from the day he receives the notice within which to submit an answer and to request a hearing. The Associate Director may extend this time limit for good cause shown. If the annuitant answers, he shall specifically admit, deny, or explain each fact alleged in the notice, unless he states that he is without knowledge. If a hearing is desired, the annuitant must file a specific request therefor with or as a part of his answer.

(b) An annuitant who fails to answer or to request a hearing within the time permitted under paragraph (a) of this section is considered to have waived his right to answer or to a hearing. If an annuitant neither answers nor requests a hearing within the time permitted, or answers but fails to request a hearing, the Associate Director shall decide the case on the basis of the administrative record, including the notice and any documents, affidavits, or other relevant evidence. The decision of the Associate Director shall (1) be served on the annuitant or his counsel by certified or registered mail; (2) include a statement of findings and conclusions with the reasons therefor; and (3) become the final decision of OPM unless the case is appealed or reviewed pursuant to § 831.1111.

[34 FR 17618, Oct. 31, 1969]

### § 831.1106 Hearing.

(a) OPM's hearing examiner shall preside at any hearing held pursuant to this subpart, unless OPM designates another presiding officer. The presiding officer shall fix the time and place of the hearing after giving due consideration to the convenience of the annuitant. The hearing is open to the public unless otherwise ordered by OPM or the presiding officer.

(b) The hearing shall be recorded by an official reporter designated by OPM. OPM shall furnish to the annuitant, without charge, a copy of the transcript of the hearing.

### § 831.1107 Powers of presiding officers.

The presiding officer may:

(a) Administer oaths and affirmations;

(b) Rule upon offers of proof and receive relevant evidence;

(c) Fix the time and place of hearing;

(d) Regulate the course of the hearing;

(e) Exclude any person from the hearing for contumacious conduct or misbehavior that obstructs the hearing;

(f) Hold conferences for simplification of the issues, or for any other purpose;

(g) Dispose of procedural requests or similar matters;

(h) Authorize the filing of briefs and set the time for filing;

(i) Make initial decisions; and

(j) Take any other action in the course of the proceeding consistent with the purposes of this subpart.

### § 831.1108 Witnesses.

(a) Witnesses shall testify under oath or affirmation and shall be subject to cross-examination.

(b) Each party is responsible for securing the attendance of his witnesses. OPM has no power of subpena in these cases.

### § 831.1109 Evidence.

(a) Rules of evidence are not strictly applied, but the presiding officer shall exclude irrelevant or unduly repetitious evidence.

(b) Each exhibit of a documentary character shall be submitted to the presiding officer, duly marked, and made a part of the record. An exhibit does not become evidence unless received in evidence by the presiding officer.

### § 831.1110 Initial decision.

(a) Upon completion of a hearing pursuant to § 831.1106, the presiding officer shall make and file an initial decision, a copy of which shall be served on each party or counsel by certified or registered mail.

(b) The initial decision shall include a statement of findings and conclusions, with the reasons therefor, and shall be based upon a consideration of the entire record.

(c) The initial decision shall become the final decision of OPM unless the case is appealed or reviewed pursuant to § 831.1111.

### § 831.1111 Appeal and review.

(a) An appeal from an initial decision, or a decision of the Associate Director under § 831.1105(b), may be made to OPM, with service on the other party, within 30 calendar days from the date of the decision. An appeal shall be in writing and shall state plainly and concisely the grounds for the appeal, with a specific reference to the record when issues of fact are raised. The other party may file an opposition to the appeal within 15 days after service on him. On notice to the parties, OPM may extend the time limits prescribed in this paragraph.

(b) Within 30 calendar days from the date of an initial decision or a decision of the Associate Director, OPM, on its own motion, may direct that the record be certified to it for review.

[34 FR 17618, Oct. 31, 1969]

### § 831.1112 Final decision.

(a) On appeal from or review of an initial decision or a decision of the Associate Director, OPM shall decide the case on the record. The record shall include the notice, answer, transcript of testimony and exhibits, briefs, the initial decision or the decision of the Associate Director, the papers filed in connection with the appeal and opposition to the appeal and all other papers, requests and exceptions filed in the proceeding.

(b) OPM may adopt, modify, or set aside the findings, conclusions, or order of the presiding officer or the Associate Director.

(c) The final decision of OPM shall be in writing and include a statement of findings and conclusions, the reasons or basis therefor, and an appropriate order, and shall be served on the parties.

[33 FR 12498, Sept. 4, 1968, as amended at 34 FR 17618, Oct. 31, 1969]

## Subpart L—Disability Retirement

SOURCE: 58 FR 49179, Sept. 22, 1993, unless otherwise noted.

### § 831.1201 Introduction.

This subpart sets out the requirements an employee must meet to qualify for disability retirement, how an employee applies for disability retirement, how an agency applies for disability retirement for an employee, when a disability annuity ends, an individual's retirement rights after the disability annuity ends, and the effect of reemployment in the Federal service on a disability annuitant.

### § 831.1202 Definitions.

As used in this subpart—

*Accommodation* means an adjustment made to an employee's job or work environment that enables the employee to perform the duties of the position. Reasonable accommodation may include modifying the worksite; adjusting the work schedule; restructuring the job; obtaining or modifying equipment or devices; providing interpreters, readers, or personal assistants; and reassigning or retraining the employee.

*Basic pay* means the pay an employee receives that is subject to civil service retirement deductions. The definition is the same as the definition of ''basic pay'' under 5 U.S.C. 8331(3).

*Commuting area* means the geographic area that usually constitutes one area for employment purposes. It includes a population center (or two or more neighboring ones) and the surrounding localities in which people live and can reasonably be expected to travel back and forth daily from home to work in their usual employment.

*Disabled* and *disability* mean unable or inability, because of disease or injury, to render useful and efficient service in

the employee's current position, or in a vacant position in the same agency at the same grade or pay level for which the individual is qualified for reassignment.

*Examination* and *reexamination* mean an evaluation of evidentiary material related to the question of disability. Unless OPM exercises its choice of a physician, the cost of providing medical documentation rests with the employee or disability annuitant, who must provide any information OPM needs to make an evaluation.

*Medical condition* means a health impairment resulting from a disease or injury, including a psychiatric disease. This is the same definition of ''medical condition'' as in § 339.104 of this chapter.

*Medical documentation* and *documentation of a medical condition* mean a statement from a licensed physician or other appropriate practitioner that provides information OPM considers necessary to determine an individual's entitlement to benefits under this subpart. Such a statement must meet the criteria set forth in § 339.104 of this chapter.

*Permanent position* means an appointment without time limitation.

*Physician* and *practitioner* have the same meanings given in § 339.104 of this chapter.

*Qualified for reassignment* means able to meet the minimum requirements for the grade and series of the vacant position in question.

*Same grade or pay level* means, in regard to a vacant position within the same pay system as the employee currently occupies, the same grade and an equivalent amount of basic pay. A position under a different pay system or schedule is at the ''same pay level'' if the representative rate, as defined in § 532.401 of this chapter, equals the representative rate of the employee's current position.

*Useful and efficient service* means (1) acceptable performance of the critical or essential elements of the position; and (2) satisfactory conduct and attendance.

*Vacant position* means an unoccupied position of the same grade or pay level and tenure for which the employee is qualified for reassignment that is located in the same commuting area and is serviced by the same appointing authority of the employing agency. The vacant position must be full time, unless the employee's current position is less than full time, in which case the vacant position must have a work schedule of no less time than that of the current position. In the case of an employee of the United States Postal Service, a vacant position does not include a position in a different craft or a position to which reassignment would be inconsistent with the terms of a collective bargaining agreement covering the employee.

**§ 831.1203 Basic requirements for disability retirement.**

(a) Except as provided in paragraph (b) of this section, the following conditions must be met for an individual to be eligible for disability retirement:

(1) The individual must have completed at least 5 years of civilian service that is creditable under the Civil Service Retirement System.

(2) The individual must, while employed in a position subject to the Civil Service Retirement System, have become disabled because of a medical condition, resulting in a service deficiency in performance, conduct, or attendance, or if there is no actual service deficiency, the disabling medical condition must be incompatible with either useful and efficient service or retention in the position.

(3) The disabling medical condition must be expected to continue for at least 1 year from the date the application for disability retirement is filed.

(4) The employing agency must be unable to accommodate the disabling medical condition in the position held or in an existing vacant position.

(5) An application for disability retirement must be filed with the employing agency before the employee or Member separates from service, or with the former employing agency or the Office of Personnel Management (OPM) within 1 year thereafter. This time limit can be waived only in certain instances explained in § 831.1204.

(b) A National Guard technician who is retiring under the special provisions of 5 U.S.C. 8337(h) is not required to

meet the conditions given in paragraphs (a) (2), (3), and (4) of this section. Instead, the individual must be disabled for membership in the National Guard or for the military grade required to hold his or her position and meet the other eligibility requirements under 5 U.S.C. 8337(h)(2).

[58 FR 49179, Sept. 22, 1993, as amended at 63 FR 17049, Apr. 8, 1998]

### § 831.1204 Filing disability retirement applications: General.

(a) Except as provided in paragraphs (c) and (d) of this section, an application for disability retirement is timely only if it is filed with the employing agency before the employee or Member separates from service, or with the former employing agency or OPM within 1 year thereafter.

(b) An application for disability retirement that is filed with OPM, an employing agency or former employing agency by personal delivery is considered filed on the date on which OPM, the employing agency or former employing agency receives it. The date of filing by facsimile is the date of the facsimile. The date of filing by mail is determined by the postmark date; if no legible postmark date appears on the mailing, the application is presumed to have been mailed 5 days before its receipt, excluding days on which OPM, the employing agency or former employing agency, as appropriate, is closed for business. The date of filing by commercial overnight delivery is the date the application is given to the overnight delivery service.

(c) An application for disability retirement that is filed with OPM or the applicant's former employing agency within 1 year after the employee's separation, and that is incompletely executed or submitted in a letter or other form not prescribed by OPM, is deemed timely filed. OPM will not adjudicate the application or make payment until the application is filed on a form prescribed by OPM.

(d) OPM may waive the 1-year time limit if the employee or Member is mentally incompetent on the date of separation or within 1 year thereafter, in which case the individual or his or her representative must file the application with the former employing agency or OPM within 1 year after the date the individual regains competency or a court appoints a fiduciary, whichever is earlier.

(e) An agency may consider the existence of a pending disability retirement application when deciding whether and when to take other personnel actions. An employee's filing for disability retirement does not require the agency to delay any appropriate personnel action.

[63 FR 17049, Apr. 8, 1998]

### § 831.1205 Agency-filed disability retirement applications.

(a) *Basis for filing an application for an employee.* An agency must file an application for disability retirement of an employee who has 5 years of civilian Federal service when all of the following conditions are met:

(1) The agency has issued a decision to remove the employee;

(2) The agency concludes, after its review of medical documentation, that the cause for unacceptable performance, attendance, or conduct is disease or injury;

(3) The employee is institutionalized, or the agency concludes, based on a review of medical and other information, that the employee is incapable of making a decision to file an application for disability retirement;

(4) The employee has no personal representative or guardian; and

(5) The employee has no immediate family member who is willing to file an application on his or her behalf.

(b) *Agency procedures.* (1) When an agency issues a decision to remove an employee and not all of the conditions described in paragraph (a) of this section have been satisfied, but the removal is based on reasons apparently caused by a medical condition, the agency must advise the employee in writing of his or her possible eligibility for disability retirement.

(2) If the agency is filing a disability retirement application on the employee's behalf, the agency must inform the employee in writing at the same time it informs the employee of its removal decision, or at any time before the separation is effected, that—

(i) The agency is submitting a disability retirement application on the employee's behalf to OPM;

(ii) The employee may review any medical information in accordance with the criteria in § 294.106(d) of this chapter; and

(iii) The action does not affect the employee's right to submit a voluntary application for retirement under this part.

(3) When an agency submits an application for disability retirement to OPM on behalf of an employee, it must provide OPM with copies of the decision to remove, the medical documentation, and any other documents needed to show that the cause for removal is due to a medical condition. Following separation, the agency must provide OPM with a copy of the documentation of the separation.

(c) *OPM procedures.* (1) OPM will not act on any application for disability retirement filed by an agency on behalf on an employee until it receives the appropriate documentation of the separation. When OPM receives a complete application for disability retirement under this section, it will notify the former employee that it has received the application, and that he or she may submit medical documentation. OPM will determine entitlement to disability benefits under § 831.1206.

(2) OPM will cancel any disability retirement when a final decision of an administrative authority or court reverses the removal action and orders the reinstatement of an employee to the agency rolls.

### § 831.1206 Evidence supporting entitlement to disability benefits.

(a) *Evidence to support disability retirement application.* (1) Before OPM determines whether an individual meets the basic requirements for disability retirement under § 831.1203, an applicant for disability retirement or the employing agency must submit to OPM the following forms included in Standard Form 2824, ''Documentation in Support of Disability Retirement Application:''

(i) Standard Form 2824A—''Applicant's Statement;''

(ii) Standard Form 2824B—''Supervisor's Statement;''

(iii) Standard Form 2824D—''Agency Certification or Reassignment and Accommodation Efforts;'' and

(iv) Standard Form 2824E—''Disability Retirement Application Checklist.''

(2) Standard Form 2824C—''Physician's Statement'' and the supporting medical documentation may be submitted directly to OPM.

(3) The applicant, or the employing agency, must also obtain and submit additional documentation as may be required by OPM to determine entitlement to the disability retirement benefit.

(4) Refusal by the applicant, physician, or employing agency to submit the documentation OPM has determined is necessary to decide eligibility for disability retirement is grounds for disallowance of the application.

(b) *OPM procedures for processing a disability retirement application.* (1) OPM will review the documentation submitted under paragraph (a) of this section in support of an application for disability retirement to determine whether the applicant has met the conditions stated in § 831.1203 of this part. OPM will issue its decision in writing to the applicant and to the employing agency. The decision will include a statement of the findings and conclusions, and an explanation of the right to request consideration under § 831.109 of this part.

(2) OPM may rescind a decision to allow an application for disability retirement at any time if there is an indication of error in the original decision, such as fraud or misstatement of fact, or if additional medical documentation is needed. The written notification will include a statement of the findings and conclusions, and an explanation of the right to request reconsideration under § 831.109 of this part.

(c) *Medical examination.* OPM may offer the applicant a medical examination when it determines that additional medical evidence is necessary to make a decision on an application. The medical evaluation will be conducted by a medical officer of the United States or a qualified physician or board of physicians designated by OPM. The

applicant's refusal to submit to an examination is grounds for disallowance of the application.

(d) *Responsibility for providing evidence.* It is the responsibility of the applicant to obtain and submit documentation that is sufficient for OPM to determine whether there is a service deficiency, caused by disease or injury, of sufficient degree to preclude useful and efficient service, or a medical condition that warrants restriction from the critical task or duties of the position held. It is also the responsibility of the disability annuitant to obtain and submit evidence OPM requires to show continuing entitlement to disability benefits.

### § 831.1207 Withdrawal of disability retirement applications.

(a) OPM will honor, without question, an applicant's request to withdraw an employee-filed disability retirement application if it receives the withdrawal request before the employing agency has separated the current employee, or, if the employee has already separated from the service, the withdrawal request is received before the official notice of approval has been issued by OPM. Similarly, OPM will honor, without question, an agency's request to withdraw an agency-filed disability retirement application if it receives the withdrawal request before the employee has separated from the service. Once the request to withdraw the application is accepted, an applicant must reapply to receive any further consideration.

(b) Withdrawal of a disability retirement application does not ensure the individual's continued employment. It is the employing agency's responsibility to determine whether it is appropriate to continue to employ the individual.

(c) OPM considers voluntary acceptance of a permanent position in which the employee has civil service retirement coverage, including a position at a lower grade or pay level, to be a withdrawal of the employee's disability retirement application. The employing agency must notify OPM immediately when an applicant for disability retirement accepts a position of this type.

(d) OPM also considers a disability retirement application to be withdrawn when the agency reports to OPM that it has reassigned an applicant or an employee has refused a reassignment to a vacant position, or the agency reports to OPM that it has successfully accommodated the medical condition in the employee's current position. Placement consideration is limited only by agency authority and can occur after OPM's allowance of the application up to the date of separation for disability retirement. The employing agency must notify OPM immediately if any of these events occur.

(e) After OPM allows a disability retirement application and the employee is separated, the application cannot be withdrawn. However, an individual entitled to a disability annuity may decline to accept all or any part of the annuity under the waiver provisions of 5 U.S.C. 8345(d) or request to be found medically recovered under § 831.1208(e) of this part.

### § 831.1208 Termination of disability annuity because of recovery.

(a) Each annuitant receiving disability annuity from the Fund shall be examined under the direction of OPM at the end of 1 year from the date of disability retirement and annually thereafter until the annuitant becomes 60 years of age unless the disability is found by OPM to be permanent in character. OPM may order a medical or other examination at any time to determine the facts relative to the nature and degree of disability of the annuitant. Failure to submit to reexamination shall result in suspension of annuity.

(b) A disability annuitant may request medical reevaluation under the provisions of this section at any time. OPM will reevaluate the medical condition of disability annuitants age 60 or over only on their own request.

(c) Recovery based on medical documentation. When an examination or reevaluation shows that a disability annuitant has medically recovered from the disability, OPM will terminate the annuity effective on the first day of the month beginning 1 year after the date of the medical examination showing recovery.

(d) Recovery based on reemployment by the Federal Government. Reemployment by an agency at any time before age 60 is evidence of recovery if the reemployment is in a permanent position at the same or higher grade or pay level as the position from which the disability annuitant retired. The permanent position must be full-time unless the position the disability annuitant occupied immediately before retirement was less than full-time, in which case the permanent position must have a work schedule of no less time than that of the position from which the disability annuitant retired. In this instance, OPM needs no medical documentation to find the annuitant recovered. Disability annuity payments will terminate effective on the first day of the month following the month in which the recovery finding is made under this paragraph.

(e) Recovery based on a voluntary request. OPM will honor a written and signed statement of medical recovery voluntarily filed by a disability annuitant when the medical documentation on file does not demonstrate that the annuitant is mentally incompetent. OPM needs no other documentation to find the annuitant recovered. Disability annuity payments will terminate effective on the first day of the month beginning 1 year after the date of the statement. A disability annuitant can withdraw the statement only if the withdrawal is received by OPM before annuity payments terminate.

(f) When an agency reemploys a recovered disability annuitant at any grade or rate of pay within the 1-year period pending termination of the disability retirement benefit under paragraph (c), (d), or (e) of this section, OPM will terminate the annuity effective on the date of reemployment.

### § 831.1209 Termination of disability annuity because of restoration to earning capacity.

(a) *Restoration to earning capacity*. If a disability annuitant is under age 60 on December 31 of any calendar year and his or her income from wages or self-employment or both during that calendar year equal at least 80 percent of the current rate of basic pay of the position occupied immediately before retirement, the annuitant's earning capacity is considered to be restored. The disability annuity will terminate on the June 30 after the end of the calendar year in which earning capacity is restored. When an agency reemploys a restored disability annuitant at any grade or rate of pay within the 180-day waiting period pending termination of the disability retirement benefit, OPM will terminate the annuity effective on the date of reemployment.

(b) *Current rate of basic pay for the position occupied immediately before retirement*. (1) A disability annuitant's income for a calendar year is compared to the gross annual rate of basic pay in effect on December 31 of that year for the position occupied immediately before retirement. The income for most disability annuitants is based on the rate for the grade and step which reflects the total amount of basic pay (both the grade and step and any additional basic pay) in effect on the date of separation from the agency for disability retirement. Additional basic pay is included subject to the premium pay restrictions of 5 U.S.C. 5545 (c)(1) and (c)(2). A higher grade and step will be established if it results from using either the date of application for disability retirement or the date of reasonable accommodation, as adjusted by any increases in basic pay that would have been effected between each respective date and the date of final separation. Use of these two alternative pay setting methods is subject to paragraph (b)(1) (i) and (ii) of this section. The highest grade and step established as a result of setting pay under the normal method and the two alternative methods is designated as the rate of basic pay for the position occupied immediately before retirement and applies only to restoration to earning capacity decisions. In cases involving use of either of the two alternative pay setting methods, the determination of the rate of basic pay for the position occupied immediately before retirement is made by the employing agency at the time the disability retirement is allowed. OPM must review the rate so determined to establish whether the correct rate has been established, and will inform the employee of the proper rate at the time the disability annuity is

awarded. This rate of basic pay becomes the basis for all future earning capacity determinations.

(i) The ''date of application for disability retirement'' is the date the application is signed by the authorized official of the employing agency immediately before forwarding the application to OPM.

(ii) The ''date of reasonable accommodation'' is the date of the employing agency's notice of reasonable accommodation to an employee's medical condition (as a result of its review of medical documentation) which results in a reduction in the rate of basic pay. The use of the date of reasonable accommodation to establish the rate of basic pay for the position held at retirement is subject to the following conditions:

(A) The date of the employing agency's notice to provide accommodation is no more than 1 year before the date the disability retirement application is signed by the authorized official in the employing agency immediately before forwarding it to OPM; and

(B) A complete record of the date of the personnel decision, the medical documentation substantiating the existence of the medical condition, and the justification for the accommodation is established in writing and included at the time the agency submits the application for disability retirement. OPM will review the record to determine whether the medical documentation demonstrates that the medical condition existed at the time of the accommodation and warranted the accommodation made.

(2) In the case of an annuitant whose basic pay rate on the date determined under paragraph (b)(1) of this section did not match a specific grade and step in a pay schedule:

(i) For those retiring from a merit pay position, a position for which a special pay rate is authorized (except as provided in paragraph (b)(2)(ii) of this section), or any other position in which the rate of basic pay is not equal to a grade and step in a pay schedule, the grade and step will be established for this purpose at the lowest step in the pay schedule grade that is equal to or greater than the actual rate of basic pay payable. This rule will not be applied when the rate exceeds that of the schedule applicable to the organization from which the individual retired, when there is no existing apposite schedule with grades and steps, or in other organizations which are excluded from coverage of schedules with grades and steps, as in the case of pay systems using pay bands.

(ii) For those retiring with a retained rate of basic pay or from a position for which a special pay rate is in effect but whose rate of basic pay exceeds the highest rate payable in the pay schedule grade applicable to the position held, the grade and step is established for this purpose in the grade in the schedule that is closest to the grade of the position held and within which the amount of the retained pay falls. The step is established for this purpose at the lowest step in that grade which equals or exceeds the actual rate of pay payable.

(iii) When the pay system under which an annuitant retired has been either modified or eliminated since the individual retired, the individual will be treated as if he or she had been employed at their retirement grade and step at the time of the system change, and will be deemed to have been placed under the new system using whatever rules would have been applicable at that time. This will only apply when a pay system has been abolished or modified, and not when the grade and step of a position has been modified subsequent to retirement by reclassification or other action, in which case the grade and step in effect at the time of retirement will control.

(iv) If using the above rules it is not possible to set a grade and step for computing the current rate of pay, then if possible the current rate of pay will be set using the relative position in the range of pay applicable to the position from which the individual retired. For example, if at the time of retirement the rate of pay was $75,000 in a range from $70,000 to $90,000, for all future determinations, the current rate of pay would be 25% up the new pay range from the bottom. If the new range was $96,000 to $120,000, then the new current rate of pay would be $102,000 ($96,000 plus 0.25 times $24,000 ($120,000 minus $96,000)).

(v) In those cases, such as of some former Congressional staff employees and others whose pay is not set under a formal system, where none of the above guidelines will yield a current rate of pay, OPM will ascertain the current rate of pay after consultation with the former employing organization, or successor organization.

(3) For annuitants retiring from the United States Postal Service, only cost-of-living allowances subject to civil service retirement deductions are included in determining the current rate of basic pay of the position held at retirement.

(c) *Income*. Earning capacity for the purposes of this section is demonstrated by an annuitant's ability to earn post-retirement income in a calendar year through personal work efforts or services. The total amount of income from all sources is used to determine earning capacity. This includes income received as gross wages from one or more employers, net earnings from one or more self-employment endeavors, and deferred income that is earned in a calendar year. In determining an annuitant's income for a calendar year, the following considerations apply:

(1) There are two sources of income: wages and self-employment income. All income which is subject to Federal employment taxes (i.e., social security or Medicare taxes) or self-employment taxes constitutes earned income. In addition, any other income as described in this section also constitutes earned income. The determination of whether a disability annuitant earns wages as an employee of an organization or earns income as a self-employed person is based on the usual common law rules applicable in determining the existence of an employer-employee relationship. Whether the relationship exists under the usual common law rules will be determined by OPM after the examination of the particular facts of each case.

(2) Income earned from one source is not offset by losses from another source. Income earned as wages is not reduced by a net loss from self-employment. The net income from each self-employment endeavor is calculated separately, and the income earned as net earnings from one self-employment endeavor is not reduced by a net loss from another self-employment endeavor. The net incomes from each separate self-employment endeavor are added together to determine the total amount of income from self-employment for a calendar year.

(3) Only income earned from personal work efforts or services is considered in determining earning capacity. All forms of non-work-related unearned income are excluded. Paragraph (f) of this section includes a representative list of the types of unearned income that are not considered.

(4) Income earned in a calendar year may only be reduced by certain self-employment business expenses, as provided in paragraph (e) of this section; job-connected expenses incurred because of the disabling condition, as provided in paragraph (g) of this section; and the return from investment allowance, as provided in paragraph (h) of this section. Once earned, income cannot be reduced by any other means. Thus, income cannot be lowered by such means as leave buy-back provisions, conversion of wages for paid time to leave without pay or a similar non-paid status, reductions in wages attributable to cash shortages or product losses, etc.

(5) For determining annual income from wages or self-employment or both, income is earned in the calendar year the annuitant actually renders the personal work effort or service and either actually or constructively receives the remuneration, except as provided under paragraph (c)(7) of this section. For this purpose, income paid on a regular basis (i.e., on a weekly, biweekly, monthly or similar pay period basis) will be deemed earned in the year in which payment is made in the regular course of business.

(6) Deferred income is included as income in the calendar year in which it is constructively received. Income is constructively received when it is credited, set apart, or otherwise made available so that the annuitant may draw upon it at any time, or could draw upon it during the calendar year if the annuitant had given notice of the intent to do so. Deferred income includes all earnings, whether in the

form of cash or property or applied to provide a benefit for the employee, which are subject to the disability annuitant's designation or assignment. Usually, the earnings are set aside by a salary-reduction agreement, a deferred compensation arrangement, or the designation of specific earnings amounts towards the purchase of non-taxable employee fringe benefits. Thus, any earnings for which the individual has the opportunity to adjust the amount of income received in a calendar year by controlling the remuneration of voluntarily giving up the right to control the remuneration, regardless of whether a written instrument exists, are income for earning capacity purposes.

(7) The Internal Revenue Code provides exceptions to the general rule on constructive receipt for certain deferred compensation plans which, by their design, defer receipt of income for Federal employment tax purposes as of the later of when services are performed or when there is no substantial risk of forfeiture of the rights to such amount. Even though these special deferred compensation plans defer the constructive receipt of the income for tax purposes to future years beyond the year in which the income is actually earned, the income reflects earning capacity. Therefore, employer contributions and employee payments to these special deferred compensation plans are considered income in the calendar year in which the services are performed, even though the Internal Revenue Code may exclude these contributions and payments from income for tax purposes.

(d) *Wages*. For purposes of earning capacity determinations, the term ''wages'' means the gross amount of all remuneration for services performed by an employee for his or her employer, unless specifically excluded herein, before any deductions or withholdings.

(1) The name by which the remuneration for services is designated is immaterial. Remuneration includes but is not limited to one-time or recurring—

(i) Base salary or pay; tips; commissions; professional fees; honoraria; bonuses and gift certificates of any type; golden parachute payments; payments for any non-work periods, such as vacation, holiday, or sick pay; pay advances; overtime pay; severance pay; dismissal pay; termination pay; and back pay;

(ii) Deferred income, within the meaning of paragraphs (c) (6) and (7) of this section, or other employer contributions or payments in an arrangement in which the employee has the opportunity (whether exercised or not) to adjust income by recovering the contributions or payments during the calendar year in which earned, for general discretionary income purposes;

(iii) Non-cash wages or payment of in-kind benefits, such as shares of stock in the business, real or personal property, stock in trade, inventory items, goods, lodging, food, and clothing. The valuation for all non-cash wages or other in-kind benefits is determined in a manner consistent with the fair value standards that appear in the Social Security Administration's regulations at 20 CFR 404.1041(d).

(2) Any amount offset or deducted under 5 U.S.C. 8344 is treated as wages if the annuity continues while the annuitant is reemployed by the Federal Government.

(3) As a general rule, remuneration as wages does not include any contribution, payment, benefits furnished, or service provided by an employer in any of the following areas:

(i) The general retirement system established by the employer for its employees, usually either a qualified pension, profit-sharing, stock bonus plan, or a qualified annuity contract plan;

(ii) Medical or hospitalization health benefit plans;

(iii) Life insurance plans;

(iv) Sickness or accident disability pay beyond 6 months of illness, or workers' compensation payments;

(v) The value of meals and lodgings provided at the convenience of the employer;

(vi) Moving expenses;

(vii) Educational assistance programs;

(viii) Dependent care assistance programs;

(ix) Scholarships and fellowship grants;

(x) De minimis fringe benefits, such as items of merchandise given by the employer at holidays which are not

readily convertible into cash and courtesy discounts on company products offered not as remuneration for services performed but as a means of promoting good will;

(xi) Qualified group legal services plans;

(xii) Uniforms and tools supplied by the employer, including employer-provided allowances for such items, for the exclusive use by the employee on the job; and

(xiii) Amounts that an employer pays the individual specifically, either as advances or reimbursements, for traveling or other ordinary and necessary expenses incurred, or reasonably expected to be incurred in the employer's business.

(4) However, there are two exceptions to this general rule:

(i) When it is provided under circumstances in which either a salary reduction or deferral agreement is used (whether evidenced by a written instrument or otherwise); or

(ii) When the employee had the opportunity (whether exercised or not) to elect to receive the cash value, whether in the form of money or personal or real property, of the employer-provided amount or service.

(e) *Self-employment income.* (1) Self-employment income is the remuneration that is received as an independent contractor, either as

(i) A sole proprietor of a business or farm;

(ii) A professional in one's own practice; or

(iii) A member of a partnership or corporation, as these terms are defined by the Internal Revenue Code, and regardless of whether the business entity is operated for profit.

(2) The term ''net earnings'' from self-employment in a business enterprise means the gross revenue to the business endeavor from all sources before any other deductions or withholdings, minus

(i) Allowable business expenses, as provided in paragraph (e)(3) of this section;

(ii) Any job-connected disability expenses, as provided in paragraph (g) of this section; and

(iii) Any return from investment allowance, as provided in paragraph (h) of this section.

(3) Certain expenses of a self-employed business entity may be offset from the gross revenue from all sources of that self-employed business in determining the amount of net earnings for a particular calendar year. Expenses which may be deducted are only those items and costs which are permitted by the Internal Revenue Code for income tax purposes as ordinary and necessary to the operation of the business. However, expenses incurred on behalf of the disability annuitant may not be deducted, regardless of whether they are permitted by the Internal Revenue Code. These expenses that are incurred but cannot be deducted include the costs for wages paid to the individual, interest earnings, guaranteed payments, dividends, employee benefits, pension plans, and salary reduction or deferral plans. Also, self-employed disability annuitants may not deduct the costs of other withdrawals or expenses which are not used solely for business purposes. Examples of items that cannot be deducted if used at all for personal use by the self-employed disability annuitant include personal property items, such as automobiles and boats; real property, such as vacation property or residences; and memberships, dues, or fees for professional associations or public or private organizations or clubs.

(4) Fees paid to an annuitant as a director of a corporation are a part of net earnings from self-employment.

(f) *Income not included.* Other types of income not considered in determining earning capacity include—

(1) Investment income, such as interest or dividends from savings accounts, stocks, personal loans or home mortgages held, unless the disability annuitant receives the return from capital investment in the course of his or her trade or business;

(2) Capital gains from sales of real or personal property that the disability annuitant owns, unless received in the course of his or her trade or business:

(3) Rents or royalties, unless received in the course of his or her trade or business;

(4) Distributions from pension plans, annuity plans, Individual Retirement Accounts (IRA's), Simplified Employee Benefit-IRA's (SEP-IRA's), Keogh Accounts, employee stock ownership plans, profit sharing plans, or deferred income payments that are received by the annuitant in any year after the calendar year in which the funds were contributed to the plan;

(5) Income earned before the commencing date of civil service retirement annuity payments;

(6) Scholarships or fellowships;

(7) Proceeds from life insurance, inheritances, estates, trusts, endowments, gifts, prizes, awards, gambling or lottery winnings, and amounts received in court actions whether by verdict or settlement, unless received in the course of their trade or business;

(8) Unemployment compensation under State or Federal law, supplemental unemployment benefits, or workers' compensation:

(9) Alimony, child support, or separate maintenance payments received;

(10) Pay for jury duty; and

(11) Entitlement payments from other Federal agencies, such as benefits from the Social Security Administration or the Veterans Administration, Railroad Retirement System retirement pay, or military retirement pay.

(g) *Job-connected expenses incurred because of the disabling condition may be deducted from income.* (1) Job-connected expenses deductible from income for purposes of determining earning capacity are those expenses that are primarily for and essential to the annuitant's occupation or business and are directly connected with or result from the disability for which the disability annuity was allowed.

(2) The determination of whether a job-connected expense may be deducted from income is governed by the following considerations:

(i) The expense must be directly attributable to the disability and must be one which would not have been incurred in the absence of the annuitant working in his or her business or occupation. Expenses incurred for the preservation of the annuitant's health, alleviation of his or her physical or mental discomfort, or other expenses of an employed person cannot be deducted.

(ii) The disability must be of such severity that it requires the annuitant to use special means of transportation, services, or equipment to perform the duties of the occupation or business. Examples of such disabilities include blindness, paraplegia, multiple sclerosis, and cerebral hemorrhage. Claims involving transportation or equipment may be deducted only in the amount normally allowed for business expenses or as depreciation by the Internal Revenue Service for Federal income tax purposes.

(iii) Claims involving services performed by a family member or other individual directly employed by the annuitant may be deducted only if a true employer-employee relationship exists between the annuitant and the employed individual, and the amount claimed as an expense does not exceed the local market rate of payment to individuals who provide similar services. It is the responsibility of the annuitant to provide evidence demonstrating that an employer-employee relationship exists, and what the local market rate is for such services. For the purpose of this paragraph, to establish that a true employer-employee relationship exists, the annuitant must provide evidence that all statutorily mandated employment requirements are met, including (but not limited to) income tax withholdings, FICA tax deductions and payments, and unemployment insurance. If the annuitant fails to provide evidence of the local market rate for such services, payments may be deducted only if the amount claimed does not exceed the Federal minimum hourly rate in effect on December 31 of the calendar year in which claimed. Absent evidence that it is customary and regular practice in the local labor market to work more hours per week, payment may not be deducted for services provided by an individual in excess of 40 hours a week.

(3) A job-connected expense can be deducted only in the calendar year in which paid.

(4) Claims for items used for both personal and job-related purposes may be deducted only by the prorated

amount attributable to the job-related use.

(5) A job-connected expense may not be deducted from income from self-employment if the expense has already been deducted as a business expense.

(6) It is the responsibility of the annuitant claiming job-connected expense to provide adequate documentation to substantiate the amount claimed. Adequate documentation will generally include the following information:

(i) Written recommendation of a physician, vocational rehabilitation specialist, occupational health resource specialist, or other similar professional specialist that the retiree should use the transportation, services, or equipment;

(ii) A description of the item and an explanation of its use by the annuitant in the performance of his or her occupation or business;

(iii) A copy of the receipt of purchase, bill of sale, or leasing agreement for the item claimed with the date, duration of the agreement, and agreed upon price clearly specified;

(iv) A complete supporting explanation of how the amount claimed for the job-connected expense has been calculated; and

(v) An explanation of the circumstances and calculation of the prorated cost of the item if used for both personal and business use.

(h) *Return from investment allowance.* A disability annuitant may reduce the net earnings from a self-employed business endeavor (adjusted for any interest paid on borrowed capital) by 6 percent of his or her capital investment in that business, owned or borrowed. The capital investment's value is its fair-market value as of December 31 of the year for which the income is being reported.

(i) *Requirement to report income.* All disability annuitants who, on December 31 of any calendar year, are under age 60 must report to OPM their income from wages or self-employment or both for that calendar year. Each year as early as possible, OPM will send a form to annuitants to use in reporting their income from the previous calendar year. The form specifies the date by which OPM must receive the report. OPM will determine entitlement to continued annuity on the basis of the report. If an annuitant fails to submit the report, OPM may stop annuity payments until it receives the report.

### § 831.1210 Annuity rights after a disability annuity terminates.

(a) An individual is entitled to an immediate annuity when the disability annuity stops because of recovery or restoration to earning capacity if the individual is not reemployed in a position subject to civil service retirement coverage and—

(1) Is at least age 50 when the disability annuity stops and had 20 or more years of service at the time of retirement for disability; or

(2) Had 25 or more years of service at the time of retirement for disability regardless of age.

(b) An individual whose annuity stops because of recovery or restoration to earning capacity and who is not eligible for an immediate annuity under paragraph (a) of this section, is eligible for a deferred annuity upon reaching age 62.

(c) The disability annuity of an individual whose annuity stopped because of recovery or restoration to earning capacity may be reinstated under § 831.1212 of this part.

### § 831.1211 Reinstatement of disability annuity.

(a) When a disability annuity stops, the individual must again prove that he or she meets the eligibility requirements in order to have the annuity reinstated.

(b) When a recovered disability annuitant under age 62 whose annuity was terminated because he or she was found recovered on the basis of medical evidence (§ 831.1208(b)), is not reemployed in a position subject to civil service retirement coverage, and, based on the results of a current medical examination, OPM finds that the individual's medical condition has worsened since the finding of recovery and that the original disability on which retirement was based has recurred, OPM will reinstate the disability annuity. The right to the reinstated annuity begins with

the date of the medical examination showing that the disability recurred.

(c) OPM will reinstate the disability annuity of a recovered disability annuitant under age 62 whose annuity was terminated because he or she was found recovered on the basis of Federal reemployment (§ 831.1208(c)) when—

(1) The results of a current medical examination show that the disabling medical condition that was the basis of the disability retirement continues to exist; and

(2) Within 1 year after the date of reemployment, this medical condition has again caused the individual to be unable to provide useful and efficient service, and the employee has been—

(i) Separated and not reemployed in a position subject to civil service retirement coverage; or

(ii) Placed in a position that results in a reduction in grade or pay below the grade from which the individual retired, or in a change to a non-permanent position. The right to the reinstated annuity begins with the date of the medical examination showing that the disabling medical condition continues to exist, but not earlier than the first day after separation, or the effective date of the placement in the position which results in a reduction in grade or pay or change to a non-permanent position.

(d) When a recovered disability annuitant under age 62 whose annuity was terminated because he or she was found recovered on the basis of a voluntary request (§ 831.1208(e)), is not reemployed in a position subject to civil service retirement coverage, and, based on the results of a current medical examination, OPM finds that the disability has recurred, OPM will reinstate the disability annuity. The right to the reinstated annuity begins with the date of the medical examination showing that the disability recurred, but not earlier than 1 year before the date the request for reinstatement is received by OPM.

(e) When a disability annuitant whose earning capacity has been restored but who is not reemployed in a position in which he or she is subject to civil service retirement coverage, and who (except in the case of a National Guard technician whose annuity was awarded under 5 U.S.C. 8337(h)), has not recovered from the disability for which retired, loses his or her earning capacity, as determined by OPM, before reaching age 62, OPM will reinstate the disability annuity. The reinstated annuity is payable from January 1 of the year following the calendar year in which earning capacity was lost. Earning capacity is lost if, during any calendar year, the individual's income from wages or self-employment or both is less than 80 percent of the current rate of basic pay of the position held at retirement.

(f) A reinstated annuity is the same type as the original annuity and is paid at the rate of annuity to which the annuitant was entitled on the date his or her disability annuity was last discontinued.

(g) Reinstatement of the disability annuity ends the right to any other annuity based on the same service, unless the annuitant makes a written election to receive the other annuity instead of the disability annuity.

(h) When OPM reinstates an employee's disability annuity, the agency must offset the employee's pay by the amount of annuity allocable to the period of employment, unless the annuitant is exempted from this requirement under the provisions of 5 U.S.C. 8344(i). The offset begins on the date of OPM's determination of eligibility for reinstatement. OPM must reduce any retroactive payment of annuity for a period of employment with an agency before that date by the amount of pay earned during that period.

(i) When an individual's annuity is terminated upon reemployment (subject to subchapter III of chapter 83, title 5, United States Code), OPM must determine the individual's future annuity rights under the law in effect at the date of his or her subsequent separation. If, upon separation from such reemployment, the individual does not meet the eligibility requirements under subchapter III of chapter 83, title 5, United States Code, for title to annuity based on such separation, OPM will resume payment of the terminated annuity at the rate last payable, unless payment is otherwise barred.

[58 FR 12498, Sept. 4, 1968. Redesignated at 59 FR 27214, May 26, 1994]

### § 831.1212 Administrative review of OPM decisions.

The right to administrative review of an initial decision of OPM is set forth in § 831.109 of this part. The right to appeal a final decision of OPM to the Merit Systems Protection Board is set forth in § 831.110 of this part.

[58 FR 12498, Sept. 4, 1968. Redesignated at 59 FR 27214, May 26, 1994]

## Subpart M—Collection of Debts

SOURCE: 50 FR 34664, Aug. 27, 1985, unless otherwise noted.

### § 831.1301 Purpose.

This subpart prescribes procedures to be followed by the Office of Personnel Management (OPM) , which are consistent with the Federal Claims Collection Standards (FCCS) (Chapter II of title 4, Code of Federal Regulations), in the collection of debts owed to the Civil Service Retirement and Disability Fund.

### § 831.1302 Scope.

This subpart covers the collection of debts due the Civil Service Retirement and Disability Fund, with the exception of the collection of court-imposed judgments, amounts referred to the Department of Justice because of fraud, and amounts collected from back pay awards in accordance with § 550.805(e)(2) of this chapter.

### § 831.1303 Definitions.

In this subpart—

*Additional charges* means interest, penalties, and/or administrative costs owed on a debt.

*Annuitant* means a retired employee or Member of Congress, spouse, widower, or child receiving recurring benefits under the provisions of subchapter III, chapter 83, of title 5, United States Code.

*Compromise* is an adjustment of the total amount of the debt to be collected based upon the considerations established by the FCCS (4 CFR part 103).

*Consumer reporting agency* has the same meaning provided in 31 U.S.C. 3701(a)(3).

*Debt* means a payment of benefits to an individual in the absence of entitlement or in excess of the amount to which an individual is properly entitled.

*Delinquent* has the same meaning provided in 4 CFR 101.2(b).

*FCCS* means the Federal Claims Collection Standards (Chapter II of title 4, Code of Federal Regulations).

*Offset* means to withhold the amount of a debt, or a portion of that amount, from one or more payments due the debtor. Offset also means the amount withheld in this manner.

*Reconsideration* means the process of reexamining an individual's liability for a debt based on—

(1) Proper application of law and regulation; and

(2) Correctness of the mathematical computation.

*Repayment schedule* means the amount of each payment and number of payments to be made to liquidate the debt as determined by OPM.

*Retirement fund* means the Civil Service Retirement and Disability Fund.

*Voluntary repayment agreement* means an alternative to offset that is agreed to by OPM and includes a repayment schedule.

*Waiver* is a decision not to recover a debt under authority of 5 U.S.C. 8346(b).

### § 831.1304 Processing.

(a) *Notice*. Except as provided in § 831.1305, OPM will, before starting collection, tell the debtor in writing—

(1) The reason for and the amount of the debt;

(2) The date on which the full payment is due;

(3) OPM's policy on interest, penalties, and administrative charges;

(4) If payment in full would create financial hardship to the debtor and offset is available, the types of payment(s) to be offset, the repayment schedule, the right to request an adjustment in the repayment schedule and the right to request a voluntary repayment agreement in lieu of offset;

(5) The individual's right to inspect and/or receive a copy of the Government's records relating to the debt;

(6) The method and time period (30 calendar days) for requesting reconsideration, waiver, and/or compromise

and, in the case of offset, an adjustment to the repayment schedule;

(7) The standards used by OPM for determining entitlement to waiver and compromise;

(8) The right to a hearing by the Merit Systems Protection Board on a waiver request (if OPM's waiver decision finds the individual liable) in accordance with paragraph (c)(2) of this section; and

(9) The fact that a timely filing of a request for reconsideration, waiver and/or compromise, or a later timely appeal of a waiver denial to the Merit Systems Protection Board, will stop collection proceedings, unless (i) failure to take the offset would substantially prejudice the Government's ability to collect the debt; and (ii) the time before the payment is to be made does not reasonably permit the completion of these procedures.

(b) *Requests for reconsideration, waiver, and/or compromise.* (1) If a request for reconsideration, waiver and/or compromise is returned to us by mail, it must be postmarked within 30 calendar days of the date of the notice detailed in paragraph (a) of this section. If a request for reconsideration, waiver, and/or compromise is hand delivered, it must be received within 30 calendar days of the date of the notice detailed in paragraph (a) of this section. OPM may extend the 30 day time limit for filing when individuals can prove that they: (i) Were not notified of the time limit and were not otherwise aware of it; or (ii) were prevented by circumstances beyond their control from making the request within the time limit.

(2) When a request for reconsideration, waiver, and/or compromise covered by this paragraph is properly filed before the death of the debtor, it will be processed to completion unless the relief sought is nullified by the debtor's death.

(3) Individuals requesting reconsideration, waiver, and/or compromise will be given a full opportunity to present any pertinent information and documentation supporting their position.

(4) An individual's request for waiver will be evaluated on the basis of the standards set forth in subpart N of this part. An individual's request for compromise will be evaluated on the basis of standards set forth in the FCCS (4 CFR part 103).

(c) *Reconsideration, waiver, and/or compromise decisions.* (1) OPM's decision will be based upon the individual's written submissions, evidence of record, and other pertinent available information.

(2) After consideration of all pertinent information, a written decision will be issued. The decision will state the extent of the individual's liability, and, for waiver and compromise requests, whether the debt will be waived or compromised. If the individual is determined to be liable for all or a portion of the debt, the decision will reaffirm or modify the conditions for the collection previously proposed under paragraph (a) of this section. The decision will state the individual's right to appeal to the Merit Systems Protection Board as provided by § 1201.3 of this title, and, in the case of a denial of waiver, that a timely appeal will stop collection of the debt.

### § 831.1305 Collection of debts.

(a) *Means of collection.* Collection of a debt may be made by means of offset under § 831.1306, or under any statutory provision providing for offset of money due the debtor from the Federal Government, or by referral to the Justice Department for litigation, as provided in § 831.1306. Referral may also be made to a collection agency under the provisions of the FCCS.

(b) *Additional charges.* Interest, penalties, and administrative costs will be assessed on the debt in accordance with standards established in the FCCS at 4 CFR 102.13. Additional charges will be waived when required by the FCCS. In addition, such charges may be waived when OPM determines—

(1) Collection would be against equity and good conscience under the standards prescribed in §§ 831.1403 through 831.1405 of this part; or

(2) Waiver would be in the best interest of the United States.

(c) *Collection in installments.* Whenever feasible, debts will be collected in one lump sum. However, when the debtor is financially unable to pay in one lump sum of fails to respond to a demand for full payment and off-set is

available, installment payments may be effected. The amount of the installment payments will be set in accordance with the criteria in 4 CFR 102.11.

(d) *Commencement of collection.* (1) Except as provided in paragraph (d)(2) of this section, collection will begin after the time limits for requesting further rights stated in § 831.1304(a)(6) expire or OPM has issued decisions on all timely requests for those rights and the Merit Systems Protection Board has acted on any timely appeal of a waiver denial, unless: (i) Failure to make an offset would substantially prejudice the Government's ability to collect the debt; and (ii) the time before the payment is to be made does not reasonably permit the completion of the proceedings in § 831.1304 or litigation. When offset begins without completion of the administrative review process, these procedures will be completed promptly, and amounts recovered by offset but later found not owed will be refunded promptly.

(2) The procedures identified in § 831.1304 will not be applied when the debt is caused by (i) a retroactive adjustment in the periodic rate of annuity or any deduction taken from annuity when the adjustment is a result of the annuitant's election of different entitlements under law, if the adjustment is made within 120 days of the effective date of the election; or (ii) interim, estimated payments made before the formal determination of entitlement to annuity, if the amount is recouped from the total annuity payable on the first day of the month following the last advance payment or the date the formal determination is made, whichever is later.

### § 831.1306 Collection by administrative offset.

(a) *Offset from retirement payments.* A debt may be collected in whole or in part from lump-sum retirement payment or recurring annuity payments.

(b) *Offset from other payments*—(1) *Administrative offset.* (i) A debt may be offset from other payments due the debtor from other agencies in accordance with 4 CFR 102.3, except that offset from back pay awarded under the provisions of 5 U.S.C. 5596 (and 5 CFR 550.801 *et seq.*) will be made in accordance with § 550.805(e)(2) of this chapter.

(ii) In determining whether to collect claims by means of administrative offset after the expiration of the six year limitation provided in 5 U.S.C. 2415, the Director or his designee will determine the cost effectiveness of leaving a claim unresolved for more than 6 years. This decision will be based on such factors as the amount of the debt; the cost of collection; and the likelihood of recovering the debt.

(2) *Salary offset.* When the debtor is an employee, or a member of the Armed Forces or a reserve component of the Armed Forces, OPM may effect collection action by offset of the debtor's pay in accordance with 5 U.S.C. 5514 and 5 CFR 550.1101 *et seq.* Due process described in § 831.1304 will apply. The questions of fact and liability, and entitlements to waiver or compromise determined through that process are deemed correct and will not be amended under salary offset procedures. When the debtor did not receive a hearing on the amount of the offset under § 831.1304 and requests such hearing, one will be conducted in accordance with subpart K of part 550 of this chapter.

### § 831.1307 Use of consumer reporting agencies.

(a) *Notice.* If a debtor's response to the notice described in § 831.1304(a) does not result in payment in full, payment by offset, or payment in accordance with a voluntary repayment agreement or other repayment schedule acceptable to OPM, and the debtor's rights under § 831.1304 have been exhausted, OPM may report the debtor to a consumer reporting agency. In addition, a debtor's failure to make subsequent payments in accordance with a repayment schedule may result in a report to a consumer reporting agency. Before making a report to a consumer reporting agency, OPM will notify the debtor in writing that—

(1) The payment is overdue;

(2) OPM intends, after 60 days, to make a report as described in paragraph (b) of this section to a consumer reporting agency;

(3) The debtor's right to dispute the liability has been exhausted under § 831.1304; and

(4) The debtor may suspend OPM action on referral by paying the debt in one lump sum or making payments current under a repayment schedule.

(b) *Report.* When a debtor's response to the notice described in paragraph (a) of this section fails to comply with paragraph (a)(4) of this section and 60 days have elapsed since the notice was mailed, OPM may report to a consumer reporting agency that an individual is responsible for an unpaid debt and provide the following information:

(1) The individual's name, address, taxpayer identification number, and any other information necessary to establish the identity of the individual;

(2) The amount, status, and history of the debt; and

(3) The fact that the debt arose in connection with the administration of the Civil Service Retirement System.

(c) *Subsequent reports.* OPM will update its report to the consumer reporting agency whenever it has knowledge of events that substantially change the status or the amount of the liability.

### § 831.1308 Referral to a collection agency.

(a) OPM may refer certain debts to commercial collection agencies under the following conditions:

(1) All processing required by § 831.1304 has been completed before the debt is released.

(2) A contract for collection services has been negotiated.

(3) OPM retains the responsibility for resolving disputes, compromising claims, referring the debt for litigation, or suspending or terminating collection action.

### § 831.1309 Referral for litigation.

From time to time and in a manner consistent with the General Accounting Office's and the Justice Department's instructions, OPM will refer certain overpayments to the Justice Department for litigation. Referral for litigation will suspend processing under this subpart.

## Subpart N—Standards for Waiver of Overpayments

SOURCE: 45 FR 23635, Apr. 8, 1980, unless otherwise noted.

### § 831.1401 Conditions for waiver.

Recovery of an overpayment from the Civil Service Retirement and Disability Fund may be waived pursuant to section 8346(b), of title 5, United States Code, when the annuitant (a) is without fault and (b) recovery would be against equity and good conscience. Where it has been determined that the recipient of an overpayment is ineligible for waiver, the individual is nevertheless entitled to an adjustment in the recovery schedule if he/she shows that it would cause him/her financial hardship to make payment at the rate scheduled.

### § 831.1402 Fault.

A recipient of an overpayment is without fault if he/she performed no act of commission or omission which resulted in the overpayment. The fact that the Office of Personnel Management may have been at fault in initiating an overpayment will not necessarily relieve the individual from liability.

(a) *Considerations.* Pertinent considerations in finding fault are—

(1) Whether payment resulted from the individual's incorrect but not necessarily fraudulent statement, which he/she should have known to be incorrect;

(2) Whether payment resulted from the individual's failure to disclose material facts in his/her possession which he/she should have known to be material; or

(3) Whether he/she accepted a payment which he/she knew or should have known to be erroneous.

(b) *Mitigation factors.* The individual's age, physical and mental condition or the nature of the information supplied to him/her by OPM or a Federal agency may mitigate against finding fault if one or more contributed to his/her submission of an incorrect statement, a statement which did not disclose material facts in his/her possession, or his/her acceptance of an erroneous overpayment.

### § 831.1403 Equity and good conscience.

(a) *Defined.* Recovery is against equity and good conscience when—

(1) It would cause financial hardship to the person from whom it is sought;

(2) The recipient of the overpayment can show (regardless of his or her financial circumstances) that due to the notice that such payment would be made or because of the incorrect payment either he/she has relinquished a valuable right or changed positions for the worse; or

(3) Recovery could be unconscionable under the circumstances.

### § 831.1404 Financial hardship.

Financial hardship may be deemed to exist in—but not limited to—those situations where the annuitant from whom collection is sought needs substantially all of his/her current income and liquid assets to meet current ordinary and necessary living expenses and liabilities.

(a) *Considerations.* Some pertinent considerations in determining whether recovery would cause financial hardship are as follows:

(1) The individual's financial ability to pay *at the time collection is scheduled to be made.*

(2) Income to other family member(s), if such member's ordinary and necessary living expenses are included in expenses reported by the annuitant.

(b) *Exemptions.* Assets exempt from execution under State law should not be considered in determining an individual's ability to repay the indebtedness, rather primary emphasis shall be placed upon the annuitant's liquid assets and current income in making such determinations.

### § 831.1405 Ordinary and necessary living expenses.

An individual's ordinary and necessary living expenses include rent, mortgage payments, utilities, maintenance, food, clothing, insurance (life, health and accident), taxes, installment payments, medical expenses, support expenses when the annuitant is legally responsible, and other miscellaneous expenses which the individual can establish as being ordinary and necessary.

### § 831.1406 Waiver precluded.

(a) *When not granted.* Waiver of an overpayment cannot be granted when—

(1) The overpayment was obtained by fraud; or

(2) The overpayment was made to an estate.

### § 831.1407 Burdens of proof.

(a) *Burden of OPM.* The Associate Director for Compensation must establish by the preponderance of the evidence that an overpayment occurred.

(b) *Burden of annuitant.* The recipient of an overpayment must establish by substantial evidence that he/she is eligible for waiver or an adjustment.

## Subpart O—Allotments From Civil Service Annuities

SOURCE: 42 FR 52373, Sept. 30, 1977; 42 FR 61240, Dec. 2, 1977, unless otherwise noted.

### § 831.1501 Definitions.

(a) *Allotment* means a specified deduction from the annuity payments due an annuitant voluntarily authorized by the annuitant to be paid to an allottee.

(b) *Allottee* means the institution or organization to which the allotment is paid.

(c) *Allotter* means the annuitant from whose annuity payments an allotment is deducted.

(d) *Annuity Payments* means the net monthly annuity payment due an annuitant after all authorized deductions (such as those for health benefits, Federal income tax, overpayment of annuity, payment of a government claim, etc. have been made.

### § 831.1511 Authorized allottees.

(a) An annuitant may make an allotment to the national office or headquarters of any of the following organizations:

(1) A labor organization recognized under Executive Order 11491, as amended;

(2) An employee organization recognized under 5 U.S.C. 8901(8);

(3) Other lawful organizations which:

(i) Are national in scope,

(ii) Are nonprofit and noncommercial, existing primarily for the purpose of representing employee or annuitant interests in their dealings with employing agencies or OPM,

(iii) Consist primarily of Federal employees and/or annuitants, and

(iv) Existed as of December 23, 1975.

(b) OPM, in its sole discretion, may approve the individual organizations which may receive allotments only after the organization has collected, in accordance with procedures prescribed by OPM, a minimum of two thousand (2,000) allotment authorizations from civil service annuitants.

(c) OPM shall permit an annuitant to make an allotment to an organization only when:

(1) The organization has been approved as an allottee by OPM, and

(2) The organization has agreed in writing to solicit and process allotments in accordance with requirements prescribed by OPM.

### § 831.1521 Limitations.

(a) The amount of any allotment may not be less than one dollar ($1) and, in the absence of compelling circumstances, shall be in whole dollars.

(b) The total amount of any allotment(s) may not exceed the net monthly annuity due the allotter.

(c) An annuitant may make only one allotment payable to the same allottee at the same time and may make no more than a total of two allotments.

(d) Payment of an allotment shall be discontinued when the allotter's annuity payments are terminated or suspended by OPM.

(e) Allotments shall be disbursed on one of the regularly designated paydays of the allotter in accordance with OPM's agreement with the allottee.

(f) Allotters shall agree that OPM shall be held harmless for any authorized allotment request made by an allottee in accordance with the allottee's agreement with OPM.

(g) Allotters shall agree that disputes regarding any authorized allotment shall be a matter between the allotter and the allottee.

(h) The total number of allottees shall be limited to twenty (20), with first preference given to those organizations participating in the Federal Employees Health Benefits Program. Thereafter, preference shall be based on the date of application and the number of annuitants who have completed allotment authorizations.

(i) OPM, in its discretion, shall recover from the allottee, the incremental costs of making allotments.

(j) OPM, in its sole discretion, may terminate an allottee's participation in the allotment program described by this subpart at any time in accordance with its agreement with the allottee.

## Subpart P—Customs and Border Protection Officers

SOURCE: 76 FR 41997, July 18, 2011, unless otherwise noted.

### § 831.1601 Applicability and purpose.

(a) This subpart contains regulations of the Office of Personnel Management (OPM) to supplement 5 U.S.C. 8336(c), which establishes special retirement eligibility for customs and border protection officers employed under the Civil Service Retirement System; 5 U.S.C. 8331(3)(C) and (G), pertaining to basic pay; 5 U.S.C. 8334(a)(1) and (c), pertaining to deductions, contributions, and deposits; 5 U.S.C. 8335(b), pertaining to mandatory retirement; and 5 U.S.C. 8339(d), pertaining to computation of annuity.

(b) The regulations in this subpart are issued pursuant to the authority given to OPM in 5 U.S.C. 8347 to prescribe regulations to carry out subchapter III of chapter 83 of title 5 of the United States Code, and in 5 U.S.C. 1104 to delegate authority for personnel management to the heads of agencies, and pursuant to the authority given the Director of OPM in Section 535(d) of the Department of Homeland Security Appropriations Act, 2008, Division E of Public Law 110–161, 121 Stat. 1844, at 2075.

### § 831.1602 Definitions.

In this subpart—

*Agency head* means the Secretary of the Department of Homeland Security. For purposes of an approval of coverage under this subpart, agency head is also deemed to include the designated representative of the Secretary of the Department of Homeland Security (DHS), except that the designated representative must be a department headquarters-level official who reports directly to the Secretary of the Department of Homeland Security, or to the Deputy Secretary of the Department of Homeland Security, and who is the sole

such representative for the entire department. For the purposes of a denial of coverage under this subpart, agency head is also deemed to include the designated representative of the Secretary of the Department of Homeland Security at any level within the Department of Homeland Security.

*Customs and border protection officer* means an employee in the Department of Homeland Security occupying a position within the Customs and Border Protection Officer (GS–1895) job series (determined applying the criteria in effect as of September 1, 2007) or any successor position, and whose duties include activities relating to the arrival and departure of persons, conveyances, and merchandise at ports of entry. Also included in this definition is an employee engaged in this activity who is transferred directly to a supervisory or administrative position in the Department of Homeland Security after performing such duties in 1 or more positions within the GS–1895 job series (determined applying the criteria in effect as of September 1, 2007), or any successor position, for at least 3 years.

*First-level supervisors* are employees classified as supervisors who have direct and regular contact with the employees they supervise. First-level supervisors do not have subordinate supervisors. A first-level supervisor may occupy a primary position or a secondary position if the appropriate definition is met.

*Primary position* means a position classified within the Customs and Border Protection Officer (GS–1895) job series (determined applying the criteria in effect as of September 1, 2007) or any successor position whose duties include the performance of work directly connected with activities relating to the arrival and departure of persons, conveyances, and merchandise at ports of entry.

*Secondary position* means a position within the Department of Homeland Security that is either—

(1) Supervisory; i.e., a position whose primary duties are as a first-level supervisor of customs and border protection officers in primary positions; or

(2) Administrative; i.e., an executive, managerial, technical, semiprofessional, or professional position for which experience in a primary customs and border protection officer position is a prerequisite.

**§ 831.1603 Conditions for coverage in primary positions.**

(a) An employee's service in a position that has been determined by the employing agency head to be a primary customs and border protection officer position is covered under the provisions of 5 U.S.C. 8336(c).

(b) An employee who is not in a primary position, nor covered while in a secondary position, and who is detailed or temporarily promoted to a primary position is not covered under the provisions of 5 U.S.C. 8336(c) for any purpose under this subpart.

**§ 831.1604 Conditions for coverage in secondary positions.**

(a) An employee's service in a position that has been determined by the employing agency head to be a secondary position is covered under the provisions of 5 U.S.C. 8336(c) if all of the following criteria are met:

(1) The employee is transferred directly (i.e., without a break in service exceeding 3 days) from a primary position to a secondary position; and

(2) The employee has completed 3 years of service in a primary position, including a position for which no CSRS deductions were withheld; and

(3) If applicable, the employee has been continuously employed in secondary positions since transferring from a primary position without a break in service exceeding 3 days, except that a break in employment in secondary positions which begins with an involuntary separation (not for cause), within the meaning of 8336(d)(1) of title 5, United States Code, is not considered in determining whether the service in secondary positions is continuous for this purpose.

(b) For the purpose of applying the criteria at paragraphs (a)(1) through (3) of this section to evaluate transfers, service, and employment periods that occurred before September 1, 2007—

(1) A primary position is deemed to include:

(i) A position whose duties included the performance of work directly connected with activities relating to the

arrival and departure of persons, conveyances, and merchandise at ports of entry that was classified within the Immigration Inspector Series (GS–1816), Customs Inspector Series (GS–1890), Canine Enforcement Officer Series (GS–1801), or any other series which the agency head determines were predecessor series to the Customs and Border Protection Series (GS–1895), and that would have been classified under the GS–1895 series had it then existed; and

(ii) A position within the Customs and Border Protection Series (GS–1895) whose duties included the performance of work directly connected with activities relating to the arrival and departure of persons, conveyances, and merchandise at ports of entry.

(2) A secondary position is deemed to include:

(i) A first-level supervisor of an employee in a position described at paragraph (b)(1)(i) or (b)(1)(ii) of this section; or

(ii) An executive, managerial, technical, semiprofessional, or professional position for which experience in a position described at paragraph (b)(1)(i) or (b)(1)(ii) of this section is a mandatory prerequisite.

(c) An employee who is not in a primary position, nor covered while in a secondary position, and who is detailed or temporarily promoted to a secondary position is not covered under the provisions of 5 U.S.C. 8336(c) for any purpose under this subpart.

### § 831.1605 Evidence.

(a) An agency head's determination under §§ 831.1603(a) and 831.1604(a) must be based solely on the official position description of the position in question and any other official description of duties and qualifications.

(b) If an employee is in a position not subject to the one-half percent higher withholding rate of 5 U.S.C. 8334(c), and the employee does not, within 6 months after entering the position or after any significant change in the position, formally and in writing seek a determination from the employing agency that his position is properly covered by the higher withholding rate, the agency head's determination that the service was not so covered at the time of the service is presumed to be correct. This presumption may be rebutted by a preponderance of the evidence that the employee was unaware of his or her status or was prevented by cause beyond his or her control from requesting that the official status be changed at the time the service was performed.

### § 831.1606 Requests from individuals.

(a) An employee who requests credit for service under 5 U.S.C. 8336(c) bears the burden of proof with respect to that service, and must provide the employing agency with all pertinent information regarding duties performed.

(b) An employee who is currently serving in a position that has not been approved as a primary or secondary position, but who believes that his or her service is creditable as service in a primary or secondary position may request the agency head to determine whether or not the employee's current service should be credited and, if it qualifies, whether it should be credited as service in a primary or secondary position. A written request for current service must be made within 6 months after entering the position or after any significant change in the position.

(c) A current or former employee (or the survivor of a former employee) who believes that a period of past service in an unapproved position qualifies as service in a primary or secondary position and meets the conditions for credit may request the agency head to determine whether or not the employee's past service should be credited and, if it qualifies, whether it should be credited as service in a primary or secondary position. A written request for past service must be made no later than June 30, 2012.

(d) The agency head may extend the time limit for filing under paragraph (b) or (c) of this section when, in the judgment of such agency head, the individual shows that he or she was prevented by circumstances beyond his or her control from making the request within the time limit.

### § 831.1607 Withholdings and contributions.

(a) During the service covered under the conditions established by § 831.1603

and § 831.1604, the Department of Homeland Security will deduct and withhold from the employee's base pay the amount required under 5 U.S.C. 8334(a) for such positions and submit that amount, together with agency contributions required by 5 U.S.C. 8334(a), to OPM in accordance with payroll office instructions issued by OPM.

(b) If the correct withholdings and/or Government contributions are not submitted to OPM for any reason whatsoever, the Department of Homeland Security must correct the error by submitting the correct amounts (including both employee and agency shares) to OPM as soon as possible. Even if the Department of Homeland Security waives collection of the overpayment of pay under any waiver authority that may be available for this purpose, such as 5 U.S.C. 5584, or otherwise fails to collect the debt, the correct amount must still be submitted to OPM without delay as soon as possible.

(c) Upon proper application from an employee, former employee or eligible survivor of a former employee, the Department of Homeland Security will pay a refund of erroneous additional withholdings for service that is found not to have been covered service. If an individual has paid to OPM a deposit or redeposit, including the additional amount required for covered service, and the deposit or redeposit is later determined to be erroneous because the service was not covered service, OPM will pay the refund, upon proper application, to the individual, without interest.

(d) The additional employee withholding and agency contribution for covered or creditable service properly made as required under 5 U.S.C. 8334(a)(1) or deposited under 5 U.S.C. 8334(c) are not separately refundable, even in the event that the employee or his or her survivor does not qualify for a special annuity computation under 5 U.S.C. 8339(d).

(e) While an employee who does not hold a primary or secondary position is detailed or temporarily promoted to a primary or secondary position, the additional withholdings and agency contributions will not be made. While an employee who does hold a primary or secondary position is detailed or temporarily promoted to a position which is not a primary or secondary position, the additional withholdings and agency contributions will continue to be made.

### § 831.1608 Mandatory separation.

(a) Except as provided in paragraph (c) of this section, the mandatory separation provisions of 5 U.S.C. 8335(b) apply to customs and border protection officers appointed in primary and secondary positions. A mandatory separation under section 8335(b) is not an adverse action under part 752 of this chapter or a removal action under part 359 of this chapter. Section 831.502 provides the procedures for requesting an exemption from mandatory separation.

(b) In the event an employee is separated mandatorily under 5 U.S.C. 8335(b), or is separated for optional retirement under 5 U.S.C. 8336(c), and OPM finds that all or part of the minimum service required for entitlement to immediate annuity was in a position which did not meet the requirements of a primary or secondary position and the conditions set forth in this subpart, such separation will be considered erroneous.

(c) The customs and border protection officer mandatory separation provisions of 5 U.S.C. 8335(b) do not apply to an individual first appointed as a customs and border protection officer before July 6, 2008.

### § 831.1609 Reemployment.

An employee who has been mandatorily separated under 5 U.S.C. 8335(b) is not barred from reemployment in any position except a primary position after age 60. Service by a reemployed annuitant is not covered by the provisions of 5 U.S.C. 8336(c).

### § 831.1610 Review of decisions.

(a) The final decision of the agency head issued to an employee as the result of a request for determination filed under § 831.1606 may be appealed to the Merit Systems Protection Board under procedures prescribed by the Board.

(b) The final decision of the agency head denying an individual coverage while serving in an approved secondary position because of failure to meet the

conditions in § 831.1604(a) may be appealed to the Merit Systems Protection Board under procedures prescribed by the Board.

### § 831.1611 Oversight of coverage determinations.

(a) Upon deciding that a position is a customs and border protection officer position, the agency head must notify OPM (Attention: Associate Director, Retirement Services, or such other official as may be designated) stating the title of each position, occupational series, position description number (or other unique identifier), the number of incumbents, and whether the position is primary or secondary. The Director of OPM retains the authority to revoke the agency head's determination that a position is a primary or secondary position.

(b) The Department of Homeland Security must establish and maintain a file containing all coverage determinations made by the agency head under § 831.1603 and § 831.1604, and all background material used in making the determination.

(c) Upon request by OPM, the Department of Homeland Security will make available the entire coverage determination file for OPM to audit to ensure compliance with the provisions of this subpart.

(d) Upon request by OPM, the Department of Homeland Security must submit to OPM a list of all covered positions and any other pertinent information requested.

### § 831.1612 Elections of Retirement Coverage, exclusions from retirement coverage, and proportional annuity computations.

(a) *Elections of coverage.* (1) The Department of Homeland Security must provide an employee who is a customs and border protection officer on December 26, 2007, the opportunity to elect not to be treated as a customs and border protection officer under section 535(a) and (b) of the Department of Homeland Security Appropriations Act, 2008, Public Law 110–161, 121 Stat. 2042.

(2) An election under this paragraph (a) is valid only if made on or before June 22, 2008.

(3) An individual eligible to make an election under this paragraph who fails to make such an election on or before June 22, 2008, is deemed to have elected to be treated as a customs and border protection officer for retirement purposes.

(b) *Exclusion from coverage.* The provisions of this subpart and any other specific reference to customs and border protection officers in this part do not apply to employees who on December 25, 2007, were law enforcement officers under subpart I of this part or subpart H of part 842 within U.S. Customs and Border Protection. These employees cannot elect to be treated as a customs and border protection officer under paragraph (a) of this section, nor can they be deemed to have made such an election.

(c) *Proportional annuity computation.* The annuity of an employee serving in a primary or secondary customs and border protection officer position on July 6, 2008, must, to the extent that its computation is based on service rendered as a customs and border protection officer on or after that date, be at least equal to the amount that would be payable—

(1) To the extent that such service is subject to the Civil Service Retirement System, by applying section 8339(d) of title 5, United States Code, with respect to such service; and

(2) To the extent such service is subject to the Federal Employees' Retirement System, by applying section 8415(d) of title 5, United States Code, with respect to such service.

## Subpart Q—Phased Retirement

SOURCE: 79 FR 46619, Aug. 8, 2014, unless otherwise noted.

### § 831.1701 Applicability and purpose.

This subpart contains the regulations implementing provisions of 5 U.S.C. 8336a authorizing phased retirement. This subpart establishes the eligibility requirements for making an election to enter phased retirement status, the procedures for making an election, the record-keeping requirements, and the methods to be used for certain computations not addressed elsewhere in part 831.

**§ 831.1702 Definitions.**

In this subpart—

*Authorized agency official* means—

(1) For the executive branch agencies, the head of an Executive agency as defined in 5 U.S.C. 105;

(2) For the legislative branch, the Secretary of the Senate, the Clerk of the House of Representatives, or the head of any other legislative branch agency;

(3) For the judicial branch, the Director of the Administrative Office of the U.S. Courts;

(4) For the Postal Service, the Postmaster General;

(5) For any other independent establishment that is an entity of the Federal Government, the head of the establishment; or

(6) An official who is authorized to act for an official named in paragraphs (1)–(5) in the matter concerned.

*Composite retirement annuity* means the annuity computed when a phased retiree attains full retirement status.

*Director* means the Director of the Office of Personnel Management.

*Full retirement status* means that a phased retiree has ceased employment and is entitled, upon application, to a composite retirement annuity.

*Full-time* means—

(1) An officially established recurring basic workweek consisting of 40 hours within the employee's administrative workweek (as established under § 610.111 of this chapter or similar authority); or

(2) An officially established recurring basic work requirement of 80 hours per biweekly pay period (as established for employees with a flexible or compressed work schedule under 5 U.S.C. chapter 61, subchapter II, or similar authority).

*Phased employment* means the less-than-full-time employment of a phased retiree.

*Phased retiree* means a retirement-eligible employee who—

(1) With the concurrence of an authorized agency official, enters phased retirement status; and

(2) Has not entered full retirement status.

*Phased retirement annuity* means the annuity payable under 5 U.S.C. 8336a before full retirement.

*Phased retirement percentage* means the percentage which, when added to the working percentage for a phased retiree, produces a sum of 100 percent.

*Phased retirement period* means the period beginning on the date on which an individual becomes entitled to receive a phased retirement annuity and ending on the date on which the individual dies or separates from phased employment.

*Phased retirement status* means that a phased retiree is concurrently employed in phased employment and eligible to receive a phased retirement annuity.

*Working percentage* has the meaning given that term in § 831.1712(a).

**§ 831.1703 Implementing directives.**

The Director may prescribe, in the form he or she deems appropriate, such detailed procedures as are necessary to carry out the purpose of this subpart.

ENTERING PHASED RETIREMENT

**§ 831.1711 Eligibility.**

(a) A retirement-eligible employee, as defined in paragraphs (b) and (c), may elect to enter phased retirement status if the employee has been employed on a full-time basis for not less than the 3-year period ending on the effective date of phased retirement status, under § 831.1714(a).

(b) Except as provided in paragraph (c) of this section, a retirement-eligible employee means an employee who, if separated from the service, would meet the requirements for retirement under subsection (a) or (b) of 5 U.S.C. 8336.

(c) A retirement-eligible employee does not include—

(1) A member of the Capitol Police or Supreme Court Police, or an employee occupying a law enforcement officer, firefighter, nuclear materials courier, air traffic controller, or customs and border protection officer position, except a customs and border protection officer who is exempt from mandatory separation and retirement under 5 U.S.C. 8335 pursuant to section 535(e)(2)(A) of Division E of the Consolidated Appropriations Act, 2008, Public Law 110–161;

(2) An individual eligible to retire under 5 U.S.C. 8336(c), (m), or (n); or

(3) An employee covered by a special work schedule authority that does not allow for a regularly recurring part-time schedule, such as a firefighter covered by 5 U.S.C. 5545b or a nurse covered by 38 U.S.C. 7456 or 7456A.

### § 831.1712 Working percentage and officially established hours for phased employment.

(a) For the purpose of this subpart, *working percentage* means the percentage of full-time equivalent employment equal to the quotient obtained by dividing—

(1) The number of officially established hours per pay period to be worked by a phased retiree, as described in paragraph (b) of this section; by

(2) The number of hours per pay period to be worked by an employee serving in a comparable position on a full-time basis.

(b) The number of officially established hours per pay period to be worked by an employee in phased retirement status must equal one-half the number of hours the phased retiree would have been scheduled to work had the phased retiree remained in a full-time work schedule and not elected to enter phased retirement status. These hours make up the officially established part-time work schedule of the phased retiree and exclude any additional hours worked under § 831.1715(h).

### § 831.1713 Application for phased retirement.

(a) To elect to enter phased retirement status, a retirement-eligible employee covered by § 831.1711 must—

(1) Submit to an authorized agency official a written and signed request to enter phased employment, on a form prescribed by OPM;

(2) Obtain the signed written approval of an authorized agency official to enter phased employment; and

(3) File an application for phased retirement, in accordance with § 831.104.

(b) Except as provided in paragraph (c) of this section, an applicant for phased retirement may withdraw his or her application any time before the election becomes effective, but not thereafter.

(c) An applicant for phased retirement may not withdraw his or her application after OPM has received a certified copy of a court order (under part 581 or part 838 of this chapter) affecting the benefits.

(d)(1) An employee and an agency approving official may agree to a time limit to the employee's period of phased employment as a condition of approval of the employee's request to enter phased employment and phased retirement, or by mutual agreement after the employee enters phased employment status.

(2) To enter into such an agreement, the employee and the approving official must complete a written and signed agreement.

(3) The written agreement must include the following:

(i) The date the employee's period of phased employment will terminate;

(ii) A statement that the employee can request the approving official's permission to return to regular employment status at any time as provided in § 831.1721; the agreement must also explain how returning to regular employment status would affect the employee, as described in §§ 831.1721–1723.

(iii) A statement that the employee has a right to elect to fully retire at any time as provided in § 831.1731;

(iv) A statement that the employee may accept a new appointment at another agency, with or without the new agency's approval of phased employment, at any time before the expiration of the agreement or within 3 days of the expiration of the agreement; the agreement must also explain how accepting an appointment at a new agency as a regular employee would affect the employee, as described in §§ 831.1721–1723;

(v) An explanation that when the agreed term of phased employment ends, the employee will be separated from employment and that such separation will be considered voluntary based on the written agreement; and

(vi) An explanation that if the employee is separated from phased employment and is not employed within 3 days (i.e., the employee has a break in

service of greater than 3 days), the employee will be deemed to have elected full retirement.

(4) The agency approving official and the employee may rescind an existing agreement, or enter into a new agreement to extend or reduce the term of phased employment agreed to in an existing agreement, by entering into a new written agreement meeting the requirements of this paragraph, before the expiration of the agreement currently in effect.

(e) An agency must establish written criteria that will be used to approve or deny applications for phased retirement before approving or denying applications for phased retirement.

### § 831.1714 Effective date of phased employment and phased retirement annuity commencing date.

(a) Phased employment is effective the first day of the first pay period beginning after phased employment is approved by the authorized agency official under § 831.1713(a), or the first day of a later pay period specified by the employee with an authorized agency official's concurrence.

(b) The commencing date of a phased retirement annuity (i.e., the beginning date of the phased retirement period) is the first day of the first pay period beginning after phased employment is approved by an authorized agency official under § 831.1713(a), or the first day of a later pay period specified by the employee with the authorized agency official's concurrence.

### § 831.1715 Effect of phased retirement.

(a)(1) A phased retiree is deemed to be a full-time employee for the purpose of 5 U.S.C. chapter 89 and 5 CFR part 890 (related to health benefits), as required by 5 U.S.C. 8336a(i). The normal rules governing health benefits premiums for part-time employees in 5 U.S.C. 8906(b)(3) do not apply.

(2) A phased retiree is deemed to be receiving basic pay at the rate applicable to a full-time employee holding the same position for the purpose of determining a phased retiree's annual rate of basic pay used in calculating premiums (employee withholdings and agency contributions) and benefits under 5 U.S.C. chapter 87 and 5 CFR part 870 (dealing with life insurance), as required by 5 U.S.C. 8336a(n). The deemed full-time schedule will consist of five 8-hour workdays each workweek, resulting in a 40-hour workweek. Only basic pay for hours within the deemed full-time schedule will be considered, consistent with 5 U.S.C. 8336a(n) and the definition of ''full-time'' in § 831.1702. Any premium pay creditable as basic pay for life insurance purposes under 5 CFR 870.204 for overtime work or hours outside the full-time schedule that an employee was receiving before phased retirement, such as standby duty pay under 5 U.S.C. 5545(c)(1) or customs officer overtime pay under 19 U.S.C. 267(a), may not be considered in determining a phased retiree's deemed annual rate of basic pay under this paragraph.

(b) A phased retiree may not be appointed to more than one position at the same time.

(c) A phased retiree may move to another position in the agency or another agency during phased retirement status only if the change would not result in a change in the working percentage. To move to another agency during phased retirement status and continue phased employment and phased retirement status, the phased retiree must submit a written and signed request and obtain the signed written approval, in accordance with § 831.1713(a)(1) and (2), of the authorized agency official of the agency to which the phased retiree is moving. Notwithstanding the provisions of § 831.1714, if the authorized agency official approves the request, the phased retiree's phased employment and phased retirement status will continue without interruption at the agency to which the phased retiree moves. If the authorized agency official at the agency to which the phased retiree moves does not approve the request, phased employment and phased retirement status terminates in accordance with § 831.1722(b).

(d) A phased retiree may be detailed to another position or agency, subject to 5 CFR part 300, subpart C, if the working percentage of the position to which detailed is the same as the working percentage of the phased retiree's position of record.

(e) A retirement-eligible employee who makes an election under this subpart may not elect an alternative annuity under 5 U.S.C. 8343a.

(f) If the employee's election of phased retirement status becomes effective, the employee is barred from electing phased retirement status again. Ending phased retirement status or entering full retirement status does not create a new opportunity for the individual to elect phased retirement status.

(g) Except as otherwise expressly provided by law or regulation, a phased retiree is treated as any other employee on a part-time tour of duty for all other purposes.

(h)(1) A phased retiree may not be assigned hours of work in excess of the officially established part-time schedule (reflecting the working percentage), except under the conditions specified in paragraph (h)(2) of this section.

(2) An authorized agency official may order or approve a phased retiree to perform hours of work in excess of the officially established part-time schedule only in rare and exceptional circumstances meeting all of the following conditions:

(i) The work is necessary to respond to an emergency posing a significant, immediate, and direct threat to life or property;

(ii) The authorized agency official determines that no other qualified employee is available to perform the required work;

(iii) The phased retiree is relieved from performing excess work as soon as reasonably possible (e.g., by management assignment of work to other employees); and

(iv) When an emergency situation can be anticipated in advance, agency management made advance plans to minimize any necessary excess work by the phased retiree.

(3) Employing agencies must inform each phased retiree and his or her supervisor of—

(i) The limitations on hours worked in excess of the officially established part-time schedule;

(ii) The requirement to maintain records documenting that exceptions met all required conditions;

(iii) The fact that, by law and regulation, any basic pay received for hours outside the employee's officially established part-time work schedule (as described in § 831.1712(a)(1) and (b)) is subject to retirement deductions and agency contributions, in accordance with 5 U.S.C. 8336a(d), but is not used in computing retirement benefits; and

(iv) The fact that, by law and regulation, any premium pay received for overtime work or hours outside the full-time schedule, that would otherwise be basic pay for retirement, such as customs officer overtime pay under 19 U.S.C. 267(a), will not be subject to retirement deductions or agency contributions, in accordance with 5 U.S.C. 8336a(d), and that any such premium pay received will not be included in computing retirement benefits.

(4) Employing agencies must maintain records documenting that exceptions granted under paragraph (h)(2) of this section meet the required conditions. These records must be retained for at least 6 years and be readily available to auditors. OPM may require periodic agency reports on the granting of exceptions and of any audit findings.

(5) If OPM finds that an agency (or subcomponent) is granting exceptions that are not in accordance with the requirements of this paragraph (h), OPM may administratively withdraw the agency's (or subcomponent's) authority to grant exceptions and require OPM approval of any exception.

(6) If OPM finds that a phased retiree has been working a significant amount of excess hours beyond the officially established part-time schedule to the degree that the intent of the phased retirement law is being undermined, OPM may require that the agency end the individual's phased retirement by unilateral action, notwithstanding the normally established methods of ending phased retirement. This finding does not need to be based on a determination that the granted exceptions failed to meet the required conditions in paragraph (h)(2) of this section. With the ending of an individual's phased retirement, that individual must be returned to regular employment status on the same basis as a person making an election under § 831.1721—unless that

individual elects to fully retire as provided under § 831.1731.

(7) A phased retiree must be compensated for excess hours of work in accordance with the normally applicable pay rules.

(8) Any premium pay received for overtime work or hours outside the full-time schedule that would otherwise be basic pay for retirement, such as customs officer overtime pay under 19 U.S.C. 267(a), is not subject to retirement deductions or agency contributions, in accordance with 5 U.S.C. 8336a(d).

(i) A phased retiree is deemed to be an annuitant for the purpose of subpart S of 5 CFR part 831.

RETURNING TO REGULAR EMPLOYMENT STATUS

**§ 831.1721 Ending phased retirement status to return to regular employment status.**

(a) *Election to end phased retirement status to return to regular employment status.* (1) A phased retiree may elect, with the permission of an authorized agency official, to end phased employment at any time to return to regular employment status. The election is deemed to meet the requirements of 5 U.S.C. 8336a(g) regardless of the employee's work schedule. The employee is not subject to any working percentage limitation (i.e., full-time, 50 percent of full-time, or any other working percentage) upon electing to end phased retirement status.

(2) To elect to end phased retirement status to return to regular employment status, a phased retiree must—

(i) Submit to the authorized agency official, on a form prescribed by OPM, a written and signed request to end phased retirement status to return to regular employment status; and

(ii) Obtain the signed written approval of the authorized agency official for the request.

(3) An employee may cancel an approved election to end phased retirement status to return to regular employment status by submitting a signed written request to the agency and obtaining the approval of an authorized agency official before the effective date of return to regular employment status.

(4) The employing agency must notify OPM that the employee's phased retirement status has ended by submitting to OPM a copy of the completed election to end phased retirement status to return to regular employment status within 15 days of its approval.

(b) *Mandated return to regular employment status.* A phased retiree may be returned to regular employment status as provided under § 831.1715(h)(6).

(c) *Bar on reelection of phased retirement.* Once an election to end phased retirement status to return to regular employment status is effective, the employee may not reelect phased retirement status.

**§ 831.1722 Effective date of end of phased retirement status to return to regular employment status.**

(a)(1) Except as provided in paragraph (b) of this section, if a request to end phased retirement status to return to regular employment status is approved by an authorized agency official under § 831.1721 on any date on or after the first day of a month through the fifteenth day of a month, the phased retiree's resumption of regular employment status is effective the first day of the first full pay period of the month following the month in which the election to end phased retirement status to return to regular employment status is approved.

(2) If a request to end phased retirement status to return to regular employment status is approved by an authorized agency official under § 831.1721 on any date on or after the sixteenth day of a month through the last day of a month, the phased retiree's resumption of regular employment status is effective on the first day of the first full pay period of the second month following the month in which the election to end phased retirement status to return to regular employment status is approved.

(3) The phased retirement annuity terminates on the date determined under paragraph (a)(1) or (2) of this section.

(b) When a phased retiree moves from the agency that approved his or her phased employment and phased retirement status to another agency and the authorizing official at the agency to

which the phased retiree moves does not approve a continuation of phased employment and phased retirement status, phased employment and phased retirement status terminates when employment ends at the current employing agency.

**§ 831.1723 Effect of ending phased retirement status to return to regular employment status.**

(a) After phased retirement status ends under § 831.1722, the employee's rights under subchapter III of chapter 83 or chapter 84 of title 5, United States Code, are determined based on the law in effect at the time of any subsequent separation from service.

(b) After an individual ends phased retirement status to return to regular employment status, for the purposes of subchapter III of chapter 83 or chapter 84 of title 5, United States Code, at the time of the subsequent separation from service, the phased retirement period will be treated as if it had been a period of part-time employment with the work schedule described in § 831.1712(a)(1) and (b). The part-time proration adjustment for the phased retirement period will be based upon the individual's officially established part-time work schedule, with no credit for extra hours worked. In determining the individual's deemed rate of basic pay during the phased retirement period, only basic pay for hours within the individual's officially established part-time work schedule may be considered. No pay received for other hours during the phased retirement period may be included as part of basic pay for the purpose of computing retirement benefits, notwithstanding the normally applicable rules.

(c) The restrictions in §§ 831.1751 and 831.1752 regarding when an individual must complete a deposit for civilian service, a redeposit for civilian service that ended on or after March 1, 1991, or a deposit for military service do not apply when a phased retiree ends phased retirement status to return to regular employment status under this section.

(d) When a phased retiree whose phased retirement annuity was subject to an actuarial reduction for unpaid redeposit service, in accordance with § 831.303(c) and (d), ends phased retirement status to return to regular employment status, the annuity the individual becomes entitled to at retirement is subject to the actuarial reduction, increased by cost-of-living adjustments under § 831.1743(d). For the purpose of applying the provisions of § 831.1743(d) under this paragraph, cost-of-living adjustments are applied through the annuity commencing date.

ENTERING FULL RETIREMENT STATUS

**§ 831.1731 Application for full retirement status.**

(a) *Election of full retirement.* (1) A phased retiree may elect to enter full retirement status at any time by submitting to OPM an application for full retirement in accordance with § 831.104. This includes an election made under § 831.1715(h)(6) in lieu of a mandated return to regular employment status. Upon making such an election, a phased retiree is entitled to a composite retirement annuity.

(2) A phasFERCed retiree may cancel an election of full retirement status and withdraw an application for full retirement by submitting a signed written request with the agency and obtaining the approval of an authorized agency official before the commencing date of the composite retirement annuity.

(b) *Deemed election of full retirement.* A phased retiree who is separated from phased employment for more than 3 days enters full retirement status. The individual's composite retirement annuity will begin to accrue on the commencing date of the composite annuity as provided in § 831.1732, and payment will be made after he or she submits an application in accordance with § 831.104 for the composite retirement annuity.

(c) *Survivor election provisions.* An individual applying for full retirement status under this section is subject to the survivor election provisions of subpart F of this part.

**§ 831.1732 Commencing date of composite retirement annuity.**

(a) The commencing date of the composite retirement annuity of a phased retiree who enters full retirement status is the day after separation.

(b) A phased retirement annuity terminates upon separation from service.

COMPUTATION OF PHASED RETIREMENT ANNUITY AT PHASED RETIREMENT AND COMPOSITE RETIREMENT ANNUITY AT FULL RETIREMENT

**§ 831.1741 Computation of phased retirement annuity.**

(a) Subject to adjustments described in paragraphs (b) and (c) of this section, a phased retiree's phased retirement annuity equals the product obtained by multiplying—

(1) The amount of annuity computed under 5 U.S.C. 8339, including any reduction for any unpaid deposit for non-deduction service performed before October 1, 1982, but excluding reduction for survivor annuity, that would have been payable to the phased retiree if, on the date on which the phased retiree enters phased retirement status, the phased retiree had separated from service and retired under 5 U.S.C. 8336(a) or (b); by

(2) The phased retirement percentage for the phased retiree.

(b)(1) The monthly installment of annuity derived from the computation of the annuity under paragraph (a) of this section is reduced by any actuarial reduction for unpaid redeposit service in accordance with § 831.303(c) and (d).

(2) For the purpose of applying § 831.303(c) and (d) in paragraph (b)(1) of this section, the term ''time of retirement'' in § 831.303(c)(2) and (d)(2)(i) means the commencing date of the phased retiree's phased retirement annuity.

(c) The monthly installment of annuity derived from the computation of the annuity under paragraph (a) of this section is also subject to any offset under § 831.1005, adjusted by multiplying the offset that would otherwise apply had the phased retiree fully retired under 5 U.S.C. 8336(a) or (b) by the phased retirement percentage.

**§ 831.1742 Computation of composite annuity at final retirement.**

(a) Subject to the adjustment described in paragraph (c) of this section, a phased retiree's composite retirement annuity at final retirement equals the sum obtained by adding—

(1) The amount computed under § 831.1741(a) without adjustment under § 831.1741(b) and (c), increased by cost-of-living adjustments under § 831.1743(c); and

(2) The ''fully retired phased component'' computed under paragraph (b) of this section.

(b)(1) Subject to the requirements described in paragraphs (b)(2) and (b)(3) of this section, a ''fully retired phased component'' equals the product obtained by multiplying—

(i) The working percentage; by

(ii) The amount of an annuity computed under 5 U.S.C. 8339 that would have been payable at the time of full retirement if the individual had not elected phased retirement status and as if the individual was employed on a full-time basis in the position occupied during the phased retirement period and before any reduction for survivor annuity.

(2) In applying paragraph (b)(1)(ii) of this section, the individual must be deemed to have a full-time schedule during the period of phased retirement. The deemed full-time schedule will consist of five 8-hour workdays each workweek, resulting in a 40-hour workweek. In determining the individual's deemed rate of basic pay during phased retirement, only basic pay for hours within the deemed full-time schedule will be considered, consistent with the definition of ''full-time'' in § 831.1702. Any premium pay creditable as basic pay for retirement purposes for overtime work or hours outside the full-time schedule that an employee was receiving before phased retirement, such as standby duty pay under 5 U.S.C. 5545(c)(1) or customs officer overtime pay under 19 U.S.C. 267(a), may not be considered in determining a phased retiree's deemed rate of basic pay during phased retirement.

(3) In computing the annuity amount under paragraph (b)(1) of this section—

(i) The amount of unused sick leave equals the result of dividing the days of unused sick leave to the individual's credit at separation for full retirement by the working percentage; and

(ii) The reduction for any unpaid deposit for non-deduction service performed before October 1, 1982, is based on the amount of unpaid deposit, with

interest computed to the commencing date of the composite annuity.

(c) The composite retirement annuity computed under paragraph (a) of this section is adjusted by applying any reduction for any survivor annuity benefit.

(d) The monthly installment derived from a composite retirement annuity computed under paragraph (a) of this section and adjusted under paragraph (c) is adjusted by any—

(1) Actuarial reduction applied to the phased retirement annuity under § 831.1741(b), increased by cost-of-living adjustments under § 831.1743(d); and

(2) Offset under § 831.1005 (i.e., the offset based on all service, including service during the phased retirement period, performed by the individual that was subject to mandatory Social Security coverage).

### § 831.1743 Cost-of-living adjustments.

(a) The phased retirement annuity under § 831.1741 is increased by cost-of-living adjustments in accordance with 5 U.S.C. 8340.

(b) A composite retirement annuity under § 831.1742 is increased by cost-of-living adjustments in accordance with 5 U.S.C. 8340, except that 5 U.S.C. 8340(c)(1) does not apply.

(c)(1) For the purpose of computing the amount of phased retirement annuity used in the computation under § 831.1742(a)(1), the initial cost-of-living adjustment applied is prorated in accordance with 5 U.S.C. 8340(c)(1).

(2) If the individual enters full retirement status on the same day as the effective date of a cost-of-living adjustment (usually December 1st), that cost-of-living adjustment is applied to increase the phased retirement annuity used in the computation under § 831.1742(a)(1).

(d)(1) For the purpose of computing the actuarial reduction used in the computation under § 831.1742(d)(1), the initial cost-of-living adjustment applied is prorated in accordance with 5 U.S.C. 8340(c)(1).

(2) If the individual enters full retirement status on the same day as the effective date of a cost-of-living adjustment (usually December 1st), that cost-of-living adjustment is applied to increase the actuarial reduction used in the computation under § 831.1742(d)(1).

(3) When applying each cost-of-living adjustment to the actuarial reduction used in the computation under § 831.1742(d)(1), the actuarial reduction is rounded up to the next highest dollar.

## Opportunity of a Phased Retiree To Pay a Deposit or Redeposit for Civilian or Military Service

### § 831.1751 Deposit for civilian service for which no retirement deductions were withheld and redeposit for civilian service for which retirement deductions were refunded to the individual.

(a)(1) Any deposit an employee entering phased retirement status wishes to make for civilian service for which no retirement deductions were withheld (i.e., ''non-deduction'' service) must be paid within 30 days from the date OPM notifies the employee of the amount of the deposit, during the processing of the employee's application for phased retirement. The deposit amount will include interest under § 831.105, computed to the effective date of phased retirement.

(2) No deposit payment may be made by the phased retiree when entering full retirement status.

(3) As provided under § 831.1741(a)(1), for the computation of phased retirement annuity, the amount of any unpaid deposit for non-deduction service performed before October 1, 1982, including interest computed to the effective date of phased retirement annuity, will be the basis for reduction of the phased retirement annuity for such unpaid deposit.

(4) As provided under § 831.1742(b)(2), the amount of any unpaid deposit for non-deduction service performed before October 1, 1982, including interest computed to the commencing date of the composite annuity, will be the basis for reduction of the ''fully retired phased component'' for such unpaid deposit.

(b)(1) Any redeposit an employee entering phased retirement status wishes to make for civilian service for which retirement deductions were refunded to the employee must be paid within 30 days from the date OPM notifies the

employee of the amount of the redeposit, during the processing of the employee's application for phased retirement. The redeposit amount will include interest under § 831.105 computed to the effective date of phased retirement.

(2) No redeposit payment may be made by the phased retiree when entering full retirement status.

(3) As provided under § 831.1741(b), for the computation of monthly installment of phased retirement annuity, the amount of any unpaid redeposit at phased retirement, or unpaid balance thereof, including interest computed to the effective date of phased retirement, will be the basis, along with the phased retiree's age, for any actuarial reduction of the monthly installment of phased retirement annuity for such unpaid redeposit.

(4) As provided under § 831.1742(d)(1), any actuarial reduction for unpaid redeposit service applied to the monthly installment of phased retirement annuity, as described in paragraph (b)(3) of this section and § 831.1741(b), is increased by cost-of-living adjustments and applied to the monthly installment derived from the composite retirement annuity.

### § 831.1752 Deposit for military service.

(a) A phased retiree who wishes to make a military service credit deposit under § 831.2104(a) for military service performed prior to entering phased retirement status must complete such a deposit no later than the day before the effective date of his or her phased employment and the commencing date of the phased retirement annuity. A military service credit deposit for military service performed prior to an individual's entry into phased retirement status cannot be made after the effective date of phased employment and the commencing date of phased retirement annuity.

(b) A phased retiree who wishes to make a military service credit deposit under § 831.2104(a) for military service performed after the effective date of phased employment and the commencing date of the phased retirement annuity and before the effective date of the composite retirement annuity (e.g., due to the call-up of the employee for active military service) must complete such a deposit no later than the day before the effective date of his or her composite retirement annuity.

### § 831.1753 Civilian and military service of an individual affected by an erroneous retirement coverage determination.

(a) For the purpose of crediting service for which actuarial reduction of annuity is permitted under § 831.303(d) for an employee who enters phased retirement, the deposit amounts under § 831.303(d) form the basis, along with the phased retiree's age, for any actuarial reduction of the phased retirement annuity for such unpaid deposits.

(b) No deposit payment for service described under § 831.303(d) may be made by the phased retiree when entering full retirement status.

(c) As provided under § 831.1741(b), the amount of any deposit under § 831.303(d) at the commencing date of the individual's phased retirement annuity, or unpaid balance thereof, including interest computed to the effective date of phased retirement annuity, will be the basis, along with the phased retiree's age, for any actuarial reduction of the phased retirement annuity for such unpaid deposit.

(d) As provided under § 831.1742(d)(1), any actuarial reduction for any unpaid deposit service under § 831.303(d) applied to the phased retirement annuity, as described in § 831.1741(b), is increased by cost-of-living adjustments and applied to the monthly installment derived from the composite retirement annuity.

## DEATH BENEFITS

### § 831.1761 Death of phased retiree during phased employment.

(a) For the purpose of 5 U.S.C. 8341—

(1) The death of a phased retiree is deemed to be a death in service of an employee; and

(2) The phased retirement period is deemed to have been a period of part-time employment with the work schedule described in § 831.1712(a)(1) and (b) for the purpose of determining survivor benefits. The part-time proration adjustment for the phased retirement period will be based upon the employee's officially established part-time work

schedule, with no credit for extra hours worked. In determining the employee's deemed rate of basic pay during the phased retirement period, only basic pay for hours within the employee's officially established part-time work schedule may be considered. No pay received for other hours during the phased retirement period may be included as part of basic pay for the purpose of computing retirement benefits, notwithstanding the normally applicable rules.

(b) If a phased retiree elects not to make a deposit described in 5 U.S.C. 8334(d)(1), such that his or her annuity is actuarially reduced under 5 U.S.C. 8334(d)(2) and § 831.1741(b), and that individual dies in service as a phased retiree, the amount of any deposit upon which such actuarial reduction was to have been based will be deemed to have been fully paid.

### § 831.1762 Death of an individual who has separated from phased employment and who dies before submitting an application for a composite retirement annuity.

(a) For the purpose of 5 U.S.C. 8341, an individual who dies after separating from phased employment and before submitting an application for composite retirement annuity is deemed to have filed an application for full retirement status, and composite retirement annuity, with OPM.

(b) Unless an individual described in paragraph (a) of this section was reemployed with the Federal Government after separating from phased employment, the composite retirement annuity of an individual described in paragraph (a) of this section is deemed to have accrued from the day after separation through the date of death. Any composite annuity accrued during such period of time, minus any phased annuity paid during that period, will be paid as a lump-sum payment of accrued and unpaid annuity, in accordance with 5 U.S.C. 8342(c) and (f).

### § 831.1763 Lump-sum credit.

If an individual performs phased employment, the lump-sum credit will be reduced by any annuity that is paid or accrued during phased employment.

## REEMPLOYMENT AFTER SEPARATION FROM PHASED RETIREMENT STATUS

### § 831.1771 Reemployment of an individual who has separated from phased employment and who dies before submitting an application for a composite retirement annuity.

(a) Unless eligibility for annuity terminates under 5 U.S.C. 8344, a phased retiree who has been separated from employment for more than 3 days and who has entered full retirement status, but who has not submitted an application for composite retirement annuity, is deemed to be an annuitant receiving annuity from the Civil Service Retirement and Disability Fund during any period of employment in an appointive or elective position in the Federal Government.

(b) A phased retiree described in paragraph (a) whose entitlement to a composite retirement annuity terminates under 5 U.S.C. 8344 due to reemployment, is an employee effective upon reemployment. The individual is not entitled to a phased retirement annuity (i.e., phased retirement annuity does not resume) during the period of employment, and the individual's entitlement to a composite retirement annuity terminates effective on the date of employment.

## MENTORING

### § 831.1781 Mentoring.

(a) A phased retiree, other than an employee of the United States Postal Service, must spend at least 20 percent of his or her working hours in mentoring activities as defined by an authorized agency official. For purposes of this section, mentoring need not be limited to mentoring of an employee who is expected to assume the phased retiree's duties when the phased retiree fully retires.

(b) An authorized agency official may waive the requirement under paragraph (a) of this section in the event of an emergency or other unusual circumstances (including active duty in the armed forces) that, in the authorized agency official's discretion, would make it impracticable for a phased retiree to fulfill the mentoring requirement.

## Subpart R—Agency Requests to OPM for Recovery of a Debt from the Civil Service Retirement and Disability Fund

SOURCE: 51 FR 45443, Dec. 19, 1986, unless otherwise noted.

### § 831.1801 Purpose.

This subpart prescribes the procedures to be followed by a Federal agency when it requests the Office of Personnel Management (OPM) to recover a debt owed to the United States by administrative offset against money due and payable to the debtor from the Civil Service Retirement and Disability Fund (the Fund). This subpart also prescribes the procedures that OPM must follow to make these administrative offsets.

### § 831.1802 Scope.

This subpart applies to agencies, employees, and Members, as defined by § 831.1803.

### § 831.1803 Definitions.

For purposes of this subpart, terms are defined as follows—

*Act* means the Federal Claims Collection Act of 1966 as amended by the Debt Collection Act of 1982 and implemented by 4 CFR 101.1 *et seq.*, the Federal Claims Collection Standards (FCCS).

*Administrative offset* means withholding money payable from the Fund to satisfy a debt to the United States under 31 U.S.C. 3716.

*Agency* means (a) an Executive agency as defined in section 105 of title 5, United States Code, including the U.S. Postal Service and the U.S. Postal Rate Commission; (b) a military department, as defined in section 102 of title 5, United States Code; (c) an agency or court in the judicial branch, including a court as defined in section 610 of title 28, United States Code, the District Court for the Northern Mariana Islands, and the Judicial Panel on Multidistrict Litigation; (d) an agency of the legislative branch, including the U.S. Senate and the U.S. House of Representatives; and (e) other independent establishments that are entities of the Federal Government.

*Annuitant* has the same meaning as in section 8331(9) of title 5, United States Code.

*Annuity* means the monthly benefit payable to an annuitant or survivor annuitant.

*Compromise* has the same meaning as in 4 CFR part 103.

*Consent* means the debtor has agreed in writing to administrative offset after receiving notice of all rights under 31 U.S.C. 3716 and this subpart.

*Creditor agency* means the agency to which the debt is owed.

*Debt* means an amount owed to the United States on account of loans insured or guaranteed by the United States, and other amounts due the United States from fees, duties, leases, rents, royalties, services, sales of real or personal property, overpayments, fines, penalties, damages, interests, taxes, forfeitures, etc.

*Debt claim* means an agency request for recovery of a debt in a form approved by OPM.

*Debtor* means a person who owes a debt, including an employee, former employee, Member, former Member, or the survivor of one of these individuals.

*Employee* has the same meaning as in section 8331(1) of title 5, United States Code, and includes reemployed annuitants and employees of the U.S. Postal Service.

*Fraud claim* means any debt designated by the Attorney General (or designee) as involving an indication of fraud, the presentation of a false claim, or misrepresentation on the part of the debtor or any other party having an interest in the claim.

*Fund* means the Civil Service Retirement and Disability Fund established under 5 U.S.C. 8348.

*Lump-sum credit* has the same meaning as in section 8331(8) of title 5, United States Code.

*Member* has the same meaning as in section 8331(2) of title 5, United States Code.

*Net annuity* means annuity after excluding amounts required by law to be deducted. For example, Federal income tax is excluded up to the maximum amount that the individual is entitled to for all dependents. Other examples

of exclusions are group health insurance premiums (including amounts deducted for Medicare) and group life insurance premiums.

*Paying agency* means the agency that employs the debtor and authorizes the disbursement of his or her current pay account.

*Refund* means the payment of a lump-sum credit to an individual who meets all requirements for payment and files application for it.

### § 831.1804 Conditions for requesting an offset.

An agency may request that money payable from the Fund be offset to recover any valid debt due the United States when all of the following conditions are met:

(a) The debtor failed to pay all of the debt on demand, or the creditor agency has collected as much as possible from payments due the debtor from the paying agency; and

(b) The creditor agency sends a debt claim to OPM (under § 831.1805(b) (1), (2), (3), or (4), as appropriate) after doing one of the following:

(1) Obtaining a court judgment for the amount of the debt;

(2) Following the procedures required by 31 U.S.C. 3716 and 4 CFR 102.4;

(3) Following the procedures required by 5 U.S.C. 5514 and § 550.1107 of this title; or

(4) Following the procedures agreed upon by the creditor agency and OPM, if it is excepted by § 831.1805(b)(4) from the completion of procedures prescribed by § 831.1805(b)(3).

### § 831.1805 Creditor agency processing for non-fraud claims.

(a) *Where to submit the debt claim, judgment or notice of debt*—(1) *Creditor agencies that are not the debtor's paying agency*. (i) If the creditor agency knows that the debtor is employed by the Federal Government, it should send the debt claim to the debtor's paying agency for collection.

(ii) If some of the debt is unpaid after the debtor separates from the paying agency, the creditor agency should send the debt claim to OPM as described in paragraph (b) of this section.

(2) *Creditor agencies that are the debtor's paying agency*. Ordinarily, debts owed the paying agency should be offset under 31 U.S.C. 3716 from any final payments (salary, accrued annual leave, etc.) due the debtor. If a balance is due after offsetting the final payments or the debt is discovered after the debtor has been paid, the paying agency may send the debt claim to OPM as described in paragraph (b) of this section.

(b) *Procedures for submitting a debt claim, judgment or notice of debt to OPM*—(1) *Debt claims for which the agency has a court judgment*. If the creditor agency has a court judgment against the debtor specifying the amount of the debt to be recovered, the agency should send the debt claim and two certified copies of the judgment to OPM.

(2) *Debt claims previously processed under 5 U.S.C. 5514*. If the creditor agency previously processed the debt claim under section 5514, it should—

(i) Notify the debtor that the claim is being sent to OPM to complete collection from the Fund; and

(ii) Send the debt claim (on SF 2805) to OPM with two copies of the paying agency's certification of the amount collected and one copy of the notice to the debtor that the claim was sent to OPM.

(3) *Debt claims not processed under 5 U.S.C. 5514, reduced to court judgment, or excepted by paragraph (b)(4) of this section*. (i) If the debt claim was not processed under § 5514, reduced to court judgment or excepted by paragraph (b)(4) of this section, the creditor agency must—

(A) Comply with the procedures required by 4 CFR 102.4—issuing written notice to the debtor of the nature and amount of the debt, the agency's intention to collect by offset, the opportunity to inspect and copy agency records pertaining to the debt, the opportunity to obtain review within the agency of the determination of indebtedness, and the opportunity to enter into a written agreement with the agency to repay the debt; and

(B) Complete the appropriate debt claim.

(ii) If the debtor does not respond to the creditor agency's notice within the allotted time and there is no reason to believe that he or she did not receive the notice, the creditor agency may

submit the debt claim to OPM after certifying that notice was issued and the debtor failed to reply.

(iii) If the debtor responds to the notice by requesting a review (or hearing if one is available), the review (or hearing) must be completed before the creditor agency submits the debt claim.

(iv) If the debtor receives the notice and responds by consenting to the collection, the creditor agency must send a copy of the debtor's consent along with the debt claim.

(4) *Debt claims excepted from procedures described in paragraph (b)(3) of this section.* Creditor agencies follow specific procedures approved by OPM, rather than those described in paragraph (b)(3) of this section, for the collection of—

(i) Debts due because of the individual's failure to pay health benefits premiums while he or she was in nonpay status or while his or her salary was not sufficient to cover the cost of premiums;

(ii) Unpaid Federal taxes to be collected by Internal Revenue Service levy;

(iii) Premiums due because of the annuitant's election of Part B, Medicare coverage (retroactive collection limited to 6 months of premiums); or

(iv) Overpaid military retired pay an annuitant elects in writing to have withheld from his or her annuity.

(5) *General certification requirements for debt claims.* Creditor agencies submitting debt claims must certify—

(i) That the debt is owed to the United States;

(ii) The amount and reason for the debt and whether additional interest accrues;

(iii) The date the Government's right to collect the debt first accrued;

(iv) The agency has complied with the applicable statutes, regulations, and OPM procedures;

(v) That if a competent administrative or judicial authority issues an order directing OPM to pay a debtor an amount previously paid to the agency (regardless of the reasons behind the order), the agency will reimburse OPM or pay the debtor directly within 15 days of the date of the order (NOTE: OPM may, at its discretion, decline to collect other debt claims sent by an agency that does not abide by this certification.);

(vi) If the collection will be in installments, the amount or percentage of net annuity in each installment; and,

(vii) If the debtor does not (in writing) consent to the offset, or does not (in writing) acknowledge receipt of the required notices and procedures, or the creditor agency does not document a judgment offset or a previous salary offset, the action(s) taken to comply with 4 CFR 102.3, including any required hearing or review, and the date(s) the action(s) was taken.

(6) *Notice of debt.* When a creditor agency cannot send a complete debt claim, it should notify OPM of the existence of the debt so the lump-sum will not be paid before the debt claim arrives.

(i) The notice to OPM must include a statement that the debt is owed to the United States, the date the debt first accrued, and the basis for and amount of the debt, if known. If the amount of the debt is not known, the agency must establish the amount and notify OPM in writing as soon as possible after submitting the notice.

(ii) The creditor agency may either notify OPM by making a notation in column 8 [Remarks] under ''Fiscal Record'' on the Standard Form 2806 (Individual Retirement Record), if the SF 2806 is in its possession, or if not, by submitting a separate document identifying the debtor by name, giving his or her date of birth, social security number, and date of separation, if known.

(c) *Time limits for sending records and debt claims to OPM*—(1) *Time limits for submitting debt claims.* Unless there is an application for refund pending, there is no specific time for submitting a debt claim or notice of debt to OPM. Generally, however, agencies must file a debt claim before the statute of limitations expires (4 CFR 102.4(c)) or before a refund is paid. Time limits are imposed (see § 831.1806(a)) when the debtor is eligible for a refund and OPM receives his or her application requesting payment. In the latter situation, creditor agencies must file a complete debt claim within 120 days (or 180 days if the agency requests an extension of

time before the refund is paid) of the date OPM requests a complete debt claim.

(2) *Time limit for submitting retirement records to OPM.* A paying agency must send an individual's SF 2806 to OPM no later than 60 days after the separation, termination, or entrance on duty in a position in which the employee is not covered by the Civil Service Retirement System.

### § 831.1806 OPM processing for non-fraud claims.

(a) *Refunds—incomplete debt claims.* (1) If a creditor agency sends OPM a notice of debt or an incomplete debt claim against a refund OPM is processing for payment, OPM will withhold the amount of the debt but will not make any payment to the creditor agency. OPM will notify the creditor agency that the procedures in this subpart and 4 CFR 102.4 must be completed; and a debt claim must be completed and returned to OPM within 120 days of the date of OPM's notice to the creditor agency. Upon request, OPM will grant the creditor agency one extension of up to 60 days if the request for extension is received before the lump-sum payment has been made. The extension will commence on the day after the 120-day period expires so that the total time OPM holds payment of the refund will not exceed 180 days.

(2) During the period allotted the creditor agency for sending OPM a complete debt claim, OPM will handle the debtor's application for refund under section 8342(a) of title 5, United States Code, in one of two ways:

(i) If the amount of the debt is known, OPM will notify the debtor of the debt claim against his or her lump-sum credit, withhold the amount of the debt, and pay the balance to the debtor, if any.

(ii) If the amount of the debt is not known, OPM will not pay any amount to the debtor until the creditor agency certifies the amount of the debt, submits a complete debt claim, or the time limit for submission of the debt claim expires, whichever comes first.

(b) *Refunds—complete debt claims*—(1) *If OPM receives an application from the debtor prior to or at the same time as the agency's debt claim.* (i) If a refund has been paid, we will notify the creditor agency there are no funds available for offset. Except in the case of debts due because of the employee's failure to pay health benefits premiums while he or she is in nonpay status or while his or her salary was not sufficient to cover the cost of premiums, creditor agencies should refer to the instructions in the FCCS for other measures to recover the outstanding debt; however, OPM will retain the SF 2805 on file in the event the debtor is once again employed in a position subject to retirement deductions.

(ii) If a refund is payable, and the creditor agency submits a complete debt claim in accordance with § 831.1805(b) (1), (2), (3), or (4), the debt will be collected from the refund and any balance paid to the debtor. OPM will send the debtor a copy of the debt claim, judgment, consent, or other document, and notify him or her that the creditor agency was paid.

(2) *If OPM has not received an application from the debtor when the agency's debt claim is received.* If a debtor has not filed application for a refund, OPM will retain the debt claim for future recovery. OPM will make the collection whenever an application is received, provided the creditor agency *initiated* the administrative offset before the statute of limitations expired. (See 4 CFR 102.3(b)(3) and 102.4(c).) OPM will notify the creditor agency that it does not have an application from the debtor so that the agency may take other action to recover the debt. (Note: If the recovery action is successful, the creditor agency must notify OPM so it can void the debt claim).

(3) *Future recovery.* (i) If OPM receives an application for refund within 1 year of the date the agency's debt claim was received *and* the creditor agency does not indicate that interest is accruing on the debt, the debt will be processed as stated in paragraph (b)(1)(ii) of this section.

(ii) If OPM receives an application for refund within 1 year of the date the agency's debt claim was received and the creditor agency indicates that interest accrues on the debt, when necessary, OPM will contact the creditor agency to confirm that the debt is outstanding and request submission in

writing, of the total additional accrued interest. OPM will not make interest computations for creditor agencies.

(iii) When OPM receives an application for refund more than 1 year after the creditor agency's debt claim was received, whether interest accrues or not, OPM will contact the creditor agency to see if the debt is still outstanding and, when necessary, request an update of the interest charges. If the debt is still due, the creditor agency must give the debtor an opportunity to establish that his or her changed financial circumstances, if any, would make the offset unjust. (See 4 CFR 102.4(c).) If the creditor agency determines that offset as requested in the debt claim would be unjust because of the debtor's changed financial circumstances, the agency should permit the debtor to offer a satisfactory repayment plan in lieu of offset. If the agency decides to pursue the offset, it must submit to OPM the requested information and any new instructions within 60 days of the date of OPM's request or the claim may be voided and the balance paid to the individual.

(c) *Annuities—incomplete debt claims.* If a creditor agency sends OPM notice of a debt or an incomplete debt claim against a debtor who is receiving an annuity, OPM will not offset the annuity. OPM will notify the creditor agency that the procedures in this subpart and 4 CFR 102.4 must be completed; and a debt claim must be completed and sent to OPM. No time limit will be given for the submission of a debt claim against an annuity; however, a complete debt claim must be received within 10 years of the date the Government's right to collect first accrued (4 CFR 102.3(b)(3)).

(d) *Annuities—complete debt claims*—(1) *General*—(i) *Notice.* When OPM receives a complete debt claim and an application for annuity, OPM will offset the annuity, pay the creditor agency, and mail the debtor a copy of the debt claim along with notice of the payment to the creditor agency.

(ii) *Beginning deductions.* If OPM has already established the debtor's annuity payment, deductions will begin with the next available annuity payment. If OPM is in the process of establishing the annuity payments, deductions will not be taken from advance annuity payments, but will begin with the annuity payable on the first day of the month following the last advance payment.

(iii) *Updating accrued interest.* Once OPM has completed a collection, if there are additional accrued interest charges, the creditor agency must contact OPM regarding any additional amount due within 90 days of the date of the final payment.

(2) *Claims held for future recovery.* (i) If OPM receives an application for annuity within 1 year of the date the agency's debt claim was received, the debt will be processed as stated in paragraph (d)(1) of this section.

(ii) If OPM receives an application for annuity more than 1 year after the agency's debt claim was submitted, OPM will contact the creditor agency to see if the debt is still outstanding. If the debt is still due, the creditor agency should permit the debtor to offer a satisfactory repayment plan in lieu of offset if the debtor establishes that his or her changed financial circumstances would make the offset unjust. (See 4 CFR 102.4(c).) If the agency decides to pursue the offset, it must submit the requested information and any new instructions about the collection to OPM.

(3) *Limitations on OPM review.* In no case will OPM review—

(1) The merits of a creditor agency's decision with regard to reconsideration, compromise, or waiver; or

(2) The creditor agency's decision that a hearing was not required in any particular proceeding.

### § 831.1807 Installment withholdings.

(a) When possible, OPM will collect a creditor agency's full claim in one payment from the debtor's refund or annuity.

(b) If collection must be made from an annuity and the debt is large, the creditor agency must generally accept payment in installments. The responsibility for establishing and notifying the debtor of the amount of the installments belongs to the creditor agency (see § 831.1805(b)(5)). However, OPM will not make an installment deduction for more than 50 percent of net annuity, unless a higher percentage is needed to

satisfy a judgment against a debtor within 3 years or the annuitant has consented to the higher amount in writing. All correspondence concerning installment deductions received by OPM will be referred to the creditor agency for consideration.

### § 831.1808 Special processing for fraud claims.

When an agency sends a claim indicating fraud, presentation of a false claim, misrepresentation by the debtor or any other party interested in the claim, or any claim based in whole or part on conduct violating the antitrust laws, to the Department of Justice (Justice) for possible treatment as a fraud claim (4 CFR 101.3), the following special procedures apply.

(a) *Agency processing.* If the debtor is separated or separates while Justice is reviewing the claim, the paying agency must send the SF 2806 to OPM, as required by § 831.1805(c)(2). The agency where the claim arose must send OPM notice that a claim is pending with Justice. (See § 831.1805(b)(6) for instructions on giving OPM a notice of debt.)

(b) *Department of Justice processing.* (1) The Attorney General or a designee will decide whether a debt claim sent in by an agency will be reserved for collection by Justice as a fraud claim. Upon receiving a possible fraud claim to be collected by offset from the Fund, the Attorney General or a designee must notify OPM. The notice to OPM must contain the following:

(i) The name, date of birth, and social security number of the debtor;

(ii) The amount of the possible fraud claim, if known;

(iii) The basis of the possible fraud claim; and

(iv) A statement that the claim is being considered as a possible fraud claim, the collection of which is reserved to Justice.

(2) When there is a pending refund application, the Attorney General or designee must file a complaint seeking a judgment on the claim and send a copy of the complaint to OPM; or as provided in 4 CFR 101.3, refer the claim to the agency where the claim arose and submit a copy of the referral to OPM within 180 days of the date of either notice from the agency that a claim is pending with Justice (paragraph (a) of this section) or notice from Justice that it has received a possible fraud claim (paragraph (b)(1) of this section) whichever is earlier. When the claim is referred to the agency where it arose, the agency must begin administrative collection action under 4 CFR 102.4 and send a complete debt claim to OPM as required in § 831.1805.

(c) *OPM processing against refunds.* (1) Upon receipt of a notice under paragraph (a) or (b)(1) of this section, whichever is earlier, OPM will withhold the amount of the debt claim, if known; notify the debtor that the amount of the debt will be withheld from the refund for at least 180 days from the date of the notice that initiated OPM processing; and pay the balance to the debtor. If the amount of the debt claim is not known, OPM will notify the debtor that a debt claim may be offset against his or her refund and that OPM will not pay any amount until either the amount of the debt claim is established, or the time limit for filing a complaint in court or submitting the debt claim expires, whichever comes first.

(2) If the Attorney General files a complaint and notifies OPM within the applicable 180-day period, OPM will continue to withhold payment of the lump-sum credit until there is a final judgment.

(3) If the Attorney General refers the claim to the agency where the claim arose (creditor agency) and notifies OPM within the applicable 180-day period, OPM will notify the creditor agency that the procedures in this subpart and 4 CFR 102.4 must be completed; and a debt claim must be sent to OPM within 120 days of the date of OPM's notice to the creditor agency. At the request of the creditor agency, one extension of time of not more than 60 days will be granted, as provided by § 831.1806(a).

(4) If OPM is not notified that a complaint has been filed or that the claim has been referred to the creditor agency within the applicable 180-day period, OPM will pay the balance of the refund to the debtor.

(d) *OPM processing against annuities.* If the debtor has filed an annuity claim, OPM will not take action

against the annuity. OPM will continue to pay the annuity unless and until there is a final judgment for the United States or submission of a complete debt claim.

(e) *OPM collection and payment of the debt.* (1) If the United States obtains a judgment against the debtor for the amount of the debt or the creditor agency submits a complete debt claim, OPM will collect and pay the debt to the creditor agency as provided in §§ 831.1806 and 831.1807.

(2) If the suit or the administrative proceeding results in a judgment for the debtor without establishing a debt to the United States, OPM will pay the balance of the refund to the debtor upon receipt of a certified copy of the judgment or administrative decision.

## Subpart S—State Income Tax Withholding

SOURCE: 47 FR 50679, Nov. 9, 1982, unless otherwise noted.

### § 831.1901 Definitions.

For the purpose of this subpart:

*Agreement* means the Federal-State agreement contained in this subpart.

*Annuitant* means an employee or Member retired, or a spouse, widow, or widower receiving survivor benefits, under the provisions of subchapter III, chapter 83 of title 5, United States Code.

*Effective date* means, with respect to a request or revocation, that the request or revocation will be reflected in payments authorized after that date, and before the next request or revocation is implemented.

*Fund* means the Civil Service Retirement and Disability Fund as established and described in section 8348 of title 5, United States Code.

*Income tax* and *State income tax* mean any form of tax for which, under a State statute, (a) collection is provided, either in imposing on employers generally the duty of withholding sums from the compensation of employees and making returns of such sums to the State or by granting to employers generally the authority to withhold sums from the compensation of employees, if any employee voluntarily elects to make such sums withheld; and (b) the duty to withhold generally is imposed, or the authority to withhold generally is granted, with respect to the compensation of employees who are residents of the State.

*Net recurring payment* means the amount of annuity or survivor benefits (not recurring interim payments made while a claim is pending adjudication) payable to the annuitant on a monthly basis less the amounts currently being deducted for health benefits, Medicare, life insurance, Federal income tax, overpayment of annuity, indebtedness to the Government, voluntary allotments, waivers, or being paid to a third party or a court officer in compliance with a court order or decree.

*Net withholding* means the amount of State income tax deductions withheld during the previous calendar quarter as a result of requests which designated the State as payee, less similar deductions taken from prior payments which were cancelled in the previous calendar quarter. *Proper State official* means a State officer authorized to bind the State contractually in matters relating to tax administration.

*Received* means, in respect to the magnetic tape containing requests and revocations, received at the special mailing address established by OPM for income tax requests, or, for those items not so received, received at the OPM data processing center charged with processing requests.

*Request* means, in regard to a request for tax withholding, a change in the amount withheld, or revocation of a prior request, a written submission from an annuitant in a format acceptable to the State which provides the annuitant's name, Civil Service Retirement Claim number, Social Security identification number, address, the amount to be withheld and the State to which payment is to be made, which is signed by the annuitant or, in the case of incompetence, his or her representative payee.

*State* means a State, the District of Columbia, or any territory or possession of the United States.

### § 831.1902 Federal-State agreements.

OPM will enter into an agreement with any State within 120 days of an application for agreement from the

proper State official. The terms of the standard agreement will be §§ 831.1903 through 831.1906 of this subpart. OPM and the State may agree to additional terms and provisions, insofar as those additional terms and provisions do not contradict or otherwise limit the terms of the standard agreement.

**§ 831.1903 OPM responsibilities.**

OPM will, in performance of this agreement:

(a) Process the magnetic tape containing State tax transactions against the annuity roll once a month at the time monthly recurring payments are prepared for the United States Treasury Department. Errors that are identified will not be processed into the file, and will be identified and returned to the State for resolution via the monthly error report. Collections of State income tax will continue in effect until the State requesting the initial action supplies either a valid revocation or change. The magnetic tape must be received 35 days prior to the date of the check in which the transactions are to be effective. For example, withholding transactions for the July 1 check must be received 5 days prior to June 1. If the magnetic tape submitted by the State cannot be read, OPM will notify the State of this fact, and if a satisfactory replacement can be supplied in time for monthly processing, it will be processed.

(b) Deduct from the regular, recurring annuity payments of an annuitant the amount he or she has so requested to be withheld, provided that:

(1) The amount of the request is an even dollar amount, not less than Five Dollars nor more than the net recurring amount. The State may set any even dollar amount above Five Dollars as a minimum withholding amount.

(2) The annuitant has not designated more than one other State for withholding purposes within the calendar year. The State can set any limit on the number of changes an annuitant may make in the amount to be withheld.

(c) Retain the amounts withheld in the Fund until payment is due.

(d) Pay the net withholding to the State on the last day of the first month following each calendar quarter.

(e) Make the following reports:

(1) A monthly report which will include all the State tax withholdings, cancellations and adjustments for the month, and also each request OPM was not able to process, with an explanation, in coded format, of the reason for rejection.

(2) A quarterly report which will include State, State address, quarterly withholdings, quarterly cancellations and adjustments, quarterly net withholdings and year-to-date amounts. Where cancelled or adjusted payments were made in a previous year, OPM shall append a listing of the cancelled or adjusted payments which shows the date and amount of each cancelled or adjusted tax withholding, and the name and Social Security identification number of the annuitant from whom it was withheld. If either party terminates the agreement and the amount of cancelled or adjusted deductions exceeds the amount withheld for the final quarter, then the quarterly report shall show the amount to be refunded to OPM and the address to which payment should be made.

(3) An annual summary report which contains the name, Social Security identification number, and total amount withheld from non-cancelled payments during the previous calendar year, for each annuitant who requested tax withholding payable to the State. In the event the annuitant had State income tax withholding in effect for more than one State in that calendar year, the report will show only the amount withheld for the State receiving the report.

(4) An annual report to each annuitant for whom State income taxes were withheld giving the amount of withholding paid to the State during the calendar year.

**§ 831.1904 State responsibilities.**

The State will, in performance of this agreement:

(a) Accept requests and revocations from annuitants who have designated that State income tax deductions will go to the State.

(b) Convert these requests on a monthly basis to a machine-readable

magnetic tape using specifications received from OPM, and forward that tape to OPM for processing.

(c) Inform annuitants whose tax requests are rejected by OPM that the request was so rejected and of the reason why it was so rejected.

(d) Recognize that, to the extent not prohibited by State laws, records maintained by the State relating to this program are considered jointly maintained by OPM and are subject to the Privacy Act of 1974 (5 U.S.C. 552a). Accordingly, the States will maintain such records in accordance with that statute and OPM's implementing regulations at 5 CFR part 297.

(e) Respond to requests of annuitants for information and advice in regard to State income tax withholding.

(f) Credit the amounts withheld from civil service annuities to the State tax liability of the respective annuitants, and, subject to applicable provisions of State law to the contrary, refund any balance over and above that liability to the annuitant, unless he or she should request otherwise.

(g) Surrender all tax withholding requests to OPM when this agreement is terminated or when the documents are not otherwise needed for this State tax withholding program.

(h) Allow OPM, the Comptroller General or any of their duly authorized representatives access to, and the right to examine, all records, books, papers or documents related to the processing of requests for State income tax withholding from civil service annuities.

### § 831.1905 Additional provisions.

These additional provisions are also binding on the State and OPM:

(a) A request or revocation is effective when processed by OPM. OPM will process each request by the first day of the second month following the month in which it is received, but incurs no liability or indebtedness by its failure to do so.

(b) Any amount deducted from an annuity payment and paid to the State as a result of a request is deemed properly paid, unless the annuity payment itself is cancelled.

(c) OPM will provide the State with the information necessary to properly process a request for State income tax withholding.

(d) If the State is paid withholding which is contrary to the terms of the annuitant's request, the State is liable to the annuitant for the amount improperly withheld, and subject to account verification from OPM, agrees to pay that amount to the annuitant on demand.

(e) In the case of a disputed amount in any of the reports described and authorized by this agreement, the Associate Director for Compensation of OPM will issue an accounting. If the State finds this accounting unacceptable, it may then and only then pursue such remedies as are otherwise available.

(f) If a State receives an overpayment of monies properly belonging to the Fund, OPM will offset the overpayment from a future payment due the State. If there are no further payments due the State, OPM will inform the State in writing of the amount due. Within 60 days of the date of receipt of that communication the State will make payment of the amount due.

### § 831.1906 Agreement modification and termination.

This agreement may be modified or terminated in the following manner:

(a) Either party may suggest a modification of non-regulatory provisions of the agreement in writing to the other party. The other party must accept or reject the modification within 60 calendar days of the date of the suggestion.

(b) The agreement may be terminated by either party on 60 calendar days written notice.

(c) OPM may modify this agreement unilaterally through the rule making process described in sections 553, 1103, 1105 of title 5, United States Code.

## Subpart T—Payment of Lump Sums

SOURCE: 50 FR 20081, May 13, 1985, unless otherwise noted.

### § 831.2001 Definitions.

*Court order or decree* means the order or decree of any court of any State, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the

Northern Mariana Islands, the Virgin Islands or any Indian court, as defined section 8331(24) of title 5, United States Code.

*Current spouse* means a person who is married to the employee or Member at the time the application for refund is filed.

*Duly appointed representative of the deceased employee's, separated employee's, retiree's, survivor's or Member's estate* means an individual named in an order of a court having jurisdiction over the estate of the deceased which grants the individual the authority to receive, or the right to possess, the property of the deceased; and also means, where the law of the domicile of the deceased has provided for the administration of estates through alternative procedures which dispense with the need for a court order, an individual who demonstrates that he or she is entitled to receive, or possess, the property of the deceased under the terms of those alternative procedures.

*Former spouse* means a living person who was married for at least 9 months to an employee or Member who had performed at least 18 months of creditable service in a position covered by the retirement system.

*Retirement system* means the civil service retirement system as described in subchapter III of chapter 83 of title 5, United States Code.

[50 FR 20081, May 13, 1985, as amended at 57 FR 29784, July 7, 1992]

### § 831.2002 Eligibility for lump-sum payment upon filing an Application for Refund of Retirement Deductions (SF 2802).

Except as provided in §§ 831.2007 through 2009 or in section 3716 of title 31, United States Code, on administrative offset for government claims, a former employee or Member who has been separated from a covered position for at least 31 days at the time of filing an application for refund and who is ineligible for an annuity commencing within 31 days after the date of filing an application for refund is eligible for a refund for the total lump-sum credit to his or her credit in the Retirement Fund.

### § 831.2003 Eligibility for lump-sum payment upon death or retirement.

(a) If there is no survivor who is entitled to monthly survivor annuity benefits on the death of a former employee, Member, annuitant, or survivor annuitant, the total lump-sum credit to the former employee's or Member's credit in the Retirement Fund is payable, except as provided in section 3716 of title 31, United States Code, on administrative offset for government claims, to the person(s) entitled in the normal order of precedence described in section 8342(c) of title 5, United States Code. If a deceased employee, separated employee, retiree or Member provided in a valid designation of beneficiary that the lump sum proceeds shall be payable to the deceased's estate, or to the Executor, Administrator, or other representative of the deceased's estate, or if the proceeds would otherwise be properly payable to the duly appointed representative of the deceased's estate under the order of precedence specified in 5 U.S.C. 8342(c), payment of the proceeds to the duly appointed representative of the deceased's estate will bar recovery by any other person.

(b) If an annuity is payable, the former employee, Member or the person entitled in the order of precedence described in section 8342(c) of title 5, United States Code, may be paid, except as provided in section 3716 of title 31, United States Code, administrative offset for government claims, lump-sum payment of—

(1) Retirement deductions withheld from the employee's or Member's pay after he or she became eligible for the maximum annuity, if the employee or Member does not elect to treat those deductions as voluntary contributions toward the purchase of an additional annuity; and

(2) Retirement deductions withheld from the employee's or Member's pay during his or her final period of service if the employee or Member was not subject to the retirement system for at least one of the last 2 years before final separation from service and if the service covered by the deductions is not used for title to annuity; and

(3) Except as provided in paragraph (d) of this section, partial redeposits of refunds previously paid; and

(4) Partial deposits for civilian service performed on and after October 1, 1982; and

(5) Partial deposits for post-1956 military service; and

(6) Annuity accrued and unpaid.

(c) A former employee, Member, or survivor who is eligible for an annuity may not be paid a lump-sum payment of—

(1) Partial or completed deposits for nondeduction civilian service performed before October 1, 1982, unless the service covered by the deposit is not creditable under the retirement system; or

(2) Completed deposits for nondeduction civilian service performed on and after October 1, 1982, unless the service covered by the deposit is not creditable under the retirement system; or

(3) Completed deposits for post-1956 military services, unless the service covered by the deposit is not creditable under the retirement system.

Payments of the partial or completed deposits mentioned in this paragraph are subject to 31 U.S.C. 3716 (administrative offset for government claims).

(d) A former employee or Member who is eligible for a nondisability annuity may not be paid a lump-sum payment of a partial redeposit for refunded deductions relating to a period of service that ended before October 1, 1990.

[50 FR 20081, May 13, 1985, as amended at 56 FR 6550, Feb. 19, 1991; 57 FR 29784, July 7, 1992]

### § 831.2004 Amount of lump-sums.

If applicable, the amount of a refund will include interest computed as described in § 831.105(b).

### § 831.2005 Designation of beneficiary for lump-sum payment.

(a) The Designation of Beneficiary must be in writing, signed, and witnessed,and received in OPM before the death of the designator.

(b) No change or cancellation of beneficiary in a last will or testament, or in any other document not witnessed and filed as required by this section, has any force or effect.

(c) A witness to a Designation of Beneficiary is ineligible to receive payment as a beneficiary.

(d) Any person, firm, corporation, or legal entity may be named as beneficiary.

(e) A change of beneficiary may be made at any time and without the knowledge or consent of the previous beneficiary, and this right cannot be waived or restricted.

### § 831.2006 Designation of agent by next of kin.

When a deceased employee, Member, or annuitant has not named a beneficiary and one of the next of kin entitled makes a claim for lump-sum benefit, other next of kin entitled to share in the lump-sum benefit may designate the one who made the claim to act as their agent to receive their distributive shares.

### § 831.2007 Notification of current and/or former spouse before payment of lump sum.

(a) Payment of the lump-sum credit based on a refund application filed on or after May 7, 1985, may be made only if any current spouse and any former spouse (from whom the employee or Member was divorced after May 6, 1985) are notified of the former employee's or Member's application.

(b)(1) Notification of the former spouse will not be required if the marriage to the former spouse was of less than 9 months duration or if the employee has not completed a total of 18 months of creditable service covered under the retirement system.

(2) Applicants for payment of the lump-sum credit must certify on a form prescribed by OPM whether the applicant has a current or former spouse subject to the notification requirement.

(c) Proof of notification will consist of a signed and witnessed Statement by the current and/or former spouse on a form provided by OPM acknowledging that he or she has been informed of the former employee's or Member's application for refund and the consequences of the refund on the current or former spouse's possible annuity entitlement. This Statement must be presented to the employing agency or OPM when filing the Application for Refund of Retirement Deductions.

(d) If the current and/or former spouse refuses to acknowledge the notification or the employee or Member is otherwise unable to obtain the acknowledgement, the employee or Member must submit—

(1) Affidavits signed by two individuals who witnessed the employee's or Member's attempt to personally notify the current or former spouse. The witnesses must attest that they were in the presence of the employee or Member and the current or former spouse when the employee or Member gave or attempted to give the notification form to the current or former spouse and that the employee's or Member's purpose should have been clear to the current or former spouse; or

(2) The current mailing address of the current or former spouse. OPM will attempt to notify (by certified mail—return receipt requested) the current or former spouse at the address provided by the employee or Member. Except as provided in paragraph (e) of this section, the lump-sum credit will not be paid until at least 20 days after OPM receives the signed return receipt.

(e) If an OPM notice sent under paragraph (d)(2) of this section is returned and OPM has no reason to believe that the current or former spouse does not live at the address to which the notice was sent, OPM will re-mail the notice by first class mail and wait at least 20 days after the notice has been remailed before paying the refund.

[50 FR 20081, May 13, 1985, as amended at 51 FR 31936, Sept. 8, 1986; 55 FR 9106, Mar. 12, 1990; 55 FR 29340, July 19, 1990]

### § 831.2008 Waiver of spouse and/or former spouse notification requirement.

The current and/or former spouse notification requirement will be waived upon a showing that the current and/or former spouse's whereabouts cannot be determined. A request for waiver on this basis must be accompanied by—

(a) A judicial or administrative determination that the current and/or former spouse's whereabouts cannot be determined; or

(b) Affidavits by the former employee or Member and two other persons at least one of whom is not related to the former employee or Member attesting to the inability to locate the current and/or former spouse and stating the efforts made to locate the current and/or former spouse.

### § 831.2009 Lump sum payments which include contributions made to a retirement system for employees of a nonappropriated fund instrumentality.

A lump sum payment will include employee contributions and interest as provided under subpart G of part 847 of this chapter.

[61 FR 41720, Aug. 9, 1996]

### § 831.2010 Transfers between retirement systems.

Transfers of employees' contributions between the Civil Service Retirement and Disability Fund and other retirement systems for Federal or District of Columbia employees when made in accordance with Federal statute for the purpose of transferring retirement service credit to the other retirement system are not subject to the notice requirements or court order provisions of this subpart.

[51 FR 31937, Sept. 8, 1986]

### § 831.2011 Effect of part 772 of this chapter on CSRS lump-sum payments.

(a) An interim appointment under § 772.102 of this chapter does not affect the lump-sum payment of retirement contributions made to a separated employee unless it becomes effective within 31 days of the employee's separation from the service. An interim appointment effective within 31 days of the employee's separation makes the employee ineligible for the lump-sum payment. Payments made in error will be collected under subpart M of part 831 of this chapter.

(b) When an employee's separation is cancelled after the MSPB initial decision becomes final, when the Board issues a final order cancelling the employee's separation, or when the agency and the employee agree to cancel the separation, the agency must notify OPM and request the amount of the erroneous lump-sum payment.

(c) At the time the employee's separation is cancelled, the agency must deduct the amount of the lump-sum

payment from any back pay to which the employee is entitled as required by 5 CFR 550.805(e).

(d) Amounts recovered from back pay will not be subject to waiver consideration under 5 U.S.C. 8346(b). If there is no back pay or the back pay is insufficient to recover the erroneous payment, the employee may request that OPM waive the recovery of the uncollected portion of the overpayment. If waiver is not granted, the employee must repay the erroneous payment.

[57 FR 3713, Jan. 31, 1992]

## Subpart U—Deposits for Military Service

SOURCE: 48 FR 38788, Aug. 26, 1983, unless otherwise noted.

### § 831.2101 Purpose.

This subpart prescribes the procedures to be followed when an employee or Member (or survivor of an employee or Member) wishes to make a deposit for service, and when a former employee or Member who retires or separates from civilian service with title to annuity after September 8, 1982, but before October 1, 1983 (or survivor of such employee or Member), wishes to make a deposit for service.

### § 831.2102 Scope.

This subpart applies to all agencies with employees occupying positions subject to subchapter III of chapter 83 of title 5, United States Code, the United States Senate, and the United States House of Representatives.

### § 831.2103 Definitions.

*Employee* shall have the same meaning as in 5 U.S.C. 8331(1).

*Estimated earnings* is an estimate of basic pay for a period of military service, as determined by an authorized official of the Department of Defense the Department of Transportation, the Department of Commerce, or the Department of Health and Human Services.

*Fund* is the Civil Service Retirement and Disability Fund.

*Member* shall have the same meaning as in 5 U.S.C. 8331(2).

*OPM* is the Office of Personnel Management.

*Period of service* is the total years, months, and days from date of initial entry on active duty (or January 1, 1957, if that is later) to date of final discharge for enlisted military personnel, and to date of final release from active duty for officers and reservists. ''Period of service'' includes consecutive periods of service where there is no break in service, but does not include any lost time.

*Service* is active honorable military service performed after December 31, 1956.

*Sufficient evidence* of basic pay for service exists when the employee, Member, or survivor eligible to make a deposit for service provides copies of all official military pay documents, as identified in instructions published by OPM, which show the exact basic pay he or she received for a full period of service. If an employee, Member, or survivor does not have sufficient evidence of basic pay, he or she shall obtain a statement of estimated earnings from the appropriate branch of the military service.

*Survivor* shall have the same meaning as in 5 U.S.C. 8331(10).

[48 FR 38788, Aug. 26, 1983, as amended at 66 FR 66711, Dec. 27, 2001]

### § 831.2104 Eligibility to make deposit.

The following individuals may make deposit for any full period of service performed before the separation on which title to civil service annuity is based:

(a) An employee or Member currently occupying a position subject to subchapter III of chapter 83 of title 5, United States Code, and the survivor(s) of such an employee or Member who dies in service (including a person who was eligible to make a deposit under this paragraph but who failed to make the deposit before separation from service due to administrative error); and

(b) A former employee or Member who was separated with title to an annuity or who retired from a position subject to subchapter III of chapter 83 of title 5, United States Code, after September 8, 1982, and before October 1,

1983, and the survivor(s) of such an employee or Member.

[48 FR 38788, Aug. 26, 1983, as amended at 49 FR 20631, May 16, 1984]

### § 831.2105 Filing an application to make deposit.

(a) An individual described in § 831.2104(a) of this subpart shall file an application for deposit with the appropriate office in the employing agency, or, for Members and Congressional employees, with the Secretary of the Senate or the Clerk of the House of Representatives, as appropriate.

(b) An individual described in § 831.2104(b) of this subpart may, at the time of filing an application for retirement or death benefits, file an application for deposit or complete a deposit with OPM.

### § 831.2106 Processing applications for deposit for service.

(a) The agency, Clerk of the House of Representatives, or Secretary of the Senate shall have the employee or Member:

(1) Complete an application to make deposit;

(2) Provide a copy of his or her DD 214 or its equivalent to verify the period(s) of service; and

(3) Provide sufficient evidence of basic pay, if available, or a statement of estimated earnings.

(b) Upon receipt of the application, the DD 214(s), and either sufficient evidence of basic pay, if available, or a statement of estimated earnings, the agency, Clerk of the House of Representatives, or Secretary of the Senate shall multiply the amount of basic pay by 7 percent to compute the exact deposit owed, exclusive of any interest.

(c) If interest is applicable, it shall be computed in accordance with instructions published by OPM.

(d) The agency, Clerk of the House of Representatives, or Secretary of the Senate shall establish a deposit account showing the total amount due, and a payment schedule (unless deposit is made in a lump sum), and record the date and amount of each payment.

(e) An individual who is eligible to make deposit to OPM shall submit an application to make deposit, accompanied by a copy of his or her DD 214(s) or its (their) equivalent(s), as well as sufficient evidence of basic pay, if available, or a statement of estimated earnings, to OPM.

[48 FR 38788, Aug. 26, 1983, as amended at 66 FR 66711, Dec. 27, 2001]

### § 831.2107 Payments on deposits.

(a) Deposits made to agencies, the Clerk of the House of Representatives or the Secretary of the Senate.

(1) Deposits made to agencies, the Clerk of the House of Representatives or the Secretary of the Senate shall be collected in full in one lump sum whenever this is possible. Notwithstanding the provisions of paragraph (a)(2) of this section, a separated employee who, through administrative error, did not make or complete the deposit prior to his or her separation must complete the deposit in a lump sum within the time limit set by OPM when it rules that an administrative error has been made.

(2) If the employee or Member cannot make payment in a lump sum, the agency, the Clerk of the House of Representatives, or the Secretary of the Senate shall accept installment payments (by allotments or otherwise). However, agencies, the Clerk of the House of Representatives, and the Secretary of the Senate will not be required to accept individual checks in amounts of less than $50.

(3) If the employee or Member dies, the employing agency, the Clerk of the House of Representatives or the Secretary of the Senate shall advise the survivor of the right to make or complete a deposit. If the survivor decides to make or complete the payment, the agency, the Clerk of the House of Representatives, or the Secretary of the Senate shall collect the amount due in one lump sum.

(4) Payments received by the employing agency, the Clerk of the House of Representatives, or the Secretary of the Senate shall be remitted immediately to OPM for deposit to the Fund.

(5) Once the employee's, Member's, or survivor's deposit has been paid in full or closed out, the employing agency, the Clerk of the House of Representatives, or the Secretary of the Senate shall submit documentation pertaining to the deposit to OPM, in accordance

with instructions published by OPM issuances.

(6) Deposits must be made for full periods of service.

(b) Deposits made to OPM.

(1) Deposits made to OPM shall be made in a lump sum prior to final adjudication of the application for retirement or survivor benefits.

(2) Deposits must be made for full periods of service.

[48 FR 38788, Aug. 26, 1983, as amended at 49 FR 20631, May 16, 1984; 66 FR 66711, Dec. 27, 2001]

## Subpart V—Alternative Forms of Annuities

SOURCE: 51 FR 42989, Nov. 28, 1986, unless otherwise noted.

### § 831.2201 Purpose.

This subpart explains the benefits available to employees and Members who elect an alternative form of annuity under section 8343a of title 5, United States Code.

### § 831.2202 Definitions.

In this subpart—

*Alternative form of annuity* means the benefit elected under § 831.2204.

*Current spouse annuity* has the same meaning as in § 831.603.

*Date of final adjudication* means the date 30 days after the date of the first regular monthly payment as defined in § 831.603.

*Former spouse annuity* has the same meaning as in § 831.603.

*Lump-sum credit* has the same meaning as in 5 U.S.C. 8331(8).

*Present value factor* represents the amount of money (earning interest at an assumed rate) required at the time of retirement to fund an annuity that: (a) Starts out at the rate of $1 a month and is payable in monthly installments for the annuitant's lifetime based on mortality rates for non-disability annuitants under the Civil Service Retirement System; and (b) increases each year at an assumed rate of inflation. Interest, mortality, and inflation rates used in computing the present value are those used by the Board of Actuaries of the Civil Service Retirement System for valuation of the System, based on dynamic assumptions. The present value factors are unisex factors obtained by averaging sex-distinct present value factors, weighted by the total dollar value of annuities typically paid to new retirees at each age.

*Time of retirement* has the same meaning as in § 831.603.

[51 FR 42989, Nov. 28, 1986, as amended at 54 FR 10136, Mar. 10, 1989]

### § 831.2203 Eligibility.

(a) Except as provided in paragraphs (b), (c), and (h) of this section, an employee or Member whose annuity entitlement commences after June 5, 1986, under any provision of subchapter III of chapter 83 of title 5, United States Code (other than section 8337 of that title), may elect an alternative form of annuity instead of any other benefits under the subchapter.

(b) An employee or Member who, at the time of retirement has a former spouse who is entitled to a portion of the employee's or Member's retirement benefits or a former spouse annuity under a court order acceptable for processing as defined by § 838.103 of this chapter or under a qualifying court order as defined in § 838.1003 of this chapter may not elect an alternative form of annuity.

(c) An employee or Member who is married at the time of retirement may not elect an alternative form of annuity unless the employee's or Member's spouse specifically consents to the election before the date of final adjudication. OPM may waive spousal consent only under the conditions prescribed by § 831.618.

(d) The election of an alternative form of annuity and evidence of spousal consent must be filed on a form prescribed by OPM. The form will require that a notary public or other official authorized to administer oaths certify that the current spouse presented identification, gave consent to the specific election as executed by the retiree, signed or marked the form, and acknowledged that the consent was given freely in the notary's or official's presence.

(e) An election of the alternative form of annuity must be in writing and received by OPM on or before the date

of final adjudication. After the date of final adjudication, an election of the alternative form of annuity is irrevocable.

(f) Except as provided in paragraph (g), an annuitant who dies before the date of final adjudication is deemed to have made an affirmative election under paragraph (a) with a fully reduced annuity to provide a current spouse annuity, regardless of any election completed under § 831.614, and the lump-sum credit will be paid in accordance with the order of precedence established under 5 U.S.C. 8342(c).

(g) If an annuitant described in paragraph (f) has completed an election under § 831.611(a) or (b)—

(1) The lump-sum credit will be paid in accordance with the order of precedence established under 5 U.S.C. 8342(c); and

(2) The election under § 831.611(a) or (b) will be honored.

(h)(1)(i) An individual whose annuity commences after December 1, 1990, and before October 1, 1994, may elect an alternative form of annuity only if that individual is—

(A) An employee or Member who meets the conditions and fulfills the requirements described in § 831.2207(c) (2) and (3); or

(B) An employee who is separated involuntarily other than for cause on charges of misconduct or delinquency;

(ii) An individual whose annuity commences on or after October 1, 1994, may elect an alternative form of annuity only if that individual is an employee or Member who meets the conditions and fulfills the requirements described in § 831.2207(c) (2) and (3).

(2) For the purpose of paragraph (h)(1)(i)(B) of this section, the term ''employee'' does not include—

(i) Members of Congress;

(ii) Individuals in positions in the Executive Schedule under sections 5312 through 5317 of title 5, United States Code;

(iii) Presidential appointees under section 105(a)(1), 106(a)(1), or 107 (a)(1) or (b)(1) of title 3, United States Code, if the maximum basic pay for such positions is at or above the rate for Executive Schedule, level V;

(iv) Noncareer appointees in the Senior Executive Service or noncareer members of the Senior Foreign Service; and

(v) Any individual in a position that is excepted from the competitive service because of its confidential, policy-determining, policy-making, or policy-advocating character.

(3) Notwithstanding paragraph (h)(1) of this section, an employee whose annuity commences after December 1, 1990, and before December 2, 1991, may elect an alternative form of annuity if that individual—

(i)(A) Was ordered to active military duty (other than for training) before December 1, 1990, in connection with Operation Desert Shield; or

(B) Is an employee of the Department of Defense who is certified by the Secretary of Defense to have performed, after November 30, 1990, duties essential to support Operation Desert Shield, and the certification is submitted to OPM in a form prescribed by OPM; and

(ii) Would have been eligible, as of November 30, 1990, to elect an alternative form of annuity under paragraph (a) of this section.

[51 FR 42989, Nov. 28, 1986, as amended at 53 FR 11634, Apr. 8, 1988; 56 FR 6551, Feb. 19, 1991; 57 FR 33598, July 29, 1992; 58 FR 52882, Oct. 13, 1993; 60 FR 54586, 54587, Oct. 25, 1995]

### § 831.2204 Alternative forms of annuities available.

(a) An employee or Member who is eligible to make an election under § 831.2203 may elect to receive his or her lump-sum credit plus an annuity computed in accordance with section 8339 of title 5, United States Code, for which they qualify (including any reduction for survivor benefits) and reduced under § 831.2205.

(b) A retired employee or Member who elected an alternative form of annuity is subject to all provisions of subchapter III of chapter 83 of title 5, United States Code, as would otherwise apply to a retired employee or Member who did not elect an alternative form of annuity, except that an individual

who elected an alternative form of annuity is not eligible to apply for disability annuity under section 8337 of such subchapter.

[51 FR 42989, Nov. 28, 1986, as amended at 53 FR 11634, Apr. 8, 1988; 54 FR 10136, Mar. 10, 1989]

### § 831.2205 Computation of alternative form of annuity.

(a) To compute the beginning rate of annuity payable to a retiree who elects an alternative form of annuity, OPM will first compute the monthly rate of annuity otherwise payable under subchapter III of chapter 83 of title 5, United States Code, including all reductions provided under the subchapter other than those in § 8343a. That monthly rate is then reduced by an amount equal to the retiree's lump-sum credit divided by the present value factor for the retiree's attained age (in full years) at the time of retirement. The reduced monthly rate is then rounded to the next lowest dollar and becomes the rate of annuity payable.

(b) OPM will publish a notice in the FEDERAL REGISTER announcing any proposed adjustments in present value factors at least 30 days before the effective date of the adjustments.

### § 831.2206 Election to pay deposit or redeposit for civilian service.

(a) If an employee or Member who elects an alternative form of annuity owes a deposit or redeposit for civilian service, and elects to pay that deposit or redeposit before the date of final adjudication, OPM will compute the annuity as if the deposit or redeposit had been made and will deem that deposit or redeposit to be included in the lump-sum credit for the purpose of computing the reduction in annuity under § 831.2205.

(b) The amount of a deposit or redeposit deemed paid under paragraph (a) of this section will include any interest owed by the employee or Member under 5 U.S.C. 8334.

(c) For the purpose of paragraph (a) of this section, ''redeposit'' does not include a redeposit owed for service for which credit is allowed pursuant to § 831.303(c)(1).

[54 FR 10136, Mar. 10, 1989, as amended at 56 FR 43865, Sept. 5, 1991]

### § 831.2207 Partial deferred payment of the lump-sum credit if annuity commences after January 3, 1988, and before October 1, 1989.

(a) Except as provided in paragraph (c) of this section, if the annuity of an employee or Member commences after January 3, 1988, and before October 1, 1989, the lump-sum credit payable under § 831.2204 is payable to the individual, or his or her survivors, according to the following schedule:

(1) Sixty percent of the lump-sum credit is payable at the time of retirement, and

(2) Forty percent is payable, with interest determined under section 8334(e)(3) of title 5, United States Code, one year after the time of retirement.

(b) If an employee or Member whose annuity commences after January 3, 1988, and before October 1, 1989, dies before the date of final adjudication, that individual is subject to § 831.2203 (f) or (g), but the lump-sum credit will be paid in accordance with the schedule in paragraph (a) of this section.

(c) An annuitant is exempt from the deferred payment schedule under paragraph (a) of this section if the individual—

(1) Separates involuntarily, other than for cause on charges of delinquency or misconduct, or

(2) Has, at the time of retirement, a life-threatening affliction or other critical medical condition.

(3)(i) For the purpose of this section, *life-threatening affliction or other critical medical condition* means a medical condition so severe as to reasonably limit an individual's probable life expectancy to less than 2 years.

(ii) The existence of one of the following medical conditions is *prima facie* evidence of a life threatening affliction or other critical medical condition:

(A) Metastatic and/or inoperable neoplasms.

(B) Aortic stenosis (severe).

(C) Class IV cardiac disease with congestive heart failure.

(D) Respiratory failure.

(E) Cor pulmonale with respiratory failure.

(F) Emphysema with respiratory failure.

(G) [Reserved]

(H) Severe cardiomyopathy—Class IV.

(I) Aplastic anemia.

(J) Uncontrolled hypertension with hypertensive encephalopathy.

(K) Cardiac aneurysm not amenable to surgical treatment.

(L) Agranulocytosis.

(M) Severe hepatic failure.

(N) Severe Hypoxic brain damage.

(O) Severe portal hypertension with esophageal varices.

(P) AIDS (Active—Not AIDS Related Complex or only seropositivity).

(Q) Life threatening infections (encephalitis, meningitis, rabies, etc.).

(R) Scleroderma with severe esophageal involvement.

(S) Amyotrophic lateral sclerosis (rapidly progressive).

(T) Hemiplegia with life threatening complications.

(U) Quadriplegia with life threatening complications.

(iii) Evidence of the existence of a life-threatening affliction or other critical medical condition must be certified by a physician and sent to OPM on or before the date the annuitant elects to receive an alternative form of annuity. For the purpose of this section, ''physician'' has the same meaning given that term in § 339.102 of this chapter.

(iv) If a medical condition other than those listed in paragraph (c)(3)(ii) of this section is claimed as a basis for exemption from the deferred payment schedule, OPM will review the physician's certification to determine whether the cited condition is life-threatening or critical.

(v) The cost of providing medical documentation under this paragraph rests with the employee or Member, unless OPM exercises its choice of physician.

[53 FR 11634, Apr. 8, 1988, as amended at 60 FR 54586, Oct. 25, 1995]

### § 831.2208 Partial deferred payment of the lump-sum credit if annuity commences after December 2, 1989, and before October 1, 1995.

(a) Except as provided in paragraph (c) of this section, if the annuity of a retiree commences after December 2, 1989, and before October 1, 1994, the lump-sum credit payable under § 831.2204 is payable to the individual, or his or her survivors, according to the following schedule:

(1) Fifty percent of the lump-sum credit is payable at the time of retirement, and

(2) Fifty percent is payable, with interest determined under section 8334(e)(3) of title 5, United States Code, 1 year after the time of retirement, except if the payment date of the amount specified in paragraph (a)(1) of this section was after December 4, 1989, payment with interest will be made in the calendar year following the calendar year in which the payment specified in paragraph (a)(1) of this section was made.

(b) If a retiree whose annuity commences after December 2, 1989, and before October 1, 1994, and who is otherwise entitled to a computation under this subpart, dies before the date of final adjudication, that individual is subject to § 831.2203 (f) or (g), but the lump-sum credit will be paid in accordance with the schedule in paragraph (a) of this section.

(c)(1) A retiree is exempt from the deferred payment schedule under paragraph (a) of this section if the individual meets the conditions, and fulfills the requirements, described in § 831.2207(c).

(2)(i) A retiree who is exempt from the deferred payment schedule may waive that exemption by notifying OPM, in writing, on or before the date he or she elects to receive the alternative form of annuity.

(ii) Paragraph (c)(2)(i) of this section does not apply to an individual whose annuity commences after December 1, 1990, if that individual's eligibility to elect an alternative form of annuity is pursuant to § 831.2203(h)(1)(i)(A).

(iii) A waiver under paragraph (c)(2)(i) of this section cannot be revoked.

[56 FR 6551, Feb. 19, 1991, as amended at 56 FR 43865, Sept. 5, 1991; 60 FR 54587, Oct. 25, 1995]

### § 831.2209 Redetermined annuity after reemployment.

(a) For purposes of this section, ''lump-sum credit'' does not include—

(1) The amount by which the lump-sum credit attributable to service performed before the annuitant's first retirement was reduced by annuity payments that were not reimbursed by the employing agency under section 8344(a) of title 5, United States Code, or

(2) Any part of the lump-sum credit attributable to service performed before the annuitant's first retirement that has already been paid to the annuitant pursuant to an election or an alternative form of annuity.

(b) An annuitant who meets the requirements for a redetermined annuity under subpart H, and who meets all requirements of § 831.2203, may elect an alternative form of annuity.

(c) To compute the beginning rate of the redetermined annuity payable to an annuitant who elects an alternative form of annuity, OPM will first compute the monthly rate payable under subchapter III of chapter 83 of title 5, United States Code, including all reductions provided under the subchapter other than those in section 8343a. That monthly rate is then reduced by the sum of—

(1)(i) Any reduction that was computed under § 831.2205 at the time of the annuitant's prior retirement, increased by—

(ii) All cost-of-living adjustments under section 8340 of title 5, United States Code that applied to the annuitant before the commencing date of the redetermined annuity, and

(2) An amount equal to the annuitant's lump-sum credit, divided by the present value factor for the annuitant's attained age on the date the redetermined annuity commences.

(d) The beginning rate of a redetermined annuity payable to an annuitant who does not elect, or is not eligible to elect, an alternative form of annuity will be reduced in accordance with paragraph (c)(1) of this section.

[54 FR 10136, Mar. 10, 1989. Redesignated at 55 FR 4597, Feb. 9, 1990]

# PART 835—DEBT COLLECTION

## Subparts A–E [Reserved]

## Subpart F—Collection of Debts by Federal Tax Refund Offset

Sec.
835.601 Purpose.
835.602 Past-due legally enforceable debt.
835.603 Notification of intent to collect.
835.604 Reasonable attempt to notify.
835.605 OPM action as a result of consideration of evidence submitted as a result of the notice of intent.
835.606 Change in notification to Internal Revenue Service.
835.607 Administrative charges.

AUTHORITY: 5 U.S.C. 8347(a) and 8461(g). Subpart F also issued under 31 U.S.C. 3720A.

SOURCE: 57 FR 61771, Dec. 29, 1992, unless otherwise noted.

## Subparts A–E [Reserved]

## Subpart F—Collection of Debts by Federal Tax Refund Offset

### § 835.601 Purpose.

This subpart establishes procedures for OPM to refer past-due legally enforceable debts to the Internal Revenue Service (IRS) for offset against the income tax refunds of persons owing debts to OPM. It specifies the agency procedures and the rights of the debtor applicable to claims referred under the Federal Tax Refund Offset Program for the collection of debts owed to OPM.

### § 835.602 Past-due legally enforceable debt.

A past-due legally enforceable debt for referral to the IRS is a debt that—

(a) Resulted from—

(1) Erroneous payments made under the Civil Service Retirement or the Federal Employees' Retirement Systems; or

(2) Unpaid health or life insurance premiums due under the Federal Employees' Health Benefits or Federal Employees' Group Life Insurance Programs; or

(3) Any other statute administered by OPM;

(b) Is an obligation of a debtor who is a natural person;

(c) Except in the case of a judgment debt, has been delinquent at least 3 months but not more than 10 years at the time the offset is made;

(d) Is at least $25.00;

(e) With respect to which the individual's rights described in 5 CFR 831.1301 through 831.1309 have been exhausted;

(f) With respect to which either:

(1) OPM's records do not contain evidence that the person owing the debt (or his or her spouse) has filed for bankruptcy under title 11 of the United States Code; or

(2) OPM can clearly establish at the time of the referral that the automatic stay under 11 U.S.C. 362 has been lifted or is no longer in effect with respect to the person owing the debt or his or her spouse, and the debt was not discharged in the bankruptcy proceeding;

(g) Cannot currently be collected under the salary offset provisions of 5 U.S.C. 5514(a)(1);

(h) Is not eligible for administrative offset under 31 U.S.C. 3716(a) because of 31 U.S.C. 3716(c)(2), or cannot currently be collected as an administrative offset by OPM under 31 U.S.C. 3716(a) against amounts payable to the debtor by OPM; and

(i) Has been disclosed by OPM to a consumer reporting agency as authorized by 31 U.S.C. 3711(f), unless the consumer reporting agency would be prohibited from reporting information concerning the debt by reason of 15 U.S.C. 1681c, or unless the amount of the debt does not exceed $100.

### § 835.603 Notification of intent to collect.

(a) *Notification before submission to the IRS.* A request for reduction of an IRS income tax refund will be made only after OPM makes a determination that an amount is owed and past-due and gives or makes a reasonable attempt to give the debtor 60 days written notice of the intent to collect by IRS tax refund offset.

(b) *Contents of notice.* OPM's notice of intention to collect by IRS tax refund offset (Notice of Intent) will state:

(1) The amount of the debt;

(2) That unless the debt is repaid within 60 days from the date of OPM's Notice of Intent, OPM intends to collect the debt by requesting the IRS to reduce any amounts payable to the debtor as a Federal income tax refund by an amount equal to the amount of the debt and all accumulated interest and other charges;

(3) A mailing address for forwarding any written correspondence and a contract name and a telephone number for any questions; and

(4) That the debtor may present evidence to OPM that all or part of the debt is not past due or legally enforceable by—

(i) Sending a written request for a review of the evidence to the address provided in the notice;

(ii) Stating in the request the amount disputed and the reasons why the debtor believes that the debt is not past-due or is not legally enforceable;

(iii) Including in the request any documents that the debtor wishes to be considered or stating that the additional information will be submitted within the remainder of the 60-day period.

### § 835.604 Reasonable attempt to notify.

In order to constitute a reasonable attempt to notify the debtor, OPM must have used a mailing address for the debtor obtained from the IRS pursuant to 26 U.S.C. 6103(m)(2) within a period of 1 year preceding the attempt to notify the debtor, unless OPM received clear and concise notification from the debtor that notices from the agency are to be sent to an address different from the address obtained from IRS. Clear and concise notice means that the debtor has provided the agency with written notification, including the debtor's name and identifying number (as defined in 26 CFR 301.6109–1), and the debtor's intent to have the agency notices sent to the new address.

### § 835.605 OPM action as a result of consideration of evidence submitted as a result of the notice of intent.

(a) *Consideration of evidence.* If, as a result of the Notice of Intent, OPM receives notice that the debtor will submit additional evidence or receives additional evidence from the debtor within the prescribed time period, any notice to the IRS will be stayed until OPM can—

(1) Consider the evidence presented by the debtor; and

(2) Determine whether or not all or a portion of the debt is still past due and legally enforceable; and

(3) Notify the debtor of its determination.

(b) *Notification to the debtor.* Following review of the evidence, OPM will issue a written decision notifying the debtor whether OPM has sustained, amended, or canceled its determination that the debt is past-due and legally enforceable. The notice will advise the debtor of any further action to be taken and explain the supporting rationale for the decision.

(c) *OPM action on the debt.* (1) OPM will notify the debtor of its intent to refer the debt to the IRS for offset against the debtor's Federal income tax refund, if it sustains its decision that the debt is past-due and legally enforceable. OPM will also notify the debtor whether the amount of the debt remains the same or is modified.

(2) OPM will not refer the debt to the IRS for offset against the debtor's Federal income tax refund, if it reverses its decision that the debt is past-due and legally enforceable.

### § 835.606 Change in notification to Internal Revenue Service.

(a) Except as noted in paragraph (b) of this section, after OPM sends IRS notification of an individual's liability for a debt, OPM will promptly notify IRS of any change in the notification, if OPM—

(1) Determines that an error has been made with respect to the information contained in the notification;

(2) Receives a payment or credits a payment to the account of the debtor named in the notification that reduces the amount of the debt referred to the IRS for offset; or

(3) Receives notification that the individual owing the debt has filed for bankruptcy under title 11 of the United States Code or has been adjudicated bankrupt and the debt has been discharged.

(b) OPM will not notify the IRS to increase the amount of a debt owed by a debtor named in OPM's original notification to the IRS.

(c) If the amount of a debt is reduced after referral by OPM and offset by the IRS, OPM will refund to the debtor any excess amount and will promptly notify the IRS of any refund made by OPM.

### § 835.607 Administrative charges.

All administrative charges incurred in connection with the referral of the debts to the IRS will be assessed on the debt and thus increase the amount of the offset.

## PART 837—REEMPLOYMENT OF ANNUITANTS

### Subpart A—General Provisions

Sec.
837.101 Applicability.
837.102 Definitions.
837.103 Notice.
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AUTHORITY: 5 U.S.C. 8337, 8344, 8347, 8455, 8456, 8461, and 8468; and section 302 of Pub. L. 99–335, June 6, 1986, as amended.

SOURCE: 58 FR 48266, Sept. 15, 1993, unless otherwise noted.

## Subpart A—General Provisions

### § 837.101 Applicability.

(a) This part prescribes rules governing—

(1) Reemployment of an annuitant by the Federal Government;

(2) Reemployment of an annuitant by the government of the District of Columbia when the annuitant—

(i) Had been employed subject to CSRS by the District of Columbia prior to October 1, 1987;

(ii) Is an employee of the government of the District of Columbia not excluded from CSRS under § 831.201(g) or § 831.201(i); or

(iii) Is an employee of the District of Columbia who is deemed to be a Federal employee for FERS purposes under § 842.107 or § 842.108 of this chapter; and

(3) The payment of retirement and death benefits based on reemployment covered by this part.

(b) This part is not applicable to reemployment, in the Executive Branch, under 5 U.S.C. 8344(i) or 8468(f) (see part 553 of this chapter), relating to reemployment of retirees to meet exceptional employment needs, or to employment under 5 U.S.C. 8344 (j) or (k) or 5 U.S.C. 8468 (g) or (h) in the Judicial or Legislative Branches.

[58 FR 48266, Sept. 15, 1993, as amended at 62 FR 50996, Sept. 30, 1997; 64 FR 15288, Mar. 31, 1999]

### § 837.102 Definitions.

*Actual service* means the period of time during which an annuitant is reemployed, excluding periods of separation and non-pay status.

*Annuitant* means a former employee or Member who is receiving, or meets the legal requirements and has filed claim for, annuity under either CSRS or FERS based on his or her service.

*Another retirement system* or ''other retirement system'' means a program created by Federal or District of Columbia statute or regulation and administered by an agency of the Federal Government or District of Columbia that provides retirement and/or death benefits to Federal or District of Columbia employees whose employment would otherwise be subject to the provisions of CSRS or FERS, or that credits service in the computation of benefits that would otherwise be credited in the computation of a CSRS or FERS benefit, or that provides a death benefit when a death benefit is payable from CSRS or FERS.

*CSRS* means the Civil Service Retirement System, as described in subchapter III of chapter 83 of title 5, United States Code.

*CSRS annuitant* means an annuitant retired under CSRS.

*CSRS-Offset service* means service by a reemployed CSRS annuitant that is subject to the OASDI tax by operation of section 101 of Public Law 98–21. It does not include any service performed before January 1, 1984.

*CSRS-Offset wages* means basic pay, as defined under 5 U.S.C. 8331(3), of an employee or Member performing CSRS-Offset service, but not to exceed the contribution and benefit base for the calendar year involved.

*Continuous service* means reemployment without a period of separation from service, or conversion to intermittent status, of more than 3 days.

*Contribution and benefit base* means the contribution and benefit base in effect with respect to the period involved, as determined under section 230 of the Social Security Act.

*FEC* means Federal Employees Compensation, that is, benefits paid on the basis of a work-related disease or injury under the provisions of chapter 81 of title 5, United States Code, but does not include a scheduled award under the provisions of 5 U.S.C. 8107, or medical services under 5 U.S.C. 8103.

*FERS* means the Federal Employees Retirement System, as described in chapter 84 of title 5, United States Code.

*FERS annuitant* means an annuitant who retired under FERS, or a reemployed CSRS annuitant whose election of FERS coverage under part 846 of this chapter is effective on or after January 8, 1988.

*Full-time equivalent to part-time service* means the amount of actual service that would result if the total hours worked on a part-time basis had been performed on a full-time basis, and the remaining portion of the period of reemployment was in a non-pay status.

*Full-time service* means actual service in which the reemployed annuitant is scheduled to work the number of hours and days required by the administrative workweek for his or her grade or class (normally 40 hours).

*Fund* means the Civil Service Retirement and Disability Fund as described at 5 U.S.C. 8348.

*Intermittent service* means any actual service performed on a less than full-time basis with no prescheduled regular tour of duty.

*Lump-sum credit* has the same meaning as the term is defined at section 8401(19) or section 8331(8) of title 5, United States Code, as may be applicable under the circumstances.

*OASDI tax* means, with respect to Federal wages, the Old Age, Survivors, and Disability Insurance tax imposed under section 3101(a) of the Internal Revenue Code of 1986.

*Part-time service* means actual service performed on a less than full-time basis under a pre-scheduled regular tour of duty.

*Pay* means the basic pay of the position to which the reemployed annuitant is appointed, prior to reduction for retirement contributions and annuity offset, and excludes any other benefits or compensation the reemployed annuitant receives, such as benefits authorized under the provisions of chapter 81 of title 5, United States Code.

*Reemployed* means reemployed in an appointive or elective position with the Federal Government, or reemployed in an appointive or elective position with the District of Columbia (when the annuitant was first employed subject to CSRS by the District of Columbia before October 1, 1987, or is an employee of the government of the District of Columbia not excluded from CSRS under § 831.201(g) or § 831.201(i) of this chapter, or is an employee of the government of the District of Columbia who is deemed to be a Federal employee for FERS purposes under § 842.107 or § 842.108 of this chapter), whether the position is subject to CSRS, FERS, or another retirement system, but does not include appointment as a Governor of the Board of Governors of the United States Postal Service, or reemployment under the provisions of law that exclude offset of pay by annuity, that is, sections 8344(i), (j), or (k), or 8468(f), (g), or (h) of title 5, United States Code.

*Retired Member* means a former Member of Congress, as defined by 5 U.S.C. 2106, who has met the requirements for Member retirement as specified at sections 8336(g), 8337(a), 8338(b), 8412, 8413, and 8451(b) of title 5, United States Code, and who has filed claim therefor.

*Suspension*, in regard to payment of annuity, means that payment of annuity stops but annuitant status continues.

*Termination* in regard to payment of annuity, means that both payment of annuity and annuitant status cease.

[58 FR 48266, Sept. 15, 1993, as amended at 62 FR 50996, Sept. 30, 1997; 64 FR 15288, Mar. 31, 1999]

### § 837.103 Notice.

(a) *To OPM*. On or before the date a reemployed annuitant is appointed, the appointing agency must notify OPM in writing of the appointment, and provide OPM with the following information—

(1) The annuitant's name, date of birth, social security number (if applicable), and retirement claim number;

(2) A description of the kind of appointment;

(3) Whether the amount of annuity allocable to the period of reemployment is, or will be, withheld from the reemployed annuitant's pay, in accordance with § 837.303 of this part; and

(4) When the appointment is an interim appointment under § 772.102 of this chapter, an explicit statement that the appointment is required by the Whistleblower Protection Act of 1989.

(b) *To annuitant.* The agency should advise the annuitant in writing, generally, of the effect reemployment has on annuitant status and/or the continued receipt of annuity, the possible, future retirement benefits that may be payable to an annuitant on the basis of reemployment, and, for CSRS annuitants, whether the annuitant may elect to have retirement deductions withheld from his or her basic pay.

(c) *Obligation of annuitant to provide information.* Before appointment, and as a condition of reemployment, the annuitant must provide the employing agency with the following information—

(1) Whether the annuitant is then in receipt of annuity;

(2) The gross monthly amount of annuity the annuitant is then receiving;

(3) Whether the annuitant is a disability annuitant, and if so, whether OPM has found the annuitant recovered from his or her disability, or restored to earning capacity; and.

(4) If the annuitant is a CSRS annuitant, whether the annuitant's retirement was based on an involuntary separation, not for charges of misconduct or delinquency.

### § 837.104 Reemployment of former employees of nonappropriated fund instrumentalities.

A former employee of a nonappropriated fund instrumentality who has made an election of retirement coverage under part 847 of this chapter will continue to be covered under the elected retirement system for all periods of service as a reemployed annuitant.

[61 FR 41720, Aug. 9, 1996]

## Subpart B—Annuitant and Employee Status

### § 837.201 Annuitant status.

Unless his or her annuity is terminated under the provisions of § 837.202 or § 837.403 of this part, an annuitant continues to be an annuitant throughout the period of reemployment, whether or not he or she continues to receive annuity payments during the period of reemployment.

### § 837.202 Annuities that terminate on reemployment.

(a) *FERS annuitants.* (1) The annuity of a FERS annuitant who is a disability annuitant whom OPM has found recovered or restored to earning capacity prior to reemployment terminates on reemployment.

(2) The annuity of a FERS annuitant who is a former military reserve technician awarded a disability retirement annuity under 5 U.S.C. 8456, in addition to being subject to paragraph (a)(1) of this section, shall terminate on the date the annuitant declines an offer of employment with a department or agency, where the employment is in the same commuting area and of the same grade as, or a level equivalent to, the position from which the annuitant retired.

(b) *CSRS annuitants.* (1) The annuity of a CSRS annuitant terminates on reemployment if—

(i) The annuitant is a disability annuitant whom OPM has found recovered or restored to earning capacity prior to reemployment, or whose disability annuity was awarded under the provisions of 5 U.S.C. 8337(h) because the annuitant was a National Guard Technician who was medically disqualified for continued membership in the National Guard;

(ii) The annuitant is not a retired Member and the annuity is based on an involuntary separation (other than a separation that was mandated by statute based on the annuitant's age and length of service, or a separation for

cause on charges of misconduct or delinquency) where the reemployment would, if the individual were not an annuitant, be covered by CSRS;

(iii) The annuitant is not a retired Member and is appointed by the President to a position that would, if the individual were not an annuitant, be covered by CSRS; or

(iv) The annuitant is not a retired Member and is elected as a Member.

(2) A disability annuity awarded a former National Guard Technician under the provisions of 5 U.S.C. 8337(h) shall terminate on the date the annuitant declines an offer of employment with a department or agency, where the employment is in the same commuting area and of the same grade as, or a level equivalent to, the position from which the annuitant retired.

### § 837.203 Annuities that are suspended during reemployment.

(a) *All annuitants*. Payment of annuity is suspended when—

(1) The annuitant is appointed as a justice or judge of the United States, as defined by section 451 of title 28, United States Code; or

(2) The annuitant receives an interim appointment under § 772.102 of this chapter.

(b) *CSRS annuitants only*. Payment of annuity is suspended when the annuitant is a retired Member and becomes employed in an elective position, or is appointed to a position that is not intermittent or without pay.

## Subpart C—Coverage and Contributions

### § 837.301 Coverage.

(a) *When annuity terminates on, or is suspended during, reemployment*. Retirement coverage under either CSRS or FERS is governed by subpart B of part 831 or subpart A of part 842 of this chapter, as is appropriate.

(b) *When annuity continues*. (1) Unless a reemployed FERS annuitant's employment is on an intermittent basis, as an employee subject to another retirement system, or as President, deductions for the Fund shall be made under 5 U.S.C. 8422(a).

(2) A CSRS annuitant is not subject to deductions, unless he or she is serving in an other-than-intermittent status (except as President), is not covered by another retirement system, and elects to have retirement deductions made from his or her pay. Generally, deductions are made no later than the beginning of the first pay period immediately following the date the reemployed annuitant files the election with the employing agency. When the annuitant elects to have deductions made, he or she may not change the election during continuous service with that agency.

(3) The amount of basic pay prior to offset of annuity under § 837.303 of this part is used in computing the amount of deductions. The rate of retirement deductions is that which attaches to the position under the provisions of sections 8334(a), 8334(k), or 8422(a) of title 5, United States Code, as is applicable.

### § 837.302 Agency contributions.

(a) *FERS annuitants*. An agency that reemploys a FERS annuitant subject to retirement deductions under § 837.301(b)(1) of this part shall make contributions, as specified in 5 U.S.C. 8423, to the Fund, based on the reemployed annuitant's pay prior to offset of annuity under the provisions of § 837.303 of this part.

(b) *CSRS annuitants*. An agency that reemploys a CSRS annuitant is required to make an agency contribution when—

(1) The annuity is suspended or terminated under the provisions of subpart B of this part; and

(2) The appointment is subject to CSRS deductions under the provisions of subpart B of part 831 of this chapter.

### § 837.303 Annuity offset.

(a) *Applicability*. When the right to receive annuity continues during reemployment (even though actual receipt of annuity may have been waived under 5 U.S.C. 8345(d) or 8465(a)), the pay of the reemployed annuitant shall be offset by the amount of annuity allocable to the period of reemployment, except that—

(1) No amount shall be offset from pay in accordance with this section for a period for which the annuitant has

elected to receive FEC benefits in lieu of annuity; and

(2) No amount shall be offset from a lump-sum payment of annual leave, made on or after termination of the reemployment period.

(b) *Payment*. The employing agency shall pay to the Fund the full amount required to be offset from a reemployed annuitant's salary under this section in accordance with instructions issued by OPM. Payment in full to the Fund is not contingent on actual offset from the reemployed annuitant's salary.

(c) *Computation*. To compute the amount of the annuity offset for any particular pay period, divide the amount of annuity for the calendar days included in the pay period by the number of hours that would constitute a full-time tour of duty for that pay period, then multiply the result by the number of hours actually paid for the pay period, not to exceed the number of hours that constitutes a full-time tour of duty.

### § 837.304 Agency liability for payments.

(a) The agency will remit funds properly withheld from the pay of a reemployed annuitant in accordance with this subpart to OPM in the manner prescribed for the transmission of withholdings and contributions as soon as possible, but not later than provided by standards established by OPM.

(b) When the employing agency fails to withhold from the pay of the reemployed annuitant some or all of the amounts required to be withheld from that pay by this subpart, the employee has received an overpayment of pay. The employing agency must collect the overpayment of pay (unless it is waived under 5 U.S.C. 5584 or some other applicable statute) and remit the proper funds to OPM in the manner prescribed for the transmission of withholdings and contributions as soon as possible, but not later than provided by standards established by OPM.

(c) If the employing agency waives the annuitant's repayment of the salary overpayment, it must submit—on behalf of the reemployed annuitant—an amount equal to the correct deduction from pay (or the balance due in the case of a partial deduction) to OPM in the manner prescribed for the transmission of withholdings and contributions as soon as possible, but not later than provided by standards established by OPM.

[58 FR 48266, Sept. 15, 1993, as amended at 66 FR 66711, Dec. 27, 2001]

### § 837.305 Lump-sum credit not reduced.

When annuity continues during the period of reemployment, and the reemployment is subject to annuity offset under the provisions of § 837.303 of this subpart, or any similar provision of law or regulation, the amount of an annuitant's lump-sum credit to the Fund shall not be reduced by the amount of annuity allocable to the period of reemployment.

### § 837.306 Refund of lump-sum credit.

An annuitant serving as a justice or judge of the United States, as defined by section 451 of title 28, United States Code, may apply for and receive payment of the annuitant's lumpsum credit, less the amount of annuity or other benefits previously paid on that account. Receipt of a refund under this section will irrevocably terminate the right to annuity, and the annuitant status, of the recipient, based on any prior separations from employment covered by CSRS or FERS.

## Subpart D—Reemployment of Disability Annuitants

### § 837.401 Generally.

A disability annuitant may be reemployed in any position for which he or she is qualified.

### § 837.402 Special notice.

(a) *To annuitant*. In addition to the advice described in paragraph 837.103(b) of this part, the agency should generally also advise a disability annuitant, in writing, prior to reemployment, that—

(1) Reemployment on a permanent basis in a position equivalent in grade and pay to the position from which the annuitant retired may constitute the basis for an OPM finding of recovery from disability;

(2) Reemployment subject to medical and physical qualification standards equivalent to those of the position from which the annuitant retired may constitute the basis for an OPM finding of recovery from disability;

(3) The pay of the position in which the annuitant is reemployed, prior to the offset of annuity, or the pay of an interim appointment under § 772.102 of this chapter, as may be applicable, will be included as earnings in determining whether the disability annuity will be terminated due to restoration to earning capacity;

(4) Receipt of, or continued entitlement to receive, full or partial FEC benefits during reemployment, when those benefits are based on the same injury or medical condition that is the basis for OPM's award of disability retirement, is conclusive evidence (unless there is contravening medical evidence) that the annuitant has not recovered from the disability; and

(5) A disability annuitant age 60 or over cannot be found by OPM to be restored to earning capacity, and can only be found recovered at the annuitant's request.

(b) *To OPM.* On reemployment of a disability annuitant, the employing agency shall, in addition to the notice required by § 837.103(a) of this part, notify OPM in writing of—

(1) The physical and medical requirements of the position (providing a copy of the employee's position description);

(2) The position's grade level and/or rate of pay;

(3) Whether the employment is full-time, part-time, or intermittent;

(4) Whether, to the best of the agency's knowledge, the reemployed annuitant is receiving, or entitled to receive, FEC benefits; and

(5) Whether any medical evidence was used in making the employment decision, and if so, provide OPM with a copy of the medical information.

### § 837.403 Termination of annuity during reemployment.

(a) *Agency action.* When a reemployed disability annuitant is found recovered from disability or restored to earning capacity by OPM, OPM shall terminate the annuity as of the date of the finding, and the employing agency shall cease reducing pay by the amount of annuity allocable to the period of reemployment effective that same date. If the appointment is subject to retirement deductions, retirement deductions will begin or continue, as the case may be.

(b) *Subsequent benefits*—(1) *CSRS.* If, on separation from a period of reemployment during which the disability annuity was terminated because of recovery or restoration to earning capacity, the former disability annuitant is entitled to either an immediate or deferred annuity based on the most recent separation, any right to an annuity based on a prior separation is permanently extinguished. If no such right to immediate or deferred annuity accrues based on this most recent separation, however, any right to immediate or deferred annuity will be determined on the basis of the next prior separation.

(2) *FERS.* If a disability annuity is terminated during a period of reemployment because of recovery or restoration to earning capacity, any right to an annuity based on a prior separation is permanently extinguished, except as otherwise provided by § 844.405(b)(2) of this chapter.

### § 837.404 Reinstatement of annuity during a period of employment not subject to CSRS or FERS.

When OPM reinstates the disability annuity of an individual employed in a position not subject to CSRS or FERS, the employing agency shall withhold retirement deductions and offset pay subject to the provisions of subpart C of this part, as of the date of OPM's administrative determination of reinstatement. OPM shall offset from any retroactive payment of annuity for a period that is also a period of employment an amount equal to the amount of annuity, or the pay for the period of employment, whichever is the lesser.

## Subpart E—Retirement Benefits on Separation

### § 837.501 Refund of retirement deductions.

A reemployed annuitant who separates from reemployment without title to either a supplemental annuity or a

redetermined annuity under this subpart is entitled to have any retirement deductions withheld from pay during the period of reemployment refunded without interest.

### § 837.502 Reinstatement of annuity.

(a) *When appropriate.* (1) When an annuity was terminated because of reemployment under the provisions of § 837.202 of this part, or any similar provision of statute or regulation in effect prior to the promulgation of this part, the annuity that was terminated will be reinstated effective the date immediately following the date the reemployed annuitant separated from reemployment, if—

(i) The reemployed annuitant's right to annuity has not been terminated under any other provision of regulation or statute; and

(ii) The reemployed annuitant is not entitled to either an immediate or deferred CSRS or FERS annuity based on the separation from reemployment.

(2) When an annuity was suspended because of reemployment under the provisions of § 837.203 of this part, the annuity that was suspended will be reinstated effective the date immediately following the date the reemployed annuitant separated from reemployment.

(b) *Amount of reinstated annuity.* The amount of an annuity reinstated under the provisions of paragraph (a)(2) of this section will be the amount of the annuity at the effective date of termination, adjusted by such adjustments as would have occurred had the annuity remained payable during the period of reemployment.

### § 837.503 Supplemental annuity.

(a) *Title requirements.* A reemployed annuitant is entitled, on separation, or conversion to intermittent service, to a supplemental annuity if—

(1) The annuitant performed—

(i) At least 1 year of actual, continuous, full-time service;

(ii) Actual, continuous part-time service equivalent to 1 year of actual full-time service; or

(iii) A combination of part-time and full-time actual, continuous service that is equivalent to 1 year of actual full-time service; and

(2)(i) The annuity is not terminated or suspended on reemployment; and

(ii) The pay during reemployment was subject to offset by the amount of annuity allocable to the period of reemployment; *or*

(iii) The reemployed annuitant separates from an interim appointment made under the provisions of § 772.102 of this chapter.

(b) *Computation of supplemental annuity*—(1) *CSRS.* (i) That portion of a supplemental annuity that is based on the total years and full months of creditable reemployment service performed while covered under CSRS, is computed under the provisions of 5 U.S.C. 8339(a), (b), (d), (e), (h), (i), (n) and (q). Unused sick leave to the reemployed annuitant's credit immediately prior to separation from reemployed annuitant service will be credited under the rules prescribed in § 831.302 of this chapter, and 5 U.S.C. 8339(m), not to exceed the amount of unused sick leave available immediately before the effective date of an election of FERS coverage, and not including any unused sick leave included in the computation of an annuity or supplemental annuity the annuitant is receiving at the time of separation from the most recent period of reemployment.

(ii) A supplemental annuity computed in whole or in part under the provisions of this paragraph, using CSRS-Offset service, is subject to reduction under subpart G of this part.

(2) *FERS.* That portion of a supplemental annuity that is based on the total years and full months of creditable reemployment service performed on and after the effective date of FERS coverage is computed under the provisions of 5 U.S.C. 8415 (a) through (f).

(3) *Average pay.* The average pay used in the computation of a supplemental annuity is the average basic pay for the entire period of actual continuous reemployment service, excluding intermittent service.

(4) *Survivor reduction.* If the reemployed annuitant's annuity, at the time he or she applies for supplemental annuity, is reduced to provide a survivor benefit for a spouse, (or, for FERS annuitants only, a former spouse), the supplemental annuity will

be reduced by 10 percent, and the survivor annuities increased, if the annuitant was retired under CSRS, by 55 percent of the supplemental annuity, and if the annuitant was retired under FERS, by 50 percent of the supplemental annuity, unless the reemployed annuitant notifies OPM at the time of application that he or she does not wish to have such reductions and increases effected.

(c) *Creditable service.* (1) All actual reemployment service performed after the date of retirement on a full-time or part-time basis may be credited in the computation of a supplemental annuity provided—

(i) When the reemployment service was performed on or after October 1, 1982, retirement deductions were withheld or, for CSRS annuitants, a deposit has been paid under the provisions of 5 U.S.C. 8334;

(ii) The reemployment service was not performed subject to another retirement system, except when the deductions under the other retirement system have been refunded and a deposit paid to OPM, where the law so permits, or benefits under the other retirement system have been waived in favor of CSRS or FERS benefits; and

(iii) The reemployment service has not been used in the computation of another supplemental or redetermined annuity.

(2) A period of reemployment service during which annuitant status continues and annuity is paid, and which is excluded from the normal annuity offset from pay by special statutory provision, cannot be credited in the computation of a supplemental annuity or any subsequent annuity entitlement.

(d) *Commencing date.* (1) Except as provided in clause (2) of this subparagraph, the supplemental annuity commences on the earlier of the first day of the month following—

(i) The day the annuitant is separated from reemployment; or

(ii) The day the annuitant is converted to an intermittent status.

(2) The supplemental annuity of a FERS annuitant, and the supplemental annuity of a CSRS reemployed annuitant who has not elected FERS coverage and who was—

(i) Involuntarily separated from the reemployment service (except by removal for cause on charges of misconduct or delinquency);

(ii) Involuntarily converted to an intermittent status, or;

(iii) Separated from reemployment service, or converted to intermittent status, after serving 3 days or less in the month of such separation or conversion—shall commence on the earlier of the day after separation from reemployment service, the effective date of conversion to intermittent status, or the day after the date pay ceases.

**§ 837.504 Redetermined annuity.**

(a) *Title requirements.* (1) A reemployed annuitant is entitled, on separation, or conversion to intermittent service, to a redetermined annuity if—

(i) The annuitant performed—

(A) At least 5 years of actual, continuous, full-time service;

(B) Actual, continuous part-time service equivalent to 5 years of actual full-time service, or;

(C) A combination of part-time and full-time actual, continuous service that is equivalent to 5 years of actual full-time service.

(ii)(A) The annuity was not terminated or suspended during reemployment; and

(B) The pay during reemployment was subject to offset by the amount of annuity allocable to the period of reemployment; *or*

(C) The reemployed annuitant separated from an interim appointment made under the provisions of § 772.102 of this chapter.

(iii) Retirement deductions are withheld, or a deposit is paid, for the entire period of continuous reemployment service immediately preceding the most recent separation from reemployment service; and

(iv) The reemployed annuitant elects the redetermined annuity in lieu of his or her prior annuity and the supplemental annuity that would be payable under § 837.503 of this subpart.

(2) An employee whose annuity was terminated under the provisions of § 837.202(b)(1)(iii) of this part, and who has not elected FERS coverage, is entitled to a redetermined annuity on separation.

(b) *Computation.* (1) A redetermined annuity is computed using all the reemployed annuitant's creditable service, under the provisions of law in effect governing the payment of CSRS and/or FERS annuities, as may be applicable, at the time of separation from reemployment service, or conversion to intermittent status.

(2) The amount of the redetermined annuity of an individual whose previous annuity was terminated under the provisions of § 837.202(b)(1)(iii) of this part will at least equal the amount of the terminated annuity plus any increases under section 8340 of title 5, United States Code, occurring after the termination of the previous annuity and before the commencement of the redetermined annuity, adjusted by any annuity increase or reduction resulting from additional or different elections made by the reemployed annuitant.

(c) *Commencing date.* The commencing date of the redetermined annuity is the same as the law and/or regulations would provide in the case of a retiring employee.

### § 837.505 Cost-of-living adjustments on Member annuities.

(a) *Applying cost-of-living adjustments to recomputed Member annuities under CSRS.* A member annuity benefit that is recomputed under section 8344(d)(1) of title 5, United States Code, which applies to certain former Members who become employed in an appointive position subject to CSRS, will include the cost-of-living adjustments under section 8340 of title 5, United States Code, that are effective after the commencing date of the benefit computed under section 8344(d)(1).

(b) *Limitations on cost-of-living adjustments on recomputed Member annuities under CSRS.* For purposes of determining limitations on cost-of-living adjustments under section 8340(g) of title 5, United States Code, the final (or average) salary of a Member whose benefit has been recomputed under section 8344(d)(1) of title 5, United States Code, which applies to certain former Members who become employed in an appointive position subject to CSRS, will be increased by adjustments in the rates of the General Schedule under subpart I of chapter 53 of title 5, United States Code, that are effective after the commencing date of the benefit computed under section 8344(d)(1).

[59 FR 10267, Mar. 4, 1994]

### § 837.506 Computation of redetermined annuity for former employees of nonappropriated fund instrumentalities.

(a) The redetermined annuity of a former employee of a nonappropriated fund instrumentality who elected CSRS or FERS coverage under 5 CFR part 847, subpart D, is recomputed under 5 CFR part 847, subpart F.

(b) The redetermined annuity of a former employee of a nonappropriated fund instrumentality who elected CSRS or FERS retirement credit under 5 CFR part 847, subpart H, is recomputed under 5 CFR part 847, subpart I.

[68 FR 2178, Jan. 16, 2003]

## Subpart F—Death Benefits

### § 837.601 Generally.

Except as otherwise provided by this subpart, when an annuitant who is reemployed under circumstances that provide for continuation of annuitant status during reemployment dies, death benefits are payable under CSRS or FERS as if the individual died as an annuitant, and not as employee.

### § 837.602 Lump-sum payment of retirement deductions.

If an annuitant reemployed subject to the provisions of this part dies while so reemployed, and the annuitant would not have been entitled to a supplemental annuity, had the separation been for reasons other than death, or if there is no supplemental spousal survivor annuity payable (including a survivor annuity payable to a former spouse, if the annuitant retired under FERS) the amount of retirement deductions withheld during the period of reemployment will be paid in a lump sum to the person entitled under the provisions of 5 U.S.C. 8342(c) or 8424(d), as appropriate.

### § 837.603 Increased survivor benefits.

(a) *Supplemental survivor annuity.* (1) If an annuitant reemployed subject to the provisions of this part dies while so

reemployed, and the annuitant would have been entitled to a supplemental annuity, had the separation been for reasons other than death, and there is a spousal survivor annuity payable (including a survivor annuity payable to a former spouse, if the annuitant retired under FERS) the amount of the spousal survivor annuity will, if any necessary deposit for service credit is made, be increased by 55 percent of the supplemental annuity, if the reemployed annuitant was retired under CSRS, or 50 percent of the supplemental annuity, if the reemployed annuitant was retired under FERS.

(2) Supplemental survivor annuity benefits payable under this paragraph, computed in whole or in part under the provisions of § 837.503(b)(1)(i) of this part, using CSRS-Offset service, are subject to reduction under subpart G of this part.

(b) *Redetermined survivor annuity.* If an annuitant reemployed subject to the provisions of this part dies while so reemployed, and the annuitant would have been entitled to elect a redetermined annuity, had the separation been for reasons other than death, and if there is a spousal survivor annuity payable (including a survivor annuity payable to a former spouse, if the annuitant retired under FERS), a person entitled to a spousal survivor annuity may elect to have his or her survivor annuity computed as if the annuitant had elected a redetermined annuity, provided any necessary deposit for service credit is made.

## Subpart G—CSRS Offset

### § 837.701 Offset from supplemental annuity.

(a) OPM will reduce the supplemental annuity of an individual who has performed CSRS-Offset service, if the individual is entitled, or on proper application would be entitled, to old-age benefits under title II of the Social Security Act.

(b) The reduction required under paragraph (a) of this section is effective on the first day of the month during which the reemployed annuitant—

(1) Is entitled to a supplemental annuity under this part; and

(2) Is entitled, or on proper application would be entitled, to old-age benefits under title II of the Social Security Act.

(c) Subject to paragraphs (d) and (e) of this section, the amount of the reduction required under paragraph (a) of this section is the lesser of—

(1) The difference between—

(i) The social security old-age benefit for the month referred to in paragraph (b) of this section; and

(ii) The old-age benefit that would be payable to the individual for the month referred to in paragraph (b) of this section, excluding all CSRS-Offset wages as a reemployed annuitant, and assuming the annuitant was fully insured (as defined by section 214(a) of the Social Security Act); or

(2) The product of—

(i) The old-age benefit to which the individual is entitled or would, on proper application, be entitled; and

(ii) A fraction—

(A) The numerator of which is the annuitant's total CSRS-Offset service as a reemployed annuitant, rounded to the nearest whole number of years not exceeding 40 years; and

(B) The denominator of which is 40.

(d) Cost-of-living adjustments under 5 U.S.C. 8340 occurring after the effective date of the reduction required under paragraph (a) of this section will be based on only the supplemental annuity remaining after reduction under this subpart.

(e) The amounts for paragraphs (c)(1)(i), (c)(1)(ii), and (c)(2)(i) of this section are computed without regard to subsections (b) through (1) of section 203 of the Social Security Act (relating to reductions in social security benefits), and without applying the provisions of the second sentence of section 215(a)(7)(B)(i) or section 215(d)(5)(ii) of the Social Security Act (relating to part of the computation of the social security windfall elimination provisions).

(f) OPM will accept the determination of the Social Security Administration, submitted in a form prescribed by OPM, concerning entitlement to social security benefits and the beginning and ending dates thereof.

**§ 837.702 Offset from supplemental survivor annuity.**

(a) OPM will reduce a supplemental survivor annuity (an annuity under 5 U.S.C. 8341) based on the service of an individual who performed CSRS-Offset service, if the survivor annuitant is entitled, or on proper application would be entitled, to survivor benefits under section 202(d), (e), or (f) (relating to children's, widows', and widowers' benefits, respectively) of the Social Security Act.

(b) The reduction required under paragraph (a) of this section begins (or is reinstated) on the first day of the month during which the survivor annuitant—

(1) Is entitled to a disability or survivor annuity under CSRS; and

(2) Is entitled, or on proper application would be entitled, to survivor benefits under the Social Security Act provisions mentioned in paragraphs (a) and (c) of this section, respectively.

(c) The reduction under paragraphs (a) of this section will be computed and adjusted in a manner consistent with the provisions of § 837.701 (c) through (e) of this part.

(d) A reduction under paragraph (a) of this section stops on the date entitlement to the disability or survivor benefits under title II of the Social Security Act terminates. In the case of a survivor annuitant who has not made proper application for the social security benefit, the reduction under paragraph (a) of this section stops on the date entitlement to such survivor benefits would otherwise terminate. If a social security benefit is reduced under any provision of the Social Security Act, even if reduced to zero, entitlement to that benefit is not considered to have terminated.

(e) OPM will accept the determination or certification of the Social Security Administration, submitted in a form prescribed by OPM, concerning entitlement to social security survivor benefits and the beginning and ending dates thereof.

## Subpart H—Alternative Entitlements and Canceled Retirements

**§ 837.801 Unperfected entitlement to CSRS benefits based on a prior separation.**

(a) An employee who meets the age and service requirements for title to a non-disability annuity under CSRS on the basis of a prior separation, but did not apply for that annuity before a subsequent separation from service to which a different annuity entitlement attaches, may elect, on application, to receive either—

(1) The annuity based on the later separation; or

(2) The annuity based on the prior separation, with payment of annuity suspended during the period(s) of employment subsequent to the commencing date of annuity, and such benefits as would be payable had the subsequent period(s) of employment been performed under the provisions of this part.

(b) When an individual who has applied for a deferred annuity under CSRS is reemployed under CSRS before the commencing date of that annuity, the application is deemed to have not been made.

**§ 837.802 Benefits under another retirement system for Federal employees based on the most recent separation.**

(a) *Generally*. An annuitant who has performed reemployment service after the commencing date of annuity under the provisions of another retirement system, and who is entitled to an annuity benefit from the other retirement system during a period in which he or she is also entitled to an annuity benefit under CSRS or FERS, may receive both benefits simultaneously, or for the same period, except that the annuitant may not receive both benefits simultaneously, or for the same period, if—

(1) The provisions of law or regulation governing the other retirement system do not permit the annuitant to receive both benefits simultaneously, or for the same period of time; or

(2) Entitlement to the annuity from the other retirement system is based

on service credited in the computation of the CSRS or FERS annuity, or service credited in the computation of the annuity from the other retirement system was used in the computation of the CSRS or FERS annuity.

(b) *Election of alternative benefits.* (1) Where simultaneous receipt of, or entitlement to, both annuities is barred under the provisions of paragraph (a)(1) of this section, the annuitant must elect to receive either the annuity under the other retirement system, or the CSRS annuity.

(2) Where the annuitant, under the provisions of paragraph (b)(1) of this section, elects to receive annuity from the other retirement system in lieu of the CSRS or FERS annuity, the CSRS or FERS annuity terminates as of the commencing date of the other annuity, and any overpayment of CSRS annuity will be offset from the other annuity and paid to OPM.

(c) *Recomputation.* Where simultaneous receipt of annuities from more than one retirement system is barred by paragraph (a)(2), but not by paragraph (a)(1), of this section, the CSRS or FERS annuity may be recomputed to exclude credit for service credited in determining entitlement to, or the amount of, the annuity from the other retirement system, effective as of the commencing date of the annuity from the other retirement system for Federal employees, and the recomputed CSRS or FERS annuity may be paid simultaneous with, or for the same period as, the annuity from the other retirement system for Federal employees.

(d) *Forfeiture.* Where an annuitant's coverage as an employee under another retirement system, whether by election or by operation of law or regulation, results in forfeiture of annuity rights under CSRS or FERS, the CSRS or FERS annuity will terminate as of the effective date of coverage.

(e) *Survivors.* The rules detailed in this section in regard to dual entitlement to annuity benefits under CSRS or FERS and another retirement system also apply to dual entitlement to survivor benefits under CSRS or FERS and another retirement system, unless the particular circumstance is otherwise governed by specific provision of statute or regulation.

(f) *Agency responsibilities.* The agency responsible for administering another retirement system must—

(1) Promptly notify OPM of an election of coverage under that retirement system by a reemployed CSRS or FERS annuitant, or the coverage of a reemployed CSRS annuitant under that retirement system by election or operation of law or regulation, when such coverage affects the annuitant's entitlement to CSRS annuity;

(2) Promptly notify OPM when a reemployed annuitant separates with entitlement to an annuity under the other retirement system that cannot, under the provisions of paragraph (a) of this section, be paid simultaneous with, or during the same period as, the CSRS annuity; and

(3) Reimburse OPM for overpayments of annuity resulting from a failure to comply with paragraphs (b) (1) and (2) of this section.

### § 837.803 Cancellation of retirement by judicial or administrative authority.

(a) *Cancellation of retirement action.* A separation from employment on which an application for retirement is based may only be canceled by the former employing agency in response to a direct and final order of a judicial or administrative body charged with the responsibility of reviewing the legality of the separation, and authorized to make such order, or by agreement between the annuitant and the former employing agency in resolution of a grievance, complaint, dispute, appeal or other action, involving an allegedly erroneous separation, before such authority.

(b) *Agency notification to OPM.* Upon receiving a final order requiring cancellation of the annuitant's separation or after the annuitant and the agency agree to cancel the separation, the employing agency must notify OPM and request the amount of the erroneous payment to be recovered under § 550.805(e) of this chapter from any back pay adjustment to which the employee may be entitled.

(c) *Collection of erroneously paid retirement benefits.* (1) If OPM determines that an overpayment of annuity or

lump-sum credit has occurred and the employee is entitled to receive back pay because of the canceled separation, the overpaid retirement benefits must be deducted to the extent they can be recovered from the back pay adjustment as required by § 550,805(e) of this chapter.

(2) Amounts recovered from back pay will not be subject to waiver consideration under the provisions of 5 U.S.C. 8346(b) or 8470(b). If there is no back pay or the back pay is insufficient to recover the entire payment, the employee may request that OPM waive the uncollected portion of the overpayment. If waiver is not granted, the employee must repay the erroneous payment.

**§ 837.804 Finality of elections under this subpart.**

Except as otherwise provided by this subpart, an election of coverage under, or annuity from, another retirement system, in lieu of CSRS or FERS coverage or annuity, or the election between simultaneous entitlements under CSRS or FERS, is final and conclusive for the period of simultaneous entitlement to coverage or annuity.

# PART 838—COURT ORDERS AFFECTING RETIREMENT BENEFITS

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AUTHORITY: 5 U.S.C. 8347(a) and 8461(g). Subparts B, C, D, E, J, and K also issued under 5 U.S.C. 8345(j)(2) and 8467(b). Sections 838.221, 838.422, and 838.721 also issued under 5 U.S.C. 8347(b).

SOURCE: 57 FR 33574, July 29, 1992, unless otherwise noted.

## Subpart A—Court Orders Generally

ORGANIZATION AND STRUCTURE OF REGULATIONS ON COURT ORDERS

### § 838.101 Purpose and scope.

(a)(1) This part regulates the Office of Personnel Management's handling of court orders affecting the Civil Service Retirement System (CSRS) or the Federal Employees Retirement System (FERS), both of which are administered by the Office of Personnel Management (OPM). Generally, OPM must comply with court orders, decrees, or court-approved property settlement agreements in connection with divorces, annulments of marriage, or legal separations of employees, Members, or retirees that award a portion of the former employee's or Member's retirement benefits or a survivor annuity to a former spouse.

(2) In executing court orders under this part, OPM must honor the clear instructions of the court. Instructions must be specific and unambiguous. OPM will not supply missing provisions, interpret ambiguous language, or clarify the court's intent by researching individual State laws. In carrying out the court's instructions, OPM performs purely ministerial actions in accordance with these regulations. Disagreement between the parties concerning the validity or the provisions of any court order must be resolved by the court.

(b) This part prescribes—

(1) The requirements that a court order must meet to be acceptable for processing under this part;

(2) The procedures that a former spouse or child abuse creditor must follow when applying for benefits based on a court order under sections 8341(h), 8345(j), 8445 or 8467 of title 5, United States Code;

(3) The procedures that OPM will follow in honoring court orders and in making payments to the former spouse or child abuse creditor; and

(4) The effect of certain words and phrases commonly used in court orders affecting retirement benefits.

(c)(1) Subparts A through I of this part apply only to court orders received by OPM on or after January 1, 1993.

(2) Subpart J of this part applies only to court orders received by OPM before January 1, 1993.

(3) Subpart K of this part applies only to court orders received by OPM on or after October 14, 1994.

(d) This part has no application to the Thrift Savings Plan described in subchapter III of chapter 84 of title 5, United States Code.

[57 FR 33574, July 29, 1992, as amended at 59 FR 66637, 66638, Dec. 28, 1994]

### § 838.102 Regulatory structure.

(a) This part is organized as follows:

(1) Subpart A contains information and rules of general application to all court orders directed at CSRS or FERS retirement benefits.

(2) Subparts B and C of this part contain information about court orders directed at ongoing employee annuity payments.

(3) Subparts D and E of this part contain information about court orders directed at refunds of employee contributions.

(4) Subpart F of this part contains information about the effect of words and phrases commonly used in court orders affecting ongoing employee annuity payments and refunds of employee contributions.

(5) Subparts G, H, and I of this part contain information about court orders awarding former spouse survivor annuities.

(6) Subpart J of this part contains the rules applicable to court orders filed under procedures in effect prior to the implementation of this part. These rules continue to apply to court orders received by OPM before January 1, 1993.

(7) Subpart K of this part contains rules applicable to court orders for the enforcement of judgments rendered against employees or annuitants for physical, sexual, or emotional abuse of a child.

(b) Part 890 of this chapter contains information about coverage under the Federal Employees Health Benefits Program.

(c) Part 581 of this chapter contains information about garnishment of Government payments including salary and CSRS and FERS retirement benefits.

(d) Parts 294 and 297 of this chapter and §§ 831.106 and 841.108 contain information about disclosure of information from OPM records.

(e) Subpart V of part 831 of this chapter and subpart G of part 842 of this chapter contain information about how court orders affect eligibility to make an alternative form of annuity election.

(f) Part 1600 of this title contains information about court orders affecting the Federal Employees Thrift Savings Plan.

(g) Subpart F of part 831 of this chapter, subpart F of part 841 of this chapter, and part 843 of this chapter contain information about entitlement to survivor annuities.

(h) Subpart T of part 831 of this chapter and subpart B of part 843 of this chapter contain information about refunds of employee contributions and lump-sum death benefits.

(i) Parts 870, 871, 872, and 873 of this chapter contain information about the Federal Employees Group Life Insurance Program.

[57 FR 33574, July 29, 1992, as amended at 59 FR 66637, Dec. 28, 1994]

### § 838.103 Definitions.

In this part (except subpart J)—

*Child abuse creditor* means an individual who applies for benefits under CSRS or FERS based on a child abuse judgment enforcement order.

*Child abuse judgment enforcement order* means a court or administrative order requiring OPM to pay a portion of an employee annuity or a refund of employee contributions to a child abuse

creditor as a means of collection of a ''judgment rendered for physically, sexually, or emotionally abusing a child'' as defined in sections 8345(j)(3)(B) and 8467(c)(2) of title 5, United States Code.

*Civil Service Retirement System* or *CSRS* means the retirement system for Federal employees described in subchapter III of chapter 83 of title 5, United States Code.

*Composite retirement annuity* means the annuity computed when a phased retiree attains full retirement status.

*Court order* means any judgment or property settlement issued by or approved by any court of any State, the District of Columbia, the Commonwealth of Puerto Rico, Guam, The Northern Mariana Islands, or the Virgin Islands, or any Indian court in connection with, or incident to, the divorce, annulment of marriage, or legal separation of a Federal employee or retiree.

*Court order acceptable for processing* means a court order as defined in this section that meets the requirements of subpart C of this part to affect an employee annuity, subpart E of this part to affect a refund of employee contributions, or subpart H of this part to award a former spouse survivor annuity.

*Employee* means an employee or Member covered by CSRS or FERS and a phased retiree as defined under this part.

*Employee annuity* means the recurring payments under CSRS or FERS made to a retiree, the recurring phased retirement annuity payments under CSRS or FERS made to a phased retiree in phased retirement status, and recurring composite retirement annuity payments under CSRS or FERS made to a phased retiree when he or she attains full retirement status. *Employee annuity* does not include payments of accrued and unpaid annuity after the death of a retiree or phased retiree under 5 U.S.C. 8342(g) or 8424(h).

*ERISA* means the Employees Retirement Income Security Act, 29 U.S.C. 1001 *et seq*.

*Federal Employees Retirement System* or *FERS* means the retirement system for Federal employees described in chapter 84 of title 5, United States Code.

*Former spouse* means (1) in connection with a court order affecting an employee annuity or a refund of employee contributions, a living person whose marriage to an employee has been subject to a divorce, annulment of marriage, or legal separation resulting in a court order, or (2) in connection with a court order awarding a former spouse survivor annuity, a living person who was married for at least 9 months to an employee or retiree who performed at least 18 months of civilian service covered by CSRS or who performed at least 18 months of civilian service creditable under FERS, and whose marriage to the employee of retiree was terminated prior to the death of the employee or retiree.

*Former spouse survivor annuity* means a recurring benefit under CSRS or FERS, or the basic employee death benefit under FERS as described in part 843 of this chapter, that is payable to a former spouse after the employee's or retiree's death.

*Gross annuity* means the amount of monthly annuity payable to a retiree or phased retiree after reducing the self-only annuity to provide survivor annuity benefits, if any, but before any other deduction. Unless the court order expressly provides otherwise, *gross annuity* also includes any lump-sum payments made to the retiree under 5 U.S.C. 8343a or 8420a.

*Member* means a Member of Congress covered by CSRS or FERS.

*Net annuity* means the amount of monthly annuity payable to a retiree or phased retiree after deducting from the gross annuity any amounts that are—

(1) Owed by the retiree to the United States;

(2) Deducted for health benefits premiums under 5 U.S.C.8906 and 5 CFR 891.401 and 891.402;

(3) Deducted for life insurance premiums under 5 U.S.C. 8714a(d);

(4) Deducted for Medicare premiums;

(5) Properly withheld for Federal income tax purposes, if the amounts withheld are not greater than they would be if the retiree claimed all dependents he or she was entitled to claim;

(6) Properly withheld for State income tax purposes, if the amounts

withheld are not greater than they would be if the retiree claimed all dependents he or she was entitled to claim; or

(7) Already payable to another person based on a court order acceptable for processing or a child abuse judgment enforcement order.

Unless the court order expressly provides otherwise, *net annuity* also includes any lump-sum payments made to the retiree under 5 U.S.C. 8343a or 8420a.

*Phased retiree* means a retirement-eligible employee who—

(1) With the concurrence of an authorized agency official, enters phased retirement status in accordance with 5 CFR part 831, subpart Q, or part 848; and

(2) Has not entered full retirement status;

For the purpose of this part, when the term *employee* is used it also refers to a *phased retiree*.

*Phased retirement annuity* means the annuity payable under 5 U.S.C. 8336a or 8412a, and 5 CFR part 831, subpart Q, or part 848, before full retirement.

*Phased retirement status* means that a phased retiree is concurrently employed in phased employment and eligible to receive a phased retirement annuity.

*Reduction to provide survivor benefits* means the reduction required by section 8339(j)(4) or section 8419(a) of title 5, United States Code.

*Refund of employee contributions* means a payment of the lump-sum credit to a separated employee under section 8342(a) or section 8424(a) of title 5, United States Code. *Refund of employee contributions* does not include lump-sum payments made under section 8342(c) through (f) or section 8424(d) through (g) of title 5, United States Code.

*Retiree* means a former employee, including a phased retiree who has entered full retirement status, or a Member who is receiving recurring payments under CSRS or FERS based on his or her service as an employee or Member. *Retiree* does not include an employee receiving a phased retirement annuity or a person receiving an annuity only as a current spouse, former spouse, child, or person with an insurable interest.

*Retirement* means a retirement other than a phased retirement.

*Self-only annuity* means the recurring unreduced payments under CSRS or FERS to a retiree with no survivor annuity payable to anyone. *Self-only annuity* also includes the recurring unreduced phased retirement annuity payments under CSRS or FERS to a phased retiree before any other deduction. Unless the court order expressly provides otherwise, *self-only annuity* also includes any lump-sum payments made to the retiree under 5 U.S.C. 8343a or 8420a.

*Separated employee* means a former employee or Member who has separated from a position in the Federal Government covered by CSRS and FERS under subpart B of part 831 of this chapter or subpart A of part 842 of this chapter, respectively, and is not currently employed in such a position, and who is not a retiree.

[57 FR 33574, July 29, 1992, as amended at 58 FR 3202, Jan. 8, 1993; 59 FR 66637, Dec. 28, 1994; 79 FR 46625, Aug. 8, 2014]

STATUTORY LIMIT ON COURT'S AUTHORITY

### § 838.111 Exemption from legal process except as authorized by Federal law.

(a) Employees, retirees, and State courts may not assign CSRS and FERS benefits except as provided in this part.

(b) CSRS and FERS benefits are not subject to execution, levy, attachment, garnishment or other legal process except as expressly provided by Federal law.

DIVISION OF RESPONSIBILITIES

### § 838.121 OPM's responsibilities.

OPM is responsible for authorizing payments in accordance with clear, specific and express provisions of court orders acceptable for processing.

### § 838.122 State courts' responsibilities.

State courts are responsible for—

(a) Providing due process to the employee or retiree;

(b) Issuing clear, specific, and express instructions consistent with the statutory provisions authorizing OPM to provide benefits to former spouses or child abuse creditors and the requirements of this part for awarding such benefits;

(c) Using the terminology defined in this part only when it intends to use the meaning given to that terminology by this part;

(d) Determining when court orders are invalid; and

(e) Settling all disputes between the employee or retiree and the former spouse or child abuse creditor.

[57 FR 33574, July 29, 1992, as amended at 59 FR 66638, Dec. 28, 1994]

### § 838.123 Claimants' responsibilities.

Claimants are responsible for—

(a) Filing a certified copy of court orders and all other required supporting information with OPM;

(b) Keeping OPM advised of their current mailing addresses;

(c) Notifying OPM of any changes in circumstances that could affect their entitlement to benefits; and

(d) Submitting all disputes with employees or retirees to the appropriate State court for resolution.

### § 838.124 Employees' and retirees' responsibilities.

Employees and retirees are responsible for—

(a) Raising any objections to the validity of a court order in the appropriate State court; and

(b) Submitting all disputes with former spouses to the appropriate State court for resolution.

## PROCEDURES APPLICABLE TO ALL COURT ORDERS

### § 838.131 Computation of time.

(a) The rules applicable for computation of time under §§ 831.107 and 841.109 of this chapter apply to this part.

(b)(1) Appendix A of this subpart lists the proper addresses for submitting court orders affecting CSRS and FERS benefits.

(2) A former spouse or child abuse creditor should submit the documentation required by this part to the address provided in appendix A of this subpart. The component of OPM responsible for processing court orders will note the date of receipt on court orders that it receives.

(3) If a court order is delivered to OPM at an address other than the address in appendix A of this subpart, the recipient will forward the court order to the component of OPM responsible for processing court orders. However, OPM is not considered to have received the court order until the court order is received in the component of OPM responsible for processing orders.

[57 FR 33574, July 29, 1992, as amended at 59 FR 66638, Dec. 28, 1994]

### § 838.132 Payment schedules.

(a) Under CSRS and FERS, employee annuities and survivor annuities are payable on the first business day of the month following the month in which the benefit accrues.

(b) In honoring and complying with a court order, OPM will not disrupt the payment schedule described in paragraph (a) of this section, despite any provision in the court order directing a different schedule of accrual or payment of amounts due the former spouse or child abuse creditor.

[57 FR 33574, July 29, 1992, as amended at 59 FR 66638, Dec. 28, 1994]

### § 838.133 Minimum awards.

Payments under this part will not be less than one dollar per month. Any court order that awards a former spouse a portion of an employee annuity or a former spouse survivor annuity in an amount of less than one dollar per month will be treated as an award of an annuity equal to one dollar per month.

### § 838.134 Receipt of multiple court orders.

(a) Except as provided in paragraph (c) of this section, for court orders affecting employee annuities or awarding former spouse survivor annuities, in the event that OPM receives two or more court orders acceptable for processing—

(1) When the court orders relate to two or more individuals (former spouses or child abuse creditors), the court orders will be honored in the

order in which they were received by OPM to the maximum extent possible under § 838.211 or § 838.711.

(2) When two or more court orders relate to the same former spouse, separated spouse, or child abuse creditor the one issued last will be honored.

(b)(1) Except as provided in paragraph (c) of this section, for court orders affecting refunds of employee contributions, in the event that OPM receives two or more court orders acceptable for processing—

(i) When the court orders affect two or more former spouses—

(A) The refund will not be paid if either court order prohibits payment of the refund of contributions; otherwise,

(B) The court orders will be honored in the order in which they were issued until the contributions have been exhausted.

(ii) When two or more court orders relate to the same former spouse, the one issued last will be honored first.

(2) In no event will the amount paid out exceed the amount of the refund of employee contributions.

(c) With respect to issues relating to the validity of a court order or to the amount of payment—

(1) If the employee, separated employee, retiree, or other person adversely affected by the court order and former spouse submit conflicting court orders from the same jurisdiction, OPM will consider only the latest court order; or

(2) If the employee, separated employee, retiree, or other person adversely affected by the court order and former spouse submit conflicting court orders from different jurisdictions—

(i) If one of the court orders is from the jurisdiction shown as the employee's, separated employee's, or retiree's address in OPM's records, OPM will consider only the court order issued by that jurisdiction; or

(ii) If none of the court orders is from the jurisdiction shown as the employee's, separated employee's, or retiree's address in OPM's records, OPM will consider only the latest court order.

[57 FR 33574, July 29, 1992, as amended at 59 FR 66638, Dec. 28, 1994]

**§ 838.135 Settlements.**

(a) OPM must comply with the terms of a properly filed court order acceptable for processing even if the retiree and the former spouse agree that they want OPM to pay an amount different from the amount specified in the court order. Information about OPM's processing of amended court orders is contained in §§ 838.225 and 838.806.

(b)(1) OPM will not honor a request from the former spouse that an amount less than the amount provided in the court order be withheld from an employee annuity or a refund of employee contributions.

(2) OPM will not honor a request from the retiree that an amount greater than the amount provided in the court order be withheld from an employee annuity or a refund of employee contributions.

[57 FR 33574, July 29, 1992, as amended at 58 FR 3202, Jan. 8, 1993]

## ADDRESS FOR FILING COURT ORDERS WITH OPM

### APPENDIX A TO SUBPART A OF PART 838—ADDRESSES FOR SERVING COURT ORDERS AFFECTING CSRS OR FERS BENEFITS

(a) The mailing address for delivery of court orders affecting CSRS or FERS benefits by the United States Postal Service is—

Office of Personnel Management, Retirement and Insurance Group, P.O. Box 17, Washington, DC 20044–0017

(b) The address for delivery of court orders affecting CSRS or FERS benefits by process servers, express carriers, or other forms of handcarried delivery is—

Court-ordered Benefits Section, Allotments Branch, Retirement and Insurance Group, Office of Personnel Management, 1900 E Street, NW., Washington, DC

[57 FR 33574, July 29, 1992, as amended at 58 FR 3202, Jan. 8, 1993]

## Subpart B—Procedures for Processing Court Orders Affecting Employee Annuities

REGULATORY STRUCTURE

### § 838.201 Purpose and scope.

(a) This subpart regulates the procedures that the Office of Personnel Management will follow upon the receipt of claims arising out of State court orders directed at employee annuities under CSRS or FERS. OPM must comply with qualifying court orders, decrees, or court-approved property settlements in connection with divorces, annulments of marriages, or legal separations of employees or retirees that award a portion of an employee annuity to a former spouse.

(b) This subpart prescribes—

(1) The circumstances that must occur before employee annuities are available to satisfy a court order acceptable for processing; and

(2) The procedures that a former spouse must follow when applying for a portion of an employee annuity based on a court order under section 8345(j) or section 8467 of title 5, United States Code.

(c)(1) Subpart C of this part contains the rules that a court order must satisfy to be a court order acceptable for processing to affect an employee annuity.

(2) Subpart F of this part contains definitions that OPM uses to determine the effect on employee annuity of a court order acceptable for processing.

AVAILABILITY OF FUNDS

### § 838.211 Amounts subject to court orders.

(a)(1) Employee annuities other than phased retirement annuities are subject to court orders acceptable for processing only if all of the conditions necessary for payment of the employee annuity to the former employee have been met, including, but not limited to—

(i) Separation from a position in the Federal service covered by CSRS or FERS under subpart B of part 831 of this chapter or subpart A of part 842 of this chapter, respectively;

(ii) Application for payment of the employee annuity by the former employee; and

(iii) The former employee's immediate entitlement to an employee annuity.

(2) Money held by an employing agency or OPM that may be payable at some future date is not available for payment under court orders directed at employee annuities.

(3) OPM cannot pay a former spouse a portion of an employee annuity before the employee annuity begins to accrue.

(4) Payment to a former spouse under a court order may not exceed the net annuity.

(b)(1) Phased retirement annuities are subject to court orders acceptable for processing only if all of the conditions necessary for payment of the phased retirement annuity to the phased retiree have been met, including, but not limited to—

(i) Entry of the employee into phased retirement status under 5 CFR part 831, subpart Q, or part 848 of this chapter, respectively;

(ii) Application for payment of the phased retirement annuity by the phased retiree; and

(iii) The phased retiree's entitlement to a phased retirement annuity.

(2) Money held by an employing agency or OPM that may be payable at some future date is not available for payment under court orders directed at phased retirement annuities.

(3) OPM cannot pay a former spouse a portion of a phased retirement annuity before the employee annuity begins to accrue.

(4) Payment to a former spouse under a court order may not exceed the phased retirement annuity.

(c) Waivers of employee annuity payments under the terms of section 8345(d) or section 8465(a) of title 5, United States Code, exclude the waived portion of the annuity from availability for payment under a court order if such waivers are postmarked or received before the date that OPM receives a court order acceptable for processing.

[57 FR 33574, July 29, 1992, as amended at 79 FR 46626, Aug. 8, 2014]

APPLICATION AND PROCESSING PROCEDURES

### § 838.221 Application requirements.

(a) A former spouse (personally or through a representative) must apply in writing to be eligible for a court-awarded portion of an employee annuity. No special form is required.

(b) The application letter must be accompanied by—

(1) A certified copy of the court order acceptable for processing that is directed at employee annuity;

(2) A certification from the former spouse or the former spouse's representative that the court order is currently in force and has not been amended, superseded, or set aside;

(3) Information sufficient for OPM to identify the employee or retiree, such as his or her full name, CSRS or FERS claim number, date of birth, and social security number;

(4) The current mailing address of the former spouse; and

(5) If the employee has not retired under CSRS or FERS or died, the mailing address of the employee.

(c)(1) When court-ordered payments are subject to termination (under the terms of the court order) if the former spouse remarries, no payment will be made until the former spouse submits to OPM a statement in the form prescribed by OPM certifying—

(i) That a remarriage has not occurred;

(ii) That the former spouse will notify OPM within 15 calendar days of the occurrence of any remarriage; and

(iii) That the former spouse will be personally liable for any overpayment to him or her resulting from a remarriage.

(2) OPM may subsequently require periodic recertification of the statements required under paragraph (c)(1) of this section.

### § 838.222 OPM action on receipt of a court order acceptable for processing.

(a) If OPM receives a court order acceptable for processing that is directed at an employee annuity that is in pay status, OPM will inform—

(1) The former spouse—

(i) That the court order is acceptable for processing;

(ii) Of the date on which OPM received the court order, the date on which the former spouse's benefit begins to accrue, and if known, the date on which OPM commences payment under the order;

(iii) Of the amount of the former spouse's monthly benefit and the formula OPM used to compute the monthly benefit; and

(iv) That, if he or she disagrees with the amount of the monthly benefits, he or she must obtain, and submit to OPM, an amended court order clarifying the amount; and

(2) The retiree or phased retiree—

(i) That the former spouse has applied for benefits under this subpart;

(ii) That the court order is acceptable for processing and that OPM must comply with the court order;

(iii) Of the date on which OPM received the court order, the date on which the former spouse's benefit begins or accrue, and if known, the date on which OPM commences payment under the court order;

(iv) Of the amount of the former spouse's monthly benefit and the formula OPM used to compute the monthly benefit;

(v) That, if he or she contests the validity of the court order, he or she must obtain, and submit to OPM, a court order invalidating the court order submitted by the former spouse; and

(vi) That, if he or she disagrees with the amount of the former spouse's monthly benefits, he or she must obtain, and submit to OPM, an amended court order clarifying the amount.

(b) If OPM receives a court order acceptable for processing that is directed at an employee annuity but the employee has died, or if a retiree or phased retiree dies after payments from the retiree or phased retiree to a former spouse have begun, OPM will inform the former spouse that the employee, or retiree, or phased retiree has died and that OPM can only honor court orders dividing employee annuities during the lifetime of the retiree or phased retiree.

(c) If OPM receives a court order acceptable for processing that is directed

at an employee annuity that is not in pay status, OPM will inform—

(1) The former spouse—

(i) That the court order is acceptable for processing;

(ii) That benefits cannot begin to accrue until the employee retires, or enters phased retirement status;

(iii) To the extent possible, the formula that OPM will use to compute the former spouse's monthly benefit; and

(iv) That, if he or she disagrees with the formula, he or she must obtain, and submit to OPM, an amended court order clarifying the amount; and

(2) The employee, separated employee, retiree, or phased retiree—

(i) That the former spouse has applied for benefits under this subpart;

(ii) That the court order is acceptable for processing and that OPM must comply with the court order;

(iii) To the extent possible, the formula that OPM will use to compute the former spouse's monthly benefit;

(iv) That, if he or she contests the validity of the court order, he or she must obtain, and submit to OPM, a court order invalidating the court order submitted by the former spouse; and

(v) That, if he or she disagrees with the amount of the former spouse's monthly benefits, he or she must obtain, and submit to OPM, an amended court order clarifying the amount.

(d) The failure of OPM to provide, or of the employee, separated employee, retiree, phased retiree or the former spouse to receive, the information specified in this section prior to the commencing date of a reduction or accrual does not affect—

(1) The validity of payment under the court order; or

(2) The commencing date of the reduction in the employee annuity or the commencing date of the accrual of former spouse benefits as determined under § 838.231.

[57 FR 33574, July 29, 1992, as amended at 79 FR 46626, Aug. 8, 2014]

### § 838.223 OPM action on receipt of a court order not acceptable for processing.

If OPM receives an application from a former spouse not based on a court order acceptable for processing, OPM will inform the former spouse that OPM cannot approve the application and provide the specific reason(s) for disapproving the application. Examples of reasons for disapproving an application include that the court order does not meet the definition of court order in § 838.103 or does not meet one or more of the requirements of subpart C of this part.

### § 838.224 Contesting the validity of court orders.

(a) An employee, separated employee, or retiree who alleges that a court order is invalid must prove the invalidity of the court order by submitting a court order that—

(1) Declares the court order submitted by the former spouse is invalid; or

(2) Sets aside the court order submitted by the former spouse.

(b) OPM must honor a court order acceptable for processing that appears to be valid and that the former spouse has certified is currently in force and has not been amended, superseded, or set aside, until OPM receives a court order described in paragraph (a) of this section or a court order amending or superseding the court order submitted by the former spouse.

### § 838.225 Processing amended court orders.

(a) If the employee, separated employee, retiree, or former spouse submits an amended court order pertaining to payment of a portion of the employee annuity, OPM will process the amended court order prospectively only, effective against employee annuity accruing beginning the first day of the second month after OPM receives the amended court order.

(b) A court order is not effective to adjust payments prior to the first day of the second month after OPM receives the court order unless—

(1) The court order—

(i) Expressly directs OPM to adjust for payment made under the prior court order; and

(ii) Determines the total amount of the adjustment or the length of time over which OPM will make the adjustment; and

(iii) Provides a specific monthly amount of the adjustment or a formula to compute the amount of the monthly adjustment; and

(2) Annuity continues to be available from which to make the adjustment.

PAYMENT PROCEDURES

**§ 838.231 Commencing date of payments.**

(a) A court order acceptable for processing is effective against employee annuity accruing beginning the first day of the second month after OPM receives the court order.

(b)(1) OPM will not begin payments to the former spouse until OPM receives all the documentation required by § 838.221 (b) and (c).

(2) If payments are delayed under paragraph (b)(1) of this section, after OPM receives all required documentation, it will authorize payment of the annuity that has accrued since the date determined under paragraph (a) of this section but the payment of which was delayed under paragraph (b)(1) of this section.

**§ 838.232 Suspension of payments.**

(a) Payments from employee annuities under this part will be discontinued whenever the employee annuity payments are suspended or terminated. If employee annuity payments to the retiree or phased retiree are restored, payments to the former spouse will also resume, subject to the terms of any court order acceptable for processing in effect at that time.

(b) Paragraph (a) of this section will not be applied to permit a retiree or phased retiree to deprive a former spouse of payment by causing suspension of payment of employee annuity.

[79 FR 46626, Aug. 8, 2014]

**§ 838.233 Termination of payments.**

A former spouse portion of an employee annuity stops accruing at the earliest of—

(a) The date on which the terms of the court order require termination;

(b)(1) The last day of the first month before OPM receives a court order invalidating, vacating, or setting aside the court order submitted by the former spouse if OPM receives the latest court order no later than 20 days before the end of the month; or

(2) The last day of the month in which OPM receives a court order invalidating, vacating, or setting aside the court order submitted by the former spouse if OPM receives the latest court order than 20 days before the end of the month; or

(c) The last day of the first month after OPM receives an amended court order;

(d) The last day of the month immediately preceding the month in which the retiree or phased retiree dies; or

(e) Except as provided in § 838.237, the date on which the former spouse dies.

[57 FR 33574, July 29, 1992, as amended at 79 FR 46626, Aug. 8, 2014]

**§ 838.234 Collection of arrearages.**

Specific instructions are required before OPM may pay any arrearage. Except as provided in § 838.225(b), OPM will not increase a former spouse's share of employee annuity to satisfy an arrearage due the former spouse. However, under § 838.225, OPM will prospectively honor the terms of an amended court order that either increases or decreases the court order's entitlement.

**§ 838.235 Payment of lump-sum awards.**

If a court order acceptable for processing awards a former spouse a lump-sum amount from the employee annuity and does not state the monthly rate at which OPM should pay the lump-sum, OPM will pay the former spouse equal monthly installments at 50 percent of the gross annuity (subject to the limitations under § 838.211) at the time of retirement or the date of the order, whichever comes later, until the lump-sum amount is paid.

**§ 838.236 Court orders barring payment of annuities.**

(a) State courts lack authority to prevent OPM from paying employee annuities as required by section 8345(a) or section 8463 of title 5, United States Code. OPM will not honor court orders directing that OPM delay or otherwise not pay employee annuities at the time or in the amount required by statute.

(b) Except as otherwise provided in this subpart, OPM will honor court orders acceptable for processing that direct OPM to pay the employee annuity to the court, an officer of the court acting as a fiduciary, or a State or local government agency during the pendency of a divorce or legal separation proceeding.

### § 838.237 Death of the former spouse.

(a) Unless the court order acceptable for processing expressly provides otherwise, the former spouse's share of an employee annuity terminates on the last day of the month immediately preceding the death of the former spouse, and the former spouse's share of employee annuity reverts to the retiree or phased retiree.

(b) Except as otherwise provided in this subpart, OPM will honor a court order acceptable for processing or an amended court order acceptable for processing that directs OPM to pay, after the death of the former spouse, the former spouse's share of the employee annuity to—

(1) The court;

(2) An officer of the court acting as fiduciary;

(3) The estate of the former spouse; or

(4) One or more of the retiree's or phased retiree's children as defined in 5 U.S.C. 8342(c) or 8424(d).

[57 FR 33574, July 29, 1992, as amended at 58 FR 43493, Aug. 17, 1993; 79 FR 46626, Aug. 8, 2014]

PROCEDURES FOR COMPUTING THE AMOUNT PAYABLE

### § 838.241 Cost-of-living adjustments.

Unless otherwise provided in the court order, when the terms of the court order or § 838.621 provide for cost-of-living adjustments on the former spouse's payment from employee annuity, the cost-of-living adjustment will be effected at the same time and at the same percentage rate as the cost-of-living adjustment in the employee annuity.

### § 838.242 Computing lengths of service.

(a)(1) The smallest unit of time that OPM will calculate in computing a formula in a court order is a month, even where the court order directs OPM to make a more precise calculation.

(2) If the court order states a formula using a specified simple or decimal fraction other than twelfth parts of a year, OPM will use the specified number to perform simple mathematical computations.

(b) Unused sick leave is counted as ''creditable service'' on the date of separation for an immediate CSRS or FERS annuity. The unused sick leave of a phased retiree is counted as ''creditable service'' on the date of separation of the phased retiree to enter full retirement status. Unused sick leave is not apportioned over the time when earned.

[57 FR 33574, July 29, 1992, as amended at 79 FR 46626, Aug. 8, 2014]

### § 838.243 Minimum amount of awards.

OPM will treat any court order that awards a former spouse a portion of an employee annuity equal to less than $12 per year as awarding the former spouse $1 per month.

## Subpart C—Requirements for Court Orders Affecting Employee Annuities

### § 838.301 Purpose and scope.

This subpart regulates the requirements that a court order directed at employee annuity must meet to be a court order acceptable for processing.

### § 838.302 Language not acceptable for processing.

(a) *Qualifying Domestic Relations Orders.* (1) Any court order labeled as a ''qualified domestic relations order'' or issued on a form for ERISA qualified domestic relations orders is not a court order acceptable for processing unless the court order expressly states that the provisions of the court order concerning CSRS or FERS benefits are governed by this part.

(2) When a court order is required by paragraph (a)(1) of this section to state that the provisions of a court order concerning CSRS or FERS benefits are governed by this part the court order must expressly—

(i) Refer to part 838 of title 5, Code of Federal Regulations, and

(ii) State that the provisions of the court order concerning CSRS or FERS benefits are drafted in accordance with the terminology used in this part.

(3) Although any language satisfying the requirements of paragraph (a)(2) of this section is sufficient to prevent a court order from being unacceptable under paragraph (a)(1) of this section, OPM recommends the use of the language provided in ¶ 001 in appendix A to subpart F of this part to state that the provisions of the court order concerning CSRS or FERS benefits are governed by this part.

(4) A court order directed at employee annuity that contains the language described in paragraph (a)(2) of this section must also satisfy all other requirements of this subpart to be a court order acceptable for processing.

(b) *Benefits for the lifetime of the former spouse.* Any court order directed at employee annuity that expressly provides that the former spouse's portion of the employee annuity may continue after the death of the employee or retiree, such as a court order providing that the former spouse's portion of the employee annuity will continue for the lifetime of the former spouse, is not a court order acceptable for processing.

### § 838.303 Expressly dividing employee annuity.

(a) A court order directed at employee annuity is not a court order acceptable for processing unless it expressly divides the employee annuity as provided in paragraph (b) of this section.

(b) To expressly divide employee annuity as required by paragraph (a) of this section the court order must—

(1) Identify the retirement system using terms that are sufficient to identify the retirement system as explained in § 838.611; and

(2) Expressly state that the former spouse is entitled to a portion of the employee annuity using terms that are sufficient to identify the employee annuity as explained in § 838.612.

### § 838.304 Providing for payment to the former spouse.

(a) A court order directed at employee annuity is not a court order acceptable for processing unless it provides for OPM to pay the former spouse a portion of an employee annuity as provided in paragraph (b) of this section.

(b) To provide for OPM to pay the former spouse a portion of an employee annuity as required by paragraph (a) of this section the court order must—

(1) Expressly direct OPM to pay the former spouse directly;

(2) Direct the retiree to arrange or to execute forms for OPM to pay the former spouse directly; or

(3) Be silent concerning who is to pay the portion of the employee annuity awarded to the former spouse.

(c) Except when the court order directed at employee annuity contains a provision described in paragraph (b)(2) of this section, a court order directed at employee annuity that instructs the retiree to pay a portion of the employee annuity to the former spouse is not a court order acceptable for processing.

(d) Although paragraphs (b)(2) and (b)(3) of this section provide acceptable methods for satisfying the requirement that a court order directed at employee annuity provide for OPM to pay the former spouse, OPM strongly recommends that any court order directed at employee annuity expressly direct OPM to pay the former spouse directly.

### § 838.305 OPM computation of formulas.

(a) A court order directed at employee annuity is not a court order acceptable for processing unless the court order provides sufficient instructions and information that OPM can compute the amount of the former spouse's monthly benefit using only the express language of the court order, subparts A, B, and F of this part, and information from normal OPM files.

(b)(1) To provide sufficient instructions and information for OPM to compute the amount of the former spouse's share of the employee annuity as required by paragraph (a) of this section the court order must state the former spouse's share as—

(i) A fixed amount;

(ii) A percentage or a fraction of the employee annuity; or

(iii) A formula that does not contain any variables whose values are not readily ascertainable from the face of the court order directed at employee annuity or normal OPM files.

(2) Normal OPM files include information about—

(i) The dates of employment for all periods of creditable civilian and military service;

(ii) The rate of basic pay for all periods of creditable civilian service;

(iii) The annual rates of basic pay for each grade and step under the General Schedule since 1920;

(iv) The amount of premiums for basic and optional life insurance under the Federal Employees Group Life Insurance Program;

(v) The amount of the Government and the employee shares of premiums for any health insurance plan under the Federal Employees Health Benefits Program;

(vi) The standard Federal income tax withholding tables;

(vii) The amount of cost-of-living adjustments under section 8340 or section 8462 of title 5, United States Code, and the amount of the percentage change in the national index on which the adjustment is based;

(viii) The amount of pay adjustments to the General Schedule under section 5303 (or section 5305 prior to November 5, 1990) of title 5, United States Code, and the amount of the percentage change in the national index on which the adjustment is based;

(ix) The provision of law under which a retiree has retired; and

(x) Whether a retiree has elected to provide survivor benefits for a current spouse, former spouse, or a person with an insurable interest.

(c)(1) A court order directed at employee annuity is not a court order acceptable for processing if OPM would have to examine a State statute or court decision (on a different case) to understand, establish, or evaluate the formula for computing the former spouse's share of the employee annuity.

(2) A court order directed at employee annuity is not a court order acceptable for processing if it awards the former spouse a ''community property'' fraction, share, or percentage of the employee annuity and does not provide a formula by which OPM can compute the amount of the former spouse's share of the employee annuity from the face of the court order or from normal OPM files.

(d) A court order directed at employee annuity is not a court order acceptable for processing if the court order awards a portion of the ''present value'' of an annuity unless the amount of the ''present value'' is stated in the court order.

(e) A court order directed at employee annuity is not a court order acceptable for processing if the court order directs OPM to determine a rate of employee annuity that would require OPM to determine a salary or average salary, other than a salary or average salary actually used in computing the employee annuity, as of a date prior to the date of the employee's entry into phased retirement or separation and to adjust that salary for use in computing the former spouse share unless the adjustment is by—

(1) A fixed amount or fixed annual amounts that are stated in the order;

(2) The rate of cost-of-living or salary adjustments as those terms are described in § 838.622;

(3) The percentage change in pay that the employee actually received excluding changes in grade and/or step; or

(4) The percentage change in either of the national indices used to compute cost-of-living or salary adjustments as those terms are described in § 838.622.

[57 FR 33574, July 29, 1992, as amended at 79 FR 46627, Aug. 8, 2014]

### § 838.306 Specifying type of annuity for application of formula, percentage or fraction.

(a) A court order directed at an employee annuity that states the former spouse's share of employee annuity as a formula, percentage, or fraction is not a court order acceptable for processing unless OPM can determine the type of annuity (i.e., phased retirement annuity, composite retirement annuity, net annuity, gross annuity, or self-only annuity) on which to apply the formula, percentage, or fraction.

(b) The standard types of annuity to which OPM can apply the formula, percentage, or fraction are phased retirement annuity of a phased retiree, or net annuity, gross annuity, or self-only annuity of a retiree. Unless the court order otherwise directs, OPM will apply to gross annuity the formula, percentage, or fraction directed at annuity payable to either a retiree or a phased retiree. Section 838.625 contains information on other methods of describing these types of annuity.

(c)(1) A court order may include provisions directed at:

(i) Phased retirement annuity payable to a phased retiree, to address the possibility that an employee will enter phased retirement status;

(ii) Composite retirement annuity payable to a phased retiree at entry into full retirement status, to address the possibility that an employee will enter phased retirement status and then enter full retirement status; and

(iii) Annuity payable to an employee who retires without having elected phased retirement status.

(2) To separately provide for division of phased retirement annuity or composite retirement annuity, a provision of a court order must expressly state that it is directed at ''phased retirement annuity'' or ''composite retirement annuity,'' and must meet the requirements of paragraph (a). That is, it must state the type of annuity to be divided (e.g., ''net phased retirement annuity''). If such a provision is unclear as to whether it is directed at gross, net, or self-only phased retirement annuity or composite retirement annuity, the provision will be applied to gross phased retirement annuity or gross composite retirement annuity, as described in paragraph (b) of this section.

(3) Unless a court order expressly states that phased retirement annuity or composite retirement annuity is not to be divided, a court order meeting the requirements of paragraph (a) of this section and that generally provides for division of annuity, without meeting the requirements of paragraph (c)(2) of this section, regarding the specific type of annuity being divided, will be applied to divide any employee annuity, including phased retirement annuity and composite retirement annuity.

[79 FR 46627, Aug. 8, 2014]

## Subpart D—Procedures for Processing Court Orders Affecting Refunds of Employee Contributions

REGULATORY STRUCTURE

### § 838.401 Purpose and scope.

(a) This subpart regulates the procedures that the Office of Personnel Management will follow upon the receipt of claims arising out of State court orders that affect refunds of employee contributions under CSRS or FERS. OPM must comply with court orders, decrees, or court-approved property settlements in connection with divorces, annulments of marriages, or legal separations of employees or retirees that—

(1) Award a portion of a refund of employee contributions to a former spouse; or

(2) If the requirements of §§ 838.431 and 838.505 are met, bar payment of a refund of employee contributions.

(b) This subpart prescribes—

(1) The circumstances that must occur before refunds of employee contributions are available to satisfy a court order acceptable for processing; and

(2) The procedures that a former spouse must follow when applying for a portion of a refund of employee contributions based on a court order under section 8345(j) or section 8467 of title 5, United States Code.

(c)(1) Subpart E of this part contains the rules that a court order directed at a refund of employee contributions must satisfy to be a court order acceptable for processing.

(2) Subpart F of this part contains definitions that OPM uses to determine the effect on a refund of employee contributions of a court order acceptable for processing.

AVAILABILITY OF FUNDS

### § 838.411 Amounts subject to court orders.

(a)(1) Refunds of employee contributions are subject to court orders acceptable for processing only if all of

the conditions necessary for payment of the refund of employee contributions to the separated employee have been met, including, but not limited to—

(i) Separation from a covered position in the Federal service;

(ii) Application for payment of the refund of employee contributions by the separated employee; and

(iii) Immediate entitlement to a refund of employee contributions.

(2) Money held by an employing agency or OPM that may be payable at some future date is not available for payment under court orders directed at refunds of employee contributions.

(b) Payment under a court order may not exceed the amount of the refund of employee contributions.

APPLICATION AND PROCESSING PROCEDURES

### § 838.421 Application requirements.

(a) A former spouse (personally or through a representative) must apply in writing to be eligible for a court-awarded portion of a refund of employee contributions. No special form is required.

(b) The application letter must be accompanied by—

(1) A certified copy of the court order acceptable for processing that is directed at a refund of employee contributions.

(2) A certification from the former spouse or the former spouse's representative that the court order is currently in force and has not been amended, superseded, or set aside;

(3) Information sufficient for OPM to identify the employee or separated employee, such as his or her full name, date of birth, and social security number;

(4) The current mailing address of the former spouse; and

(5) If the employee or separated employee has not applied for a refund of employee contributions, the current mailing address of the employee or separated employee.

### § 838.422 Timeliness of application.

(a) Except as provided in § 838.431 and paragraph (b) of this section, a court order acceptable for processing that is directed at a refund of employee contributions is not effective unless OPM receives the documentation required by § 838.421 not later than—

(1) The last day of the second month before payment of the refund; or

(2) Twenty days after OPM receives the Statement required by § 831.2007(c) or § 843.208(b) of this chapter if the former spouse has indicated on that Statement that such a court order exists.

(b) If OPM receives a copy of a court order acceptable for processing that is directed at a refund of employee contributions but not all of the documentation required by § 838.421, OPM will notify the former spouse that OPM must receive the missing items within 15 days after the date of the notice or OPM cannot comply with the court order.

[57 FR 33574, July 29, 1992, as amended at 58 FR 43493, Aug. 17, 1993]

### § 838.423 OPM action on receipt of a court order acceptable for processing.

(a) If OPM receives a court order acceptable for processing that is directed at a refund of employee contributions, OPM will inform—

(1) The former spouse—

(i) That the court order is acceptable for processing;

(ii) Of the date on which OPM received the court order;

(iii) Whether OPM has a record of unrefunded employee contributions on the employee;

(iv) That the former spouse's share of the refund of employee contributions cannot be paid unless the employee separates from the Federal service and applies for a refund of employee contributions;

(v) To the extent possible, the formula that OPM will use to compute the former spouse's share of a refund of employee contributions; and

(vi) That, if the former spouse disagrees with the formula, the former spouse must obtain, and submit to OPM, an amended court order clarifying the amount; and

(2) The employee or separated employee—

(i) That the former spouse has applied for benefits under this subpart;

(ii) That the court order is acceptable for processing and that OPM must comply with the court order;

(iii) Of the date on which OPM received the court order;

(iv) That the former spouse's share of the refund of employee contributions cannot be paid unless the employee separates from the Federal service and applies for a refund of employee contributions;

(v) To the extent possible, the formula that OPM will use to compute the former spouse's share of the refund of employee contributions;

(vi) That, if he or she contests the validity of the court order, he or she must obtain, and submit to OPM, a court order invalidating the court order submitted by the former spouse; and

(vii) That, if he or she disagrees with the formula, he or she must obtain, and submit to OPM, an amended court order clarifying the amount.

(b) The failure of OPM to provide, or of the employee or separated employee or the former spouse to receive, the information specified in this section does not affect the validity of payment under the court order.

### § 838.424 OPM action on receipt of a court order not acceptable for processing.

If OPM receives an application from a former spouse not based on a court order acceptable for processing, OPM will inform the former spouse that OPM cannot approve the application and provide the specific reason(s) for disapproving the application. Examples of reasons for disapproving an application include that the order does not meet the definition of court order in § 838.103 or does not meet one or more of the requirements of subpart E of this part.

### § 838.425 Contesting the validity of court orders.

(a) An employee or separated employee who alleges that a court order is invalid must prove the invalidity of the court order by submitting a court order that—

(1) Declares invalid the court order submitted by the former spouse; or

(2) Sets aside the court order submitted by the former spouse.

(b) OPM must honor a court order acceptable for processing that appears to be valid and that the former spouse has certified is currently in force and has not been amended, superseded, or set aside, until the employee or separated employee submits a court order described in paragraph (a) of this section or a court order amending or superseding the court order submitted by the former spouse.

## PAYMENT PROCEDURES

### § 838.431 Correcting failures to provide required spousal notification.

The interests of a former spouse with a court order acceptable for processing that is directed at a refund of employee contributions who does not receive notice of an application for refund of employee contributions because the employee or separated employee submits fraudulent proof of notification or fraudulent proof that the former spouse's whereabouts are unknown are protected if, and only if—

(a) The former spouse files a court order acceptable for processing that affects or bars the refund of employee contributions with OPM no later than the last day of the second month before the payment of the refund; or

(b) The former spouse submits proof that—

(1) The evidence submitted by the employee was fraudulent; and

(2) Absent the fraud, the former spouse would have been able to submit the necessary documentation required by § 838.421 within the time limit prescribed in § 838.422.

### § 838.432 Court orders barring payment of refunds.

A court order, notice, summons, or other document that attempts to restrain OPM from paying a refund of employee contributions is not effective unless it meets all the requirements of § 838.505 or part 581 of this chapter.

PROCEDURES FOR COMPUTING THE AMOUNT PAYABLE

### § 838.441 Computing lengths of service.

(a) The smallest unit of time that OPM will calculate in computing a formula in a court order is a month, even where the court order directs OPM to make a more precise calculation.

(b) If the court order states a formula using a specified simple or decimal fraction other than twelfth parts of a year, OPM will use the specified number to perform simple mathematical computations.

## Subpart E—Requirements for Court Orders Affecting Refunds of Employee Contributions

### § 838.501 Purpose and scope.

This subpart regulates the requirements that a court order directed at or barring a refund of employee contributions must meet to be a court order acceptable for processing.

(a) A court order is directed at a refund of employee contributions if it awards a former spouse a portion of a refund of employee contributions.

(b) A court order bars a refund of employee contributions if it prohibits payment of a refund of employee contributions to preserve a former spouse's court-awarded entitlement to a portion of an employee annuity or to a former spouse survivor annuity.

### § 838.502 Expressly dividing a refund of employee contributions.

(a) A court order directed at a refund of employee contributions is not a court order acceptable for processing unless it expressly awards a former spouse a portion of a refund of employee contributions as provided in paragraph (b) of this section.

(b) To expressly award a former spouse a portion of a refund of employee contributions as required by paragraph (a) of this section, the court order must—

(1) Identify the retirement system using terms that are sufficient to identify the retirement system as explained in § 838.611; and

(2) Expressly state that the former spouse is entitled to a portion of a refund of employee contributions using terms that are sufficient to identify the refund of employee contributions as explained in § 838.612.

### § 838.503 Providing for payment to the former spouse.

(a) A court order directed at a refund of employee contributions is not a court order acceptable for processing unless it provides for OPM to pay a portion of a refund of employee contributions to the former spouse as provided in paragraph (b) of this section.

(b) To provide for OPM to pay a portion of a refund of employee contributions to the former spouse as required by paragraph (a) of this section, the court order must—

(1) Expressly direct OPM to pay the former spouse directly;

(2) Direct the employee or separated employee to arrange or to execute forms for OPM to pay the former spouse directly; or

(3) Be silent concerning who is to pay the portion of the refund of employee contributions awarded to the former spouse.

(c) Although paragraphs (b)(2) and (b)(3) of this section provide acceptable methods for satisfying the requirement that the court order provide for OPM to pay the former spouse, OPM strongly recommends that the court order expressly direct OPM to pay the former spouse directly.

### § 838.504 OPM computation of formulas.

(a) A court order directed at a refund of employee contributions is not a court order acceptable for processing unless the court order provides sufficient instructions and information so that OPM can compute the amount of the former spouse's share of the refund of employee contributions using only the express language of the court order, subparts A, D, and F of this part, and information from normal OPM files.

(b) To provide sufficient instructions and information that OPM can compute the amount of the former spouse's share of the refund of employee contributions as required by paragraph (a) of this section requires that the court order state the former spouse's share as—

(1) A fixed amount;

(2) A percentage or a fraction of the refund of employee contributions; or

(3) A formula that does not contain any variables whose values are not readily ascertainable from the face of the court order or normal OPM files.

(c) A court order directed at a refund of employee contributions is not a court order acceptable for processing if OPM would have to examine a State statute or court decision (on a different case) to understand, establish, or evaluate the formula for computing the former spouse's share of the refund of employee contributions.

### § 838.505 Barring payment of refunds.

A court order barring payment of a refund of employee contributions is not a court order acceptable for processing unless—

(a) It expressly directs OPM not to pay a refund of employee contributions;

(b) It awards, or a prior court order acceptable for processing has awarded, the former spouse a former spouse survivor annuity or a portion of the employee annuity; and

(c) Payment of the refund of employee contributions would prevent payment to the former spouse under the court order described in paragraph (b) of this section.

## Subpart F—Terminology Used in Court Orders Affecting Employee Annuities or Refunds of Employee Contributions

REGULATORY STRUCTURE

### § 838.601 Purpose and scope.

(a) This subpart regulates the meaning of terms necessary to award benefits in a court order directed at an employee annuity or a refund of employee contributions. OPM applies the meanings to determine whether a court order directed at an employee annuity or a refund of employee contributions is a court order acceptable for processing and to establish the amount of the former spouse's share of an employee annuity or a refund of employee contributions.

(b)(1) This subpart establishes a uniform meaning to be used for terms and phrases frequently used in awarding a former spouse a portion of an employee annuity or a refund of employee contributions.

(2) This subpart informs the legal community about the definitions to apply terms used in drafting court orders so that the resulting court orders contain the proper language to accomplish the aims of the court.

(c)(1) To assist attorneys and courts in preparing court orders that OPM can honor in the manner that the court intends, appendix A of this subpart contains model language to accomplish many of the more common objectives associated with the award of a former spouse's share of an employee annuity or a refund of employee contributions.

(2) By using the language in appendix A of this subpart, the court, attorneys, and parties will know that the court order will be acceptable for processing and that OPM will treat the terminology used in the court order in the manner stated in the appendix.

IDENTIFICATION OF BENEFITS

### § 838.611 Identifying the retirement system.

(a) To satisfy the requirements of § 838.303(b)(1) or § 838.502(b)(1), a court order must contain language identifying the retirement system to be affected. For example, ''CSRS,'' ''FERS,'' ''OPM,'' or ''Federal Government'' benefits, or benefits payable ''based on service with the U.S. Department of Agriculture,'' etc., are sufficient identification of the retirement system.

(b) Except as provided in paragraphs (b)(1) and (b)(2) of this section, language referring to benefits under another retirement system, such as military retired pay, Foreign Service retirement benefits or Central Intelligence Agency retirement benefits, does not satisfy the requirements of § 838.303(b)(1) or § 838.502(b)(1).

(1) A court order that mistakenly labels CSRS benefits as FERS benefits and vice versa satisfies the requirements of §§ 838.303(b)(1) and 838.502(b)(1).

(2) Unless the court order expressly provides otherwise, for employees transferring to FERS, court orders directed at CSRS benefits apply to the entire FERS basic benefit, including

the CSRS component, if any. Such a court order satisfies the requirements of §§ 838.303(b)(1) and 838.502(b)(1).

(c) A court order affecting military retired pay, even when military retired pay has been waived for inclusion in CSRS annuities, does not award a former spouse a portion of an employee annuity or a refund of employee contributions under CSRS or FERS. Such a court order does not satisfy the requirements of § 838.303(b)(1) or § 838.502(b)(1).

### § 838.612 Distinguishing between annuities and contributions.

(a) A court order that uses terms such as ''annuities,'' ''pensions,'' ''retirement benefits,'' or similar terms, without distinguishing between phased retirement annuity payable to a phased retiree, or composite retirement annuity payable to a phased retiree upon entry into full retirement status, and employee annuity payable to a retiree, satisfies the requirements of §§ 838.303(b)(2) and 838.502(b)(2) for purposes of dividing any employee annuity or a refund of employee contributions.

(b)(1) A court order using ''contributions,'' ''deductions,'' ''deposits,'' ''retirement accounts,'' ''retirement fund,'' or similar terms satisfies the requirements of § 838.502(b)(2) and may be used only to divide the amount of contributions that the employee has paid into the Civil Service Retirement and Disability Fund.

(2) Unless the court order specifically states otherwise, when an employee annuity is payable, a court order using the terms specified in paragraph (b)(1) of this section satisfies the requirements of § 838.303(b)(2) and awards the former spouse a benefit to be paid in equal monthly installments at 50 percent of the gross annuity beginning on the date the employee annuity commences or the date of the court order, whichever comes later, until the specific dollar amount is reached.

[79 FR 46627, Aug. 8, 2014]

## COMPUTATION OF BENEFITS

### § 838.621 Prorata share.

(a) *Pro rata share* means one-half of the fraction whose numerator is the number of months of Federal civilian and military service that the employee performed during the marriage and whose denominator is the total number of months of Federal civilian and military service performed by the employee through the day before the effective date of phased retirement or separation for retirement, as applicable to the annuity calculation. In the computation of the division of phased retirement annuity and a composite retirement annuity, a pro rata share will be computed through the day before the effective date of an employee's phased retirement for the computation of the division of a phased retirement annuity and then recomputed for division of the composite retirement annuity under §§ 831.1742 and 848.502.

(b) A court order that awards a former spouse a prorata share of an employee annuity or a refund of employee contributions by using the term ''prorata share'' and identifying the date when the marriage began satisfies the requirements of §§ 838.305 and 838.504 and awards the former spouse a prorata share as defined in paragraph (a) of this section.

(c) A court order that awards a portion of an employee annuity as of a specified date before the employee's phased retirement or retirement awards the former spouse a pro rata share as defined in paragraph (a) of this section.

(d) A court order that awards a portion of the ''value'' of an annuity as of a specific date before retirement, without specifying what ''value'' is, awards the former spouse a prorata share as defined in paragraph (a) of this section.

[57 FR 33574, July 29, 1992, as amended at 79 FR 46627, Aug. 8, 2014]

### § 838.622 Cost-of-living and salary adjustments.

(a)(1) A court order that awards adjustments to a former spouse's portion of an employee annuity stated in terms such as ''cost-of-living adjustments'' or ''Cola's'' occurring after the date of the decree but before the date of phased retirement or retirement provides increases equal to the adjustments described in or effected under 5 U.S.C. 8340 or 8462.

(2) A court order that awards adjustments to a former spouse's portion of

an employee annuity stated in terms such as ''salary adjustments'' or ''pay adjustments'' occurring after the date of the decree provides increases equal to the adjustments described in or effected under 5 U.S.C. 5303, until the date the individual enters phased retirement status or retires.

(b)(1) Unless the court order directly and unequivocally orders otherwise, a court order that awards a former spouse a portion of an employee annuity either on a percentage basis or by use of a fraction or formula provides that the former spouse's share of the employee annuity will be adjusted to maintain the same percentage or fraction whenever the employee annuity changes as a result of—

(i) Salary adjustments occurring after the date of the decree and before the employee retires; and

(ii) Cost-of-living adjustments occurring after the date of the decree and after the date of the employee's retirement.

(2) A court order that awards a former spouse a specific dollar amount from the employee annuity prevents the former spouse from benefiting from salary and cost-of-living adjustments after the date of the decree, unless the court expressly orders their inclusion.

(c)(1)(i) Except as provided in paragraph (b) of this section, a court order that contains a general instruction to calculate the former spouse's share effective at the time of divorce or separation entitles the former spouse to the benefit of salary adjustments occurring after the specified date to the same extent as the employee.

(ii) To prevent the application of salary adjustments after the date of the divorce or separation, the court order must either state the exact dollar amount of the award to the former spouse or specifically instruct OPM not to apply salary adjustments after the specified date in computing the former spouse's share of the employee annuity.

(2)(i) Except as provided in paragraph (b) of this section, a court order that requires OPM to compute a benefit as of a specified date before the employee's phased retirement or retirement, and specifically instructs OPM not to apply salary adjustments after the specified date in computing the former spouse's share of an employee annuity, provides that the former spouse is entitled to the application of cost-of-living adjustments after the date the individual enters phased retirement status or retires (if the employee does not enter phased retirement status first), in the manner described in § 838.241.

(ii) To award cost-of-living adjustments between a specified date and the employee's phased retirement or retirement, the court order must specifically instruct OPM to adjust the former spouse's share of the employee annuity by any cost-of-living adjustments occurring between the specified date and the date the employee enters phased retirement status or retires (if the employee does not enter phased retirement status first).

(iii) To prevent the application of cost-of-living adjustments that occur after the employee annuity begins to accrue to the former spouse's share of the employee annuity, the decree must either state the exact dollar amount of the award to the former spouse or specifically instruct OPM not to apply cost-of-living adjustments occurring after the date the employee enters phased retirement status or retires (if the employee does not enter phased retirement status first).

[57 FR 33574, July 29, 1992, as amended at 79 FR 46627, Aug. 8, 2014]

### § 838.623 Computing lengths of service.

(a) Sections 838.242 and 838.441 contain information on how OPM calculates lengths of service.

(b) Unless the court order otherwise expressly directs—

(1) For the purpose of describing a period of time to be excluded from any element of a computation, the term ''military service'' means military service as defined in section 8331(13) of title 5, United States Code, and does not include civilian service with the Department of Defense or the Coast Guard; and

(2) For the purpose of describing a period of time to be included in any element of a computation, the term ''military service'' means all periods of military and civilian service performed with the Department of Defense or the Coast Guard.

(c)(1) When a court order directed at employee annuity (other than a phased retirement annuity or a composite retirement annuity) contains a formula for dividing employee annuity that requires a computation of service worked as of a date prior to separation and using terms such as ''years of service,'' ''total service,'' ''service performed,'' or similar terms, the time attributable to unused sick leave will not be included.

(2) When a court order directed at employee annuity other than a phased retirement annuity or a composite retirement annuity contains a formula for dividing employee annuity that requires a computation of ''creditable service'' (or some other phrase using ''credit'' or its equivalent) as of a date prior to retirement, unused sick leave will be included in the computation as follows:

(i) If the amount of unused sick leave is specified, the court order awards a portion of the employee annuity equal to the monthly employee annuity at retirement times a fraction, the numerator of which is the number of months of ''creditable service'' as of the date specified plus the number of months of unused sick leave specified (which sum is rounded to eliminate partial months) and whose denominator is the months of ''creditable service'' used in the retirement computation.

(ii) If the amount of unused sick leave is not specified, the court order awards a portion of the employee annuity equal to the monthly rate at the time of retirement times a fraction, the numerator of which is the number of months of ''creditable service'' as of the date specified (no sick leave included) and whose denominator is the number of months of ''creditable service'' used in the retirement computation (sick leave included).

(d)(1) General language such as ''benefits earned as an employee with the U.S. Postal Service * * *'' provides only that CSRS or FERS retirement benefits are subject to division and does not limit the period of service included in the computation (i.e., service performed with other Government agencies will be included).

(2) To limit the computation of benefits other than a phased retirement annuity or a composite retirement annuity to a particular period of employment, the court order must—

(i) Use language expressly limiting the period of service to be included in the computation (e.g., ''only U.S. Postal Service'' or ''exclusive of any service other than U.S. Postal Service employment''); or

(ii) Specify the number of months to be included in the computation; or

(iii) Describe specifically the period of service to be included in the computation (e.g., ''only service performed during the period Petitioner and Defendant were married'' or ''benefits based on service performed through the date of divorce'').

(e) A court order directed at a phased retirement annuity or a composite retirement annuity cannot limit the computation and division of a phased retirement annuity or composite retirement annuity to a particular period of employment or service. A phased retirement annuity is based on an employee's service as of phased retirement and a ''fully retired phased component,'' described in §§ 831.1742 and 848.502, of a composite retirement annuity is based on a phased retiree's service as of his or her full retirement. A court order that attempts to limit the computation of a phased retirement annuity or a composite retirement annuity to a particular period of employment or service is not a court order acceptable for processing. If the former spouse's award of a portion of phased retirement annuity or a composite retirement annuity is to be limited, the limitation of the division must be accomplished in a manner other than by limiting the service to be used in the computation.

[57 FR 33574, July 29, 1992, as amended at 79 FR 46628, Aug. 8, 2014]

### § 838.624 Distinguishing between formulas and fixed amounts.

(a) A court order that contains both a formula or percentage instruction and a dollar amount is deemed to include the dollar amount only as the court's estimate of the initial amount of payment. The formula or percentage instruction controls.

(b) A court order that awards a portion of the ''present value'' of an employee annuity and specifically states the amount of either the ''present value'' of the employee annuity or of the award is deemed to give the former spouse ''a specific dollar amount'' that is payable from a monthly employee annuity and will be paid as a lump-sum award in accordance with § 838.235.

**§ 838.625 Types of annuity.**

(a) Terms that are synonymous with net annuity are—

(1) Disposable annuity; and

(2) Retirement check.

(b) Terms that are synonymous with self-only annuity are—

(1) Life rate annuity;

(2) Unreduced annuity; and

(3) Annuity without survivor benefit.

(c) All court orders that do not specify net annuity or self-only annuity apply to gross annuity.

MODEL PARAGRAPHS

APPENDIX A TO SUBPART F OF PART 838—RECOMMENDED LANGUAGE FOR COURT ORDERS DIVIDING EMPLOYEE ANNUITIES

This appendix provides recommended language for use in court orders attempting to divide employee annuity. A court order directed at employee annuity should include five elements:

• Identification of the benefits;

• Instructions that OPM pay the former spouse;

• A method for computing the amount of the former spouse's benefit;

• Identification of the type of annuity to which to apply a fraction, percentage or formula; and

• Instructions on what OPM should do if the employee leaves Federal service before retirement and applies for a refund of employee contributions.

The court order may also include instructions for disposition of the former spouse's share if the former spouse dies before the employee. By using the model language, courts will know that the court order will have the effect described in this appendix.

The model language in this appendix does not award a benefit that is payable after the death of the employee. A separate, distinct award of a former spouse survivor annuity is necessary to award a former spouse a benefit that is payable after the death of the employee. Appendix A to subpart I of this part contains model language for awarding survivor annuities and contains some examples that award both a portion of an employee annuity and a survivor annuity.

The model language uses the terms ''[former spouse]'' to identify the spouse who is receiving a former spouse's portion of an employee annuity and ''[employee]'' to identify the Federal employee whose employment was covered by the Civil Service Retirement System or the Federal Employees Retirement System. Obviously, in drafting an actual court order the appropriate terms, such as ''Petitioner'' and ''Respondent,'' or the names of the parties should replace ''[former spouse]'' and ''[employee].''

Similarly, the models are drafted for employees covered by the Civil Service Retirement System. The name of the retirement system should be changed for employees covered by the Federal Employees Retirement System.

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Using the following paragraph will expressly state that the provisions of the court order concerning CSRS or FERS benefits are governed by this part. A court order directed at employee annuity (or awarding a survivor annuity) that is labelled a ''Qualified Domestic Relations Order'' or is issued on an ERISA form will not be automatically rendered unacceptable under §838.302(a) or §838.803(a) if the court order contains the following paragraph.

''The court has considered the requirements and standard terminology provided in part 838 of Title 5, Code of Federal Regulations. The terminology used in the provisions of this order that concern benefits under the Civil Service Retirement System are governed by the standard conventions established in that part.''

*100 Series—Identification of the benefits and instructions that OPM pay the former spouse.*

**¶101 Identifying retirement benefits and directing OPM to pay the former spouse.**

Using the following paragraph will expressly divide employee annuity to satisfy the requirements of §838.303 and direct OPM to pay the former spouse a share of an employee annuity to satisfy the requirements of §838.304.

''[Employee] is (or will be) eligible for retirement benefits under the Civil Service Retirement System based on employment with the United States Government. [Insert language for computing the former spouse's share from 200 series of this appendix.] The United States Office of Personnel Management is directed to pay [former spouse]'s share directly to [former spouse].''

**¶102–110** [Reserved]

**¶111 Protecting a former spouse entitled to military retired pay.**

Using the following paragraph will protect the former spouse interest in military retired pay in the event that the employee waives the military retired pay to allow crediting the military service under CSRS or FERS. The paragraph should be used only if the former spouse is awarded a portion of the military retired pay. ''If [Employee] waives military retired pay to credit military service under the Civil Service Retirement System, [insert language for computing the former spouse's share from 200 series of this appendix]. The United States Office of Personnel Management is directed to pay [former spouse]'s share directly to [former spouse].''

*200 Series—Computing the amount of the former spouse's benefits.*

Paragraphs 201 through 204 contain model language for the most common types of wards that court orders make to former spouses. Subsequent paragraphs in the 200 series contain model language for less common, more complex awards.

Awards other than fixed amounts require that the court order specify the type of annuity (''gross,'' ''net,'' or self-only) on which the award is computed. The types of annuity are defined in §838.103. Variations on type of annuity are covered by the 300 series of this appendix.

**¶201 Award of a fixed monthly amount.**

Using the following paragraph will award the former spouse a fixed monthly amount. OPM will not apply COLA's to a fixed monthly amount unless the court order expressly directs that OPM and COLA's using the language in ¶231 of this appendix or similar language.

''[Employee] is (or will be) eligible for retirement benefits under the Civil Service Retirement System based on employment with the United States Government. [Former spouse] is entitled to $[insert a number] per month from [employee]'s civil service retirement benefits. The United States Office of Personnel Management is directed to pay [former spouse]'s share directly to [former spouse].''

**¶ 202 Award of a percentage.**

Using the following paragraph will award the former spouse a stated percentage of the employee annuity. Unless the court order expressly directly that OPM not add COLA's to the former spouse's share of the employee annuity, OPM will add COLA's to keep the former spouse's share at the stated percentage. Paragraph 232 of this appendix provides language for excluding COLA's.

''[Employee] is (or will be) eligible for retirement benefits under the Civil Service Retirement System based on employment with the United States Government. [Former spouse] is entitled to [insert a number] percent of [employee]'s [insert ''gross,'' ''net,'' or ''self-only''] monthly annuity under the Civil Service Retirement System. The United States Office of Personnel Management is directed to pay [former spouse]'s share directly to [former spouse].''

**¶ 203 Award of a fraction.**

Using the following paragraph will award the former spouse a stated fraction of the employee annuity. Unless the court order expressly directly that OPM not add COLA's to the former spouse's share of the employee annuity, OPM will add COLA's to keep the former spouse's share at the stated percentage. Paragraph 232 of this appendix provides language for excluding COLA's.

''[Employee] is (or will be) eligible for retirement benefits under the Civil Service Retirement System based on employment with the United States Government. [Former spouse] is entitled to [insert fraction]ths of [employee]'s [insert ''gross,'' ''net,'' or ''self-only''] monthly annuity under the Civil Service Retirement System. The United States Office of Personnel Management is directed to pay [former spouse]'s share directly to [former spouse].''

**¶ 204 Award of a prorata share.**

Using the following paragraph will award the former spouse a prorata share of the employee annuity. Prorata share is defined in § 838.621. To award a prorata share the court order must state the date of the marriage. Unless the court order specifies a different ending date, the marriage ends for computation purposes on the date that the court order is filed with the court clerk. Unless the court order expressly directs that OPM not add COLA's to the former spouse's share of the employee annuity, OPM will add COLA's to keep the former spouse's share at the stated percentage. Paragraph 232 of this appendix provides language for excluding COLA's.

''[Employee] is (or will be) eligible for retirement benefits under the Civil Service Retirement System based on employment with the United States Government. [Former spouse] is entitled to a prorata share of [employee]'s [insert 'gross,' 'net,' or self-only] monthly annuity under the Civil Service Retirement System. The marriage began on [insert date]. The United States Office of Personnel Management is directed to pay [former spouse]'s share directly to [former spouse].''

**¶ 205–210** [Reserved]

**¶ 211 Award based on a stated formula.**

Using the following paragraphs will award the former spouse a share of the employee annuity based on a formula stated in the court order. The formula must be stated in the court order (including a court-approved property settlement agreement). The formula may not be incorporated by reference to a statutory provision or a court decision in another case. If the court order uses a formula, the court order must include any data that is necessary for OPM to apply the formula unless the necessary data is contained in normal OPM files.

''[Employee] is (or will be) eligible for retirement benefits under the Civil Service Retirement System based on employment with the United States Government. [Former spouse] is entitled to a share of [employee]'s [insert 'gross,' 'net,' or self-only] monthly annuity under the Civil Service Retirement System to be computed as follows: [Insert formula for computing the former spouse's share.]''

''The United States Office of Personnel Management is directed to pay [former spouse]'s share directly to [former spouse].''

**¶¶ 212–217 Award of phased retirement annuity or composite retirement annuity.**

A court order may include an award directed at (1) phased retirement annuity payable to a phased retiree, to address the possibility that an employee will enter phased retirement status; (2) composite retirement annuity payable to a phased retiree at entry into full retirement status, to address the possibility that an employee will enter phased retirement status and then enter full retirement status; or (3) annuity payable to an employee who retires without having elected phased retirement status.

A general non-specific award will apply to any employee annuity payable, including phased retirement annuity and composite retirement annuity (*see* ¶¶ 201–211). For example, an award dividing employee annuity that uses terms such as ''annuities,'' ''pensions,'' ''retirement benefits,'' or similar

general terms, would apply to all types of employee annuity.

To separately provide for division of phased retirement annuity or composite retirement annuity, a provision of a court order must expressly state that it is directed at ''phased retirement annuity'' or ''composite retirement annuity,'' and must indicate the share of employee annuity as a formula, percentage, or fraction. That is, it must state the type of annuity to be divided (e.g., ''net phased retirement annuity''). If such a provision is unclear as to whether it is directed at gross, net, or self-only phased retirement annuity or composite retirement annuity, the provision will be applied to gross phased retirement annuity or gross composite retirement annuity.

It should be noted that a former spouse survivor annuity cannot be awarded from a phased retirement annuity; therefore, a phased retirement annuity is not subject to reduction to provide a former spouse survivor annuity. As a consequence, an award dividing either ''self-only phased retirement annuity'' or a ''gross phased retirement annuity'' would be directed at identical annuities. However, a former spouse survivor annuity can be awarded from a composite retirement annuity payable to a phased retiree at entry into full retirement status (i.e., when the ''phased retiree'' enters full retirement status and becomes a ''retiree''); therefore, there would be a difference between an award of a share of ''self-only composite retirement annuity'' and an award of a share of ''gross composite retirement annuity.''

Due to the complexity of the benefits, care should be taken in drafting separate awards of phased retirement annuity or composite retirement annuity. It should also be noted, for example, that an award directed only at the division of phased retirement annuity or composite retirement annuity payable to a phased retiree will not be effective to divide annuity payable to an employee who retires in the usual manner, without having entered phased retirement status first. If separate awards of phased retirement annuity or composite retirement annuity are to be provided, consideration should be given to including provisions in the paragraph addressing the possibility that the employee may retire in the usual manner without entering phased retirement status before fully retiring. Similarly, if employee annuity is only to be awarded in the event the employee retires in the usual manner, without entering phased retirement status before fully retiring, consideration should be given to including specific language to that effect.

**¶212 Award of phased retirement annuity and composite retirement annuity while providing for the possibility that the employee retires in the usual manner without entering phased retirement status before fully retiring.**

Using the following paragraph will award phased retirement annuity and composite retirement annuity and provides for the possibility that the employee retires in the usual manner without entering phased retirement status:

''[Employee] is (or will be) eligible for retirement benefits under the Civil Service Retirement System based on employment with the United States Government. If [employee] enters phased retirement status, the [former spouse] is entitled to a [insert description of percentage, fraction, formula, or insert term 'pro rata share'] of [employee]'s [insert 'gross,' 'net,' or 'self-only'] monthly phased retirement annuity under the Civil Service Retirement System. When [employee] enters full retirement status and receives a composite retirement annuity, [former spouse] is awarded [insert language awarding fraction, formula, or 'pro rata share'] of [employee]'s monthly [insert ''gross,'' ''net'' or ''self-only''] composite retirement annuity under the Civil Service Retirement System. If [employee] retires from employment with the United States Government without entering phased retirement status before fully retiring, [former spouse] is entitled to [insert appropriate language from 200 series or 300 series paragraphs] under the Civil Service Retirement System. The marriage began on [insert date]. The United States Office of Personnel Management is directed to pay [former spouse]'s share directly to [former spouse].''

**¶213 Award of composite retirement annuity while providing for the possibility that the employee retires in the usual manner without entering phased retirement status, but not providing for award of phased retirement annuity.**

Using the following will award composite retirement annuity when an employee enters phased retirement status and subsequently enters full retirement status, and provides for the possibility that the employee retires in the usual manner without having entered phased retirement status; however, the paragraph will not award a phased retirement annuity when the employee enters phased retirement status:

''[Employee] is (or will be) eligible for retirement benefits under the Civil Service Retirement System based on employment with the United States Government. If [employee] enters phased retirement status and subsequently enters full retirement status, the [former spouse] is entitled to a [insert description of percentage, fraction, formula, or insert term 'pro rata share'] of [employee]'s [insert 'gross,' 'net,' or 'self-only'] monthly composite retirement annuity under the Civil Service Retirement System. If [employee] retires from employment with the

United States Government without entering phased retirement status before fully retiring, [former spouse] is entitled to [insert appropriate language from 200 series or 300 series paragraphs] under the Civil Service Retirement System. The marriage began on [insert date]. The United States Office of Personnel Management is directed to pay [former spouse]'s share directly to [former spouse].''

**¶214 Award of employee annuity when the employee retires in the usual manner, without providing for the possibility that the employee enters phased retirement status and full retirement status.**

Use the following paragraph if the former spouse is only to be awarded a portion of the employee's annuity when the employee retires in the usual manner, without an award of a portion of the employee's phased retirement annuity or composite retirement annuity in the event that the employee enters phased retirement status. It should be noted, however, that if this conditional clause provided below is used in an appropriate 200 or 300 series paragraph without a conditional award of a portion of phased retirement annuity and composite retirement annuity, the former spouse will not receive a portion of the employee's annuity if the employee enters phased retirement status and then enters full retirement status:

''If [employee] retires from employment with the United States Government without entering phased retirement status before fully retiring, [former spouse] is awarded [insert remaining language for the paragraph from the appropriate 200 series or 300 series]. . . The marriage began on [insert date]. The United States Office of Personnel Management is directed to pay [former spouse]'s share directly to [former spouse].''

**¶215 Award of phased retirement annuity and composite retirement annuity, without providing for the possibility that the employee retires in the usual manner without having entered phased retirement status and full retirement status.**

Use the following paragraph to award only phased retirement annuity and composite retirement annuity. This paragraph will not award benefits if the employee retires in the usual manner without entering phased retirement status:

''[Employee] is (or will be) eligible for retirement benefits under the Civil Service Retirement System based on employment with the United States Government. If [employee] enters phased retirement status, the [former spouse] is entitled to a [insert description of percentage, fraction, formula, or insert term 'pro rata share'] of [employee]'s monthly [insert 'gross,' 'net,' or 'self-only'] phased retirement annuity under the Civil Service Retirement System. When [employee] enters full retirement status and receives a composite retirement annuity, [former spouse] is awarded [insert language awarding percentage, fraction, formula, or pro rata share] of [employee]'s monthly [insert ''gross,'' ''net'' or ''self-only''] composite retirement annuity under the Civil Service Retirement System. The marriage began on [insert date]. The United States Office of Personnel Management is directed to pay [former spouse]'s share directly to [former spouse].''

**¶216 Award of only phased retirement annuity, but not awarding composite retirement annuity when the employee enters full retirement status or providing for the possibility that the employee retires in the usual manner without entering phased retirement status before fully retiring.**

Using the following will award only phased retirement annuity. This paragraph will not award composite retirement annuity when the employee enters full retirement status nor will it provide for the possibility that the employee retires in the usual manner without entering phased retirement status. It should be noted that if this paragraph is used, the former spouse will not receive a portion of the employee's annuity benefits if the employee retires in the usual manner without entering phased retirement status first:

''[Employee] is (or will be) eligible for retirement benefits under the Civil Service Retirement System based on employment with the United States Government. If [employee] enters phased retirement status, the [former spouse] is entitled to a [insert description of percentage, fraction, formula, or insert term 'pro rata share'] of [employee]'s [insert 'gross,' 'net,' or 'self-only'] monthly phased retirement annuity under the Civil Service Retirement System. The marriage began on [insert date]. The United States Office of Personnel Management is directed to pay [former spouse]'s share directly to [former spouse].''

**¶217 Award of only composite retirement annuity when employee enters full retirement status following phased retirement, but not awarding phased retirement annuity when the employee enters phased retirement status or providing for the possibility that the employee retires in the usual manner without entering phased retirement status before fully retiring.**

Using the following will award only composite retirement annuity when the employee enters full retirement status following phased retirement. This paragraph will not award phased retirement annuity when the employee enters phased retirement status nor will it provide for the possibility that the employee retires in the usual manner without entering phased retirement status. It should be noted that if this paragraph is used, the former spouse will not receive a portion of the employee's annuity benefits if

the employee retires without entering full retirement status from phased retirement status:

''[Employee] is (or will be) eligible for retirement benefits under the Civil Service Retirement System based on employment with the United States Government. If [employee] enters phased retirement status and enters full retirement status, the [former spouse] is entitled to a [insert description of percentage, fraction, formula, or insert term 'pro rata share'] of [employee]'s [insert 'gross,' 'net,' or 'self-only'] monthly composite retirement annuity under the Civil Service Retirement System. The marriage began on [insert date]. The United States Office of Personnel Management is directed to pay [former spouse]'s share directly to [former spouse].''

**¶218–230**

**¶231 Awarding COLA's on fixed monthly amounts.**

Using the following paragraph will award COLA's in addition to a fixed monthly amount to the former spouse. The model awards COLA's at the same rate applied to the employee annuity.

''[Employee] is (or will be) eligible for retirement benefits under the Civil Service Retirement System based on employment with the United States Government. [Former spouse] is entitled to $[insert a number] per month from [employee]'s civil service retirement benefits. When COLA's are applied to [employee]'s retirement benefits, the same COLA applies to [former spouse]'s share. The United States Office of Personnel Management is directed to pay [former spouse]'s share directly to [former spouse].''

**¶232 Excluding COLA's on awards other than fixed monthly amounts.**

Using the following paragraph will prevent application of COLA's to a former spouse's share of an employee annuity in cases where the former spouse has been awarded a percentage, fraction or pro rata share of the employee annuity, rather than a fixed dollar amount.

''[Employee] is (or will be) eligible for retirement benefits under the Civil Service Retirement System based on employment with the United States Government. [Insert language for computing the former spouse's share from ¶202, ¶203, ¶204, ¶211, or ¶¶212–217 of this appendix.] The United States Office of Personnel Management is directed to determine the amount of [former spouse]'s share on the date [insert 'when [employee] retires or enters phased retirement status' or if the employee has not retired or entered phased retirement status, or 'of this order' if the employee is already retired or entered phased retirement status] and not to apply COLA's to that amount. The United States Office of Personnel Management is directed to pay [former spouse]'s share directly to [former spouse].''

*300 Series—Type of Annuity*

Awards of employee annuity to a former spouse (other than awards of fixed dollar amounts) must specify whether OPM will use the ''phased retirement annuity,'' ''composite retirement annuity,'' ''gross annuity,'' ''net annuity,'' or ''self-only annuity'' as defined in §838.103 (see also §838.306) in determining the amount of the former spouse's entitlement. The court order may contain a formula that has the effect of creating other types of annuity, but the court order may only do this by providing a formula that starts from ''phased retirement annuity,'' ''composite retirement annuity,'' ''gross annuity,'' ''net annuity,'' or ''self-only annuity'' as defined in §838.103.

**¶301 Awards based on benefits actually paid.**

The court order may include a formula that effectively uses the court's definition of net annuity rather than the one provided by §838.103. For example, using the following paragraph will award the former spouse a prorata share of the employee annuity reduced only by the amount deducted as premiums for basic life insurance under the Federal Employee Group Life Insurance Program.

''[Employee] is (or will be) eligible for retirement benefits under the Civil Service Retirement System based on employment with the United States Government. [Former spouse] is entitled to a prorata share of [employee]'s monthly annuity under the Civil Service Retirement System, where monthly annuity means the self-only annuity less the amount deducted as premiums for basic life insurance under the Federal Employee Group Life Insurance Program. The marriage began on [insert date]. The United States Office of Personnel Management is directed to pay [former spouse]'s share directly to [former spouse].''

**¶302–310** [Reserved]

**¶311 Awards of earned annuity in cases where the actual annuity is based on disability.**

Using the following paragraph will award a former spouse a prorata share of what the employee annuity would have been based on only the employee's actual service in cases where the actual employee annuity is based on disability. The paragraph also allows the court order to provide for the former spouse's share to begin when the employee reaches a stated age, using age 62 as an example. As with all other formulas the court order must specify whether the computation applies to ''gross,'' ''net,'' or self-only annuity. OPM will apply COLA's that occurred after the date of the disability retirement to

the former spouse's share. The following paragraph should be used only for disability retirees under CSRS. Under FERS, section 8452 of title 5, United States Code, provides a formula for recomputation of disability annuities at age 62 to approximate an earned annuity. Therefore to award a portion of the ''earned'' benefit under FERS add the introductory phrase, ''Starting when [employee] reaches age 62,'' to the paragraph describing how to compute the amount.

''[Employee] is (or will be) eligible for retirement benefits under the Civil Service Retirement System based on employment with the United State's Government. Starting when [employee] reaches age 62, [former spouse] is entitled to a prorata share of [employee]'s [insert ''gross,'' ''net,'' or self-only] monthly annuity under the Civil Service Retirement System, where monthly annuity means the amount of [employee]'s monthly annuity computed as though [employee] had retired on an immediate, nondisability annuity on the commencing date of [employee]'s annuity based on disability. In computing the amount of the immediate annuity, the United States Office of Personnel Management will deem [employee] to have been age 62 at the time that [employee] retired on disability. The marriage began on [insert date]. The United States Office of Personnel Management is directed to pay [former spouse]'s share directly to [former spouse].''

*400 Series—Refunds of employee contributions.*

Court orders that award a former spouse a portion of a future employee annuity of an employee who is not then eligible to retire should include an additional paragraph containing instructions that tell OPM what to do if the employee separates before becoming eligible to retire and requests a refund of employee contributions. The court order may award the former spouse a portion of the refund of employee contributions or bar payment of the refund of employee contributions.

**¶ 401 Barring payment of a refund of employee contributions.**

Using the following paragraph will bar payment of the refund of employee contributions if payment of the refund of employee contributions would extinguish the former spouse's entitlement to a portion of the employee annuity. ''The United States Office of Personnel Management is directed not to pay [employee] a refund of employee contributions.''

**¶ 402 Dividing a refund of employee contributions.**

Using the following paragraph will allow the refund of employee contributions to be paid but will award a prorata share of the refund of employee contributions to the former spouse. The sentence on the beginning date of the marriage is unnecessary if the beginning is stated elsewhere in the order. The award of a prorata share is used only as an example; the court order could provide another fraction, percentage, or formula, or a fixed amount. Note that a refund of employee contributions voids the employee's rights to an employee annuity and the former spouse's right to any portion of that annuity.

''If [employee] becomes eligible and applies for a refund of employee contributions, [former spouse] is entitled to a prorata share of the refund of employee contributions. The marriage began on [insert date]. The United States Office of Personnel Management is directed to pay [former spouse]'s share directly to [former spouse].''

*500 Series—Death of the former spouse.*

**¶ 501 Full annuity restored to the retiree.**

No special provision is necessary to restore the entire annuity to the retiree upon the death of the former spouse. Unless the court order expressly provides otherwise, OPM will pay the former spouse's share to the retiree after the death of the former spouse.

**¶ 502 Former spouse share paid to children.**

Using the following paragraph will award the former spouse's share of an employee annuity to the children, including any adopted children, of the employee and former spouse.

''If [former spouse] dies before [employee], the United States Office of Personnel Management is directed to pay [former spouse]'s share of [employee]'s civil service retirement benefits to surviving children of the marriage including any adopted children, in equal shares. Upon the deaths of any child, that child's share will be distributed among the other surviving children.''

The language may be modified to terminate the payments to the children when they reach a stated age. A court order that includes such a provision for termination must include sufficient information (such as the children's dates of birth) to permit OPM to determine when the children's interest terminate. OPM will not consider evidence outside the court order (and normal OPM files) to establish the children's dates of birth.

**¶ 503 Former spouse share paid to the court.**

Using the following paragraph will provide for payment of the former spouse's share of an employee annuity to the court after the death of the former spouse. This would allow a court officer to administer the funds. ''If [former spouse] dies before [employee], the United States Office of Personnel Management is directed to pay [former spouse]'s share of [employee]'s civil service retirement benefits to this court at the following address: ''[Insert address where checks should be sent. The address may be up to six lines and should include sufficient information for

court officials to credit the correct account.]''

[57 FR 33574, July 29, 1992, as amended at 79 FR 46628, Aug. 8, 2014]

## Subpart G—Procedures for Processing Court Orders Awarding Former Spouse Survivor Annuities

REGULATORY STRUCTURE

### § 838.701 Purpose and scope.

(a) This subpart regulates the procedures that the Office of Personnel Management will follow upon the receipt of claims arising out of State court orders awarding former spouse survivor annuities under CSRS or FERS (including the FERS basic employee death benefit as defined in § 843.102 of this chapter). OPM must comply with qualifying court orders, decrees, or court-approved property settlements in connection with divorces, annulments of marriages, or legal separations of employees or retirees that award former spouse survivor annuities.

(b) This subpart prescribes—

(1) The commencing and terminating dates of former spouse survivor annuities based on court orders acceptable for processing; and

(2) The procedures that a former spouse must follow when applying for a former spouse survivor annuity based on a court order under section 8341(h) or section 8445 of title 5, United States Code.

(c)(1) Subpart H of this part contains the rules that a court order must satisfy to be a court order acceptable for processing to award a former spouse survivor annuity.

(2) Subpart I of this part contains definitions that OPM uses to determine the effect of a court order in connection with a former spouse survivor annuity.

[57 FR 33574, July 29, 1992, as amended at 58 FR 43493, Aug. 17, 1993]

LIMITATIONS ON SURVIVOR ANNUITIES

### § 838.711 Maximum former spouse survivor annuity.

(a) Under CSRS, payments under a court order may not exceed the amount provided in § 831.641 of this chapter.

(b) Under FERS, payments under a court order may not exceed amount provided in § 842.613 of this chapter plus the basic employee death benefit as defined in § 843.102 of this chapter.

[57 FR 33574, July 29, 1992, as amended at 58 FR 52882, Oct. 13, 1993]

APPLICATION AND PROCESSING PROCEDURES

### § 838.721 Application requirements.

(a)(1) A former spouse (personally or through a representative) must apply in writing to be eligible for a former spouse survivor annuity based on a court order acceptable for processing. No special form is required to give OPM notice of the court order.

(2) OPM may require an additional application after the death of the employee, separated employee, or retiree. This additional application will be on a form prescribed by OPM.

(b)(1) The application letter under paragraph (a)(1) of this section must be accompanied by—

(i) A certified copy of the court order;

(ii) A certification from the former spouse or the former spouse's representative that the court order is currently in force and has not been amended, superseded, or set aside;

(iii) Information sufficient for OPM to identify the employee or retiree, such as his or her full name, CSRS or FERS claim number, date of birth, and social security number;

(iv) The current mailing address of the former spouse;

(v) If the employee has not retired or died, the mailing address of the employee; and

(vi) A statement in the form prescribed by OPM certifying—

(A) That the former spouse has not remarried before age 55;

(B) That the former spouse will notify OPM within 15 calendar days of the occurrence of any remarriage before age 55; and

(C) That the former spouse will be personally liable for any overpayment to him or her resulting from a remarriage before age 55.

(2) OPM may subsequently require recertification of the statements required by this paragraph.

**§ 838.722 OPM action on receipt of a court order acceptable for processing.**

(a) If OPM receives a court order acceptable for processing that awards a former spouse survivor annuity based on the service of a living retiree, OPM will inform—

(1) The former spouse—

(i) That the court order is acceptable for processing;

(ii) Of the date on which OPM received the court order; and

(iii) Of the present amount of the monthly former spouse survivor annuity if the retiree were to die immediately and the formula OPM used to compute the monthly benefit; and

(2) The retiree—

(i) That the former spouse has applied for benefits under this subpart;

(ii) That the court order is acceptable for processing and that OPM must comply with the court order;

(iii) Of the date on which OPM received the court order;

(iv) Of the amount and commencing date of the reduction in the retiree's annuity;

(v) Of the present amount of the monthly former spouse survivor annuity if the retiree were to die immediately and the formula OPM used to compute the amount of the former spouse survivor annuity; and

(vi) That, if he or she contests the validity of the court order, he or she must obtain, and submit to OPM, a court order invalidating the court order submitted by the former spouse.

(b) If OPM receives a court order acceptable for processing that awards a former spouse survivor annuity, but the employee, separated employee, or retiree has died, OPM will inform—

(1) The former spouse—

(i) That the court order is acceptable for processing;

(ii) Of the date on which OPM received the court order, the date on which the former spouse's benefit will begin to accrue, and if known the date on which OPM will commence payment under the court order; and

(iii) Of the amount on the monthly former spouse survivor annuity and the formula OPM used to compute the former spouse survivor annuity.

(2) Anyone whom OPM knows will be adversely affected by the court order—

(i) That the former spouse has applied for benefits under this subpart;

(ii) That the court order is acceptable for processing and that OPM must comply with the court order;

(iii) Of the date on which OPM received the court order;

(iv) How the court order may adversely affect him or her; and

(v) That, if he or she contests the validity of the court order, he or she must obtain, and submit to OPM, a court order invalidating the court order submitted by the former spouse.

(c) If OPM receives a court order acceptable for processing that awards a former spouse survivor annuity and the employee or separated employee has not retired or died, OPM will attempt to inform—

(1) The former spouse—

(i) That the court order is acceptable for processing;

(ii) To the extent possible, the formula that OPM will use to compute the former spouse survivor annuity (including the FERS basic employee death benefit as defined in § 843.102 of this chapter, if applicable); and

(iii) That, if he or she disagrees with the formula, he or she must obtain, and submit to OPM, an amended court order clarifying the amount before the employee or separated employee retires or dies; and

(2) The employee or separated employee—

(i) That the former spouse has applied for benefits under this subpart;

(ii) That the court order is acceptable for processing and the OPM must comply with the court order;

(iii) To the extent possible, the formula that OPM will use to compute the former spouse survivor annuity (including the FERS basic employee death benefit as defined in § 843.102 of this chapter, if applicable); and

(iv) That, if he or she—

(A) Contests the validity of the court order, he or she must obtain, and submit to OPM, a court order invalidating the court order submitted by the former spouse; or

(B) Disagrees with the formula, he or she must obtain, and submit to OPM,

an amended court order clarifying the amount before he or she retires or dies.

(d) The failure of OPM to provide, or of the employee, separated employee, or retiree, the former spouse, or anyone else to receive, the information specified in this section does not affect—

(1) The validity of payment under the court order; or

(2) The commencing date of the reduction in the employee annuity or the commencing date of the former spouse's entitlement as determined under § 838.731.

[57 FR 33574, July 29, 1992, as amended at 58 FR 43493, Aug. 17, 1993]

### § 838.723 OPM action on receipt of a court order not acceptable for processing.

If OPM receives an application from a former spouse not based on a court order acceptable for processing, OPM will inform the former spouse that OPM cannot approve the application and provide the specific reason(s) for disapproving the application. Examples of reasons for disapproving an application include that the order does not meet the definition of court order in § 838.103 or does not meet one or more of the requirements of subpart H of this part.

### § 838.724 Contesting the validity of court orders.

(a) An employee, retiree or person adversely affected by a court order who alleges that a court order is invalid must prove the invalidity of the court order by submitting to OPM a court order that—

(1) Declares invalid the court order submitted by the former spouse; or

(2) Sets aside the court order submitted by the former spouse.

(b) OPM must honor a court order acceptable for processing that appears to be valid and that the former spouse has certified is currently in force and has not been amended, superseded, or set aside, until the employee, separated employee, retiree, or person adversely affected by the court order submits to OPM a court order described in paragraph (a) of this section or, if issued before the retirement or death of the employee or separated employee, a court order acceptable for processing amending or superseding the court order submitted by the former spouse.

### § 838.725 Effect on employee and retiree election rights.

(a) A court order acceptable for processing that awards a former spouse survivor annuity does not affect a retiring employee's or retiree's rights and obligations to make survivor elections under subpart F of part 831 of this chapter or subpart F of part 842 of this chapter.

(b) A court order acceptable for processing that awards a former spouse survivor annuity requires OPM to pay a former spouse survivor annuity and prevents OPM from paying an elected survivor benefit to a widow or widower or another former spouse if the election is inconsistent with the court order.

## PAYMENT PROCEDURES

### § 838.731 Commencing date of payments.

(a) A former spouse survivor annuity based on a court order acceptable for processing begins to accrue in accordance with the terms of the court order but no earlier than the later of—

(1) The first day after the date of death of the employee, separated employee, or retiree; or

(2) The first day of the second month after OPM receives a copy of the court order acceptable for processing.

(b) OPM will not authorize payment of the former spouse survivor annuity until it receives an application and supporting documentation required under § 838.721.

### § 838.732 Termination of entitlement.

(a) A former spouse survivor annuity (other than the FERS basic employee death benefit as defined in § 843.102 of this chapter) or the right to a future former spouse survivor annuity based on a court order acceptable for processing terminates in accordance with the terms of the court order but no later than the last day of the month before the former spouse remarries before age 55 or dies.

(b) If the employee dies before the former spouse remarries before age 55

or dies, the former spouse's entitlement to the FERS basic employee death benefit as defined in § 843.102 of this chapter based on a court order acceptable for processing terminates in accordance with the terms of the court order.

[57 FR 33574, July 29, 1992, as amended at 58 FR 43493, Aug. 17, 1993]

### § 838.733 Rights of current and other former spouses after termination of a former spouse's entitlement.

(a) If a former spouse of a retiree loses entitlement to a former spouse survivor annuity based on a court order acceptable for processing while the retiree is living and—

(1) If court orders acceptable for processing award former spouse survivor annuities to other former spouses, OPM will continue the reduction to comply with court orders in the order specified in § 838.135;

(2) If paragraph (a)(1) of this section does not obligate the entire entitlement lost by he former spouse, OPM will continue the reduction to provide a current spouse survivor annuity or a former spouse survivor annuity based on a timely-filed election under § 831.611, § 831.612, § 831.631, § 831.632, § 842.603, § 842.604, § 842.611, or § 842.612 of this chapter; or

(3) If paragraphs (a)(1) and (a)(2) of this section do not obligate the entire entitlement lost by the former spouse, the retiree (except a retiree under CSRS who retired before May 7, 1985 and who remarried before February 27, 1986) may elect within 2 years after the former spouse loses entitlement to continue the reduction to provide a survivor annuity for a spouse acquired after retirement.

(b)(1) If a former spouse of an employee or retiree loses entitlement to a former spouse survivor annuity based on a court order acceptable for processing after the death of the employee or retiree and—

(i) If court orders acceptable for processing award former spouse survivor annuities to other former spouses, OPM will pay the next entitled former spouse in the order specified in § 838.135; or

(ii) If paragraph (b)(1) of this section does not obligate the entire entitlement lost by the former spouse, OPM will pay the balance to a current spouse of the deceased—

(A) Retiree who had elected a reduced annuity to provide a current spouse annuity (as defined in § 831.603 or § 842.602); or

(B) Employee.

(2) Except as provided in § 838.734—

(i) The former spouse survivor annuity based on paragraph (b)(1)(i) of this section begins to accrue in accordance with the terms of the court order but no earlier than the later of—

(A) The first day of the month in which the former spouse with the earlier-issued court order loses entitlement; or

(B) The first day of the second month after OPM receives a copy of the court order acceptable for processing; or

(ii) The current spouse annuity under paragraph (b)(1) (ii) of this section begins to accrue on the first day of the month in which the former spouse loses entitlement.

(c) OPM will not authorize payment of the former spouse survivor annuity until it receives an application and supporting documentation required under § 838.721.

[57 FR 33574, July 29, 1992, as amended at 58 FR 52882, Oct. 13, 1993]

### § 838.734 Payment of lump-sum awards by survivor annuity.

OPM will not honor court orders awarding lump-sum payments (other than the FERS basic employee death benefit as defined in § 843.102 of this chapter) to a former spouse upon the death of an employee or retiree.

[57 FR 33574, July 29, 1992, as amended at 58 FR 43493, Aug. 17, 1993]

### § 838.735 Cost-of-living adjustments.

(a) OPM applies cost-of-living adjustments to all former spouse survivor annuities in pay status at the time of the adjustment and in the amount provided by Federal statute.

(b) OPM will not honor provisions of a court order that alters the time or amount of cost-of-living adjustments or that attempts to prevent OPM from applying cost-of-living adjustments to a former spouse survivor annuity in pay status.

## Subpart H—Requirements for Court Orders Awarding Former Spouse Survivor Annuities

### § 838.801 Purpose and scope.

This subpart regulates the requirements that a court order awarding a former spouse survivor annuity must meet to be a court order acceptable for processing.

### § 838.802 CSRS limitations.

(a) A court order awarding a former spouse survivor annuity under CSRS is not a court order acceptable for processing unless the marriage terminated on or after May 7, 1985.

(b) In the case of a retiree who retired under CSRS before May 7, 1985, a court order awarding a former spouse survivor annuity under CSRS is not a court order acceptable for processing unless the retiree was receiving a reduced annuity to provide a survivor annuity to benefit that spouse on May 7, 1985.

### § 838.803 Language not acceptable for processing.

(a) *Qualifying Domestic Relations Orders.* (1) Any court order labeled as a ''qualified domestic relations order'' or issued on a form for ERISA qualified domestic relations orders is not a court order acceptable for processing unless the court order expressly states that the provisions of the court order concerning CSRS or FERS benefits are governed by this part.

(2) When a court order is required by paragraph (a)(1) of this section to state that the provisions of a court order concerning CSRS or FERS benefits are governed by this part the court order must—

(i) Expressly refer to part 838 of Title 5, Code of Federal Regulations, and

(ii) Expressly state that the provisions of the court order concerning CSRS or FERS benefits are drafted in accordance with the terminology used in this part.

(3) Although any language satisfying the requirement of paragraph (a) (2) of this section is sufficient to prevent a court order from being unacceptable under paragraph (a)(1) of this section, OPM recommends the use of the language provided in ¶001 in appendix A to subpart F of this part to state that the provisions of the court order concerning CSRS or FERS benefits are governed by this part.

(4) A court order directed at employee annuity that contains the language described in paragraph (a)(2) of this section must also satisfy all other requirements of this subpart to be a court order acceptable for processing.

(b) *Employee annuity cannot continue after the death of the retiree.* Any court order that provides that the former spouse's portion of the employee annuity shall continue after the death of the employee or retiree, by using language such as ''will continue to receive benefits after the death of'' the employee, that the former spouse ''will continue to receive benefits for his (or her) lifetime,'' or ''that benefits will continue after the death of'' the employee, but does not use terms such as ''survivor annuity,'' ''death benefits,'' ''former spouse annuity,'' or similar terms is not a court order acceptable for processing.

(c) A court order that attempts to award a former spouse survivor annuity based on a phased retirement annuity or to reduce a phased retirement annuity to provide survivor benefits is not a court order acceptable for processing.

[57 FR 33574, July 29, 1992, as amended at 79 FR 46631, Aug. 8, 2014]

### § 838.804 Court orders must expressly award a former spouse survivor annuity or expressly direct an employee or retiree to elect to provide a former spouse survivor annuity.

(a) A court order awarding a former spouse survivor annuity is not a court order acceptable for processing unless it expressly awards a former spouse survivor annuity or expressly directs an employee or retiree to elect to provide a former spouse survivor annuity as described in paragraph (b) of this section.

(b) To expressly award a former spouse survivor annuity or expressly direct an employee or retiree to elect to provide a former spouse survivor annuity as required by paragraph (a) of this section the court order must—

(1) Identify the retirement system using terms that are sufficient to identify the retirement system as explained in § 838.911; and

(2) (i) Expressly state that the former spouse is entitled to a former spouse survivor annuity using terms that are sufficient to identify the survivor annuity as explained in § 838.912; or

(ii) Expressly direct the retiree to elect to provide a former spouse survivor annuity using terms that are sufficient to identify the survivor annuity as explained in § 838.912.

**§ 838.805 OPM computation of formulas in computing the designated base.**

(a) A court order awarding a former spouse survivor annuity is not a court order acceptable for processing unless the court order provides sufficient instructions and information so that OPM can determine the amount of the former spouse's monthly benefit using only the express language of the court order, subparts A, G and I of this part, and information from normal OPM files.

(b) To provide sufficient instructions and information for OPM to compute the amount of a former spouse survivor annuity as required by paragraph (a) of this section, if the court order uses a formula to determine the former spouse survivor annuity, it must not use any variables whose values are not readily ascertainable from the face of the court order or normal OPM files.

(c) A court order awarding a former spouse survivor annuity is not a court order acceptable for processing if OPM would have to examine a State statute or court decision (on a different case) to understand, establish, or evaluate the formula for computing the former spouse survivor annuity.

**§ 838.806 Amended court orders.**

(a) A court order awarding a former spouse survivor annuity is not a court order acceptable for processing if it is issued after the date of retirement or death of the employee and modifies or replaces the first order dividing the marital property of the employee or retiree and the former spouse.

(b) For purposes of awarding, increasing, reducing, or eliminating a former spouse survivor annuity, or explaining, interpreting, or clarifying a court order that awards, increases, reduces or eliminates a former spouse survivor annuity, the court order must be—

(1) Issued on a day prior to the date of retirement or date of death of the employee; or

(2) The first order dividing the marital property of the retiree and the former spouse.

(c) A court order that awards a former spouse survivor annuity and that is issued after the first order dividing the marital property of the retiree and the former spouse has been vacated, set aside, or otherwise declared invalid is not a court order acceptable for processing if—

(1) It is issued after the date of retirement or death of the retiree;

(2) It changes any provision concerning a former spouse survivor annuity in the court order that was vacated, set aside or otherwise declared invalid; and

(3)(i) The court order is effective prior to the date when it is issued; or

(ii) The retiree and former spouse do not compensate the Civil Service Retirement and Disability Fund for any uncollected annuity reduction due as a result of the court order vacating, setting aside, or otherwise invalidating the first order terminating the marital relationship between the retiree and the former spouse.

(d) In this section, ''date of retirement'' means the later of—

(1) The date that the employee files an application for retirement; or

(2) The effective commencing date for the employee's annuity other than the commencing date of a phased retirement annuity.

(e) In this section, ''issued'' means actually filed with the clerk of the court, and does not mean the effective date of a retroactive court order that is effective prior to the date when actually filed with the clerk of the court (e.g., a court order issued nunc pro tunc).

(f)(1) In this section, the ''first order dividing the marital property of the retiree and the former spouse'' means—

(i) The original written order that first ends (or first documents an oral order ending) the marriage if the court

divides any marital property (or approves a property settlement agreement that divides any marital property) in that order, or in any order issued before that order); or

(ii) The original written order issued after the marriage has been terminated in which the court first divides any marital property (or first approves a property settlement agreement that divides any marital property) if no marital property has been divided prior to the issuance of that order.

(2) The first order dividing marital property does not include—

(i) Any court order that amends, explains, clarifies, or interprets the original written order regardless of the effective date of the court order making the amendment, explanation, clarification, or interpretation; or

(ii) Any court order issued under reserved jurisdiction or any other court order issued subsequent to the original written order that divide any marital property regardless of the effective date of the court order.

[57 FR 33574, July 29, 1992, as amended at 58 FR 3202, Jan. 8, 1993; 79 FR 46631, Aug. 8, 2014]

### § 838.807 Cost must be paid by annuity reduction.

(a) A court order awarding a former spouse survivor annuity is not a court order acceptable for processing unless it permits OPM to collect the annuity reduction required by 5 U.S.C. 8339(j)(4) or 8419 from annuity paid by OPM to a retiree. OPM will not honor a court order that provides for the retiree or former spouse to pay OPM the amount of the annuity reduction by any other means.

(b) The amount of the annuity reduction required by section 8339(j)(4) or section 8419 of title 5, United States Code, may be paid—

(1) By reduction of the former spouse's entitlement under a court order acceptable for processing that is directed at employee annuity payable to a retiree;

(2) By reduction of the employee annuity payable to a retiree; or

(3) By actuarial reduction of the former spouse survivor annuity in the event the reduction of the employee annuity is not made for any reason prior to the death of the annuitant.

(c) Unless the court order otherwise directs, OPM will collect the annuity reduction required by 5 U.S.C. 8339(j)(4) or 8419 from the employee annuity payable to a retiree.

[57 FR 33574, July 29, 1992, as amended at 79 FR 46631, Aug. 8, 2014]

## Subpart I—Terminology Used in Court Orders Awarding Former Spouse Survivor Annuities

REGULATORY STRUCTURE

### § 838.901 Purpose and scope.

(a) This subpart regulates the meaning of terms necessary to award a former spouse survivor annuity in a court order, and for OPM to determine whether a court order awarding a former spouse survivor annuity is a court order acceptable for processing and the amount of the former spouse survivor annuity.

(b)(1) This subpart establishes a uniform meaning to be used for terms and phrases frequently used in awarding a former spouse survivor annuity.

(2) This subpart informs the legal community about the definition to be applied to terms used in court orders, to permit the resulting orders to be more carefully drafted, using the proper language to accomplish the aims of the court.

(c)(1) To assist attorneys and courts in preparing court orders that OPM can honor in the manner that the court intends, appendix A of this subpart contains model language to accomplish many of the more common objectives associated with the award of a former spouse survivor annuity.

(2) By using the language in appendix A of this subpart, the court, attorneys, and parties will know that the court order will be acceptable for processing and that OPM will treat the terminology used in the court order in the manner stated in the appendix.

IDENTIFICATION OF BENEFITS

**§ 838.911 Identifying the retirement system.**

(a) To satisfy the requirements of § 838.804(b)(1), a court order must contain language identifying the retirement system affected. For example, ''CSRS,'' ''FERS,'' ''OPM,'' or ''Federal Government'' survivor benefits, or ''survivor benefits payable based on service with the U.S. Department of Agriculture,'' etc., are sufficient identification of the retirement system.

(b) Except as provided in paragraphs (b)(1) and (b)(2) of this section, language referring to benefits under another retirement system, such as military retired pay, Foreign Service retirement benefits and Central Intelligence Agency retirement benefits, does not satisfy the requirements of § 838.804(b)(1).

(1) A court order that mistakenly labels CSRS benefits as FERS benefits and vice versa satisfies the requirements of § 838.804(b)(1).

(2) Unless the court order expressly provides otherwise, for employees transferring to FERS, court orders directed at CSRS benefits apply to this entire FERS basic benefit, including the CSRS component, if any. Such a court order satisfies the requirements of § 838.804(b)(1).

(c) A court order affecting military retired pay, even when military retired pay has been waived for inclusion in CSRS annuities, does not award a former spouse survivor annuity under CSRS or FERS. Such a court order does not satisfy the requirements of § 838.804(b)(1).

(d) A court order that requires an employee or retiree to maintain survivor benefits covering the former spouse satisfies the requirements of § 838.804(b)(1), if the former spouse was covered by a CSRS or FERS survivor annuity or the FERS basic employee death benefit as defined in § 843.102 of this chapter at the time of the divorce.

[57 FR 33574, July 29, 1992, as amended at 58 FR 43493, Aug. 17, 1993]

**§ 838.912 Specifying an award of a former spouse survivor annuity.**

(a) To satisfy the requirements of § 838.804(b)(2), a court order must specify that it is awarding a former spouse survivor annuity. The court order must contain language such as ''survivor annuity,'' ''death benefits,'' ''former spouse survivor annuity under 5 U.S.C. 8341(h)(1),'' etc.

(b)(1) A court order that provides that the former spouse is to ''continue as'' or ''be named as'' the beneficiary of CSRS survivor benefits or similar language satisfies the requirements of § 838.804(b)(2).

(2) A court order that requires an employee or retiree to maintain survivor benefits covering the former spouse satisfies the requirements of § 838.804(b)(2), if the former spouse was covered by a CSRS or FERS survivor annuity or the FERS basic employee death benefit as defined in § 843.102 of this chapter at the time of the divorce.

(c) Two types of potential survivor annuities may be provided by retiring employees to cover former spouses. Under CSRS, section 8341(h) of title 5, United States Code, provides for ''former spouse survivor annuities'' and section 8339(k) of title 5, United States Code, provides for ''insurable interest annuities.'' These are distinct benefits, each with its own advantages. The corresponding FERS provisions are sections 8445 and 8444, respectively.

(1) OPM will enforce court orders to provide section 8341(h) or section 8445 annuities. These annuities are less expensive and have fewer restrictions than insurable interest annuities but the former spouse's interest will automatically terminate upon remarriage before age 55. To provide a section 8341(h) or section 8445 annuity, the court order must use terms such as ''former spouse survivor annuity,'' ''section 8341(h) annuity,'' or ''survivor annuity.''

(2) OPM cannot enforce court orders to provide ''insurable interest annuities'' under section 8339(k) or section 8444. These annuities may only be elected at the time of retirement by a retiring employee who is not retiring under the disability provision of the law and who is in good health. The retirees may also elect to cancel the insurable interest annuity to provide a survivor annuity for a spouse acquired after retirement. The parties might

seek to provide this type of annuity interest if the nonemployee spouse expects to remarry before age 55, if the employee expects to remarry a younger second spouse before retirement or if another former spouse has already been awarded a section 8341(h) annuity. However, the court will have to provide its own remedy if the employee is not eligible for or does not make the election. OPM cannot enforce the court order. Language including the words ''insurable interest'' or referring to section 8339(k) or section 8444 does not satisfy the requirements of § 838.804(b)(2).

(3) In court orders which contain internal contradictions about the type of annuity, such as ''insurable interest annuity under section 8341(h),'' the section reference will control.

[57 FR 33574, July 29, 1992, as amended at 58 FR 43493, Aug. 17, 1993]

COMPUTATION OF BENEFIT

### § 838.921 Determining the amount of a former spouse survivor annuity.

(a) A court order that contains no provision stating the amount of the former spouse survivor annuity provides the maximum former spouse survivor annuity permitted under § 831.641 or § 842.613 of this chapter and satisfies the requirements of § 838.805.

(b)(1) A court order that provides that ''a former spouse will keep'' or ''an employee or retiree will maintain'' the survivor annuity to which he or she was entitled at the time of the divorce satisfies the requirements of § 838.805 and provides a former spouse survivor annuity in the same proportion to the maximum survivor annuity under § 831.641 or § 842.613 of this chapter as the former spouse had at the time of divorce. For example, a former spouse of an employee would be entitled to a maximum survivor benefit; a former spouse of a retiree (who was married to the retiree at retirement and continuously until the divorce resulting in the court order) would be entitled to the survivor benefit elected at retirement.

(2) If, at the time of divorce, the employee covered by FERS had at least 18 months of civilian service creditable under FERS but less than 10 years of service creditable under FERS, a former spouse with a court order described in paragraph (b)(1) or paragraph (b)(2) of this section may be entitled to the basic employee death benefit as defined in § 843.102 of this chapter, but is not entitled to any other former spouse survivor annuity based on the court order.

(c)(1) A court order that awards a former spouse survivor annuity of less than $12 per year satisfies the requirements of § 838.805 and provides an initial rate of $1 per month plus all cost-of-living increases occurring after the later of—

(i) The date of the court order; or

(ii) The date when the employee retires.

(2) The reduction in the employee annuity will be computed as though the court order provided a former spouse survivor annuity of $1 per month.

(d)(1) A court order that awards a former spouse survivor annuity while authorizing the employee or retiree to elect a lesser former spouse survivor annuity upon the employee's or retiree's remarriage satisfies the requirements of § 838.805, and provides the former spouse survivor annuity at the rate initially provided in the court order but does not allow the employee or retiree to elect a lesser benefit for the former spouse.

(2) To provide full survivor annuity benefits to a former spouse while authorizing the employee or retiree to elect a lesser former spouse survivor annuity benefit in order to provide survivor annuity benefits for a subsequent spouse, the court order must provide for a reduction in the former spouse survivor annuity upon the employee's or retiree's election of survivor annuity benefits for a subsequent spouse.

(3) A reduction in the amount of survivor benefits provided to the former spouse does not satisfy the requirements of § 838.805 if it is contingent upon the employee's or annuitant's remarriage rather than his or her election of survivor annuity benefits for a subsequent spouse.

[57 FR 33574, July 29, 1992, as amended at 58 FR 43493, Aug. 17, 1993; 58 FR 52882, Oct. 13, 1993]

### § 838.922 Prorata share defined.

(a) *Prorata share* means the fraction of the maximum survivor annuity allowable under § 831.641 or § 842.613 of this chapter whose numerator is the number of months of Federal civilian and military service that the employee performed during the marriage and whose denominator is the total number of months of Federal civilian and military service performed by the employee.

(b) A court order that awards a former spouse a ''prorata share'' of a survivor annuity by using that term and identifying the date when the marriage began satisfies the requirements of § 838.805 and awards the former spouse a former spouse survivor annuity equal to the prorata share as defined in paragraph (a) of this section.

(c) A court order that awards a portion of a survivor annuity, as of a specified date before the employee's retirement, awards the former spouse a former spouse survivor annuity equal to the prorata share as defined in paragraph (a) of this section.

(d) A court order that awards a portion of the ''value'' of a survivor annuity as of a specific date before retirement, without specifying what ''value'' is, awards the former spouse a former spouse survivor annuity equal to a prorata share as defined in paragraph (a) of this section.

[57 FR 33574, July 29, 1992, as amended at 58 FR 52882, Oct. 13, 1993]

### § 838.923 Cost-of-living adjustment before the death of a retiree.

A court order that awards a former spouse survivor annuity is deemed to order OPM to add to the survivor annuity rate cost-of-living adjustments that occur before the death of a retiree (in the same manner as these adjustments are applied to the survivor rate generally) unless the court order contains an instruction expressly directing OPM not to add these adjustments to the survivor annuity rate. (See § 838.735 for information concerning cost-of-living adjustments after the death of an employee or retiree.)

## MISCELLANEOUS PROVISIONS

### § 838.931 Court orders that provide temporary awards of former spouse survivor annuities.

A provision in a court order that temporarily awards a former spouse survivor annuity satisfies the requirements of § 838.804(b)(2), but the temporary award becomes permanent on the date on which OPM is barred from honoring a modification of the court order (the date of retirement or death, or, in the case of a post-retirement divorce, the date of the initial court order), as provided in sections 8341(h)(4) and 8445(d) of title 5, United States Code.

[57 FR 33574, July 29, 1992, as amended at 58 FR 43493, Aug. 17, 1993]

### § 838.932 Court orders that permit the former spouse to elect to receive a former spouse survivor annuity.

(a) Except as provided in paragraph (b) of this section, a court order that gives the former spouse the right to elect a former spouse survivor annuity satisfies the requirements of § 838.804(b)(2) and provides a former spouse survivor annuity in the amount otherwise provided by the court order.

(b) A former spouse who has been awarded a former spouse survivor annuity by a court order that gives the former spouse the right to elect a former spouse survivor annuity may irrevocably elect not to be eligible for a former spouse survivor annuity based on the court order.

(c) The former spouse may make the election under paragraph (b) of this section at any time after the issuance of the court order. An election under paragraph (b) of this section—

(1) Must be in writing and in the form prescribed by OPM;

(2) Is effective on the first day of the month following the month in which OPM received the election; and

(3) Is irrevocable once it has become effective.

(d) The reduction in an employee annuity based on a court order that gives the former spouse the right to elect a former spouse survivor annuity terminates on the last day of the month in which OPM receives the former

spouse's election under paragraph (b) of this section.

[57 FR 33574, July 29, 1992, as amended at 58 FR 43493, Aug. 17, 1993]

### § 838.933 Payment of the cost of a former spouse survivor annuity.

(a) A court order that unequivocally awards a former spouse survivor annuity and directs the former spouse to pay for that benefit satisfies the requirements of § 838.805, and—

(1) If the former spouse has also been awarded a portion of the employee annuity then the cost of the survivor benefit will be deducted from the former spouse's share of the employee annuity (if sufficient to cover the total cost—there will be no partial withholding); otherwise,

(2) The reduction will be taken from the employee annuity and collection from the former spouse will be a private matter between the parties.

(b) a court order that conditions the award of a former spouse survivor annuity on the former spouse's payment of the cost of the benefit satisfies the requirements of § 838.805 only if a court order acceptable for processing also awards the former spouse a portion of the employee annuity sufficient to cover the cost.

## MODEL PARAGRAPHS

## APPENDIX A TO SUBPART I OF PART 838—RECOMMENDED LANGUAGE FOR COURT ORDERS AWARDING FORMER SPOUSE SURVIVOR ANNUITIES

This appendix provides recommended language for use in court orders awarding former spouse survivor annuities. A former spouse survivor annuity is not a continuation of a former spouse's share of an employee annuity after the death of the employee. A former spouse's entitlement to a portion of an employee annuity cannot continue after the death of the employee. A court order that attempts to extend the former spouse's entitlement to a portion of an employee annuity past the death of the employee is not effective. The model language in this appendix does not award benefits payable to the former spouse during the lifetime of the employee. A separate, distinct award of a portion of the employee annuity is necessary to award a former spouse a benefit during the lifetime of the employee. Appendix A to subpart F of this part contains model language for a portion of an employee annuity.

Attorneys should exercise great care in preparing provisions concerning former spouse survivor annuities because sections 8341(h)(4) and 8445(d) of title 5, United States Code, prohibit OPM from accepting modifications after the retirement or death of the employee. (See § 838.806 concerning unacceptable modifications.) A court order awarding a former spouse survivor annuity should include four elements:

- Identification of the retirement system;
- Explicit award of the former spouse survivor annuity.
- Method for computing the amount of the former spouse's benefit; and
- Instructions on what OPM should do if the employee leaves Federal service before retirement and applies for a refund of employee contributions.

By using the model language, courts will know that the court order will have the effect described in this appendix.

The model language uses the terms ''[former spouse]'' to identify the spouse who is receiving a former spouse survivor annuity and ''[employee]'' to identify the Federal employee whose employment was covered by the Civil Service Retirement System or the Federal Employees Retirement System. Obviously, in drafting an actual court order the appropriate terms, such as ''Petitioner'' and ''Respondent,'' or the names of the parties should replace ''[former spouse]'' and ''[employee].''

Similarly, except when the provision applies only to the basic employee death benefit (defined in § 843.103 of this chapter) that is available only under the Federal Employees Retirement System, the models are drafted for employees covered by the Civil Service Retirement System (5 U.S.C. 8331 *et seq.*). The name of the retirement system should be changed for employees covered by the Federal Employees Retirement System (5 U.S.C. chapter 84.).

Statutory references used in the models are to CSRS provisions (such as section 8341(h) of title 5, United States Code). When appropriate, the corresponding FERS provision (such as section 8445 of title 5, United States Code) should be used.

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Paragraphs 701 through 704 contain model language for awards of former spouse survivor annuities in amounts that do not require specification of the base on which the former spouse's share will be computed. Situations in which the computational base need not be specified include amounts defined by law or regulation. For example, the maximum former spouse survivor annuity is fixed by statute generally at 55 percent of the employee annuity under CSRS and 50 percent of the employee annuity under FERS.

Paragraphs 711 and 712 contain model language for awards of former spouse survivor annuities that use the employee annuity as the base on which the portion awarded will be computed (that is, on which percentage, fraction or formula will be applied). Paragraphs 721 and 722 contain model language for awards of former spouse survivor annuities that use the maximum possible survivor annuity as the base on which the portion awarded will be computed (that is, on which percentage, fraction or formula will be applied). Using the maximum possible survivor annuity as the base will generally award 55 percent under CSRS and 50 percent under FERS of the amount that using the employee annuity as the base would produce.

Paragraphs 750 and higher contain model language to implement the most common other types of awards.

Each model paragraph includes a reference to the statutory provision under CSRS that authorizes OPM to honor court orders awarding former spouse survivor annuities. The FERS statutory provision that corresponds to section 8341(h) (mentioned in the first sentence of each example) is section 8445.

**¶701 Award of the maximum survivor annuity.**

Using the following paragraph will award the maximum possible former spouse survivor annuity. Under CSRS, the maximum possible survivor annuity is 55 percent of the employee annuity unless the surviving spouse or former spouse was married to the retiree at retirement and agreed to a lesser amount at that time. Under FERS, the maximum possible survivor annuity is 50 percent of the employee annuity unless the surviving spouse or former spouse was married to the retiree at retirement and agreed to a lesser amount at that time.

''Under section 8341(h)(1) of title 5, United States Code, [former spouse] is awarded the maximum possible former spouse survivor annuity under the Civil Service Retirement System.''

**¶702 Award that continues the pre-divorce survivor annuity benefits.**

Using the following paragraph will award a former spouse survivor annuity equal to the amount that the former spouse would have received if the marriage were never terminated by divorce.

''Under section 8341(h)(1) of title 5, United States Code, [former spouse] is awarded a former spouse survivor annuity under the Civil Service Retirement System in the same amount to which [former spouse] would have been entitled if the divorce had not occurred.''

**¶703 Award of a prorata share.**

Using the following paragraph will award the former spouse a prorata share of the maximum possible survivor annuity. Prorata share is defined in §838.922. To award a prorata share the court order must state the date of the marriage. Unless the court order specifies a different ending date, the marriage ends for computation purposes on the date that the court order is filed with the court clerk.

''Under section 8341(h)(1) of title 5, United States Code, [former spouse] is awarded a former spouse survivor annuity under the Civil Service Retirement System. The amount of the former spouse survivor annuity will be equal to a prorate share. The marriage began on [insert date].''

**¶704 Award of a fixed monthly amount.**

Using the following paragraph will award a former spouse survivor annuity that will start at the amount stated in the order when the employee or retiree dies, unless the stated amount exceeds the maximum possible former spouse survivor annuity. If the

amount stated in the order exceeds the maximum possible former spouse survivor annuity, the court order will be treated as awarding the maximum. After payment of the former spouse survivor annuity has began, COLA's will be applied in accordance with § 838.735. If the final sentence of this model paragraph is omitted, OPM will add COLA's occurring after the date of the employee's retirement or the date of issuance of the court order, whichever is later.

''Under section 8341(h)(1) of title 5, United States Code, [former spouse] is awarded a former spouse survivor annuity under the Civil Service Retirement System. The amount of the former spouse survivor annuity will be equal to $[insert a number] per month. The Office of Personnel Management is ordered not to increase this amount by COLA's occurring before death of [employee or retiree].''

**¶ 705–710** [Reserved]

**¶ 711 Award of a percentage or fraction of the employee annuity.**

Using the following paragraph will award a former spouse survivor annuity equal to the stated percentage or fraction of the employee annuity. The stated percentage or fraction may not exceed 55 percent under CSRS or 50 percent under FERS.

''Under section 8341(h)(1) of title 5, United States Code, [former spouse] is awarded a former spouse survivor annuity under the Civil Service Retirement System. The amount of the former spouse survivor annuity will be equal to [insert a percentage or fraction] percent of the [employee]'s employee annuity.''

**¶ 712 Award based on a stated formula as a share of employee annuity.**

Using the following paragraphs will award a former spouse survivor annuity in an amount to be determined by applying a stated formula to employee annuity. The amount of the former spouse survivor annuity may not exceed 55 percent of the employee annuity under CSRS or 50 percent under FERS. The formula must be stated in the court order (including a court-approved property settlement agreement). The formula may not be incorporated by reference to a statutory provision or a court decision in another case. If the court order uses a formula, the court order must include any data that is necessary for OPM to evaluate the formula unless the necessary data is contained in normal OPM files.

''Under section 8341(h)(1) of title 5, United States Code, [former spouse] is awarded a former spouse survivor annuity under the Civil Service Retirement System. The amount of the former spouse survivor annuity will be the portion of the [employee]'s employee annuity computed as follows:

''[Insert formula.]''

**¶ 713–720** [Reserved]

**¶ 721 Award of a percentage or fraction of the maximum survivor annuity.**

Using the following paragraph will award a former spouse survivor annuity equal to the stated percentage or fraction of the maximum possible survivor annuity. The stated percentage or fraction may not exceed 100 percent.

''Under section 8341(h)(1) of title 5, United States Code, [former spouse] is awarded a former spouse survivor annuity under the Civil Service Retirement System. The amount of the former spouse survivor annuity will be equal to [insert a percentage or fraction] of the maximum possible survivor annuity.

**¶ 722 Award based on a stated formula as a share of maximum survivor annuity.**

Using the following paragraphs will award a former spouse survivor annuity based on a stated formula to be applied to the maximum possible survivor annuity. The formula must be stated in the court order (including a court-approved property settlement agreement). The formula may not be incorporated by reference to a statutory provision or a court decision in another case. If the court order uses a formula, the court order must include any data that is necessary for OPM to evaluate the formula unless the necessary data is contained in normal OPM files.

''Under section 8341(h)(1) of title 5, United States Code, [former spouse] is awarded a former spouse survivor annuity under the Civil Service Retirement System. The amount of the former spouse survivor annuity will be the portion of the maximum possible survivor annuity computed as follows:

''[Insert formula.]''

**¶ 723–750** [Reserved]

**¶ 751 Changing amount of former spouse survivor annuity based on remarriage before retirement.**

Using the following paragraph will award the maximum possible former spouse survivor annuity unless the employee remarries before retirement. Upon the employee's remarriage before retirement the amount of the former spouse survivor annuity changes to a prorata share. The maximum possible and prorata share are used as examples only; other amounts may be substituted. Similar language is not acceptable for remarriages after retirement.

''Under section 8341(h)(1) of title 5, United States Code, [former spouse] is awarded the maximum possible former spouse survivor annuity under the Civil Service Retirement System unless [employee] remarries before retirement. If [employee] remarries before retirement, under section 8341(h)(1) of title 5, United States Code, [former spouse] is awarded a former spouse survivor annuity under the Civil Service Retirement System. The amount of the former spouse survivor annuity will be equal to a prorata share. The

marriage to [former spouse] began on [insert data].''

**¶752 Changing amount of former spouse survivor annuity based on remarriage after retirement.**

Using the following paragraph will award the maximum possible former spouse survivor annuity unless the employee remarries after retirement and elects to provide a survivor annuity for the spouse acquired after retirement. Upon the employee's remarriage after retirement and election to provide a survivor annuity for the spouse acquired after retirement, the amount of the former spouse survivor annuity changes to a prorata share. The maximum possible and prorata share are used as examples only; other amounts maybe substituted. The change in the amount of the former spouse survivor annuity must be triggered by the election, which is a part of normal OPM files, rather than the remarriage, which is not documented in normal OPM files.

''Under section 8341(h)(1) of title 5, United States Code, [former spouse] is awarded the maximum possible former spouse survivor annuity under the Civil Service Retirement System unless [employee] elects to provide a survivor annuity for a new spouse acquired after retirement. If [employee] elects to provide a survivor annuity to a new spouse acquired after retirement, under section 8341(h)(1) of title 5, United States Code, [former spouse] is awarded a former spouse survivor annuity under the Civil Service Retirement System. The amount of the former spouse survivor annuity will be equal to a prorata share. The marriage to [former spouse] began on [insert data].''

*800 Series—Paying the cost of a former spouse survivor annuity.*

A court order awarding a former spouse survivor annuity requires that the employee annuity be reduced. The reduction lowers the gross employee annuity. The costs associated with providing the former spouse survivor annuity must be paid by annuity reduction. Under §838.807, if the former spouse is awarded a portion of the employee annuity sufficient to pay the cost associated with providing the survivor annuity, the former spouse's share maybe reduced to pay the cost.

**¶801 Costs to be paid from the employee annuity.**

No special provision on payment of the costs associated with providing the former spouse survivor annuity is necessary if the court intends the cost to be taken from the employee annuity.

**¶802 Costs to be paid from former spouse's share of the employee annuity.**

Using the following paragraph will award the former spouse a prorata share of the employee annuity and a prorata share of the maximum possible survivor annuity and provide that the cost associated with the survivor annuity be deducted from the former spouse's share of the employee annuity. Prorata share and self-only annuity are used as examples only; another amount or type of annuity may be substituted.

''[Employee] is (or will be) eligible for retirement benefits under the Civil Service Retirement System based on employment with the United States Government. [Former spouse] is entitled to a prorata share of [employee]'s self-only monthly annuity under the Civil Service Retirement System. [Former spouse]'s share of [employee]'s employee annuity will be reduced by the amount of the costs associated with providing the former spouse survivor annuity awarded in the next paragraph. The marriage began on [insert date]. The United States Office of Personnel Management is directed to pay [former spouse]'s share directly to [former spouse].''

''Under section 8341(h)(1) of title 5, United States Code, [former spouse] is awarded a former spouse survivor annuity under the Civil Service Retirement System. The amount of the former spouse survivor annuity will be equal to a prorata share.

*900 Series—Refunds of employee contributions.*

Court orders that award a former spouse survivor annuity based on the service of an employee who is not then eligible to retire should include an additional paragraph containing instructions that tell OPM what to do if the employee requests a refund of employee contributions before becoming eligible to retire. The court order may award the former spouse a portion of the refund of employee contributions or bar payment of the refund of employee contributions.

**¶901 Barring payment of a refund of employee contributions.**

Using the following paragraph will bar payment of the refund of employee contributions if payment of the refund of employee contributions would extinguish the former spouse's entitlement to a former spouse survivor annuity. ''The United States Office of Personnel Management is directed not to pay [employee] a refund of employee contributions.''

**¶902 Dividing a refund of employee contributions.**

Using the following paragraph will allow the refund of employee contributions to be paid but will award a prorata share of the refund of employee contributions to the former spouse. The award of a prorata share is used only an example; the court order could provide another fraction, percentage, or formula, or a fixed amount. A refund of employee contributions voids the employee's rights to an employee annuity unless the employee is reemployed under the retirement system. Payment of the refund of employee contributions will also extinguish the

former spouse's right to a court-ordered portion of an employee annuity or a former spouse survivor annuity unless the employee is reemployed and reestablishes title to annuity benefits.

''If [employee] becomes eligible and applies for a refund of employee contributions, [former spouse] is entitled to a prorata share of the refund of employee contributions. The marriage began on [insert date]. The United States Office of Personnel Management is directed to pay [former spouse]'s share directly to [former spouse.]''

## Subpart J—Court Orders Affecting Civil Service Retirement Benefits

SOURCE: 50 FR 20077, May 13, 1985, unless otherwise noted. Redesignated at 57 FR 33596, July 29, 1992.

### § 838.1001 [Reserved]

### § 838.1002 Relation to other regulations.

(a) Part 581 of this chapter contains information about garnishment of Government payments including salaries and civil service retirement benefits.

(b) Parts 294 and 297 of this chapter and § 831.106 of this chapter contain information about disclosure of information from OPM records.

(c) Subpart F of part 831 of this chapter, subpart F of part 842 of this chapter, and subpart C of part 843 of this chapter contain information about entitlement to survivor annuities.

(d) Subpart T of part 831 of this chapter and subpart B of part 843 of this chapter contain information about entitlement to lump-sum death benefits.

(e) Parts 870, 871, 872, and 873 of this chapter contain information about coverage under the Federal Employees' Group Life Insurance Program.

(f) Part 890 of this chapter contains information about coverage under the Federal Employees Health Benefits Program.

(g) Section 831.109 of this chapter contains information about the administrative review rights available to a person who has been adversely affected by an OPM action under this subpart.

[50 FR 20077, May 13, 1985. Redesignated and amended at 57 FR 33596, 33598, July 29, 1992]

### § 838.1003 Definitions.

In this subpart:

*Associate Director* means the Associate Director for Retirement and Insurance in the OPM or an OPM official authorized to act on his or her behalf.

*Court order* means any judgment or property settlement issued by or approved by any court of any State, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Northern Mariana Islands, or the Virgin Islands, and any Indian court in connection with, or incident to, the divorce, annulment of marriage, or legal separation of a Federal employee or retiree.

*CSRS* means subchapter III of chapter 83 of title 5, United States Code.

*Employee retirement benefits* means employees' and Members' annuities and refunds of retirement contributions but does not include survivor annuities or lump-sum payments made pursuant to section 8342 (c) through (f) of title 5, United States Code.

*Former spouse* means (1) in connection with a court order affecting employee retirement benefits, a living person whose marriage to an employee, Member, or retiree has been subject to a divorce, annulment, or legal separation resulting in a court order; or (2) in connection with a court order awarding a former spouse annuity, a living person who was married for at least 9 months to an employee, Member, or retiree who performed at least 18 months of creditable service in a position covered by CSRS and whose marriage to the employee was terminated prior to the death of the employee, Member, or retiree.

*Former spouse annuity* means a former spouse annuity as defined in § 831.603 of this chapter.

*Gross annuity* means the amount of a self-only annuity less only applicable survivor reduction, but before any other deduction.

*Member* means a Member of Congress.

*Net annuity* means the amount of annuity payable after deducting from the gross annuity any amounts that are (1) owed by the retiree to the United States, (2) deducted for health benefits premiums pursuant to section 8906 of title 5, United States Code, and §§ 891.401 and 891.402 of this title, (3) deducted for life insurance premiums pursuant to section 8714a(d) of title 5,

United States Code, (4) deducted for Medicare premiums, or (5) properly withheld for Federal income tax purposes, if amounts withheld are not greater than they would be if the individual claimed all dependents to which he or she was entitled.

*Qualifying court order* means a court order that meets the requirements of § 838.1004.

*Retiree* means a former employee or Member who is receiving recurring payments under CSRS based on service by the employee or Member. *Retiree*, as used in the subpart, does not include a current spouse, former spouse, child or person with an insurable interest.

*Self-only annuity* means the recurring payment to a retiree who has elected not to provide a survivor annuity to anyone.

[50 FR 20077, May 13, 1985, as amended at 55 FR 9103, Mar. 12, 1990; 56 FR 45884, Sept. 9, 1991. Redesignated and amended at 57 FR 33596, July 29, 1992]

### § 838.1004 Qualifying court orders.

(a) A former spouse is entitled to a portion of an employee's retirement benefits only to the extent that the division of retirement benefits is expressly provided for by the court order. The court order must divide employee retirement benefits, award a payment from employee retirement benefits, or award a former spouse annuity.

(b) The court order must state the former spouse's share as a fixed amount, a percentage or a fraction of the annuity, or by a formula that does not contain any variables whose value is not readily ascertainable from the face of the order or normal OPM files.

(c)(1) For purposes of payments from employee retirement benefits, OPM will review court orders as a whole to determine whether the language of the order shows an intent by the court that the former spouse should receive a portion of the employee's retirement benefits directly from the United States.

(i) Orders that direct or imply that OPM is to make payment of a portion of employee retirement benefits, or are neutral about the source of payment, will be honored unless the retiree can demonstrate that the order is invalid in accordance with § 838.1009.

(ii) Orders that specifically direct the retiree to pay a portion of employee retirement benefits to a former spouse (and do not contain language to show the court intends payment from the Civil Service Retirement System) will be honored unless the retiree objects to direct payment by OPM within the 30-day notice period prescribed in § 838.1008, but will not be honored even if the retiree raises only a general objection to payment by OPM within that 30-day notice period.

(2) For purposes of awarding a former spouse annuity, the court order must either state the former spouse's entitlement to a survivor annuity or direct an employee, Member, or retiree to provide a former spouse annuity.

(d) For purposes of affecting or awarding a former spouse annuity, a court order is not a qualifying court order whenever—

(1) The marriage was terminated before May 7, 1985; or

(2)(i) The marriage was terminated on or after May 7, 1985; and

(ii) The employee or Member retired under CSRS before May 7, 1985; and

(iii)(A) The employee or Member had elected not to provide a current spouse annuity for that spouse at the time of retirement; or,

(B) In the case of a post-retirement marriage, the annuitant had not elected to provide a survivor annuity for that spouse before May 7, 1985.

(e)(1) For purposes of awarding, increasing, reducing, or eliminating a former spouse survivor annuity, or explaining, interpreting, or clarifying a court order that awards, increases, reduces or eliminates a former spouse annuity, the court order must be—

(i) Issued on a day prior to the date of retirement or date of death of the employee; or

(ii) The first order dividing the marital property of the retiree and the former spouse.

(2) In paragraph (e)(1) of this section, ''date of retirement'' means the later of—

(i) The date that the employee files an application for retirement; or

(ii) The effective commencing date for the employee's annuity.

(3) In paragraphs (e)(1) and (e)(4) of this section ''issued'' means actually

filed with the clerk of the court, and does not mean the effective date of a retroactive court order that is effective prior to the date when actually filed with the clerk of the court (e.g., a court order issued nunc pro tunc).

(4)(i) In paragraph (e)(1)(ii) of this section, the ''first order dividing the marital property of the retiree and the former spouse'' means—

(A) The original written order that first ends (or first documents an oral order ending) the marriage if the court divides any marital property (or approves a property settlement agreement that divides any marital property) in that order, or in any order issued before that order; or

(B) The original written order issued after the marriage has been terminated in which the court first divides any marital property (or first approves a property settlement agreement that divides any marital property) if no marital property has been divided prior to the issuance of that order.

(ii) The first order dividing marital property does not include—

(A) Any court order that amends, explains, clarifies, or interprets the original written order regardless of the effective date of the court order making the amendment, explanation, clarification, or interpretation; or

(B) Any court order issued under reserved jurisdiction or any other court orders issued subsequent to the original written order that divide any marital property regardless of the effective date of the court order.

[50 FR 20077, May 13, 1985, as amended at 51 FR 31936, Sept. 8, 1986; 52 FR 3210, Feb. 3, 1987; 53 FR 48896, Dec. 5, 1988; 53 FR 49638, Dec. 8, 1988. Redesignated and amended at 57 FR 33596, July 29, 1992]

### § 838.1005 Applications by former spouse.

(a) A former spouse (personally or through a representative) must apply in writing to be eligible for benefits under this subpart. No special form is required.

(b) The application letter must be accompanied by—

(1) A certified copy of the court order granting benefits under CSRS; and

(2) A statement that the court order has not been amended, superseded, or set aside; and

(3) Identifying information concerning the employee, Member, or retiree such as his or her full name, claim number, date of birth, and social security number, if available; and

(4) The mailing address of the former spouse.

(c) When payments are subject to termination upon remarriage, no payment shall be made until the former spouse submits to the Associate Director a statement on the form prescribed by OPM certifying—

(1) That a remarriage has not occurred; and

(2) That the former spouse will notify the Associate Director within 15 calendar days of the occurrence of any remarriage; and

(3) That the former spouse will be personally liable for any overpayment to him or her resulting from a remarriage. The Associate Director may subsequently require recertification of these statements.

### § 838.1006 Amounts payable.

(a) Money held by an executive agency or OPM that may be payable at some future date is not available for payment under court orders unless all of the conditions necessary for payment of the money to the former employee or Member have been met, including, but not limited to—

(1) Separation from a covered position in the Federal service; and

(2) Application for payment of the money by the former employee or Member; and

(3) The former employee's or Member's immediate entitlement to payment of the money subject to the order.

(b) Waivers of employee or Member annuity payments under the terms of section 8345(d) of title 5, United States Code, exclude the waived portion of the annuity from availability for payment under a court order if such waivers are postmarked before the expiration of the 30-day notice period provided by § 838.1008.

(c) Payment under a court order may not exceed—

(1) In cases involving employee or Member annuities, the net annuity.

(2) In cases involving lump-sum payments (refunds), the amount of the lump-sum credit.

(3) In cases involving former spouse annuities, the amount provided in § 831.641 of this chapter.

(d) In cases in which court orders award former spouse annuities—

(1) Except as provided in paragraph (d)(2) of this section, former spouse annuities based on qualifying court orders will commence and terminate in accordance with the court order.

(2) A court order will not be honored to the extent it would require an annuity to commence prior to the day after the employee, Member, or retiree dies, or the first day of the second month beginning after the date on which OPM receives written notice of the court order together with the additional information required by § 838.1005. Further, a court order will not be honored to the extent it requires an annuity to be terminated contrary to section 8341(h)(3)(B) of title 5, United States Code.

(3) A court order will not be honored to the extent is is inconsistent with any joint designation or waiver previously executed under § 831.614 of this chapter with respect to the former spouse involved.

[50 FR 20077, May 13, 1985, as amended at 51 FR 31936, Sept. 8, 1986. Redesignated and amended at 57 FR 33596, July 29, 1992; 58 FR 52882, Oct. 13, 1993]

### § 838.1007 Preliminary review.

(a)(1) Upon receipt of a court order and documentation required by § 838.1005 affecting the future civil service retirement benefits of an employee or Member who is living and has not applied for benefits under CSRS, the Associate Director will notify the former spouse that OPM has received the court order and documentation. The court order and documentation will be filed for further review when the employee or Member dies or funds become available under § 838.1006.

(2) When OPM has received a court order and documentation required by § 838.1005 affecting an employee or Member who retires, dies, or applies for a lump-sum benefit, the Associate Director will determine whether the court order is a qualifying court order under § 838.1004.

(3) Upon receipt of a court order and necessary documentation required by § 838.1005 affecting employee retirement benefits that are available under § 838.1006 or awarding a former spouse annuity to a former spouse of an employee who retired under CSRS or died, the Associate Director will determine whether the court order is a qualifying court order under § 838.1004.

(b) Upon preliminary determination that the court order is qualifying, the Associate Director will give the notifications required by § 838.1008.

(c) Upon preliminary determination that the court order is not qualifying, the former spouse will be notified of the basis for the determination and the right to reconsideration under § 831.109 of this chapter.

[50 FR 20077, May 13, 1985. Redesignated and amended at 57 FR 33596, July 29, 1992]

### § 838.1008 Notifications.

(a) In a case in which the court order affects employee retirement benefits:

(1) The Associate Director will notify the employee, Member, or retiree that a court order has been received that appears to require that a portion of his or her retirement benefits be paid to a former spouse and provide the employee, Member, or retiree with a copy of the court order. The notice will inform the former employee or Member—

(i) That OPM intends to honor the court order; and

(ii) Of the effect that the court order will have on the former employee or Member's retirement benefits; and

(iii) That no payments will be made to the former spouse for a period of 30 days from the notice date to enable the former employee or Member to contest the court order.

(2) The Associate Director will notify the former spouse—

(i) That OPM intends to honor the court order; and

(ii) Of the amount that the former spouse is entitled to receive under the court order, and in cases that award a portion of the benefits on a percentage basis or by a formula, how the amount was computed; and

(iii) That payment is being delayed for a period of 30 days to give the former employee or Member an opportunity to contest the court order.

(b) In a case in which the court order awards a former spouse annuity—

(1) The Associate Director will notify the retiree, if living, or, if the employee, Member, or retiree is dead, his or her surviving spouse, or the person entitled to the lump-sum death benefit under section 8342 of title 5, United States Code, if possible, that a court order has been received that requires the payment of a former spouse annuity. The notice will include a copy of the court order. The notice will state—

(i) That OPM intends to honor the court order; and

(ii) The effect it will have on the potential retirement benefit of the person receiving the notice; and

(iii) That any objection to honoring the court order must be filed within 30 days from the notice date.

(2) The former spouse will be notified—

(i) That OPM intends to honor the court order; and

(ii) Of the amount of survivor annuity that he or she will be entitled to receive and how the amount was computed; and

(iii) That anyone adversely affected has a period of 30 days in which to contest the court order.

(c) In a case in which the court order affects employee retirement benefits and awards a former spouse annuity all of the notices under paragraphs (a) and (b) of this section will be provided.

### § 838.1009 Decisions.

(a)(1) When the individual does not respond within the 30-day notice period provided for by § 838.1008, the court order will be honored in accordance with the notification.

(2) When a timely response to the notification is received, the Associate Director will consider the response. The former spouse's claim will be denied and the former spouse will be notified of the right to request reconsideration under § 831.109 of this chapter whenever is is shown that—

(i) The court order is not a qualifying court order; or

(ii) The court order is inconsistent with a contemporaneous or subsequent court order.

(b) If any person who may lose benefits if OPM honors the court order objects to payment based on the validity of the court order and the record contains reasonable support for the objection, he or she will be granted 30 days to initiate legal action to determine the validity of the objection. If funds are available under § 838.1006 and evidence is submitted that legal action had been started before the 30 days have expired, money will continue to be withheld, but no payment will be made to the former spouse pending judicial determination of the validity of the court order.

[50 FR 20077, May 13, 1985. Redesignated and amended at 57 FR 33596, July 29, 1992]

### § 838.1010 Court orders or decrees preventing payment of lump sums.

(a) Payment of the lump-sum credit to a former employee or Member will be subject to the terms of any court order or decree issued with respect to any former spouse or to any current spouse from whom the employee or Member was legally separated, if—

(1) The court order or decree expressly relates to any portion of the lump-sum credit involved; and

(2) Payment of the lump-sum credit would extinguish entitlement of the current or former spouse to a survivor annuity under section 8341(h) of title 5, United States Code, or to any portion of an annuity under section 8345(j) of title 5, United States Code.

(b) For paragraph (a) of this section to have effect, OPM must be in receipt of the court order or decree before authorizing payment of the refund.

(c)(1) In the event that OPM receives two or more court orders or decrees—

(i) When there are two former spouses, the court orders or decrees will be honored in the order in which they were issued until the lump-sum has been exhausted.

(ii) When there are two or more court orders or decrees relating to the same former spouse, the one issued last will be honored first.

(2) In no event will the amount paid out exceed the amount of the lump-sum credit.

(d) OPM is not liable for any payment made from money due from or payable by OPM to any individual pursuant to a court order or decree regular on its face, if such payment is made in accordance with this subpart.

(e) Except as provided in paragraph (f) of this section, a court order or decree directed at a refund of retirement contributions is not effective unless the court order or decree and supporting documentation required by § 838.1005 are received by OPM not later than—

(1) The last day of the second month before payment of the refund; or

(2) Twenty days after OPM receives the Statement required by § 831.2007(c) of this chapter if the former spouse has indicated on that Statement that such an order exists.

(f) The interests of a former spouse with a court order or decree who does not receive notice of a refund application because the former employee or Member submits fraudulent proof of notification or fraudulent proof that the former spouse's whereabouts are unknown are protected if, and only if—

(1) The former spouse files the court order or decree with OPM no later than the last day of the second month before the payment of the refund; or

(2) The former spouse submits proof that—

(i) The evidence submitted by the employee was fraudulent; and

(ii) Absent the fraud, the former spouse would have been able to submit the necessary documentation required by § 838.1005 within the time limit prescribed in paragraph (e) of this section.

(g) Court orders, notices, summons, or other documents that attempt to restrain OPM from paying refunds of retirement contributions are not effective unless they meet all the requirements of—

(1) Paragraph (a) of this section, including the requirement that the court order or decree, or a prior court order or decree, has awarded the former spouse a former spouse annuity as defined in § 831.603 of this chapter or a portion of the employee's or Member's future annuity benefit; or

(2) Part 581 of this chapter.

[50 FR 20081, May 13, 1985, as amended at 51 FR 31937, Sept. 8, 1986; 55 FR 9106, Mar. 12, 1990. Redesignated and amended at 57 FR 33596, July 29, 1992]

### § 838.1011 Effective dates.

(a)(1) The provisions of this subpart apply to any employee retirement benefits regardless of the date of issuance of the court order or the date when the employee or Member retires.

(2) The Associate Director will not increase the amount apportioned from current retirement benefits to satisfy an arrearage due the former spouse unless the court order states the amount of the arrearage and directs that it be paid from the employee retirement benefit. However, the Associate Director will honor the terms of a new or revised court order that either increases or decreases the former spouse's entitlement. These changes will be prospective only.

(3) Benefits payable to a former spouse from a retiree's annuity begin to accrue no earlier than the beginning of the month after receipt of a qualifying court order and the documentation required by § 838.1005, and terminate no later than the last day of the month before the death of the retiree.

(b)(1) The provisions of this subpart concerning former spouse annuities apply only with respect to a former spouse of an employee, Member, or retiree who retires or dies while employed in a position covered by CSRS on or after May 7, 1985, or a former spouse whose marriage to an employee, Member, or retiree is terminated on or after May 7, 1985, regardless of the date the employee separates from a position covered by CSRS.

(2) The survivor annuity for a former spouse commences and terminates in accordance with the court order. However, a court order will not be honored to the extent it would require an annuity to commence before—

(i) The day after the employee, Member, or retiree dies; or

(ii) The first day of the second month beginning after OPM receives the court order, together with such additional information required by § 838.1005, whichever is later. Further, a court order

will not be honored to the extent it requires an annuity to be terminated contrary to section 8341(h)(3)(B) of title 5, United States Code.

[50 FR 20077, May 13, 1985, as amended at 51 FR 31936, Sept. 8, 1986. Redesignated and amended at 57 FR 33596, July 29, 1992]

### § 838.1012 Death of the former spouse.

(a) Unless the qualifying court order expressly provides otherwise, the former spouse's share of employee retirement benefits terminates on the last day of the month before the death of the former spouse, and the former spouse's share of employee retirement benefits reverts to the retiree.

(b) Except as otherwise provided in this subpart, OPM will honor a qualifying court order or an amended qualifying court order that directs OPM to pay, after the death of the former spouse, the former spouse's share of the employee annuity to—

(1) The court;

(2) An officer of the court acting as a fiduciary;

(3) The estate of the former spouse; or

(4) One or more of the retiree's children as defined in section 8342(c) or section 8424(d) of title 5, United States Code.

[57 FR 33597, July 29, 1992, as amended at 58 FR 43493, Aug. 17, 1993]

### § 838.1013 Limitations.

(a) Employee retirement benefits are subject to apportionment by court order only while the former employee or Member is living. Payment of apportioned amounts will be made only to the former spouse and/or the children of the former employee or Member. Payment will not be made to any of the following:

(1) The heirs or legatees of the former spouse; or

(2) The creditors of the former employee or Member, or the former spouse; or

(3) Other assignees of the former employee or Member, or the former spouse.

(b) The amount of payment under this subpart will not be less than one dollar and, in the absence of compelling circumstances, will be in whole dollars.

(c) In honoring and complying with a court order, the Associate Director will not disrupt the scheduled method of accruing retirement benefits or the normal timing for making such payment, despite the existence of a special schedule of accrual or payment of amounts due the former spouse.

(d) Payments from employee retirement benefits under this subpart will be discontinued whenever the retiree's annuity payments are suspended or terminated. If annuity payments to the retiree are restored, payment to the former spouse will also resume.

(e) Since the former spouse is entitled to payments from employee retirement benefits only while the former employee or Member is living, the former spouse is personally liable for any payments from employee retirement benefits received after the death of the retiree.

### § 838.1014 Guidelines on interpreting court orders.

As circumstances require, OPM will publish in the FEDERAL REGISTER a notice of the guidelines it uses in interpreting court orders. Upon publication of the notice in the FEDERAL REGISTER of such guidelines, they will become an appendix to this subpart.

### § 838.1015 Liability.

OPM is not liable for any payment made from employee retirement benefits pursuant to a court order if such payment is made in accordance with the provisions of this subpart.

### § 838.1016 Receipt of multiple court orders.

In the event that OPM receives two or more qualifying court orders—

(a) When there are two or more former spouses, the court orders will be honored in the order in which they were issued to the maximum extent possible under §§ 831.641 of this chapter and 838.1006.

(b) Where there are two or more court orders relating to the same former spouse, the one issued last will be honored.

[50 FR 20077, May 13, 1985. Redesignated and amended at 57 FR 33596, July 29, 1992; 58 FR 52882, Oct. 13, 1993]

### § 838.1017 Cost-of-living adjustments.

In cases where the court order apportions a percentage of the employee retirement benefit, the Associate Director will initially determine the amount of proper payment. That amount will be increased by future cost-of-living increases unless the court directs otherwise.

### § 838.1018 Settlements.

The former spouse may request that an amount be withheld from the retirement benefits that is less than the amount stipulated in the court order. This lower amount will be deemed a complete fulfillment of the obligation of OPM for the period in which the request is in effect.

## APPENDIX A TO SUBPART J OF PART 838—GUIDELINES FOR INTERPRETING STATE COURT ORDERS DIVIDING CIVIL SERVICE RETIREMENT BENEFITS

UNITED STATES OF AMERICA

OFFICE OF PERSONNEL MANAGEMENT

RETIREMENT AND INSURANCE GROUP

GUIDELINES FOR INTERPRETING STATE COURT ORDERS DIVIDING CIVIL SERVICE RETIREMENT BENEFITS

These guidelines explain the interpretation that the Office of Personnel Management (OPM) will place on terms and phrases frequently used in dividing benefits. These guidelines are intended not only for the use of OPM, but also for the legal community as a whole, with the hope that by informing attorneys, in advance, about the manner in which OPM will interpret terms written into court orders, the resulting orders will be more carefully drafted, using the proper language to accomplish the aims of the court.

A substantial number of State court orders are drafted under the mistaken belief that the Employee Retirement Income Security Act (ERISA) (29 U.S.C. 1001 *et seq.*) applies to CSRS benefits. Sections 1003(b)(1) and 1051 of title 29, United States Code, exempt CSRS from ERISA, because CSRS is a ''governmental plan'' as defined in section 1001(23) of title 29, United States Code. Accordingly, OPM does not honor ERISA Qualifying Domestic Relations Orders (QDRO's) except to the extent that the law governing CSRS expressly authorizes compliance with State court orders. OPM will honor the orders to the extent permitted by CSRS. However, many provisions of ERISA QDRO's are not authorized under CSRS. Most significantly, a court cannot require that payments to the former spouse begin before the employee actually retires (i.e., begins to receive benefits) and, unless the order expressly provides that the former spouse is entitled to a survivor annuity, the payments to the former spouse cannot continue after the employee dies.

I. COMPUTATIONS GENERALLY

*A. Adjustments affecting court-awarded benefits.* 1. Orders that award adjustments to a former spouse stated in terms such as ''cost-of-living adjustments'' or ''COLAs'' occurring after the date of the decree but before the date of retirement will be interpreted to award increases equal to the adjustments described in or effected under section 8340 of title 5, United States Code.

2. Orders that award adjustments to a former spouse stated in terms such as ''salary adjustments'' or ''pay adjustments'' occurring after the date of the decree will be interpreted to award increases equal to the adjustments described in or effected under section 5303 of title 5, United States Code until the date of retirement.

3. Unless otherwise specified in the order, adjustments described in section 8340 of title 5, United States Code will be applied after the date of retirement.

*B. Application of COLAs.* 1. Unless the court directly and unequivocally orders otherwise, decrees that divide annuities either on a percentage basis or by use of a formula will be interpreted to entitle the former spouse to salary adjustments occurring after the date of the decree and cost-of-living adjustments occurring after the date of the decree or occurring after the date of the employee's retirement, whichever comes later.

2. On the other hand, decrees that award a former spouse a specific dollar amount from the annuity will be interpreted as excluding salary and cost-of-living adjustments after the date of the decree, unless the court expressly orders their inclusion.

3. Orders that contain a general instruction to calculate the former spouse's share effective at the time of divorce or separation will not be interpreted to prevent the inclusion of salary adjustments occurring after the specified date. To prevent the application of salary adjustments after the date of the divorce or separation, the decree must either state the exact dollar amount of the award to the former spouse or specifically state that salary adjustments after the specified date are to be disregarded in computing the former spouse's share.

4. Orders that require OPM to compute a benefit as of a specified date, and specifically state that salary adjustments after the specified date are to be disregarded in computing the former spouse's share will not be interpreted to prevent the application of COLAs

*after* the date of the Federal employee's retirement. To award COLAs between the specified date and the Federal employee's retirement, the order must specifically state that the former spouse will receive the benefit of any COLAs occurring between the specified date and the date of the Federal employee's retirement. To prevent the application of COLAs after the retirement date, the decree must either state the exact dollar amount of the award to the former spouse or specifically state that the former spouse will not receive the benefit of COLAs occurring after the date of the Federal employee's retirement.

*C. Present value.* 1. Orders that award a portion of the ''present value'' of an annuity will not be honored unless the amount of the ''present value'' is stated in the order. (See 5 CFR 838.1004(b).)

2. Orders that award a portion of the ''present value'' of an annuity stated in the order will be interpreted as awarding ''a specific dollar amount.'' Unless the court specifically states otherwise, such an award payable from a monthly annuity benefit will be paid in equal installments at 50 percent of the monthly annuity rate at the time of retirement or the date of the order, whichever comes later, until the specific dollar amount is reached.

3. Orders that award a portion of the ''value'' of an annuity as of a specific date before retirement, without specifying what ''value'' is, will be interpreted as awarding a portion of the annuity equal to the monthly annuity rate at the time of retirement times a fraction, the numerator of which is the number of months of ''creditable service'' or service worked as of the date specified and the denominator of which is the total number of months as of the time of retirement of ''creditable service'' or service worked, whichever term is used in the court order. (See III. C. of these Guidelines.)

4. Orders that contain general language awarding a specified portion of a Federal employee's ''retirement benefits'' as of a specified date before retirement, but do not specify whether OPM should use ''creditable service'' or ''service worked'' as of the date specified to complete the computation, will be interpreted to award a portion of the annuity equal to the monthly annuity rate at the time of retirement times a fraction, the numerator of which is the number of months of service worked as of the date specified and the denominator of which is the number of months of ''creditable service'' as of the time of retirement.

*D. Annuity as of a date before retirement.* Orders that award a portion of an employee's annuity as of a specified date *before* the employee's retirement will be interpreted as awarding a portion of the annuity equal to the monthly annuity rate at the time of retirement times a fraction, the numerator of which is the number of months of ''creditable service'' or service worked as of the date specified and the denominator of which is the number of months of ''creditable service'' or service worked used in the retirement computation.

*E. Formulas or percentage instructions.* Orders that contain both a formula or percentage instruction and a dollar amount will be interpreted as including the dollar amount only as the court's estimate of the initial amount of payment. The formula or percentage instruction will control.

*F. Computation limited to a particular period of employment.* In order to limit the computation of benefits to a particular period of employment, the court order must use language expressly limiting the period of service to be included in the computation. General language such as ''benefits accrued as a result of employment with the U.S. Postal Service * * *'' will be interpreted to mean only that CSRS retirement benefits are subject to division (see V.A. of appendix A to subpart J of part 838). Such language will not be interpreted to limit the period of service included in the computation (i.e., service performed with other Government agencies will be included). To limit the period of service, the court order should specify the number of months to be included in the computation or should describe specifically the period of service to be included in the computation (e.g., ''only U.S. Postal Service'' or ''exclusive of any service other than U.S. Postal Service employment'' or ''only service performed during the period Petitioner and Defendant were married'' or ''benefits based on service performed through the date of divorce,'' etc.).

*G. Amounts less than $12 per year.* Orders awarding a former spouse less than $12 per year are qualifying court orders. Such orders will be interpreted as an award of $1 per month.

## II. Types of annuity

A. Gross annuity will be interpreted as the amount of the annuity payable after any applicable survivor reduction but before any other deduction.

B. 1. To divide an annuity before any applicable survivor reduction, the decree must contain language to the effect that the division is to be made on the self-only annuity, the life-rate annuity, or the annuity unreduced for survivor benefit, or equivalent language. A division of ''gross annuity'' will not accomplish this purpose.

2. To divide an annuity before the social security offset under section 8349 of title 5, United States Code, the order must expressly state that the division is to occur before the social security offset. The term ''unreduced annuity'' will mean annuity after the social security offset.

C. Net annuity or disposable annuity will be interpreted to mean net annuity as defined in §838.1003.

D. Orders that fail to state the type of annuity that they are dividing will be interpreted as dividing gross annuity (defined above).

E. Orders dividing a ''retirement check'' will be interpreted as dividing net annuity (as defined in §838.1003).

III. CALCULATING TIME

A. The smallest unit of time that will be used in computing a formula in a decree is a month.

1. This policy is based on section 8332 of title 5, United States Code, that allows credit for service for years or twelfth parts thereof. Requests to calculate smaller units of time will not be honored.

2. Time calculations by the Office of Personnel Management will be no more precise than years and twelfth parts, even where the court order directs OPM to make a more precise calculation. However, if the court order states a formula using a specified simple or decimal fraction other than twelfth parts, OPM will use the specified number to perform simple mathematical computations. For example, the share of a former spouse awarded a portion of the annuity equal to ½ of the fraction whose numerator is 12.863 years and whose denominator is the total service on which the annuity is based would be computed by taking ½ of the quotient obtained by dividing 12.863 by the total service measured *in years and twelfth parts*.

B. The term ''military service'' will generally be interpreted to include only periods of service within the definition of military service contained in section 8331(13) of title 5, United States Code, i.e., active duty military service. Civilian service with military organizations will not be included as ''military service,'' except where the exclusion of such civilian service would be manifestly contrary to the intent of the court order.

C. 1. Unused sick leave is counted as ''creditable service'' on the date of separation for immediate retirement; it is not apportioned over the time when earned.

2. When an order contains a formula for dividing annuity that requires a computation of service worked as of a date prior to separation and using terms such as ''years of service,'' ''total service,'' or similar terms, the time attributable to unused sick leave will not be included.

3. When an order contains a formula for dividing annuity that requires a computation of ''creditable service'' (or some other phrase using ''credit'' or its equivalent) as of a date prior to retirement, unused sick leave will be included in the computation as follows—

(i) If the amount of unused sick leave is specified, the order will be interpreted to award a portion of the annuity equal to the monthly annuity at retirement times a fraction, the numerator of which is the number of months of ''creditable service'' as of the date specified plus the number of months of unused sick leave specified and whose denominator is the months of ''creditable service'' used in the retirement computation.

(ii) If the amount of unused sick leave is not specified, the order will be interpreted to award a portion of the annuity equal to the monthly rate at the time of retirement times a fraction, the numerator of which is the number of months of ''creditable service'' as of the date specified (no sick leave included) and whose denominator is the number of months of ''creditable service'' used in the retirement computation.

IV. DISTINGUISHING BETWEEN DIVISIONS OF ANNUITY AND REFUNDS OF CONTRIBUTIONS

A. Orders that are unclear about whether they are dividing an annuity or a refund of contributions will be interpreted as dividing an annuity.

B. Orders using ''annuities,'' ''pensions,'' ''retirement benefits,'' or similar terms will be interpreted as dividing an annuity and whatever other employee benefits become payable, such as refunds. Orders using ''contributions,'' ''deductions,'' ''deposits,'' ''retirement accounts,'' ''retirement fund,'' or similar terms will be interpreted as dividing the amount of contributions the employee has paid into the Civil Service Retirement Fund. Unless the court order specifically states otherwise, when an annuity is payable, such orders will be paid in equal monthly installments at 50 percent of the monthly annuity at the time of retirement or the date of the order, whichever comes later, until the specific dollar amount is reached.

V. IDENTIFYING BENEFITS AFFECTED

A. Orders that do not specify what pension or retirement benefits are to be divided will not be interpreted as dividing CSRS benefits. Terms such as ''CSRS,'' ''United States,'' ''OPM,'' ''Federal Government'' benefits, ''Postal Service retirement benefits,'' ''retirement benefits payable based on service with the U.S. Department of Agriculture,'' or similar terms will be considered sufficient to identify civil service retirement benefits for division.

B. Except as provided below, orders directed at other retirement systems will not be interpreted as affecting CSRS benefits.

1. Orders that mistakenly label CSRS benefits as Federal Employees Retirement System (FERS) benefits, will be interpreted as dividing CSRS benefits and *vice versa*.

2. Unless the order expressly provides otherwise, for employees transferring to FERS, orders directed at CSRS benefits will be interpreted as applying to the entire FERS

basic benefit, including the CSRS component, if any.

C. Orders directed at other Federal retirement systems such as military retired pay, Foreign Service retirement benefits and Central Intelligence Agency retirement benefits will not be interpreted as dividing CSRS benefits.

D. Orders dividing military retired pay, even when military retired pay has been waived for inclusion in CSRS annuities, will not be interpreted as dividing CSRS benefits. (Such orders cannot be qualifying orders under section 838.1004(b), because the amount cannot be computed from the face of the order or from normal OPM files.)

VI. STATE LAW NOT SPECIFIED IN COURT ORDERS

A. 1. Except as provided in Guideline VI.A.2., OPM will not research, interpret, or apply State law regarding community or marital property rights or divisions.

2. OPM will not divide disability retirement benefits when such a division would be contrary to State law unless the order expressly directs division of ''disability'' benefits.

B. Orders that do not specify the ''community property'' fraction or percentage of the former spouse's share will not be considered qualifying because the amount of the benefit cannot be computed from the face of the order or from normal OPM files (5 CFR 838.1004(b)).

[55 FR 9103, Mar. 12, 1990. Redesignated and amended at 57 FR 33596, July 29, 1992]

## APPENDIX B TO SUBPART J OF PART 838—GUIDELINES FOR INTERPRETING STATE COURT ORDERS AWARDING SURVIVOR ANNUITY BENEFITS TO FORMER SPOUSES

UNITED STATES OF AMERICA

OFFICE OF PERSONNEL MANAGEMENT

RETIREMENT AND INSURANCE GROUP

GUIDELINES FOR INTERPRETING STATE COURT ORDERS AWARDING SURVIVOR ANNUITY BENEFITS TO FORMER SPOUSES

These guidelines explain the interpretation that the Office of Personnel Management (OPM) will place on terms and phrases frequently used in awarding survivor benefits. These guidelines are intended not only for the use of OPM, but also for the legal community as a whole, with the hope that by informing attorneys, in advance, about the manner in which OPM will interpret terms written into court orders, the resulting orders will be more carefully drafted, using the proper language to accomplish the aims of the court.

I. INSURABLE INTEREST ANNUITIES

Two types of potential survivor annuities may be provided by retiring employees to cover former spouses. Section 8341(h) of title 5, United States Code, provides for ''former spouse annuities.'' Section 8339(k) of title 5, United States Code, provides for ''insurable interest annuities.'' These are distinct benefits, each with its own advantages.

A. OPM will enforce State court orders to provide section 8341(h) annuities. These annuities are less expensive and have fewer restrictions than insurable interest annuities but the former spouse's interest will automatically terminate upon remarriage before age 55. To provide a section 8341(h) annuity, the order must use terms such as ''former spouse annuity,'' ''section 8341(h) annuity,'' or ''survivor annuity.''

B. OPM will not enforce State court orders to provide ''insurable interest annuities'' under section 8339(k). These annuities may only be elected at the time of retirement by a retiring employee who is not retiring under the disability provision of the law and who is in good health. The retiree may also elect to cancel the insurable interest annuity to provide a survivor annuity for a spouse acquired after retirement. The parties might seek to provide this type of annuity interest if the non-employee spouse expects to remarry before age 55, if the employee expects to remarry a younger second spouse before retirement, or if another former spouse has already been awarded a section 8341(h) annuity. However, the State court will have to provide its own remedy if the employee is not eligible for or does not make the election. OPM will not enforce the order. Language including the words ''insurable interest'' or referring to section 8339(k) will be interpreted as providing for this type of survivor benefit.

C. In orders which contain internal contradictions about the type of annuity, such as ''insurable interest annuity under section 8341(h),'' the section reference will control.

II. ORDERS DIRECTED AT OTHER RETIREMENT SYSTEMS

A. Except as provided in paragraphs A1 and A2, orders directed at other retirement systems will not be interpreted as affecting Civil Service Retirement System (CSRS) benefits.

1. Orders that mistakenly label CSRS benefits as Federal Employee's Retirement System (FERS) benefits, will be interpreted as affecting CSRS benefits and *vice versa*.

2. Unless the order expressly provides otherwise, for employees transferring to FERS, orders directed at CSRS benefits will be interpreted as applying to the entire FERS basic benefit, including the CSRS component, if any.

B. Orders directed at other Federal retirement systems such as military retired pay, Foreign Service retirement benefits and Central Intelligence Agency retirement benefits will not be interpreted as awarding a former spouse annuity under CSRS. Thus, orders should contain language identifying the retirement system from which survivor benefits are being awarded. For example, orders should contain terms such as ''CSRS,'' ''OPM,'' ''Federal Government employee survivor benefits,'' or ''survivor benefits payable based on service with the U. S. Department of Agriculture,'' etc.

C. Orders affecting military retired pay, even when military retired pay has been waived for inclusion in CSRS annuities, will not be interpreted as awarding a former spouse annuity under CSRS.

III. SPECIFICITY REQUIRED TO AWARD A FORMER SPOUSE ANNUITY.

A. Orders must contain language identifying the benefits affected. For example, ''CSRS,'' ''OPM,'' or ''Federal Government'' survivor benefits, or ''survivor benefits payable based on service with the U.S. Department of Agriculture,'' etc., will be considered sufficient identification.

B. 1. Except as provided paragraphs B2 through B4, orders must specify the benefit being awarded. Orders must contain language such as ''survivor annuity,'' ''death benefits,'' ''former spouse annuity under 5 U.S.C. 8341(h)(1),'' etc.

2. Orders that provide that the former spouse is to ''continue as'' or ''be named as'' the ''designated beneficiary'' of CSRS benefits will be interpreted to award a former spouse annuity.

3. Orders that provide that the former spouse will ''continue to receive benefits after the death of'' the employee or ''that benefits will continue after the death of'' the employee, but do not use terms such as ''survivor annuity,'' ''death benefits,'' ''former spouse annuity,'' or similar terms will not be interpreted to award a former spouse annuity.

4. Orders that give the former spouse the right to elect a former spouse annuity will be interpreted to award a former spouse annuity. The former spouse does not have an election opportunity. OPM will not accept an election by the former spouse to eliminate the court-awarded former spouse annuity.

C. 1. Orders that unequivocally award survivor annuity and direct the former spouse to pay for that benefit are qualifying court orders. If the former spouse has also been awarded a portion of the retiree's benefits then the cost of the survivor benefit will be deducted from the former spouse's portion of the annuity (if sufficient to cover the total cost—there will be no partial withholding). Otherwise, the reduction will be taken from the retiree's annuity and collection from the former spouse will be a private matter between the parties.

2. Orders that condition the award of survivor annuity on the former spouse's payment of the cost of the benefit are qualifying only if there is also an award of retirement benefits sufficient to cover the cost. Absent a sufficient award of employee retirement benefits to pay the cost of survivor benefits, the order is not qualifying.

D. Orders providing that former spouses will keep the survivor annuity to which they were entitled at the time of the divorce will be interpreted to award a former spouse annuity in the same amount as they had at the time of divorce.

E. Orders that fail to state the amount of the former spouse annuity will be interpreted as providing the maximum former spouse annuity.

F. Orders awarding a former spouse annuity of less than $12 per year are qualifying court orders. Such orders will be interpreted to provide an initial rate of $1 per month plus all cost-of-living increases occurring after the date of the order. The reduction in the retiree's annuity will be computed as though the order provided a former spouse annuity of $1 per month.

G. Orders that provide *full* survivor annuity benefits to a former spouse with the contingency that the employee or annuitant may elect a *lesser* benefit for the former spouse upon his or her remarriage will be interpreted to provide only a full survivor annuity benefit to the former spouse. In order to provide full survivor annuity benefits to a former spouse with the contingency that the employee or annuitant may provide a lesser survivor annuity benefit to the former spouse in order to provide survivor annuity benefits for a subsequent spouse, the order should allow a reduction in the former spouse benefit contingent upon the employee's or annuitant's *election* of survivor annuity benefits for a subsequent spouse. A reduction in the amount of survivor benefits provided to the former spouse will not be permitted if it is contingent upon the employee's or annuitant's *remarriage* rather than his or her *election* of survivor annuity benefits for a subsequent spouse. (See 5 CFR 838.1004(b).)

[55 FR 9105, Mar. 12, 1990. Redesignated and amended at 57 FR 33596, July 29, 1992]

## Subpart K—Court Orders Under the Child Abuse Accountability Act

SOURCE: 59 FR 66637, Dec. 28, 1994, unless otherwise noted.

REGULATORY STRUCTURE

### § 838.1101 Purpose and scope.

(a) This subpart regulates the procedures that the Office of Personnel Management will follow upon the receipt of claims arising out of child abuse judgment enforcement orders.

(b) This subpart prescribes—

(1) The circumstances that must occur before employee annuities or refunds of employee contributions are available to satisfy a child abuse judgment enforcement order; and

(2) The procedures that a child abuse creditor must follow when applying for a portion of an employee annuity or refund of employee contributions based on a child abuse judgment enforcement order.

AVAILABILITY OF FUNDS

### § 838.1111 Amounts subject to child abuse judgment enforcement orders.

(a)(1) Employee annuities, other than phased retirement annuities, and refunds of employee contributions are subject to child abuse enforcement orders only if all of the conditions necessary for payment of the employee annuity or refund of employee contributions to the former employee have been met, including, but not limited to—

(i) Separation from the Federal service;

(ii) Application for payment of the employee annuity or refund of employee contributions by the former employee; and

(iii) Immediate entitlement to an employee annuity or refund of employee contributions.

(2) Money held by an employing agency or OPM that may be payable at some future date is not available for payment under child abuse judgment enforcement orders.

(3) OPM cannot pay a child abuse creditor a portion of an employee annuity before the employee annuity begins to accrue.

(b)(1) Phased retirement annuities are subject to child abuse enforcement orders only if all of the conditions necessary for payment of the phased retirement annuity to the phased retiree have been met, including, but not limited to—

(i) Entry of the employee into phased retirement status under subpart Q of part 831 of this chapter or part 848 of this chapter, respectively;

(ii) Application for payment of the phased retirement annuity by the phased retiree; and

(iii) The phased retiree's immediate entitlement to a phased retirement annuity.

(2) Money held by an employing agency or OPM that may be payable at some future date is not available for payment under child abuse judgment enforcement orders.

(3) OPM cannot pay a child abuse creditor a portion of a phased retirement annuity before the employee annuity begins to accrue.

(c) Waivers of employee annuity payments under the terms of section 8345(d) or section 8465(a) of title 5, United States Code, exclude the waived portion of the annuity from availability for payment under a child abuse judgment enforcement order if such waivers are postmarked or received before the date that OPM receives the child abuse judgment enforcement order.

[59 FR 66637, Dec. 28, 1994, as amended at 79 FR 46631, Aug. 8, 2014]

APPLICATION, PROCESSING, AND PAYMENT PROCEDURES AND DOCUMENTATION REQUIREMENTS

### § 838.1121 Procedures and requirements.

(a) Except as otherwise expressly provided in this part, the procedures and requirements applicable to legal process under part 581 of this chapter apply to OPM's administration of child abuse judgment enforcement orders.

(b)(1) OPM will accept for processing any legal process under part 581 of this chapter that appears valid on its face.

(2)(i) After OPM has determined that a child abuse judgment enforcement order is valid on its face, OPM will not entertain any complaint concerning the validity of the order. Such complaints must be presented to authorities having jurisdiction to review the validity of the legal process.

(ii) OPM will not delay compliance with a child abuse judgment enforcement order based on any complaint

concerning the validity of the order unless instructed to do so by an appropriate authority under the law of the jurisdiction issuing the legal process, the office of the United States Attorney for the jurisdiction issuing the legal process, or the U.S. Department of Justice.

(c)(1) The address for service of a child abuse judgment enforcement order is provided in appendix A to subpart A of this part.

(2)(i) OPM considers service of legal process by mailing or delivery of the child abuse judgment enforcement order to the designated address appropriate service notwithstanding more formal requirements imposed on creditors under State law.

(ii) OPM will execute forms required under a State procedure to waive any right to more formal procedures for service of legal process than specified in paragraph (c)(2)(i) of this section.

# PART 839—CORRECTION OF RETIREMENT COVERAGE ERRORS UNDER THE FEDERAL ERRONEOUS RETIREMENT COVERAGE CORRECTIONS ACT

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## Subpart A—General Provisions

### § 839.101 What is the Federal Erroneous Retirement Coverage Corrections Act?

(a) The Federal Erroneous Retirement Coverage Corrections Act (FERCCA) is Title II of Public Law 106–265, enacted September 19, 2000. The FERCCA addresses the problems created when employees are in the wrong retirement plan for an extended period.

(b) Generally, you must be in the wrong retirement plan for at least 3 years of service after December 31, 1986, before the FERCCA applies to you. Depending on the type of error, the FERCCA provides:

(1) A choice between retirement plans,

(2) New rules for crediting civilian and military service that was not subject to retirement deductions,

(3) Payment of lost earnings on employee make-up contributions to the Thrift Savings Plan, and

(4) Payment of certain out-of-pocket expenses that are a direct result of a retirement coverage error.

**§ 839.102 Definitions.**

*Agency* means an executive agency as defined in section 105 of title 5, United States Code; a legislative branch agency; a judicial branch agency; and the U.S. Postal Service and Postal Rate Commission.

*Agency automatic (1%) contributions* means contributions made to a FERS participant's Thrift Savings Plan account by his or her employing agency under 5 U.S.C. 8432(c)(1) or (c)(3).

*Agency matching contributions* means contributions made to a FERS participant's Thrift Savings Plan account by his or her employing agency under 5 U.S.C. 8432(c)(2).

*Annuitant* means the same as *Retiree*.

*Basic Employee Death Benefit or BEDB* means the FERS survivor benefit payable as a lump sum or over 36 months, described in § 843.309 of this chapter.

*Board* means the Federal Retirement Thrift Investment Board established under 5 U.S.C. 8472.

*CSRS* means the Civil Service Retirement System, as described in subchapter III of chapter 83 of title 5, United States Code.

*CSRS component* means the part of a FERS retirement benefit that is computed under CSRS provisions (see § 846.304 of this chapter).

*CSRS Offset* means the Civil Service Retirement System Offset plan, which is for employees whose service is subject to CSRS deductions and Social Security taxes, as described in 5 U.S.C. 8349.

*Employee* means an employee or Member individual as defined in section 8331(1) and (2) or 8401(11) and (20) of title 5, United States Code. Employee includes an individual who has applied for retirement benefits, but not separated from service.

*Employee retirement deductions* means the amount that is deducted from basic pay under section 8334(a) of title 5, United States Code, for CSRS employees; or section 8334(k) of title 5, United States Code, for CSRS Offset employees; or the portion of the normal cost of FERS coverage that is deducted from an employee's basic pay under section 8422(a) of title 5, United States Code.

*Employer* means, with respect to an employee, that individual's employing agency.

*Employer retirement contributions* means the employer share of retirement contributions that are required payments to the Fund under sections 8334(a) and 8423(a) of title 5, United States Code.

*Former spouse* means a living person who was married to you for at least 9 months.

*FERCCA* means the Federal Erroneous Retirement Coverage Corrections Act.

*FERS* means the Federal Employees' Retirement System, as described in chapter 84 of title 5, United States Code.

*Fund* means the Civil Service Retirement and Disability Fund described in section 8348 of title 5, United States Code.

*Government contributions* means agency automatic (1%) contributions and agency matching contributions.

*Lost earnings* means earnings that you would have received had your make-up contributions to the Thrift Savings Fund been made during the period of the error when they should have otherwise been made.

*Make-up contributions* means employee contributions to the Thrift Savings Plan that should have been deducted from a participant's basic pay earlier, but were not due to an employing agency error.

*MSPB* means the Merit Systems Protection Board described in chapter 12 of title 5, United States Code.

*OPM* means the Office of Personnel Management.

*Present value factor* has the same meaning as in § 831.2202 or § 842.702 of this chapter, as applicable.

*Previously corrected* means a retirement coverage error that has been properly corrected before March 19, 2001.

*Qualifying court order* has the same meaning as in § 846.702 of this chapter, referring to court orders that affect

CSRS or FERS payments following a divorce or legal separation.

*Qualifying retirement coverage error* means an erroneous decision by an employee or agent of the Government as to whether Government service is CSRS covered, CSRS Offset covered, FERS covered, or Social Security-Only covered that remained in effect for at least 3 years of service after December 31, 1986.

*Reemployed annuitant* means a CSRS or FERS retiree who is reemployed under conditions that do not terminate the CSRS or FERS annuity. (See part 837 of this chapter for additional information on reemployed annuitants.)

*Retiree* means a former employee or Member who is receiving, or meets the statutory age and service requirements for, an annuity under either CSRS or FERS. This includes individuals who meet the statutory requirements for benefits and chose to postpone the beginning date of the annuity under § 842.204(c) or § 842.212(b)(1)(ii) of this chapter (pertaining to FERS MRA+10 and FERS deferred benefits). Retiree does not include a current spouse, former spouse, child, or person with an insurable interest receiving a survivor annuity. An individual who has left Federal service after completing 5 years of service but has not reached the age at which annuity payments may begin is considered a ''separated employee'' rather than a retiree.

*Retirement coverage* means participation in CSRS, CSRS Offset, FERS, or Social Security-Only. Retirement coverage is shown on the Notification of Personnel Action (Standard Form 50) or other similar record of personnel actions.

*Retirement plan* means the same as *retirement coverage*.

*Separated employee* means a former employee or Member who has separated from service and who has not met all the requirements for retirement under CSRS or FERS.

*Social Security coverage* means service as a Federal employee that is employment under section 210 of the Social Security Act (42 U.S.C. 410) and is subject to Social Security taxes.

*Social Security-Only* means coverage under Social Security without concurrent coverage under CSRS, CSRS Offset, or FERS.

*Social Security taxes* means the Old Age, Survivors, and Disability Insurance taxes imposed on employees under section 3101(a) of the Internal Revenue Code of 1986 (31 U.S.C. 3101(a)) and on employers under section 3111(a) of the Internal Revenue Code of 1986 (31 U.S.C. 3111(a)).

*Survivor* means a person entitled to benefits under chapter 83 or 84 of title 5, United States Code, based on the service of a deceased employee, separated employee, or retiree.

*Thrift Savings Plan or TSP* means the Federal Retirement Thrift Savings Plan established by the Federal Employees' Retirement System Act of 1986, Pub. L. 99–335, 100 Stat. 514, which has been codified, as amended, primarily at 5 U.S.C. 8351 and 8401–8479.

## Subpart B—Eligibility

GENERAL PROVISIONS

### § 839.201 Do these rules apply to me?

(a) These rules apply to employees who had a qualifying retirement coverage error. For all purposes, a qualifying retirement coverage error must have lasted for at least 3 years of Federal service after December 31, 1986, as stated in the definitions section (§ 839.102). It does not matter whether you have left Federal service, retired, or have been reemployed as an annuitant, as long as you had a qualifying retirement coverage error. In addition, the survivor of an employee, separated employee, or retiree who had a qualifying retirement coverage error is also covered by these rules.

(b) An error that lasted less than 3 years of Federal service after December 31, 1986, is not qualifying under the rules in this part.

(c) For errors lasting less than 3 years that involve erroneous placement in FERS during a period that the employee was eligible to elect FERS, see § 846.204(b) of this chapter for guidance.

ELECTION OPPORTUNITY

**§ 839.211 If these rules apply to me because I had a qualifying retirement coverage error, can I choose which retirement plan I want to be in?**

The FERCCA does not provide an election opportunity in all situations where there was a qualifying retirement coverage error. Even if your error is one that provides an election opportunity under the FERCCA, certain events may disqualify you from making an election under the FERCCA. If you had a qualifying retirement coverage error, your eligibility to choose your retirement plan may be affected by the situations described in the next seven questions.

**§ 839.212 May I make a retirement coverage election if I received a refund of my retirement deductions after I was corrected to FERS?**

If your qualifying retirement coverage error was previously corrected to FERS and you then received a refund of your FERS retirement deductions, you are not allowed to elect retirement plan coverage under the FERCCA.

**§ 839.213 May I make a retirement coverage election if I withdrew all or part of my TSP account after I was corrected to FERS?**

(a) You may not make a retirement coverage election if your qualifying retirement coverage error was previously corrected to FERS, and you later received one of the following TSP withdrawals:

(1) A TSP annuity after separation from service, but before receiving a FERS annuity; or

(2) A single payment or monthly payments after separation from service; or

(3) An age-based in-service withdrawal.

(b) If you received an automatic cashout of your TSP account after you separated (because your account balance was $3,500 or less), or if you received a financial hardship in-service withdrawal, you may make a retirement coverage election.

**§ 839.214 Am I disqualified from making an election of retirement coverage under the FERCCA if I withdrew my TSP account after I retired under FERS?**

No, you may make an election of retirement coverage under the FERCCA if you made a TSP withdrawal as a retiree.

**§ 839.215 May I make a retirement coverage election under the FERCCA if I received a payment as settlement of my claim for losses because of a qualifying retirement coverage error?**

You can make a retirement coverage election under the FERCCA if OPM waives repayment of the entire amount under § 839.1202. If OPM does not waive the entire repayment, you must pay back the amount that OPM did not waive.

PREVIOUS ELECTION OPPORTUNITY

**§ 839.221 If my qualifying retirement coverage error was that I was put into FERS by mistake and then, after the error was discovered, I chose my current retirement coverage, can I now make another election?**

No, OPM regulations allow certain employees who were put in FERS in error to choose between remaining in FERS or being covered under their automatic retirement coverage. (See § 846.204(b)(2) of this chapter). If you already had this opportunity to choose your retirement coverage; then you may not make an election of retirement coverage based on the same error under these rules.

COURT-ORDERED BENEFITS FOR FORMER SPOUSES

**§ 839.231 Can I make an election if my former spouse is entitled to a portion of my retirement benefits by qualifying court order?**

Yes, but if you want to elect FERS you need your former spouse's consent to the election. If you are subject to a qualifying court order and want to elect FERS, the requirements in § 846.722 of this chapter (Former Spouse's Consent to an Election of FERS Coverage) apply to you.

### § 839.232 If a deceased employee's survivors include both a current spouse and a former spouse, or spouses, who are eligible for survivor annuities, must all of them consent to an election of FERS?

If the employee dies before making an election of retirement coverage under the FERCCA, all eligible potential survivors, that is, both the current and any former spouses, must consent to an election of FERS coverage. If they do not all consent, the election cannot be made.

ELECTIONS

### § 839.241 Am I eligible to make an election under the FERCCA if I had a qualifying retirement coverage error and none of the conditions mentioned in § 839.212 through § 839.232 apply to me?

If you were in CSRS or CSRS Offset and should have been in FERS or Social Security-Only, or if you were in FERS and should have been in CSRS, CSRS Offset, or Social Security-Only, then you have an election opportunity. This is summarized in the following chart:

| You are or were in: | And you belong in: |
|---|---|
| CSRS or CSRS Offset | FERS. |
| CSRS or CSRS Offset | Social Security-Only. |
| FERS | Social Security-Only. |
| FERS | CSRS. |
| FERS | CSRS Offset. |

### § 839.242 Do these rules apply to me if I had multiple errors?

You must be in the wrong retirement plan for at least 3 years of Federal service after December 31, 1986. You need not be in the same wrong retirement plan during the entire 3-year period. If you had more than one type of erroneous retirement coverage, then you will have a retirement plan election under these rules if one of the errors is of a type that qualifies you for an election.

## Subpart C—Employer Responsibility to Notify Employees

### § 839.301 What should I do if I am not sure whether I am or was in the wrong retirement plan?

(a) If you are an employee, your employer has your personnel records and will review them to determine whether an error has been made. Therefore, you should notify your employer's human resources office if you believe an error has been made in your case. Notify your current employer even if you believe the error occurred while you were employed at another agency.

(b) If you are not currently employed by the Federal Government, you should notify OPM at: U.S. Office of Personnel Management, Retirement Operations Center, Post Office Box 45, Boyers, Pennsylvania 16017. You can also contact us by electronic mail at *FERCCA@OPM.GOV*. Notify OPM regardless of whether you are a retiree, survivor, or separated employee.

(c) You may also get additional information about the FERCCA and whether or not you qualify at: *www.opm.gov/benefits/correction*.

### § 839.302 Will my employer give me a written explanation?

(a) Your employer must provide you with written notice of the error. The notice must include an explanation of the error, your options regarding the error, and any time limits that apply.

(b) Your employer must inform you if they find that you do not have a retirement coverage error.

### § 839.303 Is my employer required to find employees with a retirement coverage error?

The FERCCA requires your employer to take reasonable and appropriate measures to identify individuals affected by a qualifying retirement coverage error and notify them of their rights under the law.

### § 839.304 What if my employer does not notify me?

(a) If your error has not previously been corrected, the 6-month time limit on making an election of retirement coverage under the FERCCA (see

§ 839.611(a)) does not begin to run until you are notified of the error.

(b) If your error was previously corrected, the 18-month time limit on making an election of retirement coverage ends on September 19, 2002. Employers and OPM may extend the time limit if you were prevented from making a timely election due to a cause beyond your control (see § 839.612).

## Subpart D—Retirement Coverage Elections for Errors That Were Not Previously Corrected

ERRONEOUS CSRS OR CSRS OFFSET

### § 839.401 What can I elect if I was put in CSRS or CSRS Offset by mistake?

If you were placed in CSRS or CSRS Offset due to a qualifying retirement coverage error and you should have been in FERS, you may elect CSRS Offset or FERS. If you were placed in CSRS or CSRS Offset due to a qualifying retirement coverage error and you should have been in Social Security-Only, you may elect CSRS Offset or Social Security-Only. This is summarized in the following chart:

| You are in: | And you belong in: | You may elect: |
|---|---|---|
| CSRS | FERS | CSRS Offset or FERS. |
| CSRS Offset | FERS. | |
| CSRS | Social Security-Only | CSRS Offset or Social Security-Only. |
| CSRS Offset | Social Security-Only. | |

ERRONEOUS FERS

### § 839.411 What can I elect if I was put in FERS by mistake?

If you were placed in FERS due to a qualifying retirement coverage error and you should have been in CSRS, you may elect FERS or CSRS. If you were placed in FERS due to a qualifying retirement coverage error and you should have been in CSRS Offset, you may elect FERS or CSRS Offset. If you were placed in FERS due to a qualifying retirement coverage error and you should have been in Social Security-Only, you may elect FERS or Social Security-Only. This is summarized in the following chart:

| You are in: | And you belong in: | You may elect: |
|---|---|---|
| FERS | CSRS | FERS or CSRS. |
| FERS | CSRS Offset | FERS or CSRS Offset. |
| FERS | Social Security-Only | FERS or Social Security-Only. |

## Subpart E—Retirement Coverage Elections for Errors That Were Previously Corrected

MOVED OUT OF CSRS OR CSRS OFFSET

### § 839.501 What can I elect if my employer moved me out of CSRS or CSRS Offset?

If you were moved out of CSRS or CSRS Offset due to a qualifying retirement coverage error and were placed in FERS, you may elect CSRS Offset or remain in FERS. If you were moved out of CSRS or CSRS Offset due to a qualifying retirement coverage error and were placed in Social Security-Only, you may elect CSRS Offset or remain in Social Security-Only. This is summarized in the following chart:

| You were in: | And your coverage was previously corrected to: | You may elect: |
|---|---|---|
| CSRS | FERS | CSRS Offset or FERS. |
| CSRS Offset | FERS. | |
| CSRS | Social Security-Only | CSRS Offset or Social Security-Only. |
| CSRS Offset | Social Security-Only.. | |

MOVED OUT OF FERS

### § 839.511 What can I elect under the FERCCA if my employer put me into FERS by mistake and then I was not allowed to remain in FERS when the error was discovered?

An employee who was erroneously placed in FERS during a time when the employee should have had an opportunity to elect FERS is allowed to keep the erroneous FERS coverage. If the employee was given an opportunity to remain in FERS, then the employee is disqualified from making an election of retirement coverage under the FERCCA (see § 839.221). If you were not allowed to remain in FERS and were placed in CSRS due to a qualifying retirement coverage error, you may elect FERS or remain in CSRS. If you were not allowed to remain in FERS and were placed in CSRS Offset due to a qualifying retirement coverage error, you may elect FERS or remain in CSRS Offset. If you were not allowed to

remain in FERS and were placed in Social Security-Only due to a qualifying retirement coverage error, you may elect FERS or remain in Social Security-Only. This is summarized in the following chart:

| You were in: | And your coverage was previously corrected to: | You may elect: |
|---|---|---|
| FERS | CSRS | CSRS or FERS. |
| FERS | CSRS Offset | CSRS Offset or FERS. |
| FERS | Social Security-Only | Social Security-Only or FERS. |

## Subpart F—Making an Election

GENERAL PROVISIONS

### § 839.601 How do I make an election?

You may make your election using the form issued by OPM. If you are an employee, your employer will provide you with this form. If you are not a current employee, OPM will provide the form.

### § 839.602 What if I don't make an election?

(a) If your qualifying retirement coverage error was not previously corrected and you fail to make an election within the time limit under § 839.611(a), your retirement coverage is summarized in the following chart:

| If you are in: | And you belong in: | You are considered to have elected: |
|---|---|---|
| CSRS or CSRS Offset. | FERS | CSRS Offset. |
| FERS | CSRS, CSRS Offset or Social Security-Only. | FERS. |
| CSRS or CSRS Offset. | Social Security-Only | CSRS Offset. |

(b) If your qualifying retirement coverage error was previously corrected and you fail to make an election within the time limit under § 839.611(b), you are considered to have elected to remain in your current retirement plan.

### § 839.603 Can I later change my election?

Your election is irrevocable once your employer or OPM processes it. If you do not make a timely election, the resulting coverage (see § 839.602) is also irrevocable.

### § 839.604 When is my election effective?

Your election is effective on the date that the retirement coverage error first occurred. This means that your election will be retroactive, or will change your retirement coverage for a period of service in the past.

TIME LIMITS

### § 839.611 What are the time limits for making an election?

(a) If your qualifying retirement coverage error was not previously corrected, you have 6 months from the date you receive notice of the error under § 839.302 to make an election.

(b) If your qualifying retirement coverage error was previously corrected, the time limit for making an election expires on September 19, 2002.

### § 839.612 Can I make a belated election?

(a) If you are an employee, your employer can waive the time limit for making an election if you request such a waiver in writing. The employer would have to determine that you exercised due diligence, but could not make an election within the time limit because of circumstances beyond your control.

(b) Your employer's decision not to waive the time limit under this section must be in writing and include notice of your right to request OPM to reconsider the decision.

(c) OPM can waive the time limit for separated employees, retirees, and survivors who exercised due diligence but could not make an election because of circumstances beyond their control if a request is submitted to OPM, and OPM concludes that a waiver is justified.

FERS ELECTIONS

### § 839.621 Can I cancel my FERS election if I was in the wrong retirement plan at the time I elected FERS coverage and I have an election opportunity under the FERCCA?

If you were erroneously in CSRS, CSRS Offset, or Social Security-Only at the time you elected FERS and you have an election opportunity under the FERCCA, you can choose whether you

want the FERS election to remain in effect. However, you may not choose whether you want your FERS election to remain in effect if you chose FERS after your employer notified you that you were put in FERS by mistake (see § 839.221).

### § 839.622 Can I cancel my FERS election if my qualifying retirement coverage error was previously corrected and I now have an election opportunity under the FERCCA?

Yes, your FERS coverage election does not disqualify you from making a retirement coverage election under the FERCCA. You can choose whether you want the FERS election to remain in effect. However, you may not choose whether you want your FERS election to remain in effect if you chose FERS after your employer notified you that you were put in FERS by mistake (see § 839.221).

### § 839.623 If I decide to keep the FERS election in effect, may I change the effective date of the FERS election?

No, If you decide to keep FERS, the original FERS election will remain unchanged.

## Subpart G—Errors That Don't Permit an Election

### § 839.701 Is it correct that even though I had a qualifying retirement coverage error under the FERCCA, I may not have a choice of retirement coverage?

Under the FERCCA, the types of retirement coverage errors listed in § 839.241 trigger a right to make a retirement coverage election. The following chart summarizes the types of errors that do not trigger an election right:

| You are in: | And you belong in: | Your coverage must be corrected to: |
|---|---|---|
| CSRS Offset | CSRS | CSRS. |
| CSRS | CSRS Offset | CSRS Offset. |
| Social Security-Only | CSRS | CSRS. |
| Social Security-Only | CSRS Offset | CSRS Offset. |
| Social Security-Only | FERS | FERS. |

### § 839.702 How do these rules apply to me if I don't have an election right under the FERCCA, but I did have a qualifying retirement coverage error?

After your retirement coverage is corrected to the proper plan, your retirement deductions will be adjusted in accordance with subpart H of this part and your Social Security taxes will be adjusted in accordance with subpart I of this part, if applicable. You may also file a claim for losses in accordance with subpart L of this part.

## Subpart H—Adjusting Retirement Deductions and Contributions

EMPLOYEE RETIREMENT DEDUCTIONS

### § 839.801 Do I owe more money if I had a qualifying retirement coverage error and the employee retirement deductions for the new retirement plan are more than what I already paid?

(a) No, your employer is responsible for paying any additional amount to the Fund. Your employer will not bill you for any additional retirement deductions.

(b) For qualifying retirement coverage errors corrected under this part, the rules at § 831.111(b) of this chapter (pertaining to employee options when the employer fails to withhold CSRS or CSRS Offset retirement deductions) do not apply.

### § 839.802 If I was in CSRS during my qualifying retirement coverage error, paid into the Fund more than I would have paid as a CSRS Offset, Social Security-Only, or FERS employee, and end up retroactively in one of those retirement plans, will I get a refund of the excess I had withheld from my pay?

CSRS Offset and FERS require employees to pay Social Security taxes in addition to retirement deductions. When you are retroactively changed under the FERCCA to CSRS Offset, FERS, or Social Security-Only, the deductions you paid in under CSRS will be used to pay both the amounts required for retirement deductions under CSRS Offset or FERS, as applicable to you, and also the Social Security taxes that you would have paid had you been

in CSRS-Offset, FERS, or Social Security-Only.

**§ 839.803 If I am like the person in the previous question, but the amount I paid as deductions under CSRS is more than the amount of combined retirement deductions and Social Security taxes due for my new retirement coverage, will I get a refund of the excess?**

Yes, either OPM or your employer, as appropriate, will issue the payment in accordance with OPM instructions.

**§ 839.804 If my qualifying retirement coverage error occurred while I was a reemployed annuitant, and I am later corrected retroactively to a different retirement plan, will I have to pay any additional amount for retirement deductions?**

(a) If you (as a reemployed annuitant) were erroneously in CSRS and had retirement deductions withheld from pay, and later are corrected to CSRS Offset or FERS coverage, the amount erroneously withheld under CSRS will be used to pay the retroactive CSRS Offset or FERS retirement deductions and Social Security taxes.

(b) If you (as a reemployed annuitant) were erroneously placed in CSRS and elected not to have retirement deductions withheld from pay, and later are corrected to CSRS Offset or FERS, your share of retroactive Social Security taxes will be treated as an overpayment of salary. If you are corrected to CSRS Offset, you may elect to have retirement deductions withheld from future salary as a reemployed annuitant and may also make a deposit to cover the retirement deductions for past service as a reemployed annuitant in accordance with § 837.503(c) of this chapter. If you are corrected to FERS, your retirement deductions under FERS will be treated as an overpayment of salary.

(c) If you (as a reemployed annuitant) were erroneously in CSRS Offset and had retirement deductions withheld from pay, and later are corrected to CSRS or FERS coverage, the amount erroneously withheld under CSRS Offset will be used to pay the retroactive CSRS or FERS retirement deductions. The employer is responsible for paying to the Fund any additional retirement deductions.

(d) If you (as a reemployed annuitant) were erroneously placed in CSRS Offset and elected not to have retirement deductions withheld from pay, and later are corrected to CSRS, you may elect to have retirement deductions withheld from future salary as a reemployed annuitant and may also make a deposit to cover the retirement deductions for past service as a reemployed annuitant in accordance with § 837.503(c) of this chapter. Your retirement deductions under CSRS will be treated as an overpayment of salary.

(e) If you (as a reemployed annuitant) were erroneously placed in CSRS Offset and elected not to have retirement deductions withheld from pay, and later are corrected to FERS, your retirement deductions under FERS will be treated as an overpayment of salary.

(f) A reemployed annuitant erroneously placed in FERS and later corrected to CSRS or CSRS Offset is considered to have elected retirement deductions as a reemployed annuitant under the corrected coverage. The employer is responsible for paying to the Fund any additional retirement deductions under the corrected retirement coverage.

(g) If you have a salary overpayment, your employer will inform you of your rights regarding the overpayment.

(h) These rules are summarized in the following chart:

| Wrong coverage is: | And retirement deductions were | And you are corrected to | Then |
|---|---|---|---|
| (1) CSRS | Taken | CSRS Offset or FERS. | • The erroneous CSRS deductions are used to pay the retroactive CSRS Offset or FERS deductions and Social Security taxes.<br>• Retirement deductions will continue to be withheld from salary.<br>• Social Security taxes must be withheld from salary. |

| Wrong coverage is: | And retirement deductions were | And you are corrected to | Then |
|---|---|---|---|
| (2) CSRS | Not taken | CSRS Offset | • Retroactive Social Security taxes are treated as an overpayment of salary.<br>• You may elect to have retirement deductions withheld from future salary.<br>• Social Security taxes must be withheld from salary.<br>• You may pay a deposit to OPM for past retirement deductions. |
| (3) CSRS | Not taken | FERS | • Retroactive Social Security taxes are treated as an overpayment of salary.<br>• Retirement deductions and Social Security taxes must be withheld from salary.<br>• Your retirement deductions for past service under FERS are treated as an overpayment of salary. |
| (4) CSRS Offset | Taken | CSRS or FERS | • The erroneous CSRS Offset deductions are used to pay retroactive CSRS or FERS retirement deductions.<br>• Retirement deductions will continue to be withheld from salary.<br>• Social Security taxes must be withheld from salary if correct coverage is FERS.<br>• Employer must pay any additional amount of retirement deductions. |
| (5) CSRS Offset | Not taken | CSRS | • You may elect to have retirement deductions withheld from future salary.<br>• You may pay a deposit to OPM for past retirement deductions. |
| (6) CSRS Offset | Not taken | FERS | • Your retirement deductions for past service under FERS will be treated as an overpayment of salary. |
| (7) FERS | Taken | CSRS or CSRS Offset. | • You are considered to have elected retirement deductions as a reemployed annuitant under the corrected coverage.<br>• Employer must pay any additional retirement deductions due for past service. |

## EMPLOYER RETIREMENT CONTRIBUTIONS

### § 839.811 Does my employer owe more money if I had a qualifying retirement coverage error and the employer retirement contributions for my new retirement plan are more than what was already paid?

Yes, your employer must pay any additional retirement contributions to the Fund.

### § 839.812 Will my employer get a refund if I had a qualifying retirement coverage error and the employer retirement contributions for my new retirement plan are less than what was already paid?

No, if you were erroneously in CSRS, CSRS Offset, or Social Security-Only, then a correction of a retirement coverage error will not reduce the employer retirement contribution owed. Also, the FERCCA states that an employer may not remove from the Fund FERS employer contributions when correcting a qualifying retirement coverage error under this part.

## RECORDS CORRECTION

### § 839.821 Who is responsible for correcting my records?

(a) Your current employer will correct your records in accordance with OPM instructions. Your employer must not delay correcting your records.

(b) For former employees and retirees, the last employer will correct the records. For survivors, the employee's last employer will correct the records. If an employer no longer exists as an organization, and there is no successor agency, then OPM will correct the records.

### § 839.822 Which employer is responsible for submitting the employee and employer retirement deductions and contributions and correcting my records if I had different employers?

Your current or most recent employer will be responsible for this purpose. Even if that employer was not involved in the retirement coverage error, it must issue corrected records for the entire period of the retirement coverage error.

## Subpart I—Social Security Taxes

### § 839.901 When will my employer begin withholding Social Security taxes if I was erroneously in CSRS during my qualifying retirement coverage error and my corrected coverage will now require me to pay Social Security taxes?

(a) If you are in CSRS by mistake and belong in CSRS Offset, FERS, or Social Security-Only, your employer must begin withholding Social Security taxes by changing your retirement coverage to CSRS Offset. Your employer must begin this withholding as soon as possible after the error is discovered.

(b) Your employer will correct your retirement coverage back to the date the error first occurred once you are notified of the error and have an opportunity to make any elections that you are eligible to make.

### § 839.902 Will my CSRS retirement deductions be used to pay the Social Security taxes for the period of the qualifying retirement coverage error if I was erroneously placed in CSRS and did not pay Social Security taxes?

(a) If your qualifying retirement coverage error was not previously corrected, the amount erroneously withheld for CSRS retirement deductions will be:

(1) Used to pay your new retirement deduction amount; and

(2) Applied toward any Social Security taxes you owe for the time you were in the wrong retirement plan.

(b) You will get Social Security credit for all the time you were erroneously covered by CSRS. Your employer will send the Social Security Administration a record of your earnings for all the years you should have had Social Security coverage.

### § 839.903 What happens to the Social Security taxes I erroneously paid when my employer corrects my retirement coverage to CSRS?

(a) Except for the last 3 years, the money you erroneously paid into Social Security will remain to your credit in the Social Security fund. The Social Security Administration will include all but those last 3 years in determining your eligibility for, and the amount of, future benefits.

(b) The amount you paid into Social Security for the last 3 years will be used to help pay your CSRS retirement deductions.

## Subpart J—Lost Earnings for Certain Make-up Contributions to the TSP

### § 839.1001 Does the FERCCA allow me to increase my TSP account if I was in CSRS during my qualifying retirement coverage error and my correct coverage will be FERS?

The Board's error correction regulations (5 CFR 1605 of chapter VI) generally allow you to increase your TSP account through a schedule of make-up contributions to replace the missed employee contributions. In addition, the FERCCA allows certain employees who have completed a schedule of make-up contributions, or who plan to schedule make-up contributions, to receive lost earnings on those contributions under certain circumstances. Employees are (and have been) entitled to lost earnings on the make-up agency contributions they receive as a result of the correction of an agency error.

### § 839.1002 Will OPM compute the lost earnings if my qualifying retirement coverage error was previously corrected and I made TSP make-up contributions?

If you made contributions to the TSP after your qualifying retirement coverage error was previously corrected, OPM will compute the lost earnings on your make-up contributions to the TSP under the following circumstances:

| You were in: | And were previously corrected to: | And under these rules you elect: |
|---|---|---|
| CSRS | FERS | FERS. |
| CSRS Offset | FERS. | |
| Social Security-Only | FERS | No election required. |
| Social Security-Only | CSRS. | |
| Social Security-Only | CSRS Offset | |

### § 839.1003 How will OPM compute the amount of lost earnings?

(a) Lost earnings will generally be computed in accordance with the Board's lost earnings regulations (5

CFR 1606 of chapter VI). However, the FERCCA states that OPM may compute the lost earnings in an alternative manner if such a computation is not administratively feasible. The alternative manner will yield an amount that is as close as practicable to the amount computed under 5 CFR 1606 of chapter VI.

(b) Your employer is required to submit to OPM all information required to compute the amount of lost earnings.

### § 839.1004 Are lost earnings payable if I separated or if the employee died?

(a) Yes. If the TSP account is not withdrawn, the lost earnings are paid to the account.

(b) If there is no TSP account at the time the lost earnings are payable, you or your survivors will receive the payment directly.

## Subpart K—Effect of Election

GENERAL PROVISIONS

### § 839.1101 How are my retirement benefits computed if I elect CSRS or CSRS Offset under this part?

Unless otherwise stated in this part, your retirement benefit is computed as if you were properly put in CSRS or CSRS Offset on the effective date of the error. All the eligibility and benefit computation rules for CSRS or CSRS Offset apply to your retirement benefit.

### § 839.1102 How are my retirement benefits computed if I elect FERS under this part?

OPM will compute your retirement benefit as if you were properly put in FERS on the effective date of the error. All the eligibility and benefit computation rules for FERS apply to your retirement benefit.

### § 839.1103 If my qualifying retirement coverage error started when I should have been placed under FERS automatically, but my agency put me in CSRS because I had some past service, will I get a CSRS component in my FERS annuity for the service before the error if I elect FERS?

No, employees who should have been automatically placed in FERS (generally because they did not have 5 years of past service under CSRS rules) do not have a CSRS component in their future FERS benefit. All service must be treated as FERS service in this circumstance.

RETIREES AND SURVIVORS

### § 839.1111 If I elect to change my retirement coverage under the FERCCA, can I change the election I originally made at retirement for survivor benefits?

(a) Yes, if you elect to change your retirement coverage under the FERCCA, you will have an opportunity to change the election you made for survivor benefits.

(b) If you elect less than the maximum survivor benefit, your spouse's consent is necessary in accordance with § 831.614 or § 842.603(a)(1) of this chapter, as applicable.

### § 839.1112 If I elect to change my retirement coverage under the FERCCA, can I retroactively revoke the waiver of military retired pay I made at retirement?

Yes, you may retroactively change your decision regarding waiver of your military retired pay.

### § 839.1113 If I elect to change my retirement coverage under the FERCCA, can I change my decision about making a deposit or redeposit for civilian or military service?

Yes, you or your survivor will have a new opportunity to decide whether to pay any deposits or redeposits.

### § 839.1114 Will OPM actuarially reduce my benefit if I elect to change my retirement coverage under these rules?

Your annuity may be subject to three possible actuarial reductions under the FERCCA. These reductions may be required for an unpaid deposit (see § 831.303(d) and § 839.1116 of this chapter), for Government contributions in a TSP account (see § 839.1118), or for a previous payment of the Basic Employee Death Benefit (see § 839.1121).

### § 839.1115 What is an actuarial reduction?

An actuarial reduction allows you to receive benefits without having to pay

an amount due in a lump sum. OPM reduces your annuity in a way that, on average, allows the Fund to recover the amount of the missing lump sum over your lifetime. The actuarial reduction becomes a permanent reduction in your benefit. The amount of the reduction depends on your age and the amount of the lump sum you would otherwise have to pay at that time. To compute an actuarial reduction, OPM divides the lump sum amount by the present value factor for your age at retirement.

**§ 839.1116 If, because of the change in my retirement coverage, I will owe larger deposits for military and civilian service credit, will I have to pay the additional deposit due or will OPM actuarially reduce my annuity?**

You can choose to pay the additional deposit amount. If you choose not to pay the deposit, OPM will actuarially reduce your annuity, as explained in 831.303(d) of this chapter.

**§ 839.1117 If I elect to change my retirement coverage under the FERCCA, can I get a refund of the service credit deposit I made and receive the actuarial reduction instead?**

No, the FERCCA allows OPM to reduce an annuity by an actuarial reduction only for the deposit amount that remains unpaid.

**§ 839.1118 Will my annuity be actuarially reduced because I had Government contributions in my TSP account?**

Retirees and survivors of deceased employees who received a Government contribution to their TSP account after being corrected to FERS and who later elect CSRS Offset under the FERCCA are allowed to keep the Government contributions, and earnings on the Government contributions in the TSP account. Instead of adjusting the TSP account, the FERCCA requires that the CSRS-Offset annuity be reduced actuarially.

**§ 839.1119 How is the actuarial reduction for TSP computed?**

(a) The part of your TSP account on the date you retired that is Government contributions and earnings on those Government contributions forms the basis for the actuarial reduction. OPM will divide the Government contributions and earnings by the present value factor for your age (in full years) at the time you retired. OPM will then round the result to the next highest dollar amount, which will be the monthly actuarial reduction amount.

(b) If a survivor annuity is the only benefit that is payable, the present value factor for the survivor's age at the time of death is used. The survivor benefit is not reduced for TSP if the retiree's rate was reduced.

SURVIVOR BENEFITS

**§ 839.1121 What is the Actuarial Reduction for the Basic Employee Death Benefit (BEDB)?**

If you received a BEDB under FERS and you elect CSRS Offset under these rules, you do not have to pay back the BEDB. Instead, the FERCCA requires that OPM actuarially reduce your survivor annuity. The reduction will be the amount of the BEDB divided by the present value factor for your age at the time of the employee's death. The result is rounded to the next highest dollar amount and is the monthly actuarial reduction amount. If you elected to receive the BEDB in installments rather than a lump sum, the lump-sum amount is used for the purpose of computing the actuarial reduction.

**§ 839.1122 Does receipt of a one-time payment of retirement contributions as a death benefit prevent me from electing CSRS Offset?**

You may still elect CSRS Offset if otherwise eligible. OPM will collect the amount of the one-time death benefit from any survivor benefits that are payable.

## Subpart L—Discretionary Actions by OPM

**§ 839.1201 If I took legal action against my employer because of a qualifying retirement coverage error, can OPM reimburse me for expenses related to my legal actions?**

(a) The FERCCA allows OPM, in its sole discretion, to reimburse you for necessary and reasonable expenses you actually incurred while pursuing a

legal or administrative remedy of your qualifying retirement coverage error.

(b) Necessary and reasonable expenses include actual amounts paid for attorney fees, court costs, expert witness fees, and other litigation expenses.

(c) You may not receive reimbursement under this section if you received a monetary award that compensated you for your litigation expenses.

(d) You must support your request for reimbursement with evidence that supports your claim.

(e) In determining what is a necessary and reasonable expense, OPM will consider:

(1) The type and amount of the expense;

(2) The circumstances that gave rise to the expense; and

(3) Whether the expense is directly related to litigation concerning a retirement coverage error.

### § 839.1202 Can OPM waive repayment of a monetary award I received as resolution of the harm caused me by a qualifying retirement coverage error?

(a) The FERCCA allows OPM, in its sole discretion, to waive repayment of all or part of a settlement payment or court-ordered payment if you can demonstrate that CSRS Offset coverage does not fully compensate you for your losses.

(b) Your request for waiver must state why you believe waiver of repayment is appropriate and include any evidence that supports your request.

### § 839.1203 Can OPM compensate me for my losses if I did not take any legal action against my employer, but did incur some expenses because of a qualifying retirement coverage error?

(a) The FERCCA allows OPM, in its sole discretion, to compensate you for a monetary loss that is a direct and proximate result of your retirement coverage error.

(b) Monetary losses include payments of additional Social Security taxes, payment of additional retirement deductions, and other out-of-pocket expenses that you incurred because of a retirement coverage error.

(c) You must substantiate your claim for losses with any evidence that supports your request.

(d) OPM cannot pay you for:

(1) Claimed losses related to forgone contributions and earnings under the TSP, other than lost earnings on make-up contributions to the TSP as provided in subpart J of this part; and

(2) Claimed losses related to any other investment opportunities.

### § 839.1204 On what basis will OPM review claims under this subpart?

(a) OPM will base its decision on only the written record, including all of your submissions and other documentation in OPM's possession.

(b) At OPM's discretion, OPM may request your employer to provide an administrative report. The report may include:

(1) A description of the retirement coverage error;

(2) A statement as to whether a settlement or other court-ordered award was made;

(3) The employer's recommendation for resolution of the claim; and

(4) Any other information your employer believes OPM should consider.

(c) The burden of proof that the criteria for approving a reimbursement of expenses is on you.

### § 839.1205 Does the Director of OPM review the claims?

The Associate Director for Retirement and Insurance and his or her delegatees have the authority to perform the Director's actions, as set out in this subpart (see section 2208 of the FERCCA).

### § 839.1206 How do I submit a claim under this subpart?

(a) No specific form is required. Your request must be in writing and contain the following information:

(1) It must describe the basis for the claim and state the dollar amount you seek to receive;

(2) It must include your name, address, and telephone number;

(3) It must include the name, address, and telephone number of your current or last employer;

(4) It must be signed by you; and

(5) It must include any information you believe OPM should consider, such as cancelled checks or other evidence of amounts you paid.

(b) Send your claim to: Office of Personnel Management, Retirement and Insurance Service, ATTN: FC Section, Washington, DC 20415–3200

## Subpart M—Appeal Rights

### § 839.1301 What if my employer determines my error is not subject to these rules?

(a) Your employer must provide you with a written decision. The decision must include the reason for the decision, and notice of your right to appeal the decision to the MSPB.

(b) If your employer determines that it cannot waive the time limit for making an election under § 839.612, the decision must inform you of your right to ask OPM to review the decision. OPM will advise you in writing of your appeal rights following its review of your employer's decision.

### § 839.1302 What types of decisions can I appeal?

(a) You can appeal to the MSPB a decision that affects your rights and interests under this part, except an OPM decision under subpart L (see § 839.1303). Some examples of decisions are:

(1) Your employer's determination that your error is not subject to these rules;

(2) Your employer's determination that you are not eligible to elect retirement coverage under these rules; and

(3) OPM's denial of your request for a waiver of the time limit for making an election.

(b) You may not seek review of a decision under any employee grievance procedures, including those established by chapter 71 of title 5, United States Code, and 5 CFR part 771.

### § 839.1303 Are there any types of decisions that I cannot appeal?

Yes, OPM's decisions under subpart L (Discretionary Actions by OPM) are final and conclusive and are not subject to administrative or judicial review.

### § 839.1304 Is there anything else I can do if I am not satisfied with the way my error was corrected?

(a) Except for claims under subpart L (see § 839.1303), and after exhausting your administrative remedies as set out in this subpart, you may bring a claim against the Government under section 1346(b) or chapter 171 of title 28, United States Code.

(b) You may also bring a claim against the Government under any other provision of law if your claim is for amounts not otherwise provided for under these rules.

# PART 841—FEDERAL EMPLOYEES RETIREMENT SYSTEM—GENERAL ADMINISTRATION

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AUTHORITY: 5 U.S.C. 8461; Sec. 841.108 also issued under 5 U.S.C. 552a; Secs. 841.110 and 841.111 also issued under 5 U.S.C. 8470(a); subpart D also issued under 5 U.S.C. 8423; Sec. 841.504 also issued under 5 U.S.C. 8422; Sec. 841.507 also issued under section 505 of Pub. L. 99–335; subpart J also issued under 5 U.S.C. 8469; Sec. 841.506 also issued under 5 U.S.C. 7701(b)(2); Sec. 841.508 also issued under section 505 of Pub. L. 99–335; Sec. 841.604 also issued under Title II, Pub. L. 106–265, 114 Stat. 780.

## Subpart A—General Provisions

SOURCE: 52 FR 19242, May 21, 1987, unless otherwise noted.

### § 841.101 Purpose.

The purpose of this subpart is to state the administrative rules governing the operations of the Federal Employees Retirement System (FERS) that have general application to the basic benefits under FERS.

### § 841.102 Regulatory structure for the Federal Employees Retirement System.

(a) This part contains the following subparts:

(1) General provisions (subpart A);

(2) Applications for benefits (subpart B);

(3) Claims processing (subpart C);

(4) Government costs (subpart D);

(5) Employee deductions and Government contributions (subpart E);

(6) Computing interest (subpart F);

(7) Cost-of-Living Adjustments (subpart G);

(8) Waiver, allotment, or assignment of benefits (subpart H);

(9) Court orders affecting benefits (subpart I); and

(10) State income tax withholding (subpart J).

(b)(1) Part 842 of this chapter contains information about basic annuity rights of employees and Members under FERS.

(2) Part 843 of this chapter contains information about death benefits and employee refunds under FERS.

(3) Part 844 of this chapter contains information about disability retirement benefits under FERS.

(4) Part 845 of this chapter contains information about debt collection.

(5) Part 846 of this chapter contains information about election rights available to employees who are eligible to join FERS.

(6) Part 848 of this chapter contains information about phased retirement under FERS.

(c)(1) Part 831 of this chapter contains information about the Civil Service Retirement System.

(2) Part 835 of this chapter contains information about debt collection from FERS benefits.

(3) Part 837 of this chapter contains information about reemployment of FERS annuitants.

(4) Part 838 of this chapter contains information about court orders affecting FERS benefits.

(5) Part 847 of this chapter contains information about elections under the Civil Service Retirement System or FERS relating to periods of service with a nonappropriated fund instrumentality under the jurisdiction of the armed forces.

(6) Part 850 of this chapter contains information about CSRS and FERS electronic retirement processing.

(7) Parts 294 and 297 of this chapter and §§ 831.106 and 841.108 of this chapter contain information about disclosure of information from OPM records.

(8) Part 581 of this chapter contains information about garnishment of Government payments including salary and CSRS and FERS retirement benefits.

(9) Parts 870, 871, 872, and 873 of this chapter contain information about the Federal Employees Group Life Insurance Program.

(10) Part 890 of this chapter contains information about coverage under the Federal Employees Health Benefits Program.

(11) Chapter II (parts 1200 through 1299) of this title contains information about appeals to the Merit Systems Protection Board.

(12) Chapter VI (parts 1600 through 1699) of this title contains information about the Federal Employees Thrift Savings Plan.

[52 FR 19242, May 21, 1987, as amended at 55 FR 14229, Apr. 17, 1990; 61 FR 41720, Aug. 9, 1996; 79 FR 46631, Aug. 8, 2014]

### § 841.103 Definitions.

In this subpart—

*CSRS* means the Civil Service Retirement System as described in subchapter III of chapter 83 of title 5, United States Code.

*FERS* means the Federal Employees Retirement System as described in chapter 84 of title 5, United States Code.

### § 841.104 Special terms defined.

(a) Unless otherwise defined for use in any subpart, as used in connection with FERS (parts 841 through 850 of this chapter), terms defined in 5 U.S.C. 8401 have the same meanings assigned to them by that section.

(b) Unless otherwise defined for use in any subpart, as used in connection with FERS (parts 841 through 850 of this chapter)—

*Agency* means an executive agency as defined in section 105 of title 5, United States Code; a legislative branch agency; a judicial agency; and the U.S. Postal Service and Postal Rate Commission.

*Associate Director* means the Associate Director for Retirement and Insurance in OPM, or his or her designee.

*OPM* means the Office of Personnel Management.

[52 FR 19242, May 21, 1987, as amended at 79 FR 46631, Aug. 8, 2014]

### § 841.105 Administration of FERS.

(a) OPM has charge of the adjudication of all claims for basic benefits arising under FERS and of all matters directly or indirectly concerned with these adjudications.

(b) In the adjudication of claims arising under FERS, OPM will consider and take appropriate action on counterclaims filed by the Government as set-offs against amounts payable from the Civil Service Retirement Fund.

### § 841.106 Basic records.

(a) Agencies having employees or Members subject to FERS must establish and maintain retirement accounts for those employees and Members.

(b)(1) The individual retirement record required by § 841.504(c) is the basic record for action on all claims for annuity or refund, and those pertaining to deceased employees, deceased Members, or deceased annuitants.

(2) When the official records repository for the records in question certifies that the records in question are lost, destroyed, or incomplete, OPM will accept such inferior or secondary evidence that it considers appropriate under the circumstances, and such inferior or secondary evidence is then admissible.

(3) Except as provided in paragraph (b)(2) of this section, inferior or secondary evidence will not be considered.

[52 FR 19242, May 21, 1987, as amended at 57 FR 32154, July 21, 1992]

### § 841.107 Computation of interest.

Interest, when applicable, will be computed under subpart F of this part.

### § 841.108 Disclosure of information.

(a)(1) Except as provided in section 8461 of title 5, United States Code, OPM has in its possession or under its control records containing the following types of information:

(i) Documentation of Federal service subject to FERS.

(ii) Documentation of service credit and refund claims made under FERS.

(iii) Retirement and death claims files, including documents supporting the retirement application, health benefits and life insurance eligibility, medical records supporting disability claims, and designations of beneficiaries.

(iv) Claims review and correspondence files pertaining to benefits under the Federal Employees Health Benefits Program.

(v) Documentation of claims made for life insurance and health benefits by annuitants under a Federal Government retirement system other than FERS.

(2) These records may be disclosed to the individual to whom the information pertains, or, with prior written consent of the individual, to any agency or other person, except that medical evidence about which a prudent physician would hesitate to inform the individual, will be disclosed only to a licensed physician designated in writing for that purpose by the individual or by his or her representative.

(3) Federal employee retirement records will be disclosed consistent with the provisions of the Privacy Act of 1974 (5 U.S.C. 552a), including, but not limited to, disclosures pursuant to a routine use promulgated for such records and printed in OPM's periodic publication of notices of systems of records. However, a beneficiary designated in accordance with FERS (5 U.S.C. 8424(c)) will, during the lifetime of the designator, be disclosed to the designator only, at his or her signed written request. Such beneficiary designations that may appear in records being disclosed to other than the designator must be removed before the record is disclosed. If information pertaining to a designation of beneficiary is specifically asked for by a court of competent jurisdiction, it may be released to the court, but with a written notice that it is released under protest.

(4) Except as provided in paragraphs (a)(2) and (a)(3) of this section, OPM will not disclose information from the files, records, reports, or other papers and documents pertaining to a claim filed with OPM, whether potential, pending, or adjudicated. This information is privileged and confidential.

(b) On written request OPM will return, to the person entitled to them, certificates of discharge, adoption papers, marriage certificates, decrees of divorce, letters testamentary or of administration, when they are no longer needed in the settlement of the claim. If papers returned constitute part of the material and essential evidence in a claim, OPM will retain copies of them or of the parts of them that appear to be of evidentiary value.

### § 841.109 Computation of time.

In computing a period of time for filing documents, the day of the action or event after which the designated period of time begins to run is not included. The last day of the period is included

unless it is a Saturday, a Sunday, or a legal holiday; in this event, the period runs until the end of the next day which is not a Saturday, a Sunday, or a legal holiday.

### § 841.110 Garnishment of FERS payments.

FERS payments are not subject to execution, levy, attachment, garnishment or other legal process except as expressly provided by Federal law.

[76 FR 9962, Feb. 23, 2011]

### § 841.111 Garnishment of payments after disbursement.

(a) Payments that are covered by 5 U.S.C. 8470(a) and made by direct deposit are subject to 31 CFR part 212, Garnishment of Accounts Containing Federal Benefit Payments.

(b) This section may be amended only by a rulemaking issued jointly by the Department of the Treasury and the agencies defined as a ''benefit agency'' in 31 CFR part 212.

[76 FR 9962, Feb. 23, 2011]

## Subpart B—Applications for Benefits

SOURCE: 52 FR 19244, May 21, 1987, unless otherwise noted.

### § 841.201 Purpose.

This subpart states the general application requirement applicable under the Federal Employees Retirement System (FERS). Specific application requirements for particular benefits are contained with the regulations concerning those benefits.

### § 841.202 Applications required.

(a) No benefit is payable under FERS, until after the claimant has applied for the benefit in the form prescribed by OPM.

(b) An employee, Member, or survivor may exercise any option or make any election authorized by FERS only in the form prescribed by OPM.

### § 841.203 Withdrawal of applications.

(a) Except as provided in paragraphs (b) and (c) of this section, an applicant for benefits under FERS may withdraw his or her application for benefits until a payment based on that application has been authorized, but not thereafter.

(b) An applicant for benefits under FERS may not withdraw his or her application for benefits after OPM has received a certified copy of a court order (under part 581 of this chapter or subpart I of this part) affecting the benefits.

(c) When an ''appropriate authority'' determines that the separation upon which payment has been based is an ''unjustified or unwarranted personnel action'' as these terms are defined in § 550.804 of this chapter, an individual may withdraw his/her application for FERS benefits within 60 days of the decision. As provided in § 550.805, any FERS payments must be deducted from any back pay award.

### § 841.204 Deemed application to protect survivors.

(a) A former employee is deemed to have filed an application for annuity if the former employee—

(1) Was not reemployed in a position subject to FERS under subpart A of part 842 of this chapter on the date of death;

(2) Dies after separation from Federal service but before actually filing an application for benefits; and

(3) At the time of separation from Federal service, was eligible for an immediate annuity under § 842.204(a)(1) and was eligible to elect to postpone the commencing date of that annuity under § 842.204(c) of this chapter.

(b) For the purpose of determining entitlement to a survivor annuity, a former employee who is deemed to have filed an application under paragraph (a) of this section is considered to have died as a retiree.

(c) For purposes of determining the amount of a survivor annuity, the annuity of a former employee who, under paragraph (a) of this section, is deemed to have filed an application is computed as though the commencing date were the first day of the month after the former employee's death.

[55 FR 994, Jan. 11, 1990, as amended at 55 FR 41179, Oct. 10, 1990]

## Subpart C—Claims Processing

SOURCE: 52 FR 19244, May 21, 1987, unless otherwise noted.

### § 841.301 Purpose.

(a) This subpart explains—

(1) The procedures that employees. separated employees, retirees, and survivors must follow in applying for benefits under FERS;

(2) The procedures that OPM will generally follow in determining eligibility for benefits under FERS;

(3) The appeal rights available to claimants adversely affected by OPM decisions under FERS; and

(4) The special rules for processing competing claimant cases under FERS.

(b) This subpart does not apply to processing—

(1) Forfeiture of annuity for conviction of certain criminal offenses relating to national security under subchapter II of chapter 83 of title 5, United States Code (processed under subpart K of part 831 of this chapter);

(2) Court orders affecting FERS benefits (processed under subpart I of this part); or

(3) Collection of debts due to the United States (processed under part 845 of this chapter).

### § 841.302 Definitions.

In this subpart—

*Employee* means an employee as defined in section 8401(11) of title 5, United States Code, and a Member as defined in section 8401(20) of title 5, United States Code. *Employee* includes a person who had applied for retirement under FERS but had not been separated from the service prior to his or her death even if the person's retirement would have been retroactively effective upon separation.

*FERS* means the Federal Employees Retirement System as described in chapter 84 of title 5, United States Code.

*MSPB* means the Merit Systems Protection Board described in chapter 12 of title 5, United States Code.

*Retiree* means a former employee or Member who is receiving recurring payments under FERS based on service by the employee or Member. *Retiree*, as used in this subpart, does not include a current spouse, former spouse, child, or person with an insurable interest receiving a survivor annuity. *Retiree* for purposes of determining a person's status at the time of death means that the person had been separated from the service and had met all the requirements to receive an annuity including having filed an application for the annuity prior to his or her death.

*Separated employee* means a former employee or Member who has been separated from the service but who has not met all the requirements for retirement under FERS or who has not filed an application for retirement under FERS.

*Survivor* means a person entitled to benefits under part 843 or 846 of this chapter based on the death of an employee, separated employee, retiree, or survivor.

### § 841.303 Applications filed with agencies.

(a) Employees filing applications for retirement or to make deposits or redeposits under FERS (including applications for disability retirement) and separating employees filing applications for refunds of contributions must file their applications with their employing agencies.

(b) Survivors filing applications for death benefits based on the death of an employee may file their applications with the employee's employing agency.

### § 841.304 Applications filed with OPM.

(a) Separated employees filing applications for retirement or refunds of contributions; survivors filing applications for death benefits based on the deaths of separated employees, retirees, or survivors; and retirees making elections or seeking to change information in their retirement records must file their applications with OPM.

(b) Survivors filing applications for death benefits based on the death of an employee may file their applications with OPM.

### § 841.305 Decisions subject to reconsideration.

(a) A OPM decision under FERS is subject to reconsideration by OPM, whenever the decision is in writing and states the right to reconsideration.

(b) OPM will reconsider a decision subject to reconsideration under § 841.306. A decision subject to reconsideration is not subject to appeal under § 841.308.

**§ 841.306 Reconsideration.**

(a) *Who may file.* Except as noted in paragraph (b) of this section, any individual whose rights or interests under FERS are affected by an OPM decision (under § 841.305) stating the right to request reconsideration may request OPM to review its initial decision.

(b) *Actions covered elsewhere.* (1) A request for reconsideration of termination of annuity payments under 5 U.S.C. 8311 through 22 will be made in accordance with the procedures set out in subpart K of part 831 of this chapter.

(2) A request for reconsideration of a decision to collect a debt will be made in accordance with § 845.204(b).

(3) A decision on court orders affecting FERS benefits will be made in accordance with subpart I of this part.

(c) *Reconsideration.* A request for reconsideration, when applicable, must be in writing, must include the applicant's name, address, date of birth and claim number, if applicable, and must state the basis for the request.

(d) *Time limits on reconsideration.* (1) A request for reconsideration must be received by OPM within 30 calendar days from the date of the initial decision.

(2) The Associate Director's representative responsible for reconsiderations may extend the time limit for filing when the requestor shows that he or she was not notified of the time limit and was not otherwise aware of it, or that he or she was prevented by circumstances beyond his or her control from making the request within the time limit.

(e) *Final decision.* After any applicable reconsideration, the Associate Director's representative will issue a final decision that must be in writing, must fully set forth the findings and conclusions of the reconsideration, and must contain notice of the right to request an appeal provided in § 841.308. Copies of the final decision must be sent to the individual, to any competing claimants and, where applicable, to the agency.

**§ 841.307 Final decisions without reconsideration.**

OPM may issue a final decision providing the opportunity to appeal under § 841.308 rather than an opportunity to request reconsideration under § 841.306. Such a decision must be in writing and state the right to appeal under § 841.308.

**§ 841.308 Appeals to MSPB.**

Except as noted in this paragraph, an individual whose rights or interests under FERS are affected by a final decision of OPM may request MSPB to review the decision in accord with procedures prescribed by MSPB. Decisions made in accord with the procedures referenced in § 841.306(b)(1) are made under subchapter II of chapter 83, title 5, United States Code. Such decisions are not appealable to MSPB under section 8461(e) of title 5, United States Code.

**§ 841.309 Competing claimants.**

(a) Competing claimants are applicants for survivor benefits based on the service of an employee, separated employee, or retiree when—

(1) A benefit is payable based on the service of the employee, separated employee, or retiree; and

(2) Two or more claimants have applied for benefits based on the service of the employee, separated employee, or retiree; and

(3) An OPM decision in favor of one claimant will adversely affect another claimant(s).

(b) In cases involving competing claimants, the Associate Director or his or her designee will issue a final decision that will be in writing, will fully set forth findings and conclusions, and will contain notice of the right to appeal provided in § 841.308. Copies of the final decision will be sent to all competing claimants.

(c)(1) When OPM receives applications from competing claimants before any payments are made based on the service of the employee or Member, OPM will begin payments to the claimant(s) found entitled in the decision issued under paragraph (b) of this section.

(2) When OPM does not receive an application from a competing claimant(s) until after another person has begun to receive payments based on the service

of the employee or Member, the payments will continue until a decision is issued under paragraph (b) of this section. When a decision is issued under paragraph (b) of this section, OPM will—

(i) If OPM affirms its earlier decision, continue payments to the claimant(s) OPM originally determined to be entitled; or

(ii) If OPM reverses its earlier decision, suspend payment to the claimant(s) OPM originally determined to be entitled and immediately begin payment to the claimant(s) OPM determines to be entitled in its decision under paragraph (b) of this section. OPM will not take action to collect the overpayment until the time limit for filing an appeal has expired or the MSPB has issued a final decision on a timely appeal, whichever comes later.

## Subpart D—Government Costs

SOURCE: 51 FR 47187, Dec. 31, 1986, unless otherwise noted.

### § 841.401 Purpose and scope.

(a) The purpose of this subpart is to regulate the Government contributions to the Civil Service Retirement Fund under FERS.

(b) This subpart covers—

(1) Factors considered in the computation of agency contributions under FERS;

(2) Publication of notice of the normal cost rates for each category of employees;

(3) Agency appeals of rate determinations; and

(4) Methodology for determining the amount due from each agency.

### § 841.402 Definitions.

In this subpart—

*Actuary* means an associate or fellow in the Society of Actuaries and one who is enrolled under section 3042 of Pub. L. 93–406, the ''Employee Retirement Income Security Act of 1974.''

*Administrative expenses* means the normal cost loading applicable to the administration of FERS.

*Age* means age, as of the beginning of the fiscal year, rounded to the nearest birthday.

*Agency head* means, for the executive branch agencies, the head of an executive agency as defined in 5 U.S.C. 105; for the legislative branch, the Secretary of the Senate, the Clerk of the House of Representatives, or the head of any other legislative branch agency; for the judicial branch, the Director of the Administrative Office of the United States Courts; for the Postal Service, the Postmaster General; for any other independent establishment that is an entity of the Federal Government, the head of the establishment.

*Board* means the Board of Actuaries of the Civil Service Retirement System.

*Category of employees* means a grouping of employees under § 841.403.

*Child survivor termination and death rates* means the rate, by age of the child, at which child survivor benefits terminate.

*CSRS* means subchapter III of chapter 83 of title 5, United States Code.

*Death and recovery rates for disability annuitants* means the rate, by age, sex, and duration on the roll, at which disability annuitants are removed from the annuity roll because of death; and the rate, by age, sex, and duration on the roll, at which disability annuitants are removed from the annuity roll because of recovery or restoration to earning capacity.

*Death and remarriage rates for surviving spouses* means the rate, based on the sex of the employee, age of the survivor annuitant, and the duration on the annuity roll, at which spousal survivor annuitants are removed from the annuity roll because of death; and the rate, based on the sex of the employee, age of the survivor annuitant, and the duration on the roll, at which survivor annuitants are removed from the annuity roll because of remarriage.

*Death rates for non-disability annuitants* means the rate, by age and sex of the annuitant, at which non- disability annuitants are removed from the annuity roll because of death.

*Disability retirement rates* means the rate, by age, sex, length of service, and whether the employees are eligible for social security disability benefits, at which employees retire for disability.

*Duration on the roll* means the number of full years on the annuity roll as of the beginning of the fiscal year.

*Economic Assumptions* means the assumptions used by the Board with respect to inflation, interest rates, and wage and salary growth.

*Employee death rates* means the rate, by age and sex of the employees and whether the employees are survived by spouses entitled to survivor annuities, at which employees die in service.

*Employees* means employees as defined in section 8401(11) of title 5, United States Code, and Members, as defined in section 8401(20) of title 5, United States Code.

*Family characteristics of annuitants* means, based on the annuitant's age and sex, and in some cases, on the type of annuity (regular, disability, or deferred), the number and average age of child survivors at the death of the annuitant, the percentage of annuitants with an annuity reduced to provide survivor benefits, the percentage of annuitants who actually leave a surviving spouse entitled to a survivor annuity at the annuitant's death, and the average age of the surviving spouse.

*Family characteristics of employees* means, based on the employee's age at death and sex, the number and average age of child survivors and the average age of the surviving spouse, per death of an employee with a survivor.

*FERS* means chapter 84 of title 5, United States Code.

*Involuntary retirement rates* means, by age and sex of the employee, the rate of involuntary retirements (discontinued service and optional early retirements).

*Merit salary increases* means salary increases, by age and length of service, that are not general salary increases. ''Merit salary increases'' include promotions and within-grade and similar increases based in whole or in part on employee performance, but do not include comparability increases, Postal Service COLA, or similar adjustments to entire pay scales; or premium pay.

*Military service rates* means the fraction, by age and sex, of employees who have military service to all employees, and the average length of military service and the salary on which their deposits to receive credit for military service are based for these employees.

*Normal cost percentage* or *normal cost* means the entry-age normal cost of the provisions of FERS which relate to the Fund, computed by the Office in accordance with generally accepted actuarial practice and standards (using dynamic assumptions) and expressed as a level percentage of aggregate basic pay.

*Service* means all creditable service, including military service, rounded to the nearest number of years as of the beginning of the fiscal year.

*Single agency rate* means a normal cost percentage for one category of employees in one agency. A single agency rate is set under § 841.412 as a result of a successful appeal.

*Voluntary retirement rates* means the rate, based on the sex, age, and service of the employee, of regular longevity retirements.

*Withdrawal rates* means the rate at which employees leave FERS-covered service without retiring, including employees who are paid refunds and employees who take deferred retirement. These rates are of two types: ''not offset for reentry'' and ''offset for reentry.'' These rates are by age and service.

### § 841.403 Categories of employees for computation of normal cost percentages.

Normal cost percentages will be determined for each of the following groups of employees:

(a) Members;

(b) Congressional employees;

(c) Law enforcement officers, members of the Supreme Court Police, firefighters, nuclear materials couriers, customs and border protection officers, and employees under section 302 of the Central Intelligence Agency Retirement Act of 1964 for Certain Employees.

(d) Air traffic controllers;

(e) Military reserve technicians;

(f) Employees under section 303 of the Central Intelligence Agency Act of 1964 for Certain Employees when serving abroad;

(g) All other employees.

[52 FR 25196, July 6, 1987, as amended at 76 FR 42000, July 18, 2011]

### § 841.404 Demographic factors.

(a) The Office of Personnel Management (OPM) will consider the factors listed below in determining normal cost percentages. To the extent data are available for the factor by specific category of employees, such data will be used. To the extent category specific data are not available, the most relevant available data will be used.

(1) Distributions of new entrants by age, sex, and service;

(2) Withdrawal rates;

(3) Merit salary increases;

(4) Voluntary retirement rates;

(5) Involuntary retirement rates;

(6) Disability retirement rates;

(7) Employee death rates;

(8) Military service rates;

(9) Family characteristics for employees;

(10) Death rates for non-disability annuitants;

(11) Death and recovery rates for disability annuitants;

(12) Child survivor termination and death rates;

(13) Family characteristics for annuitants; and

(14) Administrative expenses.

(b) Generally, each rate, ratio, or fraction must be separately considered to determine the rates for males and their survivors and the rates for females and their survivors, except those rates for child survivors and merit salary increases.

### § 841.405 Economic assumptions.

The determinations of the normal cost percentage will be based on the economic assumptions determined by the Board. When an agency's case is based in whole or in part on the pattern of merit salary increases specific to the agency or to a category of employees within the agency, the Board may require modification of the economic assumptions concerning salary and wage growth to take into account the combined effect of merit and general wage and salary increases.

### § 841.406 Determination of normal cost percentages.

(a) OPM will determine the Government-wide normal cost percentage for each category of employees. These normal cost percentages will be used by all agencies that have not been granted a single agency rate under § 841.412.

(b) Each normal cost percentage will be rounded to the nearest one-tenth of a percent.

### § 841.407 Notice of normal cost percentage determinations.

(a) No later than 5 years after the publication of a current notice of normal cost percentages, OPM will publish in the FEDERAL REGISTER a notice that will contain updated normal cost percentages.

(b) The notice of normal cost percentage will include a statement of—

(1) The Government-wide normal cost percentage and any single agency rates for each category of employees;

(2) The effective date of any changes made by the notice;

(3) The address for obtaining information on the data and assumptions used in computing the normal cost percentages;

(4) The time limit for submission of appeals under § 841.409; and

(5) The address for filing an appeal under § 841.409.

### § 841.408 Effective date of normal cost percentages.

(a) Except as provided in paragraph (b) of this section and in § 841.412, normal cost percentages stated in a notice of normal cost percentages under § 841.407 will be effective at the beginning of the first full pay period of the first fiscal year that commences at least 3 months after the date of publication of the notice.

(b) The initial normal cost percentages will be effective at the beginning of the first pay period on or after January 1, 1987.

[51 FR 47187, Dec. 31, 1986, as amended at 58 FR 43493, Aug. 17, 1993]

### § 841.409 Agency appeal right.

(a)(1) An agency with at least 1,000 employees in the general category of employees or 500 employees in any of the special categories may appeal to the Board the normal cost percentage for that category as applied to that agency.

(2) The Secretary of the Treasury or the Postmaster General may request

the Board to reconsider a determination of the amount of any supplemental liability due from the Treasury of the United States or the United States Postal Service, respectively.

(b) No appeal will be considered by the Board unless the agency files, no later than 6 months after the date of publication of the notice of normal cost percentages under § 841.407, a petition for appeal that meets *all* the requirements of § 841.410.

(c) No request for reconsideration will be considered by the Board unless the Secretary of the Treasury or the Postmaster General files, no later than 6 months after the date of receipt of the notice of supplemental liability, a request for reconsideration supported by an actuarial report similar to the report described in § 841.410(c).

[52 FR 25196, July 6, 1987]

### § 841.410 Contents of petition for appeal.

(a) To file an appeal, an agency head must, before expiration of the time limit, file with OPM—

(1) A letter of appeal;

(2) An actuarial report; and

(3) A certificate of eligibility (described in paragraph (d) of this section).

(b)(1) The letter of appeal must be in writing and signed by the agency head. Delegation of signatory authority is not permitted.

(2) The letter of appeal may contain any argument the agency wishes to make or may simply submit the actuarial report for consideration.

(c) The actuarial report must contain a detailed actuarial analysis of the normal cost of FERS benefits as applied to the employees of that agency in the category of employees for which the agency is appealing the use of the Government-wide rate. The actuarial report must—

(1) Be signed by an actuary;

(2) Use the economic assumptions under § 841.405; and

(3) Specifically address and consider each of the demographic factors listed in § 841.404. The appealing agency is responsible for developing data relating to the first nine demographic factors as they relate to the category of agency employees for which the appeal is being filed. Government-wide demographic factors (available from OPM) will be presumed to be sufficient and reliable for factors 10 through 13 unless the appealing agency is able to demonstrate, through sufficient and reliable data relating to its employees or former employees, the use of alternative factors is appropriate. The fourteenth factor, administrative expenses, will be supplied by OPM.

(d) The certificate of eligibility is a letter from the agency's director of personnel certifying that the agency has the requisite 1,000 or 500 in the category of employees under consideration.

### § 841.411 Appeals procedure.

(a) A Government-wide normal cost percentage is presumed to apply to all agencies. Any agency appealing application of a Government-wide normal cost percentage to any category of employees in its workforce must demonstrate to the satisfaction of the Board that the normal cost percentage for that category of employees in that agency is significantly different from the Government-wide normal cost percentage.

(b) While an agency has an appeal pending, the Government-wide normal cost percentage continues to apply to that agency.

(c) The Board cannot consider an appeal unless all the documents required for a petition for appeal under § 841.410(a) are filed before expiration of the time limit for an appeal.

(d) The Board cannot sustain an appeal unless the Board finds that—

(1) The data used in the agency's actuarial analysis are sufficient and reliable (As a general rule, at least 5 years of data pertaining to any group of employees must be analyzed before the results are considered sufficient and reliable.);

(2) The assumptions used in the agency's actuarial analysis are justified;

(3) When all relevant factors are considered together, there is a demonstrated difference between the normal cost for the group at issue in the appeal and the normal cost for the same group calculated on a Government-wide basis; and

(4) The difference between the Government-wide normal cost percentage and the single agency rate would be at least 10 percent of the normal cost being appealed.

### § 841.412 Rates determined by appeal.

(a) If the Board finds that a different normal cost is warranted based on an agency appeal, it will establish a single agency rate for the category of employees in that agency.

(b) The single agency rate will be effective at the beginning of the first pay period beginning 30 days after the date of the Board's decision.

(c) A single agency rate may be higher or lower than the Government-wide rate and will remain in force for not less than 3 years.

(d) After a single agency rate has been in force for at least 3 years, OPM may—

(1) Require, no more often than annually, that the agency justify continuation of the rate; and/or

(2) When it publishes a notice of normal cost percentages under § 841.407, terminate the single agency rate.

### § 841.413 Determinations of amount due from each agency.

(a) For each pay period, each agency will determine the total amount of basic pay paid to employees in each category of employees.

(b) For each category of employees, the amount due from each agency for a pay period is the product of—

(1) The total amount of basic pay of employees in that category of employees in that agency; and

(2) The normal cost percentage.

[51 FR 47187, Dec. 31, 1986, as amended at 52 FR 25196, July 6, 1987]

## Subpart E—Employee Deductions and Government Contributions

SOURCE: 52 FR 2057, Jan. 16, 1987, unless otherwise noted.

### § 841.501 Purpose.

This subpart contains regulations concerning deductions from employees' pay and government contributions for FERS coverage.

### § 841.502 Definitions.

In this subpart—

*Employee* means employee as defined in § 842.102 of this chapter or Member as defined in section 8401(20) of title 5, United States Code.

*Employee deduction* means the portion of the normal cost of FERS coverage which is deducted from an employee's basic pay.

*FERS* means chapter 84 of title 5, United States Code.

*Fund* means the Civil Service Retirement and Disability Fund.

*Normal cost percentage* or *Normal cost* means the entryage normal cost of the provisions of FERS which relate to the Fund, computed by the Office in accordance with generally accepted actuarial practice and standards (using dynamic assumptions) and expressed as a level percentage of aggregate basic pay. Normal cost percentage or normal cost include both agency and employee contributions.

*Social security* means old age, survivors and disability insurance under section 3101(a) of the Internal Revenue Code of 1954.

### § 841.503 Amounts of employee deductions.

(a) Except as provided in paragraph (b) of this section, the rate of employee deductions from basic pay for FERS coverage is seven percent of basic pay minus the percent of tax which is (or would be) in effect for the payment, for the employee cost of social security.

(b) The rate of employee deductions from basic pay for FERS coverage for a Member, law enforcement officer, firefighter, nuclear materials courier, customs and border protection officer, air traffic controller, member of the Supreme Court Police, Congressional employee, or employee under section 302 of the Central Intelligence Agency Act of 1964 for Certain Employees is seven and one-half percent of basic pay, minus the percent of tax which is (or would be) in effect for the payment, for the employee cost of social security.

(c) Employee deductions will be at the rate in paragraph (a) or (b) of this section as if social security deductions were being made even if social security deductions have ceased because of the

amount of earnings during the year, or are not made for any other reason.

[52 FR 2057, Jan. 16, 1987, as amended at 52 FR 25197, July 6, 1987; 76 FR 42000, July 18, 2011]

### § 841.504 Agency responsibilities.

(a) Each employing agency is required to contribute the total amount of the normal cost percentage for each category of its employees, determined under § 841.413 of this part, to the Fund.

(b) Each employing agency must withhold the appropriate amount of employee deductions from the basic pay paid each covered employee for each pay period. No employee deduction is due if an employee receives no basic pay for a pay period.

(c) An employing agency must record the appropriate amount of employee deductions on an individual retirement record maintained for each employee in the manner prescribed by OPM.

(d) When an employee separates from Federal service or transfers to another agency, or transfers to a position in which he or she is not covered by FERS, the agency must close the employee's Individual Retirement Record (IRR) and forward it to OPM within the time standards prescribed by OPM. However, if an employee transfers to another position covered under FERS—

(1) Within the same agency, and

(2) To a position serviced by another payroll office, the agency may, in lieu of forwarding an IRR to OPM at the time of the intra-agency transfer, record the transfer for future IRR certification in an internal automated system of records.

(e) An agency must maintain payroll systems and records in such manner as to permit accurate and timely reporting to OPM, in the manner prescribed by OPM.

(f) An agency must report the employee deduction and agency contribution amounts for each pay period in the manner prescribed by OPM.

(g) An agency must make such other reports of the normal cost, employee deductions and Government contributions amounts as are prescribed and in the manner prescribed by OPM.

(h) An agency must remit in full the total amount of normal cost (which includes both employee deductions and Government contributions), so that payment is received by the Fund on the day of payment to the employee of the basic pay from which the employee deductions were made.

(i) Upon the death of an employee whose tour of duty is less than full time, the employing agency must certify to OPM—

(1) The number of hours that the employee was entitled to basic pay (whether in a duty or paid-leave status) in the 52-week work year immediately preceding the end of the last pay period in which the employee was in a pay status; and

(2) If the employee's tour of duty was part time (regularly scheduled), the number of hours of work in the employee's tour of duty.

[52 FR 2057, Jan. 16, 1987, and 52 FR 25196, July 6, 1987, as amended at 53 FR 16535, May 10, 1988; 65 FR 21119, Apr. 20, 2000]

### § 841.505 Correction of error.

(a) When it is determined that an agency has paid less than the correct total amount of the normal cost for any or all of its current or past employees, for any reason whatsoever, including but not limited to, coverage decisions, correction of the percentage applicable or of the amount of basic pay, or additional payment of basic pay, the agency must pay the total additional amount payable under 5 U.S.C. 8423 and subpart D of the this part to the Fund.

(b) The agency withholds the appropriate employee deduction from any payment of additional basic pay which is part of, or the result of, the corrective action.

(c) The payment to the Fund described in paragraph (a) of this section shall be made as soon as possible, but not later than provided by standards established by OPM, regardless of whether or when the portion which should have been deducted from employee basic pay is recovered by the agency.

(d) Any portion of the payment to the Fund described in paragraph (a) of this section which should have been deducted, but was not, from employee basic pay constitutes an overpayment of pay, subject to collection by the agency from the employee, unless

waived under applicable authority such as 5 U.S.C. 5584.

(e) Corrections and the related agency payments and employee deductions will be reported to OPM in the manner prescribed by OPM.

### § 841.506 Effect of part 772 of this chapter on FERS payments.

(a) *Agency notification to OPM.* (1) When it is determined that a FERS employee is to be given interim relief under 5 U.S.C. 7701(b)(2)(A), the employing agency must notify OPM of the effective date of the interim appointment under § 772.102 of this chapter. The notice must specify that the appointment is required by the *Whistleblower Protection Act of 1989.*

(2) When the MSPB initial decision cancelling the employee's separation becomes final, when the Board issues a final order cancelling the retiree's separation, or when the agency agrees to cancel the separation, the employing agency must notify OPM of the date the interim appointment ends and request the amount of the erroneous payment to be recovered under § 550.805(e) of this chapter from any back pay adjustment to which the employee may be entitled.

(b) *Employee deductions and normal cost percentage.* For the duration of the appointment, the agency will withhold the appropriate employee deduction and contribute the total amount of the normal cost percentage for the employee as prescribed by OPM. If and when a separation action is cancelled, the agency must make the corrections specified under § 841.507 of this subpart.

[57 FR 3714, Jan. 31, 1992, as amended at 58 FR 48273, Sept. 15, 1993]

### § 841.507 Correction of unjustified or unwarranted personnel action.

(a) When an ''appropriate authority'' determines that there has been an ''unjustified or unwarranted personnel action'' as these terms are defined in subpart H of part 550 of this title, the employing agency will pay the Fund the amount of the normal cost percentage of the basic pay included in back pay. The normal cost percentage owed the Fund is computed on the amount of gross basic pay without regard to deductions described in § 550.805(e) of this chapter for other amounts earned or erroneous payments received.

(b) The agency will withhold the appropriate employee deductions from the amount of basic pay included in gross back pay giving due regard to deductions described in § 550.805(e) of this chapter.

(c) The payment to the Fund described in paragraph (a) of this section shall be made within the time period established by OPM standards.

(d)(1) Any FERS benefits—lump-sum payments or annuity benefits—paid based on a separation that is later cancelled are considered erroneous payments that must be repaid to OPM. Agencies must deduct such payments from any back pay adjustment to which the employee may be entitled as required by 5 CFR 550.805(e).

(2) Amounts recovered from back pay will not be subject to waiver consideration under 5 U.S.C. 8470(b). If there is no back pay, or the back pay is insufficient to recover the entire erroneous payment, the employee may request that OPM waive recovery of the uncollected portion of the overpayment. If waiver is not granted, the employee must repay the erroneous payment.

[52 FR 2057, Jan. 16, 1987. Redesignated and amended at 57 FR 3714, Jan. 31, 1992; 58 FR 43493, Aug. 17, 1993]

### § 841.508 Effective date.

The employee deductions specified in § 841.503 are effective on the later of the first day of the first pay period beginning in 1987 or the first day an employee is covered by FERS.

[52 FR 2057, Jan. 16, 1987. Redesignated at 57 FR 3714, Jan. 31, 1992]

## Subpart F—Computation of Interest

SOURCE: 52 FR 12132, Apr. 15, 1987, unless otherwise noted.

### § 841.601 Purpose.

This subpart regulates the computation of interest under the Federal Employees Retirement System (FERS).

### § 841.602 Definitions.

*Contributions* or *deductions* means the amounts deducted from an employee's

pay or deposited as the employee's share of the cost of FERS.

*Individual Retirement Record* means the record of individual retirement deductions required by § 841.504.

*Last year of service* means the calendar year in which deductions stop on the Individual Retirement Record under consideration.

*Unexpended balance* means the unrefunded amount consisting of—

(a) Retirement deductions made from the basic pay of an employee under subpart E of part 841 of this chapter;

(b) Amounts deposited by an employee for periods of service (including military service) for which—

(1) No retirement deductions were made; or

(2) Deductions were refunded to the employee; and

(c) Interest compounded annually on the deductions and deposits at a rate which, for any calendar year, will be equal to the overall average yield to the Civil Service Retirement Fund during the preceding fiscal year from all obligations purchased by the Secretary of the Treasury during that fiscal year under section 8348(c), (d), and (e) of title 5, United States Code, as determined by the Secretary of the Treasury. Interest on deductions and deposits does not include interest—

(1) If the service covered by the deductions totals 1 year or less; or

(2) For a fractional part of a month in the total service.

*Year of the computation* means the calendar year when the unexpended balance is being computed.

### § 841.603 Rate of interest.

For calendar year 1985 and for each subsequent calendar year, OPM will publish a notice in the FEDERAL REGISTER to notify the public of the interest rate that will be in effect during that calendar year.

### § 841.604 Interest on service credit deposits.

(a) Interest on civilian service credit deposits is computed under § 842.305 of this chapter.

(b) Interest on military service credit deposits is computed under § 842.307 of this chapter.

(c) In the case of a retirement coverage error that was corrected under part 839 (pertaining to errors that lasted for at least 3 years of service after December 31, 1986) in which:

(1) A CSRS service credit deposit was made; and

(2) There is a subsequent retroactive change to FERS, the excess of the amount of the CSRS civilian or military service credit deposit over the FERS civilian or military deposit, together with interest computed under § 842.305 of this chapter, shall be paid to the employee or annuitant. In the case of a deceased employee or annuitant, payment is made to the individual entitled to lump-sum benefits under subpart B of part 843 of this chapter.

[52 FR 12132, Apr. 15, 1987, as amended at 57 FR 32155, July 21, 1992; 66 FR 15618, Mar. 19, 2001]

### § 841.605 Interest included in the unexpended balance.

(a) Interest on each Individual Retirement Record is computed separately.

(b) For determining the amount of interest in the unexpended balance when none of the employee deductions have been returned (e.g., employee refunds or at the time of retirement), the amount of interest in the unexpended balance equals the sum of the amounts of interest applicable to each calendar year's deductions. The amount of interest on each calendar year's deductions equals the sum of—

(1) For the calendar year in which the deductions were taken—

(i) Except during the last year of service, the amount of the employee's deductions for that calendar year times the rate of interest set under § 841.603 for that calendar year times the fraction whose numerator is the number of full months when deductions were withheld and whose denominator is 24;

(ii) During the last year of service, the amount of the employee's deductions for that year times the rate of interest set under § 841.603 for that year times the fraction—

(A) Whose numerator equals the sum of—

(*1*) One half times the number of months (fractional months rounded up)

of that year during which the employee was employed;

(*2*) One for each full month of that year after the employee's service terminated; and

(B) Whose denominator is 12.

(2) For each calendar year after the year when the deductions were withheld but before the calendar year of the computation, the amount of the employee's deductions plus interest for prior years, times the rate of interest set under § 841.603 for that year; and

(3) For the year of the computation—

(i) If it is not the same calendar year that the deductions were withheld, the amount of the employee's deductions plus interest for prior years, times the rate of interest set under § 841.603 for that year times the fraction whose numerator is the number of full months that have been completed in the year of the computation and whose denominator is 12; or

(ii) If it is the same calendar year that the deductions were withheld, the amount of the employee's deductions for that year times the rate of interest set under § 841.603 for that year times the fraction—

(A) Whose numerator equals the sum of—

(*1*) One half times the number of months (fractional months rounded up) of that year during which the employee was employed;

(*2*) One for each full month of that year after the employee's service terminated; and

(B) Whose denominator is 12.

(c)(1) For adding interest to the unexpended balance after retirement, the unexpended balance including interest computed under paragraph (b) of this section is computed as of the time of retirement.

(2) Each month after retirement, the unexpended balance is reduced by the amount of annuity paid and interest is added to the remaining portion at the rate computed as follows:

(i) Add one to the interest rate under § 841.603 for the current year.

(ii) Raise the sum produced under paragraph (c)(2)(i) of this section to the 1/12 power.

(iii) Subtract one from the result of paragraph (c)(2)(ii) of this section to produce the interest rate for the month.

(d)(1) Interest on payments of the unexpended balance will be paid for the month unless the payment has been authorized before the 5th workday before the end of the month (excluding the 31st day of 31-day months).

(2) For the purposes of paragraph (d)(1) of this section, payment is authorized when the person with authority to approve the claim approves payment.

### § 841.606 Interest on survivor reduction deposits.

Interest on deposits under subpart F of part 842 of this chapter is compounded annually and accrued monthly.

(a) The initial interest on each monthly difference between the reduced annuity rate and the annuity rate actually paid equals the amount of the monthly difference times the difference between—

(1) One and six tenths raised to the power whose numerator is the number of months between the date when the monthly difference in annuity rates occurred and the date when the initial interest is computed and whose denominator is 12; and

(2) One.

(b) The total initial interest due is the sum of all of the initial interest on each monthly difference computed in accordance with paragraph (a) of this section.

(c) Additional interest on any uncollected balance will be compounded annually and accrued monthly. The additional interest due each month equals the remaining balance due times the difference between—

(1) One and six tenths raised to the 1/12 power; and

(2) One.

### § 841.607 Interest on overpayment debts.

Interest on overpayment debts is computed under § 845.205(b).

## Subpart G—Cost-of-Living Adjustments

SOURCE: 55 FR 14229, Apr. 17, 1990, unless otherwise noted.

### § 841.701 Purpose and scope.

(a) The purpose of this subpart is to regulate computation of cost-of-living adjustments (COLA's) for basic benefits under the Federal Employees Retirement System (FERS).

(b) This subpart provides the methodology for—

(1) Computing COLA's on each type of FERS basic benefit subject to COLA's; and

(2) Computing COLA's on annuities partially computed under FERS and partially computed under the Civil Service Retirement System (CSRS).

(c) COLA's on children's annuities are not covered by this subpart because COLA's on children's annuities are computed under CSRS rules.

### § 841.702 Definitions.

In this subpart—

*Annuity supplement* means the benefit under subpart E of part 842 of this chapter. An *annuity supplement* is only payable to retirees.

*Basic annuity* means the benefits computed under subpart D of part 842 of this chapter and payable to retirees.

*Basic employee death benefit* means the basic employee death benefit as defined in § 843.102 of this chapter.

*Beneficiary of insurable interest annuity* means a person receiving a recurring benefit under FERS that is payable (after the employee's, Members, or retiree's death) to a person designated to receive such an annuity under § 842.605 of this chapter.

*COLA* means a cost-of-living adjustment.

*Combined CSRS/FERS annuity* means the recurring benefit with a CSRS component and a FERS component. A ''combined CSRS/FERS annuity'' is only payable to a retiree who as an employee elected to transfer to FERS under part 846 of this chapter, who at the time of transfer had at least 5 years of service creditable under CSRS (excluding service that was subject to both social security and partial CSRS deductions), and who was covered by FERS for at least 1 month.

*CSRS* means the Civil Service Retirement System as described in subchapter III of chapter 83 of title 5, United States Code.

*CSRS component* means the portion of a combined CSRS/FERS annuity that is computed under CSRS rules.

*Current spouse annuity* means a current spouse annuity as defined in § 842.602 of this chapter.

*Disability retiree* means a retiree who retired under part 844 of this chapter.

*Effective date* means the date annuities increased by a COLA begin to accrue at the higher rate.

*FERS* means the Federal Employees Retirement System as defined in chapter 84 of title 5, United States Code.

*FERS component* means the portion of a combined CSRS/FERS annuity computed under FERS rules.

*Former spouse annuity* means a former spouse annuity as defined in § 842.602 of this chapter.

*Initial monthly rate* means the monthly annuity rate that a retiree (other than a disability retiree) is entitled to receive at the time of retirement (as defined in § 842.602 of this chapter).

*Percentage change* means the percent change in the price index as defined in section 8462(a)(2) of title 5, United States Code.

*Retiree* means a retiree as defined in § 842.602 of this chapter.

*Survivor* means a person receiving a current spouse annuity or a former spouse annuity, or the beneficiary of an insurable interest annuity. As used in this subpart, ''survivor'' does not include a child annuitant.

*Survivor supplement* means the recurring benefit payable to a survivor under § 843.308 of this chapter.

### § 841.703 Increases on basic annuities and survivor annuities.

(a) Except as provided in §§ 841.704, 841.706, and 841.707, and paragraph (e) of this section, COLA's on basic annuities and survivor annuities are the greater of—

(1) One dollar per month; or

(2)(i) If the percentage change is less than 2 percent, the percentage change;

(ii) If the percentage change is at least 2 percent and not greater than 3 percent, 2 percent; and

(iii) If the percentage change exceeds 3 percent, 1 percentage point less than the percentage change.

(b) After survivor annuities commence, they are subject to COLA's

computed under paragraph (a) of this section, even if they are based on a basic employee annuity that includes a CSRS component.

(c) COLA's apply to basic annuities (not to annuity supplements), survivor annuities, and survivor supplements.

(d) COLA's do not apply for annuitants who are under age 62 as of the effective date, except—

(1) Survivors;

(2) Disability retirees (other than disability retirees whose benefits is based on 60% of high-3 average salary);

(3) Retirees who retired under § 842.208 of this chapter (the special provisions for law enforcement officers and firefighters);

(4) Retirees who retired under § 842.207 of this chapter (the special provision for air traffic controllers);

(5) Retirees who retired under § 842.210 of this chapter (the special provision for military reserve technicians who ceased satisfying the requirements of their position) due to a disability.

(e)(1) Except as provided in paragraph (e)(2) of this section, COLA's are not payable to disability retirees during the first year.

(2) COLA's are payable to disability retirees during the first year if the annuity rate payable is the retiree's earned benefit or the annuity is redetermined because the retiree has reached age 62.

(3) After the first year, both the disability benefit and the social security offset (it any) are increased by COLA's. Disability retirees' earned benefits also increase with COLA's, even when earned benefits are not paid. After application of the COLA, the greater of the increased 40 percent benefit offset by social security or the increased earned benefit is paid until the annuity is redetermined at age 62. After age 62, the redetermined annuity is paid.

(f) COLA's are payable to retirees and survivors whose annuities commence before the effective date.

### § 841.704 Proration of COLA's.

(a) The full amounts of COLA's are payable on annuities having a commencing date more than 11 months before the effective date.

(b)(1) Prorated portions of COLA's are payable of annuities having a commencing date within 11 months before the effective date.

(2) Proration is based on the number of months (with any portion of a month counting as a month) between the annuity commencing date and the effective date.

(3) For survivors of deceased retirees, proration is determined by the date the annuity was first payable to the deceased retiree.

(4) Proration applied to the assume social security disability insurance benefit is based on the commencing date of the disability annuity, not the beginning of the social security disability benefit.

### § 841.705 Increases on basic employee death benefits.

(a) COLA's on the basic employee death benefit increase the $15,000 component by the percentage change.

(b) Recipients of the basic employee death benefit are entitled to COLA's if the employee or Member died on or after the effective date.

### § 841.706 Increases on combined CSRS/FERS annuities.

(a) COLA's on combined CSRS/FERS annuities are computed by increasing the CSRS component by the percentage change and the FERS component by the amount of COLA's under § 841.703(a).

(b) The initial monthly rate is computed by—

(1) Applying CSRS rules to CSRS service to obtain the annual rate of the self-only annuity (as defined in § 831.603 of this chapter) based on the CSRS service; then

(2) Applying FERS rules to FERS service to obtain the annual rate of annuity determined under § 842.403, § 842.405, § 842.406, or § 842.407 of this chapter based on the FERS service; then

(3) Making any applicable FERS reductions for age and/or survivor benefits to the amounts computed under paragraphs (b)(1) and (b)(2) of this section; then

(4) Dividing the sum of the reduced amounts computed under paragraph (b)(3) of this section by 12; then

(5) Dropping any cents.

(c) The initial monthly CSRS component is computed by—

(1) Applying CSRS rules to CSRS service to obtain the annual rate of the self-only annuity (as defined in § 831.603 of this chapter) based on the CSRS service; then

(2) Making any applicable FERS reductions for age and/or survivor benefits; then

(3) Dividing the annual amount by 12; then

(4) Dropping any cents.

(d) The initial monthly FERS component is computed by subtracting the initial monthly CSRS component from the initial monthly rate.

(e) A retiree who was covered under FERS for at least one month has a FERS component. If the amount of the FERS component as computed under paragraph (d) of this section is zero (because the CSRS component is equal to the monthly rate, leaving no balance for the FERS component), the FERS component is $1 per month. The retiree is due a full dollar increase on the FERS component with the next COLA. An employee with less than a month of FERS service has no FERS component and is not due any FERS COLA's.

(f) COLA's are determined by applying the appropriate increase to each component and rounding to the next lower dollar (each component must increase by at least one dollar if a COLA applies to each component) before adding them together for the new monthly amount payable.

### § 841.707 COLA's affecting computation of survivor supplements.

For purposes of computing the assumed CSRS annuity under § 843.308 of this chapter, the assumed CSRS annuity includes COLA's computed under CSRS rules.

### § 841.708 Special provisions affecting retired military reserve technicians.

(a) Military reserve technicians who retire as a result of a medical disability are excepted from the bar against COLA increases for retirees under age 62.

(b) Military reserve technicians have retired as a result of a medical disability if they retire under—

(1) Section 8451(a)(1)(B) of title 5, United States Code (allowing retirement by military reserve technicians who are medically disabled for their positions); or

(2) Section 8456 of title 5, United States Code (allowing retirement by military reserve technicians who are not disabled for their positions and who are not eligible under the special military technician discontinued service provisions (section 8414(c)) but who are medically disqualified for military service or the rank required to hold their positions).

(c)(1) Military reserve technicians have not retired as a result of a medical disability if they retire under section 8414(c) of title 5, United States Code (allowing retirement by military reserve technicians who may not be disabled for their positions, but are medically or nonmedically disqualified for military service or the rank required to hold the position, and who are at least age 50 with 25 years of service), unless they provide OPM official documentation showing that their disqualification was for medical reasons.

(2) When OPM receives no information about the reason for the disqualification of a military reserve technician retiring under section 8414(c) of title 5, United States Code, OPM will process the case assuming that the disqualification was for nonmedical reasons. OPM will inform these retirees that they will not receive COLA's until they reach age 62 unless they provide an official certification from the military showing that their disqualification was for medical reasons.

## Subpart H—Waiver of Benefits

SOURCE: 52 FR 2058, Jan. 16, 1987, unless otherwise noted.

### § 841.801 Purpose.

This subpart regulates the statutory provision on waiver of annuity benefits under the Federal Employees' Retirement System.

### § 841.802 Definitions.

As used in this subpart—

*Annuitant* means a person receiving or who is entitled and has made application to receive retirement or survivor benefits under subchapter II, IV, or V of chapter 84 of title 5, United States Code.

*Annuity* means the gross monthly annuity rate payable before any authorized deductions (such as those for health benefits and life insurance premiums).

*Qualifying court order* means a court order acceptable for processing as defined in § 838.103 of this chapter or a qualifying court order as defined in § 838.1003 of this chapter.

*Waiver* means an annuitant's written request to forfeit a specified amount of annuity as described in this subpart.

[52 FR 2058, Jan. 16, 1987, as amended at 57 FR 33598, July 29, 1992]

### § 841.803 Waiver of annuity.

(a) An annuitant may decline to accept all or any part of the amount of his or her annuity by a waiver signed and filed with the Office of Personnel Management (OPM).

(b) A waiver is effective the first day of the month following the month in which it is received in OPM, unless a later effective date is specified by the annuitant.

(c) A waiver remains in effect until revoked or changed by the annuitant in writing, except as provided in paragraph (f) of this section. The effective date of a revocation or change will be the first day of the month following the month in which the request to revoke or change is received in OPM, unless a later date is specified by the annuitant.

(d) The amount of annuity that is waived is forfeited during the period the waiver is in effect and cannot be recovered.

(e) An annuity which has a waiver in effect will not be increased by cost-of-living adjustments (COLA) authorized under 5 U.S.C. 8462. Upon cancellation of a waiver, the rate of annuity will be increased by any COLA authorized during the period a waiver was in effect.

(f) Upon the death of an annuitant with a waiver in effect, any survivor annuity payable will be authorized at the full rate of annuity as though the waiver had not been in effect, unless the survivor annuitant executes a waiver.

### § 841.804 Waivers and court orders.

The effect of a qualifying court order on a waiver is controlled by § 838.111(c) of this chapter.

[52 FR 2058, Jan. 16, 1987, as amended at 57 FR 33598, July 29, 1992]

## Subpart I [Reserved]

## Subpart J—State Income Tax Withholding

SOURCE: 52 FR 5432, Feb. 23, 1987, unless otherwise noted.

### § 841.1001 Purpose.

This subpart regulates state income tax withholding from payments of basic benefits under the Federal Employees Retirement System (FERS).

### § 841.1002 Definitions.

For the purpose of this subchapter:

*Agreement* means the Federal-State agreement contained in this subpart.

*Annuitant* means an employee or Member retired, or a spouse, widow, or widower receiving survivor benefits, under chapter 84 of title 5, United States Code.

*Effective date* means, with respect to a request or revocation, that the request or revocation will be reflected in payments authorized after that date, and before the next request or revocation is implemented.

*Fund* means the Civil Service Retirement and Disability Fund as established and described in section 8348 of title 5, United States Code.

*Income tax* and *State income tax* mean any form of tax for which, under a State statute, (a) collection is provided, either in imposing on employers generally the duty of withholding sums from the compensation of employees and making returns of such sums to the State or by granting to employers generally the authority to withhold sums from the compensation of employees, if any employee voluntarily elects to have such sums withheld; and (b) the duty to withhold generally is imposed, or the authority to withhold generally is granted, with respect to

the compensation of employees who are residents of the State.

*Net recurring payment* means the amount of annuity or survivors benefits (not recurring interim payments made while a claim is pending adjudication) payable to the annuitant on a monthly basis less the amounts currently being deducted for health benefits, Medicare, life insurance, Federal income tax, overpayment of annuity, indebtedness to the Government, voluntary allotments, waivers, or being paid to a third party or a court officer in compliance with a court order or decree.

*Net withholding* means the amount of State income tax deductions withheld during the previous calendar quarter as a result of requests which designated the State as payee, less similar deductions taken from prior payments which are cancelled in the previous calendar quarter.

*Proper State Official* means a State officer authorized to bind the State contractually in matters relating to tax administration.

*Received* means, in respect to the magnetic tape containing requests and revocations, received at the special mailing address established by OPM for income tax requests, or, for those items not so received, received at the OPM data processing center charged with processing requests.

*Requests* means, in regard to a request for tax withholdings, a change in the amount withheld, or revocation of a prior request, a written submission from an annuitant in a format acceptable to the State which provides the annuitant's name, FERS claim number, Social Security identification number, address, the amount to be withheld and the State to which payment is to be made, which is signed by the annuitant or, in the case of incompetence, his or her representative payee.

*State* means a State, the District of Columbia, or any territory or possession of the United States.

### § 841.1003 Federal-State agreements.

OPM will enter into an agreement with any State within 120 days of an application for agreement from the proper State official. The terms of the standard agreement will be §§ 841.1004 through 841.1007 of this subpart. OPM and the State may agree to additional terms and provisions, insofar as those additional terms and provisions do not contradict or otherwise limit the terms of the standard agreement.

### § 841.1004 OPM responsibilities.

OPM will, in performance of this agreement:

(a) Process the magnetic tape containing State tax transactions against the annuity roll once a month at the time monthly recurring payments are prepared for the United States Treasury Department. Errors that are identified will not be processed into the file, and will be identified and returned to the State for resolution via the monthly error report. Collections of State income tax will continue in effect until the State requesting the initial action supplies either a valid revocation or change. The magnetic tape must be received 35 days prior to the date of the check in which the transactions are to be effective. For example, withholding transactions for the July 1 check must be received 5 days prior to June 1. If the magnetic tape submitted by the State cannot be read, OPM will notify the State of this fact, and if a satisfactory replacement can be supplied in time for monthly processing, it will be processed.

(b) Deduct from the regular, recurring annuity payments of an annuitant the amount he or she has so requested to be withheld, provided that:

(1) The amount of the request is an even dollar amount, not less than Five Dollars nor more than the net recurring amount. The State may set any even dollar amount above Five Dollars as a minimum withholding amount.

(2) The annuitant has not designated more than one other State for withholding purposes within the calendar year. The State can set any limit on the number of changes an annuitant may make in the amount to be withheld.

(c) Retain the amounts withheld in the Fund until payment is due.

(d) Pay the net withholding to the State on the last day of the first month following each calendar quarter.

(e) Make the following reports:

(1) A monthly report which will include all the State tax withholdings, cancellations and adjustments for the month, and also each request OPM was not able to process, with an explanation, in coded format, of the reason for rejection.

(2) A quarterly report which will include State, State address, quarterly withholdings, quarterly cancellations and adjustments, quarterly net withholdings and year-to-date amounts. Where cancelled or adjusted payments were made in a previous year, OPM shall append a listing of the cancelled or adjusted payments which shows the date and amount of each cancelled or adjusted tax withholding, and the name and Social Security identification number of the annuitant from whom it was withheld. If either party terminates the agreement and the amount of cancelled or adjusted deductions exceeds the amount withheld for the final quarter, then the quarterly report shall show the amount to be refunded to OPM and the address to which payment should be made.

(3) An annual summary report which contains the name, Social Security identification number, and total amount withheld from non-cancelled payments during the previous calendar year, for each annuitant who requested tax withholding payable to the State. In the event the annuitant had State income tax withholding in effect for more than one State in that calendar year, the report will show only the amount withheld for the State receiving the report.

(4) An annual report to each annuitant for whom State income taxes were withheld giving the amount of withholding paid to the State during the calendar year.

### § 841.1005 State responsibilities.

The State will, in performance of this agreement:

(a) Accept requests and revocations from annuitants who have designated that State income tax deductions will go to the State.

(b) Convert these requests on a monthly basis to a machine-readable magnetic tape using specifications received from OPM, and forward that tape to OPM for processing.

(c) Inform annuitants whose tax requests are rejected by OPM that the request was so rejected and of the reason why it was so rejected.

(d) Recognize that, to the extent not prohibited by State laws, records maintained by the State relating to this program are considered jointly maintained by OPM and are subject to the Privacy Act of 1974 (5 U.S.C. 552a). Accordingly, the States will maintain such records in accordance with that statute and OPM's implementing regulations at 5 CFR part 297.

(e) Respond to requests of annuitants for information and advice in regard to State income tax withholding.

(f) Credit the amounts withheld from FERS annuities to the State tax liability of the respective annuitants, and, subject to applicable provisions of State law to the contrary, refund any balance over and above that liability to the annuitant, unless he or she should request otherwise.

(g) Surrender all tax withholding requests to OPM when this agreement is terminated or when the documents are not otherwise needed for this State tax withholding program.

(h) Allow OPM, the Comptroller General or any of their duly authorized representatives access to, and the right to examine, all records, books, papers or documents related to the processing of requests for State income tax withholding from FERS annuities.

### § 841.1006 Additional provisions.

These additional provisions are also binding on the State and OPM:

(a) A request or revocation is effective when processed by OPM. OPM will process each request by the first day of the second month following the month in which it is received, but incurs no liability or indebtedness by its failure to do so.

(b) Any amount deducted from an annuity payment and paid to the State as a result of a request is deemed properly paid, unless the annuity payment itself is cancelled.

(c) OPM will provide the State with the information necessary to properly process a request for State income tax withholding.

(d) If the State is paid withholding which is contrary to the terms of the

annuitant's request, the State is liable to the annuitant for the amount improperly withheld, and subject to account verification from OPM, agrees to pay that amount to the annuitant on demand.

(e) In the case of a dispute amount in any of the reports described and authorized by this agreement, the Associate Director will issue an accounting. If the State finds this accounting unacceptable, it may then and only then pursue such remedies as are otherwise available.

(f) If a State received an overpayment of monies properly belonging to the Fund, OPM will offset the overpayment from a future payment due the State. If there are no further payments due the State, OPM will inform the State in writing of the amount due. Within 60 days of the date of receipt of that communication that State will make payment of the amount due.

### § 841.1007 Agreement modification and termination.

This agreement may be modified or terminated in the following manner:

(a) Either party may suggest a modification of non-regulatory provisions of the agreement in writing to the other party. The other party must accept or reject the modification within 60 calendar days of the date of the suggestion.

(b) The agreement may be terminated by either party on 60 calendar days written notice.

(c) OPM may modify this agreement unilaterally through the rule making process described in sections 553, 1103, and 1105 of title 5, United States Code.

## PART 842—FEDERAL EMPLOYEES RETIREMENT SYSTEM—BASIC ANNUITY

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AUTHORITY: 5 U.S.C. 8461(g); Secs. 842.104 and 842.106 also issued under 5 U.S.C. 8461(n); Sec. 842.104 also issued under Secs. 3 and 7(c) of Pub. L. 105–274, 112 Stat. 2419; Sec. 842.105 also issued under 5 U.S.C. 8402(c)(1) and 7701(b)(2); Sec. 842.106 also issued under Sec. 102(e) of Pub. L. 104–8, 109 Stat. 102, as amended by Sec. 153 of Pub. L. 104–134, 110 Stat. 1321–102; Sec. 842.107 also issued under Secs. 11202(f), 11232(e), and 11246(b) of Pub. L. 105–33, 111 Stat. 251, and Sec. 7(b) of Pub. L. 105–274, 112 Stat. 2419; Sec. 842.108 also issued under Sec. 7(e) of Pub. L. 105–274, 112 Stat. 2419; Sec. 842.109 also issued under Sec. 1622(b) of Public Law 104–106, 110 Stat. 515; Sec. 842.208 also issued under Sec. 535(d) of Title V of Division E of Pub. L. 110–161, 121

Stat. 2042; Sec. 842.213 also issued under 5 U.S.C. 8414(b)(1)(B) and Sec. 1313(b)(5) of Pub. L. 107–296, 116 Stat. 2135; Secs. 842.304 and 842.305 also issued under Sec. 321(f) of Pub. L. 107–228, 116 Stat. 1383, Secs. 842.604 and 842.611 also issued under 5 U.S.C. 8417; Sec. 842.607 also issued under 5 U.S.C. 8416 and 8417; Sec. 842.614 also issued under 5 U.S.C. 8419; Sec. 842.615 also issued under 5 U.S.C. 8418; Sec. 842.703 also issued under Sec. 7001(a)(4) of Pub. L. 101–508, 104 Stat. 1388; Sec. 842.707 also issued under Sec. 6001 of Pub. L. 100–203, 101 Stat. 1300; Sec. 842.708 also issued under Sec. 4005 of Pub. L. 101–239, 103 Stat. 2106 and Sec. 7001 of Pub. L. 101–508, 104 Stat. 1388; Subpart H also issued under 5 U.S.C. 1104; Sec. 842.810 also issued under Sec. 636 of Appendix C to Pub. L. 106–554 at 114 Stat. 2763A–164; Sec. 842.811 also issued under Sec. 226(c)(2) of Public Law 108–176, 117 Stat. 2529; Subpart J also issued under Sec. 535(d) of Title V of Division E of Pub. L. 110–161, 121 Stat. 2042.

## Subpart A—Coverage

SOURCE: 51 FR 47197, Dec. 31, 1986, unless otherwise noted.

### § 842.101 Purpose and scope.

(a) This subpart contains regulations concerning automatic coverage under the Federal Employees Retirement System (FERS). References to FERS coverage in this subpart are to automatic, as opposed to elective, FERS coverage.

(b) Part 846 of this chapter contains regulations concerning elective FERS coverage. FERS elections are available under limited circumstances to employees not subject to automatic FERS coverage.

[59 FR 64282, Dec. 14, 1994]

### § 842.102 Definitions.

In this subpart—

*CSRS* means the Civil Service Retirement System as described in subchapter III of chapter 83 of title 5, United States Code;

*Employee* means the following individuals listed in 5 U.S.C. 8401(11) whose service is employment for the purposes of title II of the Social Security Act and chapter 21 of the Internal Revenue Code of 1954:

(a) An employee as defined by 5 U.S.C. 2105;

(b) A U.S. Commissioner whose total pay for services performed as Commissioner is not less than $3,000 in each of the last three consecutive calendar years ending after December 31, 1954;

(c) An individual employed by a county committee established under 16 U.S.C. 590h(b);

(d) An individual employed by Gallaudet College;

(e) An individual appointed to a position on the office staff of a former President under section 1(b) of the ''Act of August 25, 1958'' (72 Stat 838);

(f) An alien (1) who was previously employed by the Government; (2) who is employed full time by a foreign government to protect or further the interests of the United States during an interruption of diplomatic or consular relations; and (3) for whose services reimbursement is made to the foreign government by the United States;

(g) A Congressional employee as defined in 5 U.S.C. 2107, including a temporary Congressional employee and an employee of the Congressional Budget Office; and

(h) The following individuals are excluded from the definition of ''employee'' in 5 U.S.C. 8401 (11):

(1) A justice or judge of the United States as defined by 28 U.S.C. 451;

(2) A temporary employee of the Administrative Office of the United States Courts or of a court named by 28 U.S.C. 610;

(3) A construction employee or other temporary, part-time, or intermittent employee of the Tennessee Valley Authority;

(4) A student employee as defined by 5 U.S.C. 5351;

(5) Teachers in dependents' schools of the Department of Defense in overseas areas with respect to Federal employment, other than teaching, performed during a recess period between two school years;

(6) An individual subject to another retirement system for Government employees (other than an employee of the United States Park Police, or the United States Secret Service) any of whose civilian employment after December 31, 1983, is employment subject to social security; and

(7) An individual excluded by OPM regulation in § 842.105.

*FERS* means the Federal Employees Retirement System as described in

chapter 84 of title 5, United States Code.

*Member* has the same meaning provided in 5 U.S.C. 2106, except that the term does not include an individual who irrevocably elects, by written notice to the official by whom such individual is paid, not to participate in FERS.

*NAF employee* means an employee of an instrumentality described in section 2105(c) of title 5, United States Code.

*OPM* means the Office of Personnel Management.

*Social security* means coverage under the Old Age, Survivors, and Disability Insurance (OASDI) programs of the Social Security Act.

[51 FR 47197, Dec. 31, 1986, as amended at 52 FR 25197, July 6, 1987; 56 FR 4931, Feb. 7, 1991]

### § 842.103 General.

To be covered under FERS, an individual must:

(a) Be an employee, Member, or specifically covered by another provision of law;

(b) Be covered by social security;

(c) Have retirement deductions withheld from pay and have agency contributions made; and

(d) Be paid based on units of time.

Except as provided in § 842.104 and as excluded by § 842.105, an employee or Member is covered by FERS.

### § 842.104 Statutory exclusions.

(a) *Lack of social security coverage.* An individual not covered by social security (title II of the Social Security Act and chapter 21 of the Internal Revenue Code of 1954), including an individual covered by full CSRS (and thereby excluded from social security coverage), is excluded from FERS coverage.

(b) *Senior officials subject to social security coverage despite continuous service.* An individual who has served without a break in service of more than 365 days since December 31, 1983, in one or more of the following positions is excluded from FERS coverage.

(1) The Vice President;

(2) A Member of Congress;

(3) A non-SES appointee to a position listed in 5 U.S.C. 5312 through 5317;

(4) A Senior Executive Service or Senior Foreign Service noncareer appointee; or

(5) An individual appointed by the President (or his designee) or the Vice President under section 105(a)(1), 107(a)(1), or (b)(1) of title 3, United States Code, to a position for which the maximum rate of basic pay payable is at or above the rate for Level V of the Executive Schedule.

(c) *Employees rehired after December 31, 1986, following a break in service.* An employee who is rehired after December 31, 1986, who has had a break in service and who, at the time of the last separation from the service, had at least 5 years of civilian service creditable under CSRS rules, any part of which was covered by CSRS or the Foreign Service Retirement System, is excluded from FERS coverage.

(d) *Employees who have not had a break in service ending after December 31, 1986.* An employee who has not had a break in service of more than 3 days ending after December 31, 1986, and who, as of December 31, 1986, had at least 5 years of credible civilian service under CSRS rules (even if none of this service was covered by CSRS), is excluded from FERS coverage.

(e) *Break in service.* For the purposes of paragraph (c) and (d) of this section, ''break in service'' means a separation from CSRS-covered service lasting at least 4 days, or a transfer or separation of less than 4 days when the employee becomes subject to automatic coverage under social security (title II of the Social Security Act and chapter 21 of the Internal Revenue Code of 1954).

(f) *Coverage under a retirement system for NAF employees.* An employee who has elected coverage under a retirement system for NAF employees in accordance with part 847 of this chapter is excluded from FERS coverage during that and all subsequent periods of service, including service as a reemployed annuitant.

(g) *Certain Federal employees who elect to continue coverage under a retirement system for employees of the District of Columbia.* (1) A former employee of the District of Columbia who is appointed in a Federal position by the Department of Justice, or by the Court Services and Offender Supervision Agency established by section 11233(a) of Pub. L. 105–33, 111 Stat. 251, as amended by section 7(c) of Pub. L. 105–274, 112 Stat.

2419, is excluded from FERS coverage beginning on the date of the Federal appointment, if the employee elects to continue coverage under a retirement system for employees of the District of Columbia under section 3 of Pub. L. 105–274, 112 Stat. 2419, and if the following conditions are met:

(i) The employee is hired by the Department of Justice or by the Court Services and Offender Supervision Agency during the period beginning August 5, 1997, and ending 1 year after the date on which the Lorton Correctional Complex is closed, or 1 year after the date on which the Court Services and Offender Supervision Agency assumes its duties, whichever is later; and

(ii) The employee elects to continue coverage under a retirement system for employees of the District of Columbia no later than June 1, 1999 or 60 days after the date of the Federal appointment, whichever is later.

(2) An individual's election to continue coverage under a retirement system for employees of the District of Columbia remains in effect until the individual separates from service with the Department of Justice or the Court Services and Offender Supervision Agency.

[59 FR 64283, Dec. 14, 1994, as amended at 61 FR 41720, Aug. 9, 1996; 64 FR 15289, Mar. 31, 1999]

### § 842.105 Regulatory exclusions.

(a) OPM is authorized in 5 U.S.C. 8402(c)(1) to ''exclude from the operation of this chapter an employee or group of employees in or under an Executive agency, the United States Postal Service, or the Postal Rate Commission, whose employment is temporary or intermittent, except an employee whose employment is part-time career employment (as defined in section 3401(2)).'' Therefore, under this authority, OPM is excluding the following:

(1) Employees serving under appointments limited to 1 year or less, unless such appointments meet the definition of provisional appointments contained in §§ 316.401 and 316.403 of this chapter; and

(2) Intermittent employees serving under other than career or career conditional appointments.

(b) When an employee who is covered by FERS moves to a position listed in paragraph (a) of this section without a break in service or after a separation of 3 days or less, his or her FERS coverage will continue, except in the case of an employee hired by the Census Bureau under a temporary, intermittent appointment to perform decennial census duties.

(c) Paragraph (a) of this section does not deny FERS coverage to an employee who receives an interim appointment under § 772.102 of this chapter and was covered by FERS at the time of the separation for which interim relief is required.

[51 FR 47197, Dec. 31, 1986, as amended at 56 FR 10143, Mar. 11, 1991; 57 FR 3714, Jan. 31, 1992; 63 FR 9402, Feb. 25, 1998]

### § 842.106 Elections of retirement coverage under the District of Columbia Financial Responsibility and Management Assistance Act of 1995.

(a) *Who may elect*—(1) *General rule*. Any individual appointed by the District of Columbia Financial Responsibility and Management Assistance Authority (the Authority) in a position not excluded from FERS coverage under § 842.105 may elect to be deemed a Federal employee for FERS purposes unless the employee has elected to participate in a retirement, health or life insurance program offered by the District of Columbia.

(2) *Exception*. A former Federal employee being appointed by the Authority on or after October 26, 1996, no more than 3 days (not counting District of Columbia holidays) after separation from Federal employment cannot elect to be deemed a Federal employee for FERS purposes unless the election was made before separation from Federal employment.

(b) *Procedure for making an election*. The Authority or the agency providing administrative support services to the Authority (Administrative Support Agency) must establish a procedure for notifying employees of their election rights and for accepting elections.

(c) *Time limit for making an election*. (1) An election under paragraph (a)(1)

of this section must be made within 30 days after the employee received the notice under paragraph (b) of this section.

(2) The Authority or its Administrative Support Agency will waive the time limit under paragraph (c)(1) of this section upon a showing that—

(i) The employee was not advised of the time limit and was not otherwise aware of it; or

(ii) Circumstances beyond the control of the employee prevented him or her from making a timely election and the employee thereafter acted with due diligence in making the election.

(d) *Effect of an election.* (1) An election under paragraph (a) of this section is effective on the commencing date of the employee's service with the Authority.

(2) An individual who makes an election under paragraph (a) of this section is ineligible, during the period of employment covered by that election, to participate in any retirement system for employees of the government of the District of Columbia.

(e) *Irrevocability.* An election under paragraph (a) of this section becomes irrevocable when received by the Authority or its Administrative Support Agency.

(f) *Employee deductions.* The Authority or its Administrative Support Agency must withhold, from the pay of an employee of the District of Columbia Financial Responsibility and Assistance Authority who has elected to be deemed a Federal employee for FERS purposes, an amount equal to the percentage withheld from Federal employees' pay for periods of service covered by FERS and, in accordance with procedures established by OPM, pay into the Civil Service Retirement and Disability Fund the amounts deducted from an employee's pay.

(g) *Employer contributions.* The District of Columbia Financial Responsibility and Assistance Authority must, in accordance with procedures established by OPM, pay into the Civil Service Retirement and Disability Fund amounts equal to any agency contributions required under FERS.

[61 FR 58459, Nov. 15, 1996]

### § 842.107 Employees covered under the National Capital Revitalization and Self-Government Improvement Act of 1997.

The following categories of employees of the District of Columbia Government are deemed to be Federal employees for FERS purposes on and after October 1, 1997:

(a) Nonjudicial employees of the District of Columbia Courts;

(b) The District of Columbia Department of Corrections Trustee, authorized by section 11202 of Pub. L. 105–33, 111 Stat. 251, and an employee of the Trustee if the Trustee or employee is a former Federal employee appointed with a break in service of 3 days or less;

(c) The District of Columbia Pretrial Services, Parole, Adult Probation and Offender Supervision Trustee, authorized by section 11232 of Pub. L. 105–33, 111 Stat. 251, as amended by section 7(b) of Pub. L. 105–274, 112 Stat. 2419, and an employee of the Trustee, if the Trustee or employee is a former Federal employee appointed with a break in service of 3 days or less.

[62 FR 50997, Sept. 30, 1997, as amended at 64 FR 15289, Mar. 31, 1999]

### § 842.108 Employees covered under the District of Columbia Courts and Justice Technical Corrections Act of 1998.

Employees of the Public Defender Service of the District of Columbia are deemed to be Federal employees for FERS purposes on and after April 1, 1999.

[64 FR 15289, Mar. 31, 1999]

### § 842.109 Continuation of coverage for former Federal employees of the Civilian Marksmanship Program.

(a) A Federal employee who was covered under FERS;

(1) Was employed by the Department of Defense to support the Civilian Marksmanship Program as of the day before the date of the transfer of the Program to the Corporation for the Promotion of Rifle Practice and Firearms Safety; and

(2) Was offered and accepted employment by the Corporation as part of the transition described in section 1612(d)

of Public Law 104–106, 110 Stat. 517—remains covered by FERS during continuous employment with the Corporation unless the individual files an election under paragraph (c) of this section. Such a covered individual is treated as if he or she were a Federal employee for purposes of this part, and of any other part within this title relating to FERS. The individual is entitled to the benefits of, and is subject to all conditions under, FERS on the same basis as if the individual were an employee of the Federal Government.

(b) Cessation of employment with the Corporation for any period terminates eligibility for coverage under FERS during any subsequent employment by the Corporation.

(c) An individual described by paragraph (a) of this section may at any time file an election to terminate continued coverage under the Federal benefits described in §1622(a) of Public Law 104–106, 110 Stat. 521. Such an election must be in writing and filed with the Corporation. It takes effect immediately when received by the Corporation. The election applies to any and all Federal benefits described by section 1622(a) of Public Law 104–106, 110 Stat. 521, and is irrevocable. The Corporation must transmit the election to OPM with the individual's retirement records.

(d) The Corporation must withhold from the pay of an individual described by paragraph (a) of this section an amount equal to the percentage withheld from the pay of a Federal employee for periods of service covered by FERS and, in accordance with procedures established by OPM, pay into the Civil Service Retirement and Disability Fund the amounts deducted from the individual's pay.

(e) The Corporation must, in accordance with procedures established by OPM, pay into the Civil Service Retirement and Disability Fund amounts equal to any agency contributions required under FERS.

[74 FR 66566, Dec. 16, 2009]

## Subpart B—Eligibility

SOURCE: 52 FR 4473, Feb. 11, 1987, unless otherwise noted.

### § 842.201 Purpose.

This subpart regulates the statutory provisions on eligibility for nondisability retirement under the Federal Employees Retirement System (FERS).

### § 842.202 Definitions.

In this subpart—

*Commuting area* has the same meaning given that term in § 351.203 of this chapter.

*Minimum retirement age* means an age based on an individual's year of birth, as follows:

| Year of Birth | Minimum Retirement Age |
|---|---|
| Before 1948 | 55 years. |
| 1948 | 55 years and 2 months. |
| 1949 | 55 years and 4 months. |
| 1950 | 55 years and 6 months. |
| 1951 | 55 years and 8 months. |
| 1952 | 55 years and 10 months. |
| 1953–1964 | 56 years. |
| 1965 | 56 years and 2 months. |
| 1966 | 56 years and 4 months. |
| 1967 | 56 years and 6 months. |
| 1968 | 56 years and 8 months. |
| 1969 | 56 years and 10 months. |
| 1970 and after | 57 years. |

### § 842.203 General eligibility requirement.

An employee must have at least 5 years of civilian service creditable under FERS to be eligible for an annuity under this subpart, except as provided under part 846 of this chapter.

### § 842.204 Immediate voluntary retirement—basic age and service requirements.

(a) An employee or Member who separates from service is entitled to an annuity—

(1) Except as provided in paragraph (d) of this section, after attaining the minimum retirement age and completing 10 years of service; or

(2) After becoming age 60 and completing 20 years of service; or

(3) After becoming age 62 and completing 5 years of service.

(b)(1) Except as provided in paragraph (b)(2) or (c) of this section, an annuity payable under paragraph (a) of this section commences on the first day of the month following separation.

(2) An annuity payable under paragraph (a) of this section commences on

the day after separation, if that separation occurs upon the expiration of a term (or other period) for which the individual was appointed or elected.

(c)(1) An employee or Member entitled to an annuity under paragraph (a)(1) of this section may elect to postpone the commencing date of that annuity, provided the individual—

(i) Has completed less than 30 years of service; and

(ii) Is not entitled to an immediate annuity under any other provision of this subpart. An immediate annuity means an annuity that will begin within 31 days of separation.

(2) A postponed commencing date may not precede the later of—

(i) The first day of the month after the date of separation of the employee or Member; or

(ii) The 31st day after the date of filing the election of a commencing date.

(3) A postponed commencing date must be no later than the second day before the employee's 62nd birthday.

(4) The election of a commencing date may be filed not more than 90 days before the commencing date elected by the employee or Member, and must be filed in a form prescribed by the Office of Personnel Management (OPM).

(5) A written election that is not in the prescribed form, but which designates a specific commencing date, and otherwise conforms to the time limits in paragraphs (c)(2) through (c)(4) of this section, will be accepted as an informal election subject to ratification in the prescribed form.

(6) The election of a commencing date becomes irrevocable on the date OPM authorizes the first annuity payment.

(d)(1) If an employee or Member separates from service after attaining the minimum retirement age and completing 10 years of service, but is reemployed before filing an application for retirement based on that separation, the individual may not elect an annuity commencing date that precedes separation from the reemployment service.

(2) In the case of an employee or Member who separates from service after attaining the minimum retirement age and completing 10 years of service, and is reemployed after filing an application for retirement based on that separation, that individual may not elect an annuity commencing date that precedes separation from the reemployment service if he or she is reemployed prior to a postponed commencing date elected under paragraph (c) of this section.

[51 FR 47197, Dec. 31, 1986, as amended at 56 FR 65418, Dec. 17, 1991]

### § 842.206 Involuntary retirement.

(a) An employee, other than an employee entitled to an annuity under § 842.207 or § 842.208, who separates from the service involuntarily after completing 25 years of service, or after becoming age 50 and completing 20 years of service is entitled to an annuity, except as provided in paragraphs (b) and (c) of this section.

(b) An employee who is separated for cause on charges of misconduct or delinquency is not entitled to an annuity under paragraph (a) of this section.

(c) An employee who would otherwise be entitled to an annuity under paragraph (a) of this section is not so entitled if the employee has declined a reasonable offer of another position that meets all of the following conditions:

(1) The offer must be made in writing;

(2) The employee must meet established qualification requirements; and

(3) The offered position must be—

(i) In the employee's agency, including an agency to which the employee would be transferred in a transfer of function(s) between agencies;

(ii) Within the employee's commuting area unless geographic mobility is a condition of the employee's employment;

(iii) Of the same tenure and work schedule; and

(iv) Not lower than the equivalent of two grades or pay levels below the employee's current grade or pay level, without consideration of the employee's eligibility to retain his or her current grade or pay under part 536 of this chapter or other authority. In movements between pay schedules or pay systems, the comparison rate of the grade or pay level that is two grades below that of the current position will be compared with the comparison rate

of the grade or pay level of the offered position. For this purpose, ''comparison rate'' has the meaning given that term in § 536.103 of this chapter, except paragraph (2) of that definition should be used for the purpose of comparing grades or levels of work in making reasonable offer determinations in all situations not covered by paragraph (1) of that definition.

(d) An annuity payable under paragraph (a) of this section commences on the day after separation from the service.

[52 FR 4473, Feb. 11, 1987, as amended at 70 FR 31315, May 31, 2005; 73 FR 66157, Nov. 7, 2008]

### § 842.207 Air traffic controllers.

(a) An employee who separates from service, except by removal for cause or charges of delinquency or misconduct, is entitled to an annuity—

(1) After completing 25 years of service as an air traffic controller; or

(2) After becoming age 50 and completing 20 years of service as an air traffic controller.

(b) An annuity payable under paragraph (a) of this section commences on the first day of the month following separation.

### § 842.208 Firefighters, customs and border protection officers, law enforcement officers, members of the Capitol or Supreme Court Police, and nuclear materials couriers.

(a) An employee who separates from service, except by removal for cause on charges of delinquency or misconduct, is entitled to an annuity—

(1) After completing any combination of service as a firefighter, customs and border protection officer, law enforcement officer, member of the Capitol or Supreme Court Police, or nuclear materials courier totaling 25 years; or

(2) After becoming age 50 and completing any combination of service as a firefighter, customs and border protection officer, law enforcement officer, member of the Capitol or Supreme Court Police, or nuclear materials courier totaling 20 years.

(b) An annuity payable under paragraph (a) of this section commences on the first day of the month following separation.

[52 FR 4473, Feb. 11, 1987, as amended at 65 FR 2524, Jan. 18, 2000; 76 FR 42000, July 18, 2011]

### § 842.209 Members of Congress.

(a) A Member, except one separated by resignation or expulsion, is entitled to an annuity—

(1) After completing 25 years of service; or

(2) After becoming age 50 and completing 20 years of service.

(b) An annuity payable under paragraph (a) of this section commences on the day after separation from the service.

### § 842.210 Military reserve technicians.

(a) A military reserve technician as defined in 5 U.S.C. 8401(30) who is separated from civilian service because of ceasing to qualify as a member of a military reserve component after reaching age 50 and completing 25 years of service is entitled to an annuity.

(b) An annuity payable under paragraph (a) of this section commences on the day after separation.

### § 842.211 Senior Executive Service, Defense Intelligence Senior Executive Service, and Senior Cryptologic Executive Service.

(a) A member of the Senior Executive Service, the Defense Intelligence Senior Executive Service, or the Senior Cryptologic Senior Executive Service who is removed or who resigns after receipt of written notice of proposed removal for less than fully successful executive performance, or for failure to be recertified as a senior executive, is entitled to an annuity—

(1) After completing 25 years of service; or

(2) After becoming age 50 and completing 20 years of service.

(b) *Removed for less than fully successful executive performance* means (1) with respect to a member of the Senior Executive Service, removal in accordance with procedures in subpart E of part 359 of this chapter; and (2) with respect to a member of the Defense Intelligence Senior Executive Service or the Senior

Cryptologic Executive Service, a certification by the head of the Defense Intelligence Agency or National Security Agency (or their designees) that the employee has been removed for less than fully successful executive performance.

(c) *Removed for failure to be recertified as a senior executive* means (1) With respect to a member of the Senior Executive Service, removal in accordance with the procedures in subpart C of part 359 of this chapter, and (2) with respect to a member of the Defense Intelligence Senior Executive Service or the Senior Cryptologic Executive Service, a certification by the head of the Defense Intelligence Agency or National Security Agency (or their designees) that the employee has been removed for failure to be recertified under 10 U.S.C. 1601(a) or section 12(a)(1) of the National Security Agency Act, respectively.

(d) An annuity payable under paragraph (a) of this section commences on the day after separation from service.

[52 FR 4473, Feb. 11, 1987, as amended at 56 FR 173, Jan. 3, 1991]

### § 842.212 Deferred retirement.

(a) An employee or Member who, after completing 5 years of service, separates from service or transfers to a position not covered by FERS is entitled to a deferred annuity beginning on the first day of the month after the individual attains age 62.

(b)(1) Except as provided in paragraphs (b)(3) and (c) of this section, an employee or Member who has not attained the minimum retirement age, and who, after completing 10 years of service, is separated or transferred to a position in which the individual is no longer covered by FERS, is entitled to a deferred annuity commencing—

(i) The first day of the month following the date on which the individual attains the minimum retirement age or, if later,

(ii) A date the individual designates that follows the date on which the designation is filed.

(2) The election of a commencing date may be filed no more than 90 days before that commencing date, and must be elected in a form prescribed by OPM. A written election that is not in the prescribed form, but which designates a specific commencing date, will be accepted for as an informal election, subject to ratification in the prescribed form.

(3) An employee or Member is not entitled to a deferred annuity under paragraph (b)(1) of this section if the individual is eligible for an annuity under §§ 842.205 through 842.211 or will, within 31 days after filing the election of a commencing date, attain age 62.

(4) The election of a commencing date becomes irrevocable on the date OPM authorizes the first annuity payment.

(c)(1) If an employee or Member separates from service after completing 10 years of service but before attaining the minimum retirement age, and is reemployed before filing an application for retirement based on that separation, that individual may not elect an annuity commencing date that precedes separation from the reemployment service.

(2) In the case of an employee or Member who separates from service after completing 10 years of service but before attaining the minimum retirement age, and is reemployed after filing an application for retirement based on that separation, that individual may not elect an annuity commencing date that precedes separation from the reemployment service if he or she is reemployed prior to a postponed commencing date elected under paragraph (b).

[51 FR 47197, Dec. 31, 1986, as amended at 56 FR 65418, Dec. 17, 1991]

### § 842.213 Voluntary early retirement-substantial delayering, reorganization, reduction in force, transfer of function, or other workforce restructuring.

(a) A *specific designee* is defined as a senior official within an agency who has been specifically designated to sign requests for voluntary early retirement authority under a designation from the head of the agency. Examples include a Chief Human Capital Officer, an Assistant Secretary for Administration, a Director of Human Resources Management, or other official.

(b) An agency's request for voluntary early retirement authority must be

signed by the head of the agency or by a specific designee.

(c) The request must contain the following information:

(1) Identification of the agency or specified component(s) for which the authority is being requested;

(2) Reasons why the agency needs voluntary early retirement authority. This must include a detailed summary of the agency's personnel and/or budgetary situation that will result in an excess of personnel because of a substantial delayering, reorganization, reduction in force, transfer of function, or other workforce restructuring or reshaping, consistent with agency human capital goals;

(3) The date on which the agency expects to effect the substantial delayering, reorganization, reduction in force, transfer of function, or other workforce restructuring or reshaping;

(4) The time period during which the agency plans to offer voluntary early retirement;

(5) The total number of non-temporary employees in the agency (or specified component(s));

(6) The total number of non-temporary employees in the agency (or specified component(s)) who may be involuntarily separated, downgraded, transferred, or reassigned as a result of the substantial delayering, reorganization, reduction in force, transfer of function, or other workforce restructuring or reshaping;

(7) The total number of employees in the agency (or specified component(s)) who are eligible for voluntary early retirement;

(8) An estimate of the total number of employees in the agency (or specified component(s)) who are expected to retire early during the period covered by the request for voluntary early retirement authority; and

(9) A description of the types of personnel actions anticipated as a result of the agency's need for voluntary early retirement authority. Examples include separations, transfers, reassignments, and downgradings.

(d) OPM will evaluate a request for voluntary early retirement based on:

(1) A specific request to OPM from the agency for voluntary early retirement authority;

(2) A voluntary separation incentive payment implementation plan, as discussed in part 576, subpart A, of this chapter, which must outline the intended use of the incentive payments and voluntary early retirement; or

(3) The agency's human capital plan, which must outline its intended use of voluntary separation incentive payments and voluntary early retirement authority, and the changes in organizational structure it expects to make as the result of projected separations and early retirements.

(e) Regardless of the method used, the request must include all of the information required by paragraph (c) of this section.

(f) OPM may approve an agency's request for voluntary early retirement authority to cover the entire period of the substantial delayering, reorganization, reduction in force, transfer of function, or other workforce restructuring or reshaping described by the agency, or the initial portion of that period with a requirement for subsequent information and justification if the period covers multiple years.

(g) After OPM approves an agency's request, the agency must immediately notify OPM of any subsequent changes in the conditions that served as the basis for the approval of the voluntary early retirement authority. Depending upon the circumstances involved, OPM will modify the authority as necessary to better suit the agency's needs.

(h) The agency may further limit voluntary early retirement offers based on:

(1) An established opening and closing date for the acceptance of applications that is announced to employees at the time of the offer; or

(2) The acceptance of a specified number of applications for voluntary early retirement, provided that, at the time of the offer, the agency notified employees that it retained the right to limit the number of voluntary early retirements.

(i) Within the timeframe specified for its approved voluntary early retirement authority, the agency may subsequently establish a new or revised closing date, or reduce or increase the number of early retirement applications it will accept, if management's

downsizing and/or reshaping needs change. If the agency issues a revised closing date, or a revised number of applications to be accepted, the new date or number of applications must be announced to the same group of employees included in the original announcement. If the agency issues a new window period with a new closing date, or a new instance of a specific number of applications to be accepted, the new window period or number of applications to be accepted may be announced to a different group of employees as long as they are covered by the approved voluntary early retirement authority.

(j) Chapter 43 of title 38, United States Code, requires that agencies treat employees on military duty, for all practical purposes, as though they were still on the job. Further, employees are not to be disadvantaged because of their military service. In accordance with these provisions, employees on military duty who would otherwise be eligible for an offer of voluntary early retirement will have 30 days following their return to duty to either accept or reject an offer of voluntary early retirement. This will be true even if the voluntary early retirement authority provided by OPM has expired.

(k) An employee who separates from the service voluntarily after completing 25 years of service, or becoming age 50 and completing 20 years of service, is entitled to an annuity if, on the date of separation, the employee:

(1) Is serving in a position covered by a voluntary early retirement offer; and

(2) Meets the following conditions which are covered in 5 U.S.C. 8414(b)(1)(B):

(i) Has been employed continuously, by the agency in which the employee is serving, for at least the 31-day period ending on the date on which such agency requests the determination referred to in section 842.213(b);

(ii) Is serving under an appointment that is not time limited;

(iii) Has not been duly notified that such employee is to be involuntarily separated for misconduct or unacceptable performance;

(iv) Is separated from the service voluntarily during a period in which, as determined by the Office of Personnel Management (upon request of the agency) under regulations prescribed by the Office:

(A) Such agency (or, if applicable, the component in which the employee is serving) is undergoing substantial delayering, substantial reorganization, substantial reductions in force, substantial transfer of function, or other substantial workforce restructuring (or shaping);

(B) A significant percentage of employees serving in such agency (or component) are likely to be separated or subject to an immediate reduction in the rate of basic pay (without regard to subchapter VI of chapter 53, or comparable provisions); or

(C) Identified as being in positions which are becoming surplus or excess to the agency's future ability to carry out its mission effectively; and

(v) As determined by the agency under regulations prescribed by the Office, is within the scope of the offer of voluntary early retirement, which may be made based on the following criteria:

(A) 1 or more organizational units;

(B) 1 or more occupational series or levels;

(C) 1 or more geographical locations;

(D) Specific periods;

(E) Skills, knowledge, or other factors related to a position; or

(F) Any appropriate combination of such factors.

(l) Agencies are responsible for ensuring that employees are not coerced into voluntary early retirement. If an agency finds any instances of coercion, it must take appropriate corrective action.

(m) Except as provided in paragraph (j) of this section, an agency may not offer or process voluntary early retirements beyond the stated expiration date of a voluntary early retirement authority or offer early retirements to employees who are not within the scope of the voluntary early retirement authority approved by OPM.

(n) OPM may terminate a voluntary early retirement authority if it determines that the condition(s) that formed the basis for the approval of the authority no longer exist.

(o) OPM may amend, limit, or terminate a voluntary early retirement authority to ensure that the requirements of this subpart are properly being followed.

[69 FR 33279, June 15, 2004, as amended at 69 FR 50265, Aug. 16, 2004; 80 FR 75786, Dec. 4, 2015]

## Subpart C—Credit for Service

SOURCE: 52 FR 18193, May 14, 1987, unless otherwise noted.

### § 842.301 Purpose.

This subpart sets forth the provisions governing credit for service under the Federal Employees Retirement System (FERS), 5 U.S.C. 8411. Except as provided by section 302 of the Federal Employees' Retirement System Act of 1986, Pub. L. 99–335 (the special provisions for employees who elect to transfer to FERS), service not creditable under this subpart is not creditable either for the purposes of determining eligibility to an annuity or in computing the rate of an annuity benefit under subchapter II (basic annuity), IV (survivor annuity), or V (disability annuity) of chapter 84 of title 5 of the United States Code.

### § 842.302 Definitions.

*Cadet Nurse Corps* means any training as a student or graduate nurse under a plan approved under section 2 of the Act of June 15, 1943 (57 Stat. 153).

*Employee* means an employee as defined by 5 U.S.C. 8401(11).

*FERS* means the Federal Employees Retirement System as established under chapter 84 of title 5, United States Code.

*Government* means the Federal Government and Gallaudet College.

*Member* means a Member of Congress as defined by 5 U.S.C. 8401(20).

*Military service* means honorable active service in the armed forces of the United States; in the commissioned corps of the Public Health Service after June 30, 1960; or in the commissioned corps of the National Oceanic and Atmospheric Administration, or a predecessor entity in function, after June 30, 1961. ''Military service'' does not include service in the National Guard except when ordered to active duty in the service of the United States.

*Survivor* means a current spouse, a child or a former spouse who is entitled to an annuity in accordance with part 843 of this chapter.

### § 842.303 General.

(a)(1) Except as provided in paragraph (a)(2) of this section, no service credit is allowed for a period of separation from service.

(2) Service credit is allowed for a period of separation of less than 4 days and for a period of separation during which an individual was receiving benefits under subchapter I of chapter 81 of title 5, United States Code, provided the individual returns to duty in the Government subject to FERS.

(b) Service credit cannot be granted in excess of actual calendar time from the date of appointment to the date of separation from service.

(c) Any period of time for which service credit under chapter 84 of title 5, United States Code, is specifically allowed by a provision of law is creditable under this subpart subject to any applicable deposit requirements.

### § 842.304 Civilian service.

(a) Except as otherwise provided under title III of the Federal Employees' Retirement System Act of 1986, an employee or Member is entitled to credit for all purposes under FERS for a period of civilian service with the Government or the U.S. Postal Service—

(1) Performed after December 31, 1986, which is covered service under subpart A of this part and for which deductions required under 5 U.S.C. 8422(a) have not been refunded;

(2) That, other than service under paragraph (a)(1) of this section—

(i) Was performed before 1989;

(ii) Would have been creditable under 5 U.S.C. 8332 if the employee or Member were subject to subchapter III of chapter 83 of title 5, United States Code, without regard to any deposit, redeposit, or coverage requirement under that subchapter; and

(iii) Is covered by deductions or a deposit required by § 842.305 and the deductions or deposit have not been refunded after the employee or Member first became subject to FERS;

(3) That was creditable under subchapter II of chapter 8 of title 1 of the Foreign Service Act of 1980 (Foreign Service Pension System), provided—

(i) The employee or Member waives credit for the service under the Foreign Service Pension System; and

(ii) The employee or Member makes the deposit required by § 842.305, and the deposit is not refunded;

(4) While on leave of absence without pay, subject to a limit of 6 months per calendar year, except that the 6-month limit does not apply while—

(i) Performing military service; or

(ii) Receiving benefits under subchapter I of chapter 81 of title 5, United States Code;

(5) While on approved leave without pay granted to serve as a full-time officer or employee of an organization composed primarily of employees, as defined by section 8331(1) or 8401(11) of title 5, United States Code, provided—

(i) The employee elects, within 60 days after the commencing date of leave without pay, to pay to the employing agency the retirement deductions and agency contributions that would be applicable if the employee were in a pay status;

(ii) Payments of the deductions and contributions begin on a regular basis within 60 days after the commencing date of leave without pay; and

(iii) Payments of the required deductions and contributions are completed and not refunded; and

(6) While assigned on detail or leave without pay to a State or local government under 5 U.S.C. 3373, provided—

(i) The normal cost percentage (under subpart D of part 841 of this chapter) for the employee (who is deemed to continue in the same normal cost percentage category as applicable on the date of the assignment) is remitted to OPM for each pay period during the assignment; and

(ii) The employee, or, if he or she dies without making an election, his or her survivor, does not elect to receive benefits under any State or local government retirement law or program, which OPM determines to be similar to FERS.

(b) *Cadet Nurse Corps.* (1) Service credit is allowed under Pub. L. 99–638 for a period of service performed with the Cadet Nurse Corps provided—

(i) The service totaled 2 years or more;

(ii) The individual submits an application for service credit to OPM no later than January 10, 1988;

(iii) The individual is employed by the Federal Government in a position subject to subchapter III of chapter 83 of title 5, United States Code (other than 5 U.S.C. 8344) or chapter 84 of that title (other than 5 U.S.C. 8468) at the time he or she applies to OPM for service credit under this provision; and

(iv) The individual makes a deposit for the service in accordance with § 842.305(g) before the date of separation from service on which the individual's entitlement to annuity is based.

(c) *National Guard technician service before January 1, 1969*—(1) *Definition.* In this section, *service as a National Guard technician* is service performed under section 709 of title 32, United States Code (or under a prior corresponding provision of law) before January 1, 1969.

(2) *Employees on or after November 6, 1990.* Employees, subject to FERS retirement deductions, whose only service as a National Guard technician was performed prior to January 1, 1969, are entitled to credit under FERS if they—

(i) Submit to OPM an application for service credit in a form prescribed by OPM;

(ii) Are employed by the Federal Government in a position subject to FERS retirement deductions after November 5, 1990; and

(iii) Complete the deposit for the service through normal service credit channels before final adjudication of their application for retirement or have the deposit deemed made when they elect the alternative form of annuity.

(3) *Former Federal employees.* Former Federal employees who were subject to FERS retirement deductions and separated after December 31, 1968, but before November 6, 1990, with title to a deferred annuity, may make a deposit for pre-1969 National Guard technician service provided they—

(i) Submit a written application for the pre-1969 National Guard technician service to OPM before November 6, 1991; and

(ii) Complete a deposit for the additional service in a lump sum or in installment payments of $50 or more. Payments must be completed before their retirement claim is finally adjudicated, unless the deposit is deemed made when they elect an alternative form of annuity.

(4) *Annuitants and survivors.* (i) Individuals who were entitled to receive an immediate annuity (or survivor annuity benefits) as of November 6, 1990, may make a deposit for pre-1969 National Guard technician service provided they—

(A) Submit a written application for service credit to OPM before November 6, 1991; and

(B) Complete a deposit for the additional service in a lump sum or in equal monthly annuity installments to be completed within 24 months of the date of the written application.

(ii) To determine the commencing date of the deposit installment payment period for annuitants and survivors, the ''date of application'' will be considered to be the first day of the second month beginning after OPM receives a complete written application from the individual.

(iii) To be a complete application, the individual's written request for pre-1969 National Guard technician service credit must also include a certification of the dates of employment and the rates of pay received by the individual during the employment period. The individual may obtain certification of service from the Adjutant General of the State in which the service was performed.

(d) *Credit for service performed as an employee of a nonappropriated fund instrumentality.* (1) Credit for service with a nonappropriated fund instrumentality is allowed in accordance with an election under 5 CFR part 847, subpart D or H.

(2) Service under FERS for which the employee withdrew all deductions is creditable in accordance with an election made under 5 CFR part 847, subpart D.

(3) An annuity that includes credit for service with a nonappropriated fund instrumentality under 5 CFR part 847, subpart D, or refunded service under paragraph (d)(2) of this section is computed under 5 CFR part 847, subpart F.

(4) An annuity that includes credit for service with a nonappropriated fund instrumentality under 5 CFR part 847, subpart H, is computed under 5 CFR part 847, subpart I.

(e) *Certain Government service performed abroad after December 31, 1988, and before May 24, 1998*—(1) *Definition.* In this section, *certain Government service performed abroad* is service performed at a United States diplomatic mission, consular post (other than a consular agency), or other Foreign Service post abroad under a temporary appointment pursuant to sections 309 and 311 of the Foreign Service Act of 1980 (22 U.S.C. 3949 and 3951).

(2) *Conditions for Creditability.* Service credit is allowed under section 321 of Pub. L. 107–228 for certain Government service performed abroad after December 31, 1988, and before May 24, 1998, provided—

(i) The service in the aggregate totaled 90 days or more;

(ii) The individual performing the service would have satisfied all eligibility requirements under regulations of the Department of State (as in effect on September 30, 2002) for a family member limited noncareer appointment (within the meaning of such regulations, as in effect on September 30, 2002) at the time the service was performed, except that, in applying this paragraph, an individual not employed by the Department of State while performing the service shall be treated as if then so employed;

(iii) The service would have been creditable under FERS had it been performed before 1989 and had the deposit requirements of § 842.305 been met;

(iv) The service is not otherwise creditable under FERS or any other retirement system for employees of the U.S. Government (disregarding title II of the Social Security Act);

(v) The individual applying for the service credit submits a written application to make a deposit with the department or agency where the service

was performed, and completes the deposit, in accordance with § 842.305(j); and

(vi) The department or agency where the service was performed remits Government contributions for the service to OPM in accordance with § 842.305(j).

(3) *Departments or agencies no longer in existence.* If the department or agency where the individual performed certain Government service abroad no longer exists, the Department of State must process applications for service credit under this section. Government contributions for the service will not need to be remitted to OPM.

[52 FR 18193, May 14, 1987, as amended at 56 FR 6554, Feb. 19, 1991; 56 FR 55596, Oct. 29, 1991; 61 FR 41720, Aug. 9, 1996; 68 FR 2178, Jan. 16, 2003; 70 FR 50953, Aug. 29, 2005]

### § 842.305 Deposits for civilian service.

(a) *Eligibility—current and former employees or Members.* An employee or Member subject to FERS and a former employee or Member who is entitled to an annuity may make a deposit for civilian service described under paragraphs (a)(2) and (a)(3) of § 842.304 upon application to OPM in a form prescribed by OPM. A deposit for civilian service cannot be made later than 30 days after the first regular monthly payment as defined in § 842.602.

(b) *Eligibility—survivors.* If an employee or Member was, at the time of death, eligible to make a deposit, the employee's survivor may make the deposit for civilian service. A deposit under this paragraph cannot be made after adjudication of the survivor's application for benefits becomes final, which is 30 days after the date of OPM's notice to the survivor of the annuity rates with and without making the deposit.

(c) *Distinct period of service.* A deposit is not considered to have been made for any distinct period of service unless the total amount due for the period is paid in full. A distinct period of civilian service for this purpose is a period of civilian service that is not interrupted by a break in service of more than 3 days.

(d) *Amount of deposits.* The amount of a deposit for a period of service under § 842.304(a)(2) equals 1.3 percent of the basic pay for the service, plus interest. The amount of a deposit for a period of service under § 842.304(a)(3) equals the amount that would have been deducted from pay under 5 U.S.C. 8422(a) had the employee been subject to FERS during the service, plus interest.

(e) *Interest.* (1) Interest is charged at the rate of 4 percent a year through December 31, 1947; 3 percent a year beginning January 1, 1948, through December 31, 1984; and thereafter at a rate as determined by the Secretary of the Treasury for each calendar year that equals the overall average yield to the Civil Service Retirement and Disability Fund (the Fund) during the preceding fiscal year from all obligations purchased by the Secretary during such fiscal year under 5 U.S.C. 8348 (c), (d), and (e).

(2) The computation of interest is on the basis of 30 days to the month. Interest is computed for the actual calendar time involved in each case; but, whenever applicable, the rule of average applies.

(3) Interest is computed from the midpoint of each service period included in the computation. The interest accrues annually on the outstanding portion, and is compounded annually, until the portion is deposited. Interest is not charged after the commencing date of annuity or for a period of separation from the service that began before October 1, 1956.

(f) *Forms of deposit.* Deposits may be made in a single lump sum or in installments not smaller than $50 each.

(g) *Cadet Nurse Corps.* (1) Upon receiving an application for service credit with the Cadet Nurse Corps, OPM will determine whether all the conditions for creditability (§ 842.304(b)) have been met; compute the deposit, including interest; and advise the employing agency and the employee of the total amount of the deposit due. The rate of basic pay for this purpose is deemed to be $15 per month for the first 9 months of study; $20 per month for the 10th through the 21st months of study; and $30 per month for any month in excess of 21 months. Interest is computed in accordance with paragraph (e) of this section.

(2) The employing agency must establish a deposit account showing the

total amount due and a payment schedule (unless deposit is made in one lump sum) to record the date and amount of each payment.

(3) If the individual cannot make payment in one lump sum, the employing agency must accept installment payments (by allotments or otherwise). The employing agency, however, is not required to accept individual checks in amounts less than $50.

(4) Payments received by the employing agency must be remitted to OPM immediately for deposit to the Civil Service Retirement and Disability Fund.

(5) Once the employee's deposit has been paid in full or closed out, the employing agency must submit the documentation pertaining to the deposit to OPM in accordance with instructions issued by OPM.

(h) *Processing applications for pre-1969 National Guard technician service credit for employees subject to FERS retirement deductions after November 5, 1990*—(1) *OPM determines creditable service.* OPM will determine whether all conditions for crediting the additional service have been met, compute the deposit, and notify the employee of the amount of and the procedures for submitting the deposit payments to OPM to obtain credit for the service.

(2) *Computing the deposit.* (i) For individuals who will not have a CSRS component, the deposit will be computed based on—

(A) One and three tenths percent of basic pay at the time the service was performed; and

(B) Interest at the rate of 3 percent per year computed as specified by section 8334(e)(2) of title 5, United States Code, until the date the deposit is paid.

(ii) For individuals who will have a CSRS component, the deposit will be computed as specified in 5 CFR 831.306(c).

(i) *Processing applications for pre-1969 National Guard technician service credit for annuitants (and survivors) and for former employees who separated after December 31, 1968, and before November 6, 1990*—(1) *OPM determines creditable service.* OPM will determine whether all conditions for crediting the additional service have been met, compute the amount of the deposit, and notify the individual.

(2) *Computing the deposit for annuitants and survivors.* (i) For individuals who do not have a CSRS component, the deposit will be computed based on—

(A) One and three tenths percent of basic pay at the time the service was performed; and

(B) Interest at the rate of 3 percent per year as specified by section 8334(e)(2) of title 5, United States Code, to the midpoint of the 24-month installment period, or if paid in a lump sum, the date the deposit is paid.

(ii) For individuals who will have a CSRS component, the deposit will be computed as specified in 5 CFR 831.306(e)(2)(i) and (ii)(A).

(iii)(A) OPM will notify annuitants and survivors of the amount of the deposit and give them a proposed installment schedule for paying the deposit from monthly annuity payments. The proposed installment payments will consist of equal monthly payments that will not exceed a period 24 months from the date a complete written application is received by OPM.

(B) The annuitant or survivor may allow the deposit installments to be deducted from his or her annuity as proposed or make payment in a lump sum within 30 days from the date of the notice.

(C) Increased annuity payments will begin to accrue the first day of the month after OPM receives the complete written application.

(iv) If an annuitant dies before completing the deposit installment payments, the remaining installments will be deducted as established for the annuitant from benefits payable to the survivor annuitant (but not if the only survivor benefit is payable to a child or children of the deceased), if any. If no survivor annuity is payable, OPM may collect the balance of the deposit from any lump sum benefits payable or from the decedent's estate, if any.

(3) *Computing the deposit for former Federal employees separated after December 31, 1968 but before November 6, 1990.* For former employees with title to a deferred annuity that commences after November 6, 1990, the deposit will be computed as provided in paragraph

(i)(2) above, except that interest will be computed through the commencing date of annuity or the date the deposit is paid, whichever comes first.

(j) *Certain Government service performed abroad after December 31, 1988, and before May 24, 1998*—(1) *Eligibility-current and former employees, and retirees.* A current or former employee, or a retiree who performed certain Government service abroad described in § 842.304(e) may make a deposit for such service, in a form prescribed by OPM.

(2) *Eligibility-survivors.* A survivor of a current employee, former employee, or a retiree eligible to make a deposit under paragraph (j)(1) of this section may make a deposit under this section if the current or former employee, or retiree is deceased and the survivor is eligible or would be eligible for a survivor annuity under FERS based on the service of the current or former employee, or retiree.

(3) *Filing of deposit application.* An individual eligible to make a deposit under paragraphs (j)(1) and (2) of this section for service described in § 842.304(e) must submit a written application to make a deposit for such service with the appropriate office in the department or agency where such service was performed. If the department or agency where the service was performed no longer exists, the individual must submit the written application to the appropriate office in the Department of State.

(4) *Time limit for filing application.* An application to make a deposit under this section must be submitted on or before August 29, 2008.

(5) *Amount of deposit.* (i) A deposit under this section must be computed using distinct periods of service. For the purpose of this section, a distinct period of service means a period of service not interrupted by a break in service of more than 3 days. A deposit may be made for any or all distinct periods of service.

(ii) The amount of deposit under this section equals the amount of deductions from basic pay that would have been required under section 8422 of title 5, United States Code, if at the time the service was performed the service had been subject to FERS deductions under that section, plus interest.

(6) *Forms of deposit.* A deposit under this section must be made as a single lump sum within 180 days of being notified of the deposit amount.

(7) *Processing deposit applications and payments.* (i) The department or agency where the service described in § 842.304(e) was performed must process the deposit applications and payments under this section. If the department or agency where the service was performed no longer exists, the Department of State must process the deposit applications and payments under this section.

(ii) Whenever requested, the Department of State must assist the department or agency responsible for processing deposit applications under this section determine whether the application meets the requirements of § 842.304(e).

(iii) Upon receiving a deposit application under this section, the department or agency must determine whether the application meets the requirements of § 842.304(e); compute the deposit, including interest; and advise the applicant of the total amount of deposit due.

(iv) The department or agency must establish a deposit account showing the total amount due.

(v) When it receives an individual's payment for the service, the department or agency must remit the payment to OPM immediately for deposit to the Civil Service Retirement and Disability Fund in accordance with instructions issued by OPM.

(vi) Once a deposit has been paid in full or otherwise closed out, the department or agency must submit the documentation pertaining to the deposit to OPM in accordance with instructions issued by OPM.

(8) *Government contributions.* (i) The department or agency where service described in § 842.304(e) was performed must pay Government contributions for each period of service covered by a deposit under this section.

(ii) The amount of contributions under this section equals the amount of Government contributions which would have been required for the service under section 8423 of title 5, United States Code, if the service had been

covered under chapter 84 of title 5, United States Code, plus interest.

(iii) The department or agency must remit the amount of Government contributions under this section to OPM at the same time it remits the employee deposit for this service to OPM in accordance with instructions issued by OPM.

(9) *Interest*. Interest must be computed as described under paragraphs (2) and (3) of 5 U.S.C. 8334(e). Interest must be computed for each distinct period of service from the midpoint of each distinct period of service. The interest accrues annually on the outstanding deposit and is compounded annually, until the deposit is paid.

(10) *Effect of deposit*. An individual completing a deposit under this section will receive retirement credit for the service covered by the deposit when OPM receives certification that the deposit has been paid in full, and the deposit payment and agency contributions are remitted to the Civil Service Retirement and Disability Fund.

(11) *Appeal rights*. When the department or agency processing an application for deposit under this section determines that the individual is not eligible to make a deposit for a period of service, it must provide the individual with a written decision explaining the reason for the decision and explaining the individual's right to appeal the decision to the Merit Systems Protection Board.

[52 FR 18193, May 14, 1987, as amended at 56 FR 55597, Oct. 29, 1991; 56 FR 65419, Dec. 17, 1991; 70 FR 50953, Aug. 29, 2005]

### § 842.306 Military service.

(a) Except as provided in paragraph (b), and unless otherwise provided under title III of the Federal Employees' Retirement System Act of 1986, an employee's or Member's military service is creditable if it was performed—

(1) Before January 1, 1957; or

(2) After December 31, 1956, subject to payment, before separation from service, of the deposit required by § 842.307.

(b) Credit for a period of military service is not allowed if the employee or Member is receiving military retired pay for such period awarded for reasons other than—

(1) Service-connected disability incurred in combat with an enemy of the United States;

(2) Service-connected disability caused by an instrumentality of war and incurred in the line of duty during a period of war (within the meaning of chapter 11 of title 38, United States Code); or

(3) Retirement under chapter 67 of title 10, United States Code.

(c) When adjudicating annuity claims, OPM will accept determinations made by the agency that authorized military retired pay concerning—

(1) The effective date of a waiver of military retired pay;

(2) Whether an individual's military retired pay was awarded for any of the reasons mentioned under paragraph (b) of this section; and

(3) Whether a period of military service forms the basis for military retired pay.

(d)(1) Except as provided in paragraphs (d)(2) and (d)(3) of this section, the computation of a survivor's annuity includes credit for any military service allowable under paragraph (a) of this section.

(2) If the separated employee (as defined in § 843.102 of this chapter) was awarded military retired pay, died after the date of separation from civilian service, and did not waive military retired pay effective before the date of death, military service upon which the military retired pay was based is not creditable.

(3) If the survivor of a deceased employee who had been awarded military retired pay files, in a form prescribed by OPM, an election not to have a period of military service included in the computation of survivor benefits, that period of military service is not included in the computation of survivor benefits.

### § 842.307 Deposits for military service.

(a) *Eligibility to make a deposit*. (1) An employee or Member subject to FERS may make a deposit for any distinct period of military service by filing an application in a form prescribed by OPM.

(2) An application to make a deposit is filed with the appropriate office in the employing agency, or, for Members

and Congressional employees, with the Secretary of the Senate, or the Clerk of the House of Representatives, as appropriate.

(3) An employee's or Member's deposit for military service must be completed before separation from service. If a deceased employee or Member was, at the time of death, eligible to make a deposit, the employee's or Member's survivor may make the deposit in one lump sum to the former employing agency, the Secretary of the Senate or the Clerk of the House of Representatives, before OPM completes adjudication of the survivor annuity application. A person who was eligible to make a deposit for military service but failed to complete the deposit within the time limits provided in this paragraph, may complete the deposit in a lump sum within the time limit set by OPM when it rules that an administrative error has been made.

(b) *Amount of deposit.* (1) The amount of a deposit for military service equals 3 percent of the basic pay for the service under 37 U.S.C. 207, or an estimate of the basic pay (see paragraph (c)(1)(iii) of this section), plus interest, unless interest is not required under paragraph (b)(4) of this section.

(2) Interest is charged at a rate as determined by the Secretary of the Treasury for each calendar year that equals the overall average yield to the Fund during the preceding fiscal year from all obligations purchased by the Secretary during such fiscal year under 5 U.S.C. 8348(c), (d), and (e).

(3) The computation of interest is on the basis of 30 days to the month. Interest is computed for the actual calendar time involved in each case; but whenever applicable, the rule of average applies.

(4) Interest is computed from the mid-point of each full period of service included in the computation. The interest accrues annual on the outstanding portion beginning on the second anniversary of the employee's or Member's beginning date of coverage under FERS, and is compounded annually, until the portion is deposited. Interest is charged to the date of deposit. No interest will be charged if the deposit is completed before the end of the year after interest begins. For example, if an employee becomes subject to FERS on March 1, 1988, interest begins to accrue on March 1, 1990; however, no interest would be included in the deposit due if the deposit is completed by February 28, 1991.

(c) *Processing deposit applications and payments.* (1) The agency, Clerk of the House of Representatives, or Secretary of the Senate will have the employee or Member—

(i) Complete an application to make deposit;

(ii) Provided a copy of his or her DD Form 214 or its equivalent to verify the period(s) of service; and

(iii) Provide copies of all official military pay documents, as identified in instructions issued by OPM, which show the exact basic pay he or she received for full period of service; or, if such evidence is not available, obtain a statement of estimated earnings from the appropriate branch of the military service and submit the statement.

(2) Upon receipt of the application, the DD Form 214, and either the evidence of exact basic pay or the statement of estimated earnings, the agency, Clerk of the House of Representatives, or Secretary of the Senate will establish a deposit account showing—

(i) The total amount due, including interest, if any;

(ii) A payment schedule (unless deposit is made in a lump sum); and

(iii) The date and amount of each payment.

(3) Deposits may be made in a single lump sum or in installments. The agency, Clerk of the House of Representatives, and Secretary of the Senate are not required to accept installment payments in amounts less than $50.

(4) Payments received by the employing agency, the Clerk of the House of Representatives, or the Secretary of the Senate will be remitted to OPM for deposit to the Fund in accordance with payroll office instructions issued by OPM.

(d) *Distinct periods of service.* A deposit is not considered to have been made for any distinct period of service unless the total amount due for the period is paid in full. A ''distinct period'' for this purpose is the total years, months, and days from the date of entry on active duty (or from January

1, 1957, if later) to the date of final discharge for enlisted military personnel, or to the date of final release from active duty for officers and reservists. A ''distinct period'' also includes consecutive periods of service where there is no break in service, but does not include any lost time.

**§ 842.308 Refunds of deductions and service credit deposits made before becoming subject to FERS.**

(a) An employee or Member who, while currently employed, is eligible under 5 U.S.C. 8342(a) for a refund of deductions or deposits (relating to civilian service performed before becoming subject to FERS and totaling less than 5 years, not counting service after 1983 that was covered simultaneously by both CSRS and social security) that were previously made for a period of service performed before becoming subject to FERS is eligible for a refund, upon proper application in a form prescribed by OPM. The amount of this refund is the difference between—

(1) The amount of deductions and deposits to his or her credit for such service, plus any interest computed in accordance with 5 U.S.C. 8331(8): and

(2) The amount of the deposit required for such service under § 842.305.

(b) A former employee or Member who is eligible under 5 U.S.C. 8342(a) for a refund of deductions or deposits covering civilian service of the types described in paragraph (a) of this section is eligible for a refund, upon proper application in a form prescribed by OPM. The individual may irrevocably elect a refund, with resepct to this service, of either—

(1) The amount provided under paragraph (a) of this section; or

(2) The full amount of deductions and deposits to his or her credit for such service, plus any interest computed in accordance with 5 U.S.C. 8331(8). If the full amount of deductions and deposits is elected by the former employee or Member, no future deposit for the service may be made.

(c) An employee or Member, who, before becoming subject to FERS, made a deposit for military service is eligible upon proper application in a form prescribed by OPM, while currently employed, for a refund of the amount deposited, excluding interest, to the extent that this amount exceeds the amount of the deposit required for such service under § 842.307.

(d) A former employee or Member who, before becoming subject to FERS, made a deposit for military service is eligible for a refund, upon proper application in a form prescribed by OPM. The former employee or Member may irrevocably elect to receive either—

(1) The amount provided under paragraph (c) of this section; or

(2) The full amount deposited and remaining to the individual's credit. If the full amount of the deposit is elected, no future deposit for the service may be made.

(e) If the current employing agency holds all necessary records pertaining to the amounts in question under paragraph (a) or (c) of this section, the current employing agency will pay the refund in accordance with OPM instructions. Otherwise, OPM will pay the refund.

**§ 842.309 Contract service.**

Contract service with the United States will only be included in the computation of, or used to establish title to, an annuity under chapter 84 of title 5, United States Code, if—

(a) The employing agency exercised an explicit statutory authority to appoint an individual into the civil service by contract; or

(b) The head of the agency which was party to the contract, based on a timely-filed application, in accordance with section 110 of Public Law 100–238, and the regulations promulgated by OPM pursuant to that statute, certifies that the agency intended that an individual be considered as having been appointed to a position in which (s)he would have been subject to subchapter III of chapter 83 of title 5, United States Code, and deposit has been paid in accordance with OPM's regulations.

[55 FR 53136, Dec. 27, 1990]

**§ 842.310 Service not creditable because of an election under part 847 of this chapter.**

Any FERS service which becomes creditable under a retirement system established for nonappropriated fund employees due to an election made

under part 847 of this chapter is not creditable for any purpose under FERS.

[61 FR 41721, Aug. 9, 1996]

## Subpart D—Computations

SOURCE: 52 FR 4475, Feb. 11, 1987, unless otherwise noted.

### § 842.401 Purpose.

This subpart regulates the basic annuity computation under the Federal Employees Retirement System (FERS).

### § 842.402 Definitions.

In this subpart—

*Full-time service* means service performed by an employee who has—

(1) An officially established recurring basic workweek consisting of 40 hours within the employee's administrative workweek (as established under § 610.111 of this chapter or similar authority);

(2) An officially established recurring basic work requirement of 80 hours per biweekly pay period (as established for employees with a flexible or compressed work schedule under 5 U.S.C. chapter 61, subchapter II, or similar authority);

(3) For a firefighter covered by 5 U.S.C. 5545b(b) who does not have a 40-hour basic workweek, a regular tour of duty averaging at least 106 hours per biweekly pay period; or

(4) A work schedule that is considered to be full-time by express provision of law, including a work schedule established for certain nurses under 38 U.S.C. 7456 or 7456A that is considered by law to be a full-time schedule for all purposes.

*Part-time service* means any actual service performed on a less than full-time basis, by an individual whose appointment describes a regularly scheduled tour of duty, and any period of time credited as nonpay status time under 5 U.S.C 8411(d), that follows a period of part-time service without any intervening period of actual service other than part-time service.

*Proration factor* means a fraction expressed as a percentage rounded to the nearest percent. The numerator is the sum of the number of hours the employee actually worked during part-time service; and the denominator is the sum of the number of hours that a full-time employee would be scheduled to work during the same period of service included in the numerator. If an employee has creditable service in addition to part-time service, such service must be included in the numerator and denominator of the fraction.

*Total service* means the full years and twelfth parts thereof of an employee's or Member's service creditable under subpart C of this part, excluding any fractional part of a month.

[52 FR 4475, Feb. 11, 1987, as amended at 52 FR 22436, June 12, 1987; 58 FR 43493, Aug. 17, 1993; 79 FR 46632, Aug. 8, 2014]

### § 842.403 Computation of basic annuity.

(a) Except as provided in paragraph (b) of this section and §§ 842.405 and 842.406, the annuity of an employee or Member is 1 percent of average pay multiplied by total service.

(b) The annuity of an employee is 1.1 percent of average pay multiplied by total service, provided the individual—

(1) Has completed 20 years of service; and

(2) At the time of separation on which entitlement to an annuity is based—

(i) Is at least age 62; and

(ii) Is not a customs and border protection officer, a Member, Congressional employee, military reserve technician, law enforcement officer, firefighter, nuclear materials courier, or air traffic controller.

[52 FR 4475, Feb. 11, 1987, as amended at 76 FR 42000, July 18, 2011]

### § 842.404 Reductions in basic annuity.

The annuity of an employee or Member retiring under § 842.204(a)(1) or § 842.212(b) is reduced by five-twelfths of 1 percent for each full month by which the commencing date of annuity precedes the 62nd birthday of the employee or Member, unless the individual—

(a) Has completed 30 years of service; or

(b)(1) Has completed 20 years of service; and

(2) Is at least age 60 on the commencing date of annuity; or

(c) Has completed 20 years of service as—

(1) An air traffic controller, except one separated by removal for cause on charges of misconduct or delinquency;

(2) A firefighter and/or law enforcement officer, except one separated by removal for cause on charges of misconduct of delinquency; or

(3) A Member, except one separated by resignation or expulsion.

### § 842.405 Air traffic controllers, firefighters, law enforcement officers, and nuclear materials couriers.

The annuity of an air traffic controller retiring under § 842.207 or a law enforcement officer, firefighter or nuclear materials courier retiring under § 842.208 is—

(a) One and seven-tenths percent of average pay multiplied by 20 years; plus

(b) One percent of average pay multiplied by the years of service exceeding 20 years.

[52 FR 4475, Feb. 11, 1987, as amended at 65 FR 2524, Jan. 18, 2000]

### § 842.406 Members of Congress and Congressional employees.

The annuity of an employee or Member who has had at least 5 years of service as a congressional employee, Member, or any combination thereof totaling 5 years is—

(a) One and seven-tenths percent of average pay multiplied by the total number of years of service as a Member and/or congressional employee not exceeding 20 years: plus

(b) One percent of average pay multiplied by the years of service other than that of a Member and/or congressional employee.

### § 842.407 Proration of annuity for part-time service.

The annuity of an employee whose service includes part-time service is computed in accordance with § 842.403, using the average pay based on the annual rate of basic pay for full-time service. This amount is then multiplied by the proration factor. The result is the annual rate of annuity before reductions for retirement before age 62, survivor benefits, or the reduction for an alternative form of annuity required by § 842.706.

[52 FR 22436, June 12, 1987]

## Subpart E—Annuity Supplement

SOURCE: 52 FR 4479, Feb. 11, 1987, unless otherwise noted.

### § 842.501 Purpose.

This subpart regulates the annuity supplement payable to eligible employees under sections 8421 and 8421(a) of title 5, United State Code.

### § 842.502 Definitions.

In this subpart—

*Age 62* means the day before an individual's sixty-second birthday.

*Annuity Supplement* means the monthly benefit described in § 842.504.

*Applicable exempt amount* and *earnings* have the same meanings as in section 203 of the Social Security Act.

*Excess earnings* means 50 percent of an individual's earnings which exceed the applicable exempt amount during a calendar year or, if less, an amount equal to the total annuity supplement paid to the individual in that year, but does not include earnings prior to an individual's attainment of the minimum retirement age.

*FERS* means chapter 84 of title 5, United States Code.

*Minimum retirement age* has the same meaning as in § 842.202.

*Test year* means the calendar year immediately before the one in which any reductions required by 5 U.S.C. 8421a and § 842.505 are applied.

### § 842.503 Eligibility for annuity supplement.

(a) Except as provided in paragraph (b) of this section, an employee or Member receiving an annuity under any of the following sections is entitled to receive an annuity supplement:

(1) Section 842.204(a)(1) if the employee or Member has completed at least 30 years of service;

(2) Section 842.204(a)(2) governing retirement at age 60 with 20 years of service;

(3) Section 842.205 governing retirement at age 50 with 20 years of service

or at any age during a major reorganization or reduction in force;

(4) Section 842.206 governing discontinued service retirement;

(5) Section 842.07 governing early retirement for air traffic controllers;

(6) Section 842.208 governing early retirement for law enforcement officers;

(7) Section 842.209 governing early retirement for Members of Congress;

(8) Section 842.210 governing early retirement for military reserve technicians; or

(9) Section 842.211 governing early retirement for members of the Senior Executive Service.

(b) An employee or Member who retires under any of the following sections before attaining the minimum retirement age is not entitled to receive an annuity supplement until he or she attains that age:

(1) Section 842.205;

(2) Section 842.206;

(3) Section 842.209; or

(4) Section 842.211, except that an individual entitled to an annuity under 5 U.S.C. 8414(a) for failure to be recertified as a senior executive shall be entitled to an annuity supplement without regard to the minimum retirement age.

(c) An employee or Member ceases to be entitled to an annuity supplement on the earlier of—

(1) The last day of the month in which the individual becomes age 62; or

(2) The last day of the month before the first month for which the individual would, upon proper application, be entitled to social security benefits.

[52 FR 4479, Feb. 11, 1987, as amended at 56 FR 173, Jan. 3, 1991]

### § 842.504 Amount of annuity supplement.

(a) Subject to paragraph (b) of this section, an annuity supplement is an amount equal to the old-age insurance benefit payable under title II of the Social Security Act, multiplied by a fraction—

(1) The numerator of which is the annuitant's total service creditable under FERS, excluding military service not performed during an absence of leave without pay from civilian service, rounded to the nearest whole number of years not exceeding 40 years; and

(2) The denominator of which is 40.

(b)(1) The benefit referred to in paragraph (a) of this section is computed—

(i) As if the annuitant were age 62 and fully insured on January 1 of the year the annuity supplement commences;

(ii) Without regard to the Social Security earnings test (section 203 of the Social Security Act);

(iii) Without regard to the Social Security windfall elimination provisions (sections 215(a)(7) and 215(d)(5) of the Social Security Act); and

(iv) Using the actuarial reduction (section 202(q) of the Social Security Act) prescribed in the following table:

| Year of Birth | Reduction (percent) |
|---|---|
| 1937 and before | 20 |
| 1938 | 20⅚ |
| 1939 | 21⅔ |
| 1940 | 22½ |
| 1941 | 23⅓ |
| 1942 | 24⅙ |
| 1943–54 | 25 |
| 1955 | 25⅚ |
| 1956 | 26⅔ |
| 1957 | 27½ |
| 1958 | 28⅓ |
| 1959 | 29⅙ |
| 1960 and later | 30 |

(2) In computing the primary insurance amount—

(i) The number of elapsed years used to compute the number of benefit computation years does not include the years beginning with the year in which the annuity supplement commences;

(ii) For an employee or Member who retires under §§ 842.205, 842.206, 842.209, or 842.211 before reaching the minimum retirement age, wages in calendar years beginning after the date of separation on which the retirement is based, are deemed to be zero.

(iii) Only basic pay for full calendar years of service creditable under FERS is taken into account in computing the retiree's wages for a benefit computation year;

(iv) For a benefit computation year after age 21 during which the retiree did not perform a full calendar year of service creditable under FERS the retiree's wages are deemed to equal the product of—

(A) The National Average Wage Index (as determined by the Commissioner of the Social Security Administration)

corresponding to that year, multiplied by

(B) A fraction—

(*1*) The numerator of which is the retiree's basic pay for his or her first full year of service creditable under FERS; and

(*2*) The denominator of which is the National Average Wage Index (as determined by the Commissioner of the Social Security Administration) corresponding to the retiree's first full year of service creditable under FERS.

[52 FR 4479, Feb. 11, 1987, as amended at 69 FR 69806, Dec. 1, 2004]

### § 842.505 Reduction in annuity supplement because of excess earnings.

(a)(1) Except as provided in paragraphs (a)(2) and (b) of this section, the annuity supplement payable under § 842.504 is reduced by excess earnings in the test year, divided by twelve.

(2) Any annuity supplement payable during the year in which an individual loses entitlement to the annuity supplement by reason of § 842.503(c) is reduced by excess earnings in the test year divided by the number of months for which the annuity supplement is payable.

(b) Any reduction in the annuity supplement during a month because of excess earnings may not exceed the amount of annuity supplement payable during that month.

(c) Earnings and estimated earnings for each test year will be furnished by retirees in a form prescribed by OPM.

(d) Failure to furnish earnings and estimated earnings in the form or at the times prescribed by OPM is cause to suspend payment of the supplement until the annuitant establishes to the satisfaction of OPM that he/she continues to be eligible for the supplement.

(e) The reductions described in paragraphs (a) and (b) of this section are not subject to the due process procedures described in 5 U.S.C. 8461(e).

## Subpart F—Survivor Elections

SOURCE: 52 FR 2061, Jan. 16, 1987, unless otherwise noted.

### § 842.601 Purpose.

This subpart explains the survivor annuity elections available under FERS for retirees, and retiring employees and Members, and the actions that they must take to provide these survivor annuities.

### § 842.602 Definitions.

In this subpart—

*Current spouse* means a living person who is married to the employee, Member, or retiree at the time of the employee's, Member's, or retiree's death.

*Current spouse annuity* means a recurring benefit under FERS that is payable (after the employee's, Member's or retiree's death) to a current spouse who meets the requirements of § 843.303 of this chapter.

*Deposit* means a deposit required to provide a survivor benefit. *Deposit,* as used in this subpart, does not include a service credit deposit or redeposit.

*FERS* means chapter 84 of title 5, United States Code.

*First regular monthly payment* means the first annuity check payable on a recurring basis (other than an estimated payment or an adjustment check) after OPM has initially adjudicated the regular rate of annuity payable under FERS and has paid the annuity accrued since the time of retirement. The *first regular monthly payment* is generally preceded by estimated payments before the claim can be adjudicated and by an adjustment check (including the difference between the estimated rate and the initially adjudicated rate).

*Former spouse* means a living person who was married for at least 9 months to an employee, Member, or retiree who performed at least 18 months of creditable service under FERS. The ''former spouse's'' marriage to the employee must have been terminated prior to the death of the employee, Member, or retiree.

*Former spouse annuity* means a recurring benefit under FERS that is payable to a former spouse after the employee's, Member's, or retiree's death.

*Fully reduced annuity* means the recurring payments under FERS received by a retiree who has elected the maximum reduction in his or her annuity to provide a current spouse annuity

and/or a former spouse annuity or annuities.

*Insurable interest rate* means the recurring payments under FERS to a retiree who has elected a reduction in annuity to provide a survivor annuity to a person with an insurable interest in the retiree.

*Marriage* has the same meaning as in § 843.102 of this chapter.

*Member* means a Member of Congress.

*Net annuity* means the net annuity as defined in § 838.103 of this chapter.

*One-half reduced annuity* means the recurring payments under FERS received by a retiree who has elected one-half of the full reduction in his or her annuity to provide a partial current spouse annuity or a partial former spouse annuity or annuities.

*Present value factor* means the amount of money (earning interest at an assumed rate) required at the time of retirement to fund an annuity that starts out at the rate of $1 a month and is payable in monthly installments for the annuitant's lifetime based on mortality rates for non-disability annuitants under the Civil Service Retirement System; and increases each year at an assumed rate of inflation. Interest, mortality, and inflation rates used in computing the present value are those used by the Board of Actuaries of the Civil Service Retirement System for valuation of the System, based on dynamic assumptions. The present value factors are unisex factors obtained by averaging six distinct present value factors, weighted by the total dollar value of annuities typically paid to new retirees at each age.

*Qualifying court order* means a court order that awards a former spouse annuity and that satisfies the requirements of section 8445 of title 5, United States Code, for awarding a former spouse annuity.

*Retiree* means a former employee or Member who is receiving recurring payments under FERS based on service by the employee or Member. ''Retiree,'' as used in this subpart, does not include a current spouse, former spouse, child, or person with an insurable interest receiving a survivor annuity.

*Self-only annuity* means the recurring unreduced payments under FERS to a retiree with no survivor annuity payable to anyone.

*Time of retirement* means the effective commencing date for retired employee's or Member's annuity. An employee or Member is unmarried at the time of retirement for all purposes under this subpart only if the employee or Member was unmarried on the date that the annuity begins to accrue.

[52 FR 2061, Jan. 16, 1987, as amended at 56 FR 65419, Dec. 17, 1991; 57 FR 33598, July 29, 1992; 57 FR 54678, Nov. 20, 1992; 58 FR 52883, Oct. 13, 1993]

### § 842.603 Election at time of retirement of a fully reduced annuity to provide a current spouse annuity.

(a) A married employee or Member retiring under FERS will receive a fully reduced annuity to provide a current spouse annuity unless—

(1) The employee or Member, with the consent of the current spouse, elects a self-only annuity, a one-half reduced annuity to provide a current spouse annuity, or a fully reduced annuity or a one-half reduced annuity to provide a former spouse annuity, in accordance with § 842.604 or § 842.606; or

(2) The employee or Member elects a self-only annuity or a fully reduced annuity or a one-half reduced annuity to provide a former spouse annuity, and current spousal consent is waived in accordance with § 842.607.

(b) Qualifying court orders that award former spouse annuities prevent payment of current spouse annuities to the extent necessary to comply with the court order and § 842.613.

(c) The amount of the reduction to provide a current spouse annuity under this section is 10 percent of the retiree's annuity.

[52 FR 2061, Jan. 16, 1987, as amended at 57 FR 54678, Nov. 20, 1992]

### § 842.604 Election at time of retirement of a fully reduced annuity or a one-half reduced annuity to provide a former spouse annuity.

(a) An unmarried employee or Member retiring under FERS may elect a fully reduced annuity or a one-half reduced annuity to provide a former spouse annuity or annuities.

(b) A married employee or Member retiring under FERS may elect a fully

reduced annuity or a one-half reduced annuity to provide a former spouse annuity or annuities instead of a fully reduced annuity to provide a current spouse annuity, if the current spouse consents to the election in accordance with § 842.606 or spousal consent is waived in accordance with § 842.607.

(c) An election under paragraph (a) or (b) of this section is void to the extent that it—

(1) Conflicts with a qualifying court order; or

(2) Would cause the total of current spouse annuities and former spouse annuities payable based on the employee's or Member's service to exceed the maximum amount of survivor annuity that the employee or Member is entitled to provide under § 842.613.

(d) Any reduction in an annuity to provide a former spouse annuity will terminate on the first day of the month after the former spouse remarries before age 55 or dies, or the former spouse's eligibility for a former spouse annuity terminates under the terms of a qualifying court order, unless—

(1) The retiree elects, within 2 years after the former spouse's death or remarriage, to continue the reduction to provide a former spouse annuity for another former spouse, or to provide a current spouse annuity; or

(2) A qualifying court order requires the retiree to provide another former spouse annuity.

(e) Except as provided in § 842.614, the amount of the reduction to provide a former spouse annuity equals—

(1) Ten percent of the employee's or Member's annuity if the employee or Member elects a fully reduced annuity; or

(2) Five percent of the employee's or Member's annuity if the employee or Member elects a one-half reduced annuity.

[52 FR 2061, Jan. 16, 1987, as amended at 57 FR 54678, Nov. 20, 1992]

### § 842.605 Election of insurable interest rate.

(a) At the time of retirement, an employee or Member in good health and who is applying for a non-disability annuity may elect an insurable interest rate. An election under this section does not exempt a married employee or Member from the provisions of § 842.603(a).

(b) An insurable interest rate may be elected by an employee or Member electing a fully reduced annuity or a one-half reduced annuity to provide a current spouse annuity or a former spouse annuity or annuities.

(c)(1) In the case of a married employee or Member, an election under this section may not be made on behalf of a current spouse unless that current spouse has consented to an election not to provide a current spouse annuity in accordance with § 842.603(a)(1).

(2) A consent (to an election not to provide a current spouse annuity in accordance with § 842.603(a)(1)) required by paragraph (c)(1) of this section to be eligible to be the beneficiary of an insurable interest rate is cancelled if—

(i) The retiree fails to qualify to receive the insurable interest rate; or

(ii) The retiree changes his or her election to receive an insurable interest rate under § 842.608; or

(iii) The retiree elects a fully reduced annuity to provide a current spouse annuity under § 842.610.

(3) An election of a one-half reduced annuity under § 842.610(b) to provide a current spouse annuity for a current spouse who is the beneficiary of an insurable interest rate is void unless the spouse consents to the election.

(4) If a retiree who had elected an insurable interest rate to benefit a current spouse elects a fully reduced annuity to provide a current spouse annuity (or with the consent of the spouse, a one-half reduced annuity to provide a current spouse annuity) under § 842.610(b), the election of the insurable interest rate is cancelled.

(5)(i) A retiring employee or Member may not elect a fully reduced annuity or a one-half reduced annuity to provide a former spouse annuity and an insurable interest rate to benefit the same former spouse.

(ii) If a retiring employee or Member who is required by court order to provide a former spouse annuity elects an insurable interest rate to benefit the former spouse with the court-ordered entitlement—

(A) If the benefit based on the election is greater than or equal to the benefit based on the court order, the

election of the insurable interest rate will satisfy the requirements of the court order as long as the insurable interest rate continues.

(B) If the benefit based on the election is less than the benefit based on the court order, the election of the insurable interest rate is void.

(iii) An election under § 842.611 of a fully reduced annuity or a one-half reduced annuity to benefit a former spouse by a retiree who elected and continues to receive an insurable interest rate to benefit that former spouse is void.

(d) To elect an insurable interest rate, an employee or Member must indicate the intention to make the election on the application for retirement and must submit a certificate of good health in a form prescribed by OPM.

(e) An insurable interest rate may be elected to provide a survivor benefit only for a person who has an insurable interest in the retiring employee or Member.

(1) An insurable interest is presumed to exist with—

(i) The current spouse;

(ii) The same-sex domestic partner;

(iii) A blood or adopted relative closer than first cousins;

(iv) A former spouse;

(v) A former same-sex domestic partner;

(vi) A person to whom the employee or Member is engaged to be married, or a person with whom the employee or Member has agreed to enter into a same-sex domestic partnership;

(vii) A person with whom the employee or Member is living in a relationship that would constitute a common-law marriage in jurisdictions recognizing common-law marriages;

(2) For purposes of this section, the term ''same-sex domestic partner'' means a person in a domestic partnership with an employee or annuitant of the same sex, and the term ''domestic partnership'' is defined as a committed relationship between two adults, of the same sex, in which the partners—

(i) Are each other's sole domestic partner and intend to remain so indefinitely;

(ii) Maintain a common residence, and intend to continue to do so (or would maintain a common residence but for an assignment abroad or other employment-related, financial, or similar obstacle);

(iii) Are at least 18 years of age and mentally competent to consent to contract;

(iv) Share responsibility for a significant measure of each other's financial obligations;

(v) Are not married or joined in a civil union to anyone else;

(vi) Are not the domestic partner of anyone else;

(vii) Are not related in a way that, if they were of opposite sex, would prohibit legal marriage in the U.S. jurisdiction in which the domestic partnership was formed; and

(viii) Are willing to certify, if required by the agency, that they understand that willful falsification of any documentation required to establish that an individual is in a domestic partnership may lead to disciplinary action and the recovery of the cost of benefits received related to such falsification, as well as constitute a criminal violation under 18 U.S.C. 1001, and that the method for securing such certification, if required, shall be determined by the agency.

(3) When an insurable interest is not presumed, the employee or Member must submit affidavits from one or more persons with personal knowledge of the named beneficiary's having an insurable interest in the employee or Member. The affidavits must set forth the relationship, if any, between the named beneficiary and the employee or Member, the extent to which the named beneficiary is dependent on the employee or Member, and the reasons why the named beneficiary might reasonably expect to derive financial benefit from the continued life of the employee or Member.

(4) The employee or Member may be required to submit documentary evidence to establish the named beneficiary's date of birth.

(f) OPM will notify the employee or Member of initial monthly annuity rates with and without the election of

an insurable interest rate and the initial rate payable to the named beneficiary. No election of an insurable interest rate is effective unless the employee or Member confirms the election in writing or dies no later than 60 days after the date of the notice described in this paragraph.

(g)(1) When an employee or Member elects both an insurable interest rate, and a fully reduced annuity or a one-half reduced annuity, the combined reduction may exceed the maximum 40 percent reduction in the retired employee's or Member's annuity permitted under section 8420 of title 5, United States Code, applicable to insurable interest annuities.

(2) The additional reduction to provide a current spouse annuity or a former spouse annuity is not considered in determining the rate of annuity payable to a beneficiary of an insurable interest election.

(h)(1) Except as provided in § 842.604(d), if a retiree who is receiving a fully reduced annuity or a one-half reduced annuity to provide a former spouse annuity has also elected an insurable interest rate to benefit a current spouse and if the eligible former spouse remarries before age 55, dies, or loses eligibility under the terms of the court order, and no other former spouse is entitled to a survivor annuity based on an election made in accordance with § 842.611 or a qualifying court order, the retiree may elect, within 2 years after the former spouse's remarriage, death, or loss of eligibility under the terms of the court order, to convert the insurable interest rate to a fully reduced annuity to provide a current spouse annuity, effective on the first day of the month following the event causing the former spouse to lose eligibility.

(2) An election under paragraph (h)(1) of this section cancels any consent not to receive a current spouse annuity required by paragraph (c) of this section for the current spouse to be eligible for an annuity under this section.

(3) When a former spouse receiving an annuity under section 8445 of title 5, United States Code, loses eligibility to that annuity, a beneficiary of an insurable interest rate who was the current spouse at both the time of the retiree's retirement and death may, within 2 years after the former spouse's death, remarriage, or loss of eligibility under the terms of the court order, elect to receive a current spouse annuity instead of the annuity he or she had been receiving.

The election is effective on the first day of the month following the event causing the former spouse to lose eligibility.

(i) Upon the death of the current spouse, a retiree whose annuity is reduced to provide both a current spouse annuity and an insurable interest benefit for a former spouse is not permitted to convert the insurable interest rate to a reduced annuity to provide a former spouse annuity.

(j) An employee or Member may name only one natural person as the named beneficiary of an insurable interest rate. OPM will not accept the designation of contingent beneficiaries and such a designation is void.

(k)(1) An election under this section is prospectively voided by an election of a fully reduced annuity to provide a current spouse annuity under § 842.612 that would benefit the same person.

(2)(i) If the current spouse is not the beneficiary of the election under this section, a retiree may prospectively void an election under this section at the time the retiree elects a reduced annuity to provide a current spouse annuity under § 842.612.

(ii) A retiree's election to void an election under paragraph (k)(2)(i) of this section must be filed at the same time as the election under § 842.612.

(3) An annuity reduction under this section terminates on the first day of the month after the beneficiary of the insurable interest rate dies.

[52 FR 2061, Jan. 16, 1987, as amended at 57 FR 54679, Nov. 20, 1992; 77 FR 42912, July 20, 2012]

### § 842.606 Election of a self-only annuity or a one-half reduced annuity by married employees and Members.

(a) A married employee may not elect a self-only annuity or a one-half reduced annuity to provide a current spouse annuity without the consent of the current spouse or a waiver of spousal consent by OPM in accordance with § 842.607.

(b) Evidence of spousal consent or a request for waiver of spousal consent must be filed on a form prescribed by OPM.

(c) The spousal consent form will require that a notary public or other official authorized to administer oaths certify that the current spouse presented identification, gave consent, signed or marked the form, and acknowledged that the consent was given freely in the notary's or official's presence.

(d) The form described in paragraph (c) of this section may be executed before a notary public, an official authorized by the law of the jurisdiction where executed to administer oaths, or an OPM employee designated for that purpose by the Associate Director.

(e) A request for waiver of the spousal consent requirement must be by letter and fully state the basis for the request.

(f) The amount of the reduction in the retiree's annuity for a one-half reduced annuity to provide a current spouse annuity is 5 percent of the retiree's annuity.

[52 FR 2061, Jan. 16, 1987, as amended at 57 FR 54679, Nov. 20, 1992]

### § 842.607 Waiver of spousal consent requirement.

(a) The spousal consent requirement will be waived upon a showing that the spouse's whereabouts cannot be determined. A request for waiver on this basis must be accompanied by—

(1) A judicial determination that the spouse's whereabouts cannot be determined; or

(2)(i) Affidavits by the employee or Member and two other persons, at least one of whom is not related to the employee or Member, attesting to the inability to locate the current spouse and stating the efforts made to locate the spouse; and

(ii) Documentary corroboration such as tax returns filed separately or newspaper stories about the spouse's disappearance.

(b) The spousal consent requirement will be waived based on exceptional circumstances if the employee or Member presents a judicial determination finding that—

(1) The case before the court involves a Federal employee who is in the process of retiring from Federal employment and the spouse of that employee;

(2) The nonemployee spouse has been given notice and an opportunity to be heard concerning this order;

(3) The court has considered sections 8416(a) of title 5, United States Code, and this section as they relate to waiver of the spousal consent requirement for a married Federal employee to elect an annuity without a reduction to provide a survivor benefit to a spouse at retirement; and

(4) The court finds that exceptional circumstances exist justifying waiver of the nonemployee spouse's consent.

[52 FR 2061, Jan. 16, 1987, as amended at 57 FR 54679, Nov. 20, 1992]

### § 842.608 Changes of election before final adjudication.

An employee or Member may name a new survivor or change his or her election of type of annuity if, not later than 30 days after the date of the first regular monthly payment, the named survivor dies or the employee or Member files with OPM a new written election. All required evidence of spousal consent or justification for waiver of spousal consent, if applicable, must accompany any new written election under this section.

[56 FR 65419, Dec. 17, 1991]

### § 842.609 [Reserved]

### § 842.610 Changes of election after final adjudication.

(a) Except as provided in § 842.611, § 842.612, or paragraph (b) of this section, an employee or Member may not revoke or change the election or name another survivor later than 30 days after the date of the first regular monthly payment.

(b)(1) Except as provided in § 842.605 and paragraphs (b)(2) and (b)(3) of this section, a retiree who was married at the time of retirement and has elected a self-only annuity, a one-half reduced annuity to provide a current spouse annuity, a fully reduced annuity or a one-half reduced annuity to provide a former spouse annuity, or an insurable interest rate may elect, no later than 18 months after the time of retirement,

an annuity reduction or an increased annuity reduction to provide a current spouse annuity.

(2) A current spouse annuity based on an election under paragraph (b)(1) of this section cannot be paid if it will, when combined with any former spouse annuity or annuities that are required by court order, exceed the maximum survivor annuity permitted under § 842.613.

(3) To make an election under paragraph (b)(1) of this section, the retiree must pay, in full no later than 18 months after the time of retirement, a deposit equal to the sum of the monthly differences between the annuity paid to the retiree and the annuity that would have been paid if the additional annuity reduction elected under paragraph (b)(1) of this section had been in effect since the time of retirement, plus—

(i) If the election under paragraph (b)(1) of this section changes the annuity from a self only annuity to a fully reduced annuity, 24.5 percent of the retiree's annual annuity, plus 6 percent interest on both; or

(ii) If the election under paragraph (b)(1) of this section changes the annuity from a self only annuity to a one-half reduced annuity or from a one-half reduced annuity to a fully reduced annuity, 12.25 percent of the retiree's annual annuity, plus 6 percent interest on both.

(4) If a retiree makes an election under paragraph (b)(1) of this section and is prevented from paying the deposit within the 18-month time limit because OPM did not send him or her a notice of the amount of the deposit at least 30 days before the time limit expires, the time limit for making the deposit will be extended 30 days after OPM sends the notice of the amount of the deposit.

(5) An election under paragraph (b)(1) of this section cancels any spousal consent under § 842.603.

(6) An election under paragraph (b)(1) of this section is void unless filed with OPM before the retiree dies.

(7) If a retiree who had elected a fully reduced annuity or a one-half reduced annuity to provide a former spouse annuity (or annuities) makes an election under paragraph (b)(1) of this section which would cause the combined current spouse annuity and former spouse annuity (or annuities) to exceed the maximum allowed under § 842.613, the former spouse annuity (or annuities) must be reduced to not exceed the maximum allowable under § 842.613.

[52 FR 2061, Jan. 16, 1987, as amended at 56 FR 65419, Dec. 17, 1991; 57 FR 54680, Nov. 20, 1992]

### § 842.611 Post-retirement election of a fully reduced annuity or one-half reduced annuity to provide a former spouse annuity.

(a) Except as provided in paragraphs (b) and (c) of this section, when a retiree's marriage terminates after retirement, the retiree may elect in writing a fully reduced annuity or a one-half reduced annuity to provide a former spouse annuity. Such an election must be filed with OPM within 2 years after the retiree's marriage to the former spouse terminates.

(b)(1) Qualifying court orders prevent payment of former spouse annuities to the extent necessary to comply with the court order and § 842.613.

(2) A retiree who elects a fully reduced annuity or a one-half reduced annuity to provide a former spouse annuity may not elect to provide a former spouse annuity in an amount that either—

(i) Is smaller than the amount required by a qualifying court order; or

(ii) Would cause the sum of all current and former spouse annuities based on a retiree's elections under §§ 842.603, 842.604, 842.612 and this section to exceed the maximum allowed under § 842.613.

(3) An election under this section is void—

(i) In the case of a married retiree, if the current spouse does not consent to the election on a form as described in § 842.606(c) and spousal consent is not waived by OPM in accordance with § 842.607; or

(ii) To the extent that it provides a former spouse annuity for the spouse who was married to the retiree at the time of retirement in an amount that is inconsistent with any joint designation or waiver made at the time of retirement under § 842.603(a)(1) or (a)(2).

(c) An election under this section is not permitted unless the retiree agrees to deposit the amount equal to the difference between the amount of annuity actually paid to the retiree and the amount of annuity that would have been paid if the reduction elected under paragraph (a) of this section had been in effect continuously since the time of retirement, plus 6 percent annual interest (computed under § 841.107 of this chapter) from the date when each difference occurred.

(d) Any reduction in an annuity to provide a former spouse annuity will terminate on the first day of the month after the former spouse remarries before age 55 or dies, or the former spouse's eligibility for a former spouse annuity terminates under the terms of a qualifying court order, unless—

(1) The retiree elects, within 2 years after the event causing the former spouse to lose eligibility, to continue the reduction to provide or increase a former spouse annuity for another former spouse, or to provide or increase a current spouse annuity; or

(2) A qualifying court order requires the retiree to provide another former spouse annuity.

(e) The amount of the reduction to provide one or more former spouse annuities or a combination of a current spouse annuity and one or more former spouse annuities under this section equals—

(1) Ten percent of the employee's or Member's annuity if the employee or Member elects a fully reduced annuity; or

(2) Five percent of the employee's or Member's annuity if the employee or Member elects a one-half reduced annuity.

[52 FR 2061, Jan. 16, 1987, as amended at 57 FR 54680, Nov. 20, 1992]

### § 842.612 Post-retirement election of a fully reduced annuity or one-half reduced annuity to provide a current spouse annuity.

(a) Except as provided in paragraph (c) of this section, a retiree who was unmarried at the time of retirement may elect, within 2 years after a post-retirement marriage, a fully reduced annuity or a one-half reduced annuity to provide a current spouse annuity.

(b) Except as provided in paragraph (c) of this section, a retiree who was married at the time of retirement may elect, within 2 years after a post-retirement marriage—

(1) A fully reduced annuity or a one-half reduced annuity to provide a current spouse annuity if—

(i) The retiree was awarded a fully reduced annuity under § 842.603 at the time of retirement; or

(ii) The election at the time of retirement was made with a waiver of spousal consent in accordance with § 842.607; or

(iii) The marriage at the time of retirement was to a person other than the spouse who would receive a current spouse annuity based on the post-retirement election; or

(2) A one-half reduced annuity to provide a current spouse annuity if—

(i) The retiree elected a one-half reduced annuity under § 842.606 at the time of retirement;

(ii) The election at the time of retirement was made with spousal consent in accordance with § 842.606; and

(iii) The marriage at the time of retirement was to the same person who would receive a current spouse annuity based on the post-retirement election.

(c)(1) Qualifying court orders prevent payment of current spouse annuities to the extent necessary to comply with the court order and § 842.613.

(2) If an election under this section causes the total of all current and former spouse annuities provided by a qualifying court order or elected under § 842.604, § 842.611, or this section to exceed the maximum survivor annuity permitted under § 842.613, OPM will accept the election but will pay the portion in excess of the maximum only when permitted by § 842.613(c).

(d)(1) Except as provided in paragraph (d)(2) or (e)(3) of this section, a retiree making an election under this section must deposit an amount equal to the difference between the amount of annuity actually paid to the retiree and the amount of annuity that would have been paid if the reduction elected under paragraphs (a) or (b) of this section had been in effect continuously since the time of retirement, plus 6 percent annual interest, computed

under § 841.606 of this chapter, from the date when each difference occurred.

(2) An election under this section may be made without deposit, if that election prospectively voids an election of an insurable interest annuity.

(e)(1) An election under this section is irrevocable when received by OPM.

(2) An election under this section is effective when the marriage duration requirements of § 843.303 of this chapter are satisfied.

(3) If an election under paragraph (a) or (b) of this section does not become effective, no deposit under paragraph (d) of this section is required.

(4) If payment of the deposit under paragraph (d) of this section is not required because the election never became effective and if some or all of the deposit has been paid, the amount paid will be returned to the retiree, or, if the retiree has died, to the person who would be entitled to any lump-sum benefits under the order of precedence in section 8424 of title 5, United States Code.

(f) Any reduction in an annuity to provide a current spouse annuity will terminate effective on the first day of the month after the marriage to the current spouse ends, unless—

(1) The retiree elects, within 2 years after a divorce terminates the marriage, to continue the reduction to provide for a former spouse annuity; or

(2) A qualifying court order requires the retiree to provide a former spouse annuity.

(g) The amount of the reduction to provide a current spouse annuity under this section equals—

(1) Ten percent of the employee's or Member's annuity if the employee or Member elects a fully reduced annuity; or

(2) Five percent of the employee's or Member's annuity if the employee or Member elects a one-half reduced annuity.

(h) If a retiree who is receiving a reduced annuity to provide a former spouse annuity and who has remarried that former spouse (before the former spouse attained age 55) dies, the retiree will be deemed to have elected to continue the reduction to provide a current spouse annuity unless the retiree requests (or has requested) in writing that OPM terminate the reduction.

[57 FR 54680, Nov. 20, 1992, as amended at 60 FR 14202, Mar. 16, 1995]

### § 842.613 Division of a survivor annuity.

(a) The maximum combined total of all current and former spouse annuities (not including any benefits based on an election of an insurable interest rate) payable based on the service of a former employee or Member equals 50 percent of the rate of the self-only annuity that otherwise would have been paid to the employee, Member, or retiree.

(b) By using the elections available under this subpart or to comply with a court order under subpart I of part 841 of this chapter, a survivor annuity may be divided into a combination of former spouse annuities and a current spouse annuity so long as the aggregate total of the current and former spouse annuities does not exceed the maximum limitation in paragraph (a) of this section.

(c) Upon termination of former spouse annuity payments because of death or remarriage of the former spouse, or by operation of a court order, the current spouse will be entitled to a current spouse annuity or an increased current spouse annuity if—

(1) The employee or Member died while employed in a position covered under FERS; or

(2) The current spouse was married to the employee or Member continuously from the time of retirement and did not consent to an election not to provide a current spouse annuity; or

(3) The current spouse married a retiree after retirement and the retiree elected, under § 842.612, to provide a current spouse annuity for that spouse in the event that the former spouse annuity payments terminate.

### § 842.614 Computation of partial annuity reduction.

If a court order or the death of a current or former spouse results in providing less than the maximum permitted survivor reduction under § 842.613, the reduction in the employee's annuity will be 10 percent of the amount of the employee's annuity on

which the survivor benefits will be computed (called the ''base'').

**§ 842.615 Deposits required.**

(a) The deposits required to elect reduced annuities under §§ 842.610, 842.611, and 842.612 are not annuity overpayments and their collection is not subject to waiver.

(b) *Actuarial reduction in annuity of retirees who make post-retirement elections to provide a current spouse annuity or a former spouse annuity.* (1) The annuity reduction required by paragraph (b)(2) of this section applies to all retirees who are required to pay deposits under § 842.611 or § 842.612 and have not paid any portion of the deposit prior to October 1, 1993, or from annuity accruing before that date.

(2) Retirees described in paragraph (b)(1) of this section must have a permanent annuity reduction computed under paragraph (b)(4) of this section.

(3) A reduction under paragraph (b)(2) of this section commences on the same date as the annuity reduction under § 842.611 or § 842.612.

(4) The annuity reduction under paragraph (b)(2) of this section is equal to the lesser of—

(i) The amount of the deposit under § 842.611 or § 842.612 divided by the present value factor for the retiree's age on the commencing date of the reduction under paragraph (b)(3) of this section (plus any previous reduction(s) in the retiree's annuity required under paragraph (b)(2) or (c)(2) of this section); or

(ii) Twenty-five percent of the rate of the retiree's self-only annuity on the commencing date of the reduction (under paragraph (b)(3) of this section).

(5)(i) The reduction under paragraph (b)(2) or paragraph (c)(2) of this section terminates on the date that the retiree dies.

(ii) If payment of a retiree's annuity is suspended or terminated and later reinstated, or if a new annuity becomes payable, OPM will increase the amount of the original reduction computed under paragraph (b)(4) or paragraph (c)(4) of this section by any cost-of-living adjustments under section 8462 of title 5, United States Code, occurring between the commencing date of the original reduction and the commencing date of the reinstated or new annuity (but the adjusted reduction may not exceed 25 percent of the rate of the reinstated or new self-only annuity).

(c) *Post-retirement survivor election deposits that were partially paid before October 1, 1993.* (1) The annuity reduction required by paragraph (c)(2) of this section applies to all retirees who are required to pay deposits under § 842.611 or § 842.612 and have paid any portion (but not all) of the deposit prior to October 1, 1993, or from annuity accruing before that date.

(2) Retirees described in paragraph (c)(1) of this section must have a permanent annuity reduction computed under paragraph (c)(4) of this section.

(3) A reduction under paragraph (c)(2) of this section commences on October 1, 1993.

(4) The annuity reduction under paragraph (c)(2) of this section is equal to the lesser of—

(i) The amount of the principal balance remaining to be paid on October 1, 1993, divided by the present value factor for the retiree's age on October 1, 1993; or

(ii) Twenty-five percent of the rate of the retiree's self-only annuity on October 1, 1993.

(5)(i) The reduction under paragraph (c)(2) of this section terminates on the date that the retiree dies.

(ii) If payment of a retiree's annuity is suspended or terminated and later reinstated, or if a new annuity becomes payable, OPM will increase the amount of the original reduction computed under paragraph (b)(4) or paragraph (c)(4) of this section by any cost-of-living adjustments under section 8462 of title 5, United States Code, occurring between the commencing date of the original reduction and the commencing date of the reinstated or new annuity (but the adjusted reduction may not exceed 25 percent of the rate of the reinstated or new self-only annuity).

(d) For retirees who die before October 1, 1993, any unpaid portion of the deposit required under § 842.611 or § 842.612 will be collected from the survivor annuity (for which the election required the deposit) before OPM pays any survivor annuity.

[52 FR 2061, Jan. 16, 1987, as amended at 58 FR 52883, Oct. 13, 1993]

## Subpart G—Alternative Forms of Annuities

SOURCE: 52 FR 2067, Jan. 16, 1987, unless otherwise noted.

### § 842.701 Purpose.

This subpart explains the benefits available to employees and Members who elect alternative forms of annuity under section 8420a of title 5, United States Code.

### § 842.702 Definitions.

In this subpart—

*Alternative form of annuity* means the benefit elected under § 842.705.

*Current spouse annuity* has the same meaning as in § 842.602.

*Date of final adjudication* means the date 30 days after the date of the first regular monthly payment as defined in § 831.603.

*Former spouse annuity* has the same meaning as in § 842.602.

*Present value factor* represents the amount of money (earning interest at an assumed rate) required at the time of retirement to fund an annuity that (a) starts out at the rate of $1 a month and is payable in monthly installments for the annuitant's lifetime based on mortality rates for non-disability annuitants; and (b) increases each year at an assumed rate of inflation. Interest, mortality, and inflation rates used in computing the present value are those used by the Board of Actuaries for valuation of the System, based on dynamic assumptions. The present value factors are unisex factors obtained by averaging sex-distinct present value factors, weighted by the total dollar value of annuities typically paid to new retirees at each age.

*Time of retirement* has the same meaning as in § 842.602.

[52 FR 2067, Jan. 16, 1987, as amended at 53 FR 11635, Apr. 8, 1988]

### § 842.703 Eligibility.

(a) Except as provided in paragraphs (b), (c), and (d) of this section, an employee or Member who retires under any provision of subchapter II of chapter 84 of title 5, United States Code, may elect an alternative form of annuity instead of any other benefits under the subchapter.

(b) An employee or Member who, at the time of retirement has a former spouse who is entitled to a portion of the employee's or Member's retirement benefits or a former spouse annuity under a court order acceptable for processing as defined by § 838.103 of this chapter or a qualifying court order as defined in § 838.1003 of this chapter may not elect an alternative form of annuity.

(c) An employee or Member who is married at the time of retirement may not elect an alternative form of annuity unless the employee's or Member's spouse specifically consents to the election. OPM may waive spousal consent only under the conditions prescribed by § 842.607.

(d)(1)(i) An individual whose annuity commences after December 1, 1990, and before October 1, 1994, may elect an alternative form of annuity only if that individual is—

(A) An employee or Member who meets the conditions and fulfills the requirements described in § 842.707(c) (2) and (3); or

(B) An employee who is separated involuntarily other than for cause on charges of misconduct or delinquency;

(ii) An individual whose annuity commences on or after October 1, 1994, may elect an alternative form of annuity only if that individual is an employee or Member who meets the conditions and fulfills the requirements described in § 842.707(c) (2) and (3).

(2) For the purpose of paragraph (d)(1)(i)(B) of this section, the term ''employee'' does not include—

(i) Members of Congress;

(ii) Individuals in positions in the Executive Schedule under sections 5312 through 5317 of title 5, United States Code;

(iii) Presidential appointees under section 105(a)(1), 106(a)(1), or 107 (a)(1) or (b)(1) of title 3, United States Code, if the maximum basic pay for such positions is at or above the rate for Executive Schedule, level V;

(iv) Noncareer appointees in the Senior Executive Service or noncareer members of the Senior Foreign Service; and

(v) Any individual in a position that is excepted from the competitive service because of its confidential, policy-determining, policy-making, or policy-advocating character.

(3) Notwithstanding paragraph (d)(1) of this section, an employee whose annuity commences after December 1, 1990, and before December 2, 1991, may elect an alternative form of annuity if that individual—

(i)(A) Was ordered to active military duty (other than for training) before December 1, 1990, in connection with Operation Desert Shield; or

(B) Is an employee of the Department of Defense who is certified by the Secretary of Defense to have performed, after November 30, 1990, duties essential to support Operation Desert Shield, and the certification is submitted to OPM in a form prescribed by OPM; and

(ii) Would have been eligible, as of November 30, 1990, to elect an alternative form of annuity under paragraph (a) of this section.

[52 FR 2067, Jan. 16, 1987, as amended at 56 FR 6551, Feb. 19, 1991; 56 FR 43866, Sept. 5, 1991; 57 FR 33598, July 29, 1992; 60 FR 54587, Oct. 25, 1995]

### § 842.704 Election requirements.

(a) The election of an alternative form of annuity and evidence of spousal consent must be filed on a form prescribed by OPM within the time limit prescribed in paragraph (b)(2) of this section. The form will require that a notary public or other official authorized to administer oaths certify that the current spouse presented identification, gave consent to the specific election as executed by the retiree, signed or marked the form, and acknowledged that the consent was given freely in the notary's or official's presence.

(b) An election of the alternative form of annuity must be in writing and received by OPM on or before the date of final adjudication. After the date of final adjudication, an election of the alternative form of annuity is irrevocable.

(c) Except as provided in paragraph (d), an annuitant who dies before the time limit prescribed in paragraph (b)(2) of this section is deemed to have made an affirmative election under § 842.703(a) with a reduced annuity to provide a current spouse annuity, regardless of any election completed under § 842.606, and the lump-sum credit will be paid in accordance with the order of precedence described in section 8424 of title 5, United States Code.

(d) If an annuitant described in paragraph (c) has completed an election under § 842.604 (a) or (b)—

(1) The lump-sum credit will be paid in accordance with the order of precedence described in section 8424 of title 5, United States Code; and

(2) The election under § 842.604 (a) or (b) will be honored.

[53 FR 11635, Apr. 8, 1988, as amended at 56 FR 6552, Feb. 19, 1991; 60 FR 54587, Oct. 25, 1995]

### § 842.705 Alternative forms of annuities available.

(a) An employee or Member who is eligible to make an election under § 842.703 may elect to receive his or her lump-sum credit, excluding interest, plus an annuity computed in accordance with sections 8415 and 8421 of title 5, United States Code, for which they qualify (including any reduction for survivor benefits) and reduced under § 842.706.

(b) A retired employee or Member who elected an alternative form of annuity is subject to all provisions of subchapters II and IV of chapter 84 of title 5, United States Code, as would otherwise apply to a retired employee or Member who did not elect an alternative form of annuity. An individual who has elected an alternative form of annuity is not eligible to apply for disability annuity under subchapter V of such chapter.

[52 FR 2067, Jan. 16, 1987, as amended at 53 FR 11635, Apr. 8, 1988]

### § 842.706 Computation of alternative form of annuity.

(a) To compute the beginning rate of annuity payable to a retiree who elects an alternative form of annuity, OPM will first compute the monthly rate of annuity (and annuity supplement, if any), otherwise payable under subchapter II of chapter 84 of title 5, United States Code, including all reductions provided under the subchapter

other than those in section 8420a of that title. That monthly rate is then reduced by an amount equal to the retiree's lump-sum credit, excluding interest, divided by the applicable present value factor for the retiree's attained age (in full years) at the time of retirement. The reduced monthly rate is then rounded to the next lowest dollar and becomes the rate of annuity payable.

(b) OPM will publish a notice in the FEDERAL REGISTER announcing any proposed adjustments in present value factors at least 30 days before the effective date of the adjustments.

### § 842.707 Partial deferred payment of the lump-sum credit if annuity commences after January 3, 1988, and before October 1, 1989.

(a) Except as provided in paragraph (c) of this section, if the annuity of an employee or Member commences after January 3, 1988, and before October 1, 1989, the lump-sum credit payable under § 842.705 is payable to the individual, or his or her survivors, according to the following schedule:

(1) Sixty percent of the lump-sum credit is payable at the time of retirement, and

(2) Forty percent is payable, with interest determined under section 8334(e)(3) of title 5, United States Code, one year after the time of retirement.

(b) If an employee or Member whose annuity commences after January 3, 1988, and before October 1, 1989, dies before the time limit prescribed in § 842.704(b)(2), that individual is subject to § 842.704 (c) or (d), but the lump-sum credit will be paid in accordance with the schedule in paragraph (a) of this section.

(c) An annuitant is exempt from the deferred payment schedule under paragraph (a) of this section if the individual—

(1) Separates involuntarily, other than for cause on charges of delinquency or misconduct, or

(2) Has, at the time of retirement, a life-threatening affliction or other critical medical condition.

(3)(i) For the purpose of this section, *life-threatening affliction or other critical medical condition* means a medical condition so severe as to reasonably limit an individual's probable life expectancy to less than 2 years.

(ii) The existence of one of the following medical conditions is *prima facie* evidence of a life-threatening affliction or other critical medical condition:

(A) Metastatic and/or inoperable neoplasms.

(B) Aortic stenosis (severe).

(C) Class IV cardiac disease with congestive heart failure.

(D) Respiratory failure.

(E) Cor pulmonale with respiratory failure.

(F) Emphysema with respiratory failure.

(G) [Reserved]

(H) Severe cardiomyopathy—Class IV.

(I) Aplastic anemia.

(J) Uncontrolled hypertension with hypertensive encephalopathy.

(K) Cardiac aneurysm not amenable to surgical treatment.

(L) Agranulocytosis.

(M) Severe hepatic failure.

(N) Severe hypoxic brain damage.

(O) Severe portal hypertension with esophageal varices.

(P) AIDS (Active—Not AIDS Related Complex or only seropositivity).

(Q) Life-threatening infections (encephalitis, meningitis, rabies, etc.).

(R) Scleroderma with severe esophageal involvement.

(S) Amyotrophic lateral sclerosis (rapidly progressive).

(T) Hemiplegia with life threatening complications.

(U) Quadriplegia with life threatening complications.

(iii) Evidence of the existence of a life-threatening affliction or other critical medical condition must be certified by a physician and sent to OPM on or before the date the annuitant elects to receive an alternative form of annuity. For the purpose of this section, ''physician'' has the same meaning given that term in § 339.102 of this chapter.

(iv) If a medical condition other than those listed in paragraph (c)(3)(ii) of this section is claimed as a basis for exemption from the deferred payment schedule, OPM will review the physician's certification to determine whether the cited condition is life-threatening or critical.

(v) The cost of providing medical documentation under this paragraph rests with the employee or Member, unless OPM exercises its choice of physician.

[53 FR 11635, Apr. 8, 1988, as amended at 60 FR 54587, Oct. 25, 1995]

### § 842.708 Partial deferred payment of the lump-sum credit if annuity commences after December 2, 1989, and before October 1, 1995.

(a) Except as provided in paragraph (c) of this section, if the annuity of a retiree commences after December 2, 1989, and before October 1, 1994, the lump-sum credit payable under § 842.705 is payable to the individual, or his or her survivors, according to the following schedule:

(1) Fifty percent of the lump-sum credit is payable at the time of retirement, and

(2) Fifty percent is payable, with interest determined under section 8334(e)(3) of title 5, United States Code, one year after the time of retirement, except if the payment date of the amount specified in paragraph (a)(1) of this section was after December 4, 1989, payment with interest will be made in the calendar year following the calendar year in which the payment specified in paragraph (a)(1) of this section was made.

(b) If a retiree whose annuity commences after December 2, 1989, and before October 1, 1994, dies before the time limit prescribed in § 842.704(b)(2), that individual is subject to § 842.704 (c) or (d), but the lump-sum credit will be paid in accordance with the schedule in paragraph (a) of this section.

(c)(1) A retiree is exempt from the deferred payment schedule under paragraph (a) of this section if the individual meets the conditions, and fulfills the requirements, described in § 842.707(c).

(2)(i) A retiree who is exempt from the deferred payment schedule may waive that exemption by notifying OPM, in writing, on or before the date he or she elects to receive the alternative form of annuity.

(ii) Paragraph (c)(2)(i) of this section does not apply to an individual whose annuity commences after December 1, 1990, if that individual's eligibility to elect an alternative form of annuity is pursuant to § 842.703(d)(1)(i)(A).

(iii) A waiver under paragraph (c)(2)(i) of this section cannot be revoked.

[56 FR 6552, Feb. 19, 1991, as amended at 60 FR 54587, Oct. 25, 1995]

## Subpart H—Law Enforcement Officers, Firefighters, and Air Traffic Controllers

SOURCE: 52 FR 2069, Jan. 16, 1987, unless otherwise noted.

### § 842.801 Applicability and purpose.

(a) This subpart contains regulations of the Office of Personnel Management (OPM) to supplement—

(1) 5 U.S.C. 8412(d) and (e), which establish special retirement eligibility for law enforcement officers, members of the Capitol Police and Supreme Court Police, firefighters, nuclear materials couriers, customs and border protection officers, and air traffic controllers employed under the Federal Employees Retirement System (FERS);

(2) 5 U.S.C. 8422(a), pertaining to deductions;

(3) 5 U.S.C. 8423(a), pertaining to Government contributions; and

(4) 5 U.S.C. 8425, pertaining to mandatory retirement.

(b) The regulations in this subpart are issued pursuant to the authority given to OPM in 5 U.S.C. 8461(g) to prescribe regulations to carry out the provisions of 5 U.S.C. chapter 84, in 5 U.S.C. 1104 to delegate authority for personnel management to the heads of agencies and pursuant to the authority given the Director of OPM in section 535(d) of the Department of Homeland Security Appropriations Act, 2008, Public Law 110–161, 121 Stat. 2042.

[76 FR 42000, July 18, 2011]

### § 842.802 Definitions.

In this subpart—

*Agency head* means, for the executive branch agencies, the head of an executive agency as defined in 5 U.S.C. 105; for the legislative branch, the Secretary of State, the Clerk of the House of Representatives, or the head of any other legislative branch agency; for the

judicial branch, the Director of the Administrative Office of the U.S. Courts; for the Postal Service, the Postmaster General; and for any other independent establishment that is an entity of the Federal Government, the head of the establishment. For the purpose of an approval of coverage under this subpart, *agency head* is also deemed to include the designated representative of the head of an executive department as defined in 5 U.S.C. 101, except that, for provisions dealing with law enforcement officers and firefighters, the designated representative must be a department headquarters-level official who reports directly to the executive department head, or to the deputy department head, and who is the sole such representative for the entire department. For the purpose of a denial coverage under this subpart, *agency head* is also deemed to include the designated representative of the *agency head*, as defined in the first sentence of this definition, at any level within the agency.

*Air traffic controller* means a civilian employee of the Department of Transportation or the Department of Defense in an air traffic control facility or flight service station facility who is actively engaged in the separation and control of air traffic or in providing preflight, inflight, or airport advisory service to aircraft operators, or who is the immediate supervisor of such an employee, as provided by 5 U.S.C. 8401(35)(A). Also included in this definition is a civilian employee of the Department of Transportation or the Department of Defense who is the immediate supervisor of a person described under 5 U.S.C. 2109(1)(B) (*i.e.*, a second-level supervisor), as provided by 5 U.S.C. 8401(35)(B).

*Detention duties* means duties that require frequent direct contact in the detention, direction, supervision, inspection, training, employment, care, transportation, or rehabilitation of individuals suspected or convicted of offenses against the criminal laws of the United States or the District of Columbia or offenses against the punitive articles of the Uniform Code of Military Justice (chapter 47 of title 10, United States Code). (See 5 U.S.C. 8401(17).)

*Employee* means an employee as defined by 5 U.S.C. 8401(11).

*Firefighter* means an employee occupying a rigorous position, whose primary duties are to perform work directly connected with the control and extinguishment of fires, as provided in 5 U.S.C. 8401(14). Also included in this definition is an employee occupying a rigorous firefighter position who moves to a supervisory or administrative position and meets the conditions of § 842.803(b).

*First-level supervisors* are employees classified as supervisors who have direct and regular contact with the employees they supervise. First-level supervisors do *not* have subordinate supervisors. A first-level supervisor may occupy a rigorous position or a secondary position if the appropriate definition is met.

*Frequent direct contact* means personal, immediate, and regularly-assigned contact with detainees while performing detention duties, which is repeated and continual over a typical work cycle.

*Law enforcement officer* means an employee occupying a rigorous position, whose primary duties are the investigation, apprehension, or detention of individuals suspected or convicted of offenses against the criminal laws of the United States, or the protection of officials of the United States against threats to personal safety, as provided in 5 U.S.C. 8401(17). Also included in this definition is an employee occupying a rigorous law enforcement officer position who moves to a supervisory or administrative position and meets the conditions of § 842.803(b). *Law enforcement officer* also includes, as required by 5 U.S.C. 8401(17)(B), an employee of the Department of the Interior or the Department of the Treasury who occupies a position that, but for enactment of chapter 84 of title 5, United States Code, would be subject to the District of Columbia Police and Firefighters' Retirement System, as determined by the Secretary of the Interior or the Secretary of the Treasury, as appropriate. Except as provided above, the definition does not include an employee whose primary duties involve maintaining order, protecting life and property, guarding against or

inspecting for violations of law, or investigating persons other than those who are suspected or convicted of offenses against the criminal laws of the United States.

*Primary duties* means those duties of a position that—

(a) Are paramount in influence or weight; that is, constitute the basic reasons for the existence of the position;

(b) Occupy a substantial portion of the individual's working time over a typical work cycle; and

(c) Are assigned on a regular and recurring basis.

Duties that are of an emergency, incidental, or temporary nature cannot be considered ''primary'' even if they meet the substantial portion of time criterion. In general, if an employee spends an average of at least 50 percent of his or her time performing a duty or group of duties, they are his or her primary duties.

*Rigorous position* means a position the duties of which are so rigorous that employment opportunities should, as soon as reasonably possible, be limited (through establishment of a maximum entry age and physical qualifications) to young and physically vigorous individuals whose primary duties are—

(a) To perform work directly connected with controlling and extinguishing fires; or

(b) Investigating, apprehending, or detaining individuals suspected or convicted of offenses against the criminal laws of the United States or protecting the personal safety of United States officials.

The condition in this definition that employment opportunities be limited does not apply with respect to an employee who moves directly (i.e., without a break in service exceeding 3 days) from one rigorous law enforcement officer position to another or from one rigorous firefighter position to another. *Rigorous position* is also deemed to include a position held by a law enforcement officer as identified in 5 U.S.C. 8401(17)(B) (related to certain employees in the Departments of the Interior and the Treasury).

*Secondary position* means a position that—

(a) Is clearly in the law enforcement or firefighting field;

(b) Is in an organization having a law enforcement or firefighting mission; and

(c) Is either—

(1) Supervisory; that is, a position whose primary duties are as a first-level supervisor or law enforcement officers or firefighters in rigorous positions; or

(2) Administrative; that is, an executive, managerial, technical, semiprofessional, or professional position for which experience in a rigorous law enforcement or firefighting position, or equivalent experience outside the Federal Government, is a mandatory prerequisite.

[52 FR 2069, Jan. 16, 1987, as amended at 57 FR 32689, July 23, 1992; 60 FR 3339, Jan. 17, 1995; 66 FR 38525, July 25, 2001; 70 FR 32710, June 6, 2005; 70 FR 42254, July 22, 2005]

### § 842.803 Conditions for coverage.

(a) *Rigorous positions.* (1) An employee's service in a position that has been determined by the employing agency head to be a rigorous law enforcement officer or firefighter position is covered under the provisions of 5 U.S.C. 8412(d).

(2) An employee who is not in a rigorous position, nor covered while in a secondary position, and who is detailed or temporarily promoted to a rigorous position is not covered under the provisions of 5 U.S.C. 8412(d).

(3) A first-level supervisor position may be determined to be a rigorous position if it satisfies the conditions set forth in § 842.802.

(b) *Secondary positions.* (1) An employee's service in a position that has been determined by the employing agency head to be a secondary law enforcement officer or firefighter position is covered under the provisions of 5 U.S.C. 8412(d), if all of the following criteria are met:

(i) The employee, while covered under the provisions of 5 U.S.C 8412(d), moves directly (that is, without a break in service exceeding 3 days) from a rigorous position to a secondary position;

(ii) The employee has completed 3 years of service in a rigorous position, including any such service during

which no FERS deductions were withheld; and

(iii) The employee has been continuously employed in a secondary position or positions since moving from a rigorous position without a break in service exceeding 3 days, except that a break in employment in secondary positions that begins with an involuntary separation (not for cause), within the meaning of 5 U.S.C. 8414(b)(1)(A), is not considered in determining whether the service in secondary positions is continuous for this purpose.

(2) An employee who is not a rigorous position, nor covered while in a secondary position, and who is detailed or temporarily promoted to a secondary position is not covered under the provisions of 5 U.S.C. 8412(d).

(c) *Air traffic controller*. An employee's service in a position that has been determined to be an air traffic controller position by the employing agency head is covered under the provisions of 5 U.S.C. 8412(e).

(d) Except as specifically provided in this subpart, an agency head's authority under this section cannot be delegated.

[52 FR 2069, Jan. 16, 1987, as amended at 57 FR 32690, July 23, 1992]

### § 842.804 Evidence.

(a) An agency head's determination under § 842.803(a) (finding that a position is a rigorous position) must be based solely on the official position description of the position in question and any other official description of duties and qualifications. The official documentation for the position should, as soon as is reasonably possible, establish that the primary duties of the position are so rigorous that the agency does not allow individuals to enter the position if they are over a certain age or if they fail to meet certain physical qualifications (that is, physical requirements and/or medical standards), as determined by the employing agency head based on the personnel management needs of the agency for the positions in question.

(b) A determination under §§ 842.803 (b) or (c) must be based on the official position description and any other evidence deemed appropriate by the agency head for making the determination.

(c) If an employee is in a position not subject to the one-half percent higher withholding rate of 5 U.S.C. 8422(a)(2)(B), and the employee does not, within 6 months after entering the position or after any significant change in the position, formally and in writing seek a determination from the employing agency that his position is properly covered by the higher withholding rate, the agency head's determination that the service was not so covered at the time of the service is presumed to be correct. This presumption may be rebutted by a preponderance of the evidence that the employee was unaware of his or her status or was prevented by cause beyond his or her control from requesting that the official status be changed at the time the service was performed.

[52 FR 2069, Jan. 16, 1987, as amended at 57 FR 32690, July 23, 1992]

### § 842.805 Withholding and contributions.

(a) During service covered under the conditions established by § 842.803 (a), (b), or (c), the employing agency will deduct and withhold from the employee's base pay the amounts required under 5 U.S.C. 8422(a)(2)(B) and submit that amount to OPM in accordance with payroll office instructions issued by OPM.

(b) During service described in paragraph (a) of this section, the employing agency must submit to OPM the Government contributions required under 5 U.S.C. 8423(a)(1)(B) in accordance with payroll office instructions issued by OPM.

(c) If the correct withholdings and/or Government contributions are not timely submitted to OPM for any reason whatsover, including cases in which it is finally determined that past service of a current or former employee was subject to the higher deduction and Government contribution rates, the employing agency must correct the error by submitting the correct amounts (including both employee and agency shares) to OPM as soon as possible. Even if the agency waives collection of the overpayment of pay under any waiver authority that may be available for this purpose, such as 5 U.S.C. 5584, or otherwise fails to collect

the debt, the correct amount must still be submitted to OPM as soon as possible.

(d) Upon proper application from an employee, former employee or eligible survivor of a former employee, an employing agency or former employing agency will pay a refund or erroneous additional withholdings for service that is found not to have been covered service. If an individual has paid to OPM a deposit or redeposit, including the additional amount required for covered service, and the deposit is later determined to be erroneous because the service was not covered service, OPM will pay the refund, upon proper application, to the individual, without interest.

(e) The additional employee withholding and agency contributions for covered service properly made are not separately refundable, even in the event that the employee or his or her survivor does not qualify for a special annuity computation under 5 U.S.C. 8415(d).

(f) While an employee who does not hold a rigorous, secondary, or air traffic controller position is detailed or temporarily promoted to such a position, the additional withholdings and agency contributions will not be made.

(g) While an employee who holds a rigorous, secondary, or air traffic controller position is detailed or temporarily promoted to a position that is not a rigorous, secondary, or air traffic controller position, the additional withholdings and agency contributions will continue to be made.

[52 FR 2069, Jan. 16, 1987, as amended at 57 FR 32690, July 23, 1992; 60 FR 3340, Jan. 17, 1995]

### § 842.806 Mandatory separation.

(a) The mandatory separation provisions of 5 U.S.C. 8425 apply to all law enforcement officers and firefighters, including those in secondary positions, and air traffic controllers, with the exception of a civilian employee of the Department of Transportation or the Department of Defense who is the immediate supervisor of a person described under 5 U.S.C. 2109(1)(B) (*i.e.*, a second-level supervisor). A mandatory separation under 5 U.S.C. 8425 is not an adverse action under part 752 of this chapter or a removal action under part 359 of this chapter.

(b) Exemptions from mandatory separation are subject to the conditions set forth under 5 U.S.C. 8425. An exemption may be granted at the sole discretion of the head of the employing agency or by the President in accordance with 5 U.S.C. 8425(c).

(c) In the event that an employee is separated mandatorily under 5 U.S.C. 8425, or is separated for optional retirement under 5 U.S.C. 8412 (d) or (e), and OPM finds that all or part of the minimum service required for entitlement to immediate annuity was in a position that did not meet the requirements of a primary or secondary position and the conditions set forth in this subpart or, if applicable, in part 831 of this chapter, such separation will be considered erroneous.

[52 FR 2069, Jan. 16, 1987, as amended at 70 FR 32710, June 6, 2005]

### § 842.807 Review of decisions.

(a) The final decision of an agency head denying an individual's request for approval of a position as a rigorous, secondary, or air traffic controller position made under § 842.804(c) may be appealed to the Merit Systems Protection Board under procedures prescribed by the Board.

(b) The final decision of an agency head denying an individual coverage while serving in an approved secondary position because of failure to meet the conditions in § 842.803(b) may be appealed to the Merit Systems Protection Board under procedures prescribed by the Board.

[66 FR 38525, July 25, 2001]

### § 842.808 Oversight of coverage determinations.

(a) Upon deciding that a position is a law enforcement officer or firefighter position, each agency head must notify OPM (Attention: Associate Director for Retirement and Insurance) stating the title of each position, the number of incumbents, whether the position is rigorous or secondary, and, if the position is rigorous, the established maximum entry age (or if no maximum entry age has yet been established, the date by

which it will be established). The Director of OPM retains the authority to overrule an agency head's determination that a position is a rigorous or secondary position, except such a determination under 5 U.S.C. 8401(17)(B) (concerning certain employees in the Departments of the Interior and the Treasury) or under 5 U.S.C. 8401(17)(D) (concerning certain positions primarily involved in detention activities).

(b) Each agency must establish a file containing all coverage determinations made by an agency head under § 842.803, and all background material used in making the determination.

(c) Upon request by OPM, the agency will make available the entire coverage determination file for OPM to audit to ensure compliance with the provisions of this subpart.

(d) Upon request by OPM, an agency must submit to OPM a list of all covered positions and any other pertinent information requested. For rigorous positions, the list must show the specific entry age requirement and physical qualification requirements for each position.

[52 FR 2069, Jan. 16, 1987, as amended at 57 FR 32691, July 23, 1992]

### § 842.809 Transitional provisions.

(a) Any service as an air traffic controller, within the meaning of this term under 5 U.S.C. 2109 as in effect on or after January 1, 1987—even if performed before that date—is included in determining an employee's length of air traffic controller service under 5 U.S.C. 8412(e) for the purposes of retirement eligibility and for mandatory separation under 5 U.S.C. 8425(a) as long as the annuity is based on a separation from service occurring after 1986.

(b) Any service as a law enforcement officer or firefighter, within the meaning of these terms under 5 U.S.C. 8331 (20) and (21), that was performed before the date on which an employee becomes subject to chapter 84 of title 5, United States Code, is included in determining the employee's length of law enforcement officer and firefighter service under 5 U.S.C. 8412(d) for the purposes of retirement eligibility and mandatory separation under 5 U.S.C. 8425(b). Service performed as a law enforcement officer or firefighter within the meaning of 5 U.S.C. 8331, other than service in a supervisory or administrative position, is considered to be service in a rigorous position for the purpose of the 3-year requirement of § 842.803(b)(1)(ii). The FERS definitions of firefighter under 5 U.S.C. 8401(14) and law enforcement officer under 5 U.S.C. 8401(17) are not applicable to service performed—

(1) Before 1987; or

(2) After 1986 and before an employee first becomes subject to chapter 84 (that is, subject to FERS deductions), unless that service was neither subject to CSRS deductions nor creditable in a CSRS component as described in § 846.304(b).

(c)(1) An individual who—

(i) Is covered as a law enforcement officer or firefighter under 5 U.S.C. 8336(c) in a supervisory or administrative position, having already met the transfer requirement of subpart I of part 831 of this chapter; and

(ii) Elects under section 301 of Pub. L. 99–335 to become subject to chapter 84 of such title and begins service in a secondary position with no break in service is considered to have met the transfer and 3-year requirements of §§ 842.803(b)(1)(i) and (ii) for coverage in a secondary position upon the effective date of the election.

(2) An individual who—

(i) Is covered as a law enforcement officer or firefighter under 5 U.S.C. 8336(c) in a supervisory or administrative position, having already met the transfer requirement of subpart I of part 831 of this chapter; and

(ii) Automatically becomes subject to chapter 84 of title 5 of the United States Code (not by election under section 301 of Pub. L. 99–335) serving in a secondary position is considered to have met the 3-year requirement of § 842.803(b)(1)(ii) for coverage in a secondary position. The employee is not covered as a law enforcement officer or firefighter in a secondary position if he or she had a break in coverage as a law enforcement officer or firefighter (within the meaning of 5 U.S.C. 8331) exceeding 3 days immediately before becoming subject to chapter 84 of title 5 of United States Code. However, a

break in coverage in supervisory or administrative positions occurring before the individual becomes subject to such chapter 84 that began with an involuntary separation (not for cause), within the meaning of 5 U.S.C. 8414(b)(1)(A), is not considered to be a break in service for this purpose.

(d) (1) The CSRS definitions of law enforcement officer under 5 U.S.C. 8331(20) and firefighter under 5 U.S.C. 8331(21) are applicable to service performed before an employee became subject to chapter 84 if the service was—

(i) Subject to CSRS deductions at the time it was performed (including service that becomes creditable under FERS annuity computation rules);

(ii) Performed before 1987 and not subject to retirement deductions; or

(iii) Performed after 1986 and not subject to retirement deductions but is creditable in a CSRS component as described in § 846.304(b).

(2) The determination of whether any service meets the CSRS definitions of law enforcement officer under 5 U.S.C. 8331 (20) or firefighter under 5 U.S.C. 8331(21) must be made in accordance with the provisions of subpart I of part 831 of this chapter.

[52 FR 2069, Jan. 16, 1987, as amended at 57 FR 32691, July 23, 1992]

REGULATIONS PERTAINING TO NONCODIFIED STATUTES

### § 842.810 Elections to be deemed a law enforcement officer for retirement purposes by certain police officers employed by the Metropolitan Washington Airports Authority (MWAA).

(a) *Who may elect.* Metropolitan Washington Airports Authority (MWAA) police officers employed as members of the MWAA police force as of December 21, 2000, who are covered by the provisions of the Federal Employees Retirement System by 49 U.S.C. 49107(b) may elect to be deemed a law enforcement officer for retirement purposes and have past service as a member of the MWAA and Federal Aviation Administration police forces credited as law enforcement officer service.

(b) *Procedure for making an election.* Elections by an MWAA police officer to be treated as a law enforcement officer for retirement purposes must be made in writing to the MWAA and filed in the employee's personnel file in accordance with procedures established by OPM in consultation with the MWAA.

(c) *Time limit for making an election.* An election under paragraph (a) of this section must be made either before the MWAA police officer separates from service with the MWAA or July 25, 2002, whichever occurs first.

(d) *Effect of an election.* An election under paragraph (a) of this section is effective on the beginning of the first pay period following the date of the MWAA police officer's election.

(e) *Irrevocability.* An election under paragraph (a) of this section becomes irrevocable when received by the MWAA.

(f) *Employee payment for past service.* (1) An MWAA police officer making an election under this section must pay an amount equal to the difference between law enforcement officer retirement deductions and retirement deductions actually paid by the police officer for the police officer's past police officer service with the Metropolitan Washington Airports Authority and Federal Aviation Administration. The amount paid under this paragraph shall be computed with interest in accordance with 5 U.S.C. 8334(e) and paid to the MWAA prior to separation.

(2) Starting with the effective date under paragraph (d) of this section, the MWAA must make deductions and withholdings from the electing MWAA police officer's base pay in accordance with 5 CFR 832.805.

(g) *Employer contributions.* (1) Upon the police officer's payment for past service credit under paragraph (f) of this section, the MWAA must, in accordance with procedures established by OPM, pay into the Civil Service Retirement and Disability Fund the additional agency retirement contribution amounts required for the police officer's past service, plus interest.

(2) Starting with the effective date under paragraph (d) of this section, the MWAA must make agency contributions for the electing police officer in accordance with 5 CFR 842.805.

(h) *Mandatory Separation.* (1) An MWAA police officer who elects to be treated as a law enforcement officer for

FERS retirement purposes is subject to the mandatory separation provisions of 5 U.S.C. 8425(b) and 5 CFR 831.502.

(2) The President and Chief Operating Officer of the MWAA is deemed to be the head of an agency for the purpose of exempting an MWAA police officer from mandatory separation in accordance with the provisions of 5 U.S.C. 8425(b) and 5 CFR 831.502(b)(1).

(i) *Reemployment.* An MWAA police officer who has been mandatorily separated under 5 U.S.C. 8425(b) is not barred from reemployment in any position except a FERS rigorous or secondary law enforcement officer position after age 60. Service by a reemployed former MWAA police officer who retired under 5 U.S.C. 8412(d) is not covered by the provisions of 5 U.S.C. 8412(d).

[66 FR 38525, July 25, 2001]

### § 842.811 Deposits for second-level supervisory air traffic controller service performed before February 10, 2004.

(a)(1) *Eligibility—current and former employees, and retirees.* A current or former employee, or a retiree who was employed as a civilian employee of the Department of Transportation or the Department of Defense before February 10, 2004, as the immediate supervisor of a person described in 5 U.S.C. 2109(1)(B) may make a deposit for such service, in a form prescribed by OPM, so that such service may be credited as air traffic controller service for FERS purposes subject to paragraph (h) of this section.

(2) *Eligibility—survivors.* A survivor of a current employee, former employee, or a retiree eligible to make a deposit under paragraph (a)(1) of this section may make a deposit under this section when the current or former employee, or a retiree—

(i) Dies during the period beginning February 10, 2004, and ending November 28, 2006, without submitting an application under this section; or

(ii) Dies after submitting an application to make a deposit under this section within the time limit set out in paragraph (c) of this section without completing a deposit.

(b) *Filing of deposit application.* An individual eligible to make a deposit under paragraph (a) of this section for service described under paragraph (a)(1) of this section must submit a written application to make a deposit for such service with the appropriate office in the agency where such service was performed.

(c) *Time limit for filing application.* An application to make a deposit under this section must be submitted on or before November 28, 2006.

(d)(1) *Amount of deposit.* A deposit under this section shall be computed using distinct periods of service. For the purpose of this section, a distinct period of service means a period of service not interrupted by a break in service of more than 3 days. A deposit may be made for a distinct period of service; however, such a deposit shall be ineffective if deposits are not completed for all distinct periods of service described under paragraph (a) of this section.

(2) The amount of deposit under this section shall be an amount equal to the amount by which the deductions from pay which would have been required under 5 U.S.C. chapter 84, subchapter II, if at the time the service was performed the service had been air traffic controller service exceeds the unrefunded deductions or deposits actually made under 5 U.S.C. chapter 84, subchapter II, with respect to such service, plus interest.

(e)(1) *Interest.* Interest shall be computed as described under paragraphs (2) and (3) of 5 U.S.C. 8334(e). Interest shall be computed for each distinct period of service from the midpoint of the distinct period of service.

(2) The computation of interest is on the basis of 30 days to the month. Interest is computed for the actual calendar time involved in each case.

(f) *Forms of deposit.* A deposit under this section may be made as a single lump sum or in installments.

(g)(1) *Processing deposit applications and payments.* Upon receiving an application for deposit under this section, the agency shall determine whether the application meets the requirements of this section; compute the deposit, including interest; and advise the applicant of the total amount of deposit due.

(2) The agency shall establish a deposit account showing the total

amount due and a payment schedule (unless deposit is made in one lump sum) to record the date and amount of each payment.

(3) If an eligible individual cannot make payment in one lump sum, the agency shall accept installment payments (by allotments or otherwise). The agency, however, is not required to accept individual checks in amounts less than $50.

(4) Payments received by the agency shall be remitted to OPM immediately for deposit to the Civil Service Retirement and Disability Fund.

(5) Once a deposit has been paid in full or otherwise closed out, the agency shall submit the documentation pertaining to the deposit to OPM in accordance with instructions issued by OPM.

(h) *Effect of deposit.* An individual completing a deposit under this section whose entitlement to an annuity is based on a separation from service on or after February 10, 2004, will receive air traffic controller retirement credit for such service, for annuity entitlement and computation purposes, when OPM receives certification that the deposit has been paid in full, and the deposit payment is remitted to the Civil Service Retirement and Disability Fund.

[70 FR 32710, June 6, 2005]

## Subpart I—Nuclear Materials Couriers

SOURCE: 65 FR 2524, Jan. 18, 2000, unless otherwise noted.

### § 842.901 Applicability and purpose.

(a) This subpart contains regulations of the Office of Personnel Management (OPM) to supplement—

(1) 5 U.S.C. 8412(d) and (e), which establish special retirement eligibility for law enforcement officers, members of the Capitol Police and Supreme Court Police, firefighters, nuclear materials couriers, customs and border protection officers, and air traffic controllers employed under the Federal Employees Retirement System (FERS);

(2) 5 U.S.C. 8422(a), pertaining to deductions;

(3) 5 U.S.C. 8423(a), pertaining to Government contributions; and

(4) 5 U.S.C. 8425, pertaining to mandatory retirement.

(b) The regulations in this subpart are issued pursuant to the authority given to OPM in 5 U.S.C. 8461(g) to prescribe regulations to carry out the provisions of 5 U.S.C. chapter 84, in 5 U.S.C. 1104 to delegate authority for personnel management to the heads of agencies and pursuant to the authority given the Director of OPM in section 535(d) of the Department of Homeland Security Appropriations Act, 2008, Division E of Public Law 110–161, 121 Stat. 1844.

[76 FR 42000, July 18, 2011]

### § 842.902 Definitions.

*Agency head* means the Secretary of Energy. For purposes of this subpart, *agency head* is also deemed to include the designated representative of the Secretary of Energy, except that the designated representative must be a department headquarters-level official who reports directly to the Secretary of Energy, or to the Deputy Secretary of Energy, and who is the sole such representative for the entire department.

*Employee* means an employee as defined by 5 U.S.C. 8401(11).

*Nuclear materials courier* means an employee of the Department of Energy, the duties of whose position are primarily to transport, and provide armed escort and protection during transit of, nuclear weapons, nuclear weapon components, strategic quantities of special nuclear materials or other materials related to national security, including an employee engaged in this activity who is transferred directly to a supervisory or administrative position within the same Department of Energy organization, after performing this activity for at least 3 years. (See 5 U.S.C. 8331(27).)

*Primary duties* means those duties of a position that—

(1)(i) Are paramount in influence or weight; that is, constitute the basic reasons for the existence of the position;

(ii) Occupy a substantial portion of the individual's working time over a typical work cycle; and

(iii) Are assigned on a regular and recurring basis.

(2) Duties that are of an emergency, incidental, or temporary nature cannot be considered ''primary'' even if they meet the substantial portion of time criterion. In general, if an employee spends an average of at least 50 percent of his or her time performing a duty or group of duties, they are his or her primary duties.

*Primary position* means a position that is in an organization of the Department of Energy and whose primary duties are to transport, and provide armed escort and protection during transit of, nuclear weapons, nuclear weapon components, strategic quantities of special nuclear materials or other materials related to national security.

*Secondary position* means a position that—

(1) Is clearly in the nuclear materials transportation field;

(2) Is in an organization of the Department of Energy having a nuclear materials transportation mission; and

(3) Is either—

(i) Supervisory; that is, a position whose primary duties are as a first-level supervisor of nuclear materials couriers in primary positions; or

(ii) Administrative; that is, an executive, managerial, technical, semiprofessional, or professional position for which experience in a primary nuclear materials courier position is a prerequisite.

### § 842.903 Conditions for coverage in primary positions.

(a) An employee's service in a position that has been determined by the Secretary of the Department of Energy to be a primary nuclear materials courier position is covered under the provisions of 5 U.S.C. 8412(d).

(b) An employee who is not in a primary position, nor covered while in a secondary position, and who is detailed or temporarily promoted to a primary position is not covered under the provisions of 5 U.S.C. 8412(d).

### § 842.904 Conditions for coverage in secondary positions.

(a) An employee's service in a position that has been determined by the Secretary of the Department of Energy to be a secondary nuclear materials courier position following 3 years of service in a primary nuclear materials courier position is covered under the provisions of 5 U.S.C. 8412(d) if all of the following criteria are met:

(1) The employee is transferred directly (i.e., without a break in service exceeding 3 days) from a primary position to a secondary position; and

(2) If applicable, the employee has been continuously employed in secondary positions since transferring from a primary position without a break in service exceeding 3 days, except that a break in employment in secondary positions which begins with an involuntary separation (not for cause), within the meaning of 5 U.S.C. 8414(b)(1)(A), is not considered in determining whether the service in secondary positions is continuous for this purpose.

(b) An employee who is not in a primary position, nor covered while in a secondary position, and who is detailed or temporarily promoted to a secondary position is not covered under the provisions of 5 U.S.C. 8412(d).

### § 842.905 Evidence.

(a) The Secretary of Energy's determination under § 842.903 that a position is a primary position must be based solely on the official position description of the position in question, and any other official description of duties and qualifications. The official documentation for the position must establish that it satisfies the requirements defined in § 842.902.

(b) A determination under § 842.904 must be based on the official position description and any other evidence deemed appropriate by the agency head for making the determination.

(c) If an employee is in a position not subject to the one-half percent higher withholding rate of 5 U.S.C. 8422(a)(3), and the employee does not, within 6 months after entering the position or after any significant change in the position, formally and in writing seek a determination from the employing agency that his or her service is properly covered by the higher withholding rate, the agency head's determination that the service was not so covered at

the time of the service is presumed to be correct. This presumption may be rebutted by a preponderance of the evidence that the employee was unaware of his or her status or was prevented by cause beyond his or her control from requesting that the official status be changed at the time the service was performed.

### § 842.906 Requests from individuals.

(a) An employee who requests credit for service under 5 U.S.C. 8412(d) bears the burden of proof with respect to that service, and must provide the employing agency with all pertinent information regarding duties performed.

(b) An employee who is currently serving in a position that has not been approved as a primary or secondary position, but who believes that his or her service is creditable as service in a primary or secondary position may request the agency head to determine whether or not the employee's current service should be credited and, if it qualifies, whether it should be credited as service in a primary or secondary position. A written request for current service must be made within 6 months after entering the position or after any significant change in the position.

(c) A current or former employee (or the survivor of a former employee) who believes that a period of past service in an unapproved position qualifies as service in a primary or secondary position and meets the conditions for credit may request the agency head to determine whether or not the employee's past service should be credited and, if it qualifies, whether it should be credited as service in a primary or secondary position. A written request for past service must be made no later than December 31, 2000.

(d) The agency head may extend the time limit for filing under paragraph (b) or (c) of this section when, in the judgment of such agency head, the individual shows that he or she was prevented by circumstances beyond his or her control from making the request within the time limit.

### § 842.907 Withholding and contributions.

(a) During service covered under the conditions established by § 842.903 (a) or (b), the Department of Energy will deduct and withhold from the employee's base pay the amounts required under 5 U.S.C. 8422(a)(3) and submit that amount to OPM in accordance with payroll office instructions issued by OPM.

(b) During service described in paragraph (a) of this section, the employing agency must submit to OPM the Government contributions required under 5 U.S.C. 8423(a) in accordance with payroll office instructions issued by OPM.

(c) If the correct withholding and/or Government contributions are not timely submitted to OPM for any reason whatsoever, including cases in which it is finally determined that past service of a current or former employee was subject to the higher deduction and Government contribution rates, the employing agency must correct the error by submitting the correct amounts (including both employee and agency shares) to OPM as soon as possible. Even if the agency waives collection of the overpayment of pay under any waiver authority that may be available for this purpose, such as 5 U.S.C. 5584, or otherwise fails to collect the debt, the correct amount must still be submitted to OPM as soon as possible.

(d) Upon proper application from an employee, former employee or eligible survivor of a former employee, an employing agency or former employing agency will pay a refund of erroneous additional withholdings for service that is found not to have been covered service. If an individual has paid to OPM a deposit or redeposit, including the additional amount required for covered service, and the deposit is later determined to be erroneous because the service was not covered service, OPM will pay the refund, upon proper application, to the individual, without interest.

(e) The additional employee withholding and agency contributions for covered service properly made are not separately refundable, even in the event that the employee or his or her survivor does not qualify for a special annuity computation under 5 U.S.C. 8415(d).

(f) While an employee who does not hold a primary or secondary position is

detailed or temporarily promoted to such a position, the additional withholdings and agency contributions will not be made.

(g) While an employee who holds a primary or secondary position is detailed or temporarily promoted to a position that is not a primary or secondary position, the additional withholdings and agency contributions will continue to be made.

### § 842.908 Mandatory separation.

(a) Effective on and after October 17, 1999, the mandatory separation provisions of 5 U.S.C. 8425 apply to all nuclear materials couriers including those in secondary positions. A mandatory separation under 5 U.S.C. 8425 is not an adverse action under part 752 of this chapter or a removal action under part 359 of this chapter.

(b) Exemptions from mandatory separation are subject to the conditions set forth under 5 U.S.C. 8425. An exemption may be granted at the sole discretion of the head of the employing agency or by the President in accordance with 5 U.S.C. 8425(c).

(c) In the event that an employee is separated mandatorily under 5 U.S.C. 8425, or is separated for optional retirement under 5 U.S.C. 8412 (d) or (e), and OPM finds that all or part of the minimum service required for entitlement to immediate annuity was in a position that did not meet the requirements of a primary or secondary position and the conditions set forth in this subpart or, if applicable, in part 831 of this chapter, such separation will be considered erroneous.

### § 842.909 Review of decisions.

The following decisions may be appealed to the Merit Systems Protection Board under procedures prescribed by the Board:

(a) The final decision of the Department of Energy issued to an employee, former employee, or survivor as the result of a request for determination filed under § 842.906; and

(b) The final decision of the Department of Energy that a break in service referred to in § 842.904(a)(2) did not begin with an involuntary separation within the meaning of 5 U.S.C. 8414(b)(1)(A).

### § 842.910 Oversight of coverage determinations.

(a) Upon deciding that a position is a nuclear materials courier position, the agency head must notify OPM (Attention: Associate Director for Retirement and Insurance) stating the title of each position, the number of incumbents, and whether the position is primary or secondary. The Director of OPM retains the authority to revoke the agency head's determination that a position is a primary or secondary position, or that an individual's service in any other position is creditable under 5 U.S.C. 8412(d).

(b) The Department of Energy must establish a file containing each coverage determination made by the agency head under § 842.903 and § 842.904, and all background material used in making the determination.

(c) Upon request by OPM, the Department of Energy will make available the entire coverage determination file for OPM to audit to ensure compliance with the provisions of this subpart.

(d) Upon request by OPM, the Department of Energy must submit to OPM a list of all covered positions and any other pertinent information requested.

## Subpart J—Customs and Border Protection Officers

SOURCE: 76 FR 42001, July 18, 2011, unless otherwise noted.

### § 842.1001 Applicability and purpose.

(a) This subpart contains regulations of the Office of Personnel Management (OPM) to supplement—

(1) 5 U.S.C. 8412(d) and (e), which establish special retirement eligibility for law enforcement officers, members of the Capitol Police and Supreme Court Police, firefighters, nuclear materials couriers, customs and border protection officers, and air traffic controllers employed under the Federal Employees Retirement System (FERS);

(2) 5 U.S.C. 8422(a), pertaining to deductions;

(3) 5 U.S.C. 8423(a), pertaining to Government contributions; and

(4) 5 U.S.C. 8425, pertaining to mandatory retirement.

(b) The regulations in this subpart are issued pursuant to the authority given to OPM in 5 U.S.C. 8461(g) to prescribe regulations to carry out the provisions of 5 U.S.C. chapter 84, in 5 U.S.C. 1104 to delegate authority for personnel management to the heads of agencies and pursuant to the authority given the Director of OPM in section 535(d) of the Department of Homeland Security Appropriations Act, 2008, Division E of Public Law 110–161, 121 Stat. 1844.

### § 842.1002 Definitions.

As used in this subpart:

*Agency head* means the Secretary of the Department of Homeland Security. For purposes of an approval of coverage under this subpart, agency head is also deemed to include the designated representative of the Secretary of Department of Homeland Security, except that the designated representative must be a department headquarters-level official who reports directly to the Secretary of Homeland Security, or to the Deputy Secretary of Homeland Security, and who is the sole such representative for the entire department. For the purposes of a denial of coverage under this subpart, agency head is also deemed to include the designated representative of the Secretary of Department of Homeland Security at any level within the Department of Homeland Security.

*Customs and border protection officer* means an employee in the Department of Homeland Security occupying a position within the Customs and Border Protection Officer (GS–1895) job series (determined applying the criteria in effect as of September 1, 2007) or any successor position and whose duties include activities relating to the arrival and departure of persons, conveyances, and merchandise at ports of entry. Also included in this definition is an employee engaged in this activity who is transferred directly to a supervisory or administrative position in the Department of Homeland Security after performing such duties in 1 or more positions within the GS–1895 job series (determined applying the criteria in effect as of September 1, 2007), or any successor position, for at least 3 years.

*Employee* means an employee as defined by 5 U.S.C. 8401(11).

*First-level supervisors* are employees classified as supervisors who have direct and regular contact with the employees they supervise. First-level supervisors do not have subordinate supervisors. A first-level supervisor may occupy a primary position or a secondary position if the appropriate definition is met.

*Primary position* means a position classified within the Customs and Border Protection Officer (GS–1895) job series (determined applying the criteria in effect as of September 1, 2007) or any successor position whose duties include the performance of work directly connected with activities relating to the arrival and departure of persons, conveyances, and merchandise at ports of entry.

*Secondary position* means a position within the Department of Homeland Security that is either—

(1) Supervisory; i.e., a position whose primary duties are as a first-level supervisor of customs and border protection officers in primary positions; or

(2) Administrative; i.e., an executive, managerial, technical, semiprofessional, or professional position for which experience in a primary customs and border protection officer position is a prerequisite.

### § 842.1003 Conditions for coverage.

(a) *Primary positions.* (1) An employee's service in a position that has been determined by the employing agency head to be a primary customs and border protection officer position is covered under the provisions of 5 U.S.C. 8412(d).

(2) An employee who is not in a primary position, nor covered while in a secondary position, and who is detailed or temporarily promoted to a primary position is not covered under the provisions of 5 U.S.C. 8412(d) for any purpose under this subpart.

(3) A first-level supervisor position may be determined to be a primary position if it satisfies the conditions set forth in § 842.1002.

(b) *Secondary positions.* An employee's service in a position that has been determined by the employing agency

head to be a secondary position is covered under the provisions of 5 U.S.C. 8412(d) if all of the following criteria are met:

(1) The employee, while covered under the provisions of 5 U.S.C. 8412(d) as a customs and border protection officer, is transferred directly (i.e., without a break in service exceeding 3 days) from a primary position to a secondary position; and

(2) The employee has completed 3 years of service in a primary position, including service for which no FERS deductions were withheld; and

(3) If applicable, the employee has been continuously employed in secondary positions since transferring from a primary position without a break in service exceeding 3 days, except that a break in employment in secondary positions which begins with an involuntary separation (not for cause), within the meaning of 8414(b)(1)(A), is not considered in determining whether the service in secondary positions is continuous for this purpose.

(c) For the purpose of applying the criteria at paragraph (b)(1) through (3) of this section to evaluate transfers, service, and employment periods that occurred before September 1, 2007—

(1) A primary position, covered under the provisions of 5 U.S.C. 8412(d), is deemed to include:

(i) A position whose duties included the performance of work directly connected with activities relating to the arrival and departure of persons, conveyances, and merchandise at ports of entry that was classified within the Immigration Inspector Series (GS–1816), Customs Inspector Series (GS–1890), Canine Enforcement Officer Series (GS–1801), or any other series which the agency head determines were predecessor series to the Customs and Border Protection Series (GS–1895), and that would have been classified under the GS–1895 series had it then existed; and

(ii) A position within the Customs and Border Protection Series (GS–1895) whose duties included the performance of work directly connected with activities relating to the arrival and departure of persons, conveyances, and merchandise at ports of entry.

(2) A secondary position is deemed to include:

(i) A first-level supervisor of an employee in a position described at paragraph (c)(1)(i) or (c)(1)(ii) of this section; or

(ii) A executive, managerial, technical, semiprofessional, or professional position for which experience in a position described at paragraph (c)(1)(i) or (c)(1)(ii) of this section is a mandatory prerequisite.

(d) An employee who is not in a primary position, nor covered while in a secondary position, and who is detailed or temporarily promoted to a secondary position is not covered under the provisions of 5 U.S.C. 8412(d) for any purpose under this subpart.

### § 842.1004 Evidence.

(a) The agency head's determination under § 842.1003(a) that a position is a primary position must be based solely on the official position description of the position in question, and any other official description of duties and qualifications. The official documentation for the position must establish that it satisfies the requirements defined in § 842.1002.

(b) A determination under § 842.1003(b) must be based on the official position description and any other evidence deemed appropriate by the agency head for making the determination.

(c) If an employee is in a position not subject to the one-half percent higher withholding rate of 5 U.S.C. 8422(a)(3), and the employee does not, within 6 months of entering the position formally and in writing seek a determination from the employing agency that his or her service is properly covered by the higher withholding rate, the agency head's determination that the service was not so covered at the time of the service is presumed to be correct. This presumption may be rebutted by a preponderance of the evidence that the employee was unaware of his or her status or was prevented by cause beyond his or her control from requesting that the official status be changed at the time the service was performed.

**§ 842.1005 Withholding and contributions.**

(a) During service covered under the conditions established by § 842.1003(a) or (c), the Department of Homeland Security will deduct and withhold from the employee's base pay the amounts required under 5 U.S.C. 8422(a) and submit that amount to OPM in accordance with payroll office instructions issued by OPM.

(b) During service described in paragraph (a) of this section, the Department of Homeland Security must submit to OPM the Government contributions required under 5 U.S.C. 8423(a) in accordance with payroll office instructions issued by OPM.

(c) If the correct withholdings and/or Government contributions are not timely submitted to OPM for any reason whatsoever, including cases in which it is finally determined that past service of a current or former employee was subject to the higher deduction and Government contribution rates, the Department of Homeland Security must correct the error by submitting the correct amounts (including both employee and agency shares) to OPM as soon as possible. Even if the Department of Homeland Security waives collection of the overpayment of pay under any waiver authority that may be available for this purpose, such as 5 U.S.C. 5584, or otherwise fails to collect the debt, the correct amount must still be submitted to OPM as soon as possible.

(d) Upon proper application from an employee, former employee or eligible survivor of a former employee, the Department of Homeland Security will pay a refund of erroneous additional withholdings for service that is found not to have been covered service. If an individual has paid to OPM a deposit or redeposit, including the additional amount required for covered service, and the deposit is later determined to be erroneous because the service was not covered service, OPM will pay the refund, upon proper application, to the individual, without interest.

(e) The additional employee withholding and agency contributions for covered service properly made are not separately refundable, even in the event that the employee or his or her survivor does not qualify for a special annuity computation under 5 U.S.C. 8415(d).

(f) While an employee who does not hold a primary or secondary position is detailed or temporarily promoted to such a position, the additional withholdings and agency contributions will not be made.

(g) While an employee who holds a primary or secondary position is detailed or temporarily promoted to a position that is not a primary or secondary position, the additional withholdings and agency contributions will continue to be made.

**§ 842.1006 Mandatory separation.**

(a) Except as provided in paragraph (d) of this section, the mandatory separation provisions of 5 U.S.C. 8425 apply to customs and border protection officers, including those in secondary positions. A mandatory separation under 5 U.S.C. 8425 is not an adverse action under part 752 of this chapter or a removal action under part 359 of this chapter.

(b) Exemptions from mandatory separation are subject to the conditions set forth under 5 U.S.C. 8425. An exemption may be granted at the sole discretion of the head of the employing agency or by the President in accordance with 5 U.S.C. 8425(c).

(c) In the event that an employee is separated mandatorily under 5 U.S.C. 8425, or is separated for optional retirement under 5 U.S.C. 8412(d) or (e), and OPM finds that all or part of the minimum service required for entitlement to immediate annuity was in a position that did not meet the requirements of a primary or secondary position and the conditions set forth in this subpart or, if applicable, in part 831 of this chapter, such separation will be considered erroneous.

(d) The customs and border protection officer mandatory separation provisions of 5 U.S.C. 8425 do not apply to an individual first appointed as a customs and border protection officer before July 6, 2008.

**§ 842.1007 Review of decisions.**

(a) The final decision of the agency head denying an individual's request for approval of a position as a primary

or secondary customs and border protection officer position made under § 842.1003(a) may be appealed to the Merit Systems Protection Board under procedures prescribed by the Board.

(b) The final decision of the agency head denying an individual coverage while serving in an approved secondary position because of failure to meet the conditions in § 842.1003(b) may be appealed to the Merit Systems Protection Board under procedures prescribed by the Board.

**§ 842.1008 Oversight of coverage determinations.**

(a) Upon deciding that a position is a customs and border protection officer, the Department of Homeland Security must notify OPM (Attention: Associate Director, Retirement Services, or such other official as may be designated) stating the title of each position, the occupational series of the position, the number of incumbents, whether the position is primary or secondary, and, if the position is a primary position, the established maximum entry age, if one has been established. The Director of OPM retains the authority to revoke the agency head's determination that a position is a primary or secondary position.

(b) The Department of Homeland Security must establish and maintain a file containing all coverage determinations made by the agency head under § 842.1003(a) and (b), and all background material used in making the determination.

(c) Upon request by OPM, the Department of Homeland Security will make available the entire coverage determination file for OPM to audit to ensure compliance with the provisions of this subpart.

(d) Upon request by OPM, the Department of Homeland Security must submit to OPM a list of all covered positions and any other pertinent information requested.

**§ 842.1009 Elections of retirement coverage, exclusions from retirement coverage, and proportional annuity computations.**

(a) *Election of coverage.* (1) The Department of Homeland Security must provide an individual who is a customs and border protection officer on December 26, 2007, with the opportunity to elect not to be treated as a customs and border protection officer under section 535(a) and (b) of the Department of Homeland Security Appropriations Act, 2008, Public Law 110–161, 121 Stat. 2042.

(2) An election under this paragraph is valid only if made on or before June 22, 2008.

(3) An individual eligible to make an election under this paragraph who fails to make such an election on or before June 22, 2008, is deemed to have elected to be treated as a customs and border protection officer for retirement purposes.

(b) *Exclusion from coverage.* The provisions of this subpart and any other specific reference to customs and border protection officers in this part do not apply to employees who on December 25, 2007, were law enforcement officers, under subpart H of this part or subpart I of part 831, within U.S. Customs and Border Protection. These employees cannot elect to be treated as a customs and border protection officer under paragraph (a) of this section, nor can they be deemed to have made such an election.

(c) *Proportional annuity computation.* The annuity of an employee serving in a primary or secondary customs and border protection officer position on July 6, 2008, must, to the extent that its computation is based on service rendered as a customs and border protection officer on or after that date, be at least equal to the amount that would be payable—

(1) To the extent that such service is subject to the Civil Service Retirement System, by applying section 8339(d) of title 5, United States Code, with respect to such service; and

(2) To the extent such service is subject to the Federal Employees' Retirement System, by applying section 8415(d) of title 5, United States Code, with respect to such service.

# PART 843—FEDERAL EMPLOYEES RETIREMENT SYSTEM—DEATH BENEFITS AND EMPLOYEE REFUNDS

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AUTHORITY: 5 U.S.C. 8461; §§ 843.205, 843.208, and 843.209 also issued under 5 U.S.C. 8424; § 843.309 also issued under 5 U.S.C. 8442; § 843.406 also issued under 5 U.S.C. 8441.

SOURCE: 52 FR 2074, Jan. 16, 1987, unless otherwise noted.

## Subpart A—General Provisions

### § 843.101 Purpose.

(a) This part regulates death benefits and employee refunds under FERS.

(b) This subpart contains definitions and regulations that have general application throughout this part.

### § 843.102 Definitions.

In this part—

*Accrued benefit* means the accrued, unpaid annuity payable after the death of a retiree.

*Adult child* means a child who has attained age 18.

*Basic annuity* means the recurring payments (after the death of an employee, separated employee, or retiree) made to a current or former spouse of a deceased retiree, employee, or separated employee under subsection (a),

(b)(1)(B), or (c)(2) of section 8442 of title 5, United States Code.

*Basic child's annuity rate* means the total amount that all surviving children of an employee or retiree would receive under CSRS.

*Basic employee death benefit* means the payment to the current spouse of a deceased employee equal to $15,000 (indexed under section 8462 of title 5, United States Code), plus one-half of the employee's final salary (or average salary, if higher).

*Child* means a child as defined in section 8441(4) of title 5, United States Code.

*Compensationer* means a person receiving recurring benefits under chapter 81 of title 5, United States Code.

*CSRS* means subchapter III of chapter 83 of title 5, United States Code.

*Current spouse* means a living person who is married to the employee, separated employee, or retiree at the time of the employee's, separated employee's or retiree's death. *Current spouse* includes a spouse who is legally separated but not divorced from the employee, separated employee, or retiree.

*Current spouse annuity* means the basic annuity (and supplementary annuity, if any) payable to a current spouse.

*Duly appointed representative of the deceased employee's, separated employee's, retiree's, survivor's or Member's estate* means an individual named in an order of a court having jurisdiction over the estate of the deceased which grants the individual the authority to receive, or the right to possess, the property of the deceased; and also means, where the law of the domicile of the deceased has provided for the administration of estates through alternative procedures which dispense with the need for a court order, an individual who demonstrates that he or she is entitled to receive, or possess, the property of the deceased under the terms of those alternative procedures.

*Employee* means an employee as defined in section 8401(11) of title 5, United States Code, and a Member as defined in section 8401(20) of title 5, United States Code. ''Employee'' includes a person who has applied for retirement under FERS but had not been separated from the service prior to his or her death, even if the person's retirement would have been retroactively effective upon separation.

*FERS* means chapter 84 of title 5, United States Code.

*Final annual rate of basic pay* means the basic pay that an employee or Member would receive in a year at the current rate of pay. A pay rate other than an annual salary is converted to an annual rate by multiplying the prescribed rate by the number of pay units in a 52-week work year.

(a) The annual pay of a part-time (regularly scheduled) employee is the product of the employee's final hourly rate of pay and the higher of—

(1) The number of hours that the employee was entitled to basic pay whether in a duty or paid leave status (not to exceed 2000 for Postal employees or 2080 for non-postal employees) in the 52-week work year immediately preceding the end of the last pay period in which the employee was in a pay status; or

(2) The number of hours in the employee's regularly scheduled tour of duty in a 52-week work year.

(b) The annual pay of an intermittent (not regularly scheduled) employee is the product of the employee's final hourly rate of pay and the number of hours that the employee was entitled to basic pay whether in a duty or paid leave status (not to exceed 2000 for Postal employees or 2080 for non-Postal employees) in the 52-week work year immediately preceding the end of the last pay period in which the employee was in a pay status.

(c) If the part-time or intermittent employee's current appointment began less than 52 weeks prior to the end of the last pay period in which the employee was in a pay status, the number of hours that the employee was entitled to basic pay is computed by multiplying the number of hours that the employee was paid basic pay by a fraction whose numerator is 52 and whose denominator is the number of weeks between the date of appointment and the end of the last pay period in which the employee was in a pay status.

(d) The annual pay for customs officers is the sum of the employee's general schedule pay, locality pay, and the lesser of—

(1) Two times the employee's final hourly rate of pay times the number of hours for which the employee was paid two times salary as compensation for overtime inspectional service under section 5(a) of the Act of February 11, 1911 (19 U.S.C. 261 and 267) plus three times the employee's final hourly rate of pay times the number of hours for which the employee was paid three times salary as compensation for overtime inspectional service under section 5(a) in the 52-week work year immediately preceding the end of the last pay period in which the employee was in pay status; or

(2) $12,500.

*Former spouse* means a living person who was married for at least 9 months to an employee, separated employee, or retiree who performed at least 18 months of service creditable under FERS and whose marriage to the employee, separated employee, or retiree was terminated before the death of the employee, separated employee, or retiree.

*Former spouse annuity* means the basic annuity (and supplementary annuity, if any) payable to a former spouse.

*Insurable interest beneficiary* means a person designated to receive a survivor annuity under § 842.605 of this chapter.

*Insurable interest reduction* means the reduction in a retiree's annuity because the retiree elected to provide a survivor annuity to an insurable interest beneficiary.

*Marriage* means a marriage recognized in law or equity under the whole law of the jurisdiction with the most significant interest in the marital status of the employee, Member, or retiree. If a jurisdiction would recognize more than one marriage in law or equity, the Office of Personnel Management (OPM) will recognize only one marriage but will defer to the local courts to determine which marriage should be recognized.

*Minimum retirement age* means the minimum retirement age as defined in § 842.202 of this chapter.[1]

[1] The definition of minimum retirement age which will be codified at 5 CFR 842.202 reads:

*Minimum retirement age* means an age based on an individual's year of birth, as follows:

| Year of birth: | *Minimum retirement age* |
|---|---|
| Before 1948 | 55 years. |
| 1948 | 55 years and 2 months. |
| 1949 | 55 years and 4 months. |
| 1950 | 55 years and 6 months. |
| 1951 | 55 years and 8 months. |
| 1952 | 55 years and 10 months. |
| 1953–1964 | 56 years. |
| 1965 | 56 years and 2 months. |
| 1966 | 56 years and 4 months. |
| 1967 | 56 years and 6 months. |
| 1968 | 56 years and 8 months. |
| 1969 | 56 years and 10 months. |
| 1970 and after | 57 years. |

*Qualifying court order* means a court order that awards a former spouse annuity and that satisfies the requirements of section 8445 of title 5, United States Code, for awarding a former spouse annuity.

*Retiree* means a former employee or Member who is receiving recurring payments under FERS based on service by the employee or Member. *Retiree*, as used in this subpart, does not include a current spouse, former spouse, child, or person with an insurable interest receiving a survivor annuity. *Retiree* for purposes of determining a person's status at the time of death means that the person had been separated from the service and had met all the requirements to receive an annuity including having filed an application for the annuity prior to his or her death.

*Separated employee* means a former employee who has been separated from the service but who has not met all the requirements for retirement under FERS or who has not filed an application for retirement under FERS.

*Step-child* means a child who is the issue of a current or former spouse of the employee or retiree but is not the issue of the employee or retiree. A child is not a step-child unless the relationship between the employee or retiree and the child's parent is a marriage.

*Supplementary annuity* means the recurring payment under section 8442(f) of title 5, United States Code.

*Unexpended balance* means the unrefunded amount consisting of—

(a) Retirement deductions made from the basic pay of an employee under subpart E of part 841 of this chapter;

(b) Amount deposited by an employee for periods of service (including military service) for which—

(1) No retirement deductions were made; or

(2) Deductions were refunded to the employee; and

(c) Interest compounded annually on the deductions and deposits at a rate which, for any calendar year, will be equal to the overall average yield to the Civil Service Retirement Fund during the preceding fiscal year from all obligations purchased by the Secretary of the Treasury during that fiscal year under section 8348 (c), (d), and (e) of title 5, United States Code, as determined by the Secretary of the Treasury. Interest on deductions and deposits does not include interest—

(1) If the service covered by the contributions totals 1 year or less; or

(2) For a fractional part of a month in the total service.

[52 FR 2074, Jan. 16, 1987; 52 FR 2352, Jan. 21, 1987, and 52 FR 23014, June 17, 1987; 53 FR 16536, May 10, 1988; 57 FR 29784, July 7, 1992; 57 FR 33599, July 29, 1992; 60 FR 13035, Mar. 10, 1995]

### § 843.103 Application required.

(a) No person is entitled to benefits under this part unless an application on behalf of that person is filed with OPM no later than 30 years after the death of the employee, separated employee, or retiree on whose service the benefit is based.

(b) Applications for benefits under this part must be filed on the form provided by OPM for that purpose.

## Subpart B—One-time Payments

### § 843.201 Purpose.

This subpart explains the requirements under FERS—

(a) For payment of employee contributions to the Civil Service Retirement Fund—

(1) As a refund of contribution, to separated employees; or

(2) As a death benefit, to survivors of employees, separated employees, and retirees; and

(b) For payment of any accrued, but unpaid, annuity to survivors of retirees.

### § 843.202 Eligibility for payment of the unexpended balance to a separated employee.

(a) Except as provided in §§ 843.208 and 843.209 or in section 3716 of title 31, United States Code, on administrative offset for Government claims, a separated employee who has been separated from a covered position for at least 31 days and who is ineligible for an annuity commencing within 31 days after the date of filing an application for refund is eligible for a payment of the unexpended balance.

(b)(1) For a retirement based on a separation before October 28, 2009, periods of service for which employee contributions have been refunded are not creditable service in determining whether the employee has sufficient service to have title to an annuity or for any other purpose.

(2) For a retirement based on a separation on or after October 28, 2009, periods of service for which employee contributions have been refunded are—

(i) Creditable service in determining whether the employee has sufficient service to have title to an annuity; and

(ii) Not creditable without deposit for any other purpose, except for average pay computation purposes.

[52 FR 2074, Jan. 16, 1987, as amended at 79 FR 46632, Aug. 8, 2014]

### § 843.203 Eligibility for a one-time payment upon death of an employee, separated employee, or retiree if no one is eligible for an annuity.

(a) If there is no survivor who is entitled to monthly survivor annuity benefits on the death of an employee, separated employee, retiree, or survivor annuitant, the unexpended balance is payable, except as provided in section 3716 of title 31, United States Code, on administrative offset for Government claims, to the person(s) entitled in the normal order of precedence described in section 8424 of title 5, United States Code.

(b) If a deceased employee, separated employee, retiree or Member provided in a valid designation of beneficiary that the lump sum proceeds shall be payable to the deceased's estate, or to the Executor, Administrator, or other representative of the deceased's estate, or if the proceeds would otherwise be

properly payable to the duly appointed representative of the deceased's estate under the order of precedence specified in 5 U.S.C. 8424(d), payment of the proceeds to the duly appointed representative of the deceased's estate will bar recovery by any other person.

[52 FR 2074, Jan. 16, 1987, as amended at 57 FR 29784, July 7, 1992]

### § 843.204 Eligibility for a one-time payment upon death of an employee, separated employee, or retiree if someone is eligible for an annuity.

(a) Except as provided in section 3716 of title 31, United States Code, on administrative offset for Government claims, even if an annuity is payable, the person entitled in the order of precedence described in section 8424 of title 5, United States Code, may be paid—

(1) Partial deposits for civilian service performed on and after October 1, 1982; and

(2) Partial deposits for post-1956 military service; and

(3) The accrued benefit.

(b) Except as provided in subpart G of part 842 of this chapter or § 843.311, when someone is eligible for an annuity, the person entitled in the order of precedence may not be paid—

(1) Partial or completed deposits for nondeduction civilian service performed before October 1, 1982, unless the service covered by the deposit is not creditable under FERS; or

(2) Completed deposits for nondeduction civilian service performed on and after October 1, 1982, unless the service covered by the deposit is not creditable under or FERS; or

(3) Completed deposits for post-1956 military service, unless the service covered by the deposit is not creditable under FERS.

(c) Payments of the partial or completed deposits mentioned in paragraph (b) of this section are subject to section 3716 of title 31, United States Code (administrative offset for Governmental claims).

### § 843.205 Designation of beneficiary—form and execution.

(a) A designation of beneficiary must be in writing, signed and witnessed, and received in the employing office (or in OPM, in the case of a retiree, or a compensationer, or a separated employee) before the death of the designator.

(b) A change or cancellation of beneficiary in a last will or testament, or in any other document not witnessed and filed as required by this section, will not have any force or effect.

(c) A witness to a designation of beneficiary is ineligible to receive payment as a beneficiary.

(d) Any person, firm, corporation, or legal entity may be named as beneficiary.

(e) A change of beneficiary may be made at any time and without the knowledge or consent of the previous beneficiary. This right cannot be waived or restricted.

(f) A designation of beneficiary is automatically cancelled whenever a separated employee is paid the unexpended balance.

(g)(1) If the shares designated equal less than 100 percent, the undesignated portion will be paid according to the order of precedence provided in section 8424 of title 5, United States Code.

(2) If the shares designated exceed 100 percent, each designee's share will be in proportion to the share originally designated. Each share is computed by multiplying the percentage designated for that designee by a fraction whose numerator is 100 and whose denominator is the total number of percent designated.

### § 843.206 Designation of beneficiary—proof of receipt.

(a) Upon receipt of a designation of beneficiary, the agency (or OPM) will mark the designation to show the date of receipt.

(b) The date of receipt of designation of beneficiary is presumed to be the date marked by the agency (or OPM).

### § 843.207 Agent of next of kin.

When a deceased employee or retiree has not named a beneficiary and one of the next of kin entitled makes a claim for the accrued benefit, other next of kin entitled to share in the unexpended balance or accrued benefit may designate the one who made the claim to act as their agent to receive their distributive shares.

### § 843.208 Notification of current and/or former spouse before payment of unexpended balance to a separated employee.

(a) Payment to an employee of the unexpended balance may be made only if current and former spouses are notified of the former employee's application.

(b) Proof of notification will consist of a signed and witnessed statement by the current and/or former spouse on a form provided by OPM acknowledging that he or she has been informed of the former employee's application for the unexpended balance and the consequences of the refund on the current or former spouse's possible annuity entitlement. This statement must be presented to the employing agency or OPM when filing the application for the unexpended balance.

(c) If the current and/or former spouse refuses to acknowledge the notification or the employee is otherwise unable to obtain the acknowledgment, the employee must submit—

(1) Affidavits signed by two individuals who witnessed the employee's attempt to personally notify the current or former spouse. The witnesses must attest that they were in the presence of the employee and the current or former spouse and that the employee's purpose should have been clear to the current or former spouse; or

(2) The current mailing address of the current or former spouse. OPM will attempt to notify (by certified mail—return receipt requested) the current or former spouse at the address provided by the employee. The unexpended balance will not be paid until OPM receives the signed return receipt.

### § 843.209 Waiver of notification requirement.

The current and/or former spouse notification requirement will be waived upon a showing that the current and/or former spouse's whereabouts cannot be determined. A request for waiver on this basis must be accompanied by—

(a) A judicial or administrative determination that the current and/or former spouse's whereabouts cannot be determined; or

(b) Affidavits by the former employee and two other persons, at least one of whom is not related to the former employee, attesting to the inability to locate the current and/or former spouse and stating the efforts made to locate the current and/or former spouse.

### § 843.210 Transfers between retirement systems.

Transfers of employees' contributions between the Civil Service Retirement Fund and other retirement systems for Federal or District of Columbia employees when made in accordance with Federal statute for the purpose of transferring retirement service credit to the other retirement system are not subject to the notice requirements of this subpart.

### § 843.211 Determining when children prevent payment of the unexpended balance.

Someone entitled to an annuity for purposes of §§ 843.203 and 843.204 includes a child, even if the amount of the child's annuity is zero because the amount of the social security child survivor benefits exceeds the child survivor benefits payable under CSRS, unless—

(a) The child's annuity entitlement has terminated under § 843.408(b); or

(b) The child is—

(1) A disabled child under § 843.407,

(2) At least age 23, and

(3) Entitled to social security child survivor benefits in an amount that equals or exceeds the amount of the child survivor benefits payable under CSRS.

[52 FR 23014, June 17, 1987]

### § 843.212 Lump-sum payments which include contributions made to a retirement system for employees of a nonappropriated fund instrumentality.

A lump-sum payment will include employee contributions and interest as provided under subpart G of part 847 of this chapter.

[61 FR 41721, Aug. 9, 1996]

## Subpart C—Current and Former Spouse Benefits

### § 843.301 Purpose.

This subpart explains the survivor benefits payable under FERS to current and former spouses based on the death or retirees, employees, and separated employees.

### § 843.302 Time for filing applications for death benefits.

A current or former spouse of a deceased retiree, employee, or separated employee may file an application for benefits under this subpart, personally or through a representative, at any time within 30 years after the death of the retiree, employee, or separated employee.

### § 843.303 Marriage duration requirements.

(a) The current spouse of a retiree, an employee, or a separated employee can qualify for a current spouse annuity or the basic employee death benefit only if—

(1) The current spouse and the retiree, employee, or separated employee had been married for at least 9 months, as explained in paragraph (b) of this section; or

(2) A child was born of the marriage, as explained in paragraph (c) of this section; or

(3) The death of the retiree, employee, or separated employee was accidental as explained in paragraph (d) of this section.

(b) For satisfying the 9-month marriage requirement of paragraph (a)(1) of this section, the aggregate time of all marriages between the spouse applying for a current spouse annuity and the retiree, employee, or separated employee is included.

(c) For satisfying the child-born-of-the-marriage requirement of paragraph (a)(2) of this section, any child, including a posthumous child, born to the spouse and the retiree, employee, or separated employee is included. This includes a child born out of wedlock if the parents later married or of a prior marriage between the same parties.

(d)(1) A death is accidental if it results from homicide or from bodily injuries incurred solely through violent, external, and accidental means. The term ''accidental'' does not include a death caused by or the result of intentional self-destruction or intentionally self-inflicted injury, while sane or insane.

(2) A State judicial or administrative adjudication of the cause of death for criminal or insurance purposes is conclusive evidence of whether a death is accidental.

(3) A death certificate showing the cause of death as accident or homicide is *prima facie* evidence that the death was accidental.

[52 FR 2074, Jan. 16, 1987, as amended at 52 FR 23014, June 17, 1987]

### § 843.304 Commencing and terminating dates of survivor annuities.

(a) A current or former spouse annuity under this subpart commences on the day after the death of the person on whose service the annuity is based.

(b) A current or former spouse annuity under this subpart terminates on the last day of the month before the current or former spouse remarries before age 55 or dies.

(c) A current spouse annuity under this subpart terminated for reasons other than death may be restored under § 843.305.

(d) A survivor annuity accrues on a daily basis, one-thirtieth of the monthly rate constituting the daily rate. An annuity does not accrue for the 31st day of any month, except in the initial month if the survivor's (of a deceased employee) annuity commences on the 31st day. For accrual purposes, the last day of a 28-day month constitutes 3 days and the last day of a 29-day month constitutes 2 days.

### § 843.305 Reinstatement.

(a) If a current spouse annuity is terminated because of a remarriage of the recipient, the annuity is reinstated on the day of the termination of the remarriage by death, annulment, or divorce if—

(1) The surviving spouse elects to receive this annuity instead of another survivor benefit to which he or she may be entitled (under FERS or another retirement system for Government employees) by reason of the remarriage; and

(2) Any lump sum paid on termination of the annuity is repaid (in a single payment or by withholding payment of the annuity until the amount of the lump sum has accrued).

(b) If present or future entitlement to a former spouse annuity terminates because of remarriage of the recipient or potential recipient, the entitlement is permanently extinguished. An annulment of the remarriage does not reinstate the entitlement.

### § 843.306 Basic benefits on death of a non-disability retiree.

(a) Except as provided in §§ 843.307 and 843.312, and paragraph (b) of this section, if an annuitant dies and is survived by a current spouse, the current spouse is entitled to a current spouse annuity equal to 50 percent of an annuity computed under subpart D of part 842 of this chapter, with respect to the retiree, unless—

(1) The right to a current spouse annuity was waived under § 842.603 of this chapter (and no election was subsequently made under § 842.610 of this chapter nullifying the waiver); or

(2) In the case of a marriage after retirement, the retiree did not file an election under § 842.612 of this chapter.

(b) A current spouse who married the retiree after retirement is entitled to an annuity under paragraph (a) of this section only upon electing this annuity instead of any other survivor benefit to which such spouse may be entitled under this subpart, subpart B of this part, or under another retirement system for Government employees.

[52 FR 2074, Jan. 16, 1987, as amended at 52 FR 23014, June 17, 1987]

### § 843.307 Basic benefits on death of a disability retiree.

(a) Except as provided in § 843.312, the widow or widower of a retiree who retired based on disability under part 844 of this chapter is entitled to a current spouse annuity based on the service of the disability annuitant computed under paragraph (b) of this section.

(b)(1) In the case of a current spouse entitled to an annuity based on the service of a disability annuitant who died after attaining age 62, the amount of the current spouse annuity is one-half of the amount of the annuity to which such disability annuitant was entitled as computed under part 844 of this chapter (including any appropriate reduction under § 844.302(b)(2) or (c)(2) of this chapter, and any adjustments under section 8462 of title 5, United States Code) as of the day before the date of the disability annuitant's death.

(2) In the case of a current spouse entitled to an annuity based on the service of a disability annuitant who dies before age 62, the amount of the current spouse annuity equals 50 percent of the amount to which the disability annuitant would have been entitled under § 844.303 of this chapter, if the disability annuitant had attained age 62 on the day before his or her death. However, in determining the amount under § 844.303(a) of this chapter, creditable service includes the period of time between the date of death and the date of the 62nd anniversary of the birth of the annuitant, but average pay is adjusted (under section 8462 of title 5, United States Code) only through date of death.

[52 FR 2074, Jan. 16, 1987, as amended at 52 FR 23014, June 17, 1987]

### § 843.308 Supplementary benefits on death of a retiree.

(a) Except as provided in § 843.312 and paragraph (d) of this section, a current spouse of a deceased retiree who is entitled to a current spouse annuity based on the retiree's service is also entitled to a supplementary annuity.

(b) The amount of the supplementary annuity under this section equals the lesser of—

(1) The amount by which the survivor's assumed CSRS annuity exceeds the annuity payable to the current spouse under § 843.306 or § 843.307; or

(2) The amount equal to the widow's or widower's insurance benefits that would be payable to him or her under title II of the Social Security Act (without regard to section 202(f)(2) of the Act) based on the wages and self-employment income of the deceased annuitant, except that for purposes of this calculation—

(i) The social security earnings test (section 203 of the Act) does not apply; and

(ii) The benefit is computed—

(A) As of the date on which the retiree dies; and

(B) As if the survivor had attained age 60 and made application for those benefits under subsection (e) or (f) of section 202 of the Act; and

(iii) In computing the primary insurance amount—

(A) For years of service under FERS, only the retiree's basic pay is considered to be wages; and

(B) For each year after age 21 for which the retiree did not work under FERS, the retiree's wages are deemed to equal the National Average Wage Index (as determined by the Commissioner of the Social Security Administration) corresponding to that year, multiplied by the retiree's basic pay for his or her first full year of employment under FERS, divided by the National Average Wage Index corresponding to the retiree's first full year of employment under FERS.

(c)(1) The supplementary annuity terminates at the beginning of the month in which the survivor first satisfies the minimum age requirement under section 202(e)(1)(B)(i) or 202(f)(1)(B)(i) of the Social Security Act.

(2) The supplementary annuity is not payable to a survivor—

(i) Who would not be entitled to benefits under section 202 (e) or (f) of the Social Security Act based on the wages and self-employment income of the deceased annuitant (determined, as of the date of the annuitant's death, as if the survivor had attained age 60 and made appropriate application for benefits, but without regard to any restriction relating to remarriage); or

(ii) For any calendar month in which the survivor is entitled (or would, on proper application, be entitled) to benefits under section 202(g) of the Social Security Act (relating to mother's and father's insurance benefits), or under section 202 (e) or (f) of the Act by reason of having become disabled, based on the wages and self-employment income of the deceased annuitant.

(d) For purposes of this section—

(1) ''Assumed CSRS annuity,'' as used in the case of a survivor, means the amount of the annuity to which such survivor would be entitled under CSRS based on the service of the deceased annuitant, which is determined—

(i) As of the day after the date of the annuitant's death;

(ii) As if the survivor had made appropriate application therefor; and

(iii) As if the service of the deceased annuitant were creditable under CSRS.

(2) ''Basic pay'' means ''basic pay'' as defined in section 8401 of title 5, United States Code.

(e) An amount payable under this section will be adjusted under section 8462 of title 5, United States Code, and will be treated in the same way as an amount payable under § 843.306 or § 843.307.

[52 FR 2074, Jan. 16, 1987, as amended at 69 FR 69806, Dec. 1, 2004]

### § 843.309 Basic employee death benefit.

(a) Except as provided in § 843.312, if an employee or Member dies after completing at least 18 months of civilian service creditable under subpart C of part 842 of this chapter and is survived by a current spouse who meets the requirements of § 843.303, the current spouse is entitled to the basic employee death benefit equal to the sum of—

(1) Fifty percent of the final annual rate of basic pay (or of the average pay, if higher) of the employee; and

(2) Fifteen thousand dollars as adjusted under section 8462 of title 5, United States Code.

(b) The current spouse may elect to receive the basic employee death benefit in one of the following forms—

(1) A one-time payment; or

(2) For deaths occurring on or after October 1, 2014, 36 equal monthly installments of 2.99522 percent of the amount of the basic employee death benefit.

(c)(1)(i) A current spouse who has elected to receive the basic employee death benefit in 36 installments under paragraph (b)(2) of this section may elect to receive the remaining portion of the basic employee death benefit in one payment.

(ii) The election to receive the remaining portion of the basic employee death benefit in one payment must be in writing and signed by the current spouse.

(iii) The election to receive the remaining portion of the basic employee

death benefit in one payment is irrevocable when OPM authorizes the payment.

(2) Upon the death of a current spouse who was receiving the basic employee death benefit in 36 installments under paragraph (b)(2) of this section, the remaining portion of the basic employee death benefit will be paid as one payment to the estate of the current spouse.

(3) As used in this section, ''remaining portion of the basic employee death benefit'' means the amount of the basic employee death benefit computed under paragraph (a) of this section that has not been paid. The amount is the remaining principal computed based on an amortization schedule with the initial principal equal to the amount computed under paragraph (a) of this section and the interest rate based on the applicable factor under paragraph (b)(2) of this section.

[52 FR 2074, Jan. 16, 1987, as amended at 52 FR 23014, June 17, 1987; 52 FR 36389, Sept. 29, 1987; 56 FR 65419, Dec. 17, 1991; 69 FR 69806, Dec. 1, 2004; 76 FR 52540, Aug. 23, 2011; 76 FR 55213, Sept. 7, 2011; 79 FR 66279, Nov. 7, 2014]

### § 843.310 Annuity based on death of an employee.

Except as provided in § 843.312, if an employee dies after completing at least 10 years of service, a current spouse is entitled to an annuity equal to 50 percent of the annuity computed under subpart D of part 842 of this chapter (without reduction for age), with respect to the employee. The annuity is in addition to the benefit described in § 843.309.

[52 FR 2074, Jan. 16, 1987, as amended at 52 FR 23014, June 17, 1987]

### § 843.311 Annuity based on death of a separated employee.

(a) Except as provided in § 843.312, if a separated employee who has completed at least 10 years of service dies after having separated from the service with title to a deferred annuity under § 842.212 of this chapter, but before having established a valid claim for an annuity, and is survived by a current spouse to whom he or she was married on the date of separation, the current spouse may elect to receive—

(1) An annuity under paragraph (b) of this section; or

(2) The unexpended balance, if the current spouse is the individual who would be entitled to the unexpended balance.

(b) Except as provided in § 843.312 and paragraph (c) of this section, the current spouse annuity under this section equals 50 percent of an annuity computed under subpart D of part 842 of this chapter, for the separated employee. If the separated employee died before having attained the minimum retirement age, the computation is made as if the separated employee had attained the minimum retirement age.

(c)(1) The current spouse annuity commences on the day after the separated employee would have attained—

(i) Age 62 if the separated employee had less than 20 years of creditable service,

(ii) Age 60 if the employee had at least 20 years of creditable service but less than 30 years of creditable service; or

(iii) The minimum retirement age if the employee had at least 30 years of creditable service.

(2)(i) The current spouse may elect to receive an adjusted annuity beginning on the day after the death of the separated employee.

(ii) The rate of the adjusted annuity equals the annuity computed under paragraph (b) of this section multiplied by the factor in appendix A of this subpart for the age of the retiree as of the birthday before the retiree's death.

[52 FR 2074, Jan. 16, 1987, as amended at 52 FR 23014, June 17, 1987; 57 FR 54681, Nov. 20, 1992]

### § 843.312 Payment to former spouses.

(a) Any benefit (or a portion of any benefit) payable to a current spouse under this subpart is payable to a former spouse instead if the former spouse is entitled to that benefit under the terms of a qualifying court order or an election under subpart F of part 842 of this chapter.

(b) A current spouse annuity may not exceed the difference between—

(1) The amount of the annuity that would otherwise be payable to the current spouse under this subpart; and

(2) The amount of the annuity payable to any former spouse of the deceased employee, retiree, or separated employee based on an election made under subpart F of part 842 of this chapter or a qualifying court order.

(c) The basic employee death benefit paid to a current spouse may not exceed the difference between—

(1) The amount that would otherwise be payable to the current spouse under § 843.310; and

(2) The portion of the basic employee death benefit payable to a former spouse based on a qualifying court order.

### § 843.313 Elections between survivor annuities.

(a) A current spouse annuity cannot be reinstated under § 843.305 unless—

(1) The surviving spouse elects to receive the reinstated current spouse annuity instead of any other payments (except any accrued but unpaid annuity and any unpaid employee contributions) to which he or she may be entitled under FERS, or any other retirement system for Government employees, by reason of the remarriage; and

(2) Any lump sum paid on termination of the annuity is returned to the Civil Service Retirement and Disability Fund.

(b) A current spouse is entitled to a current spouse annuity based on an election under § 842.612 only upon electing this current spouse annuity instead of any other payments (except any accrued but unpaid annuity and any unpaid employee contributions) to which he or she may be entitled under FERS, or any other retirement system for Government employees.

(c) A former spouse who marries a retiree is entitled to a former spouse annuity based on an election by that retiree under § 842.611, or a qualifying court order terminating that marriage to that retiree only upon electing this former spouse annuity instead of any other payments (except any accrued but unpaid annuity and any unpaid employee contributions) to which he or she may be entitled under FERS, or any other retirement system for Government employees.

(d) As used in this section, ''any other retirement system for Government employees'' does not include Survivor Benefit Payments from a military retirement system or social security benefits.

[57 FR 54681, Nov. 20, 1992]

### § 843.314 Amount of survivor annuity where service includes credit for service with a nonappropriated fund instrumentality.

(a) The survivor annuity based on service that includes service with a nonappropriated fund instrumentality made creditable by an election under 5 CFR part 847, subpart D, is computed under 5 CFR part 847, subpart F.

(b) The survivor annuity based on service that includes service with a nonappropriated fund instrumentality made creditable by an election under 5 CFR part 847, subpart H, is computed under 5 CFR part 847, subpart I.

[68 FR 2178, Jan. 16, 2003]

## APPENDIX A TO SUBPART C OF PART 843—PRESENT VALUE CONVERSION FACTORS FOR EARLIER COMMENCING DATE OF ANNUITIES OF CURRENT AND FORMER SPOUSES OF DECEASED SEPARATED EMPLOYEES

With at least 10 but less than 20 years of creditable service—

| Age of separated employee at birthday before death | Multiplier |
|---|---|
| 26 | .0726 |
| 27 | .0792 |
| 28 | .0859 |
| 29 | .0930 |
| 30 | .1002 |
| 31 | .1081 |
| 32 | .1165 |
| 33 | .1252 |
| 34 | .1343 |
| 35 | .1443 |
| 36 | .1550 |
| 37 | .1664 |
| 38 | .1786 |
| 39 | .1914 |
| 40 | .2053 |
| 41 | .2200 |
| 42 | .2358 |
| 43 | .2528 |
| 44 | .2710 |
| 45 | .2905 |
| 46 | .3114 |
| 47 | .3337 |
| 48 | .3580 |
| 49 | .3839 |
| 50 | .4118 |
| 51 | .4419 |
| 52 | .4745 |
| 53 | .5097 |
| 54 | .5477 |
| 55 | .5889 |

| Age of separated employee at birthday before death | Multiplier |
|---|---|
| 56 | .6336 |
| 57 | .6822 |
| 58 | .7350 |
| 59 | .7926 |
| 60 | .8556 |
| 61 | .9244 |

With at least 20, but less than 30 years of creditable service—

| Age of separated employee at birthday before death | Multiplier |
|---|---|
| 36 | .1810 |
| 37 | .1943 |
| 38 | .2086 |
| 39 | .2236 |
| 40 | .2398 |
| 41 | .2570 |
| 42 | .2754 |
| 43 | .2953 |
| 44 | .3166 |
| 45 | .3394 |
| 46 | .3638 |
| 47 | .3899 |
| 48 | .4182 |
| 49 | .4485 |
| 50 | .4812 |
| 51 | .5164 |
| 52 | .5545 |
| 53 | .5955 |
| 54 | .6400 |
| 55 | .6881 |
| 56 | .7404 |
| 57 | .7972 |
| 58 | .8590 |
| 59 | .9264 |

With at least 30 years of creditable service—

| Age of separated employee at birthday before death | Multiplier by separated employee's year of birth | |
|---|---|---|
| | After 1966 | From 1950 through 1966 |
| 46 | .4561 | .4910 |
| 47 | .4889 | .5264 |
| 48 | .5244 | .5646 |
| 49 | .5624 | .6055 |
| 50 | .6035 | .6497 |
| 51 | .6476 | .6973 |
| 52 | .6954 | .7487 |
| 53 | .7469 | .8042 |
| 54 | .8027 | .8643 |
| 55 | .8631 | .9294 |
| 56 | .9287 | 1.0000 |

[80 FR 37135, June 30, 2015]

## Subpart D—Child Annuities

### § 843.401 Purpose.

This subpart explains the survivor benefits payable under FERS to children based on the deaths of employees and retirees.

### § 843.402 Eligibility requirements.

A surviving child of an employee or retiree who dies after completing 18 months of civilian service creditable under FERS is entitled to an annuity under this subpart.

### § 843.403 Proof of parentage.

(a) A judicial determination of parentage conclusively establishes the paternity of a child.

(b) Except as provided in paragraph (a) of this section, a child born to the wife of a married person is presumed to be the child of the wife's husband. This presumption may be rebutted only by clear and convincing evidence that the husband is not the father of the child.

(c) When paternity is not established under paragraph (a) or (b) of this section, paternity is determined by a preponderance of the credible evidence as defined in § 1201.56(c)(2) of this title.

### § 843.404 Proof of adoption.

(a) An adopted child is—

(1) A child adopted by the employee or retiree before the death of the employee or retiree; or

(2) A child who lived with the employee or retiree and for whom a petition for adoption was filed by the employee or retiree and who is adopted by the current spouse of the employee or retiree after the death of the employee or retiree.

(b) The only acceptable evidence to prove status as an adopted child under paragraph (a)(1) of this section is a copy of the judicial decree of adoption.

(c) The only acceptable evidence to prove status as an adopted child under paragraph (a)(2) of this section is copies of—

(1) The petition for adoption (clearly showing the date filed); and

(2) The judicial decree of adoption.

### § 843.405 Dependency.

To be eligible for survivor annuity benefits, a child must have been dependent on the employee or retiree at the time of the employee's or retiree's death.

**§ 843.406 Proof of dependency.**

(a) A child is considered to have been dependent on the deceased employee or retiree if he or she is—

(1) A legitimate child; or

(2) An adopted child; or

(3) A stepchild or recognized natural child who lived with the employee or retiree in a regular parent-child relationship at the time of the employee's or retirees death; or

(4) A recognized natural child for whom a judicial determination of support was obtained; or

(5) A recognized natural child to whose support the employee or retiree made regular and substantial contributions.

(b) The following are examples of proofs of regular and substantial support. More than one of the following proofs may be required to show support of a natural child who did not live with the employee or retiree in a regular parent-child relationship and for whom a judicial determination of support was not obtained.

(1) Evidence of eligibility as a dependent child for benefits under other State or Federal programs;

(2) Proof of inclusion of the child as a dependent on the decedent's income tax returns for the years immediately before the employee's or retiree's death;

(3) Cancelled checks, money orders, or receipts for periodic payments received from the employee or retiree for or on behalf of the child;

(4) Evidence of goods or services that show regular contributions of considerable value;

(5) Proof of coverage of the child as a family member under the employee's or retiree's Federal Employees Health Benefits enrollment; and

(6) Other proof of a similar nature that OPM may find to be sufficient to demonstrate support or parentage.

(c) Survivor benefits may be denied—

(1) If evidence shows that the deceased employee or retiree did not recognize the claimant as his or her own despite a willingness to support the child; or

(2) If evidence casts doubt upon the parentage of the claimant, despite the deceased employee's or retiree's recognition and support of the child.

**§ 843.407 Disabilities.**

A child is eligible for continued annuity because the child is incapable of self-support if the Social Security Administration finds that the child is eligible for continued social security child's benefits because the child is incapable of self-support.

**§ 843.408 Commencing and terminating dates of child annuities.**

(a) An annuity under this subpart—

(1) Commences on the day after the retiree or employee dies;

(2) Commences or resumes on the first day of the month in which the child later becomes or again becomes a student as described by § 843.313, if any lump sum paid is returned to the Civil Service Retirement Fund; or

(3) Commences or resumes on the first day of the month in which the child later becomes or again becomes incapable of self-support because of a mental or physical disability incurred before age 18 (or a later recurrence of such disability), if any lump sum is returned to the Fund.

(b) An annuity under this subpart terminates on the last day of the month before the child—

(1) Becomes 18 years of age unless he or she is a student as described in § 843.410 or is incapable of self-support;

(2) Becomes capable of self-support after becoming 18 years of age unless he or she is a student as described in § 843.410;

(3) Becomes 22 years of age if he or she is a student as described in § 843.410 and—

(i) Capable of self-support; or

(ii) Incapable of self-support because of a mental or physical disability incurred after age 18;

(4) Ceases to be such a student as described in § 843.410 after becoming 18 years of age unless he or she is incapable of self-support; or

(5) Dies or marries.

(c) A survivor annuity accrues on a daily basis, one-thirtieth of the monthly rate constituting the daily rate. An annuity does not accrue for the 31st day of any month, except in the initial month if the survivor's (of a deceased employee) annuity commences on the 31st day. For accrual purposes, the last day of a 28-day month constitutes 3

days and the last day of a 29-day month constitutes 2 days.

### § 843.409 Rates of annuities.

(a) For each month, the amount of annuity payable to each surviving child under this subpart is—

(1) The difference between the basic child's annuity rate for that month and the total amount of child's insurance benefits under title II of the Social Security Act payable for that month to all children of the employee or retiree based on the total earnings (including any non-Federal wages or self employment subject to FICA taxes) of the employee or retiree;

(2) Divided by the total number of children entitled to annuity based on the service of that employee or retiree.

(b) On the death of the current spouse or the former spouse or termination of the annuity of a child, the annuity of any other child or children is recomputed and paid as though the spouse, former spouse, or child had not survived the former employee or Member.

### § 843.410 Annuity for a child age 18 to 22 during full-time school attendance.

(a) *General requirements for an annuity*. (1) For a child age 18 to 22 to be eligible to receive an annuity as a full-time student, the child must also meet all other requirements applicable to qualify for an annuity by a child who has not attained age 18.

(2) In addition to the requirements of paragraph (a)(1) of this section, OPM must receive certification, in a form prescribed by OPM, that the child is regularly pursuing a full-time course of study in an accredited institution.

(b) *Full-time course of study*. (1) Generally, a full-time course of study is a noncorrespondence course which, if successfully completed, will lead to completion of the education within the period generally accepted as minimum for completion, by a full-time day student, of the academic or training program concerned.

(2) A certification by an accredited institution that the student's workload is sufficient to constitute a full-time course of study for the program in which the student is enrolled is prima facie evidence that the student is pursuing a full-time course of study.

(c) *Certification of school attendance*. (1) OPM may periodically request the recipient of a child's annuity payments to furnish certification of school attendance. The certification must be completed in the form prescribed by OPM.

(2) If OPM requests the recipient of a child's annuity payments to provide a self-certification of school attendance, the recipient must complete and sign the certification form.

(3) If OPM requests the recipient of a child's annuity payments to provide a certification by the school, the certification must be signed by an official who is either in charge of the school or in charge of the school's records. OPM will not accept certification forms signed by instructors, counselors, aides, roommates, or others not in charge of the school or the records.

(i) If the educational institution is above the high school level, the certification must be signed by the president or chancellor, vice president or vice chancellor, dean or assistant dean, registrar or administrator, assistant registrar or assistant administrator, or the equivalent.

(ii) If the educational institution is at the high school level, the certification must be signed by the superintendent of schools, assistant superintendent of schools, principal, vice principal, assistant principal, or the equivalent.

(iii) If the educational institution is a technical or trade school, the certification must be signed by the president, vice president, director, assistant director, or the equivalent.

(4) OPM will accept a facsimile signature of a school official only if it is accompanied by a raised seal of the institution or other evidence clearly demonstrating the authenticity of the certification and making unauthorized use of the signature stamp unlikely.

(d) *Continuation of annuity during interim breaks*. A child's annuity continues during interim breaks between school years if the following conditions are satisfied:

(1) The student must have been a full-time student at the end of the

school term immediately before the break.

(2) The break between the end of the last term of full-time attendance and the return to full-time attendance must not exceed 5 months. (See § 841.109 of this chapter, concerning calculation of this time period.)

(3) The recipient of a child's annuity payments must show that the student has a bona fide intent to return to school as a full-time student immediately after the break. The full-time certification for the period term and the certification (in a form prescribed by OPM) by the recipient of a child's annuity payments that the student intends to return to school (immediately after the break) as a full-time student constitute prima facie evidence of a bona fide intent to return to school.

(e) *Benefits after age 22.* (1) A student's eligibility for a child's annuity terminates based on reaching age 22 on—

(i) June 30 of the calendar year of the child's 22nd birthday if the child's birthday is before July 1; or

(ii) The last day of the month before the child's 22nd birthday if the child's birthday occurs after June 30 but before September 1 of the calendar year; or

(iii) June 30 of the year after the one in which the child attains age 22 if the child's birthday is after August 31 of the calendar year.

(2)(i) An otherwise eligible child who becomes a full-time student after his or her 22nd birthday but before the date the annuity terminates under paragraph (e)(1) of this section is eligible for annuity while he or she is a full-time student until the termination date under paragraph (e)(1) of this section.

(ii) An otherwise eligible child who is a full-time student, and whose parent dies after the child's 22nd birthday but before the date the annuity terminates under paragraph (e)(1) of this section, is eligible for annuity while he or she is a full-time student after the death of the parent until the termination date under paragraph (e)(1) of this section.

[58 FR 32052, June 8, 1993]

### § 843.411 Direct payments to children.

For purposes of section 8466(c) of title 5, United States Code, persons who have attained age 18 are considered adults, regardless of the age of majority in the jurisdiction in which they reside.

## Subpart E—Insurable Interest Annuities

### § 843.501 Purpose.

This subpart explains the benefit payable under FERS to an insurable interest beneficiary based on the death of a retiree who elected to take an annuity reduction to provide such benefits.

### § 843.502 Eligibility.

An insurable interest beneficiary is eligible for an annuity under this subpart upon the death of a retiree if the retiree had elected (under § 842.606 of this chapter) to receive an insurable interest rate with the insurable interest beneficiary as his or her survivor.

### § 843.503 Commencing and terminating dates.

(a) An annuity under this subpart commences on the day after the retiree dies.

(b) An annuity under this subpart terminates on the last day of the month before the insurable interest beneficiary dies.

(c) A survivor annuity accrues on a daily basis, one-thirtieth of the monthly rate constituting the daily rate. An annuity does not accrue for the 31st day of any month, except in the initial month if the survivor's (of a deceased employee) annuity commences on the 31st day. For accrual purposes, the last day of a 28-day month constitutes 3 days and the last day of a 29-day month constitutes 2 days.

### § 843.504 Rate of annuity.

The amount of an annuity under this subpart is 55 percent of the retiree's annuity after the insurable interest reduction.

# PART 844—FEDERAL EMPLOYEES' RETIREMENT SYSTEM—DISABILITY RETIREMENT

### Subpart A—General Provisions

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844.404 Reinstatement of disability annuity.

AUTHORITY: 5 U.S.C. 8461.

Section 844.201 also issued under 5 U.S.C. 1104.

SOURCE: 55 FR 6598, Feb. 26, 1990, unless otherwise noted.

## Subpart A—General Provisions

### § 844.101 Purpose.

This part establishes the requirements under the Federal Employees' Retirement System (FERS) for eligibility to receive a disability annuity, application procedures for disability annuities, rules for computing a disability annuity, and the conditions and procedures under which a disability annuity is terminated and reinstated.

### § 844.102 Definitions.

In this part:

*Accommodation* means a reasonable adjustment made to an employee's job or work environment that enables the employee to perform the duties of the position. Accommodation may include modifying the worksite; adjusting the work schedule; restructuring the job; obtaining or modifying equipment or devices; providing interpreters, readers, or personal assistants; and retraining the employee.

*Basic pay* means the pay an employee receives that is subject to deductions under FERS.

*Commuting area* has the meaning given the term ''local commuting area'' in § 351.203 of this chapter.

*Disabled* and *disability* means unable or inability, because of disease or injury, to render useful and efficient service in the employee's current position.

*FERS* means the Federal Employees' Retirement System established under chapter 84 of title 5, United States Code.

*Medical condition* means a health impairment resulting from a disease or injury, including a psychiatric disease. This is the same definition of ''medical condition'' that is found in § 339.104 of this chapter.

*Medical documentation* means a statement from a licensed physician, which may be supplemented by a statement from another appropriate practitioner, that provides information OPM considers necessary to determine an individual's entitlement to benefits under this part. Such a statement must meet the criteria set forth in § 339.104 of this chapter.

*Military reserve technician* has the same meaning given this term in 5 U.S.C. 8401(30).

*OPM* means the Office of Personnel Management.

*Permanent position* means an appointment without time limitation.

*Physician* and *practitioner* have the same meaning given these terms in § 339.104 of this chapter.

*Qualified for reassignment* means able to meet the minimum requirements for

the grade and series of the vacant position in question.

*Same grade or pay level* means, in regard to a vacant position within the same pay as the position the employee currently occupies, the same grade and an equivalent amount of basic pay. A position under a different pay system or schedule is at the same pay level if the representative rate, as defined in § 532.401 of this chapter, equals the representative rate of the employee's current position.

*Useful and efficient service* means acceptable performance of the critical or essential elements of the position; and satisfactory conduct and attendance.

*Vacant position* means an unoccupied position of the same grade or pay level and tenure for which the employee is qualified for reassignment that is located in the same commuting area and, except in the case of a military reserve technician, is serviced by the same appointing authority of the employing agency. The vacant position must be full time, unless the employee's current position is less than full time, in which case the vacant position must have a work schedule of no less time than that of the current position. In the case of an employee of the United States Postal Service, a vacant position does not include a position in a different craft or a position to which reassignment would be inconsistent with the terms of a collective bargaining agreement covering the employee.

### § 844.103 Eligibility.

(a) Except as provided in paragraph (c) of this section, an individual must meet the following requirements in order to receive a disability annuity:

(1) The individual must have completed at least 18 months of civilian service that is creditable under FERS, as defined in § 842.304 of this chapter;

(2) The individual must, while employed in a position subject to FERS, have become disabled because of a medical condition, resulting in a deficiency in performance, conduct, or attendance, or if there is no such deficiency, the disabling medical condition must be incompatible with either useful and efficient service or retention in the position;

(3) The disabling medical condition must be expected to continue for at least 1 year from the date the application for disability retirement is filed;

(4) Accommodation of the disabling medical condition in the position held must be unreasonable; and

(5) The individual must not have declined an offer of reassignment to a vacant position.

(b) The employing agency must consider a disability applicant for reassignment to any vacant position. The agency must certify to the Office of Personnel Management (OPM) either that there is no vacant position or that, although it made no offer of reassignment, it considered the individual for a vacant position. If an agency offers a reassignment and the individual declines the offer, the individual may appeal the agency's determination that the individual is not disabled for the position in question to the Merit Systems Protection Board under 5 U.S.C. 7701.

(c)(1) Paragraphs (a)(2) through (a)(4) of this section do not apply to a military reserve technician who retires under 5 U.S.C. 8456.

(2) An individual who separates from employment as a military reserve technician under circumstances set forth in 5 U.S.C. 8456(a)(1) after reaching age 50 and completing 25 years of service is not entitled to a disability annuity under this part, but is entitled to an annuity under § 842.210 of this chapter.

(3) A former military reserve technician is not entitled to an annuity under 5 U.S.C. 8456 based on service as a technician if the technician is subsequently appointed to another position in the Federal Government.

### § 844.104 Administrative review of OPM decisions.

Any individual whose rights or interests under FERS are affected by an initial decision of OPM may request OPM to review its decision under § 841.306.

### § 844.105 Relationship to workers' compensation.

(a) Except as provided in paragraph (b) of this section, an individual who is eligible for both an annuity under part

842 or 844 of this chapter and compensation for injury or disability under subchapter I of chapter 81 of title 5, United States Code (other than a scheduled award under 5 U.S.C. 8107(c)), covering the same period of time must elect to receive either the annuity or compensation.

(b) Notwithstanding the provisions of paragraph (a) of this section, an individual may concurrently receive an annuity based on the individual's service under part 842 or 844 of this chapter and a benefit under subchapter I of chapter 81 of title 5, United States Code, on account of the death of another individual. An individual may also receive an annuity under part 843 of this chapter and compensation for injury or disability to himself or herself under such subchapter I covering the same period of time.

(c) An individual who elects to receive compensation payments under paragraph (a) of this section and who has not received a refund of contributions under § 843.202 retains the right to elect to receive an annuity under part 842 or 844, as the case may be, in the event that the individual's compensation payments cease or are reduced.

### § 844.106 Disability annuities which include credit for service with a nonappropriated fund instrumentality.

A disability annuity that includes credit for service with a nonappropriated fund instrumentality performed after December 31, 1965, based on an election under 5 CFR part 847, subpart D, is computed under 5 CFR part 847, subpart F.

[68 FR 2178, Jan. 16, 2003]

## Subpart B—Applications for Disability Retirement

### § 844.201 General requirements.

(a)(1) Except as provided in paragraphs (a)(3) and (a)(4) of this section, an application for disability retirement is timely only if it is filed with the employing agency before the employee or Member separates from service, or with the former employing agency or OPM within 1 year thereafter.

(2) An application for disability retirement that is filed with OPM, an employing agency or former employing agency by personal delivery is considered filed on the date on which OPM, the employing agency or former employing agency receives it. The date of filing by facsimile is the date of the facsimile. The date of filing by mail is determined by the postmark date; if no legible postmark date appears on the mailing, the application is presumed to have been mailed 5 days before its receipt, excluding days on which OPM, the employing agency or former employing agency, as appropriate, is closed for business. The date of filing by commercial overnight delivery is the date the application is given to the overnight delivery service.

(3) An application for disability retirement that is filed with OPM or the applicant's former employing agency within 1 year after the employee's separation, and that is incompletely executed or submitted in a letter or other form not prescribed by OPM, is deemed timely filed. OPM will not adjudicate the application or make payment until the application is filed on a form prescribed by OPM.

(4) OPM may waive the 1-year time limit if the employee or Member is mentally incompetent on the date of separation or within 1 year thereafter, in which case the individual or his or her representative must file the application with the former employing agency or OPM within 1 year after the date the individual regains competency or a court appoints a fiduciary, whichever is earlier.

(b)(1) Before payment of a disability annuity under this part can be authorized, the applicant must provide OPM with:

(i) Satisfactory evidence that the applicant has filed an application for disability insurance benefits under section 223 of the Social Security Act; or

(ii) An official statement from the Social Security Administration that the individual is not insured for disability insurance benefits as defined in section 223(c)(1) of the Social Security Act.

(2) A disability retirement application under this part will be dismissed when OPM is notified by the Social Security Administration that the application referred to in paragraph (b)(1)(i)

of this section has been withdrawn. All rights to an annuity under this part terminate upon withdrawal of an application for social security disability benefits.

(c) An agency may consider the existence of a pending disability retirement application when deciding whether and when to take other personnel actions. An employee's filing for disability retirement does not require the agency to delay any appropriate personnel action.

[55 FR 6598, Feb. 26, 1990, as amended at 63 FR 17050, Apr. 8, 1998]

### § 844.202 Agency-filed disability retirement applications.

(a) *Basis for filing an application for an employee.* An agency must file an application for disability retirement of an employee who has 18 months of Federal civilian service when all of the following conditions are met:

(1) The agency has issued a decision to remove the employee;

(2) The agency concludes, after its review of medical documentation, that the cause for unacceptable performance, attendance, or conduct is disease or injury;

(3) The employee is institutionalized, or the agency concludes, based on a review of medical and other information, that the employee is incapable of making a decision to file an application for disability retirement;

(4) The employee has no personal representative or guardian; and

(5) The employee has no immediate family member who is willing to file an application on his or her behalf.

(b) *Agency procedures.* (1) When an agency issues a decision to remove an employee and not all of the conditions described in paragraph (a) of this section have been satisfied, but the removal is based on reasons apparently caused by a medical condition, the agency must advise the employee in writing of his or her possible eligibility for disability retirement and of the time limit for filing an application.

(2) If all of the conditions described in paragraph (a) of this section have been met, the agency must inform the employee in writing at the same time it informs the employee of its removal decision, or at any time before the separation is effected, that:

(i) The agency is submitting a disability retirement application on the employee's behalf to OPM;

(ii) The employee may review any medical information in accordance with § 294.106(d) of this chapter; and

(iii) The action does not affect the employee's right to submit a voluntary application for disability retirement or any other retirement benefit to which the employee is entitled under FERS.

(3) When an agency submits an application for disability retirement to OPM on behalf of an employee, it must provide OPM with copies of the decision to remove the employee, the medical documentation, and any other documents needed to show that the cause for removal results from a medical condition. Following separation, the agency must provide OPM with a copy of the documentation of the separation.

(c) *OPM procedures.* (1) OPM will not act on any application for disability retirement filed by an agency on behalf of an employee until it receives the appropriate documentation of the separation. When OPM receives a complete application for disability retirement under this section, it will notify the former employee that it has received the application and that he or she may submit medical documentation. OPM will determine entitlement to disability benefits under § 844.203.

(2) OPM will cancel any disability retirement when a final decision of an administrative authority or court reverses the removal action and orders the reinstatement of an employee to the agency rolls.

### § 844.203 Supporting documentation.

(a) An individual or agency filing an application for disability retirement is responsible for providing OPM with the evidence described in § 844.201(b)(1), as well as whatever documentation OPM requires in order to determine whether the individual meets the eligibility requirements set forth in § 844.103. The documentation must be provided in a form prescribed by OPM. Failure to submit the documentation required is grounds for dismissing the application. It is also the responsibility of the disability annuitant to obtain and submit

evidence OPM requires to show continuing entitlement to disability benefits. Unless OPM orders an examination by a physician of its choice under paragraph (b) of this section, the cost of providing medical documentation rests with the applicant or disability annuitant.

(b) OPM may offer the applicant a medical examination when it determines that an independent evaluation of medical evidence is needed in order to make a decision regarding an application for a disability annuity or a disability annuitant's entitlement to continuing benefits. The medical examination will be conducted by a medical officer of the United States or a qualified physician or board of physicians designated by OPM. The applicant's refusal to submit to an examination is grounds for dismissal of the application or termination of payments to an annuitant.

(c)(1) OPM will review the documentation submitted under paragraph (a) of this section to determine whether the individual has met the eligibility requirements set forth in § 844.103. OPM will issue its decision in writing to the individual and to the employing agency. The decision will include a statement of OPM's findings and conclusions and an explanation of the applicant's right to request reconsideration or MSPB review under § 844.104.

(2) OPM may rescind a decision to allow an application for disability retirement at any time if OPM determines that the original decision was erroneous due to fraud, misstatement of fact, or upon the acquisition of additional medical or other documentation. OPM will provide the individual and the employing agency with written notification of the rescission, including a statement of OPM's findings and conclusions and an explanation of the individual's right to request reconsideration or MSPB review under § 844.104.

(d) Subject to 5 U.S.C. 552a, any supporting documentation provided to OPM under this section may be shared with the Social Security Administration and the Office of Workers' Compensation Programs of the U.S. Department of Labor.

## Subpart C—Computation of Disability Annuity

### § 844.301 Commencing date of disability annuity.

A disability annuity under this part commences on the day after the employee separates or the day after pay ceases and the employee meets the requirements for title to an annuity.

### § 844.302 Computation of disability annuity before age 62.

(a) For the purposes of this subpart, the ''adjusted social security disability benefit'' is the benefit to which an annuitant is entitled under section 223 of the Social Security Act:

(1) For the month in which the annuity under this part commences, or is reinstated under § 844.405, or, if later, the first month for which the annuitant is entitled to both an annuity under this part and a social security disability benefit;

(2) Including, where appropriate, a reduction under section 224 of the Social Security Act, based on the amount of the disability annuity under this subpart without regard to paragraphs (b)(2) and (c)(2) of this section; and

(3) Adjusted by each cost-of-living increase effective under 5 U.S.C. 8462(b) beginning with the later of the month after the 12-month period referred to in paragraph (b)(1) of this section, or the first month for which the annuitant is entitled to both an annuity under this part and a social security disability benefit.

(b)(1) Except as otherwise provided in this part, the annuity payable under this subpart until the end of the 12th month beginning after the annuity commences (or is reinstated under § 844.405) is equal to 60 percent of the annuitant's average pay.

(2) For months for which the annuitant is also entitled to a social security disability benefit, the amount computed under paragraph (b)(1) of this section is reduced by 100 percent of the annuitant's adjusted social security disability benefit.

(c)(1) Except as otherwise provided in this part, the annuity under this subpart after the period described in paragraph (b)(1) of this section is equal to

40 percent of the annuitant's average pay.

(2) For months after the period described in paragraph (b)(1) of this section for which the annuitant is also entitled to a social security disability benefit, the amount computed under paragraph (c)(1) of this section is reduced by 60 percent of the annuitant's adjusted social security disability benefit.

(d) For months in which an annuity is reduced under paragraph (b) or (c) of this section, any reduction for survivor benefits is made after the reduction for social security benefits.

### § 844.303 Minimum disability annuity.

Notwithstanding any other provision of this part, an annuity payable under this part cannot be less than the amount of an annuity computed under 5 U.S.C. 8415 (excluding subsection (f) of that section) based on the annuitant's service.

### § 844.304 Computation of disability annuity for those otherwise eligible to retire.

(a) An individual retiring under this part is not entitled to elect to receive an alternative form of annuity under 5 U.S.C. 8420a, even if the individual meets the requirements for retirement under another part and would be entitled to elect an alternative form of annuity in connection therewith.

(b) Notwithstanding any other provision of this part, an annuity payable under this part will be computed under 5 U.S.C. 8415 if it commences or is reinstated under § 844.405 (b) or (c) of this part on or after:

(1) The annuitant has satisfied the age and service requirements for retirement under 5 U.S.C. 8412 (a) through (f); or

(2) The annuitant has reached age 62.

### § 844.305 Redetermination of disability annuity at age 62.

Effective on and after the annuitant's 62nd birthday, the rate of annuity payable to a disability annuitant will be the amount of an annuity computed with respect to the annuitant under 5 U.S.C. 8415 (including subsection (g) of that section), including credit for all periods before the annuitant's 62nd birthday during which he or she was entitled to an annuity under this part. The average pay used in computing the annuity under 5 U.S.C. 8415 is adjusted by all cost-of-living increases effective under 5 U.S.C. 8462(b) during the period the annuitant was receiving the disability annuity under this part.

## Subpart D—Termination and Reinstatement of Disability Annuity

### § 844.401 Recovery from disability.

(a) Each annuitant receiving disability annuity from the Fund shall be examined under the direction of OPM at the end of one year from the date of disability retirement and annually thereafter until the annuitant becomes 60 years of age unless the disability is found by OPM to be permanent in character. OPM may order a medical or other examination at any time to determine the facts relative to the nature and degree of disability of the annuitant. Failure to submit to reexamination shall result in suspension of annuity.

(b) A disability annuitant may request medical reevaluation under the provisions of this section at any time. OPM may reevaluate the medical condition of disability annuitants age 60 or over only on their own request.

(c) *Recovery based on medical or other documentation.* When OPM determines on the basis of medical documentation or other evidence that a disability annuitant has recovered from the disability, OPM will terminate the annuity effective on the first day of the month beginning 1 year after the date of the medical documentation or other evidence showing recovery. If an agency reemploys a disability annuitant who has been found recovered at any grade or rate of pay within the 1-year period pending termination of the disability annuity under this paragraph, OPM will terminate the annuity effective on the date of reemployment.

(d) *Recovery based on reemployment by the Federal Government.* Reemployment by an agency at any time before age 60 is evidence of recovery if the reemployment is under an appointment not limited to a year or less, at the same or

higher grade or pay level as the position from which the disability annuitant retired. The new position must be full-time unless the position the disability annuitant occupied immediately before retirement was less than full-time, in which case the new position must have a work schedule of no less time than that of the position from which the disability annuitant retired. In this instance, OPM needs no medical documentation to find the annuitant recovered. Disability annuity payments will terminate effective on the first day of the month following the month in which the recovery finding is made under this paragraph.

**§ 844.402 Restoration of earning capacity.**

(a) *Earning capacity determinations.* If a disability annuitant is under age 60 on December 31 of any calendar year and his or her income from wages or self-employment or both during that calendar year equals at least 80 percent of the current rate of basic pay of the position occupied immediately before retirement, the annuitant's earning capacity is considered to be restored. The disability annuity will terminate on the June 30 after the end of the calendar year in which earning capacity is restored.

(b) *Current rate of basic pay for the position occupied immediately before retirement.* (1) A disability annuitant's income for a calendar year is compared to the gross annual rate of basic pay in effect on December 31 of that year for the position occupied immediately before retirement. The income limitation for most disability annuitants is based on the rate for the grade and step that reflects the total amount of basic pay (both the grade and step and any additional basic pay) in effect on the date of separation from the agency for disability retirement. Additional basic pay is included subject to the premium pay restrictions of 5 U.S.C. 5545 (c)(1) and (c)(2).

(2) In the case of an annuitant whose basic pay rate on the date determined under paragraph (b)(1) of this section did not match a specific grade and step in the pay schedule:

(i) For those retiring from a Senior Executive Service position, a merit pay position, a position for which a special pay rate is authorized (except as provided in paragraph (b)(2)(ii) of this section), or any other position in which the rate of basic pay is not equal to a grade and step in a pay schedule, the grade and step will be established for this purpose at the lowest step in the pay schedule grade that is equal to or greater than the actual rate of basic pay payable.

(ii) For those retiring with a retained rate of basic pay or from a position for which a special pay rate is in effect but whose rate of basic pay exceeds the highest rate payable in the pay schedule grade applicable to the position held, the grade is established for this purpose at the highest grade in the schedule that is closest to the grade of the position held and within which the amount of the retained pay falls. The step is established for this purpose at the lowest step in that grade that equals or exceeds the actual rate of pay payable.

(3) For annuitants retiring from the United States Postal Service, only cost-of-living allowances subject to FERS deductions are included in determining the current rate of basic pay of the position held at retirement.

(c) *Income.* (1) Earning capacity for the purposes of this section is demonstrated by an annuitant's ability to earn post-retirement income in exchange for personal services or a work product, or as a profit from one or more businesses wholly or partly owned by the disability annuitant and in the management of which the annuitant has an active role. Income for the purposes of this section is not necessarily the same as income for the purposes of the Internal Revenue Code.

(2) Income earned from one source is not offset by losses from another source. Income earned as wages is not reduced by a net loss from self-employment. The net income from each self-employment endeavor is calculated separately, and the income earned as net earnings from one self-employment endeavor is not reduced by a net loss from another self-employment endeavor. Thus, a net loss from one endeavor is considered to be a net income of zero, and the net incomes from each separate self-employment endeavor are

added together to determine the total amount of income from self-employment for a calendar year.

(3) Income is counted in the calendar year in which it is earned, even though receipt may be deferred.

(d) *Requirement to report income.* All disability annuitants who, on December 31 of any calendar year, are under age 60 must report to OPM their income from wages or self-employment or both for that calendar year. Each year as early as possible, OPM will send a form to annuitants to use in reporting their income from the previous calendar year. The form specifies the date by which OPM must receive the report. OPM will determine entitlement to continued annuity on the basis of the report. If an annuitant fails to submit the report, OPM may stop annuity payments until it receives the report.

**§ 844.403 Annuity rights after a disability annuity terminates.**

(a) When a disability annuity is terminated because of recovery or restoration of earning capacity and the individual is not employed in the Government, the individual is entitled to an annuity:

(1) Under 5 U.S.C. 8414(b) if the individual:

(i) Is at least age 50 when the disability annuity ceases and had 20 or more years of service at the time of retiring for disability; or

(ii) Has 25 or more years of service at the time of retiring for disability, regardless of age; or

(2) Under 5 U.S.C. 8412(g) if the individual is at least the minimum retirement age applicable under 5 U.S.C. 8412(h) when the disability annuity ceases and had 10 or more years of service at the time of retiring for disability.

(b) When a disability annuitant whose annuity was terminated because of Federal reemployment is separated and meets the age and service requirements for immediate retirement under 5 U.S.C. 8412 or 8414, the individual is entitled to an annuity computed under 5 U.S.C. 8415.

[55 FR 6598, Feb. 26, 1990. Redesignated at 58 FR 48273, Sept. 15, 1993]

**§ 844.404 Reinstatement of disability annuity.**

(a) When a disability annuity stops, the individual must again prove that he or she meets the eligibility requirements in order to have the annuity reinstated.

(b) *Reinstatement of annuity terminated based on recovery.* (1) When a recovered disability annuitant under age 62 whose annuity was terminated because he or she was found recovered on the basis of medical evidence (§ 844.401) is not reemployed in a position subject to FERS, and, based on the results of a current medical examination, OPM finds that the disability has recurred, OPM will reinstate the disability annuity as provided in paragraph (d) of this section. The right to the reinstated annuity begins on the date of the medical documentation showing that the disability has recurred, or if the medical documentation clearly shows that the disability recurred on an earlier date, the annuity will be reinstated on that earlier date.

(2) Except in the case of an individual receiving an annuity under § 844.404(b), OPM will, as provided in paragraph (d) of this section, reinstate the disability annuity of a former annuitant whose annuity was terminated because he or she was found recovered on the basis of Federal reemployment when:

(i) The results of a current medical examination show that the individual's medical condition has worsened since the finding of recovery and that the original disability on which retirement was based has recurred; and

(ii) As a result, he or she has been:

(A) Separated and not reemployed in a position subject to FERS; or

(B) Placed in a position that results in a reduction in grade or pay below that from which the individual retired, or in a change to a temporary or intermittent appointment. The right to the reinstated annuity begins on the date the reemployment ends or the effective date of the placement in the position that results in a reduction in grade or pay or change in appointment.

(c) *Reinstatement of annuity terminated because earning capacity was restored.* (1) OPM will reinstate the disability annuity as provided in paragraph (d) of this section when a disability annuitant

whose annuity was terminated under § 844.402(a):

(i) Is not reemployed in a position subject to FERS;

(ii) Has not recovered from the disability for which the individual retired (except in the case of a military reserve technician whose annuity was awarded under 5 U.S.C. 8456); and

(iii) Again loses earning capacity, as determined by OPM.

(2) The reinstated annuity is payable from January 1 of the year following the calendar year in which earning capacity was lost. Earning capacity is lost if, during any calendar year, the individual's income from wages or self-employment or both is less than 80 percent of the current rate of basic pay of the position held at retirement.

(d) Except as provided in §§ 844.303 and 844.304, a disability annuity reinstated under the preceding paragraphs of this section is paid at the rate provided under § 844.302(b) until the end of the 12th month beginning after the annuity is reinstated. Thereafter, the rate determined under § 844.302(c) is payable until age 62.

(e) Notwithstanding the preceding paragraphs, an annuity may not be reinstated under this section if the individual is receiving an annuity under part 842 of this chapter.

[55 FR 6598, Feb. 26, 1990. Redesignated and amended at 58 FR 48273, Sept. 15, 1993]

# PART 845—FEDERAL EMPLOYEES RETIREMENT SYSTEM—DEBT COLLECTION

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## Subpart A—General Provisions

### § 845.101 Purpose.

(a) This part regulates—

(1) The recovery of overpayments of FERS basic benefits;

(2) The standards for waiver of recovery of overpayments of FERS basic benefits; and

(3) The use of FERS basic benefits to recover debts due the United States.

(b) This subpart states the rules of general applicability to this part.

### § 845.102 Definitions.

In this subpart—

*FERS* means the Federal Employees Retirement System as described in chapter 84 of title 5, United States Code.

*FERS basic benefits* means any benefits payable under subchapter II, IV, or V of chapter 84 of title 5, United States Code.

*Fund* means the Civil Service Retirement Fund.

**§ 845.103 Prohibition against collection of debts.**

(a) Debts may be collected from FERS basic benefits only to the extent expressly authorized by Federal statute.

(b) When collection of a debt from FERS basic benefits is authorized under paragraph (a) of this section, the collection will be made in accordance with this part.

**§ 845.104 Status of debts.**

A payment by OPM to a debtor because of an OPM error or the failure of the creditor agency to properly and/or timely submit a debt claim under subpart D of this part, does not erase the debt or affect the validity of the claim by the creditor agency.

**§ 845.105 Termination and suspension of collection actions.**

The termination or suspension of a collection action, other than waiver of an overpayment under subparts B and C of this part, are controlled exclusively by the Federal Claims Collection Standards, chapter II of title 4, Code of Federal Regulations.

## Subpart B—Collection of Overpayment Debts

**§ 845.201 Purpose.**

This subpart prescribes procedures to be followed by the Office of Personnel Management (OPM), which are consistent with the Federal Claims Collection Standards (FCCS) (Chapter II of title 4, Code of Federal Regulations), in the collection of debts owed to the Fund.

**§ 845.202 Scope.**

This subpart covers the collection of debts due the Fund, with the exception of the collection of court-imposed judgments, amounts referred to the Department of Justice because of fraud, and amounts collected from back pay awards in accordance with § 550.805(e)(2) of this chapter.

**§ 845.203 Definitions.**

In this subpart—

*Additional charges* means interest, penalties, and/or administrative costs owed on a debt.

*Annuitant* means a retired employee or Member of Congress, former spouse, spouse, widow(er), or child receiving recurring benefits under the provisions of chapter 84 of title 5, United States Code.

*Compromise* is an adjustment of the total amount of the debt to be collected based upon the considerations established by the FCCS (4 CFR part 103).

*Consumer reporting agency* has the same meaning provided in 31 U.S.C. 3701(a)(3).

*Debt* means a payment of benefits to an individual in the absence of entitlement or in excess of the amount to which an individual is properly entitled.

*Delinquent* has the same meaning provided in 4 CFR 101.2(b).

*FCCS* means the Federal Claims Collection Standards (Chapter II of title 4, Code of Federal Regulations).

*Offset* means to withhold the amount of a debt, or a portion of that amount, from one or more payments due the debtor. Offset also means the amount withheld in this manner.

*Reconsideration* means the process of reexamining an individual's liability for a debt based on—

(a) Proper application of law and regulation; and

(b) Correctness of the mathematical computation.

*Repayment schedule* means the amount of each payment and the number of payments to be made to liquidate the debt as determined by OPM.

*Retirement fund* means the Civil Service Retirement Fund.

*Voluntary repayment agreement* means an alternative to offset that is agreed to by OPM and includes a repayment schedule.

*Waiver* is a decision not to recover a debt under authority of 5 U.S.C. 8470(b).

**§ 845.204 Processing.**

(a) *Notice.* Except as provided in § 845.205, OPM will, before starting collection, tell the debtor in writing—

(1) The reason for and the amount of the debt;

(2) The date on which the full payment is due;

(3) OPM's policy on interest, penalties, and administrative charges;

(4) That offset is available, the types of payment(s) to be offset, the repayment schedule, the right to request an adjustment in the repayment schedule and the right to request a voluntary repayment agreement in lieu of offset;

(5) The individual's right to inspect and/or receive a copy of the Government's records relating to the debt;

(6) The method and time period (30 calendar days) for requesting reconsideration, waiver, and/or compromise and, in the case of offset, an adjustment to the repayment schedule;

(7) The standards used by OPM for determining entitlement to waiver and compromise;

(8) The right to a hearing by the Merit Systems Protection Board on a waiver request (if OPM's waiver decision finds the individual liable) in accordance with paragraph (c)(2) of this section; and

(9) The fact that a timely filing of a request for reconsideration, waiver and/or compromise, or a later timely appeal of a reconsideration or waiver denial to the Merit Systems Protection Board, will stop collection proceedings, unless (i) failure to take the offset would substantially prejudice the Government's ability to collect the debt; and (ii) the time before the payment is to be made does not reasonably permit the completion of these procedures.

(b) *Requests for reconsideration, waiver, and/or compromise.* (1) If a request for reconsideration, waiver, and/or compromise is returned to OPM by mail, it must be postmarked within 30 calendar days of the date of the notice detailed in paragraph (a) of this section. If a request for reconsideration, waiver, and/or compromise is hand delivered, it must be received within 30 calendar days of the date of the notice detailed in paragraph (a) of this section. OPM may extend the 30-day time limit for filing when individuals can prove that they—

(i) Were not notified of the time limit and were not otherwise aware of it; or

(ii) Were prevented by circumstances beyond their control from making the request within the time limit.

(2) When a request for reconsideration, waiver, and/or compromise covered by this paragraph is properly filed before the death of the debtor, it will be processed to completion unless the relief sought is nullified by the debtor's death.

(3) Individuals requesting reconsideration, waiver, and/or compromise will be given a full opportunity to present any pertinent information and documentation supporting their position.

(4) An individual's request for waiver will be evaluated on the basis of the standards set forth in subpart C of this part. An individual's request for compromise will be evaluated on the basis of standards set forth in the FCCS (4 CFR part 103).

(c) *Reconsideration, waiver, and/or compromise decisions.* (1) OPM's decision will be based upon the individual's written submissions, evidence of record, and other pertinent available information.

(2) After consideration of all pertinent information, OPM will issue a written decision. The decision will state the extent of the individual's liability, and, for waiver and compromise requests, whether the debt will be waived or compromised. If the individual is determined to be liable for all or a portion of the debt, the decision will reaffirm or modify the conditions for the collection previously proposed under paragraph (a) of this section. The decision will state the individual's right to appeal to the Merit Systems Protection Board as provided by § 1201.3 of this title, and, in the case of a denial of waiver or reconsideration request that a timely appeal will stop collection of the debt.

### § 845.205 Collection of debts.

(a) *Means of collection.* Collection of a debt may be made by means of offset under § 845.206, or under any statutory provision providing for offset of money due the debtor from the Federal Government, or by referral to the Justice Department for litigation, as provided in § 845.206. Referral may also be made to a collection agency under the provisions of the FCCS.

(b) *Additional charges.* Interest, penalties, and administrative costs will be assessed on the debt in accordance with

standards established in the FCCS at 4 CFR 102.13. Additional charges will be waived when required by the FCCS. In addition, such charges may be waived when OPM determines—

(1) Collection would be against equity and good conscience under the standards prescribed in §§ 845.303 through 845.305; or

(2) Waiver would be in the best interest of the United States.

(c) *Collection in installments.* (1) Whenever feasible, debts will be collected in one lump sum.

(2) However, installments payments may be effected when—

(i) The debtor establishes that he or she is financially unable to pay in one lump sum; or

(ii)(A) The benefit payable is insufficient to make collection in one lump sum;

(B) The debtor fails to respond to a demand for full payment; and

(C) Offset is available.

(3) The amount of the installment payments will be set in accordance with the criteria in 4 CFR 102.11.

(d) *Commencement of collection.* (1) Except as provided in paragraph (d)(2) of this section, collection will begin after the time limits for requesting further rights stated in § 845.204(a)(6) expire or OPM has issued decisions on all timely requests for those rights and the Merit Systems Protection Board has acted on any timely appeal of a waiver denial, unless failure to make an offset would substantially prejudice the Government's ability to collect the debt; and the time before the payment is to be made does not reasonably permit the completion of the proceedings in § 845.204 or litigation. When offset begins without completion of the administrative review process, these procedures will be completed promptly, and amounts recovered by offset but later found not owed will be refunded promptly.

(2) The procedures identified in § 845.204 will not be applied when the debt is caused by a retroactive adjustment in the periodic rate of annuity or any deduction taken from annuity when the adjustment is a result of the annuitant's election of different entitlements under law, if the adjustment is made within 120 days of the effective date of the election; or interim estimated payments made before the formal determination of entitlement to annuity, if the amount is recouped from the total annuity payable on the first day of the month following the last advance payment or the date the formal determination is made, whichever is later.

### § 845.206 Collection by administrative offset.

(a) *Offset from retirement payments.* A debt may be collected in whole or in part from any lump-sum retirement payment or recurring annuity payments.

(b) *Offset from other payments*—(1) *Administrative offset.* (i) A debt may be offset from other payments due the debtor or from other agencies in accordance with 4 CFR 102.3 except that offset from back pay awarded under the provisions of 5 U.S.C. 5596 (and 5 CFR 550.801 *et seq.*) will be made in accordance with § 550.805(e)(2) of this chapter.

(ii) In determining whether to collect claims by means of administrative offset after the expiration of the 6-year limitation provided in 5 U.S.C. 2415, the Director or his or her designee will determine the cost effectiveness of leaving a claim unresolved for more than 6 years. This decision will be based on such factors as the amount of the debt, the cost of collection, and the likelihood of recovering the debt.

(2) *Salary offset.* When the debtor is an employee, or a member of the Armed Forces, OPM may effect collection action by offset of the debtor's pay in accordance with 5 U.S.C. 5514 and 5 CFR 550.1101 *et seq.* Due process described in § 845.204 will apply. The questions of fact and liability, and entitlements to waiver or compromise determined through that process are deemed correct and will not be amended under salary offset procedures. When the debtor did not receive a hearing on the amount of the offset under § 845.204 and requests such a hearing, one will be conducted in accordance with subpart K of part 550 of this chapter.

### § 845.207 Use of consumer reporting agencies.

(a) *Notice.* If a debtor's response to the notice described in § 845.204(a) does

not result in payment in full, payment by offset, or payment in accordance with a voluntary repayment agreement or other repayment schedule acceptable to OPM, and the debtor's rights under § 845.204 have been exhausted, OPM may report the debtor to a consumer reporting agency. In addition, a debtor's failure to make subsequent payments in accordance with a repayment schedule may result in a report to a consumer reporting agency. Before making a report to a consumer reporting agency, OPM will notify the debtor in writing that—

(1) The payment is overdue;

(2) OPM intends, after 60 days, to make a report as described in paragraph (b) of this section to a consumer reporting agency;

(3) The debtor's right to dispute the liability has been exhausted under § 845.204; and

(4) The debtor may suspend OPM action on referral by paying the debt in one lump sum or making payments current under a repayment schedule.

(b) *Report*. When a debtor's response to the notice described in paragraph (a) of this section fails to comply with paragraph (a)(4) of this section or the debtor does not respond, and 60 days have elapsed since the notice was mailed, OPM may report to a consumer reporting agency that an individual is responsible for an unpaid debt and provide the following information:

(1) The individual's name, address, taxpayer identification number, and any other information necessary to establish the identity of the individual;

(2) The amount, status, and history of the debt; and

(3) The fact that the debt arose in connection with the administration of FERS or CSRS.

(c) *Subsequent reports*. OPM will update its report to the consumer reporting agency whenever it has knowledge of events that substantially change the status or the amount of the liability.

### § 845.208 Referral to a collection agency.

(a) OPM retains the responsibility for resolving disputes, compromising claims, referring the debt for litigation, or suspending or terminating collection action.

(b) OPM may refer certain debts to commercial collection agencies under the following conditions:

(1) All processing required by § 845.204 has been completed before the debt is released; and

(2) A contract for collection services has been negotiated.

### § 845.209 Referral for litigation.

From time to time and in a manner consistent with the General Accounting Office's and the Justice Department's instructions, OPM will refer certain overpayments to the Justice Department for litigation. Referral for litigation will suspend processing under this subpart.

## Subpart C—Standards for Waiver of Overpayments

### § 845.301 Conditions for waiver.

Recovery of an overpayment from the Fund may be waived pursuant to section 8470(b), of title 5, United States Code, when (a) the annuitant is without fault and (b) recovery would be against equity and good conscience. When it has been determined that the recipient of an overpayment is ineligible for waiver, the individual is nevertheless entitled to an adjustment in the recovery schedule if he or she shows that it would cause him or her financial hardship to make payment at the rate scheduled.

### § 845.302 Fault.

A recipient of an overpayment is without fault if he or she performed no act of commission or omission that resulted in the overpayment. The fact that the Office of Personnel Management (OPM) or another agency may have been at fault in initiating an overpayment will not necessarily relieve the individual from liability.

(a) *Considerations*. Pertinent considerations in finding fault are—

(1) Whether payment resulted from the individual's incorrect but not necessarily fraudulent statement, which he or she should have known to be incorrect;

(2) Whether payment resulted from the individual's failure to disclose material facts in his or her possession,

which he or she should have known to be material; or

(3) Whether he or she accepted a payment that he or she knew or should have known to be erroneous.

(b) *Mitigation factors.* The individual's age, physical and mental condition or the nature of the information supplied to him or her by OPM or a Federal agency may mitigate against finding fault if one or more of these factors contributed to his or her submission of an incorrect statement, a statement that did not disclose material facts in his or her possession, or his or her acceptance of an erroneous overpayment.

**§ 845.303 Equity and good conscience.**

Recovery is against equity and good conscience when—

(a) It would cause financial hardship to the person from whom it is sought;

(b) The recipient of the overpayment can show (regardless of his or her financial circumstances) that due to the notice that such payment would be made or because of the incorrect payment he or she either has relinquished a valuable right or has changed positions for the worse; or

(c) Recovery would be unconscionable under the circumstances.

**§ 845.304 Financial hardship.**

Financial hardship may be deemed to exist in, but not limited to, those situations when the annuitant from whom collection is sought needs substantially all of his or her current income and liquid assets to meet current ordinary and necessary living expenses and liabilities.

(a) *Considerations.* Some pertinent considerations in determining whether recovery would cause financial hardship are as follows:

(1) The individual's financial ability to pay at the time collection is scheduled to be made.

(2) Income to other family member(s), if such member's ordinary and necessary living expenses are included in expenses reported by the annuitant.

(b) *Exemptions.* Assets exempt from execution under State law should not be considered in determining an individual's ability to repay the indebtedness. Rather primary emphasis will be placed upon the annuitant's liquid assets and current income in making such determinations.

**§ 845.305 Ordinary and necessary living expenses.**

An individual's ordinary and necessary living expenses include rent, mortgage payments, utilities, maintenance, transportation, food, clothing, insurance (life, health, and accident), taxes, installment payments, medical expenses, support expenses for which the annuitant is legally responsible, and other miscellaneous expenses that the individual can establish as being ordinary and necessary.

**§ 845.306 Waiver precluded.**

Waiver of an overpayment cannot be granted when—

(a) The overpayment was obtained by fraud; or

(b) The overpayment was made to an estate.

**§ 845.307 Burdens of proof.**

(a) *Burden of OPM.* The Associate Director must establish by the preponderance of the evidence that an overpayment occurred.

(b) *Burden of annuitant.* The recipient of an overpayment must establish by substantial evidence that he or she is eligible for waiver or an adjustment.

## Subpart D—Agency Requests to OPM for Recovery of a Debt From the Civil Service Retirement Fund

**§ 845.401 Purpose.**

This subpart prescribes the procedures to be followed by a Federal agency when it requests the Office of Personnel Management (OPM) to recover a debt owed to the United States by administrative offset against money due and payable to the debtor from the Fund. This subpart also prescribes the procedures that OPM must follow to make these administrative offsets.

**§ 845.402 Scope.**

This subpart applies to agencies and debtors, as defined by § 845.403.

**§ 845.403 Definitions.**

In this subpart—

*Act* means the Federal Claims Collection Act of 1966 as amended by the Debt Collection Act of 1982 and implemented by 4 CFR 101.1 *et seq.*, the Federal Claims Collection Standards (FCCS).

*Administrative offset* means withholding money payable from the Fund to satisfy a debt to the United States under 31 U.S.C. 3716.

*Agency* means—

(a) An Executive agency as defined in § 105 of title 5, United States Code, including the U.S. Postal Service and the U.S. Postal Rate Commission;

(b) A military department, as defined in § 102 of title 5, United States Code;

(c) An agency or court in the judicial branch, including a court as defined in § 610 of title 28, United States Code, the District Court for the Northern Mariana Islands, and the Judicial Panel on Multidistrict Litigation;

(d) An agency of the legislative branch, including the U.S. Senate and the U.S. House of Representatives; and

(e) Other independent establishments that are entities of the Federal Government.

*Annuitant* means an annuitant as defined in § 8401(2) of title 5, United States Code, or a survivor as defined in § 8401(28) of title 5, United States Code.

*Annuity* means the monthly benefit of indefinite duration payable to an annuitant or survivor annuitant.

*Compromise* has the same meaning as in 4 CFR part 103.

*Consent* means the debtor has agreed in writing to administrative offset after receiving notice of all rights under 31 U.S.C. 3716 and this subpart.

*Creditor agency* means the agency to which the debt is owed.

*Debt* means an amount owed to the United States on account of loans insured or guaranteed by the United States, and other amounts due the United States from fees, duties, leases, rents, royalties, services, sales of real or personal property, overpayments, fines, penalties, damages, interest, taxes, forfeitures, etc.

*Debt claim* means an agency request for recovery of a debt in a form approved by OPM.

*Debtor* means a person who owes a debt, including an employee, former employee, Member, former Member, or the survivor of one of these individuals.

*Employee* has the same meaning as in section 8401(11) of title 5, United States Code, and includes reemployed annuitants and employees of the U.S. Postal Service.

*Fraud claim* means any debt designated by the Attorney General (or designee) as involving an indication of fraud, the presentation of a false claim, or misrepresentation on the part of the debtor or any other party having an interest in the claim.

*Individual Retirement Record* means the record of retirement contributions that must be maintained under § 841.504 of this chapter.

*Lump-sum credit* has the same meaning as in section 8401(19) of title 5, United States Code.

*Member* has the same meaning as in section 8401(20) of title 5, United States Code.

*Net annuity* means annuity after excluding amounts required by law to be deducted.

*Paying agency* means the agency that employs the debtor and authorizes the disbursement of his or her current pay account.

*Refund* means the payment of a lump-sum credit to an individual who meets all requirements for payment and files application for it.

### § 845.404 Conditions for requesting an offset.

An agency may request that money payable from the Fund be offset to recover any valid debt due the United States when all of the following conditions are met:

(a) The debtor failed to pay all of the debt on demand, or the creditor agency has collected as much as possible from payments due the debtor from the paying agency; and

(b) The creditor agency sends a debt claim to OPM (under § 845.405(b) (1), (2), (3) or (4), as appropriate) after doing one of the following:

(1) Obtaining a court judgment for the amount of the debt;

(2) Following the procedures required by 31 U.S.C. 3716 and 4 CFR 102.4;

(3) Following the procedures required by 5 U.S.C. 5514 and subpart K of part 550 of this chapter; or

(4) Following the procedures agreed upon by the creditor agency and OPM,

if it is excepted by § 845.405(b)(4) from the completion of procedures prescribed by § 845.405(b)(3).

### § 845.405 Creditor agency processing for non-fraud claims.

(a) *Where to submit the debt claim, judgment or notice of debt*—(1) *Creditor agencies that are not the debtor's paying agency*. (i) If the creditor agency knows that the debtor is employed by the Federal Government, it should send the debt claim to the debtor's paying agency for collection.

(ii) If some of the debt is unpaid after the debtor separates from the paying agency, the creditor agency should send the debt claim to OPM as described in paragraph (b) of this section.

(2) *Creditor agencies that are the debtor's paying agency*. Ordinarily, debts owed the paying agency should be offset under 31 U.S.C. 3716 from any final payments (salary, accrued annual leave, etc.) due the debtor. If a balance is due after offsetting the final payments or the debt is discovered after the debtor has been paid, the paying agency may send the debt claim to OPM as described in paragraph (b) of this section.

(b) *Procedures for submitting debt claim, judgment or notice of debt to OPM*—(1) *Debt claims for which the agency has a court judgment*. If the creditor agency has a court judgment against the debtor specifying the amount of the debt to be recovered, the agency should send the debt claim and two certified copies of the judgment to OPM.

(2) *Debt claims previously processed under 5 U.S.C. 5514*. If the creditor agency previously processed the debt claim under 5 U.S.C. 5514, it should—

(i) Notify the debtor that the claim is being sent to OPM to complete collection from the Fund; and

(ii) Send the debt claim to OPM with two copies of the paying agency's certification of the amount collected and one copy of the notice to the debtor that the claim was sent to OPM.

(3) *Debt claims not processed under 5 U.S.C. 5514, reduced to court judgment, or excepted by paragraph (b)(4) of this section*. (i) If the debt claim was not processed under 5 U.S.C. 5514, reduced to court judgment or excepted by paragraph (b)(4) of this section, the creditor agency must—

(A) Comply with the procedures required by 4 CFR 102.4 by issuing written notice to the debtor of the nature and amount of the debt, the agency's intention to collect by offset, the opportunity to obtain review within the agency of the determination of indebtedness, and the opportunity to enter into a written agreement with the agency to repay the debt; and

(B) Complete the appropriate debt claim.

(ii) If the debtor does not respond to the creditor agency's notice within the allotted time and there is no reason to believe that he or she did not receive the notice, the creditor agency may submit the debt claim to OPM after certifying that notice was issued and the debtor failed to reply.

(iii) If the debtor responds to the notice by requesting a review (or hearing if one is available), the review (or hearing) must be completed before the creditor agency submits the debt claim.

(iv) If the debtor receives the notice and responds by consenting to the collection, the creditor agency must send (to OPM) a copy of the debtor's consent along with the debt claim.

(4) *Debt claims excepted from procedures described in paragraph (b)(3) of this section*. Creditor agencies must follow specific procedures approved by OPM, rather than those described in paragraph (b)(3) of this section, for the collection of—

(i) Debts due because of the individual's failure to pay health benefits premiums while he or she was in nonpay status or while his or her salary was not sufficient to cover the cost of premiums;

(ii) Unpaid Federal taxes to be collected by Internal Revenue Service levy;

(iii) Premiums due because of the annuitant's election of Part B, Medicare coverage (retroactive collection limited to 6 months of premiums); or

(iv) Overpaid military retired pay an annuitant elects in writing to have withheld from his or her annuity.

(5) *General certification requirements for debt claims*. Creditor agencies submitting debt claims must certify—

(i) That the debt is owed to the United States;

(ii) The amount and reason for the debt and whether additional interest accrues;

(iii) The date the Government's right to collect the debt first accrued;

(iv) That the agency has complied with the applicable statutes, regulations, and OPM procedures;

(v) That if a competent administrative or judicial authority issues an order directing OPM to pay a debtor an amount previously paid to the agency (regardless of the reasons behind the order), the agency will reimburse OPM or pay the debtor directly within 15 days of the date of the order.

NOTE: OPM may, at its discretion, decline to collect other debt claims sent by an agency that does not abide by this certification.

(vi) If the collection will be in installments, the amount or percentage of net annuity in each installment; and

(vii) If the debtor does not (in writing) consent to the offset, or does not (in writing) acknowledge receipt of the required notices and procedures, or the creditor agency does not document a judgment offset or a previous salary offset, identify the action(s) taken to comply with 4 CFR 102.3, including any required hearing or review, and give the date(s) the action(s) was taken.

(6) *Notice of debt.* When a creditor agency cannot send a complete debt claim, it should notify OPM of the existence of the debt so that the lump-sum will not be paid before the debt claim arrives.

(i) The notice to OPM must include a statement that the debt is owed to the United States, the date the debt first accrued, and the basis for and amount of the debt, if known. If the amount of the debt is not known, the agency must establish the amount and notify OPM in writing as soon as possible after submitting the notice.

(ii) The creditor agency may either notify OPM by making a notation in column 8 [Remarks] under ''Fiscal Record'' on the Individual Retirement Record, if the Individual Retirement Record is in its possession, or if not, by submitting a separate document identifying the debtor by name, giving his or her date of birth, social security number, and date of separation, if known.

(c) *Time limits for sending records and debt claims to OPM*—(1) *Time limits for submitting debt claims.* Unless there is an application for refund pending, there is no specific time for submitting a debt claim or notice of debt to OPM. Generally, however, agencies must file a debt claim before the statute of limitations expires (4 CFR 102.4(c)) or before a refund is paid. Time limits are imposed (see § 845.406(a)) when the debtor is eligible for a refund and OPM receives his or her application requesting payment. In this situation, creditor agencies must file a complete debt claim within 120 days (or 180 days if the agency requests an extension of time before the refund is paid) of the date OPM requests a complete debt claim.

(2) *Time limit for submitting retirement records to OPM.* A paying agency must send the Individual Retirement Record to OPM no later than 60 days after the separation, termination, or entrance on duty in a position in which the employee is not covered by FERS.

### § 845.406 OPM processing for non-fraud claims.

(a) *Refunds—incomplete debt claims.* (1) If a creditor agency sends OPM a notice of debt claim against a refund OPM is processing for payment, OPM will withhold the amount of the debt but will not make any payment to the creditor agency. OPM will notify the creditor agency that the procedures in this subpart and 4 CFR 102.4 must be completed; and a debt claim must be completed and returned to OPM within 120 days of the date of OPM's notice to the creditor agency. Upon request, OPM will grant the creditor agency one extension of up to 60 days if the request for extension is received before the lump-sum payment has been made. The extension will commence on the day after the 120-day period expires so that the total time OPM holds payment of the refund will not exceed 180 days.

(2) During the period allotted the creditor agency for sending OPM a complete debt claim, OPM will handle the debtor's application for refund under section 8424 of title 5, United States Code, in one of two ways:

(i) If the amount of the debt is known, OPM will notify the debtor of the debt claim against his or her lump-sum credit, withhold the amount of the debt, and pay the balance to the debtor, if any.

(ii) If the amount of the debt is not known, OPM will not pay any amount to the debtor until the creditor agency certifies the amount of the debt, submits a complete debt claim, or the time limit for submission of the debt claim expires, whichever comes first.

(b) *Refunds—complete debt claims*—(1) *OPM receives an application from the debtor prior to or at the same time as the agency's debt claim.* (i) If a refund has been paid, OPM will notify the creditor agency there are no funds available for offset. Except in the case of debts due because of the employee's failure to pay health benefits premiums while he or she is in nonpay status or while his or her salary was not sufficient to cover the cost of premiums, creditor agencies should refer to the instructions in the FCCS for other measures to recover the outstanding debt; however, OPM will retain the debt claim on file in the event the debtor is once again employed in a position subject to retirement deductions.

(ii) If a refund is payable and the creditor agency submits a complete debt claim in accordance with § 845.405(b) (1), (2), (3), or (4), the debt will be collected from the refund and any balance paid to the debtor. OPM will send the debtor a copy of the debt claim, judgment, consent, or other document, and notify him or her that the creditor agency was paid.

(2) *If OPM has not received an application from the debtor when the agency's debt claim is received.* If a debtor has not filed application for a refund, OPM will retain the debt claim for future recovery. OPM will make the collection whenever an application is received, provided the creditor agency initiated the administrative offset before the statute of limitations expired. (See 4 CFR 102.3(b)(3) and 102.4(c).) OPM will notify the creditor agency that it does not have an application from the debtor so that the agency may take other action to recover the debt.

NOTE: If the recovery action is successful, the creditor agency must notify OPM so it can void the debt claim.

(3) *Future recovery.* (i) If OPM receives an application for refund within 1 year of the date the agency's debt claim was received and the creditor agency does not indicate that interest is accruing on the debt, the debt will be processed as stated in paragraph (b)(1)(ii) of this section.

(ii) If OPM receives an application for refund within 1 year of the date the agency's debt claim was received and the creditor agency indicates that interest accrues on the debt, when necessary, OPM will contact the creditor agency to confirm that the debt is outstanding and request submission in writing, of the total additional accrued interest. OPM will not make interest computations for creditor agencies.

(iii) When OPM receives an application for refund more than 1 year after the creditor agency's debt claim was received, whether interest accrues or not, OPM will contact the creditor agency to see if the debt is still outstanding and, when necessary, request an update of the interest charges. If the debt is still due, the creditor agency must give the debtor an opportunity to establish that his or her changed financial circumstances, if any, would make the offset unjust. (See 4 CFR 102.4(c).) If the creditor agency determines that offset as requested in the debt claim would be unjust because of the debtor's changed financial circumstances, the agency should permit the debtor to offer a satisfactory repayment plan in lieu of offset. If the agency decides to pursue the offset, it must submit to OPM the requested information and any new instructions within 60 days of the date of OPM's request or the claim may be voided and the balance paid to the individual.

(c) *Annuities—incomplete debt claims.* (1) If a creditor agency sends OPM notice of a debt or an incomplete debt claim against a debtor who is receiving an annuity, OPM will not offset the annuity. OPM will notify the creditor agency that—

(i) The procedures in this subpart and 4 CFR 102.4 must be completed; and

(ii) A debt claim must be completed and sent to OPM.

(2) No time limit will be given for the submission of a debt claim against an annuity; however, a debt claim must be received within 10 years of the date the Government's right to collect first accrued (4 CFR 102.3(b)(3)).

(d) *Annuities—complete debt claims*—(1) *General*—(i) *Notice.* When OPM receives a complete debt claim and an application for annuity, OPM will offset the annuity, pay the creditor agency, and mail the debtor a copy of the debt claim along with notice of the payment to the creditor agency.

(ii) *Beginning deductions.* If OPM already established the debtor's annuity payment, deductions will begin with the next available annuity payment. If OPM is in the process of establishing the annuity payments, deductions will not be taken from advance annuity payments, but will begin with the annuity payable on the first day of the month following the last advance payment.

(iii) *Updating accrued interest.* Once OPM has completed a collection, if there are additional accrued interest charges, the creditor agency must contact OPM regarding any additional amount due within 90 days of the date of the final payment.

(2) *Claims held for future recovery.* (i) If OPM receives an application for annuity within 1 year of the date the agency's debt claim was received, the debt will be processed as stated in paragraph (c)(1) of this section.

(ii) If OPM receives an application for annuity more than 1 year after the agency's debt claim was submitted, OPM will contact the creditor agency to see if the debt is still outstanding. If the debt is still due, the creditor agency should permit the debtor to offer a satisfactory repayment plan in lieu of offset if the debtor establishes that his or her changed financial circumstances would make the offset unjust. (See 4 CFR 102.4(c).) If the agency decides to pursue the offset, it must submit the requested information and any new instructions about the collection to OPM.

(e) *Limitations on OPM review.* In no case will OPM review—

(1) The merits of a creditor agency's decision regarding reconsideration, compromise, or waiver; or

(2) The creditor agency's decision that a hearing was not required in any particular proceeding.

### § 845.407 Installment withholdings.

(a) When possible, OPM will collect a creditor agency's full claim in one payment from the debtor's refund or annuity.

(b) If collection must be made from an annuity and the debt is large, the creditor must generally accept payment in installments. The responsibility for establishing and notifying the debtor of the amount of the installments belongs to the creditor agency (see § 845.405(b)(5)). However, OPM will not make an installment deduction for more than 50 percent of net annuity, unless a higher percentage is needed to satisfy a judgment against a debtor within 3 years or the annuitant has consented to the higher amount in writing. All correspondence concerning installment deductions received by OPM will be referred to the creditor agency for consideration.

### § 845.408 Special processing for fraud claims.

When an agency sends a claim indicating fraud, presentation of a false claim, misrepresentation by the debtor or any other party interested in the claim, or any claim based in whole or part on conduct violating the antitrust laws, to the Department of Justice (Justice) for possible treatment as a fraud claim (4 CFR 101.3), the following special procedures apply.

(a) *Agency processing.* If the debtor is separated or separates while Justice is reviewing the claim, the paying agency must send the Individual Retirement Record to OPM, as required by § 845.405(c)(2). The agency where the claim arose must send OPM notice that a claim is pending with Justice. (See § 845.405(b)(6) for instructions on giving OPM a notice of debt.)

(b) *Department of Justice processing.* (1) The Attorney General or a designee will decide whether a debt claim sent in by an agency will be reserved for collection by Justice as a fraud claim. Upon receiving a possible fraud claim to be collected by offset from the Fund, the Attorney General or a designee

must notify OPM. The notice to OPM must contain the following:

(i) The name, date of birth, and social security number of the debtor;

(ii) The amount of the possible fraud claim, if known;

(iii) The basis of the possible fraud claim; and

(iv) A statement that the claim is being considered as a possible fraud claim, the collection of which is reserved to Justice.

(2) When there is a pending refund application, the Attorney General or designee must file a complaint seeking a judgment on the claim and send a copy of the complaint to OPM; or as provided in 4 CFR 101.3, refer the claim to the agency where the claim arose and submit a copy of the referral to OPM within 180 days of the date of either notice from the agency that a claim is pending with Justice (paragraph (a) of this section) or notice from Justice that it has received a possible fraud claim (paragraph (b)(1) of this section) whichever is earlier. When the claim is referred to the agency where it arose, the agency must begin administrative collection action under 4 CFR 102.4 and send a complete debt claim to OPM as required in § 845.405.

(c) *OPM processing against refunds.* (1) Upon receipt of a notice under paragraph (a) or (b)(1) of this section, whichever is earlier, OPM will withhold the amount of the debt claim, if known; notify the debtor that the amount of the debt will be withheld from the refund for at least 180 days from the date of the notice that initiated OPM processing; and pay the balance to the debtor. If the amount of the debt claim is not known, OPM will notify the debtor that a debt claim may be offset against his or her refund and that OPM will not pay any amount until either the amount of the debt claim is established, or the time limit for filing a complaint in court or submitting the debt claim expires, whichever comes first.

(2) If the Attorney General files a complaint and notifies OPM within the applicable 180-day period, OPM will continue to withhold payment of the lump-sum credit until there is a final judgment.

(3) If the Attorney General refers the claim to the agency where the claim arose (creditor agency) and notifies OPM within the applicable 180-day period, OPM will notify the creditor agency that (i) the procedures in this subpart and 4 CFR 102.4 must be completed; and (ii) a debt claim must be sent to OPM within 120 days of the date of OPM's notice to the creditor agency. At the request of the creditor agency, one extension of time of not more than 60 days will be granted, as provided by § 845.406(a).

(4) If OPM is not notified that a complaint has been filed or that the claim has been referred to the creditor agency within the applicable 180-day period, OPM will pay the balance of the refund to the debtor.

(d) *OPM processing against annuities.* If the debtor has filed an annuity claim, OPM will not take action against the annuity. OPM will continue to pay the annuity unless and until there is a final judgment for the United States or submission of a complete debt claim.

(e) *OPM collection and payment of the debt.* (1) If the United States obtains a judgment against the debtor for the amount of the debt or the creditor agency submits a complete debt claim, OPM will collect and pay the debt to the creditor agency as provided in §§ 845.406 and 845.407.

(2) If the suit or the administrative proceeding results in a judgment for the debtor without establishing a debt to the United States, OPM will pay the balance of the refund to the debtor upon receipt of a certified copy of the judgment or administrative decision.

# PART 846—FEDERAL EMPLOYEES RETIREMENT SYSTEM—ELECTIONS OF COVERAGE

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SOURCE: 52 FR 19235, May 21, 1987, unless otherwise noted.

## Subpart A—General Provisions

### § 846.101 Purpose.

This part identifies the employees who may transfer to the Federal Employees Retirement System (FERS), gives the conditions under which they may transfer, and sets forth the method of computing the annuities of employees who transfer to FERS.

### § 846.102 Definitions.

In this part—

*CSRS* means subchapter III of chapter 83 of title 5, United States Code.

*CSRS/SS service* means service subject to both CSRS deductions (or deductions under another retirement system for Federal employees if such service is creditable under CSRS) and social security deductions as a result of the Social Security Amendments of 1983. For this purpose, the service of an individual is considered CSRS/SS service if the service would have been covered under CSRS except for an election under section 208(a)(1)(A) of the Federal Employees Retirement Contribution Temporary Adjustment Act of 1983 to have no CSRS coverage.

*Employee* means an employee as defined by § 842.102 of this chapter.

*Employing office* means the office of an agency to which jurisdiction and responsibility for retirement matters for an employee have been delegated.

*FERS* means the Federal Employees Retirement System as described in chapter 84 of title 5, United States Code.

*Former spouse* means a former spouse as defined in § 838.103 or § 838.1003 of this chapter.

*Member* means a Member of Congress as defined in section 2106 of title 5, United States Code.

*OPM* means the Office of Personnel Management.

*Qualifying court order* means a court order acceptable for processing as defined in § 838.103 of this chapter or a qualifying court order as defined in § 838.1003 of this chapter.

*Social security* means coverage under the Old Age, Survivors, and Disability Insurance programs of the Social Security Act.

[52 FR 19235, May 21, 1987, as amended at 57 FR 33599, July 29, 1992]

## Subpart B—Elections

### § 846.201 Elections to become subject to FERS.

(a) *Employees and Members subject to CSRS on June 30, 1987.* An individual who, on June 30, 1987, is employed in the Federal service or is a Member and who is covered by CSRS may elect to become subject to FERS. An election under this paragraph may not be made before July 1, 1987, or after December 31, 1987.

(b)(1) *Separated employees who are reemployed.* A former employee who, after June 30, 1987, becomes reemployed and subject to CSRS may elect, during the 6-month period beginning on the date he or she becomes subject to CSRS, to become subject to FERS, except that an employee serving under an interim appointment under the authority of § 772.102 of this chapter is not eligible to elect to become subject to FERS.

(2) *Separated employees who are employed with the District of Columbia Financial Management and Assistance Authority (Authority).* A former employee who becomes employed with the Authority and subject to CSRS may elect, during the 6-month period beginning on the date he or she becomes subject to CSRS, to become subject to FERS, except that an employee serving under an interim appointment under the authority of § 772.102 of this chapter is not eligible to elect to become subject to FERS.

(c) *Employees and Members not subject to CSRS.* (1) An employee or Member who is excluded from FERS coverage on January 1, 1987, by § 842.104 (d) or (f) of this chapter and who, on December 31, 1986, is not subject to CSRS may elect to become subject to FERS. An election under this paragraph (c)(1) may not be made before July 1, 1987, or after December 31, 1987.

(2) An employee who, on June 30, 1987, is not covered by CSRS, but later becomes so covered, may elect to become subject to FERS. An election under this paragraph (c)(2) must be made during the 6-month period beginning on the date he or she becomes subject to CSRS.

(3) An employee who would be subject to CSRS except for the exclusions in § 831.201 of this chapter, but is not excluded from FERS by 5 U.S.C. 8401 nor by § 842.105 of this chapter, is deemed eligible to make an election of FERS coverage under this section. An election under this paragraph (c)(3) must be made during the period beginning July 1, 1987, and ending December 31, 1987, or, if later, during the 6-month period beginning on the date the employment described in this paragraph (c)(3) begins.

(d) *Exceptions.* (1) An individual who is an employee of the government of the District of Columbia may not elect to become subject to FERS except an individual so employed who is covered by CSRS and eligible for FERS coverage by operation of section 11246 of Pub. L. 105–33, 111 Stat. 251, or section 7(e) of Pub. L. 105–274, 112 Stat. 2419.

(2) A Member who has irrevocably elected, by written notice to the official by whom the Member is paid, not to participate in FERS may not elect to become subject to FERS during the same continuous period of service.

(3) An employee or reemployed annuitant whose appointment is excluded from FERS coverage by law or regulation may not become subject to FERS by reason of an election under this section except as specified in paragraph (c) of this section or as otherwise provided by law.

(4) An election under this section may not be made by an individual who is ineligible for social security coverage.

(e) *Effective date.* An election made under this section is effective with the first pay period beginning after the date the election is properly filed with the employing office.

(f) *Irrevocability.* An election made under this section is irrevocable.

[52 FR 19235, May 21, 1987, as amended at 57 FR 3714, Jan. 31, 1992; 61 FR 58459, Nov. 15, 1996; 62 FR 50997, Sept. 30, 1997; 64 FR 15289, Mar. 31, 1999]

**§ 846.202 Condition for making an election.**

(a) An election under § 846.102 of this part may not become effective unless the election is made with the written consent of any former spouse(s) entitled to benefits under subpart F of part 831 of this chapter or part 838 of this chapter. As provided in section 301(d)(2)(A) of the FERS Act of 1986, this section applies only if OPM has been duly notified concerning any qualifying court order and has received the documentation required in § 838.211, § 838.721, or § 838.1005 of this chapter. This section does not apply with respect to a former spouse who has ceased to be so entitled because of remarrying before age 55.

(b) OPM may waive the requirement of paragraph (a) of this section upon a showing that the former spouse's whereabouts cannot be determined. A request for waiver on this basis must be accompanied by—

(1) A judicial or administrative determination that the former spouse's whereabouts cannot be determined; or

(2)(i) Affidavits by the employee or Member and two other persons, at least one of whom is not related to the employee or Member, attesting to the inability to locate the former spouse and stating the efforts made to locate the spouse; and

(ii) Documentary corroboration such as newspaper reports about the former spouse's disappearance.

(c) OPM may waive the requirement of paragraph (a) of this section based on exceptional circumstances if the employee or Member presents a judicial determination regarding the former spouse that would warrant waiver of the consent requirement based on exceptional circumstances.

(d)(1) OPM shall, upon application of an individual, grant an extension for such individual to make an election under § 846.201 of this part, if the individual—

(i) Files an application for the extension with OPM before the end of the period during which the individual would otherwise be eligible to make the election; and

(ii) Demonstrates to OPM's satisfaction that the extension is needed to secure the modification of a decree of divorce or annulment (or court ordered or court-approved property settlement incident to any such decree) on file at OPM in order to satisfy the consent requirement under paragraph (a) of this section.

(2) The application for extension is deemed to be filed with OPM on the date it is received in the employing office.

(3) An extension granted under this paragraph expires 6 months after the date it was granted. OPM may grant one further extension upon application by the individual seeking to make an election of FERS coverage.

(e) An electing individual who has a former spouse who may be entitled to benefits as described in paragraph (a) of this section must submit with the election either—

(1) The consent of the former spouse in a form prescribed by OPM,

(2) A request for an extension as described in paragraph (f) of this section,

(3) A request for a waiver of the consent requirement and the documentation to support the request as described in paragraph (d) or (e) of this section, or

(4) A request for a determination as to whether a qualifying court order as described in paragraph (a) of this section is on file with OPM.

(f) The request for waiver or extension described in paragraphs (b), (c), and (d) of this section must be in a form prescribed by OPM. The employing office must forward the request to OPM promptly.

(g) If OPM does not have a copy of a qualifying court order in its possession, OPM's notice to the agency that it has no qualifying court order is deemed to complete the individual's election of FERS, which becomes effective with the first pay period after the employing office receives OPM's notification.

(h) If OPM has a copy of a qualifying court order, OPM will notify both the individual and the employing agency of its determination regarding a request for extension.

(i) If OPM has a copy of a qualifying court order in its possession and grants a waiver of the requirement of paragraph (a) of this section, OPM will notify both the individual and the employing office of its decision. OPM's

notice to the employing office is deemed to complete the individual's election, which becomes effective with the first pay period after the employing office receives OPM's notice that the waiver is granted.

[52 FR 19235, May 21, 1987, as amended at 57 FR 33599, July 29, 1992]

### § 846.203 Agency responsibilities.

(a) Employing offices must distribute the election forms provided by OPM to each eligible individual, including all individuals in a nonduty status.

(b) An employing office must obtain documentation of the individual's receipt of the election form specified in paragraph (a) of this section and retain the documentation permanently in the individual's official personnel folder (or the equivalent). Acceptable documentation includes—

(1) A statement of receipt signed by the individual, or

(2) A signed postal return receipt showing that the election form was received at the individual's address.

### § 846.204 Belated elections and correction of administrative errors.

(a) *Belated elections.* On determination by an employing office that the FERS transfer handbook issued by OPM was not available to an individual in a timely manner or an individual was unable, for cause beyond his or her control, to elect FERS coverage within the prescribed time limit, the employing office may, within 6 months after the expiration of the individual's opportunity to elect FERS coverage under § 846.201, accept the individual's election of FERS coverage.

(b)(1) *Correction of administrative errors related to election.* During the 6-month period after the expiration of an individual's opportunity to elect FERS coverage under § 846.201, the employing office may make prospective corrections of administrative errors regarding an individual's opportunity to elect FERS coverage, including failure to provide the election form specified in § 846.203(a) to an individual.

(2)(i) *Erroneous FERS coverage for a period of less than 3 years of service.* For an employee, separated employee, or retiree whose employing agency erroneously determined that the individual was covered by FERS during the period under § 846.201 when the individual was eligible to elect FERS, and the employing agency should have placed the individual in CSRS, CSRS Offset, or Social Security-Only, under conditions that would have included an opportunity to elect FERS coverage, and the employee, separated employee, or retiree remained in FERS for less than 3 years of service, the employee, separated employee, or retiree is deemed to have elected FERS coverage and the individual will remain covered by FERS, unless the individual declines under paragraph (b)(2)(ii) of this section to be covered by FERS.

(ii)(A) The employing agency must provide written notice to each individual who is deemed to have elected FERS under paragraph (b)(2)(i) of this section that the individual may, within 60 days after receiving the notice, decline to be deemed to have transferred to FERS.

(B) If the individual dies during the election period established by paragraphs (b)(2)(ii) (A) and (C) of this section, the right of election under paragraph (b)(2)(i) of this section may be exercised by any person who would be entitled to receive a current spouse survivor annuity or a former spouse survivor annuity under CSRS (or CSRS Offset), if any, if the error had not occurred (the election by any one such current or former spouse not to have the election of FERS coverage deemed is controlling); otherwise, by the individual or individuals entitled to receive the lump-sum credit under CSRS (or CSRS Offset) if the error had not occurred (the election by any individual entitled to a share of the lump-sum credit not to have the election of FERS coverage deemed is controlling). The time limit for making an election under this paragraph is 60 days after the date of the agency's notice to the individual (survivor) of the election right.

(C) The agency may waive the 60-day time limit under paragraphs (b)(2)(ii) (A) and (B) of this section if the individual (if living, otherwise the appropriate survivor) exercised due diligence in making the election but was prevented by circumstances beyond his or her control from making the election

within the time limit. An agency decision not to waive the time limit under this paragraph must include notice to the individual of the individual's right to request OPM to reconsider the denial of the waiver of the time limit. OPM's reconsideration decision on denial of a waiver of the time limit will notify the individual of the right to appeal to the Merit Systems Protection Board under chapter II of this title.

(iii) The employing agency must document the individual's records to reflect his or her decision concerning retirement coverage.

(c) *OPM's reconsideration.* An agency decision concerning an individual's opportunity to elect FERS coverage or the effective date of an election of FERS coverage is subject to reconsideration by OPM under § 846.205.

(d) *Correction of other administrative errors.* Failure to begin employee deductions and Government contributions on the effective date of coverage must be corrected in accordance with § 841.505 of this chapter.

(e) *Errors lasting for at least 3 years of service.* For an employee, separated employee, or retiree whose employing agency erroneously determined that the individual was covered by FERS during the period under § 846.201 of this chapter when the individual was eligible to elect FERS and the individual remained in FERS for at least 3 years of service, the error is corrected in accordance with part 839 of this chapter.

[52 FR 19235, May 21, 1987, as amended at 58 FR 47822, Sept. 13, 1993; 66 FR 15618, Mar. 19, 2001]

### § 846.205 Reconsideration and appeal rights.

(a) *Who may file.* An individual may request OPM to reconsider a decision of an employing office affecting his or her election of coverage under FERS. A request for reconsideration of a decision by OPM regarding extension of the time limit or a waiver under § 846.202 or refunds under § 846.401 must be made in accordance with § 841.305 of this chapter.

(b) *Reconsideration.* A request for reconsideration of an agency decision must be filed within the time limit given in paragraph (c) of this section. A request for reconsideration must be made in writing and must include the claimant's name, address, date of birth, and the reason for the request.

(c) *Time limit.* A request for reconsideration of an agency decision must be filed within 30 calendar days from the date of the agency's decision stating the right to reconsideration. OPM may extend the time limit on filing when a person shows that he or she was not notified of the time limit and was not otherwise aware of it, or that he or she was prevented by circumstances beyond his or her control from making the request within the time limit.

(d) *OPM's decision.* After reconsideration, OPM issues its final decision in writing, setting forth its findings and conclusions.

(e) *Appeals to MSPB.* A person whose rights or interests under this part are affected by OPM's decision under paragraph (d) of this section may request the Merit Systems Protection Board (MSPB) to review such decision in accord with procedures prescribed by MSPB.

## Subpart C—Effect of an Election To Become Subject to FERS

### § 846.301 General rules.

(a) An individual who becomes covered by FERS as a result of an election under § 846.201 is subject to the provisions of chapter 84 of title 5, United States Code and parts 841 through 845 of this chapter, except as provided in this part.

(b) Civilian service performed before the effective date of the election under § 846.201 is not creditable under FERS except as provided in this part.

### § 846.302 Crediting civilian service.

(a) Civilian service performed before the effective date of FERS coverage which is CSRS/SS service is creditable under FERS if—

(1) For service performed before January 1, 1987, 1.3 percent of basic pay was withheld as CSRS deductions (or if not withheld or if withheld and later refunded, 1.3 percent of basic pay for the period is deposited with interest computed under § 831.105(e) of this chapter); and

(2) For service performed after December 31, 1986, and before the effective

date of the election, the employee contributes an amount equal to the percentage of basic pay for such service required to be withheld under part 841, subpart E of this chapter, whether by withholdings from pay or by later deposit (if not withheld or withheld and later refunded) with interest computed under § 831.105(e) of this chapter.

(b) Civilian service performed before the effective date of the FERS coverage which is not CSRS/SS service is creditable under FERS (subject to the deposit requirements of part 842, subpart C of this chapter) if—

(1) The service would be creditable under CSRS except for § 846.306 (determined without regard to whether the service was performed before, on, or after January 1, 1989, and without regard to the provisions of part 842, subpart C of this chapter requiring that deposit be made for nondeduction or refunded service to be credited); and

(2) The service, in the aggregate, is equal to less than 5 years.

(c) Civilian service performed before the effective date of FERS coverage which is not CSRS/SS service is creditable under FERS only for the purposes specified in paragraph (d) of this section if—

(1) The service would be creditable under CSRS except for § 846.306 (determined without regard to whether the service was performed before, on, or after January 1, 1989, and without regard to the provisions of part 842, subpart C of this chapter, requiring that deposit be made for nondeduction or refunded service to be credited); and

(2) The service, in the aggregate, is equal to 5 years or more.

(d) The service described in paragraph (c) of this section is creditable under FERS for the following purposes:

(1) The 5 years of civilian service required to be eligible for a basic annuity under FERS as set forth in § 842.203 of this chapter.

(2) The minimum period of service for entitlement to—

(i) An immediate voluntary annuity under FERS as set forth in § 842.204 of this chapter;

(ii) An early retirement under FERS as set forth in § 842.205 of this chapter;

(iii) An involuntary retirement under FERS as set forth in § 842.206 of this chapter;

(iv) A Member retirement under FERS as set forth in § 842.209 of this chapter;

(v) A military reserve technician retirement under FERS as set forth in § 842.210 of this chapter;

(vi) A Senior Executive Service, Defense Intelligence Senior Executive Service, or Senior Cryptological Executive Service retirement under FERS as set forth under § 842.211 of this chapter;

(vii) A deferred annuity under FERS as set forth in § 842.212 of this chapter;

(viii) A survivor annuity under FERS based on the death in service of an employee with at least 10 years of service as set forth in § 843.310 of this chapter, but only if the survivor is entitled to the basic employee death benefit described in § 843.309 of this chapter;

(ix) A disability retirement under FERS as set forth in subchapter V of chapter 84 of title 5 United States Code;

(x) A firefighter or law enforcement annuity under FERS as set forth in § 842.208 of this chapter, but only to the extent that the service was as a law enforcement officer or firefighter as described in § 842.809(b) of this chapter;

(xi) An air traffic controller annuity under FERS as set forth in § 842.207 of this chapter, but only to the extent that the service was as an air traffic controller as described in § 842.809(a) of this chapter;

(3) The computation of benefits under § 846.304(b); and

(4) The computation of average salary under § 846.304(d).

### § 846.303 Crediting military service.

(a) Military service performed before the effective date of the election under § 846.201 creditable as provided under FERS, except as provided in paragraphs (b) and (c) of this section.

(b) Military service described in paragraph (a) of this section which would be creditable under CSRS except for the provisions of § 846.306 and performed by an individual who is subject to an annuity computation under § 846.304(b) is creditable for—

(1) The minimum period for entitlement to an annuity under FERS based on—

(i) The immediate voluntary retirement provisions under § 842.204 of this chapter;

(ii) The early retirement provisions under § 842.205 of this chapter;

(iii) The involuntary retirement provisions under § 842.206 of this chapter;

(iv) The Member retirement provisions under § 842.209 of this chapter;

(v) The military reserve technician retirement provisions under § 842.210 of this chapter;

(vi) The Senior Executive Service, Defense Intelligence Senior Executive Service, or the Senior Cryptological Executive Service retirement provisions under § 842.211 of this chapter; or

(vii) The deferred retirement provisions under § 842.212 of this chapter.

(2) Computation of benefits under § 846.304(b).

(c) If the effective date of the election of FERS by an individual who is subject to annuity computation under § 846.304(b) occurs when the individual is in non-pay status and is performing active military service, benefits for the military service performed before the effective date of the election are computed under CSRS, and benefits for the military service performed after the effective date are computed under FERS. The period of military service is considered to be two separate full periods of service, one ending the day before the effective date of FERS and one beginning on the effective date of FERS. The deposit for the period of service before the effective date of FERS coverage is computed under CSRS provisions set forth in part 831, subpart U of this chapter. The deposit for the period of service beginning on the effective date of FERS coverage is computed under FERS provisions set forth in part 842, subpart C of this chapter.

### § 846.304 Computing FERS annuities for persons with CSRS service.

(a)(1) The basic annuity of an employee who elected FERS coverage is an amount equal to the sum of the accrued benefits under CSRS as determined under paragraph (b) of this section and the accrued benefits under FERS as determined under paragraph (c) of this section.

(2) The computation method described in paragraph (a)(1) of this section is used in computing basic annuities under part 842, subpart D of this chapter, survivor annuities under part 843, subpart C of this chapter, and the basic annuities for disability retirement under subchapter V of chapter 84 of title 5 United States Code.

(3) An annuity computed under this paragraph is deemed to be the individual's annuity under FERS.

(b)(1) Except as provided in paragraphs (b)(2) and (b)(3) of this section and § 846.305, accrued benefits for civilian service as described in § 846.302(c), and military service as described in § 846.303(b) are computed under CSRS provisions.

(2) Reductions to provide survivor benefits required under part 831, subpart F of this chapter, and the 50-percent minimum annuity for air traffic controllers described in 5 U.S.C. 8339(e) do not apply to accrued benefits under this paragraph.

(3) Sick leave creditable under § 831.302 of this chapter is equal to the number of days of unused sick leave to an individual's credit as of the day of retirement, death, or as of the effective date of the election of FERS coverage, whichever is the lesser amount of sick leave, for an individual who—

(i) Retires under §§ 842.204, 842.205, 842.206, 842.207, 842.208, 842.209, 842.210, or 842.211 of this chapter;

(ii) Dies leaving a survivor eligible for a monthly FERS survivor annuity under § 843.310 or § 843.311 of this chapter; or

(iii) After retiring for disability, becomes entitled to an annuity computation under part 842, subpart D of this chapter.

(c) Accrued benefits are computed under FERS for the following service:

(1) Creditable civilian service performed on or after the effective date of the election of FERS coverage;

(2) Creditable civilian service other than as described in § 846.302(c); and

(3) Creditable military service other than that described in § 846.303 (b) and (c).

(d)(1) Except as specified in § 846.305, the average pay for computations

under paragraphs (b) and (c) of this section is the largest annual rate resulting from averaging the individual's rates of basic pay in effect over any 3 consecutive years of creditable service or, in the case of an annuity based on service of less than 3 years, over the total period of creditable service, with each rate weighted by the period it was in effect.

(2) For the purposes of paragraph (d)(1) of this section, service is considered creditable if it is creditable under either CSRS or FERS.

(e)(1) The cost-of-living adjustments for the annuities of individuals electing FERS coverage are made as follows:

(i) The portion of the annuity computed under paragraph (b) of this section is adjusted as provided under CSRS.

(ii) The portion of the annuity computed under paragraph (c) of this section is adjusted as provided under FERS.

(2) An annuity initially payable to an annuitant's survivor (other than a child under part 843, subpart D of this chapter) is increased by the total percent by which the annuitant's annuity was increased under this paragraph. Thereafter, the survivor annuity is adjusted for cost-of-living increases under 5 U.S.C. 8462.

(f) In computing an annuity under paragraph (a) of this section for an employee retiring under § 842.204(a)(1) or § 842.212(b) of this chapter, any reduction for age required by § 842.404 of this chapter applies to the sum computed under paragraph (a) of this section. No reduction under CSRS is applicable.

(g) In computing an annuity under paragraph (a) of this section for an employee retiring early under § 842.205 of this chapter or involuntarily under § 842.206 of this chapter, the reduction for age required by 5 U.S.C. 8339(h) applies to the portion of the annuity computed under CSRS provisions.

(h) In computing an annuity under paragraph (a) for an employee retiring as a firefighter or law enforcement officer under § 842.208 of this chapter or as an air traffic controller under § 842.207 of this chapter, there is no applicable reduction for age.

(i) An annuity supplement under part 842, subpart E of this chapter, is computed using the same civilian service used for the computation under paragraph (c) of this section.

(j) An alternative form of annuity for a basic annuity computed under paragraph (a) of this section is computed as follows:

(1) The alternative benefit for the portion of the annuity computed under paragraph (b) of this section is computed under CSRS as provided in part 831, subpart V of this chapter, except that a refund of CSRS contributions based on a refund application filed after the individual elects FERS coverage may not be deemed to be redeposited under § 831.2206 of this chapter if the individual is entitled to a deferred annuity under § 842.212 of this chapter.

(2) The alternative benefit for the portion of the annuity computed under paragraph (c) of this section is computed under FERS as provided in part 842, subpart G of this chapter.

### § 846.305 General inapplicability of CSRS provisions.

(a) Except as provided by this part, CSRS provisions are not applicable with respect to an individual who elects FERS coverage.

(b) An employee (or an employee's survivor for the purposes of a survivor annuity) may make a deposit under CSRS for any civilian service under § 846.302(c) of this part or military service under § 846.303.

(c) Nothing in paragraph (a) of this section precludes the payment of any lump-sum credit (as defined in 5 U.S.C. 8331(8)) in accordance with part 831, subpart T of this chapter.

[52 FR 19235, May 21, 1987. Redesignated at 58 FR 48273, Sept. 15, 1993]

## Subpart D—Refunds of CSRS Contributions

### § 846.401 Refunds of excess contributions.

(a) An individual who elects FERS coverage is entitled to a refund of CSRS contributions made prior to the effective date of the election for service that is subject to FERS computation under § 846.304(c) (if not already refunded) which exceed the contributions

required under FERS, as provided by this section.

(b) The refund is equal to—

(1) For service described in § 846.302(a) and performed on or after January 1, 1984, and before January 1, 1987, the amount by which the amount contributed exceeds 1.3 percent of basic pay;

(2) For service described in § 846.302(a) and performed on or after January 1, 1987, the amount by which the amount contributed exceeds the amount required under § 841.503 of this chapter; and

(3) For service described in § 846.302(b), the amount by which the amount contributed exceeds 1.3 percent of basic pay.

(c) A refund made under this section is payable with interest computed as prescribed under § 831.105 (d) and (e) of this chapter. Interest is payable regardless of the length of the period of service for which refund is being made or the total amount of service the employee has.

(d) A refund described in this section is payable upon the receipt of an application by OPM or its designee.

### § 846.402 Refunds of all CSRS contributions.

(a) An individual who elects to transfer to FERS is entitled to a refund of all CSRS contributions in accordance with the provisions of part 831, subpart T of this chapter.

(b) An application for refund of FERS retirement contributions under § 843.202 of this chapter is deemed to also be an application for refund of CSRS retirement contributions under part 831, subpart T of this chapter.

## Subpart E—Cancellation of Designations of Beneficiary

### § 846.501 Cancellation upon transfer to FERS.

A designation of beneficiary made under § 831.2005 of this chapter is cancelled on the effective date of an election of FERS coverage. Designations of beneficiary under FERS must be made in accordance with § 843.205 of this chapter and apply to an employee's contributions under both CSRS and FERS.

## Subpart F [Reserved]

## Subpart G—1998 Open Enrollment Elections

SOURCE: 63 FR 33233, June 18, 1998, unless otherwise noted.

### § 846.701 Purpose and scope.

This subpart contains OPM's regulations applicable to elections of FERS coverage during the 1998 open enrollment period, including—

(a) The requirements that an individual must satisfy to be eligible to make an election; and

(b) The procedures that—

(1) Employees must follow to make an election;

(2) Agencies must follow in advising employees about making an election and in processing employees' elections; and

(3) OPM will follow in cases subject to the former spouse consent requirement.

### § 846.702 Definitions.

In this subpart—

*Election* means an election of FERS coverage during the 1998 open enrollment period.

*Former spouse consent requirement* means the condition that must be satisfied under section 301(d) of the FERS Act for an employee with a former spouse to be eligible to elect FERS coverage.

*Qualifying court order* means a *court order acceptable for processing* as defined in § 838.103 of this chapter or a *qualifying court order* as defined in § 838.1003 of this chapter subject to the following conditions:

(1) If OPM has not received (as explained in § 838.131 of this chapter) a copy of the court order and identifying information required under § 838.221(b)(3), § 838.421(b)(3), § 838.721(b)(1)(iii), or § 838.1005(b)(3) of this chapter prior to the date on which the employing office receives the election to be covered by FERS, the court order is not a *qualifying court order*.

(2) If the former spouse loses entitlement to all CSRS benefits under the court order, the court order ceases to be a *qualifying court order*.

*Social security coverage* means coverage under the Old Age, Survivors, and Disability Insurance program under the Social Security Act.

*1998 open enrollment period* means July 1, 1998, through December 31, 1998.

### § 846.703 Effective date of FERS coverage.

An election under this subpart is effective on the later of—

(a) The first day of the pay period beginning after the date the election and any required supporting documentation is received by the employing office; or

(b) The first day of the pay period beginning after July 1, 1998.

### § 846.704 Irrevocability of an election of FERS coverage.

(a) An election to be covered by FERS becomes irrevocable on the date it becomes effective.

(b) If, during the 1998 open enrollment period, an employee files an election on an SF 3109 to remain covered by CSRS, the employee may revoke such an election by filing another election during the 1998 open enrollment period.

## WHO MAY ELECT

### § 846.711 Eligibility to elect FERS coverage during the 1998 open enrollment period.

An employee who is not covered by FERS, and who was an employee on January 1, 1998, and who is not otherwise ineligible for FERS coverage (under subpart A of part 842 of this chapter or § 846.722) may elect FERS coverage during the 1998 open enrollment period.

### § 846.712 Statutory exclusions.

(a) *DC government employees.* An individual employed by the government of the District of Columbia is not eligible to make an election, except—

(1) Non-judicial employees of the District of Columbia Courts, District of Columbia Department of Corrections Trustee or the District of Columbia Pretrial Services, Defense Services, Parole, Adult Probation and Offender Supervision Trustee under the National Capital Revitalization and Self-Government Improvement Act of 1997, title XI of Public Law 105–33, 111 Stat. 251, who meet the conditions of § 831.201(g)(2), (3), and (4) of this chapter; and

(2) Employees of the District of Columbia Financial Responsibility and Management Assistance Authority under the District of Columbia Financial Responsibility and Management Assistance Act of 1995, Public Law 104–8, 109 Stat. 97, as amended, who elected CSRS under § 831.201(g)(5) of this chapter.

(b) *Members of Congress.* A Member (as defined in section 2106 of title 5, United States Code) is not eligible to make an election.

(c) *Persons without social security eligibility.* An individual is not eligible to make an election if that individual is not eligible for social security coverage.

### § 846.713 Former spouse consent requirement.

An election of FERS coverage cannot become effective unless the election is made with the written consent of any former spouse(s) entitled to benefits under part 838 of this chapter.

## ELECTION PROCEDURES

### § 846.721 Electing FERS coverage.

(a) To elect FERS coverage, an employee must submit a completed FERS Election of Coverage form (SF 3109) and any additional documentation that may be required under § 846.722 (relating to the former spouse consent requirement) to the employing office no later than the close of business on December 31, 1998.

(b) Any writing signed by the employee and filed with the employing office may be treated as an election for the purpose of establishing the date of the election of FERS coverage if the employee intends that document to be an election, but the employee (or, if the employee dies after filing the election but before completing the SF 3109, the survivor) must submit a completed SF 3109 to confirm any such election.

**§ 846.722 Former spouse's consent to an election of FERS coverage.**

(a) Employee actions. (1) If the employee is subject to a qualifying court order, the employee must submit to the employing office a completed—

(i) SF 3110, Former Spouse's Consent to FERS Election, to document the former spouse's consent to the FERS coverage; or

(ii) SF 3111, Request for Waiver, Extension, or Search, to request a waiver of the former spouse consent requirement or to request an extension of the time limit for obtaining a former spouse's consent or amendment of the court order.

(2) If the employee states on the SF 3109, the FERS Election of Coverage form, that he or she does not know whether he or she is subject to a qualifying court order, the employee must submit to the employing office a completed SF 3111, Request for Waiver, Extension, or Search, to request OPM to determine whether it has a qualifying court order relating to the employee.

(b) *OPM actions*—(1) *Waiver of former spouse consent requirement*—(i) *Grounds for waiver*. OPM's authority to approve a waiver of the former spouse consent requirement is limited to cases in which the former spouse's whereabouts cannot be determined or exceptional circumstances make requiring the former spouse's consent inappropriate.

(ii) *Whereabouts cannot be determined*. OPM will waive the former spouse consent requirement upon a showing that the former spouse's whereabouts cannot be determined. A request for waiver on this basis must be accompanied by—

(A) A judicial or administrative determination that the former spouse's whereabouts cannot be determined; or

(B)(*1*) Affidavits by the employee and two other persons, at least one of whom is not related to the employee, attesting to the inability to locate the former spouse and stating the efforts made to locate the spouse; and

(*2*) Documentary corroboration such as newspaper reports about the former spouse's disappearance.

(iii) *Exceptional circumstances*. OPM will waive the former spouse consent requirement based on exceptional circumstances if the employee presents a judicial determination finding that—

(A) The case before the court involves a Federal employee who is in the process of electing FERS coverage and the former spouse of that employee;

(B) The former spouse has been given notice and an opportunity to be heard concerning this proceeding;

(C) The court has considered sections 301 and 302 of the FERS Act, Pub. L. 99–335, 100 Stat. 517, and this section as they relate to waiver of the former spouse consent requirement for an employee with a former spouse to elect FERS coverage; and

(D) The court finds that exceptional circumstances exist justifying waiver of the former spouse's consent.

(iv) *Approval of a waiver*. If OPM grants a waiver of the requirement of paragraph (a) of this section, OPM will notify both the individual and the employing office of its decision. OPM's notice to the employing office is deemed to complete the individual's election, which becomes effective with the first pay period after the employing office receives OPM's notice that the waiver is granted.

(2) *Extension of the time limit to obtain a former spouse's consent*—(i) *First request*. If an employee who is ineligible to elect FERS coverage solely because of a qualifying court order files, prior to January 1, 1999, a completed SF 3111, Request for Waiver, Extension or Search, requesting an extension of the time limit to seek an amendment of a qualifying court order, OPM is deemed to have approved the extension through June 30, 1999.

(ii) *Second request*. OPM will grant one extension of the time limit to seek an amendment of a qualifying court order to an individual who has been granted an extension under paragraph (b)(2)(i) of this section if the individual—

(A) Files an application for the extension (SF 3109) with the employing office before July 1, 1999;

(B) Has initiated legal proceedings to secure the modification of the qualifying court order on file at OPM to satisfy the former spouse consent requirement;

(C) Demonstrates to OPM's satisfaction that the individual has exercised due diligence in seeking to obtain the modification; and

(D) If seeking an extension beyond December 31, 1999, demonstrates to OPM's satisfaction that a longer extension is necessary.

(iii) *Expiration date of a second extension.* An approved extension under paragraph (b)(2)(ii) of this section expires on December 31, 1999, unless OPM's decision letter states a later expiration date.

(3) *Search for a qualifying court order.* (i) When an employing office notifies OPM that it has received an employee's request for a determination of whether OPM has a qualifying court order on file, OPM will determine whether it has such an order.

(ii) If OPM does not have a copy of a qualifying court order in its possession, OPM's notice to the employing office that it has no qualifying court order completes the employee's election of FERS coverage and the election becomes effective at the beginning of the first pay period after the employing office receives OPM's notification.

(iii) If OPM has a copy of a qualifying court order, OPM will notify both the individual and the employing office that it has a qualifying court order and that an extension until June 30, 1999, has been granted.

### § 846.723 Agency responsibilities.

(a) The employing office must determine whether the employee is eligible to elect FERS coverage.

(b)(1) As close as practicable to the beginning of the open enrollment period, the employing office must provide each employee eligible to elect FERS coverage with notice of that employee's right to make an election.

(2) The employing office must provide each employee eligible to elect FERS coverage with a copy of or ready access to the FERS Transfer Handbook.

(c) An election received by an employing office before July 1, 1998, is deemed to have been received by the employing office on July 1, 1998.

(d) An agency decision that an employee is not eligible to elect FERS coverage or refusing to accept a belated election under § 846.724 must be in writing, must fully set forth the findings and conclusions of the agency, and must notify the employee of the right to appeal the decision under this section to the Merit Systems Protection Board, including all information required under the Board's regulations. See 5 CFR 1201.21.

### § 846.724 Belated elections and correction of administrative errors.

(a) *Belated elections.* The employing office may accept a belated election of FERS coverage if it determines that—

(1) The employing office did not provide adequate notice to the employee in a timely manner;

(2) The agency did not provide access to the FERS Transfer Handbook to the employee in a timely manner; or

(3) The employee was unable, for cause beyond his or her control, to elect FERS coverage within the prescribed time limit.

(b) *Correction of administrative errors.* Failure to begin employee deductions and Government contributions on the effective date of coverage must be corrected in accordance with § 841.505 of this chapter.

### § 846.725 Appeal to the Merit Systems Protection Board.

(a) A person whose rights or interests under this part are affected by an agency decision that an employee is not eligible to elect FERS coverage or an agency refusal to accept a belated election under § 846.724, or an OPM decision denying an extension or waiver under § 846.722, may request the Merit Systems Protection Board (MSPB) to review such decision in accord with procedures prescribed by MSPB. MSPB regulations relating to appeals are contained in chapter II of this title.

(b) Paragraph (a) of this section is the exclusive remedy for review of agency decisions concerning eligibility to make an election under this subpart. An agency decision must not allow review under any employee grievance procedures, including those established by chapter 71 of title 5, United States Code, and 5 CFR part 771.

**§ 846.726 Delegation of authority to act as OPM's agent for receipt of employee communications relating to elections.**

The employing office is delegated authority to act as OPM's agent for the receipt of any documents that employees are required by this subpart to file with OPM. Such documents are deemed received by OPM on the date that the employing office receives them.

# PART 847—ELECTIONS OF RETIREMENT COVERAGE BY CURRENT AND FORMER EMPLOYEES OF NONAPPROPRIATED FUND INSTRUMENTALITIES

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### Subpart I—Computing the Retirement Annuity for Employees Who Elect To Use NAFI Service to Qualify for an Immediate CSRS or FERS Retirement

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AUTHORITY: 5 U.S.C. 8332(b)(17) and 8411(b)(6) and sections 1131 and 1132 of Pub. L. 107–107, December 28, 2001, 115 Stat 1242; 5 U.S.C. 8347(a) and 8461(g) and section 1043(b) of Pub. L. 104–106, Div. A, Title X, Feb. 10, 1996, 110 Stat. 434. Subpart B also issued under 5 U.S.C. 8347(q) and 8461(n).

SOURCE: 61 FR 41721, Aug. 9, 1996, unless otherwise noted.

## Subpart A—General Provisions

### § 847.101 Purpose and scope.

(a) This part contains the regulations issued by the Office of Personnel Management (OPM) to implement the statutory election rights of certain current and former NAFI employees under the Portability of Benefits for Nonappropriated Fund Employees Act of 1990, section 1043 of the National Defense Authorization Act for Fiscal Year 1996, and sections 1131 and 1132 of the

National Defense Authorization Act for Fiscal Year 2002.

(b) This part establishes—

(1) The eligibility requirements for making an election;

(2) The procedures for making elections;

(3) The methodologies to determine the employee costs associated with the elections; and

(4) The methodologies to calculate benefits that include credit for NAFI service based on such elections.

(c)(1) The regulations in this part apply to individuals covered by CSRS or FERS (and their survivors) and the employers of such individuals. The Department of Defense and the U.S. Coast Guard will issue any necessary regulations to implement these election rights to the extent they affect NAFI retirement systems under their jurisdiction.

(2) The regulations in this part apply only to CSRS benefits and FERS basic benefits. They do not apply to benefits under the Thrift Savings Plan described in subchapter III of chapter 84, of title 5, United States Code.

[61 FR 41721, Aug. 9, 1996, as amended at 68 FR 2179, Jan. 16, 2003]

### § 847.102 Regulatory structure.

(a)(1) Subpart A of this part contains information applicable to all elections under this part.

(2) Subpart B of this part contains information about prospective retirement coverage elections under sections 8347(q) and 8461(n) of title 5, United States Code.

(3) Subpart C of this part contains information about the procedures applicable to retroactive retirement coverage and alternative credit elections under section 1043(c)(2) of the National Defense Authorization Act for Fiscal Year 1996.

(4) Subpart D of this part contains information about the types of retroactive elections available, the eligibility requirements for each type of election, the effects of an election on CSRS and FERS coverage during future employment, and the effective dates of CSRS and FERS coverage applicable to elections under section 1043(c)(2) of the National Defense Authorization Act for Fiscal Year 1996.

(5) Subpart E of this part contains information about transferring retirement contributions in connection with elections under section 1043(c)(2) of the National Defense Authorization Act for Fiscal Year 1996.

(6) Subpart F of this part contains information about determining the employee costs associated with elections under section 1043(c)(2) of the National Defense Authorization Act for Fiscal Year 1996.

(7) Subpart G of this part contains information about benefits indirectly affected by elections under section 1043(c)(2) of the National Defense Authorization Act for Fiscal Year 1996.

(8) Subpart H of this part contains information about elections to credit NAFI service to qualify for immediate retirement under section 1132 of Public Law 107–107, the National Defense Authorization Act for Fiscal Year 2002.

(9) Subpart I of this part contains information about how benefits are computed when employees elect to credit NAFI service to qualify for immediate retirement under section 1132 of Public Law 107–107, the National Defense Authorization Act for Fiscal Year 2002.

(b) Section 831.305 of this chapter contains information about CSRS credit for NAFI service performed after June 18, 1952, but before January 1, 1966.

(c)(1) Part 831 of this chapter contains information about the Civil Service Retirement System.

(2) Parts 841 through 844 of this chapter contain information about FERS basic benefits.

(3) Part 837 of this chapter contains information about reemployment of annuitants.

(4) Part 870 of this chapter contains information about the Federal Employees' Group Life Insurance Program.

(5) Part 890 of this chapter contains information about coverage under the Federal Employees Health Benefits Program.

(6) Chapter II (parts 1200 through 1299) of this title contains information about appeals to the Merit Systems Protection Board.

(7) Chapter VI (parts 1600 through 1699) of this title contains information

about the Federal Employees Thrift Savings Plan.

[61 FR 41721, Aug. 9, 1996, as amended at 68 FR 2179, Jan. 16, 2003]

### § 847.103 Definitions.

(a) Except as provided in paragraph (b) of this section, the definitions in sections 8331 and 8401 of title 5, United States Code, apply throughout this part.

(b) In this part—

*Actuarial present value* means the amount of money (earning interest at an assumed rate) required at the time of retirement to finance an annuity that is payable in monthly installments for the annuitant's lifetime based on mortality rates for annuitants under CSRS and FERS; and increases each year at an assumed rate of inflation. Interest, mortality, and inflation rates used in computing the present value are those used by the Board of Actuaries of the Civil Service Retirement System for valuation of CSRS and FERS, based on dynamic assumptions.

*Age* means the number of years an individual has been alive as of his or her last birthday.

*Agency* means an executive agency as defined in section 105 of title 5, United States Code; a legislative branch agency; a judicial agency; and the U.S. Postal Service and Postal Rate Commission.

*Annuitant* means a *retiree* or a *survivor*.

*CSRS or FERS* means the Civil Service Retirement System or the Federal Employees Retirement System as described in chapters 83 and 84 of title 5, United States Code.

*Deferred annuity date* means the earliest date on which a retiree would be eligible, without credit for the NAFI service, to receive a deferred annuity based on his or her actual date of separation.

*Deficiency* means the remainder of the actuarial present value of crediting NAFI service, after subtracting the amount credited to the employee from a transfer to the Fund under subpart E of this part, and earnings under § 847.507 on the transferred amount.

*Employee contributions with interest* means the dollar amount deducted from an employee's pay for retirement system participation, plus any amounts the employee deposited for civilian service credit under the retirement system, and interest, if any, payable under § 841.605 of this chapter (for FERS) or under applicable NAFI retirement system rules.

*Fund* means the Civil Service Retirement and Disability Fund established in section 8348 of title 5, United States Code.

*Government contributions* means the dollar amount which was contributed on behalf of an employee by his or her employer for retirement system participation.

*Monthly annuity rate* means the amount of the monthly single life annuity under CSRS or FERS (computed without regard to any survivor benefit reductions computed under sections 8339 (j) or (k), and 8418 through 8420 of title 5, United States Code), before any offset relating to benefits under the Social Security Act under section 8349 of title 5, United States Code, but after including any reduction for age (5 U.S.C. 8339(h) or 8415(f)) or for crediting nondeduction civilian service performed before October 1, 1982 (5 U.S.C.A. 8339(i), note).

*NAFI* means a nonappropriated fund instrumentality described in section 2105(c) of title 5, United States Code.

*Retiree* means a former employee who, on the basis of his or her service meets all the requirements for title to a CSRS or FERS annuity and files claim therefor.

*Survivor* means a widow, widower, or former spouse entitled to a CSRS or FERS annuity based on the service of a deceased employee, separated employee, or retiree.

[61 FR 41721, Aug. 9, 1996, as amended at 68 FR 2179, Jan. 16, 2003]

### § 847.104 OPM responsibilities.

(a) OPM will issue guidance to employing agencies to use when notifying their employees about the opportunity to make an election under this part and for counseling employees in connection with the election.

(b) OPM will issue instructions to agencies concerning the transfer of funds and recordkeeping in connection with these elections.

(c) OPM will determine if an employee who wishes to make an election under 5 CFR part 847, subpart H, is eligible to make such an election, and OPM's determination is subject to reconsideration under 5 CFR part 831, subpart A, or 5 CFR part 841, subpart C.

[61 FR 41721, Aug. 9, 1996, as amended at 68 FR 2179, Jan. 16, 2003]

### § 847.105 Agency responsibilities.

(a) Each agency is responsible for notifying its employees of the opportunity to make an election under this part and for determining if an employee who wishes to make an election under subparts B and D of this part is qualified to do so, and for counseling employees in accordance with guidance issued by OPM.

(b) If an agency determines that an employee is not eligible to make an election under subparts B and D of this part, the agency shall issue a final decision to the employee that meets the requirements of § 847.106, including notice of the right to appeal under § 847.107.

[68 FR 2179, Jan. 16, 2003]

### § 847.106 Agency decision concerning eligibility.

(a) If the agency determines that the employee is not eligible to make an election under subpart B or D of this part, it must issue a final decision to the employee.

(b) A final decision shall be in writing, shall fully set forth the findings and conclusions of the agency, and shall contain notice of the right to request an appeal provided in § 847.107.

[61 FR 41721, Aug. 9, 1996, as amended at 68 FR 2179, Jan. 16, 2003]

### § 847.107 Appeals to MSPB.

(a) An individual whose rights or interests under the CSRS or FERS are affected by a final decision of the employing agency may request the Merit Systems Protection Board to review such decision in accordance with procedures prescribed by the Board.

(b) Paragraph (a) of this section is the exclusive remedy for review of agency decisions concerning eligibility to make an election under subparts B and D of this part. An agency decision must not allow review under any employee grievance procedures, including those established by 5 U.S.C. chapter 71, and 5 CFR part 771.

[61 FR 41721, Aug. 9, 1996, as amended at 68 FR 2179, Jan. 16, 2003]

### § 847.108 Computation of time.

In computing a period of time for filing documents, the day of the action or event after which the designated period of time begins to run is not included. The last day of the period is included unless it is a Saturday, a Sunday, or a legal holiday; in this event, the period runs until the end of the next day which is not a Saturday, a Sunday, or a legal holiday.

## Subpart B—Elections To Continue Retirement Coverage After a Qualifying Move

### § 847.201 Purpose and scope.

This subpart contains OPM's regulations on the procedures, eligibility requirements, time limits and effects of elections under sections 8347(q) and 8461(n) of title 5, United States Code.

### § 847.202 Definition of qualifying move.

(a) A qualifying move occurring on or after December 28, 2001, that would allow an opportunity to elect to continue retirement coverage under CSRS and FERS must meet all of the following criteria:

(1) The employee must not have had a prior opportunity to elect to continue CSRS or FERS retirement coverage.

(2) The employee must have moved from a position covered by CSRS or FERS to a retirement-covered position in an NAFI, and

(3) The employee must begin employment in a retirement-covered position in an NAFI no later than 1 year after separation from CSRS- or FERS-covered employment.

(b) A qualifying move occurring on or after December 28, 2001, that would allow an opportunity to elect to continue retirement coverage under an NAFI retirement system must meet all the following criteria:

(1) The employee must not have had a prior opportunity to elect to continue NAFI retirement system coverage;

(2) The employee must have moved from an NAFI to a civil service position subject to CSRS or FERS coverage; and

(3) The employee must be appointed to a CSRS- or FERS-covered position no later than 1 year after separation from retirement-covered NAFI employment.

(c) A qualifying move occurring on or after August 10, 1996, and before December 28, 2001, that would allow an opportunity to elect to continue retirement coverage under CSRS and FERS must meet all the following criteria:

(1) The employee must not have had a prior opportunity to elect to continue CSRS or FERS retirement coverage;

(2) The employee must have been vested in CSRS or FERS prior to the move to an NAFI;

(3) The employee must have moved from a position covered by CSRS or FERS to a retirement-covered position in an NAFI; and

(4) The employee must begin employment in a retirement-covered position in an NAFI no later than 1 year after separation from CSRS- or FERS-covered employment.

(d) A qualifying move occurring on or after August 10, 1996, and before December 28, 2001, that would allow an opportunity to elect to continue retirement coverage under an NAFI retirement system must meet all the following criteria:

(1) The employee must not have had a prior opportunity to elect to continue NAFI retirement system coverage;

(2) The employee must have been a vested participant in the NAFI retirement system (as the term ''vested participant'' is defined by that retirement system) prior to the move to a CSRS- or FERS-covered position;

(3) The employee must have moved from an NAFI to a civil service position subject to CSRS or FERS coverage; and

(4) The employee must be appointed to a CSRS- or FERS-covered position no later than 1 year after separation from retirement-covered NAFI employment.

(e) A qualifying move occurring between January 1, 1987, and August 9, 1996, that would allow an opportunity to elect to continue retirement coverage under CSRS or FERS must meet all the following criteria:

(1) The employee must not have had a prior opportunity to elect to continue CSRS or FERS retirement coverage;

(2) The employee must have been vested in CSRS or FERS prior to the move to an NAFI;

(3) The employee must have moved from a CSRS- or FERS-covered position within the Department of Defense or the U.S. Coast Guard to a retirement-covered position with an NAFI; and

(4) The employee must begin employment in a retirement-covered position in an NAFI no later than 4 days after separation from CSRS- or FERS-covered employment.

(f) A qualifying move occurring between January 1, 1987, and August 9, 1996, that would allow an opportunity to elect to continue retirement coverage under an NAFI retirement system must meet all the following criteria:

(1) The employee must not have had a prior opportunity to elect to continue NAFI retirement system coverage;

(2) The employee must have been a vested participant in the NAFI retirement system (as the term ''vested participant'' is defined by that retirement system) prior to the move to the civil service;

(3) The employee must have moved from an NAFI to a CSRS- or FERS-covered position within the Department of Defense or the U.S. Coast Guard; and

(4) The employee must be appointed to a CSRS- or FERS-covered position no later than 4 days after separation from retirement-covered NAFI employment.

(g) A qualifying move under paragraphs (a), (b), (c), and (d) of this section is considered to occur on the date the individual enters into the new position, not at the time of separation from the prior position.

(h) A retroactive election opportunity under subpart D of this part (pertaining to elections of CSRS, FERS, or NAFI retirement coverage) is not considered a prior opportunity to elect retirement coverage under this section.

[68 FR 2179, Jan. 16, 2003]

### § 847.203 Elections of CSRS coverage.

(a) An employee who completes a qualifying move (under § 847.202(a), (c), or (e)) from a CSRS-covered position to an NAFI may elect to continue CSRS coverage.

(b) An employee who elects CSRS coverage under this section will be covered by CSRS (or FERS, if the employee subsequently transfers to FERS under part 846 of this chapter) during all periods of future service not excluded from coverage by CSRS, including any periods of service with a NAFI.

(c) An employee who makes an election under paragraph (a) of this section and who has had a break in service exceeding 3 days is eligible to elect FERS under part 846 of this chapter.

[61 FR 41721, Aug. 9, 1996, as amended at 68 FR 2180, Jan. 16, 2003]

### § 847.204 Elections of FERS coverage.

(a) An employee who completes a qualifying move under § 847.202(a), (c) or (e) from an FERS-covered position to an NAFI may elect to continue FERS coverage.

(b) An employee who elects FERS coverage under this section will be covered by FERS during all periods of future service not excluded from coverage by FERS, including any periods of service with a NAFI.

[61 FR 41721, Aug. 9, 1996, as amended at 68 FR 2180, Jan. 16, 2003]

### § 847.205 Elections of NAFI retirement system coverage.

(a) An employee who completes a qualifying move under § 847.202(b), (d), or (f), from an NAFI position to a CSRS- or FERS-covered position may elect to continue coverage under the NAFI retirement system.

(b) An employee who elects NAFI retirement system coverage under this section is excluded from coverage under CSRS or FERS during that and all subsequent periods of employment, including any periods of service as a reemployed annuitant.

[61 FR 41721, Aug. 9, 1996, as amended at 68 FR 2180, Jan. 16, 2003]

### § 847.206 Time limit for making an election.

(a) Except as provided in paragraph (b) of this section, the time limit for making the election is 30 days after the qualifying move.

(b) Agencies may waive the time limit if it finds that the employee was not timely given the opportunity to make the election, or, despite due diligence, was prevented by circumstances beyond his or her control from making an election within the time limit.

(c) An agency decision to waive the time limit must comply with the provisions of § 847.106, including notification of the right of appeal under § 847.107.

### § 847.207 Effective dates of elections.

Elections under this subpart are effective on the date of the qualifying move.

### § 847.208 Changes of election.

An election under this subpart is irrevocable when received by the employing agency.

### § 847.209 Collection of CSRS and FERS retirement contributions from NAFI employers.

CSRS and FERS salary deductions and contributions for NAFI employees who have elected CSRS or FERS coverage under this subpart must be made and submitted to OPM in the manner currently prescribed for the transmission of withholdings and contributions.

### § 847.210 Collection of NAFI retirement contributions from Federal agencies.

The Department of Defense and the U.S. Coast Guard will establish procedures for agencies to withhold and submit retirement contributions to the retirement systems for employees who elect to be covered by a retirement system for NAFI employees under this subpart.

### § 847.211 Death of employee during election opportunity period.

(a) When an employee eligible to make an election under this subpart dies before expiration of the time limit under § 847.206, the employee is deemed to have made the election and to be covered, at time of death, by the retirement system that covered the employee before the qualifying move.

(b) The deemed election under paragraph (a) of this section does not apply if the eligible survivor elects to have it not apply.

(c) An election by the survivor to decline the deemed election must be in writing and filed no later than 30 days after the employing agency notifies the survivor of the right to decline the deemed election.

## Subpart C—Procedures for Elections Under the Retroactive Provisions

### § 847.301 Purpose and scope.

This subpart establishes the procedures applicable to elections section 1043(c)(2) of the National Defense Authorization Act for Fiscal Year 1996.

### § 847.302 Notice of election rights.

The employing agency must provide notice to all eligible employees of the opportunity to elect to continue retirement coverage under subpart D of this part. Failure to provide notice to the employee is justification for waiving the time limit under § 847.304.

### § 847.303 Election forms.

(a) Eligible employees may make an election under subpart D of this part on a form prescribed by OPM and filed with the employing agency.

(b) For elections of retirement coverage under subpart D of this part, the election form will require that the employee obtain a certification from his or her previous retirement system showing dates of service, amounts transferable from the previous retirement system to the elected retirement system under subpart E of this part, and that the employee became vested in the retirement system. If an employee was covered by more than one retirement system, he or she must obtain certification from each retirement system.

### § 847.304 Time limit.

(a) Except as provided in paragraph (b) of this section, the time limit for making an election under subpart D of this part is August 11, 1997.

(b) Because Public Law 104–106 requires that eligible employees receive timely notice of the opportunity to make the election under subpart D of this part, and that employees must be counseled concerning the election opportunity, the employing agency must waive the time limit in paragraph (a) of this section in the event that an employee did not receive such notice or counselling.

### § 847.305 Basic records.

(a) Agencies must establish and maintain retirement accounts for employees subject to CSRS or FERS in the manner prescribed by OPM.

(b) The individual retirement record (Standard Form 2806 for CSRS, or Standard Form 3100 for FERS) is the basic record for action on all claims for annuity or refund, and those pertaining to deceased employees and annuitants.

## Subpart D—Elections of Coverage Under the Retroactive Provisions

GENERAL PROVISIONS

### § 847.401 Purpose and scope.

This subpart contains OPM's regulations concerning the types of elections available, the eligibility requirements for each type of election, the effects of an election on CSRS and FERS coverage during future employment, and the effective dates of CSRS and FERS coverage applicable to retroactive retirement coverage and credit elections under section 1043(c)(2) of the National Defense Authorization Act for Fiscal Year 1996.

### § 847.402 Definition of qualifying move.

(a) A qualifying move occurring after December 31, 1965, and before August 10, 1996, which would allow an employee the opportunity to elect to continue retirement coverage under CSRS or FERS retroactive to the date of the

move must meet all the following criteria:

(1)(i) For moves occurring before February 10, 1996, the employee must not have had a prior opportunity to elect to continue CSRS, FERS, or NAFI retirement coverage under § 847.202(e) or (f);

(ii) For moves occurring on or after February 10, 1996, the employee must not have made an election under § 847.202(e) or (f);

(2) The employee must have been vested in CSRS or FERS prior to the move to a NAFI;

(3) The employee must have moved from a position covered by CSRS or FERS to a retirement-covered position in a NAFI;

(4) The employee must have begun employment in a retirement-covered position in a NAFI no later than 1 year after separation from CSRS- or FERS-covered employment; and

(5) The employee must, since moving to the NAFI position, have continuously participated in a retirement system established for NAFI employees, disregarding any break in service of not more than 3 days.

(b) A qualifying move occurring after December 31, 1965, and before August 10, 1996, which would allow an employee the opportunity to elect to continue retirement coverage under a NAFI retirement system retroactive to the date of the qualifying move must meet all the following criteria:

(1)(i) For moves occurring before February 10, 1996, the employee must not have had a prior opportunity to elect to continue CSRS, FERS, or NAFI retirement coverage under § 847.202(e) or (f);

(ii) For moves occurring on or after February 10, 1996, the employee must not have made an election under § 847.202(e) or (f);

(2) The employee must have been a vested participant in the NAFI retirement system (as the term ''vested participant'' is defined by that retirement system) prior to the move to a FERS-covered position;

(3) The employee must have moved from a NAFI to a civil service position subject to FERS coverage or CSRS/SS coverage, as defined in § 846.102 of this chapter, followed by the employee's automatic conversion to FERS coverage;

(4) The employee must have been appointed to a FERS-covered position no later than 1 year after separation from retirement-covered NAFI employment; and

(5) The employee must, since moving to the FERS position, have been continuously covered by FERS, disregarding any break in service of not more than 3 days.

(c) A move from a NAFI to CSRS, including CSRS/SS as defined under § 846.102 of this chapter followed by an election of FERS coverage under § 846.201 of this chapter, is not a qualifying move for an election of retirement coverage under § 847.431 (pertaining to elections of NAFI service credit for FERS service) and § 847.441 (pertaining to elections of NAFI retirement coverage).

(d) A qualifying move under paragraphs (a) and (b) of this section is considered to occur on the date the individual entered into the new position, not at the time of separation from the prior position.

[61 FR 41721, Aug. 9, 1996, as amended at 68 FR 2180, Jan. 16, 2003]

ELECTIONS OF CSRS OR FERS COVERAGE BASED ON A MOVE FROM CSRS OR FERS TO NAFI

### § 847.411 Election requirements.

(a) An employee who completed a qualifying move under § 847.402(a) may elect to be covered by CSRS, if the qualifying move was from a CSRS-covered position, or FERS, if the qualifying move was from a FERS-covered position, for all Federal service following the qualifying move. Employees who elect to be covered by CSRS will be prospectively covered by the CSRS Offset provisions set out in subpart J of part 831 of this chapter.

(b) A survivor eligible for benefits under the NAFI retirement system which covered an employee at the time of death may make an election under this section if the employee was otherwise eligible to make an election, but died before expiration of the time limit under § 847.304.

### § 847.412 Elections of FERS instead of CSRS.

(a) An employee who elects CSRS coverage under § 847.411(a) may, during the 6-month period beginning on the date the election under § 847.411(a) is filed with the employing agency, elect to become subject to FERS.

(b) An election of FERS under this section is subject to the provisions of part 846 of this subchapter and takes effect on the first day of the first pay period after the employing agency receives the election.

### § 847.413 Effective date of an election.

(a) An election under § 847.411 is effective on the first day of NAFI employment subject to retirement coverage following CSRS- or FERS-covered employment.

(b) Deductions and contributions for CSRS or FERS coverage under § 831.111 or § 841.501 of this chapter begin effective on the first day of the next pay period after the agency receives the employee's election under § 847.411(a).

(c) An election under § 847.411 is irrevocable when received by the employing agency.

(d) NAFI service performed on and after the effective date of an election under § 847.411 becomes fully creditable for retirement eligibility and computation of the annuity benefit, including computation of average pay.

### § 847.414 Crediting future NAFI service.

An employee who elects CSRS or FERS coverage under § 847.411 will be covered by CSRS or FERS during all periods of future service not excluded from coverage by CSRS or FERS, including any periods of service with a NAFI and service as a reemployed annuitant.

### § 847.415 OASDI coverage.

An employee who elects CSRS coverage under § 847.411 is prospectively subject to both the Old Age, Survivors, and Disability Insurance (OASDI) tax and CSRS as described in subpart J of part 831 of this chapter, known as CSRS Offset, effective from the first day of the next pay period after the employing agency receives the employee's election under § 847.411(a).

### § 847.416 Credit for refunded FERS service.

(a) An employee or survivor who elects FERS coverage under § 847.411 will receive credit in the FERS annuity for the service represented by any refund of the unexpended balance under § 843.202 of this chapter.

(b) The amount of the refund, increased by interest as computed under § 842.305(e) of this chapter, will be added to the deficiency computed under § 847.604 and collected in accordance with the provisions of § 847.609 (pertaining to a monthly reduction in the annuity benefit).

## ELECTIONS TO REMAIN IN FERS COVERAGE WITH CREDIT FOR NAFI SERVICE BASED ON A MOVE FROM NAFI TO FERS

### § 847.421 Election requirements.

(a)(1)(i) A FERS employee who completed a qualifying move under § 847.402(b) may, instead of the election provided by § 847.441 (pertaining to elections of NAFI retirement coverage), elect to remain subject to FERS for all subsequent periods of service.

(ii) Prior service under a NAFI retirement system becomes creditable under FERS rules without regard to whether a refund of contributions for such period has been paid by the NAFI retirement system.

(2) A FERS employee who has had a previous opportunity to elect retirement coverage under § 847.202(e) or (f) is not excluded from making this election.

(b) A survivor may make an election under paragraph (a) of this section if the employee was otherwise eligible to elect FERS coverage and FERS service credit, but died before expiration of the time limit under § 847.304.

(c) NAFI service made creditable under FERS by an election under this section become creditable for FERS retirement eligibility and FERS annuity computation, including average pay, upon receipt of the election by the employing agency.

(d) A election under this section is irrevocable when received by the employing agency.

[61 FR 41721, Aug. 9, 1996, as amended at 68 FR 2180, Jan. 16, 2003]

### § 847.422 Crediting future NAFI service.

An employee who elects to remain in FERS coverage with credit for NAFI service under § 847.421(a) will be covered by FERS during all periods of future service not excluded from coverage by FERS, including any periods of service with a NAFI and service as a reemployed annuitant.

### § 847.423 Credit for refunded FERS service.

(a) An employee or survivor who elects FERS coverage with credit for NAFI service under § 847.421 will receive credit in the FERS annuity for the service represented by any refund of the unexpended balance under § 843.202 of this chapter.

(b) The amount of the refund, increased by interest as computed under § 842.305(e) of this chapter, will be added to the deficiency computed under § 847.604 and collected in accordance with the provisions of § 847.609 (pertaining to a monthly reduction in the annuity benefit).

## ELECTIONS TO REMAIN IN NAFI COVERAGE WITH CREDIT FOR FERS SERVICE BASED ON A MOVE FROM FERS TO NAFI

### § 847.431 Election requirements.

(a)(1)(i) A NAFI employee who completed a qualifying move from FERS under § 847.402(a) may, instead of the election provided by § 847.411 (pertaining to elections of CSRS and FERS coverage), elect to remain subject to the current NAFI retirement system for all subsequent periods of service.

(ii) Prior service under FERS becomes credible under the NAFI retirement system rules.

(2) An NAFI employee who has had a previous opportunity to elect retirement coverage under § 847.202(e) or (f) is not excluded from making this election.

(b) A survivor may make an election under paragraph (a) of this section if the employee was otherwise eligible, but died before expiration of the time limit under § 847.304.

(c) An election under this section is irrevocable when received by the employing agency.

[61 FR 41721, Aug. 9, 1996, as amended at 68 FR 2180, Jan. 16, 2003]

### § 847.432 Effect of a refund of FERS deductions.

OPM will inform the NAFI retirement system of the amount of service performed under FERS, without regard to whether a refund of contributions for such period has been paid under FERS.

### § 847.433 Exclusion from FERS for future service.

(a) An employee who elects NAFI retirement system coverage with credit for FERS service under § 847.431(a) is excluded from coverage under FERS during that and all subsequent periods of employment, including any periods of service as a reemployed annuitant.

(b) FERS service which becomes creditable in a NAFI retirement benefit based on an election under § 847.431 is not creditable for any purpose under FERS.

## ELECTIONS OF NAFI COVERAGE BASED ON A MOVE FROM NAFI TO FERS

### § 847.441 Election requirements.

(a) An employee who completed a qualifying move under § 847.402(b) may elect to be covered by a NAFI retirement system for all Federal service following the qualifying move.

(b) A survivor eligible for benefits under FERS may make an election under this section if the employee was otherwise eligible to make an election, but died before expiration of the time limit under § 847.304.

### § 847.442 Effective date.

(a) An election under § 847.441 is effective on the first day of FERS-covered employment following NAFI employment subject to retirement coverage.

(b) Deductions and contributions for NAFI retirement system coverage begin effective on the first day of the next pay period after the agency receives the employee's election under § 847.441(a).

(c) An election under § 847.441 is irrevocable when received by the employing agency.

### § 847.443 Exclusion from FERS for future service.

An employee who elects NAFI retirement system coverage with credit for FERS service under § 847.441(a) is excluded from coverage under FERS during that and all subsequent periods of employment, including any periods of service as a reemployed annuitant.

## Subpart E—Transfers of Contributions Under the Retroactive Provisions

### § 847.501 Purpose and scope.

This subpart regulates transferring retirement contributions and crediting those contributions to offset the employee costs in connection with elections section 1043(c)(2) of the National Defense Authorization Act for Fiscal Year 1996.

### § 847.502 Transfers to the CSR Fund.

For elections of CSRS or FERS coverage under § 847.411 or FERS coverage and service credit under § 847.421, the amount under § 847.504 will be transferred to the Fund using the procedures established under § 847.506.

### § 847.503 Transfers from the CSR Fund.

For elections of NAFI retirement system coverage under § 847.441, the amount under § 847.504 will be transferred from the Fund using the procedures established under § 847.506.

### § 847.504 Amount of transfer.

(a) All transfers must include employee contributions with interest, if not previously refunded, and Government contributions for civilian service which becomes creditable under the elected retirement system due to an election under §§ 847.411, 847.421, and 846.441.

(b) If the employee has withdrawn his or her contributions to the retirement system, the amount required by paragraph (a) of this section, less the amount refunded, will be transferred.

### § 847.505 When transfer occurs.

(a) OPM, the Department of Defense, and the U.S. Coast Guard will transfer the amount specified in § 847.504 as soon as practicable after receipt of an election of retirement coverage under subpart D of this part.

(b) The transfer of contributions may not be delayed until the employee retires or separates from service.

### § 847.506 Procedures for transfer.

OPM, the Department of Defense, and the U.S. Coast Guard will jointly determine the procedure for transfer of contributions.

### § 847.507 Earnings after transfer.

Amounts transferred to the Fund under § 847.502 that are used to determine the deficiency under § 847.604 accrue interest at the rate prescribed under § 841.603 of this chapter from the date of receipt in OPM through the date determined under § 847.603 (pertaining to the date of calculation of any deficiency).

## Subpart F—Additional Employee Costs Under the Retroactive Provisions

### § 847.601 Purpose and scope.

(a) The purpose of this subpart is to establish the methodology that OPM will use to determine—

(1) The cost of an employee's election under § 847.411 or § 847.421; and

(2) The amount by which annuity payments may be affected as a result of the election.

(b) This subpart applies only to CSRS and FERS benefits. The Departments of Defense, and the U.S. Coast Guard will issue regulations providing methodologies for NAFI's under their jurisdictions.

### § 847.602 Present value factors.

(a) OPM publishes the following tables (available at personnel and payroll offices):

(1) One table of present value factors for all CSRS annuities;

(2) One table of present value factors for FERS annuities that do not receive cost-of-living adjustments before the retiree attains age 62; and

(3) One table of present value factors for FERS annuities that receives cost-of-living adjustments before the retiree attains age 62.

(b)(1) Each present value factor will equal the amount of money (earning interest at an assumed rate) required at the date of computation to fund an annuity that starts out at the rate of $1 a month and is payable in monthly installments for the annuitant's lifetime based on mortality rates for annuitants paid from the Fund; and increases each year, assuming a certain rate of inflation.

(2) Interest, mortality, and inflation rates used in computing the present value are those used by the Board of Actuaries of the Civil Service Retirement System for valuation of CSRS and FERS, based on dynamic assumptions.

(3) The present value factors are unisex factors obtained by averaging distinct present value factors, which take into account mortality for retirees and survivors under CSRS and FERS.

(c)(1) When OPM publishes in the FEDERAL REGISTER notice of normal cost percentages under § 841.407 of this chapter, it will also publish the CSRS and FERS tables of present value factors for use for this part.

(2) The present value factors will be based on the assumptions used to compute the normal cost percentages.

(3) Changes in the tables of present value factors will be effective on the first day of the month in which the changes in the normal cost percentages become effective.

### § 847.603 Date of present value and deficiency determinations.

(a) For determining the deficiency under § 847.604, OPM will determine, under §§ 847.605 through 847.607, the present values of future retirement benefits (with and without credit for the NAFI service) as of the first date on which inclusion of credit for the NAFI service will affect the rate of annuity payable.

(b) Appendix A to this subpart contains a table in which the left column is a list of events for which inclusion of credit for the NAFI service will affect the rate of annuity payable and the right column indicates the date on which the deficiency will be determined.

### § 847.604 Methodology for determining deficiency.

(a) When an event listed in the left column of the table in Appendix A to this subpart occurs, OPM will compute the deficiency, as follows:

(1) As of the date of computation under § 847.603, OPM will determine—

(i) The present value of the annuity including credit for the NAFI service under § 847.605;

(ii) The present value of the annuity without credit for the NAFI service under § 847.606 or § 847.607, as applicable; and

(iii) The amount credited to the employee from a transfer to the Fund under subpart E of this part including earnings under § 847.507.

(2) OPM will add the amount determined under paragraphs (a)(1)(ii) and (iii) of this section and subtract that sum from the amount determined under paragraph (a)(1)(i) of this section.

(b) If the amount determined under paragraph (a)(2) of this section is greater than zero, the deficiency is equal to that amount.

(c) If no event listed in the left column of the table in Appendix A to this subpart occurs—that is, the additional service credit does not cause an increase in an employee annuity or a survivor annuity actually paid—or, if the amount determined under paragraph (a)(2) of this section is less than or equal to zero, the deficiency equals zero.

### § 847.605 Methodology for determining the present value of annuity with service credit.

(a) OPM will determine the present value of the annuity including service credit for NAFI service under paragraph (b) or (c) of this section.

(b) In cases in which the annuity is payable to a retiree, the present value under paragraph (a) of this section equals the monthly annuity rate including credit for the NAFI service as of the date of computation under § 847.603 times the present value factor for the retiree's age on that date.

(c) In cases in which the annuity is payable to a survivor, the present value under paragraph (a) of this section equals the monthly annuity rate including credit for the NAFI service as of the date of computation under § 847.603 times the present value factor for the survivor's age on that date.

### § 847.606 Methodology for determining the present value of annuity without service credit—credit not needed for title.

(a) If credit for the NAFI service is not necessary to provide title to an annuity payable on the date of computation under § 847.603, OPM will determine the present value of the annuity without credit for the NAFI service under paragraph (b) or (c) of this section.

(b) In cases in which the annuity is payable to a retiree, the present value under paragraph (a) of this section equals the monthly annuity rate without credit for the NAFI service as of the date of computation under § 847.603 times the present value factor for the retiree's age on that date.

(c) In cases in which the annuity is payable to a survivor, the present value under paragraph (a) of this section equals the monthly annuity rate including credit for the NAFI service as of the date of computation under § 847.603 times the present value factor for the survivor's age on that date.

### § 847.607 Methodology for determining the present value of annuity without service credit—credit needed for title.

(a) If credit for the NAFI service is necessary to provide title to an annuity payable on the date of computation under § 847.603, OPM will determine the present value of the annuity without credit for the NAFI service under paragraph (b) or (c) of this section.

(b)(1) In cases in which the annuity is payable to a retiree, the present value under paragraph (a) of this section equals the present value of the deferred annuity without credit for the NAFI service as of the deferred annuity date discounted for interest to that date determined under § 847.603.

(2) The present value of the deferred annuity without credit for the NAFI service as of the deferred annuity date equals the retiree's monthly annuity rate without credit for the NAFI service as of the deferred annuity date times the present value factor for the retiree's age on that date.

(3) The present value under paragraph (b)(2) of this section is discounted for interest by dividing that amount by a factor equal to the value of exponential function in which—

(i) The base is one plus the assumed interest rate under § 841.405 of this chapter on the date determined under § 847.603, and

(ii) The exponent is one-twelfth of the number of months between the date determined under § 847.603 and the deferred annuity date.

(c) In cases in which the annuity is payable to a survivor, the present value under paragraph (a) of this section equals zero, that is, no survivor annuity would ever become payable without credit for the NAFI service.

### § 847.608 Reduction in annuity due to deficiency.

Any annuity payable in the case of an employee who has made an election under subpart D of this part will include credit for the NAFI service. The monthly annuity rate on the date determined under § 847.603 will be permanently reduced by an amount equal to the amount of any deficiency divided by the present value factor for the annuitant's age on that date.

## APPENDIX A TO SUBPART F OF PART 847—LIST OF EVENTS FOR WHICH INCLUSION OF NAFI SERVICE MAY AFFECT THE RATE OF ANNUITY PAYABLE

| Type of event | Date deficiency will be determined |
|---|---|
| CSRS or FERS nondisability retirement. | Commencing date of annuity. |
| CSRS disability retirement .... | Commencing date of annuity. [1] |
| FERS disability retirement ..... | First day of month following 62nd birthday. [2] |
| CSRS death in service ..... | Commencing date of survivor annuity. [3] |
| FERS death in service ..... | Commencing date of survivor annuity. |
| FERS death of disability annuitant prior to age 62. | Commencing date of survivor annuity. |
| FERS death of separated employee. | Commencing date of survivor annuity. |

| Type of event | Date deficiency will be determined |
|---|---|
| CSRS or FERS redetermination of annuity. | Commencing date of redetermined annuity benefit. |

[1] Disability annuity with and without credit for NAFI service must be computed. If annuity payable under each computation is identical due to guaranteed minimum annuity, then deficiency is zero.

[2] Generally, the date the deficiency is determined will be the disability retiree's 62nd birthday. However, if an annuity benefit based on the retiree's actual years of service and salary becomes payable prior to age 62, the deficiency is computed at that time.

[3] Deficiency amount could be zero if survivor is eligible for the guaranteed minimum annuity amount under both computations.

## Subpart G—Computation of Benefits Under the Retroactive Provisions

### § 847.701 Purpose and scope.

This subpart establishes the methodology that OPM will use to determine benefit payable in connection with an election made under subpart D of this part.

### § 847.702 Lump-sum payments and refunds.

(a) Employee contributions with interest which are transferred to the Fund under subpart E of this part are included in any lump-sum credit or unexpended balance payable to the employee or the employee's survivors under subpart T of part 831 of this chapter or under part 843 of this chapter.

(b) Government contributions which are transferred to the Fund under subpart E of this part are not included in any lump-sum credit or unexpended balance and are not payable to the employee or the employee's survivors.

### § 847.703 Reductions in annuity.

The CSRS or FERS basic annuity of an employee or survivor who has elected retirement coverage under subpart D of this part is reduced in the following order—

(a) For age, if applicable, as provided under sections 8339(h) and 8415(f) of title 5, United States Code.

(b) For noncontributory service performed before October 1, 1982, if applicable, as provided under 5 U.S.C.A. 8339(i), note.

(c) For deficiency, as determined under subpart F of this part.

(d) To provide a survivor annuity to a spouse or former spouse, if applicable, as provided under sections 8339(j)(4) and 8419(a) of title 5, United States Code.

(e) Any other reductions which may apply.

### § 847.704 Maximum survivor annuity election.

The amount of the employee's benefit after reduction for any deficiency under § 847.608 is—

(a) For CSRS, the maximum amount that may be designated as the survivor base under section 8339 (j) or (k) to title 5, United States Code;

(b) For FERS, the employee annuity (for survivor benefit purposes) under sections 8416 through 8420 of title 5, United States Code.

### § 847.705 Cost-of-living adjustments.

Cost-of-living adjustments are applied to the rate payable to the retiree or survivor, including the reduction for any deficiency described in § 847.608.

## Subpart H—Electing to Credit NAFI Service for CSRS and FERS Retirement Eligibility

SOURCE: 68 FR 2180, Jan. 16, 2003, unless otherwise noted.

### § 847.801 What information is in this subpart?

This subpart contains OPM's regulations on the procedures, eligibility requirements, and time limits for elections under 5 U.S.C. 8332(b)(17) and 5 U.S.C. 8411(b)(6).

### § 847.802 Who may elect to use NAFI service to qualify for immediate retirement under CSRS or FERS?

CSRS and FERS employees may elect to credit NAFI service for retirement purposes under this subpart if:

(a) They separate for retirement on or after December 28, 2001;

(b) They do not otherwise qualify for immediate retirement; and

(c) They have enough otherwise creditable civilian service to qualify for deferred retirement.

### § 847.803 When do employees make the election to use their NAFI service to qualify for an immediate retirement under CSRS or FERS?

Employees about to retire must make their election to credit NAFI service under this subpart no later than the date of separation on which their retirement is based.

### § 847.804 How do employees make an election to use their NAFI service to qualify for an immediate retirement under CSRS or FERS?

Employees electing to credit NAFI service under this subpart must:

(a) Inform the NAFI retirement plan that they are electing to credit NAFI service for CSRS or FERS retirement eligibility;

(b) Document the election on a form prescribed by OPM; and

(c) Submit the election with their application for immediate retirement.

### § 847.805 What NAFI service can employees elect to credit toward retirement eligibility under CSRS or FERS?

(a) Employees may elect to credit under this subpart any NAFI service that isn't already creditable under 5 U.S.C. 8332(b)(16), or under 5 CFR part 847, subpart D.

(b) NAFI service used to qualify for an immediate annuity based on an election in paragraph (a) of this section cannot be credited in a NAFI retirement plan for any purpose including eligibility and calculations of NAFI benefits.

### § 847.806 How much NAFI service must employees elect to use to qualify for an immediate CSRS or FERS retirement?

(a) Employees must elect complete periods of NAFI service under this subpart.

(b) A complete period of NAFI service in paragraph (a) of this section consists of the period from the date of appointment with an NAFI employer to the date of termination.

### § 847.807 Do employees have to pay CSRS or FERS deposits for the NAFI service they use to qualify for immediate retirement under CSRS or FERS?

Employees are not required to pay CSRS or FERS deposits for the NAFI service they use to qualify for immediate retirement under CSRS or FERS. In fact, deposits cannot be made for any NAFI service employees elect to credit for immediate retirement under this subpart.

### § 847.808 Is money in the NAFI retirement fund covering NAFI service that an employee elects to use for immediate retirement under CSRS or FERS, transferred to the Civil Service Retirement and Disability Fund?

Money in the NAFI retirement fund covering NAFI service that an employee elects to use for immediate retirement under CSRS or FERS under this subpart cannot be transferred to the Civil Service Retirement and Disability Fund.

### § 847.809 What effect will NAFI service used to qualify for an immediate retirement have on the amount of the CSRS or FERS annuity?

The annuity of a CSRS or FERS employee who elects to credit NAFI service under this subpart will be reduced under the provisions outlined in subpart I of this part.

## Subpart I—Computing the Retirement Annuity for Employees Who Elect To Use NAFI Service To Qualify for an Immediate CSRS or FERS Retirement

SOURCE: 68 FR 2181, Jan. 16, 2003, unless otherwise noted.

### § 847.901 What information is in this subpart?

This subpart contains OPM's regulations describing the computation of a CSRS or FERS retirement annuity when an employee elects to use NAFI service to qualify for immediate retirement under subpart H of this part.

### § 847.902 How does an election to credit NAFI service for immediate CSRS or FERS retirement under subpart H of this part affect the computation of the CSRS or FERS retirement annuity?

The retirement annuity of an employee who elects to use NAFI service to qualify for an immediate CSRS or FERS retirement benefit will be reduced to ensure the present value of the benefits payable will be actuarially equivalent to those that would have been payable if the employee had separated on the same date, but without credit for the NAFI service.

### § 847.903 How is the monthly reduction to the retirement annuity computed?

(a) The reduction equals:

(1) The difference in the present value of the immediate annuity with credit for NAFI service and the deferred annuity without credit for NAFI service, divided by

(2) The present value factor for the retiree's attained age (in full years) at the time of retirement.

(b) The reduction computed in paragraph (a) of this section is rounded to the next higher dollar.

### § 847.904 What are Present Value Factors?

Present value factors have the same meaning in this subpart as they do in 5 CFR 847.602.

### § 847.905 How is the present value of an immediate annuity with credit for NAFI service computed?

(a) OPM will determine the present value of the immediate annuity including service credit for NAFI service by multiplying the monthly annuity rate as of the commencing date of the annuity by the present value factor for the retiree's age on that date.

(b) The monthly annuity rate under paragraph (a) of this section for CSRS and CSRS Offset retirees equals the monthly rate of annuity otherwise payable under 5 U.S.C. chapter 83, subchapter III, including all reductions provided under that subchapter.

(c) The monthly annuity rate under paragraph (a) of this section for FERS retirees equals the monthly rate of annuity otherwise payable under 5 U.S.C. chapter 84, subchapter II, including all reductions provided under that subchapter.

### § 847.906 How is the present value of a deferred annuity without credit for NAFI service computed?

(a) The present value of a deferred annuity equals the present value of the deferred annuity without credit for the NAFI service as of the deferred annuity date discounted for interest to that date.

(b) The present value of the deferred annuity without credit for the NAFI service as of the deferred annuity date equals the retiree's monthly annuity without credit for the NAFI service as of the deferred annuity date times the present value factor for the retiree's age on that date.

(c) The present value under paragraph (b) of this section is discounted for interest by dividing that amount by a factor equal to the value of the exponential function in which—

(1) The base is one plus the assumed interest rate under 5 CFR part 841, subpart D, on the commencing date of the retiree's immediate annuity, and

(2) The exponent is one-twelfth of the number of months between the commencing date of the retiree's immediate annuity and the deferred annuity date.

### § 847.907 How is the monthly annuity rate used to compute the present value of the deferred annuity without credit for NAFI service determined?

(a) The monthly annuity rate used to compute the present value of the deferred annuity under § 847.906 of this subpart for CSRS retirees equals the monthly annuity otherwise payable under 5 U.S.C. chapter 83, subchapter III, including all reductions provided under that subchapter.

(b) The monthly annuity rate used to compute the present value of the deferred annuity under § 847.906 of this subpart for CSRS Offset retirees is computed as described in paragraph (a) of this section, except that the reduction under section 5 U.S.C. 8349 does not apply.

(c) The monthly annuity rate used to compute the present value of the deferred annuity under § 847.906 of this

subpart for FERS retirees equals the monthly rate of annuity otherwise payable under 5 U.S.C. chapter 84, subchapter II, including all reductions provided under that subchapter.

**§ 847.908 If a retiree who elected to credit NAFI service under subpart H of this part earns a supplemental annuity under 5 CFR part 837, how will that supplemental annuity be computed?**

This subpart does not affect supplemental annuities under 5 CFR part 837. Supplemental annuities will be computed in accordance with the provisions of that part.

**§ 847.909 If a retiree who elected to credit NAFI service under subpart H of this part earns a right to a redetermined annuity under 5 CFR part 837, how will the redetermined annuity be computed?**

(a) A redetermined annuity will not be subject to a reduction under this subpart if, on the date reemployment with the Government ends, the retiree qualifies for an immediate retirement without credit for the NAFI service.

(b) A redetermined annuity will be subject to a reduction under this subpart if, on the date reemployment with the Government ends, the retiree does not qualify for immediate retirement without credit for the NAFI service.

(c) The reduction in paragraph (b) of this section is computed as in accordance with § 847.903 of this subpart as if the individual was retiring for the first time.

**§ 847.910 If a retiree who elected to credit NAFI service for CSRS immediate retirement returns to work for the Government under conditions that terminate the annuity, how will the retirement annuity be computed when the employee's service with the Government ends?**

(a) If an individual whose annuity terminates upon reemployment with the Government elects to credit NAFI service under subpart B of this part to qualify for a new immediate retirement when the reemployment ends, the annuity will be subject to a reduction under this subpart.

(b) If an individual whose annuity terminates upon reemployment with the Government qualifies for a new immediate retirement when the reemployment ends without crediting NAFI service, the new annuity will not be subject to a reduction under this subpart.

(c) If an individual whose annuity terminates upon reemployment with the Government qualifies for a deferred annuity when the reemployment ends, the deferred annuity will not be subject to a reduction under this subpart.

(d) The reduction in paragraph (a) of this section is computed in accordance with § 847.903 of this subpart as if the individual was retiring for the first time.

**§ 847.911 Is an employee who elects to credit NAFI service to qualify for an immediate FERS retirement under subpart H of this part eligible for an FERS annuity supplement under 5 CFR 842 subpart E?**

An FERS Annuity Supplement is not payable to a retiree who elects to credit NAFI service under subpart H of this part.

**§ 847.912 If an employee who elects to credit NAFI service under subpart H of this part elects a survivor annuity will the monthly survivor annuity rate be subject to reduction?**

(a) The monthly survivor annuity benefit of an employee who elects to credit NAFI service under subpart H of this part will be subject to reduction.

(b) The reduction under paragraph (a) of this section equals:

(1) The difference in the present value of the initial survivor annuity generated from the immediate annuity computation with credit for NAFI service and the initial survivor annuity generated from the deferred annuity computation without credit for NAFI service, divided by

(2) The present value factor for the retiree's age (in full years) at the time of retirement.

(c) The present value of the survivor annuity generated from the immediate annuity with credit for NAFI service in paragraph (b)(1) of this section is computed under the provisions of § 847.905 of this subpart.

(d) The present value of the initial survivor annuity generated from the deferred annuity without credit for NAFI service in paragraph (b)(1) of this

section is computed under the provisions of § 847.906 of this subpart.

(e) The ages of the employee as of the commencing date of the immediate retirement and the commencing date of the deferred retirement are used to compute the present value of the survivor benefits under paragraphs (c) and (d) of this section.

# PART 848—PHASED RETIREMENT

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AUTHORITY: 5 U.S.C. 8461; 5 U.S.C. 8412a.

SOURCE: 79 FR 46632, Aug. 8, 2014, unless otherwise noted.

## Subpart A—General Provisions

### § 848.101 Applicability and purpose.

This subpart contains the regulations implementing provisions of 5 U.S.C. 8412a authorizing phased retirement. This subpart establishes the eligibility requirements for making an election to enter phased retirement status, the procedures for making an election, the record-keeping requirements, and the methods to be used for certain computations not addressed elsewhere in parts 841–843 and 845.

### § 848.102 Definitions.

In this subpart—

*Authorized agency official* means—

(1) For the executive branch agencies, the head of an Executive agency as defined in 5 U.S.C. 105;

(2) For the legislative branch, the Secretary of the Senate, the Clerk of

the House of Representatives, or the head of any other legislative branch agency;

(3) For the judicial branch, the Director of the Administrative Office of the U.S. Courts;

(4) For the Postal Service, the Postmaster General;

(5) For any other independent establishment that is an entity of the Federal Government, the head of the establishment; or

(6) An official who is authorized to act for an official named in paragraphs (1)–(5) in the matter concerned.

*Composite retirement annuity* means the annuity computed when a phased retiree attains full retirement status.

*Director* means the Director of the Office of Personnel Management.

*Full retirement status* means that a phased retiree has ceased employment and is entitled, upon application, to a composite retirement annuity.

*Full-time* means—

(1) An officially established recurring basic workweek consisting of 40 hours within the employee's administrative workweek (as established under § 610.111 of this chapter or similar authority); or

(2) An officially established recurring basic work requirement of 80 hours per biweekly pay period (as established for employees with a flexible or compressed work schedule under 5 U.S.C. chapter 61, subchapter II, or similar authority).

*Phased employment* means the less-than-full-time employment of a phased retiree.

*Phased retiree* means a retirement-eligible employee who—

(1) With the concurrence of an authorized agency official, enters phased retirement status; and

(2) Has not entered full retirement status;

*Phased retirement annuity* means the annuity payable under 5 U.S.C. 8412a before full retirement.

*Phased retirement percentage* means the percentage which, when added to the working percentage for a phased retiree, produces a sum of 100 percent.

*Phased retirement period* means the period beginning on the date on which an individual becomes entitled to receive a phased retirement annuity and ending on the date on which the individual dies or separates from phased employment.

*Phased retirement status* means that a phased retiree is concurrently employed in phased employment and eligible to receive a phased retirement annuity.

*Working percentage* has the meaning given that term in § 848.202(a).

### § 848.103 Implementing directives.

The Director may prescribe, in the form he or she deems appropriate, such detailed procedures as are necessary to carry out the purpose of this subpart.

## Subpart B—Entering Phased Retirement

### § 848.201 Eligibility.

(a) A retirement-eligible employee, as defined in paragraphs (b) and (c), may elect to enter phased retirement status if the employee has been employed on a full-time basis for not less than the 3-year period ending on the effective date of phased retirement status under § 848.203.

(b) Except as provided in paragraph (c) of this section, a retirement-eligible employee means an employee who, if separated from the service, would meet the requirements for retirement under subsection (a) or (b) of 5 U.S.C. 8412.

(c) A retirement-eligible employee does not include—

(1) A member of the Capitol Police or Supreme Court Police, or an employee occupying a law enforcement officer, firefighter, nuclear materials courier, air traffic controller, or customs and border protection officer position, except a customs and border protection officer who is exempt from mandatory separation and retirement under 5 U.S.C. 8325 pursuant to section 535(e)(2)(A) of Division E of the Consolidated Appropriations Act, 2008, Public Law 110–161;

(2) An individual eligible to retire under 5 U.S.C. 8412(d) or (e): or

(3) An employee covered by a special work schedule authority that does not allow for a regularly recurring part-time schedule, such as a firefighter covered by 5 U.S.C. 5545b or a nurse covered by 38 U.S.C. 7456 or 7456A.

**§ 848.202 Working percentage and officially established hours for phased employment.**

(a) For the purpose of this subpart, *working percentage* means the percentage of full-time equivalent employment equal to the quotient obtained by dividing—

(1) The number of officially established hours per pay period to be worked by a phased retiree, as described in paragraph (b) of this section; by

(2) The number of hours per pay period to be worked by an employee serving in a comparable position on a full-time basis.

(b) The number of officially established hours per pay period to be worked by an employee in phased retirement status must equal one-half the number of hours the phased retiree would have been scheduled to work had the phased retiree remained in a full-time work schedule and not elected to enter phased retirement status. These hours make up the officially established part-time work schedule of the phased retiree and exclude any additional hours worked under § 848.205(j).

**§ 848.203 Application for phased retirement.**

(a) To elect to enter phased retirement status, a retirement-eligible employee covered by § 848.201 must—

(1) Submit to an authorized agency official a written and signed request to enter phased employment, on a form prescribed by OPM;

(2) Obtain the signed written approval of an authorized agency official to enter phased employment; and

(3) File an application for phased retirement, in accordance with § 841.202.

(b) Except as provided in paragraph (c) of this section, an applicant for phased retirement may withdraw his or her application any time before the election becomes effective, but not thereafter.

(c) An applicant for phased retirement may not withdraw his or her application after OPM has received a certified copy of a court order (under part 581 or part 838 of this chapter) affecting the benefits.

(d)(1) An employee and an agency approving official may agree to a time limit to the employee's period of phased employment as a condition of approval of the employee's request to enter phased employment and phased retirement, or by mutual agreement after the employee enters phased employment status.

(2) To enter into such an agreement, the employee and the approving official must complete a written and signed agreement.

(3) The written agreement must include the following:

(i) The date the employee's period of phased employment will terminate;

(ii) A statement that the employee can request the approving official's permission to return to regular employment status at any time or within three days after the expiration of the agreement as provided in § 848.301. The agreement must also explain how returning to regular employment status would affect the employee, as described in §§ 848.301–302.

(iii) A statement that the employee has a right to elect to fully retire at any time as provided in § 848.401;

(iv) A statement that the employee may accept a new appointment at another agency, with or without the new agency's approval of phased employment, at any time before the expiration of the agreement or within 3 days of the expiration of the agreement; the agreement must also explain how accepting an appointment at a new agency as a regular employee would affect the employee, as described in §§ 848.301–302;

(v) An explanation that when the agreed term of phased employment ends, the employee will be separated from employment and that such separation will be considered voluntary, based on the written agreement; and

(vi) An explanation that if the employee is separated from phased employment and is not employed within 3 days (i.e., the employee has a break in service of greater than 3 days), the employee will be deemed to have elected full retirement.

(4) The agency approving official and the employee may rescind an existing agreement, or enter into a new agreement to extend or reduce the term of phased employment agreed to in an existing agreement, by entering into a

new written agreement meeting the requirements of this paragraph, before the expiration of the agreement currently in effect.

(e) An agency must establish written criteria that will be used to approve or deny applications for phased retirement before approving or denying applications for phased retirement.

### § 848.204 Effective date of phased employment and phased retirement annuity commencing date.

(a) Phased employment is effective the first day of the first pay period beginning after phased employment is approved by an authorized agency official under § 848.203(a), or the first day of a later pay period specified by the employee with the authorized agency official's concurrence.

(b) The commencing date of a phased retirement annuity (i.e., the beginning date of the phased retirement period) is the first day of the first pay period beginning after phased employment is approved by an authorized agency official under § 848.203(a), or the first day of a later pay period specified by the employee with the authorized agency official's concurrence.

### § 848.205 Effect of phased retirement.

(a)(1) A phased retiree is deemed to be a full-time employee for the purpose of 5 U.S.C. chapter 89 and 5 CFR part 890 (related to health benefits), as required by 5 U.S.C. 8412a(i). The normal rules governing health benefits premiums for part-time employees in 5 U.S.C. 8906(b)(3) do not apply.

(2) A phased retiree is deemed to be receiving basic pay at the rate applicable to a full-time employee holding the same position for the purpose of determining a phased retiree's annual rate of basic pay used in calculating premiums (employee withholdings and agency contributions) and benefits under 5 U.S.C. chapter 87 and 5 CFR part 870 (dealing with life insurance), as required by 5 U.S.C. 8412a(o). The deemed full-time schedule will consist of five 8-hour workdays each workweek, resulting in a 40-hour workweek. Only basic pay for hours within the deemed full-time schedule will be considered, consistent with 5 U.S.C. 8412a(o) and the definition of ''full-time'' in § 848.102. Any premium pay creditable as basic pay for life insurance purposes under 5 CFR 870.204 for overtime work or hours outside the full-time schedule that an employee was receiving before phased retirement, such as standby duty pay under 5 U.S.C. 5545(c)(1) or customs officer overtime pay under 19 U.S.C. 267(a), may not be considered in determining a phased retiree's deemed annual rate of basic pay under this paragraph.

(b) A phased retiree may not be appointed to more than one position at the same time.

(c) A phased retiree may move to another position in the agency or another agency during phased retirement status only if the change would not result in a change in the working percentage. To move to another agency during phased retirement status and continue phased employment and phased retirement status, the phased retiree must submit a written and signed request and obtain the signed written approval, in accordance with § 848.203(a)(1) and (2), of the authorized agency official to which the phased retiree is moving. Notwithstanding the provisions of § 848.204, if the authorized agency official approves the request, the phased retiree's phased employment and phased retirement status will continue without interruption at the agency to which the phased retiree moves. If the authorized agency official at the agency to which the phased retiree moves does not approve the request, phased employment and phased retirement status terminates in accordance with § 848.302(b).

(d) A phased retiree may be detailed to another position or agency if the working percentage of the position to which detailed is the same as the working percentage of the phased retiree's position of record.

(e) A retirement-eligible employee who makes an election under this subpart may not elect an alternative annuity under 5 U.S.C. 8420a.

(f) If the employee's election of phased retirement status becomes effective, the employee is barred from electing phased retirement status again. Ending phased retirement status or entering full retirement status does not create a new opportunity for the

individual to elect phased retirement status.

(g) With the exception of § 841.803(f), a phased retiree is deemed to be an annuitant for the purpose of subpart H of 5 CFR part 841.

(h) A phased retiree is deemed to be an annuitant for the purpose of subpart J of 5 CFR part 841.

(i) Except as otherwise expressly provided by law or regulation, a phased retiree is treated as any other employee on a part-time tour of duty for all other purposes.

(j)(1) A phased retiree may not be assigned hours of work in excess of the officially established part-time schedule (reflecting the working percentage), except under the conditions specified in paragraph (j)(2) of this section.

(2) An authorized agency official may order or approve a phased retiree to perform hours of work in excess of the officially established part-time schedule only in rare and exceptional circumstances meeting all of the following conditions:

(i) The work is necessary to respond to an emergency posing a significant, immediate, and direct threat to life or property;

(ii) The authorized agency official determines that no other qualified employee is available to perform the required work;

(iii) The phased retiree is relieved from performing excess work as soon as reasonably possible (e.g., by management assignment of work to other employees); and

(iv) When an emergency situation can be anticipated in advance, agency management made advance plans to minimize any necessary excess work by the phased retiree.

(3) Employing agencies must inform each phased retiree and his or her supervisor of—

(i) The limitations on hours worked in excess of the officially established part-time schedule;

(ii) The requirement to maintain records documenting that the exceptions met all required conditions;

(iii) The fact that, by law and regulation, any basic pay received for hours outside the employee's officially established part-time work schedule (as described in § 848.202(a)(1) and (b)) is subject to retirement deductions and agency contributions, in accordance with 5 U.S.C. 8412a(d), but is not used in computing retirement benefits; and

(iv) The fact that, by law and regulation, any premium pay received for overtime work or hours outside the full-time schedule that would otherwise be basic pay for retirement, such as customs officer overtime pay under 19 U.S.C. 267(a), will not be subject to retirement deductions or agency contributions, in accordance with 5 U.S.C. 8412a(d), and that any such premium pay received will not be included in computing retirement benefits.

(4) Employing agencies must maintain records documenting that exceptions granted under paragraph (j)(2) of this section meet the required conditions. These records must be retained for at least 6 years and be readily available to auditors. OPM may require periodic agency reports on the granting of exceptions and of any audit findings.

(5) If OPM finds that an agency (or subcomponent) is granting exceptions that are not in accordance with the requirements of this paragraph (j), OPM may administratively withdraw the agency's (or subcomponent's) authority to grant exceptions and require OPM approval of any exception.

(6) If OPM finds that a phased retiree has been working a significant amount of excess hours beyond the officially established part-time schedule to the degree that the intent of the phased retirement law is being undermined, OPM may require that the agency end the individual's phased retirement by unilateral action, notwithstanding the normally established methods of ending phased retirement. This finding does not need to be based on a determination that the granted exceptions failed to meet the required conditions in paragraph (j)(2) of this section. With the ending of an individual's phased retirement, that individual must be returned to regular employment status on the same basis as a person making an election under § 848.301—unless that individual elects to fully retire as provided under § 848.401.

(7) A phased retiree must be compensated for excess hours of work in accordance with the normally applicable pay rules.

(8) Any premium pay received for overtime work or hours outside the full-time schedule that would otherwise be basic pay for retirement, such as customs officer overtime pay under 19 U.S.C. 267(a), is not subject to retirement deductions or agency contributions, in accordance with 5 U.S.C. 8412a(d).

## Subpart C—Returning to Regular Employment Status

### § 848.301 Ending phased retirement status to return to regular employment status.

(a) *Election to end phased retirement status to return to regular employment status.* (1) A phased retiree may elect, with the permission of an authorized agency official, to end phased employment at any time to return to regular employment status. The election is deemed to meet the requirements of 5 U.S.C. 8412a(g) regardless of the employee's work schedule. The employee is not subject to any working percentage limitation (i.e., full-time, 50 percent of full-time, or any other working percentage) upon electing to end phased retirement status.

(2) To elect to end phased retirement status to return to regular employment status, a phased retiree must—

(i) Submit to an authorized agency official, on a form prescribed by OPM, a written and signed request to end phased retirement status to return to regular employment status; and

(ii) Obtain the signed written approval of an authorized agency official for the request.

(3) An employee may cancel an approved election to end phased retirement status to return to regular employment status by submitting a signed written request to the agency and obtaining the approval of an authorized agency official before the effective date of return to regular employment status.

(4) The employing agency must notify OPM that the employee's phased retirement status has ended by submitting to OPM a copy of the completed election to end phased retirement status to return to regular employment status within 15 days of its approval.

(b) *Mandated return to regular employment status.* A phased retiree may be returned to regular employment status as provided under § 848.205(j)(6).

(c) *Bar on reelection of phased retirement.* Once an election to end phased retirement status to return to regular employment status is effective, the employee may not reelect phased retirement status.

### § 848.302 Effective date of end of phased retirement status to return to regular employment status.

(a)(1) Except as provided in paragraph (b) of this section, if a request to end phased retirement status to return to regular employment status is approved by an authorized agency official under § 848.301 on any date on or after the first day of a month through the fifteenth day of a month, the phased retiree's resumption of regular employment status is effective the first day of the first full pay period of the month following the month in which the election to end phased retirement status to return to regular employment status is approved.

(2) If a request to end phased retirement status to return to regular employment status is approved by an authorized agency official under § 848.301 on any date on or after the sixteenth day of a month through the last day of a month, the phased retiree's resumption of regular employment status is effective on the first day of the first full pay period of the second month following the month in which the election to end phased retirement status to return to regular employment status is approved.

(3) The phased retirement annuity terminates on the date determined under paragraph (a)(1) or (2) of this section.

(b) When a phased retiree moves from the agency that approved his or her phased employment and phased retirement status to another agency and the authorizing official at the agency to which the phased retiree moves does not approve a continuation of phased employment and phased retirement status, phased employment and phased retirement status terminates when employment ends at the current employing agency.

**§ 848.303 Effect of ending phased retirement status to return to regular employment status.**

(a) After phased retirement status ends under § 848.302, the employee's rights under subchapter III of chapter 83 or chapter 84 of title 5, United States Code, are determined based on the law in effect at the time of any subsequent separation from service.

(b) After an individual ends phased retirement status to return to regular employment status, for the purposes of subchapter III of chapter 83 or chapter 84 of title 5, United States Code, at the time of the subsequent separation from service, the phased retirement period will be treated as if it had been a period of part-time employment with the work schedule described in § 848.202(a)(1) and (b). The part-time proration adjustment for the phased retirement period will be based upon the individual's officially established part-time work schedule, with no credit for extra hours worked. In determining the individual's deemed rate of basic pay during the phased retirement period, only basic pay for hours within the individual's officially established part-time work schedule may be considered. No pay received for other hours during the phased retirement period may be included as part of basic pay for the purpose of computing retirement benefits, notwithstanding the normally applicable rules.

(c) The restrictions in §§ 848.601 and 848.602 regarding when an individual must complete a deposit for civilian service, a redeposit for civilian service, or a deposit for military service do not apply when a phased retiree ends phased retirement status to return to regular employment status under this section.

## Subpart D—Entering Full Retirement Status

**§ 848.401 Application for full retirement status.**

(a) *Election of full retirement.* (1) A phased retiree may elect to enter full retirement status at any time by submitting to OPM an application for full retirement in accordance with § 841.202. This includes an election made under § 848.205(j)(6) in lieu of a mandated return to regular employment status. Upon making such an election, a phased retiree is entitled to a composite retirement annuity.

(2) A phased retiree may cancel an election of full retirement status and withdraw an application for full retirement by submitting a signed written request with the agency and obtaining the approval of an authorized agency official before the commencing date of the composite retirement annuity.

(b) *Deemed election of full retirement.* A phased retiree who is separated from phased employment for more than 3 days enters full retirement status. The individual's composite retirement annuity will begin to accrue on the commencing date of the composite annuity, as provided in § 848.402, and payment will be made after he or she submits an application in accordance with § 841.202 for the composite retirement annuity.

(c) *Survivor election provisions.* An individual applying for full retirement status under this section is subject to the survivor election provisions of subpart F of 5 CFR 842.

**§ 848.402 Commencing date of composite retirement annuity.**

(a) The commencing date of the composite retirement annuity of a phased retiree who enters full retirement status is the day after separation.

(b) A phased retirement annuity terminates upon separation from service.

## Subpart E—Computation of Phased Retirement Annuity at Phased Retirement and Composite Retirement Annuity at Full Retirement

**§ 848.501 Computation of phased retirement annuity.**

A phased retiree's phased retirement annuity equals the product obtained by multiplying (1) the amount of annuity computed under 5 U.S.C. 8415, excluding reduction for survivor annuity, that would have been payable to the phased retiree if, on the date on which the phased retiree enters phased retirement, the phased retiree had separated from service and retired under 5 U.S.C. 8412(a) or (b), by (2) the phased retirement percentage for the phased retiree.

**§ 848.502 Computation of composite annuity at final retirement.**

(a) Subject to the adjustment described in paragraph (c) of this section, a phased retiree's composite retirement annuity at final retirement equals the sum obtained by adding—

(1) The amount computed under § 848.501(a), increased by cost-of-living adjustments under § 848.503(c); and

(2) The ''fully retired phased component'' computed under paragraph (b) of this section.

(b)(1) Subject to the requirements described in paragraphs (b)(2) and (b)(3) of this section, a ''fully retired phased component'' equals the product obtained by multiplying—

(i) The working percentage; by

(ii) The amount of an annuity computed under 5 U.S.C. 8415 that would have been payable at the time of full retirement if the individual had not elected phased retirement status and as if the individual was employed on a full-time basis in the position occupied during the phased retirement period and before any reduction for survivor annuity.

(2) In applying paragraph (b)(1)(ii) of this section, the individual must be deemed to have a full-time schedule during the period of phased retirement. The deemed full-time schedule will consist of five 8-hour workdays each workweek, resulting in a 40-hour workweek. In determining the individual's deemed rate of basic pay during phased retirement, only basic pay for hours within the deemed full-time schedule will be considered, consistent with the definition of ''full-time'' in § 848.102. Any premium pay creditable as basic pay for retirement purposes for overtime work or hours outside the full-time schedule that an employee was receiving before phased retirement, such as standby duty pay under 5 U.S.C. 5545(c)(1) or customs officer overtime pay under 19 U.S.C. 267(a), may not be considered in determining a phased retiree's deemed rate of basic pay during phased retirement.

(3) In computing the annuity amount under paragraph (b)(1) of this section, the amount of unused sick leave credit equals the result of dividing the applicable percentage under 5 U.S.C. 8415(l) of the days of unused sick leave to the employee's credit at separation for full retirement, by the working percentage.

(c) The composite retirement annuity computed under paragraph (a) of this section is adjusted by applying any reduction for any survivor annuity benefit.

**§ 848.503 Cost-of-living adjustments.**

(a) The phased retirement annuity under § 848.501 is increased by cost-of-living adjustments in accordance with 5 U.S.C. 8462.

(b) A composite retirement annuity under § 848.502 is increased by cost-of-living adjustments in accordance with 5 U.S.C. 8462, except that 5 U.S.C. 8462(c)(1) does not apply.

(c)(1) For the purpose of computing the amount of phased retirement annuity used in the computation under § 848.502(a)(1), the initial cost-of-living adjustment applied is prorated in accordance with 5 U.S.C. 8462(c)(1).

(2) If the individual enters full retirement status on the same day as the effective date of a cost-of-living adjustment (usually December 1st), that cost-of-living adjustment, if applicable under 5 U.S.C. 8462, is applied to increase the phased retirement annuity used in the computation under § 848.502(a)(1).

**§ 848.504 Non-eligibility for annuity supplement.**

A phased retiree is not eligible to receive an annuity supplement under 5 U.S.C. 8421.

## Subpart F—Opportunity of a Phased Retiree To Pay Deposit or Redeposit for Civilian or Military Service

**§ 848.601 Deposit for civilian service for which no retirement deductions were withheld and redeposit for civilian service for which retirement deductions were refunded to the individual.**

Any deposit under § 842.304 and § 842.305, or redeposit under 5 U.S.C. 8422(i), that an employee entering phased retirement wishes to make for civilian service must be paid within 30 days from the date OPM notifies the employee of the amount of the deposit or redeposit, during the processing of

the employee's application for phased retirement. The deposit or redeposit amount will include interest, computed to the effective date of phased retirement. No deposit or redeposit payment may be made by the phased retiree when entering full retirement status.

### § 848.602 Deposit for military service.

(a) A phased retiree who wishes to make a military service credit deposit under § 842.307 for military service performed prior to entering phased retirement status must complete such a deposit no later than the day before the effective date of his or her phased employment and the commencing date of the phased retirement annuity. A military service credit deposit for military service performed prior to an individual's entry into phased retirement status cannot be made after the effective date of phased employment and the commencing date of phased retirement annuity.

(b) A phased retiree who wishes to make a military service credit deposit under § 842.307 for military service performed after the effective date of phased employment and the commencing date of phased retirement annuity and before the effective date of the composite retirement annuity (e.g., due to the call-up of the employee for active military service) must complete such a deposit no later than the day before the effective date of his or her composite retirement annuity.

## Subpart G—Death Benefits

### § 848.701 Death of phased retiree during phased employment.

(a) For the purpose of 5 U.S.C. chapter 84, subchapter IV—

(1) The death of a phased retiree is deemed to be a death in service of an employee; and

(2) The phased retirement period is deemed to have been a period of part-time employment with the work schedule described in § 848.202(a)(1) and (b) for the purpose of determining survivor benefits. The part-time proration adjustment for the phased retirement period will be based upon the employee's officially established part-time work schedule, with no credit for extra hours worked. In determining the employee's deemed rate of basic pay during the phased retirement period, only basic pay for hours within the employee's officially established part-time work schedule may be considered. No pay received for other hours during the phased retirement period may be included as part of basic pay for the purpose of computing retirement benefits, notwithstanding the normally applicable rules.

### § 848.702 Death of an individual who has separated from phased employment and who dies before submitting an application for a composite retirement annuity.

(a) For the purpose of 5 U.S.C. chapter 84, subchapter IV, an individual who dies after separating from phased employment and before submitting an application for composite retirement annuity is deemed to have filed an application for composite retirement annuity with OPM.

(b) The composite retirement annuity of a phased retiree described in paragraph (a) of this section is deemed to have accrued from the day after separation through the date of death. Any unpaid composite annuity accrued during such period, minus any phased retirement annuity paid during that period, will be paid as a lump-sum payment of accrued and unpaid annuity, in accordance with 5 U.S.C. 8424(d) and (g).

### § 848.703 Lump-sum credit.

If an individual performs phased employment, the lump-sum credit as defined in 5 U.S.C. 8401(19) will be reduced by any annuity that is paid or accrued during phased employment.

## Subpart H—Reemployment After Separation from Phased Retirement Status

### § 848.801 Reemployment of an individual who has separated from phased employment and who dies before submitting an application for a composite retirement annuity.

A phased retiree who has been separated from employment for more than

3 days and who has entered full retirement status, but who has not submitted an application for composite retirement annuity, is deemed to be an annuitant receiving annuity from the Civil Service Retirement and Disability Fund during any period of employment in an appointive or elective position in the Federal Government.

## Subpart I—Mentoring

### § 848.901 Mentoring.

(a) A phased retiree, other than an employee of the United States Postal Service, must spend at least 20 percent of his or her working hours in mentoring activities as defined by an authorized agency official. For purposes of this section, mentoring need not be limited to mentoring of an employee who is expected to assume the phased retiree's duties when the phased retiree fully retires.

(b) An authorized agency official may waive the requirement under paragraph (a) of this section in the event of an emergency or other unusual circumstances (including active duty in the armed forces) that, in the authorized agency official's discretion, would make it impracticable for a phased retiree to fulfill the mentoring requirement.

# PART 850—ELECTRONIC RETIREMENT PROCESSING

## Subpart A—General Provisions

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## Subpart D—Submission of Law Enforcement, Firefighter, and Nuclear Materials Courier Retirement Coverage Notices

850.401 Electronic notice of coverage determination.

AUTHORITY: 5 U.S.C. 8347; 5 U.S.C. 8461; 5 U.S.C. 8716; 5 U.S.C. 8913; section 9 of Pub. L. 86–724, 74 Stat. 849, 851–52 (September 8, 1960) as amended by section 102 of Reorganization Plan No. 2 of 1978, 92 Stat. 3781, 3783 (February 23, 1978).

SOURCE: 72 FR 73576, Dec. 28, 2007, unless otherwise noted.

## Subpart A—General Provisions

### § 850.101 Purpose and scope.

(a) The purpose of this part is to enable changes to OPM's retirement and insurance processing systems to improve the quality and timeliness of services to employees and annuitants covered by CSRS and FERS by using contemporary, automated business processes and supporting accessible technologies. By utilizing these automated processes, OPM will employ more efficient and effective business systems to respond to increased customer demand for higher levels of customer service and online self-service tools.

(b) The provisions of this part authorize exceptions from regulatory provisions that would otherwise apply to CSRS and FERS annuities and FEGLI, FEHB, and RFEHB benefits processed by or at the direction of OPM. Those regulatory provisions that would otherwise apply were established for a hardcopy based retirement and insurance benefits processing system that may eventually be phased out but which will continue to operate concurrently with OPM's modernization efforts. During the phased transition to electronic retirement and insurance processing, certain regulations that were not designed with information technology needs in mind, and which are incompatible with electronic business processes, must be set aside with respect to electronic retirement and insurance processing. The regulations set forth in this part make the transition to electronic processing possible.

(c) The provisions of this part do not affect retirement and insurance eligibility and annuity computation provisions. The provisions for capturing retirement and insurance data in an electronic format, however, may support, in some instances, more precise calculations of annuity and insurance benefits than were possible using hardcopy records.

[78 FR 68981, Nov. 18, 2013]

### § 850.102 Applicability.

(a) The provisions of parts 831, 835, 837 through 839, 841 through 847, 870, 890, and 891 of this chapter remain in effect, as applicable, except to the extent that they are inconsistent with one or more provisions of this part or implementing directives prescribed by the Director under § 850.104.

(b) The provisions of this part do not supersede or alter any functions performed by a private insurance company or carrier with which OPM has entered into a contract, or with which OPM may enter into a contract in the future, under chapter 87 or 89 of title 5, United States Code, or under any other provision of law or regulation.

### § 850.103 Definitions.

In this part—

*Agency* means an Executive agency as defined in section 105 of title 5, United States Code; a legislative branch agency; a judicial branch agency; the U.S. Postal Service; the Postal Regulatory Commission; and the District of Columbia government.

*Biometrics* means the technology that converts a unique characteristic of an individual into a digital form, which is then interpreted by a computer and compared with a digital exemplar copy of the characteristic stored in the computer. Among the unique characteristics of an individual that can be converted into a digital form are voice patterns, fingerprints, and the blood vessel patterns present on the retina of one or both eyes.

*Cryptographic control method* means an approach to authenticating identity or the authenticity of an electronic document through the use of a cipher (i.e., a pair of algorithms) which performs encryption and decryption.

*CSRS* means the Civil Service Retirement System established under subchapter III of chapter 83 of title 5, United States Code.

*Digital signature* means an electronic signature generated by means of an algorithm that ensures that the identity of the signatory and the integrity of the data can be verified. A value, referred to as the ''private key,'' is generated to produce the signature and another value, known as the ''public key,'' which is linked to but is not the same as the private key, is used to verify the signature.

*Digitized signature* means a graphical image of a handwritten signature usually created using a special computer input device (such as a digital pen and pad), which contains unique biometric data associated with the creation of each stroke of the signature (such as duration of stroke or pen pressure). A digitized signature can be verified by a comparison with the characteristics and biometric data of a known or exemplar signature image.

*Director* means the Director of the Office of Personnel Management.

*Electronic communication* means any information conveyed through electronic means and includes electronic forms, applications, elections, and requests submitted by email or any other electronic message.

*Electronic Document Management System (EDMS)* means the electronic system of images of hardcopy individual retirement records (SF 2806 and SF 3100) and other retirement-related documents.

*Electronic Individual Retirement Record (eIRR)* means a web-based database that contains certified electronic closeout and fully paid post-56 military service deposit Individual Retirement Records (IRRs), also known as Standard Form (SF) 2806 and SF 3100. The eIRR is stored in the Electronic Individual Retirement Record records storage database (formerly known as the Individual Retirement Record Closeout Data Capture or ICDC records storage database).

*Electronic Official Personnel Record Folder (eOPF)* means an electronic

version of the hardcopy Official Personnel Folder (OPF), providing Web-enabled access for federal employees and HR staff to view eOPF documents.

*Electronic Retirement Record (ERR)* means the certified electronic retirement record submitted to OPM as a retirement data feed in accordance with the Guide to Retirement Data Reporting. The ERR is submitted to OPM whenever an Agency would otherwise submit a hardcopy IRR to OPM.

*Employee* means an individual, other than a Member of Congress, who is covered by CSRS or FERS.

*Enterprise Human Resources Integration (EHRI) Data System* means the comprehensive electronic retirement record-keeping system that supports OPM's retirement processing across the Federal Government.

*FEGLI* means the Federal Employees' Group Life Insurance Program established under chapter 87 of title 5, United States Code.

*FEHB* means the Federal Employees Health Benefits Program established under chapter 89 of title 5, United States Code.

*FERS* means the Federal Employees' Retirement System established under chapter 84 of title 5, United States Code.

*Member* means a Member of Congress as defined by section 2106 of title 5, United States Code, who is covered by CSRS or FERS.

*Non-cryptographic method* is an approach to authenticating identity that relies solely on an identification and authentication mechanism that must be linked to a specific software platform for each application.

*Personal identification number (PIN) or password* means a non-cryptographic method of authenticating the identity of a user of an electronic application, involving the use of an identifier known only to the user and to the electronic system, which checks the identifier against data in a database to authenticate the user's identity.

*Public/private key (asymmetric) cryptography* is a method of creating a unique mark, known as a digital signature, on an electronic document or file. This method involves the use of two computer-generated, mathematically-linked keys: A private signing key that is kept private and a public validation key that is available to the public.

*Retirement Data Repository* means a secure centralized data warehouse that stores electronic retirement data of employees covered under the Civil Service Retirement System or the Federal Employees Retirement System compiled from multiple sources including agencies and Shared Service Centers.

*RFEHB* means the Retired Federal Employees Health Benefits Program established under Public Law 86–724, 74 Stat. 849, 851–52 (September 8, 1960), as amended.

*Shared Service Centers* means processing centers delivering a broad array of administrative services to multiple agencies.

*Shared symmetric key cryptography* means a method of authentication in which a single key is used to sign and verify an electronic document. The single key (also known as a ''private key'') is known only by the user and the recipient or recipients of the electronic document.

*Smart card* means a plastic card, typically the size of a credit card, containing an embedded integrated circuit or ''chip'' that can generate, store, or process data. A smart card can be used to facilitate various authentication technologies that may be embedded on the same card.

[78 FR 68981, Nov. 18, 2013]

### § 850.104 Implementing directives.

The Director must prescribe, in the form he or she deems appropriate, such detailed procedures as the Director determines to be necessary to carry out the purpose of this part.

### § 850.105 Agency responsibility.

Agencies employing individuals whose retirement records or processing are affected by this part are responsible for counseling those individuals regarding their rights and benefits under CSRS, FERS, FEGLI, FEHB, or RFEHB.

### § 850.106 Electronic signatures.

(a) Subject to any provisions prescribed by the Director under § 850.104—

(1) An electronic communication may be deemed to satisfy any statutory or regulatory requirement under CSRS, FERS, FEGLI, FEHB or RFEHB for a written election, notice, application, consent, request, or specific form format;

(2) An electronic signature of an electronic communication may be deemed to satisfy any statutory or regulatory requirement under CSRS, FERS, FEGLI, FEHB or RFEHB that an individual submit a signed writing to OPM;

(3) An electronic signature of a witness to an electronic signature may be deemed to satisfy any statutory or regulatory requirement under CSRS, FERS, FEGLI, FEHB or RFEHB for a signature to be witnessed; and

(4)(i) In general, any regulatory requirement under CSRS, FERS, FEGLI, FEHB or RFEHB that a signature be notarized, certified, or otherwise witnessed, by a notary public or other official authorized to administer oaths may be satisfied by the electronic signature of the person authorized to perform those acts when such electronic signature is attached to or logically associated with all other information and records required to be included by the applicable regulation.

(ii) Except as provided in paragraph (a)(4)(iii) of this section, a person signing a consent or election for the purpose of electronic notarization under paragraph (a)(4)(i) of this section must be in the physical presence of the notary public or an official authorized to administer oaths.

(iii) The Director may provide in directives issued under § 850.104 that alternative procedures utilized by a notary public or other official authorized to administer oaths (such as audio-video conference technology) will be deemed to satisfy the physical presence requirement for a notarized, certified, or witnessed election or consent, but only if those procedures with respect to the electronic system provide the same safeguards as are provided by physical presence.

(b) For purposes of this section, an electronic signature is a method of signing an electronic communication, including an application, claim, or notice, designation of beneficiary, or assignment that—

(1) Identifies and authenticates a particular person as the source of the electronic communication; and

(2) Indicates such person's approval of the information contained in the electronic communication.

(c) The Director will issue directives under § 850.104 that identify the acceptable methods of effecting electronic signatures for particular purposes under this part. Acceptable methods of creating an electronic signature may include—

(1) Non-cryptographic methods, including—

(i) Personal Identification Number (PIN) or password;

(ii) Smart card;

(iii) Digitized signature; or

(iv) Biometrics, such as fingerprints, retinal patterns, and voice recognition;

(2) Cryptographic control methods, including—

(i) Shared symmetric key cryptography;

(ii) Public/private key (asymmetric) cryptography, also known as digital signatures;

(3) Any combination of methods described in paragraphs (c)(1) and (c)(2) of this section; or

(4) Such other means as the Director may find appropriate.

[72 FR 73576, Dec. 28, 2007, as amended at 78 FR 68982, Nov. 18, 2013]

## Subpart B—Applications for Benefits; Elections

### § 850.201 Applications for benefits.

(a) Hardcopy applications and related submissions that are otherwise required to be made to an individual's employing agency (other than by statute) may instead be submitted electronically in such form as the Director prescribes under § 850.104.

(b) Data provided under subpart C of this part are the basis for adjudicating claims for CSRS and FERS retirement benefits, and will support the administration of FEGLI, FEHB and RFEHB coverage for annuitants, under this part.

[78 FR 68983, Nov. 18, 2013]

### § 850.202 Survivor elections.

A survivor election under subsection (j) or (k) of section 8339, or under section 8416, 8417, or 8420 of title 5, United States Code, which is otherwise required to be in writing may be effected in such form as the Director prescribes under § 850.104.

[72 FR 73576, Dec. 28, 2007, as amended at 78 FR 68983, Nov. 18, 2013]

### § 850.203 Other elections.

Any other election may be effected in such form as the Director prescribes under § 850.104. Such elections include but are not limited to elections of coverage under CSRS, FERS, FEGLI, FEHB, or RFEHB by individuals entitled to elect such coverage; applications for service credit and applications to make deposit; and elections regarding the withholding of State income tax from annuity payments.

[78 FR 68983, Nov. 18, 2013]

## Subpart C—Records

### § 850.301 Electronic records; other acceptable records.

(a) Acceptable electronic records for retirement and insurance processing by OPM include—

(1) Electronic employee data, including an eIRR or an ERR, submitted by an agency, agency payroll office, or Shared Service Center, or other entity and stored within the EHRI Retirement Data Repository, the eIRR records storage database, or other OPM database.

(2) Electronic Official Personnel Folder (eOPF) data; and

(3) Documents, including hardcopy versions of the Individual Retirement Record (SF 2806 or SF 3100), or data or images obtained from such documents, including images stored in EDMS, that are converted to an electronic or digital form by means of image scanning or other forms of electronic or digital conversion.

(b) Documents that are not converted to an electronic or digital form will continue to be acceptable records for processing by the retirement and insurance processing system.

[78 FR 68983, Nov. 18, 2013]

### § 850.302 Record maintenance.

(a) The retirement and insurance processing system does not affect the responsibilities of an agency with respect to employees or Members of Congress subject to subchapter III of chapter 83 or chapter 84 of title 5, United States Code, for the initiation and maintenance of records, evidence, or other information described in this title.

(b) Agencies are responsible for correcting errors in data provided to OPM under § 850.301.

### § 850.303 Return of personal documents.

An individual who submits personal documents to OPM in support of a claim for retirement or insurance benefits may have such documents returned to the individual if he or she requests the return of the documents when submitting the documents. If OPM receives a request for return of such documents at a later time, OPM may provide the individual with a copy of the document that is derived from electronic records.

## Subpart D—Submission of Law Enforcement, Firefighter, and Nuclear Materials Courier Retirement Coverage Notices

### § 850.401 Electronic notice of coverage determination.

An agency or other entity that submits electronic employee records directly or through a Shared Service Center must include in the notice of law enforcement officer, firefighter, or nuclear materials retirement coverage, required by §§ 831.811(a), 831.911(a), 842.808(a), or 842.910(a) of this chapter, the position description number, or other unique alphanumeric identifier, in the notice for the position for which law enforcement officer, firefighter, or nuclear materials courier retirement coverage has been approved. Agencies or other entities must submit position descriptions to OPM in a PDF document to combox address: *combox@opm.gov*.

[78 FR 68983, Nov. 18, 2013]

# PART 870—FEDERAL EMPLOYEES' GROUP LIFE INSURANCE PROGRAM

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AUTHORITY: 5 U.S.C. 8716; Subpart J also issued under section 599C of Pub. L. 101–513, 104 Stat. 2064, as amended; Sec.

870.302(a)(3)(ii) also issued under section 153 of Pub. L. 104–134, 110 Stat. 1321; Sec. 870.302(a)(3) also issued under sections 11202(f), 11232(e), and 11246(b) and (c) of Pub. L. 105–33, 111 Stat. 251, and section 7(e) of Pub. L. 105–274, 112 Stat. 2419; Sec. 870.302(a)(3) also issued under section 145 of Pub. L. 106–522, 114 Stat. 2472; Secs. 870.302(b)(8), 870.601(a), and 870.602(b) also issued under Pub. L. 110–279, 122 Stat. 2604. Subpart E also issued under 5 U.S.C. 8702(c); Sec. 870.601(d)(3) also issued under 5 U.S.C. 8706(d); Sec. 870.703(e)(1) also issued under section 502 of Pub. L. 110–177, 121 Stat. 2542; Sec. 870.705 also issued under 5 U.S.C. 8714b(c) and 8714c(c); Public Law 104–106, 110 Stat. 521.

SOURCE: 62 FR 48731, Sept. 17, 1997, unless otherwise noted.

## Subpart A—Administration and General Provisions

### § 870.101 Definitions.

*Accidental death and dismemberment* refers to the insured's death or loss of a hand, a foot, or vision in one eye that results directly from, and occurs within one year of, a bodily injury caused solely through violent, external, and accidental means.

*Acquisition of an eligible child* occurs when:

(1) A child is born to the insured;

(2) The insured adopts a child;

(3) The insured acquires a foster child;

(4) The insured's stepchild or recognized natural child moves in with the insured;

(5) An otherwise eligible child's marriage is dissolved by divorce or annulment, or his or her spouse dies;

(6) The insured gains custody of an eligible child.

*Annuitant* means a former employee entitled to an annuity under a retirement system established for employees. This includes the retirement system of a nonappropriated fund instrumentality of the Department of Defense or the Coast Guard.

*Assign* and *assignment* refer to an individual's irrevocable transfer to another individual, corporation, or trustee all ownership of FEGLI coverage (except Option C).

*Assignee* means the individual, corporation, or trustee to which an individual irrevocably transfers ownership of FEGLI coverage (except Option C).

*Beneficiary* means the individual, corporation, trust, or other entity that receives FEGLI benefits when an insured individual dies.

*Child*, as used in the definition of *Family member* for Option C coverage, means a legitimate child, an adopted child, a stepchild or foster child who lives with the employee or former employee in a regular parent-child relationship, or a recognized natural child. It does not include a stillborn child or a grandchild (unless the grandchild meets all the requirements of a foster child). The child must be under age 22 or, if age 22 or over, must be incapable of self-support because of a mental or physical disability which existed before the child reached age 22.

*Child*, as used in the *order of precedence for payment of benefits*, means a legitimate child, an adopted child, or a recognized natural child, of any age. It does not include a stepchild, a stillborn child, a grandchild, or a foster child. An individual who has reached age 18 is considered an adult and can receive a benefit payment in his/her name. However, if the age of adulthood where the individual has his/her legal residence is set at a lower age, the individual is considered an adult upon reaching that lower age. Adopted children do not inherit from their birth parents under the order of precedence stated in 5 U.S.C. 8705, other than as designated beneficiaries, but inherit from their adoptive parents. However, a child who is adopted by the spouse of a birth parent inherits from that birth parent.

*Compensation* means compensation under subchapter I of chapter 81 of title 5, United States Code, which is payable because of an on-the-job injury or disease.

*Compensationer* means an employee or former employee who is entitled to compensation and whom the Department of Labor determines is unable to return to duty.

*Court order* means:

(1) A court decree of divorce, annulment, or legal separation; or

(2) A court-approved property settlement agreement relating to a court decree of divorce, annulment, or legal separation—that requires benefits to be paid to a specific person or persons and

is received in the employing office before the insured dies.

*Covered position* means a position in which an employee is not excluded from FEGLI eligibility by law or regulation.

*Date of retirement*, as used in 5 U.S.C. 8706(b)(1)(A), means the starting date of annuity. For phased retirees, as defined in 5 U.S.C. 8336a and 8412a, the date of retirement is the date the individual enters full retirement status.

*Dependent* means living with or receiving regular and substantial support from the insured individual.

*Duly appointed representative of the insured's estate* means an individual named in a court order granting the individual the authority to receive, or the right to possess, the insured's property; the order must be issued by a court having jurisdiction over the insured's estate. Where the law of the insured's legal residence provides for the administration of estates through alternative procedures which do away with the need for a court order, this term also means an individual who shows that he/she is entitled to receive, or possess, the insured's property under the terms of those alternative procedures.

*Employee* means an individual defined by section 8701(a) of title 5, United States Code.

*Employing office* means the agency office or retirement system office that has responsibility for life insurance actions.

(1) The Administrative Office of the United States Courts is the employing office for judges of the following courts:

(i) All United States Courts of Appeals;

(ii) All United States District Courts;

(iii) The Court of International Trade;

(iv) The Court of Federal Claims; and

(v) The District Courts of Guam, the Northern Mariana Islands, and the Virgin Islands.

(2) The Washington Headquarters Services is the employing office for judges of the United States Court of Appeals for the Armed Forces.

(3) The United States Tax Court is the employing office for judges of the United States Tax Court.

(4) The United States Court of Veterans Appeals is the employing office for judges of the United States Court of Veterans Appeals.

*Family member* means a spouse (including a valid common law marriage) and unmarried dependent child(ren).

*Immediate annuity* means:

(1) An annuity that begins no later than 1 month after the date the insurance would otherwise stop (the date of separation from service), and

(2) An annuity under § 842.204(a)(1) of this title for which the starting date has been postponed under § 842.204(c) of this title.

*Judge* means an individual appointed as a Federal justice or judge under Article I or Article III of the Constitution.

*OFEGLI* means the Office of Federal Employees' Group Life Insurance, which pays benefits under the policy.

*OPM* means the Office of Personnel Management.

*OWCP* means the Office of Workers' Compensation Programs, U.S. Department of Labor, which administers subchapter I of chapter 81 of title 5, United States Code.

*Parent* means the mother or father of a legitimate child or an adopted child. The term *parent* includes the mother of a recognized natural child; it also includes the father of a recognized natural child if the recognized natural child meets the definition provided below.

*Recognized natural child*, with respect to paternity, is one for whom the father meets one of the following:

(1) (i) Has acknowledged paternity in writing;

(ii) Was ordered by a court to provide support;

(iii) Before his death, was pronounced by a court to be the father;

(iv) Was established as the father by a certified copy of the public record of birth or church record of baptism, if the insured was the informant and named himself as the father of the child; or

(v) Established paternity on public records, such as records of schools or social welfare agencies, which show that with his knowledge the insured was named as the father of the child.

(2) If paternity is not established by paragraph (1) of this definition, such evidence as the child's eligibility as a recognized natural child under other State or Federal programs or proof that the insured included the child as a dependent child on his income tax returns may be considered when attempting to establish paternity.

*Reconsideration* means the final level of administrative review of an employing office's initial decision to determine if the employing office followed the law and regulations correctly in making the initial decision concerning FEGLI eligibility and coverage.

*Regular parent-child relationship* means that the employee or former employee is exercising parental authority, responsibility, and control over the child by caring for, supporting, disciplining, and guiding the child, including making decisions about the child's education and medical care.

*Service* means civilian service which is creditable under subchapter III of chapter 83 or chapter 84 of title 5, United States Code. This includes service under a nonappropriated fund instrumentality of the Department of Defense or the Coast Guard for an individual who elected to remain under a retirement system established for employees described in section 2105(c) of title 5.

*Terminally ill* means having a medical prognosis of a life expectancy of 9 months or less.

*Underdeduction* means a failure to withhold the required amount of life insurance deductions from an individual's pay, annuity, or compensation. This includes nondeductions (when none of the required amount was withheld) and partial deductions (when only part of the required amount was withheld).

[62 FR 48731, Sept. 17, 1997; 62 FR 52181, Oct. 6, 1997, as amended at 64 FR 16602, Apr. 6, 1999; 64 FR 72461, Dec. 28, 1999; 75 FR 60575, Oct. 1, 2010; 79 FR 46637, Aug. 8, 2014]

### § 870.102 The policy.

Basic, Option A, Option B, and Option C benefits are payable according to a contract with the company or companies that issue a policy under § 8709 of title 5, United States Code. Any court action to obtain money due from this insurance policy must be taken against the company that issues the policy.

### § 870.103 Correction of errors.

(a) The employing office may make corrections of administrative errors regarding coverage or changes in coverage. Retroactive corrections are subject to the provisions of § 870.401(f).

(b) OPM may order correction of an error after reviewing evidence that it would be against equity and good conscience not to do so.

### § 870.104 Incontestability.

(a) If an individual erroneously becomes insured, the coverage will remain in effect if at least 2 years pass before the error is discovered, and if the individual has paid applicable premiums during that time. This applies to errors discovered on or after October 30, 1998, and applies only to employees, not retirees or compensationers.

(b) If an employee is erroneously allowed to continue insurance into retirement or while receiving compensation, the coverage will remain in effect if at least 2 years pass before the error is discovered, and if the annuitant or compensationer has paid applicable premiums during that time. This applies to such errors discovered on or after October 30, 1998.

(c) If an individual is erroneously enrolled in life insurance on or after the date he or she retires or begins receiving compensation, the coverage cannot remain in effect even if 2 years pass and the individual paid applicable premiums.

(d) If an individual who is allowed to continue erroneous coverage under this section does not want the coverage, he or she may cancel the coverage on a prospective basis, effective at the end of the pay period in which the waiver is properly filed. There is no refund of premiums. *Exception:* If an employee obtained Option C erroneously and did not have any eligible family members, that coverage may be cancelled retroactively and the insured will obtain a refund of the erroneous Option C premiums.

[75 FR 60576, Oct. 1, 2010]

### § 870.105 Initial decision and reconsideration.

(a) An individual may ask his or her agency or retirement system to reconsider its initial decision denying:

(1) Life insurance coverage;

(2) The opportunity to change coverage;

(3) The opportunity to designate a beneficiary; or

(4) The opportunity to assign insurance.

(b) An employing office's decision is an initial decision when the employing office gives it in writing and informs the individual of the right to an independent level of review (reconsideration) by the appropriate agency or retirement system.

(c) A request for reconsideration must be made in writing and must include the following:

(1) The employee's (or annuitant's) name, address, date of birth;

(2) The reason(s) for the request; and

(3) The retirement claim number (Civil Service Annuity Claim Number) or compensation number, if applicable.

(d) A request for reconsideration must be made within 31 calendar days from the date of the initial decision (60 calendar days if overseas). This time limit may be extended when the individual shows that he or she was not notified of the time limit and was not otherwise aware of it or that he or she was unable, due to reasons beyond the individual's control, to make the request within the time limit.

(e) The reconsideration must take place at or above the level at which the initial decision was made.

(f) After reconsideration, the agency or retirement system must issue a final decision to the insured individual. This decision must be in writing and must fully state the findings.

[75 FR 60576, Oct. 1, 2010]

## Subpart B—Types and Amount of Insurance

### § 870.201 Types of insurance.

(a) There are two types of life insurance under the FEGLI Program: Basic and Optional.

(b) There are three types of Optional insurance: Option A (standard optional insurance), Option B (additional optional insurance), and Option C (family optional insurance).

### § 870.202 Basic insurance amount (BIA).

(a)(1) An employee's Basic insurance amount (BIA) is either:

(i) The employee's annual rate of basic pay, rounded to the next higher thousand, plus $2,000; or

(ii) $10,000; whichever is higher, unless the employee has elected a Living Benefit under subpart K of this part. Effective for pay periods beginning on or after October 30, 1998, there is no maximum BIA. **Note:** If an employee's pay is ''capped'' by law, the amount of the Basic insurance is based on the capped amount, which is the amount the employee is actually being paid. It is not based on the amount the employee's pay would have been without the pay cap.

(2) The BIA of an individual who is eligible to continue Basic Life insurance coverage as an annuitant or compensationer is the BIA in effect at the time his/her insurance as an employee would stop under § 870.601.

(b) An employee's BIA automatically changes whenever annual pay is increased or decreased by an amount sufficient to raise or lower pay to a different $1,000 bracket, unless the employee has elected a Living Benefit under subpart K of this part.

(c) The amount of an employee's Basic Life insurance coverage is equal to his/her BIA multiplied by the appropriate factor based on the employee's age, as follows:

| Age | Factor |
|---|---|
| 35 or under | 2.0 |
| 36 | 1.9 |
| 37 | 1.8 |
| 38 | 1.7 |
| 39 | 1.6 |
| 40 | 1.5 |
| 41 | 1.4 |
| 42 | 1.3 |
| 43 | 1.2 |
| 44 | 1.1 |
| 45 or over | 1.0 |

[62 FR 48731, Sept. 17, 1997, as amended at 64 FR 72461, Dec. 28, 1999; 75 FR 60576, Oct. 1, 2010]

### § 870.203 Post-election BIA.

(a) The BIA of an individual who elects a Living Benefit under subpart K of this part is the amount of insurance left after the effective date of the Living Benefit election. This amount is the individual's post-election BIA.

(1) The post-election BIA of an individual who elects a full Living Benefit is 0.

(2) If an employee elects a partial Living Benefit, the employee still has some Basic insurance. OFEGLI determines this amount by computing the BIA as of the date it receives the completed Living Benefit application and reducing the amount by a percentage. This percentage represents the amount of the employee's partial Living Benefit payment, compared to the amount the employee could have received if he or she had elected a full Living Benefit. The amount that is left is rounded up or down to the nearest multiple of $1,000. (If the amount is midway between multiples, it is rounded up to the next higher multiple.)

(b) The post-election BIA cannot change after the effective date of the Living Benefit election.

(c) If an employee elected a partial Living Benefit and that employee is under age 45 at the time of death, OFEGLI will multiply the post-election BIA by the appropriate factor, as specified in § 870.202(c), in effect on the date 9 months after the date OFEGLI received the completed Living Benefit application.

[75 FR 60576, Oct. 1, 2010]

### § 870.204 Annual rates of pay.

(a) (1) An insured employee's annual pay is his/her annual rate of basic pay as fixed by law or regulation.

(2) Annual pay for this purpose includes the following:

(i) Interim geographic adjustments and locality-based comparability payments as provided by Pub. L. 101–509 (104 Stat. 1479);

(ii) Premium pay for standby duty under 5 U.S.C. 5545(c)(1);

(iii) Premium pay for overtime inspectional service for customs officers as provided by Pub. L. 103–66 (107 Stat. 453);

(iv) For a law enforcement officer as defined under 5 U.S.C. 8331(20) and §§ 831.902 and 842.802 of this title, premium pay for administratively uncontrollable overtime under 5 U.S.C. 5545(c)(2);

(v) Night differential pay for wage employees;

(vi) Environmental differential pay for employees exposed to danger or physical hardship;

(vii) Tropical differential pay for citizen employees in Panama;

(viii) Special pay adjustments for law enforcement officers;

(ix) Availability pay for criminal investigators under 5 U.S.C. 5545a;

(x) Market pay for physicians and dentists of the Department of Veterans Affairs under 38 U.S.C. 7431;

(xi) Straight-time pay for regular overtime hours for firefighters, as provided in 5 U.S.C. 5545b and part 550, subpart M, of this chapter; and

(xii) An overtime supplement for regularly scheduled overtime within a Border Patrol agent's regular tour of duty under 5 U.S.C. 5550 (as required by 5 U.S.C. 5550(d)).

(b) To convert a pay rate of other than annual salary to an annual rate, multiply the pay rate by the number of pay units in a 52–week work year.

(c) The annual pay for a part-time employee is his/her basic pay applied to his/her tour of duty in a 52–week work year.

(d) The annual pay for an employee on piecework rates is the total basic earnings for the previous calendar year, not counting premium pay for overtime or holidays.

(e) The annual pay for an employee with a regular schedule who works at different pay rates is the weighted average of the rates at which the employee is paid, projected to an annual basis.

(f) The annual pay for a non-Postal intermittent employee or an employee who works at different pay rates without a regular schedule is the annual rate which he/she is receiving at the end of the pay period.

(g)(1) Except as provided in paragraphs (g)(2) and (3) of this section, if an employee legally serves in more than one position at the same time,

and at least one of those positions entitles the employee to life insurance coverage, the annual pay for life insurance purposes is the sum of the annual rate of basic pay fixed by law or regulation for each position.

(2) Paragraph (g)(1) of this section does not apply to—

(i) An employee of the Postal Service who works on a part-time flexible schedule; or

(ii) A temporary, intermittent decennial census worker.

(3) If an employee's annual pay includes premium pay or availability pay under paragraphs (e), (f), or (g) of this section, the annual pay is determined by multiplying the employee's annual rate of basic pay by the applicable percentage factor.

(h) Notwithstanding any other provision of this section, the annual pay for a phased retiree, as defined in 5 U.S.C. 8336a and 8412a, is deemed to be the rate of a full-time employee in the position to which the phased retiree is appointed, as determined under 5 CFR 831.1715(a)(2) or 848.205(a)(2), as applicable.

[62 FR 48731, Sept. 17, 1997; 62 FR 52181, Oct. 6, 1997, as amended at 63 FR 64595, Nov. 23, 1998; 75 FR 60577, Oct. 1, 2010; 79 FR 46637, Aug. 8, 2014; 80 FR 58121, Sept. 25, 2015]

### § 870.205 Amount of Optional insurance.

(a) Option A coverage is $10,000. Effective for pay periods beginning on or after October 30, 1998, Option A cannot exceed this amount. Exception: This does not apply to annuitants who retired with a higher amount of Option A before the removal of the maximum on Basic insurance (the first pay period beginning on or after October 30, 1998).

(b)(1) Option B coverage comes in 1, 2, 3, 4, or 5 multiples of an employee's annual pay (after the pay has been rounded to the next higher thousand, if not already an even thousand). Effective for pay periods beginning on or after October 30, 1998, there is no maximum amount for each multiple.

NOTE: If an employee's pay is ''capped'' by law, the amount of the Option B insurance is based on the capped amount, which is the amount the employee is actually being paid. It is not based on the amount the employee's pay would have been without the pay cap.

(2) The amount of Option B coverage automatically changes whenever annual pay is increased or decreased by an amount sufficient to raise or lower pay to a different $1,000 bracket.

(c) Effective April 24, 1999, Option C coverage comes in 1, 2, 3, 4, or 5 multiples of the following amounts: $5,000 on the death of a spouse and $2,500 on the death of an eligible child. Payments are made to the insured individual.

[62 FR 48731, Sept. 17, 1997, as amended at 64 FR 72461, Dec. 28, 1999; 75 FR 60577, Oct. 1, 2010]

### § 870.206 Accidental death and dismemberment.

(a)(1) Accidental death and dismemberment coverage is an automatic part of Basic and Option A insurance for employees.

(2) There is no accidental death and dismemberment coverage with Option B or Option C.

(3) Individuals who are insured as annuitants or compensationers do not have accidental death and dismemberment coverage.

(b)(1) Under Basic insurance, accidental death benefits are equal to the BIA, but without the age factor described in § 870.202(c).

(2) Under Option A, accidental death benefits are equal to the amount of Option A.

(c)(1) Under Basic insurance, accidental dismemberment benefits for the loss of a hand, foot, or the vision in one eye are equal to one-half the BIA. For loss of 2 or more of these in a single accident, benefits are equal to the BIA.

(2) Under Option A, accidental dismemberment benefits for the loss of a hand, foot, or the vision in one eye are equal to one-half the amount of Option A. For loss of 2 or more of these in a single accident, benefits are equal to the amount of Option A.

(3) Accidental dismemberment benefits are paid to the employee.

(4) Accidental death benefits are paid to the employee's beneficiaries.

[75 FR 60577, Oct. 1, 2010]

## Subpart C—Eligibility

### § 870.301 Eligibility for life insurance.

(a) Each nonexcluded employee is automatically insured for Basic insurance unless he/she waives it.

(b)(1) Optional insurance must be specifically elected; it is not automatic.

(2) An employee may elect one or more types of Optional insurance if:

(i) He/she has Basic insurance; and

(ii) He/she does not have a waiver of that type (or types) or Optional insurance still in effect.

(c) Notwithstanding any other provision in this part, the hiring of a Federal employee, whether in pay status or nonpay status, for a temporary, intermittent position with the decennial census has no effect on the amount of his/her Basic or Option B insurance, the withholdings or Government contribution for his/her insurance, or the determination of when 12 months in nonpay status ends.

[62 FR 48731, Sept. 17, 1997, as amended at 63 FR 9402, Feb. 25, 1998; 64 FR 72461, Dec. 28, 1999]

### § 870.302 Exclusions.

(a) The following individuals are excluded from life insurance coverage by law:

(1) An employee of a corporation supervised by the Farm Credit Administration, if private interests elect or appoint a member of the board of directors.

(2) An individual who is not a citizen or national of the United States and whose permanent duty station is outside the United States. *Exception:* an individual who met the definition of *employee* on September 30, 1979, by service in an Executive agency, the United States Postal Service, or the Smithsonian Institution in the area which was then known as the Canal Zone.

(3) An individual first employed by the government of the District of Columbia on or after October 1, 1987. *Exceptions:*

(i) An employee of St. Elizabeths Hospital, who accepts employment with the District of Columbia government following Federal employment without a break in service, as provided in section 6 of Public Law 98–621 (98 Stat. 3379);

(ii) An employee of the District of Columbia Financial Responsibility and Management Assistance Authority (Authority), who makes an election under the Technical Corrections to Financial Responsibility and Management Assistance Act (section 153 of Pub. L. 104–134 (110 Stat. 1321)) to be considered a Federal employee for life insurance and other benefits purposes; employees of the Authority who are former Federal employees are subject to the provisions of §§ 870.503(d) and 870.705 of this part;

(iii) The Corrections Trustee or an employee of that Trustee who accepts employment with the District of Columbia government within 3 days after separating from the Federal Government.

(iv) The Pretrial Services, Parole, Adult Probation and Offender Supervision Trustee or an employee of that Trustee;

(v) Effective October 1, 1997, a judicial or nonjudicial employee of the District of Columbia Courts, as provided by Public Law 105–33 (111 Stat. 251); and

(vi) Effective April 1, 1999, an employee of the Public Defender Service of the District of Columbia, as provided by Public Law 105–274 (112 Stat. 2419).

(4) A teacher in a Department of Defense dependents school overseas, if employed by the Federal Government in a nonteaching position during the recess period between school years.

(b) The following employees are also excluded from life insurance coverage:

(1) An employee serving under an appointment limited to 1 year or less. *Exceptions:*

(i) An employee whose full-time or part-time temporary appointment has a regular tour of duty and follows employment in a position in which the employee was insured, with no break in service or with a break in service of no more than 3 days;

(ii) An acting postmaster;

(iii) A Presidential appointee appointed to fill an unexpired term; and

(iv) Certain employees who receive provisional appointments as defined in § 316.403 of this chapter.

(2) An employee who is employed for an uncertain or purely temporary period, who is employed for brief periods at intervals, or who is expected to

work less than 6 months in each year. Exception: An employee who receives an appointment of at least 1 year's duration as an Intern under § 213.3402 of this chapter, entitled ''*Entire executive civil service; Pathways Programs*,'' and who is expected to be in a pay status for at least one-third of the total period of time from the date of the first appointment to the completion of the work-study program.

(3) An intermittent employee (a non-full-time employee without a regularly-scheduled tour of duty). *Exception:* an employee whose intermittent appointment follows, with no break in service or with a break in service of no more than 3 days, employment in a position in which he or she was insured and to which he or she is expected to return.

(4) An employee whose pay, on an annual basis, is $12 a year or less.

(5) A beneficiary or patient employee in a Government hospital or home.

(6) An employee paid on a contract or fee basis. *Exception:* an employee who is a United States citizen, who is appointed by a contract between the employee and the Federal employing authority which requires his or her personal service, and who is paid on the basis of units of time.

(7) An employee paid on a piecework basis. *Exception:* an employee whose work schedule provides for full-time or part-time service with a regularly-scheduled tour of duty.

(8) A Senate restaurant employee, except a former Senate restaurant employee who had life insurance coverage on the date of transfer to a private contractor on or after July 17, 2008, and who elected to continue such coverage and to continue coverage under either chapter 83 or 84 of title 5, United States Code.

(c) OPM makes the final determination regarding the applicability of the provisions of this section to a specific employee or group of employees.

[75 FR 60577, Oct. 1, 2010, as amended at 79 FR 531, Jan. 6, 2014; 81 FR 72686, Oct. 21, 2016]

### § 870.303 Eligibility of foster children under Option C.

(a) Effective October 30, 1998, foster children are eligible for coverage as family members under Option C.

(b) To qualify for coverage as a foster child, the child must meet the following requirements:

(1) The child must live with the insured employee, annuitant, or compensationer;

(2) The parent-child relationship (as defined in § 870.101) must be with the insured employee, annuitant, or compensationer, not the biological parent;

(3) The employee, annuitant, or compensationer must be the primary source of financial support for the child; and

(4) The employee, annuitant, or compensationer must expect to raise the child to adulthood.

(c) A child placed in an insured individual's home by a welfare or social service agency under an agreement by which the agency retains control of the child or pays for maintenance does not qualify as a foster child.

(d)(1) An insured individual wishing to cover a foster child must sign a certification stating that the child meets all the requirements and that he/she will notify the employing office or retirement system if the child marries, moves out of the home, or stops being financially dependent on the employee, annuitant, or compensationer.

(2) The employing office or retirement system must keep the signed certification in the insured individual's file, along with other life insurance forms.

(e) A foster child who moves out of the insured individual's home to live with a biological parent loses eligibility and cannot again be covered as a foster child unless:

(1) The biological parent dies;

(2) The biological parent is imprisoned;

(3) The biological parent becomes unable to care for the child due to a disability; or

(4) The employee, annuitant, or compensationer obtains a court order taking parental responsibility away from the biological parent.

[64 FR 72461, Dec. 28, 1999]

## Subpart D—Cost of Insurance

### § 870.401 Withholdings and contributions for Basic insurance.

(a)(1) The cost of Basic insurance is shared between the insured individual and the Government. The employee pays two-thirds of the cost, and the Government pays one-third.

(2) When OPM makes any adjustment to the Basic life insurance premium, it will issue a public notice in the FEDERAL REGISTER.

(b)(1) During each pay period in which an insured employee is in pay status for any part of the period, the employee's share of the premium must be withheld from the employee's biweekly pay. The amount withheld from the pay of an employee who is paid on other than a biweekly basis must be computed and adjusted to the nearest one-tenth of one cent.

(2) The amount withheld from the pay of an insured employee whose annual pay is paid during a period shorter than 52 work weeks is the amount obtained by converting the biweekly rate to an annual rate and prorating the annual rate over the number of installments of pay regularly paid during the year.

(3) The amount withheld from the pay of an insured employee whose BIA changes during a pay period is based on the BIA last in force during the pay period.

(c) For each pay period in which an employee is insured, the employing agency must contribute an amount equal to one-half the amount withheld from the employee's pay. This agency contribution must come from the appropriation or fund that is used for the payment of the employee's pay. For an elected official, the contribution must come from the appropriation or fund that is available for payment of other salaries in the same office.

(d)(1) For an annuitant or compensationer who elects to continue Basic insurance and chooses the maximum reduction of 75 percent after age 65 under § 870.702(a)(2), the annuitant's share of the premium is withheld monthly and the compensationer's share is withheld every 4 weeks. These withholdings stop the month after the month in which the annuitant or compensationer reaches age 65. There are no withholdings from individuals who retired or began receiving compensation before January 1, 1990, and who elected the 75 percent reduction. For the purpose of this paragraph, an individual who separates from service after meeting the requirements for an immediate annuity under 5 U.S.C. 8412(g) is considered to retire on the day before the annuity begins.

(2) An annuitant or compensationer who elects to continue Basic insurance and chooses either the reduction election of 50 percent or the election of no reduction after age 65 under § 870.702(a)(3) or (4) pays an additional premium for the 50 percent or no reduction election. This additional premium is withheld for each $1,000 of the BIA. At age 65, the Basic premium will stop, but the annuitant or compensationer must continue to pay the additional premium for either the 50 percent or the no reduction election.

(e)(1) For each period in which an annuitant or compensationer is insured, OPM must contribute an amount equal to one-half the amount that would be withheld under paragraph (d)(1) of this section. Exception: for USPS employees who become annuitants or compensationers after December 31, 1989, the Postal Service pays the Government contributions.

(2) The Government contribution is the same amount whether the individual elects a maximum 75 percent reduction, a maximum 50 percent reduction, or no reduction.

(3) The Government contribution stops the month after the month in which the individual reaches age 65.

(f) When an agency withholds less than or none of the proper amount of Basic life insurance deductions from an individual's pay, annuity, or compensation, the agency must submit an amount equal to the sum of the uncollected deduction and any applicable agency contributions required under 5 U.S.C. 8708 to OPM for deposit in the Employees' Life Insurance Fund.

[62 FR 48731, Sept. 17, 1997, as amended at 64 FR 22544, Apr. 27, 1999; 68 FR 59081, Oct. 14, 2003; 75 FR 60578, Oct. 1, 2010]

**§ 870.402 Withholdings for Optional insurance.**

(a)(1) The insured individual pays the full cost of all Optional insurance. There is no Government contribution toward the cost of any Optional insurance.

(2) Optional insurance premiums are based on 5-year age bands beginning at age 35. The last age band for Option A is age 60+. The last age band for Options B and C is 80+. For the purpose of this subpart, effective April 24, 1999, an individual is considered to reach the next age band the 1st day of the pay period following the pay period in which his/her birthday occurs.

(3) When OPM makes any adjustment to the Optional life insurance premiums, it will issue a public notice in the FEDERAL REGISTER.

(b) During each pay period in any part of which an insured employee is in pay status, the employing agency must withhold the full cost of Optional insurance from his/her pay.

(c)(1) Subject to the provisions for reemployed annuitants in § 870.707, the full cost of Optional insurance must be withheld from the annuity of an annuitant the compensation of a compensationer.

(2) The withholdings for Option A stop the month after the month in which an annuitant or compensationer reaches age 65.

(3) For an annuitant or compensationer who elects Full Reduction for any Option B or Option C multiples under § 870.705, the withholdings for those multiples stop the month after the month in which he/she reaches age 65.

(4) For an annuitant or compensationer who elects No Reduction for any Option B or Option C multiples, the withholdings for those multiples continue, as long as he/she remains insured.

(d)(1) For Option A and Option C, the amount withheld from pay, annuity, or compensation paid on other than a biweekly basis must be computed and adjusted to the nearest cent.

(2) For Option B, the amount withheld from pay, annuity, or compensation paid on other than a biweekly basis must be computed and adjusted to the nearest one-tenth of 1 cent.

(e) If an employee's annual pay is paid during a period shorter than 52 work weeks, the employing office must determine the amount to withhold. To do this, it converts the biweekly cost to an annual cost and prorates it over the number of installments of pay regularly paid during the year.

(f) When an agency withholds less than or none of the proper amount of Optional life insurance deductions from an individual's pay, annuity, or compensation, the agency must submit an amount equal to the uncollected deductions required under 5 U.S.C. 8714a, 8714b, and 8714c to OPM for deposit in the Employees' Life Insurance Fund.

[68 FR 59081, Oct. 14, 2003]

**§ 870.403 Withholdings and contributions following a Living Benefit election.**

(a) Withholdings and contributions for Basic insurance for an individual who elects a full Living Benefit under subpart K of this part stop at the end of the pay period in which the Living Benefit election is effective.

(b) Withholdings and contributions for Basic insurance for an employee who elects a partial Living Benefit under subpart K of this part are based on the post-election BIA. This reduction in withholdings and contributions starts at the end of the pay period in which the Living Benefit election is effective.

(c) Withholdings and contributions for Basic insurance for an annuitant or compensationer who elected a partial Living Benefit as an employee are based on the post-election BIA.

(d) There is no change in withholdings for Optional insurance for individuals who elect a Living Benefit.

[62 FR 48731, Sept. 17, 1997; 62 FR 52181, Oct. 6, 1997]

**§ 870.404 Withholdings and contributions provisions that apply to both Basic and Optional insurance.**

(a) Withholdings (and Government contributions, when applicable) are based on the amount of insurance last in force on an employee during the pay period.

(b) Withholdings are not required for the period between the end of the pay period in which an employee separates

from service and the date his/her annuity or compensation begins.

(c) No payment is required while an insured employee is in nonpay status for up to 12 months. Exception: an employee who is in nonpay status while receiving compensation.

(d) The deposit described in §§ 870.401(f) and 870.402(f) must be made no later than 60 calendar days after the date the employing office determines the amount of the underdeduction that has occurred, regardless of whether or when the underdeduction is recovered by the agency. The agency must determine whether to waive collection of the overpayment of pay, in accordance with 5 U.S.C. 5584, as implemented by 4 CFR chapter I, subchapter G. However, if the agency involved is excluded from the provisions of 5 U.S.C. 5584, it may use any applicable authority to waive the collection.

(e) Effective October 21, 1972, when there is an official finding that an employee was suspended or fired erroneously, no withholdings are made from the back pay. Exception: if death or accidental dismemberment occurs during the period between the employee's removal and the finding that the agency action was erroneous, premiums are withheld from the back pay awarded.

(f) If an individual's periodic pay, compensation, or annuity isn't sufficient to cover the full withholdings, any amount available for life insurance withholding must be applied first to Basic insurance, with any remainder applied to Optional insurance (first to Option B, then Option A, then Option C).

[62 FR 48731, Sept. 17, 1997, as amended at 68 FR 59082, Oct. 14, 2003; 75 FR 60578, Oct. 1, 2010]

### § 870.405 Direct premium payments.

(a) Since January 1, 1988, annuitants who retired under 5 U.S.C. chapter 84 (Federal Employees' Retirement System) have been able to make direct premium payments if their annuity became too small to cover the premiums. Effective the first pay period beginning on or after October 30, 1998, all employees, annuitants, and compensationers whose pay, annuity, or compensation is insufficient to cover the withholdings can make direct premium payments.

(b)(1) For an individual to be eligible to make direct premium payments, the employing office or retirement system must determine that the pay, annuity, or compensation, after all other deductions, is expected to be insufficient on an ongoing basis, *i.e.*, for the next 6 months or more.

(2) This section does not apply to employees in nonpay status. Employees in nonpay status are governed by § 870.404(c).

(c)(1) When the employing office or retirement system determines that the pay, annuity, or compensation is insufficient, and will be insufficient on an ongoing basis, it must notify the insured individual (or the assignee, if the individual has assigned his/her insurance under subpart I of this part) in writing and inform him/her of the available choices.

(2) Within 31 calendar days of receiving the notice (60 days for individuals living overseas), the insured individual (or assignee) must return the notice to the employing office or retirement system, choosing either to terminate some or all of the insurance or to make direct premium payments. An employee, annuitant, or compensationer is considered to receive a mailed notice 15 days after the date of the notice.

(3) If an individual does not return the notice within the required time frames, the employing office or retirement system will terminate the insurance.

(d)(1) Terminated coverage stops at the end of the last pay period for which premiums were withheld.

(2) An individual whose insurance terminates, either by choice or by failure to return the notice, gets the 31-day extension of coverage and right to convert, as provided in subpart F of this part.

(3)(i) When an employee's pay again becomes sufficient to allow premium withholdings, the employing office will automatically reinstate the terminated coverage.

(ii) An annuitant or compensationer whose coverage terminates cannot have the coverage reinstated when the annuity or compensation becomes sufficient to cover withholdings.

(e)(1) Employing offices and retirement systems must establish a method for accepting premium payments for insured individuals who choose to pay directly.

(2) Individuals who are paying directly must send the required premium payment to the employing office or retirement system for every pay period during which coverage continues. The insured individual must make the payment after each pay period, according to the schedule established by the employing office or retirement system.

(3)(i) When an employee's pay again becomes sufficient to allow premium withholdings, he/she must stop making direct payments. The employing office will begin to withhold premiums automatically.

(ii) An annuitant or compensationer who is making direct premium payments must continue to pay directly, even if the annuity or compensation becomes sufficient to allow withholdings.

(f) The employing office or retirement system must submit all direct premium payments, along with its regular life insurance premiums, to OPM according to procedures set by OPM.

(g)(1) If an individual on direct pay fails to make the required premium payment on time, the employing office or retirement system must notify the individual. The individual must make the payment within 31 calendar days after receiving the notice (60 days if living overseas). An individual is considered to have received a mailed notice 15 days after the date of the notice, 30 days if living overseas.

(2) If an insured individual fails to make the overdue payment, his/her insurance cancels. Cancellation is effective at the end of the last pay period for which payment was received.

(3) An individual whose insurance cancels for nonpayment does not get the 31-day extension of coverage or the right to convert provided in subpart F of this part.

(4) Coverage that cancels for nonpayment is not reinstated when the individual's pay, annuity, or compensation becomes sufficient to allow withholdings, except as provided by paragraph (g)(5) of this section.

(5) If, for reasons beyond his or her control, an insured individual is unable to pay within 30 days of receiving the past due notice (45 days if living overseas), he or she may request reinstatement of coverage by writing to the employing office or retirement system within 60 days from the date of cancellation. The individual must provide proof that the inability to pay within the time limit was for reasons beyond his or her control. The employing office or retirement system will decide if the individual is eligible for reinstatement of coverage. If the employing office or retirement system approves the request, the coverage is reinstated back to the date of cancellation, and the individual must pay the back premiums.

[64 FR 72462, Dec. 28, 1999, as amended at 75 FR 60578, Oct. 1, 2010]

## Subpart E—Coverage

### § 870.501 Basic insurance: Effective dates of automatic coverage.

(a)(1) When an employee is appointed or transferred to a position in which he/she is eligible for insurance, the employee is automatically insured for Basic insurance on the day he/she enters on duty in pay status, unless, before the end of the first pay period, the employee files a waiver of Basic insurance with the employing office or had previously filed a waiver which remains in effect.

(2) An insured employee who moves to another covered position is automatically insured on the effective date of the move, unless the employee files a waiver of Basic insurance with the new employing office before the end of the first pay period in the new position.

(3) When an employee of the District of Columbia Financial Responsibility and Management Assistance Authority elects to be considered a Federal employee under section 153 of Pub. L. 104–134 (110 Stat. 1321), he/she is automatically insured on (i) the date the employee enters on duty in pay status with the Authority, or (ii) the date the Authority receives the employee's election to be considered a Federal employee, whichever is later.

(b) An employee who returns to pay and duty status after a period of more than 12 months of nonpay status is automatically insured at the time he/she actually enters on duty in pay status, unless, before the end of the first pay period, the employee files a waiver of Basic insurance coverage with the employing office or had previously filed a waiver which remains in effect.

(c) For an employee who serves in cooperation with a non-Federal agency and who is paid in whole or in part from non-Federal funds, OPM sets the effective date. This date must be part of an agreement between OPM and the non-Federal agency. The agreement must provide either:

(1) That the required withholdings and contributions be made from Federally controlled funds and deposited into the Employees' Life Insurance Fund on a timely basis, or

(2) That the cooperating non-Federal agency, by written agreement with the Federal agency, make the required withholdings and contributions from non-Federal funds and transmit that amount to the Federal agency for deposit into the Employees' Life Insurance Fund on a timely basis.

(d) If an employee waived Basic insurance on or before February 28, 1981, the waiver was automatically cancelled effective on the 1st day the employee entered on duty in pay status on or after April 1, 1981. Basic insurance coverage was automatically effective on the date of the waiver's cancellation, unless the employee filed a new waiver of Basic insurance with the employing office before the end of the pay period during which the coverage became effective.

### § 870.502 Basic insurance: Waiver/cancellation of insurance.

(a) An insured individual may cancel his/her Basic insurance at any time by filing a waiver of Basic insurance coverage. An employee files with the employing office. An annuitant files with OPM or other office that administers his/her retirement system. If still employed, a compensationer files with the employing office, and if not still employed, with OPM. The waiver is effective, and the insurance stops, at the end of the pay period in which the waiver is properly filed. Exception: an individual who has assigned his/her insurance under subpart I of this part cannot cancel the insurance.

(b) An individual who cancels his/her Basic insurance automatically cancels all forms of Optional insurance.

### § 870.503 Basic insurance: Cancelling a waiver.

(a) An annuitant or compensationer who has filed a waiver of Basic insurance cannot cancel the waiver.

(b) An employee who has filed a waiver of Basic insurance may cancel the waiver and become insured if:

(1) The employee makes an election during an open enrollment period as described in § 870.507;

(2) At least 1 year has passed since the effective date of the waiver, and the employee provides satisfactory medical evidence of insurability; or

(3) The employee has a change in family circumstances (marriage or divorce, a spouse's death, or acquisition of an eligible child) and files an election as provided in paragraph (b)(3(i), (b)(3)(ii), or (b)(3)(iii) of this section. Except as provided in paragraph (b)(3)(iii), the effective date of Basic insurance elected under this paragraph (b)(3) is the 1st day the employee actually enters on duty in a pay status on or after the day the employing office receives the election.

(i) An employee must file an election under this paragraph with the employing office, in a manner designated by OPM, along with proof of the event, no later than 60 calendar days following the date of the change in family circumstances that permits the election; the employee may also file the election before the event and provide proof no later than 60 calendar days following the event.

(ii) An employee making an election under this paragraph based on acquisition of an eligible foster child must file the election with the employing office no later than 60 calendar days after completing the required certification.

(iii) Within 6 months after an employee becomes eligible to make an election of Basic insurance due to a change in family circumstances, an employing office may determine that the employee was unable, for reasons

beyond his or her control, to elect Basic insurance within the time limit. In this case, the employee must elect Basic insurance within 60 calendar days after he or she is notified of the determination. The insurance is retroactive to the 1st day of the first pay period beginning after the date the individual became eligible, if the employee was in pay and duty status that day. If the employee was not in pay and duty status that day, the coverage becomes effective the 1st day after the date the employee returned to pay and duty status. The individual must pay the full cost of the Basic insurance from that date for the time that he or she is in pay status.

(c) OFEGLI reviews the employee's request and determines whether the employee complied with paragraph (b)(2) of this section. If the employee complied, then OFEGLI approves the Request for Insurance. The Basic insurance is effective on the date of OFEGLI's approval if the employee is in pay and duty status on that date. If the employee is not in pay and duty status on the date of OFEGLI's approval, the Basic insurance is effective the first day the employee returns to pay and duty status, as long as it is within 60 calendar days after OFEGLI's approval. If the employee is not in pay and duty status within 60 calendar days after OFEGLI's approval, the approval is revoked automatically.

(d) When an employee who has been separated from service for at least 180 days is reinstated on or after April 1, 1981, a previous waiver of Basic insurance is automatically cancelled. Unless the employee files a new waiver, Basic insurance becomes effective on the 1st day he or she actually enters on duty in pay status in a position in which he or she is eligible for coverage. *Exception:* For employees who waived Basic insurance after February 28, 1981, separated, and returned to Federal service before December 9, 1983, the waiver remained in effect; these employees were permitted to elect Basic insurance by applying to their employing office before March 7, 1984.

(e)(1) An employee of the Department of Defense who is designated as an ''emergency essential employee'' under section 1580 of title 10, United States Code, may cancel a waiver of Basic insurance without providing satisfactory medical information.

(2) An election of Basic insurance under paragraph (e)(1) of this section must be made within 60 days of being designated ''emergency essential.'' Basic insurance is effective on the date the employing office receives the election, if the employee is in pay and duty status on that date. If the employee is not in pay and duty status on the day the employing office receives the election, the coverage becomes effective on the date the employee returns to pay and duty status.

(f)(1) A civilian employee who is eligible for Basic insurance coverage and is deployed in support of a contingency operation as defined by section 101(a)(13) of title 10, United States Code, may cancel a waiver of Basic Insurance without providing satisfactory medical information.

(2) An election of Basic insurance under paragraph (f)(1) of this section must be made within 60 days after the date of notification of deployment in support of a contingency operation. Basic insurance is effective on the date the employing office receives the election, if the employee is in pay and duty status on that date. If the employee is not in pay and duty status on the day the employing office receives the election, the coverage becomes effective on the date the employee returns to pay and duty status.

[75 FR 60578, Oct. 1, 2010]

### § 870.504 Optional insurance: Election.

(a)(1) Each employee must elect or waive Option A, Option B, and Option C coverage, in a manner designated by OPM, within 60 days after becoming eligible unless, during earlier employment, he or she filed an election or waiver that remains in effect. The 60-day time limit for Option B or Option C begins on the 1st day after February 28, 1981, on which an individual is an *employee* as defined in § 870.101.

(2) An employee of the District of Columbia Financial Responsibility and Management Assistance Authority who elects to be considered a Federal employee under section 153 of Public Law 104–134 (110 Stat. 1321) must elect or waive Option A, Option B, and Option C

coverage within 31 days after the later of:

(i) The date his or her employment with the Authority begins, or

(ii) The date the Authority receives his or her election to be considered a Federal employee.

(3) Within 6 months after an employee becomes eligible, an employing office may determine that the employee was unable, for reasons beyond his or her control, to elect any type of Optional insurance within the time limit. In this case, the employee must elect or waive that type of Optional insurance within 60 days after being notified of the determination. The insurance is retroactive to the 1st day of the 1st pay period beginning after the date the individual became eligible (or after April 1, 1981, whichever is later), if the employee was in pay and duty status that day. If the employee was not in pay and duty status that day, the coverage becomes effective the 1st day after the date the employee returned to pay and duty status. The individual must pay the full cost of the Optional insurance from that date for the time that he or she is in pay status (or retired or receiving compensation with unreduced Optional insurance).

(b) Any employee who does not file a Life Insurance Election with his or her employing office, in a manner designated by OPM, specifically electing any type of Optional insurance, is considered to have waived it and does not have that type of Optional insurance.

(c) For the purpose of having Option A as an employee, an election of this insurance filed on or before February 28, 1981, is considered to have been cancelled effective at the end of the pay period which included March 31, 1981, unless the employee did not actually enter on duty in pay status during the 1st pay period that began on or after April 1, 1981. In that case, the election is considered to have been cancelled on the 1st day after the end of the next pay period in which the employee actually entered on duty in pay status. In order to have Option A as an employee after the date of this cancellation, an employee must specifically elect the coverage by filing the Life Insurance Election with his or her employing office, subject to § 870.504(a) or 870.506(b).

(d) Optional insurance is effective the 1st day an employee actually enters on duty in pay status on or after the day the employing office receives the election. If the employee is not in pay and duty status on the date the employing office receives the election, the coverage becomes effective the next date that the employee is in pay and duty status.

(e) For an employee whose Optional insurance stopped for a reason other than a waiver, the insurance is reinstated on the 1st day he or she actually enters on duty in pay status in a position in which he or she again becomes eligible.

[75 FR 60578, Oct. 1, 2010]

### § 870.505 Optional insurance: Waiver/cancellation of insurance.

(a) An insured individual may cancel entirely any type of Optional insurance, or reduce the number of multiples of his/her Option B insurance, at any time by filing a waiver of Optional insurance coverage. An employee files with the employing office. An annuitant files with OPM or other office that administers his/her retirement system. If still employed, a compensationer files with the employing office, and if not still employed, with OPM. Exception: an individual who has assigned his/her insurance under subpart I of this part cannot cancel Option A or Option B coverage.

(b) A cancellation of Optional insurance becomes effective, and Optional insurance stops, at the end of the pay period in which the waiver is properly filed. Exception: if Option C is cancelled because there are no eligible family members, the effective date is retroactive to the end of the pay period in which there stopped being any eligible family members.

(c) A waiver of Optional insurance remains in effect until it is cancelled as provided in § 870.506.

### § 870.506 Optional insurance: Cancelling a waiver.

(a) *When there is a change in family circumstances* (*see* § 870.503(b)(3)). (1) An employee may cancel a waiver of Options A, B, and C due to a change in family circumstances as provided in

paragraphs (a)(2) through (6) of this section.

(2) An employee who has waived Options A and B coverage may elect coverage, and an employee who has fewer than 5 multiples of Option B may increase the number of multiples, upon his or her marriage or divorce, upon a spouse's death, or upon acquisition of an eligible child.

(3) An employee electing or increasing Option B coverage may elect any number of multiples, as long as the total number of multiples does not exceed 5.

(4)(i) An employee who has waived Option C coverage may elect it, and an employee who has fewer than 5 multiples of Option C may increase the number of multiples, upon his or her marriage or acquisition of an eligible child. An employee may also elect or increase Option C coverage upon divorce or death of a spouse, if the employee has any eligible children.

(ii) An employee electing or increasing Option C coverage may elect any number of multiples, as long as the total number of multiples does not exceed 5.

(5)(i) Except as stated in paragraph (a)(5)(iii) of this section, the employee must file an election under paragraph (a)(2) or (a)(4) of this section with the employing office, in a manner designated by OPM, along with proof of the event, no later than 60 calendar days following the date of the event that permits the election; the employee may also file the election before the event and provide proof no later than 60 calendar days following the event.

(ii) An employee making an election under paragraph (a)(4)(i) of this section following the acquisition of an eligible foster child must file the election with the employing office no later than 60 calendar days after completing the required certification.

(iii) In the case of an employee who had a change in family circumstances between October 30, 1998, and April 23, 1999, an election under this section must have been made on or before June 23, 1999.

(iv) Within 6 months after an employee becomes eligible to make an election due to a change in family circumstances, an employing office may determine that the employee was unable, for reasons beyond his or her control, to elect or increase Optional insurance within the time limit. In this case, the employee must elect or increase Optional insurance within 60 calendar days after he or she is notified of the determination. The insurance is retroactive to the 1st day of the first pay period beginning after the date the individual became eligible if the employee was in pay and duty status that day. If the employee was not in pay and duty status that day, the coverage becomes effective the 1st day after that date the employee returned to pay and duty status. The individual must pay the full cost of the Optional insurance from that date for the time that he or she is in pay status.

(6)(i) The effective date of Options A and B insurance elected under paragraph (a)(1) of this section is the 1st day the employee actually enters on duty in pay status on or after the day the employing office receives the election.

(ii) Except as provided in paragraphs (a)(5)(iii) and (a)(6)(iv) of this section, the effective date of Option C coverage elected because of marriage, divorce, death of a spouse, or acquisition of an eligible child is the day the employing office receives the election, or the date of the event, whichever is later. *Exception:* Coverage elected under paragraph (a)(5)(iii) of this section was effective April 24, 1999.

(iii) The effective date of Option C coverage elected because of the acquisition of a foster child is the date the employing office receives the election or the date the employee completes the certification, whichever is later.

(iv) If the employee does not elect Basic insurance and Option C together (and did not have Basic insurance before), then Option C becomes effective the same day as his or her Basic insurance becomes effective.

(b) *When there is no change in family circumstances.* (1) An employee who has waived Option A or Option B coverage may cancel the waiver and elect coverage if:

(i) The employee makes an election during an open enrollment period; or

(ii) At least 1 year has passed since the effective date of the waiver, and the employee provides satisfactory medical evidence of insurability.

(2) An employee who has Option B coverage of fewer than five multiples of annual pay may increase the number of multiples if at least 1 year has passed since the effective date of his or her last election of fewer than five multiples (including a reduction in the number of multiples), and the employee provides satisfactory medical evidence of insurability.

(3) A waiver of Option C may be cancelled only if there is a change in family circumstances or during an open enrollment period.

(c) OFEGLI reviews the employee's request and determines whether the employee complied with paragraphs (b)(1)(ii) and (b)(2) of this section. If the employee complied, then OFEGLI approves the Request for Insurance. The Option A and B insurance is effective on the date of OFEGLI's approval, if the employee is in pay and duty status on that date. If the employee is not in pay and duty status on the date of OFEGLI's approval, the insurance is effective the first day the employee returns to pay and duty status, as long as it is within 60 calendar days of OFEGLI's approval. If the employee is not in pay and duty status within 60 calendar days after OFEGLI's approval, the approval is revoked automatically.

(d) If an employee waived Option A insurance on or before February 28, 1981, the waiver was automatically cancelled effective on the 1st day the employee entered on duty in pay status on or after April 1, 1981. Option A coverage was effective on the date of the waiver's cancellation, if the employee filed an election of Option A during the March 1, 1981, through March 31, 1981, open enrollment period. If the employee did not file the election with his or her employing office during the March 1981 open enrollment period, the employee is considered to have waived Option A on March 31, 1981.

(e) When an employee who has been separated from service for at least 180 days is reinstated on or after April 1, 1981, a previous waiver of Optional insurance is automatically cancelled, as follows:

(1) An employee who returned to service between April 1, 1981, and December 8, 1983, after a 180-day break in service was permitted to elect any form of Optional insurance by applying to his or her employing office before March 7, 1984.

(2) An employee who returns to service after December 8, 1983, following a 180-day break in service may elect any form of Optional insurance by applying to his or her employing office within 60 calendar days after reinstatement. Coverage is effective on the 1st day the employee actually enters on duty in pay status in a position in which he or she is eligible for insurance on or after the date the employing office receives the election. If the employee does not file a Life Insurance Election in a manner designated by OPM within the 60-day period, the employee has whatever Optional insurance coverage he or she had immediately before separating from Federal service and is considered to have waived any other Optional insurance. However, an employee who fails to file an election during the 60-day period due to reasons beyond his or her control may enroll belatedly under the conditions stated in § 870.504(a)(3).

(f)(1) An employee of the Department of Defense who is designated as ''emergency essential'' under section 1580 of title 10, United States Code, may cancel a waiver of Option A and Option B insurance.

(2) An election of Option A or Option B insurance under paragraph (f)(1) must be made within 60 days of being designated ''emergency essential.'' Optional insurance is effective on the date the employing office receives the election, if the employee is in pay and duty status on that date. If the employee is not in pay and duty status on the day the employing office receives the election, the coverage becomes effective on the date the employee returns to pay and duty status.

(g)(1) A civilian employee who is eligible for life insurance coverage and who is deployed in support of a contingency operation as defined by section 101(a)(13) of title 10, United States Code, may cancel a waiver of Option A and/or Option B insurance.

(2) An election of Optional insurance under paragraph (g)(1) of this section

must be made within 60 days after the date of notification of deployment in support of a contingency operation. Optional insurance is effective on the date the employing office receives the election, if the employee is in pay and duty status on that date. If the employee is not in pay and duty status on the day the employing office receives the election, the coverage becomes effective on the date the employee returns to pay and duty status.

(h) An annuitant or compensationer is not eligible to cancel a waiver of any type of Optional insurance or to increase multiples of Option B under this section.

[75 FR 60579, Oct. 1, 2010]

### § 870.507 Open enrollment periods.

(a) There are no regularly scheduled open enrollment periods for life insurance. Open enrollment periods are held only when specifically scheduled by OPM.

(b) During an open enrollment period, unless OPM announces otherwise, eligible employees may cancel their existing waivers of Basic and/or Optional insurance by electing the insurance in a manner designated by OPM.

(c)(1) OPM sets the effective date for all insurance elected during an open enrollment period. The newly elected insurance is effective on the 1st day of the 1st pay period that begins on or after the OPM-established date and that follows a pay period during which the employee was in pay and duty status for at least 32 hours, unless OPM announces otherwise.

(2) A part-time employee must be in pay and duty status for one-half the regularly-scheduled tour of duty shown on his or her current Standard Form 50 for newly-elected coverage to become effective, unless OPM announces otherwise.

(3) An employee who has no regularly-scheduled tour of duty or who is employed on an intermittent basis must be in pay and duty status for one-half the hours customarily worked before newly-elected coverage can become effective, unless OPM announces otherwise. For the purpose of this paragraph, an employing office may determine the number of hours customarily worked by averaging the number of hours worked in the most recent calendar year quarter prior to the start of the open enrollment period.

(d) Within 6 months after an open enrollment period ends, an employing office may determine that an employee was unable, for reasons beyond his or her control, to cancel an existing waiver by electing to be insured during the open enrollment period. An election under this paragraph must be submitted within 60 days after being notified of the determination. Coverage is retroactive to the first pay period that begins on or after the effective date set by OPM and that follows a pay period during which the employee was in pay and duty status for at least 32 hours, unless OPM announces otherwise. If the employee does not file an election within this 60-day time limit, he or she will be considered to have waived coverage.

[75 FR 60579, Oct. 1, 2010]

### § 870.508 Nonpay status.

(a) An employee who is in nonpay status is entitled to continue life insurance for up to 12 months. No premium payments are required, unless the employee is receiving compensation.

(b) If an insured employee who is entitled to free insurance while in nonpay status accepts a temporary appointment to a position in which he or she would normally be excluded from insurance coverage, the insurance continues. The amount of Basic insurance (and Option B coverage if the employee has it) is based on the combined salaries of the two positions. Withholdings are made from the employee's pay in the temporary position.

(c) If an insured employee goes on leave without pay (LWOP) to serve as a full-time officer or employee of an employee organization, he or she may elect in writing to continue life insurance within 60 days after the beginning of the LWOP. The insurance continues for the length of the appointment, even if the LWOP lasts longer than 12 months. The employee must pay to the employing office the full cost of Basic and Optional insurance starting with the beginning of the nonpay status; the employee is not entitled to 12 months of free coverage. There is no Government contribution for these employees.

(d) If an insured employee goes on LWOP while assigned to a State government, local government, or institution of higher education, the employee may elect in writing to continue the life insurance for the length of the assignment, even if the LWOP lasts longer than 12 months. The employee must pay his or her premiums to the Federal agency on a current basis starting with the beginning of the nonpay status; the employee is not entitled to 12 months of free coverage. The agency must continue to pay its contribution as long as the employee makes his or her payments.

[75 FR 60579, Oct. 1, 2010]

### § 870.509 Transfers to international organizations.

An employee transferred to an international organization may continue life insurance coverage as provided in 5 U.S.C. 3582. Regulations governing these transfers are in part 352 of this title.

### § 870.510 Continuation of eligibility for former Federal employees of the Civilian Marksmanship Program.

(a) A Federal employee who was employed by the Department of Defense to support the Civilian Marksmanship Program as of the day before the date of the transfer of the Program to the Corporation for the Promotion of Rifle Practice and Firearms Safety, and was offered and accepted employment by the Corporation as part of the transition described in section 1612(d) of Public Law 104–106, 110 Stat. 517, is deemed to be an employee for purposes of this part during continuous employment with the Corporation unless the individual files an election under § 831.206(c) or § 842.109(c) of this title. Such a covered individual is treated as if he or she were a Federal employee for purposes of this part, and of any other part within this title relating to FEGLI. The individual is entitled to the benefits of, and is subject to all conditions under, FEGLI on the same basis as if the individual were an employee of the Federal Government.

(b) Cessation of employment with the Corporation for any period terminates eligibility for coverage under FEGLI as an employee during any subsequent employment by the Corporation.

(c) The Corporation must withhold from the pay of an individual described by paragraph (a) of this section an amount equal to the premiums withheld from the pay of a Federal employee for FEGLI coverage and, in accordance with procedures established by OPM, pay into the Employees' Life Insurance Fund the amounts deducted from the individual's pay.

(d) The Corporation must, in accordance with procedures established by OPM, pay into the Employees' Life Insurance Fund amounts equal to any agency contributions required under FEGLI.

[74 FR 66566, Dec. 16, 2009]

## Subpart F—Termination and Conversion

### § 870.601 Termination of Basic insurance.

(a) Except as otherwise provided in this section or § 870.701, the Basic insurance of an insured employee stops on the date the employee separates from service, subject to a 31-day extension of coverage. *Exception:* If the employee was employed by the Architect of the Capitol as a Senate Restaurants employee the day before the food services operations of the Senate Restaurants were transferred to a private business concern and the employee accepted employment by the business concern and elected to continue his or her Federal retirement benefits and FEGLI coverage, the employee continues to be eligible for FEGLI coverage as long as he or she remains employed by the business concern or its successor.

(b) The Basic insurance of an employee who separates from service after meeting the requirement for an immediate annuity under § 842.204(a)(1) of this chapter and who postpones receiving the annuity, as provided by § 842.204(c) of this chapter (an MRA+10 annuity), stops on the date he or she separates from service, subject to a 31-day extension of coverage.

(c) The Basic insurance of an insured employee who moves without a break in service to a position in which he or she is excluded from life insurance

stops on the last day of employment in the former position, subject to a 31-day extension of coverage. *Exception:* If the position is excluded by regulation (not by law), and the employee does not have a break in service of more than three days, the Basic insurance continues.

(d)(1) Except as provided in § 870.701, the Basic insurance of an insured employee who is in nonpay status stops on the date the employee completes 12 months in nonpay status, subject to a 31-day extension of coverage. The 12 months' nonpay status may be broken by periods of less than 4 consecutive months in pay status. If an employee has at least 4 consecutive months in pay status after a period of nonpay status, he or she is entitled to begin the 12 months' continuation of Basic insurance again. If an employee has used up his or her 12 months' continuation in nonpay status and returns to duty for less than 4 consecutive months, his or her Basic insurance stops on the 32nd day after the last day of the last pay period in pay status.

(2) For the purpose of paragraph (d)(1) of this section, 4 consecutive months in pay status means any 4-month period during which the employee is in pay status for at least part of each pay period.

(3)(i) For the purpose of paragraph (d)(1) of this section, an individual who is entitled to benefits under part 353 of this chapter (USERRA—Uniformed Services Employment and Reemployment Act of 1994), who separates to go on military duty instead of going into a nonpay status, is treated as an employee in nonpay status for life insurance purposes.

(ii) Basic insurance continues free for 12 months or until 90 days after military service ends, whichever comes first.

(iii) Effective January 28, 2008, an employee who enters on active duty, or active duty for training in one of the uniformed services for more than 30 days, may continue enrollment for an additional 12 months, for a total of up to 24 months.

(A) Each agency must notify its employees of the opportunity to elect to continue coverage for the additional 12 months.

(B) An employee wanting coverage for the additional 12 months must elect it prior to the end of the first 12 months in nonpay status, in a manner designated by the employing agency.

(C) Insurance continues free for the first 12 months; however, an employee must pay both the employee and agency share of premiums to the agency on a current basis for Basic coverage, and must pay the entire cost (there is no agency share) for any Optional insurance for the additional 12 months of coverage elected.

(D) For an employee who does not elect to continue coverage for an additional 12 months, coverage terminates at the end of the first 12 months in nonpay status subject to the 31-day extension of coverage and conversion rights as provided in § 870.603 of this part.

(e) Except for employees, annuitants, and compensationers who elect direct payment as provided in § 870.405 of this part, Basic insurance stops, subject to a 31-day extension of coverage, at the end of the pay period in which the employing office or retirement system determines that an individual's periodic pay, annuity, or compensation, after all other deductions, is not enough to cover the full cost of Basic insurance.

[75 FR 60581, Oct. 1, 2010]

### § 870.602 Termination of Optional insurance.

(a) The Optional insurance of an insured employee stops when his or her Basic insurance stops, subject to the same 31-day extension of coverage.

(b) The Optional insurance of an employee who separates from service after meeting the requirement for an immediate annuity under § 842.204(a)(1) of this chapter and who postpones receiving the annuity, as provided by § 842.204(c) of this chapter (an MRA+10 annuity), stops on the date he or she separates from service, subject to a 31-day extension of coverage. *Exception:* If the employee was employed by the Architect of the Capitol as a Senate Restaurants employee the day before the food services operations of the Senate Restaurants were transferred to a private business concern and the employee accepted employment with the

business concern and elected to continue his or her Federal retirement benefits and FEGLI coverage, the employee continues to be eligible for FEGLI coverage as long as he or she remains employed by the business concern or its successor.

(c)(1) If an insured employee is not eligible to continue Optional coverage as an annuitant or compensationer as provided by § 870.701, the Optional insurance stops on the date that his or her Basic insurance is continued or reinstated under § 870.701, subject to a 31-day extension of coverage.

(d) If, at the time of an individual's election of Basic insurance during receipt of annuity or compensation, he or she elects no Basic life insurance as provided by § 870.702(a)(1), the Optional insurance stops at the end of the month in which the election is received in OPM, subject to a 31-day extension of coverage.

(e) Except for employees, annuitants, and compensationers who elect direct payment as provided in § 870.405, Optional insurance stops, subject to a 31-day extension of coverage, at the end of the pay period in which the employing office or retirement system determines that an individual's periodic pay, annuity, or compensation, after all other deductions, is not enough to cover the full cost of the Optional insurance. If an individual has more than one type of Optional insurance and his or her pay, annuity, or compensation is sufficient to cover some but not all of the insurance, the multiples of Option C terminate first, followed by Option A, and then the multiples of Option B.

[75 FR 60581, Oct. 1, 2010]

### § 870.603 Conversion of Basic and Optional insurance.

(a)(1) When group coverage terminates for any reason other than voluntary cancellation, an employee may apply to convert all or any part of his or her Basic and Optional insurance to an individual policy; no medical examination is required. The premiums for the individual policy are based on the employee's age and class of risk. An employee is eligible to convert the policy only if he or she does not return, within 3 calendar days from the terminating event, to a position covered under the group plan. *Exception:* If an employee is unable to convert, a person having power of attorney for that employee may convert on his or her behalf. If insurance has been assigned under subpart I of this part, it is the assignee(s), not the employee, who has (have) the right to convert.

(2) The employing agency must notify the employee/assignee(s) of the loss of coverage and the right to convert to an individual policy either before or immediately after the event causing the loss of coverage.

(3) The employee/assignee(s) must submit the request for conversion information to OFEGLI. OFEGLI must receive the request for conversion within 31 calendar days of the date on the conversion notification the employee receives from the employing agency (60 days if overseas) or within 60 calendar days after the date of the terminating event (90 days, if overseas), whichever is earlier.

(4) If the employee does not request conversion information within the specified time period as described in paragraph (a)(3) of this section, the employee is considered to have refused coverage unless OFEGLI determines the failure was for reasons beyond the employee's control, as described in paragraph (a)(5) of this section.

(5) When an agency fails to provide the notification required in paragraph (a)(2) of this section, or the employee/assignee fails to request conversion information within the time limit set in paragraph (a)(3) of this section for reasons beyond his or her control, the employee may make a belated request by writing to OFEGLI. The employee/assignee must make the request within 6 months after becoming eligible to convert the insurance. The employee/assignee must show that he or she was not notified of the loss of coverage and the right to convert and was not otherwise aware of it or that he or she was unable to convert to an individual policy for reasons beyond his or her control. OFEGLI will determine if the employee/assignee is eligible to convert. If the request is approved, the employee must convert within 31 calendar days of that determination.

(b) The individual conversion policy is effective the day after the group coverage ends. The employee/assignee must pay the premiums for any period retroactive to that date.

(c) The 31-day extension of coverage provided under this subpart does not depend upon timely notification of the right to convert to an individual policy. The extension cannot be continued beyond 31 days.

(d) Family members may convert Option C coverage (and name beneficiaries of their choice) if:

(1) The employee dies; or

(2) The insurance stops under circumstances that allow the employee to convert Option C coverage but the employee does not convert.

(e) If an employee with Option C coverage dies, the employing office must send a conversion notice to the family members at the employee's last address on file.

(f) Family members must submit the request for conversion information to OFEGLI. OFEGLI must receive the request for conversion within 31 calendar days of the date on the conversion notification the employee receives from his or her employing agency (60 days if overseas) or within 60 calendar days after the date of the terminating event (90 days, if overseas), whichever is earlier. There is no extension to these time limits. Family members are considered to have refused coverage if they do not request conversion within these time limits.

(g) The family members' conversion policy is effective at the end of the employee's 31-day extension of coverage.

[75 FR 60581, Oct. 1, 2010]

## Subpart G—Annuitants and Compensationers

### § 870.701 Eligibility for life insurance.

(a) When an insured employee retires, Basic life insurance (but not accidental death and dismemberment) continues or is reinstated if he/she:

(1) Is entitled to retire on an immediate annuity under a retirement system for civilian employees, including the retirement system of a nonappropriated fund instrumentality of the Department of Defense or the Coast Guard;

(2) Was insured for the 5 years of service immediately before the date the annuity starts, or for the full period(s) of service during which he/she was eligible to be insured if less than 5 years; and

(3) Has not converted to an individual policy as described in § 870.603. If it is determined that an individual is eligible to continue the group coverage as an annuitant after he/she has already converted to an individual policy, the group enrollment may be reinstated. If the individual wants the group coverage reinstated, the conversion policy must be voided, the group policy must be reinstated retroactively, and the premiums already paid on the conversion policy must be refunded to the individual.

(b) Following separation or the completion of 12 months' nonpay status, a compensationer's Basic life insurance (but not accidental death and dismemberment) continues or is reinstated if he/she:

(1) Has been insured for the 5 years of service immediately before the date of entitlement to compensation, or for the full period(s) of service during which he/she was eligible to be insured if less than 5 years; and

(2) Has not converted to an individual policy as described in § 870.603. If it is not determined that an individual is eligible to continue the group coverage as a compensationer until after he/she has converted, the group enrollment may be reinstated. If the individual wants the group coverage reinstated, the conversion policy must be voided, the group policy must be reinstated retroactively, and the premiums already paid on the conversion policy must be refunded to the individual.

(c) An individual who meets the requirements of paragraph (a) or (b) of this section or § 870.706 for continuation or reinstatement of life insurance must complete an election, in a manner designated by OPM, at the time entitlement is established. For the election to be valid, OPM must receive the election before OPM has made a final decision on the individual's application for annuity or supplemental annuity or an

individual's request to continue life insurance as a compensationer. If there is no valid election, OPM considers the individual to have chosen the option described in § 870.703(a)(2).

(d) If the annuity or compensation of an insured individual is terminated, or if the Department of Labor finds that an insured compensationer is able to return to duty, his/her Basic life insurance held as an annuitant or compensationer stops on the date of the termination or finding. There is no 31–day extension of coverage or conversion right.

(e)(1) An annuitant or compensationer who is eligible to continue or have reinstated Basic insurance is also eligible to continue or have reinstated Optional insurance if he/she meets the same coverage requirements for Optional insurance as those stated in paragraph (a) or (b) of this section for Basic insurance.

(2) For the purpose of continuing insurance as an annuitant or compensationer, an employee is not considered to have been eligible for Option C during any period when the employee had no eligible family members.

(f) An individual's period of coverage in a life insurance plan is credited to the 5 years of service under paragraph (a)(2) of this section if:

(1) He/she participated in the Office of Thrift Supervision (OTS) life insurance plan and transferred to the Office of the Comptroller of the Currency or the Federal Deposit Insurance Corporation under the Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203; and

(2) Elected FEGLI coverage during the special enrollment period between June 1, 2012 and July 29, 2012. Evidence of the non-FEGLI period of continuous coverage will be documented in a manner designated by OPM.

[62 FR 48731, Sept. 17, 1997, as amended at 75 FR 60583, Oct. 1, 2010; 81 FR 60236, Sept. 1, 2016]

### § 870.702 Amount of Basic insurance.

(a) The amount of Basic insurance an annuitant or compensationer can continue is the BIA on the date insurance would otherwise have stopped because of the individual's separation from service or completion of 12 months in nonpay status. The amount of Basic insurance in force is the BIA minus any reductions applicable under § 870.703(a).

(b)(1) For the purpose of paying benefits upon the death of an insured individual under age 45 who is retired or receiving compensation, the BIA will be multiplied by the appropriate age factor shown in § 870.202(c) of this part. Exceptions:

(i) If the insured individual retired or became insured as a compensationer before October 10, 1980, or

(ii) If the insured individual elected a partial Living Benefit as an employee under subpart K of this part.

(2)(i) For an annuitant or compensationer who elected a partial Living Benefit as an employee, the amount of Basic insurance he or she can continue is the post-election BIA, as described in § 870.203(a)(2).

(ii) If an employee elected a partial Living Benefit and that employee is under age 45 at the time of death, OFEGLI will multiply the post-election BIA by the appropriate factor, as specified in § 870.202(c), that was in effect on the date that is nine months after the date OFEGLI received the completed Living Benefit application.

[64 FR 72463, Dec. 28, 1999, as amended at 75 FR 60583, Oct. 1, 2010]

### § 870.703 Election of Basic insurance.

(a) An individual who makes an election under § 870.701(c) and who has not elected a Living Benefit must select one of the options in paragraphs (a)(1) through (4) of this section. No one else can make this election on the individual's behalf.

(1) *Termination of the insurance.* The individual's insurance stops upon conversion to an individual policy as provided under § 870.603. If the individual does not convert to an individual policy, insurance stops at the end of the month in which OPM or the employing office receives the election;

(2) *Continuation or reinstatement of Basic insurance with a maximum reduction of 75 percent during retirement.* Premiums are withheld from annuity or compensation (except as provided under § 870.401(d)(1)). The amount of Basic Life insurance in force reduces by 2 percent of the BIA each month until the maximum reduction is

reached. This reduction starts at the beginning of the 2nd month after the date the insurance would otherwise have stopped or the date of the insured's 65th birthday, whichever is later;

(3) *Continuation or reinstatement of Basic insurance with a maximum reduction of 50 percent during retirement.* Premiums are withheld from annuity or compensation. The amount of Basic insurance in force reduces by 1 percent of the BIA each month until the maximum reduction is reached. This reduction starts at the beginning of the 2nd month after the date the insurance would otherwise have stopped or the date of the insured's 65th birthday, whichever is later; or

(4) *Continuation or reinstatement of Basic insurance with no reduction after age 65.* Premiums are withheld from annuity or compensation.

(b)(1) Unless an employee has elected a partial Living Benefit under subpart K of this part or an individual has assigned the insurance under subpart I of this part, an insured individual may cancel an election under paragraph (a)(3) or (a)(4) of this section at any time. The amount of Basic insurance automatically switches to the amount that would have been in force if the individual had originally elected the 75 percent reduction. This revised amount is effective at the end of the month in which OPM receives the request to cancel the previous election. There is no refund of premiums.

(2) If an individual files a waiver of insurance, the coverage stops without a 31-day extension of coverage or conversion right. Coverage ceases at the end of the month in which OPM received the waiver.

(c) Unless he/she chooses to terminate his/her insurance, an employee who has elected a partial Living Benefit must choose the no reduction election under paragraph (a)(4) of this section. The employee cannot later change to the 75 percent reduction.

(d) If an employee has assigned his or her insurance, he/she cannot cancel an election under paragraph (a)(3) or (a)(4) of this section. Only the assignee(s) may cancel this election. Exception: If the employee elected a partial Living Benefit before assigning the remainder of his or her insurance, the assignee(s) cannot cancel the election under paragraph (a)(4) of this section.

(e)(1) For purposes of this part, a judge who retires under one of the following provisions is considered to be an employee after retirement:

(i) 28 U.S.C. 371(a) or (b);

(ii) 28 U.S.C. 372(a);

(iii) 28 U.S.C. 377;

(iv) 26 U.S.C. 7447;

(v) 11 DC Code 776;

(vi) Section 7447 of the Internal Revenue Code;

(2) The insurance of a judge described in paragraph (e)(1) of this section does not reduce after age 65. Basic insurance continues without interruption or reduction. *Exception:* If the insured is a judge eligible for compensation, and chooses to receive compensation instead of annuity, he or she must select an option described in paragraph (a) of this section.

[75 FR 60583, Oct. 1, 2010]

### § 870.704 Amount of Option A.

(a) The amount of Option A coverage an annuitant or compensationer can continue is $10,000.

(b) An annuitant's or compensationer's Option A coverage reduces by 2 percent of the original amount each month up to a maximum reduction of 75 percent. This reduction starts at the beginning of the 2nd month after the date the insurance would otherwise have stopped or the beginning of the 2nd month after the date of the insured's 65th birthday, whichever is later.

(c) Paragraph (b) of this section does not apply to a judge who retires under one of the provisions listed in § 870.703(e)(1). For purposes of this part, such a judge is considered to be an employee after retirement, and Option A insurance continues without interruption or reduction. *Exception:* If the judge is eligible for compensation and chooses to receive compensation instead of annuity, paragraph (b) of this section applies.

[75 FR 60583, Oct. 1, 2010]

**§ 870.705 Amount and election of Option B and Option C.**

(a) The number of multiples of Option B and Option C coverage an annuitant or compensationer can continue is the highest number of multiples in force during the applicable period of service required to continue Option B and Option C.

(b)(1)(i) At the time an employee retires or becomes insured as a compensationer, he or she must elect the number of allowable multiples he or she wishes to continue during retirement or while receiving compensation.

(ii) An employee who elects to continue fewer multiples than the number for which he or she is eligible is considered to have cancelled the multiples that are not continued.

(iii) An employee separating for retirement and an employee becoming insured as a compensationer on or after April 24, 1999, must choose the level of post-age-65 reduction he or she wants. There are two choices: Full Reduction and No Reduction. The election may be made only by the employee and must be made in the manner that OPM designates. The employee may make different elections for Option B and for Option C. He or she may choose Full Reduction for some multiples of an Option and No Reduction for other multiples of the same Option. Failure to make an election for Option B or for Option C will be considered to be an election of Full Reduction for all multiples of that Option.

(iv) For purposes of this part, a judge who retires under one of the provisions listed in § 870.703(e)(1) is considered to be an employee after retirement. The insurance of such a judge does not reduce after age 65. *Exception:* If the judge is eligible for compensation and chooses to receive compensation instead of annuity, the post-65 reductions and elections apply.

(2)(i) Prior to reaching age 65, an annuitant or compensationer can change from No Reduction to Full Reduction at any time. *Exception:* If the individual has assigned his or her insurance as provided in subpart I of this part, only the assignee can change from No Reduction to Full Reduction for the Option B coverage.

(3)(i) After reaching age 65, an annuitant or compensationer can change from No Reduction to Full Reduction at any time. *Exception:* If the individual has assigned his or her insurance as provided in subpart I of this part, only the assignee can change from No Reduction to Full Reduction for the Option B coverage. If an individual age 65 or over changes to Full Reduction, the amount of insurance in force is computed as if he or she had elected Full Reduction initially. There is no refund of premiums.

(ii) Except as provided in paragraph (b)(4) of this section, after reaching age 65, an annuitant or compensationer cannot change from Full Reduction to No Reduction.

(4)(i) Shortly before an annuitant or compensationer's 65th birthday, an annuitant's retirement system will send a reminder about the post-age-65 reduction election he/she made and will offer the individual a chance to change the initial election made at the time of retirement.

(ii) If the individual is already 65 or older at the time of retirement or becoming insured as a compensationer, the retirement system will process the retirement using the current Continuation of Life Insurance Coverage (SF 2818) on file, send the reminder, and give the opportunity to change the election as soon as the retirement processing or compensation transfer is complete.

(iii) If the individual assigned his/her insurance as provided in subpart I of this part, and if the employee elected No Reduction for Option B coverage at the time of retirement or becoming insured as a compensationer, the retirement system will send the reminder notice for Option B coverage to the assignee.

(iv) An annuitant or compensationer who wishes to change his/her reduction election must return the notice by the end of the month following the month in which the individual turns 65, or if already over age 65, by the end of the 4th month after the date of the letter. An annuitant or compensationer who does not return the election notice will keep his/her initial election or the default election, as applicable.

(c)(1) For each multiple of Option B and/or Option C for which an individual elects Full Reduction, the coverage reduces by 2 percent of the original amount each month. This reduction starts at the beginning of the 2nd month after the date the insurance would otherwise have stopped or the beginning of the 2nd month after the insured's 65th birthday, whichever is later. At 12:00 noon on the day before the 50th reduction, the insurance stops, with no extension of coverage or conversion right.

(2) For each multiple of Option B and/or Option C for which an individual elects No Reduction, the coverage in force does not reduce. After age 65 the annuitant or compensationer continues to pay premiums appropriate to his or her age.

(d)(1) An employee who was already retired or insured as a compensationer on April 24, 1999, and who had Option B, was given an opportunity to make an election for Option B.

(i) Annuitants and compensationers who were under age 65 were notified of the option to elect No Reduction. The retirement system will send these individuals an actual election notice before their 65th birthday, as provided in paragraph (b)(4) of this section.

(ii) Each such annuitant or compensationer who was age 65 or older on April 24, 1999, and who still had some Option B coverage remaining, was given the opportunity to stop further reductions. The individual had until October 24, 1999, to make the No Reduction election. The amount of Option B coverage retained was the amount in effect on April 24, 1999. Each annuitant or compensationer who elected No Reduction was required to pay premiums retroactive to April 24, 1999.

(2) An employee who was already retired or insured as a compensationer on April 24, 1999, could not elect No Reduction for Option C.

[75 FR 60583, Oct. 1, 2010, as amended at 81 FR 26998, May 5, 2016]

### § 870.706 Reinstatement of life insurance.

(a) An annuitant whose disability annuity terminates because he/she recovers from the disability or because his/her earning capacity returns, and whose disability annuity is later restored under 5 U.S.C. 8337(e) (after December 31, 1983), may elect to resume the Basic insurance held immediately before his/her disability annuity terminated. OPM must receive the election within 60 days after OPM mails a notice of insurance eligibility and an election form.

(b) An annuitant described in paragraph (a) of this section may elect to resume any Optional insurance held immediately before the annuity terminated if:

(1) He/she has made an election under paragraph (a) of this section; and

(2) OPM receives the election within 60 days after OPM mails a notice of insurance eligibility and an election form.

(c) Basic and Optional insurance reinstated under paragraphs (a) and (b) of this section is effective on the 1st day of the month after the date OPM receives the election. Any applicable annuity withholdings are also reinstated on the 1st day of the month after OPM receives the election.

(d) The amounts of Basic and Optional insurance reinstated under paragraphs (a) and (b) of this section are the amounts that would have been in force if the individual's annuity hadn't terminated.

[62 FR 48731, Sept. 17, 1997; 62 FR 52181, Oct. 6, 1997. Redesignated at 64 FR 72463, Dec. 28, 1999]

### § 870.707 Reemployed annuitants and compensationers.

(a)(1) If an insured annuitant or compensationer is appointed to a position in which he or she is eligible for insurance, the amount of his or her Basic life insurance as a annuitant or compensationer (and any applicable withholdings) is suspended on the day before the 1st day in pay status under the appointment, unless the reemployed annuitant or compensationer waives all insurance coverage as an employee. The Basic insurance benefit payable upon the death of a reemployed annuitant or compensationer who has Basic insurance in force as an employee, cannot be less than the benefit that would have been payable if

the individual had not been reemployed.

(2) Except as provided in paragraph (b) of this section, the Basic insurance obtained as an employee stops with no 31-day extension of coverage or conversion right, on the date reemployment terminates. Any suspended Basic insurance (and any applicable withholdings) is reinstated on the day following termination of the reemployment.

(b) Basic insurance obtained during reemployment can be continued after the reemployment terminates if the individual:

(1) Qualifies for a supplemental annuity or receives a new retirement right (or if a compensationer, he or she worked an amount of time equivalent to that required for an annuitant to qualify for a supplemental annuity);

(2) Has had Basic insurance as an employee for at least 5 years of service immediately before separation from reemployment or for the full period(s) during which such coverage was available to the individual, whichever is less; and

(3) Does not convert to nongroup insurance when Basic insurance as an employee would otherwise terminate.

(c) If the Basic insurance obtained during reemployment is continued as provided in paragraph (b) of this section, any suspended Basic life insurance stops, with no 31-day extension of coverage or conversion right.

(d)(1) An annuitant or compensationer appointed to a position in which he or she is eligible for Basic insurance is also eligible for Optional insurance as an employee, unless he or she has on file an uncancelled waiver of Basic or Optional insurance.

(2) If the individual has Option A or C as an annuitant, that insurance (and applicable withholdings) is suspended on the day before his or her 1st day in pay status under the appointment. Unless he or she waives Option A or C (or waives Basic insurance), the individual obtains Option A or C as an employee.

(3) If the individual has Option B as an annuitant or compensationer, that insurance (and applicable withholdings) continues as if the individual were not reemployed, unless:

(i) The individual files with his/her employing office an election of Option B, in a manner designated by OPM, within 60 calendar days after the date of reemployment. In this case Option B (and applicable withholdings) as an annuitant or compensationer is suspended on the date that Option B as an employee becomes effective; or

(ii) The individual waives Basic insurance.

(4) The Option B benefit payable upon the death of a reemployed annuitant or compensationer is the amount in effect as an annuitant or compensationer, unless the individual elected to have Option B as an employee.

(5) Except as provided in paragraph (e) of this section, the Optional insurance obtained as an employee stops, with no 31-day extension or conversion right, on the date reemployment terminates. The amount of suspended Optional insurance that remains in force after applicable monthly reductions after age 65 (and corresponding withholdings) is reinstated on the day after reemployment terminates.

(e) Optional life insurance obtained during reemployment may be continued after the reemployment terminates if the annuitant:

(1) Qualifies for a supplemental annuity or receives a new retirement right (or if a compensationer, he or she worked an amount of time equivalent to that required for an annuitant to qualify for a supplemental annuity);

(2) Continues Basic life insurance under § 870.703(a)(2), (3), or (4); and

(3) Has had Optional insurance as an employee for at least the 5 years of service immediately before separation from reemployment or for the full period(s) of service during which it was available to him or her, whichever is less.

(f) If Optional insurance obtained during reemployment is continued as provided in paragraph (e) of this section, any suspended Optional insurance stops, with no 31-day extension of coverage or conversion right.

(g) If a reemployed annuitant or compensationer waives life insurance as an employee, the waiver also cancels his or her life insurance as an annuitant or compensationer.

[75 FR 60584, Oct. 1, 2010]

### § 870.708 MRA-plus-10 annuitants.

(a) The Basic insurance of an individual whose coverage terminates under § 870.601(b), and who meets the requirements for continuing Basic insurance after retirement as stated in § 870.701(a), resumes on the starting date of annuity or on the date OPM receives the application for annuity, whichever is later. The individual must file an election as provided in § 870.701(c) so that OPM receives it within 60 days after OPM mails a notice of insurance eligibility and an election form.

(b) Optional insurance of an individual whose coverage terminates under § 870.602(b), and who meets the requirements for continuing Optional insurance after retirement under § 870.701(e), resumes on the starting date of annuity or on the date OPM receives the application for annuity, whichever is later.

[62 FR 48731, Sept. 17, 1997. Redesignated at 64 FR 72463, Dec. 28, 1999]

## Subpart H—Order of Precedence and Designation of Beneficiary

### § 870.801 Order of precedence and payment of benefits.

(a) Except as provided in paragraph (d) of this section and § 870.802(g)(2), benefits are paid according to the order of precedence stated in 5 U.S.C. 8705(a), as follows:

(1) To the designated beneficiary (or beneficiaries);

(2) If none, to the widow(er);

(3) If none, to the child, or children in equal shares, with the share of any deceased child going to his or her children;

(4) If none, to the parents in equal shares or the entire amount to the surviving parent;

(5) If none, to the executor or administrator of the estate;

(6) If none, to the next of kin according to the laws of the State in which the insured individual legally resided.

(b) If an insured individual provides in a valid designation of beneficiary for insurance benefits to be payable to the insured's estate, or to the Executor, Administrator, or other representative of the insured's estate, or if the benefits would otherwise be payable to the duly appointed representative of the insured's estate under the order of precedence specified in 5 U.S.C. 8705(a), payment of the benefits to the duly appointed representative of the insured's estate bars recovery by any other person.

(c) Option A and B insurance in force on a person on the date of his/her death is paid, on receipt of a valid claim, in the same order of precedence and under the same conditions as Basic insurance. A designation of beneficiary for Basic insurance is also a designation of beneficiary for Options A and B, unless the insured individual states otherwise in his/her designation.

(d)(1) If there is a court order in effect naming a specific person or persons to receive life insurance benefits upon the death of an insured individual, Basic insurance and Option A and Option B insurance will be paid to the person or persons named in the court order, instead of according to the order of precedence.

(2) To qualify a person for such payment, a certified copy of the court order must be received in the appropriate office before the death of the insured.

(3)(i) For an employee, the appropriate office is the employing agency.

(ii) For an annuitant, the appropriate office is OPM.

(iii) For a compensationer during the first 12 months of nonpay status, the appropriate office is the employing agency.

(iv) For a compensationer after separation or the completion of 12 months in nonpay status, the appropriate office is OPM.

(4) If, within the applicable time frames, the appropriate office receives conflicting court orders entitling different persons to the same insurance, benefits will be paid based on whichever court order was issued first.

(e) Upon the death of an insured family member, Option C benefits are paid to the employee, annuitant, or compensationer responsible for withholdings under § 870.402(a), except as provided in paragraph (f) of this section.

(f) If an employee, annuitant, or compensationer entitled to receive Option C benefits dies before the benefits are paid, the Option C benefits are paid to the individual(s) entitled to receive Basic life insurance benefits under the statutory order of precedence. However, if the insurance has been assigned in accordance with subpart I of this part, any prior designations of beneficiary were cancelled; benefits in this instance are paid under the statutory order of precedence, starting with the second on the list.

[62 FR 48731, Sept. 17, 1997, as amended at 64 FR 16602, Apr. 6, 1999; 64 FR 72464, Dec. 28, 1999; 68 FR 59082, Oct. 14, 2003; 75 FR 60585, Oct. 1, 2010; 77 FR 71688, Dec. 4, 2012]

### § 870.802 Designation of beneficiary.

(a) Except as provided in paragraph (i) of this section, if an insured individual wants benefits paid differently from the order of precedence, he/she must file a designation of beneficiary. A designation of beneficiary cannot be filed by anyone other than the insured individual. Exception: if the insurance has been assigned under subpart I of this part, the insured individual cannot designate a beneficiary; only the assignee(s) can designate beneficiaries.

(b) A designation of beneficiary must be in writing, signed by the insured individual, and witnessed and signed by 2 people. The completed designation of beneficiary form may be submitted to the appropriate office via appropriate methods approved by the employing office. The appropriate office must receive the designation before the death of the insured.

(1) For an employee, the appropriate office is the employing office.

(2) For an annuitant or compensationer, the appropriate office is OPM.

(c) A designation, change, or cancellation of beneficiary in a will or any other document not witnessed and filed as required by this section has no legal effect with respect to benefits under this chapter.

(d) A witness to a designation of beneficiary cannot be named as a beneficiary.

(e) Any individual, firm, corporation, or legal entity can be named as a beneficiary, except an agency of the Federal or District of Columbia Government.

(f) An insured individual (or an assignee) may change his/her beneficiary at any time without the knowledge or consent of the previous beneficiary. This right cannot be waived or restricted.

(g)(1) A designation of beneficiary is automatically cancelled 31 days after the individual stops being insured.

(2) An assignment under subpart I of this part automatically cancels an insured individual's designation of beneficiary.

(h) An insured individual may provide that a designated beneficiary is entitled to the insurance benefits only if the beneficiary survives him/her for a specified period of time (not more than 30 days). If the beneficiary doesn't survive for the specified period, insurance benefits will be paid as if the beneficiary had died before the insured.

(i)(1) Except as provided in paragraph (i)(2) of this section, if a court order has been received in accordance with § 870.801(d), an insured individual cannot designate a different beneficiary, unless

(i) The person(s) named in the court order gives written consent for the change, or

(ii) The court order is modified.

(2) If a court order has been received in accordance with § 870.801(d), and the court order applies to only part of the insurance benefits, an insured individual can designate a different beneficiary to receive the insurance benefits that are not included under the court order. If the insured individual does not make a designation for these benefits and there is no previous valid designation on file, benefits will be paid according to the order of precedence shown in § 870.801(a).

(3) If a court order received in accordance with § 870.801(d) is subsequently modified without naming a new person to receive the benefits, and a certified copy of the modified court order is received by the appropriate office before the death of the insured, the insured individual can designate a beneficiary. Benefits will be paid according to the order of precedence shown in § 870.801(d)

if the insured individual does not complete a new designation of beneficiary.

[62 FR 48731, Sept. 17, 1997; 62 FR 52181, Oct. 6, 1997, as amended at 64 FR 16602, Apr. 6, 1999; 64 FR 72464, Dec. 28, 1999; 75 FR 60585, Oct. 1, 2010]

### § 870.803 Child incapable of self-support.

(a) When it receives a claim for Option C benefits because of the death of a child age 22 or older, OFEGLI determines, based on whatever evidence it considers necessary, whether the deceased child was incapable of self-support because of a mental or physical disability which existed before the child reached age 22.

(b) If an employee elects Option C under § 870.506(a) (3), and the opportunity to elect is based solely on the acquisition of a child age 22 or older, the employee must submit to the employing office, at the time of making the election, a doctor's certificate stating that the child is incapable of self-support because of a physical or mental disability which existed before the child reached age 22 and which is expected to continue for more than 1 year. The certificate must include the name of the child, the type of disability, how long it has existed, and its expected future course and duration. The certificate must be signed by the doctor and show his/her office address.

## Subpart I—Assignments of Life Insurance

### § 870.901 Assignments permitted.

(a) (1) Section 208 of the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. 98–353 (98 Stat. 355), effective July 10, 1984, permits Federal judges to irrevocably assign their FEGLI coverage to one or more individuals, corporations, or trustees. Section 4 of Pub. L. 103–336 (108 Stat. 2661), effective October 3, 1994, extended this right to all Federal employees, annuitants, and compensationers.

(2) An individual may assign ownership of all life insurance under this part, except Option C. If an individual wishing to make an assignment owns more than one type of coverage, he/she must assign all the insurance; an individual cannot assign only a portion of the coverage. Option C cannot be assigned.

(b) An individual cannot name conditional assignees in case the primary assignee dies before the insured individual.

(c) If the insurance is assigned to two or more individuals, corporations, or trustees, the insured individual must specify percentage shares, rather than dollar amounts or types of insurance, to go to each assignee.

(d) If an individual who has made an assignment later elects increased insurance coverage under § 870.506 or during an open enrollment period, the increased coverage is considered included in the already existing assignment. The right to increase coverage remains with the insured individual, rather than transferring to the assignee.

(e) An individual who assigns ownership of insurance continues to be the insured individual, but the assignee receives those rights of an insured individual that are specified in this part.

(f) Once assigned, the value of the insurance increases or decreases automatically as provided by this part. Exception: if the insured individual elected a Living Benefit before assigning the remainder of his/her insurance, the amount of Basic insurance does not increase or decrease.

(g) An insured individual who has assigned his/her insurance cannot elect a Living Benefit; nor can an assignee elect a Living Benefit on behalf of the insured individual.

(h) An insured individual who has elected a Living Benefit under subpart K of this part may assign the remainder of his/her insurance. The assignment would affect Option A, Option B, and, for an employee who elected a partial Living Benefit, Basic insurance.

(i) A court order can direct that an insured individual make an irrevocable assignment to the person(s) named in the court order. For an assignment to be effective, the insured individual must follow the procedures in § 870.902.

[62 FR 48731, Sept. 17, 1997, as amended at 64 FR 16602, Apr. 6, 1999]

### § 870.902 Making an assignment.

(a) To assign insurance, an insured individual must complete an approved

assignment form. Only the insured individual may make an assignment; no one may assign insurance on behalf of an insured individual.

(b) The assignment form must be in writing, signed by the insured individual, and witnessed and signed by 2 people. The completed assignment form, indicating the intent to irrevocably assign all ownership of the insurance, must be received by the appropriate office.

(1) For an employee, the appropriate office is the employing office.

(2) For an annuitant or compensationer, the appropriate office is OPM.

[75 FR 60585, Oct. 1, 2010]

### § 870.903 Effective date of assignment.

An assignment under this subpart is effective on the date the employing office receives the properly completed, signed, and witnessed assignment form.

### § 870.904 Amount of insurance.

The amount of insurance is the amount of the insured individual's Basic insurance, plus any Option A and Option B coverage.

### § 870.905 Withholdings.

Premium withholdings for assigned insurance are withheld from the salary, annuity, or compensation of the insured individual, as provided in subpart D of this part.

### § 870.906 Cancellation of insurance.

(a) The right to cancel (or reduce) insurance transfers to the assignee; the insured individual cannot cancel (or reduce) insurance after making an assignment.

(b) The assignee has the right to cancel insurance according to the provisions of §§ 870.502 and 870.505. When there is more than one assignee, all assignees must agree to the cancellation. A cancellation of Basic insurance also cancels all Optional insurance.

### § 870.907 Termination and conversion.

(a) Assigned insurance terminates under the conditions stated in subpart F of this part.

(b)(1) When an insured individual's insurance terminates, an assignee has the right to convert all or part of the group insurance to an individual policy on the insured individual. The conditions stated in subpart F of this part apply to assignees who elect to convert.

(2) When there is more than one assignee, each assignee has the right to convert all or part of his/her share of the insurance. Any assignee who doesn't convert loses all ownership of the insurance.

(3) When there is more than one assignee, the maximum amount of insurance each assignee will be able to convert is determined by the dollar amount corresponding to the assignee's share of the total insurance. This amount will be rounded up to the next higher thousand, if it's not already an even thousand dollar amount.

(4) Premiums for converted life insurance are based on the insured individual's age and class of risk at the time the conversion policy is issued.

(5) The employing office must notify each assignee of the conversion right at the time the assigned group insurance terminates.

(c) An assignment terminates 31 days after the insurance terminates, unless the insured individual is reemployed in or returns to a position in which he or she is entitled to coverage under this part within 31 days after the insurance terminates. If the individual returns to Federal service, Basic insurance and any Option A and/or Option B insurance acquired through returning to service is subject to the existing assignment.

[62 FR 48731, Sept. 17, 1997, as amended at 64 FR 72465, Dec. 28, 1999; 75 FR 60586, Oct. 1, 2010]

### § 870.908 Annuitants and compensationers.

(a) If an employee assigns Basic insurance and later becomes eligible to continue such insurance coverage as an annuitant or compensationer as provided in § 870.701:

(1) At the time he/she retires or becomes eligible as a compensationer, the insured individual may elect unreduced or partially reduced insurance coverage as provided in § 870.702(a). This right remains with the insured individual and does not transfer to the

assignee. Exception: if the insured individual elected a partial Living Benefit as an employee under subpart K of this part, he/she can only elect unreduced insurance coverage.

(2) After the individual has made the election described in paragraph (a)(1) of this section, the assignee (or, if more than one, all of the assignees acting together) may, at any time, elect to cancel the annuitant's or compensationer's election of increased coverage, as provided in § 870.702(b). The right to cancel the election transfers to the assignee; the annuitant or compensationer cannot cancel the election after making an assignment. Exception: if the individual elected a partial Living Benefit as an employee under subpart K of this part, the assignee(s) cannot cancel the election of unreduced insurance coverage.

(b) When more than one assignee has been named, at the time the insured individual becomes eligible to continue coverage as an annuitant or compensationer, some assignees may choose to convert their part of the insurance, while others may choose to continue the coverage during the insured individual's retirement or receipt of compensation. The amount of each type of continued insurance is determined by the total percentage of the shares of the assignees who choose to continue the coverage.

(c)(1) When an annuitant who has assigned his/her insurance is reemployed in a position in which he/she is entitled to life insurance coverage, the coverage he/she acquires as a reemployed annuitant is subject to the existing assignment.

(2) The right of a reemployed annuitant to elect Option B coverage as an employee rather than as an annuitant under § 870.705(d)(3) remains with the insured individual and does not transfer to the assignee. Any Option B coverage elected as an employee is subject to the existing assignment.

### § 870.909 Designations and changes of beneficiary.

(a)(1) An assignment automatically cancels an insured individual's prior designation of beneficiary. After making an assignment, an individual cannot designate a beneficiary; the right to designate beneficiaries transfers to the assignee.

(2) Each assignee may designate a beneficiary or beneficiaries to receive insurance benefits upon the death of the insured individual and may also later change the beneficiaries. An assignee may designate himself/herself the primary beneficiary and name another contingent beneficiary(ies) to receive insurance benefits if the assignee dies before the insured individual.

(b) Benefits for assigned insurance are paid to the assignee(s) if the assignee(s) did not designate a beneficiary.

(c) Benefits for assigned insurance are paid to an assignee's estate if the assignee dies before the insured individual and:

(1) The assignee (or the assignee's heirs) did not designate a beneficiary; or

(2) The assignee's designated beneficiary dies before the insured individual.

(d) The provisions of § 870.802 apply to designations of beneficiary made by assignees.

### § 870.910 Notification of current addresses.

Each assignee must keep the office where the assignment is filed informed of his/her current address.

[75 FR 60586, Oct. 1, 2010]

## Subpart J—Benefits for United States Hostages in Iraq and Kuwait and United States Hostages Captured in Lebanon

### § 870.1001 Purpose.

This subpart sets forth the conditions for life insurance coverage according to the provisions of section 599C of Pub. L. 101–513 (104 Stat. 2035).

### § 870.1002 Definitions.

In this subpart:

*Hostage* and *hostage status* have the meaning set forth in section 599C of Pub. L. 101–513 (104 Stat. 2035).

*Pay period* for individuals insured under this subpart means the pay period set by the U.S. Department of State.

*Period of eligibility* means the period beginning on the effective date set forth in § 870.1004 and ending 12 months after hostage status ends for hostages in Iraq and Kuwait and 60 months after hostage status ends for hostages captured in Lebanon.

### § 870.1003 Coverage and amount of insurance.

(a) An individual is covered under this subpart when the U.S. Department of State determines that the individual is eligible under section 599C of Pub. L. 101–513 (104 Stat. 2035).

(b)(1) The amount of Basic life insurance for these individuals is the amount specified in § 870.202, subject to the applicable conditions stated in this subpart.

(2) The BIA under § 870.202 is the amount of the payment specified in section 599C(b)(2) of Pub. L. 101–513 (104 Stat. 2035), rounded to the next higher $1,000, plus $2,000.

(c) Individuals who have Basic insurance under this section also have group accidental death and dismemberment insurance.

(d) Individuals insured by this subpart are not eligible for Optional insurance.

(e) Individuals insured by this subpart are not considered employees for the purpose of this part.

(f) Eligibility for insurance under this subpart depends on the availability of funds under section 599C(e) of Pub. L. 101–513 (104 Stat. 2035).

### § 870.1004 Effective date of insurance.

Insurance under this subpart was effective on August 2, 1990, for hostages in Iraq and Kuwait and on June 1, 1982, for hostages captured in Lebanon, unless the U.S. Department of State sets a later date.

### § 870.1005 Premiums.

(a) Government contributions and employee withholdings required under subpart D of this part are paid from the funds provided under section 599C(e) of Pub. L. 101–513 (104 Stat. 2035).

(b) If an individual isn't insured for the full pay period, premiums are paid only for the days he/she is actually insured. The daily premium is the monthly premium multiplied by 12 and divided by 365.

(c) OPM may accept the payments required by this section in advance from a State Department appropriation, if necessary to fund the 12–month period of coverage beginning the earlier of:

(1) The day after sanctions or hostilities end; or

(2) The day after the individual's hostage status ends.

(d) OPM will place any funds received under paragraph (c) of this section in an account set up for that purpose. OPM will make the deposit required under 5 U.S.C. 8714 from the account when the appropriate pay period occurs.

[62 FR 48731, Sept. 17, 1997; 62 FR 52181, Oct. 6, 1997]

### § 870.1006 Cancellation of insurance.

(a) An individual who is insured under this subpart may cancel his/her insurance at any time by written request. The cancellation is effective on the 1st day of the pay period after the pay period in which the U.S. Department of State receives the request.

(b) Cancellation must be requested by the insured individual and cannot be requested by a representative acting on the individual's behalf.

(c) An individual who cancels the insurance under this section cannot obtain the insurance again, unless the U.S. Department of State determines that it would be against equity and good conscience not to allow the individual to be insured.

### § 870.1007 Termination and conversion.

(a) Insurance under this subpart terminates 12 months after hostage status ends, unless the individual cancels the insurance earlier.

(b) Insured individuals whose coverage terminates are eligible for the 31–day extension of coverage and conversion as set forth in subpart F of this part, unless the individual cancelled the coverage.

### § 870.1008 Order of precedence and designation of beneficiary.

Insurance benefits are paid under the order of precedence set forth in 5 U.S.C.

8705(a) and under the provisions of subpart H of this part.

### § 870.1009 Responsibilities of the U.S. Department of State.

(a) The U.S. Department of State functions as the ''employing office'' for individuals insured under this subpart.

(b) The U.S. Department of State must determine the eligibility of individuals under Pub. L. 101–513 (104 Stat. 2035) for insurance under this subpart. This includes determining whether an individual is barred from insurance under chapter 87 of title 5 U.S.C. because of other life insurance as provided in section 599C of Pub. L. 101–513 (104 Stat. 2035).

## Subpart K—Living Benefits

### § 870.1101 Eligibility for a Living Benefit.

(a) Effective July 25, 1995, an insured individual who is certified by his/her doctor as terminally ill, as defined in § 870.101, may elect to receive a lump-sum payment of Basic insurance.

(b) Optional insurance is not available for payment as a Living Benefit.

(c)(1) The effective date of a Living Benefit election is the date on which the Living Benefit payment is cashed or deposited. Once an election becomes effective, it can't be revoked. No further election of Living Benefits can be made.

(2) If the insured individual dies before cashing or depositing the Living Benefit payment, the payment must be returned to OFEGLI.

(d) If the insured individual has assigned his/her insurance, he/she cannot elect a Living Benefit; nor can an assignee elect a Living Benefit on behalf of an insured individual.

(e) If an individual has elected a Living Benefit, he/she may assign his/her remaining insurance.

### § 870.1102 Amount of a Living Benefit.

(a)(1) An employee may elect to receive either:

(i) A full Living Benefit, which is all of his/her Basic insurance, or

(ii) A partial Living Benefit, which is a portion of his/her Basic insurance, in a multiple of $1,000.

(2) An annuitant or compensationer may only elect to receive a full Living Benefit.

(b) The amount of Basic insurance elected as a Living Benefit will be reduced by an actuarial amount representing the amount of interest lost to the Fund because of the early payment of benefits.

(c)(1) If an individual elects a full Living Benefit, the post-election BIA will be 0. If an employee elects a partial Living Benefit, the post-election BIA will be the BIA reduced in proportion to the amount of Basic insurance elected as a Living Benefit, as prescribed by Pub. L. 103–409 (108 Stat. 4231).

(2) The post-election BIA cannot change after the effective date of a Living Benefit election.

(d)(1) If an employee elects a full Living Benefit, Basic accidental death and dismemberment coverage terminates as of the effective date of the election.

(2) If an employee elects a partial Living Benefit, Basic accidental death and dismemberment coverage is reduced to equal the post-election BIA.

### § 870.1103 Election procedures.

(a) The insured individual must request information on Living Benefits and an application form directly from OFEGLI.

(b)(1) The insured individual must complete the first part of the application and have his or her physician complete the second part. The completed application must be submitted directly to OFEGLI.

(2) Another person may apply for a Living Benefit on the insured individual's behalf if all of the following conditions are met:

(i) The insured's physician must certify that the insured individual is physically or mentally incapable of making an election;

(ii) The applicant must have power of attorney or a court order authorizing him or her to elect a Living Benefit on the insured individual's behalf;

(iii) The applicant must place his or her own signature on the application and attach it to a true and correct copy of the power of attorney or court order authorizing the applicant to

make the election on the insured individual's behalf; and

(iv) The applicant must either be the insured individual's sole beneficiary or attach a true and correct copy of each beneficiary's written and signed consent.

(c)(1) OFEGLI reviews the application, obtains certification from the insured's employing office regarding the amount of insurance and the absence of an assignment, and determines whether the individual meets the requirements to elect a Living Benefit.

(2) If OFEGLI needs additional information, it will contact the insured or the insured's physician.

(3) Under certain circumstances, OFEGLI may require a medical examination before making a decision. In these cases, OFEGLI is financially responsible for the cost of the medical examination.

(d)(1) If the application is approved, OFEGLI sends the insured a check or makes an electronic funds transfer to the insured's account for the Living Benefit payment and an explanation of benefits.

(i) Until the check has been cashed or deposited, or before the electronic funds transfer has been received, the individual may change his or her mind about electing a Living Benefit; if this happens, the individual must mark the check ''void'' and return it to OFEGLI.

(ii) Once the insured individual has cashed or deposited the payment, the Living Benefit election becomes effective and cannot be revoked; OFEGLI then sends explanations of benefits to the insured's employing office, so it can make the necessary changes in withholdings and deductions.

(2) If the application is not approved, OFEGLI will notify the insured individual and the employing office. The decision is not subject to administrative review; however, the individual may submit additional medical information or reapply at a later date if future circumstances warrant.

[75 FR 60586, Oct. 1, 2010]

## Subpart L [Reserved]

# PART 875—FEDERAL LONG TERM CARE INSURANCE PROGRAM

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AUTHORITY: 5 U.S.C. 9008.

SOURCE: 68 FR 5534, Feb. 4, 2003, unless otherwise noted.

## Subpart A—Administration and General Provisions

### § 875.101 Definitions.

This part is written as if the reader were an applicant or enrollee. Accordingly, the terms ''you,'' ''your,'' etc., refer, as appropriate, to the applicant or enrollee.

In this part, the terms *annuitant, employee, member of the uniformed services, retired member of the uniformed services,* and *qualified relative* have the meanings set forth in section 9001 of title 5, United States Code, and supplement the following definitions:

*Abbreviated underwriting* is a type of underwriting that asks fewer questions about your health status than with full underwriting to enable the Carrier to determine whether your application for coverage will be approved. The Carrier may also require review of your medical records, a phone interview, or an in-home interview.

*Actively at work* means:

(1) That as an active workforce member other than a member of the uniformed services you meet all of the following conditions:

(i) You are reporting for work at an approved work location and you work at least one-half of your regularly scheduled hours for that day; and

(ii) You are able to perform all the usual and customary duties of your employment on your regular work schedule.

(2) For a member of the uniformed services, that you are on active duty and are physically able to perform the duties of your position.

*Carrier* means a qualified carrier as defined in section 9001 of title 5, United States Code, with which OPM has contracted to provide long term care insurance coverage under this section. A Carrier may designate 1 or more administrators to perform some of its obligations.

*Domestic partner* is defined as a person in a domestic partnership with an employee, annuitant, member of the uniformed services, or retired member of the uniformed services.

*Domestic partnership* means:

(1) A committed relationship between two adults, of the opposite sex or same sex, in which the partners—

(i) Are each other's sole domestic partner and intend to remain so indefinitely;

(ii) Maintain a common residence, and intend to continue to do so (or would maintain a common residence but for an assignment abroad or other employment-related, financial, or similar obstacle);

(iii) Are at least 18 years of age and mentally competent to consent to a contract;

(iv) Share responsibility for a significant measure of each other's financial obligations;

(v) Are not married or joined in a civil union to anyone else;

(vi) Are not a domestic partner of anyone else;

(vii) Are not related in a way that would prohibit legal marriage in the U.S. jurisdiction in which the domestic partnership was formed;

(viii) Provide documentation demonstrating fulfillment of the requirements of paragraphs (1)(i) through (vii) of this definition as prescribed by OPM; and

(ix) Certify that they understand that willful falsification of the documentation described in paragraph (1)(viii) of this definition may lead to disciplinary action and the recovery of the cost of benefits received related to such falsification and may constitute a criminal violation under 18 U.S.C. 1001.

(2) You or your domestic partner must notify the employing office if at any time between the time of application and the time coverage is scheduled to go into effect, any of the conditions listed in paragraphs (1)(i) through (vii) of this definition are no longer met, in which case a domestic partnership is deemed terminated. Such notification must be made as soon as possible, but in no event later than thirty calendar days after such conditions are no longer met.

*Eligible individual* means an annuitant, active workforce member, member of the uniformed services, retired member of the uniformed services or qualified relative, as defined in section 9001 of title 5, United States Code.

*Enrollee* means an eligible individual whose application for coverage the Carrier has approved and whose coverage is in effect.

*FLTCIP* means the Federal Long Term Care Insurance Program.

*Free look* means that within 30 days after you receive the Benefit Booklet, you may cancel your coverage if you are not satisfied with it and receive a refund of any premium you paid. It will be as if the coverage was never issued.

*Full underwriting* is the more comprehensive type of underwriting under the FLTCIP, which requires that you answer many questions about your health status to enable the Carrier to determine whether your application for coverage will be approved. The Carrier may also require review of your medical records, a phone interview, or an in-home interview.

*Stepchild(ren),* as set forth in section 9001 of title 5, United States Code, means the child(ren) of the spouse or domestic partner of an employee, annuitant, member of the uniformed services, or retired member of the uniformed services.

*Stepparent* means any person, other than your mother or father, who is currently married to one of your parents, or, if one of your parents is dead, a person who was married to that parent at the time of that parent's death.

*Underwriting requirements* means the information about your current health status and history and other information that you must provide to the Carrier with your application for coverage to enable the Carrier to determine your insurability.

*Workforce member* means a Federal civilian or Postal employee, member of the uniformed services, Federal annuitant, retired member of the uniformed services, or member of any other eligible group, as defined in section 9001 of title 5, United States Code. An active workforce member is one who is currently employed or is on active duty.

[68 FR 5534, Feb. 4, 2003, as amended at 70 FR 30606, May 27, 2005; 80 FR 66786, Oct. 30, 2015; 81 FR 10057, Feb. 29, 2016]

### § 875.102 Where do I send benefit claims?

You must submit your benefit claims to the FLTCIP Carrier or its designee.

### § 875.103 Do I need to authorize release of my medical records when I file a claim?

Yes, if you file a claim for benefits, the Carrier needs to have a valid authorization from you to release your medical records.

### § 875.104 What are the steps required to resolve a dispute involving benefit eligibility or payment of a claim?

(a) If you dispute the Carrier's denial of your eligibility for benefits or your claim for payment of benefits, you must first send a written request for reconsideration to the Carrier no later than 60 days from the date of its decision.

(b) The Carrier must provide you with written notice of its review decision no later than 60 days after the date it receives your reconsideration request.

(c) If the Carrier upholds its denial (or does not respond within 60 days), you have the right to appeal its reconsideration decision directly to the Carrier. You must make this appeal in writing within 60 days from the date of

the Carrier's notice upholding its decision. You will be notified of the decision on your appeal in writing no later than 60 days from receipt of your appeal request.

(d) If a denial of your eligibility for benefits or a denial of your claim is upheld upon appeal due to the evaluation of your medical condition/functional capacity, the Carrier will inform you that you may request that an independent third party, mutually agreed to by OPM and the Carrier, review the decision. You must make this request in writing within 60 days from the date of the notice informing you of the appeal decision. The independent third party must notify you in writing of its decision no later than 60 days from the Carrier's or its designee's receipt of your request for appeal to the third party. This is the final administrative remedy available to you. The decision of the independent third party is final and binding on the Carrier.

(e) You may seek judicial review of the final administrative denial of a claim. Such action may not be brought prior to exhaustion of the administrative process provided in this section. To pursue such judicial review, you must bring legal action against the Carrier in an appropriate United States district court within 2 years from the date of the final decision. You may not sue OPM, the independent reviewer, or any other entity. If you prevail in court, your recovery is limited to the amount of benefits payable under your benefit booklet and schedule of benefits.

(f) The procedures described in paragraphs (a), (b), (c), (d), and (e) of this section apply only if you have valid coverage under the FLTCIP. If the Carrier determines that your coverage was based on an erroneous application and voids the coverage as described in § 875.408 of this part, these provisions do not apply. The Carrier will provide you with information on your review rights in its rescission letter (letter voiding your coverage).

[68 FR 5534, Feb. 4, 2003, as amended at 70 FR 30607, May 27, 2005; 72 FR 12037, Mar. 15, 2007]

### § 875.105 May OPM correct errors?

OPM may order correction of administrative errors after reviewing evidence and finding that it would be against equity and good conscience not to do so.

### § 875.106 What responsibilities do agencies have under this Program?

Federal agencies and uniformed services establishments are responsible for:

(a) Providing access to information about the FLTCIP to eligible individuals;

(b) Responding to questions from the Carrier, including questions on the employment status of an applicant or enrollee;

(c) Providing reports as OPM requires;

(d) Complying with Benefits Administration Letters and other OPM issuances/instructions; and

(e) Deducting premiums as authorized by a workforce member and as requested by the Carrier, when possible.

### § 875.107 What are OPM's responsibilities as regulator under this Program?

Consistent with the authority and discretion given to OPM by the FLTCIP law, OPM's responsibilities include those functions typically associated with, and preemptive of, State insurance regulatory authorities such as:

(a) Reviewing and approving the content and format of materials associated with the FLTCIP pursuant to section 9008(d) of title 5, United States Code;

(b) Reviewing and approving rates, forms, and marketing materials; and

(c) Determining the qualifications of enrollment personnel and the Program administrator(s).

### § 875.108 If the Carrier approves my application, will I get a certificate of insurance?

If the Carrier approves your application for coverage, OPM and/or the Carrier will make available to you a benefit booklet and schedule of benefits with complete coverage information, which will serve as your proof of insurance. You will also get a copy of your approved application for coverage.

### § 875.109 Is there a delegation of authority for resolving contract disputes between OPM and the Carrier?

For the purpose of making findings of fact and to the extent that conclusions of law may be required under any proceeding conducted in accordance with the provisions of the disputes clause included in the FLTCIP master contract, OPM delegates this function to the Armed Services Board of Contract Appeals.

## Subpart B—Eligibility

### § 875.201 Am I eligible as a Federal civilian or Postal employee?

(a) If you are a Federal civilian or Postal employee whose current position conveys eligibility for Federal Employees Health Benefits under part 890 of this chapter, you are also eligible to apply for coverage, with the following exceptions:

(1) If you are a District of Columbia employee or retiree, you are not eligible to apply for coverage, regardless of whether you are eligible for Federal Employees Health Benefits coverage. There is a related exception, however: D.C. government employees and retirees who were first employed by the D.C. government before October 1, 1987 are eligible to apply for coverage.

(2) If you are a Tennessee Valley Authority employee or retiree, you are eligible to apply for coverage, even though you may not be eligible for Federal Employees Health Benefits coverage.

(3) If you are a Non-Appropriated Fund (NAF) employee or retiree you are eligible to apply when the Secretary of Defense determines such eligibility for the NAF instrumentality that employs you, and you will be treated the same as a Federal civilian employee or retiree (as applicable) under this Part.

(b) If you are a Federal civilian or Postal employee whose current position is excluded from Federal Employees Health Benefits eligibility under § 890.102 of this chapter, you are excluded from applying for coverage unless paragraph (a)(2) of this section applies.

(c) If you are an annuitant reemployed by the Federal Government, you may apply for coverage as an employee.

[68 FR 5534, Feb. 4, 2003, as amended at 70 FR 30607, May 27, 2005]

### § 875.202 Am I eligible as a Federal annuitant?

If you are a Federal annuitant, including a survivor annuitant, a deferred annuitant, or a compensationer, you are eligible to apply for coverage. Separated Federal employees with title to a deferred annuity may apply for coverage, even if they are not yet receiving that annuity.

[68 FR 5534, Feb. 4, 2003, as amended at 70 FR 30607, May 27, 2005]

### § 875.203 Am I eligible if I separated under the FERS MRA+10 provision?

If you have separated from service under the FERS Minimum Retirement Age and 10 years of service (MRA+10) provision of 5 U.S.C. 8412(g), and have postponed receiving an annuity under that provision, you are eligible to apply for coverage under this part. For underwriting purposes, you will be considered an annuitant.

### § 875.204 Am I eligible as a member of the uniformed services?

(a) You are eligible to apply for coverage if you are on active duty or full-time National Guard duty for more than a 30-day period.

(b) You are eligible to apply for coverage if you are a member of the Selected Reserve, which consists of:

(1) Drilling Reservists and Guardsmembers assigned to Reserve Component Units;

(2) Individual Mobilization Augmentees who are Reservists assigned to Reserve Component billets in Active Component units (you may be performing duty in a pay or non-pay status); and

(3) Active Guard and Reserve members who are full-time Reserve members on full-time National Guard duty or active duty in support of the National Guard or Reserves.

(c) You are not eligible to apply for coverage if you belong to the Individual Ready Reserve. The Individual Ready Reserves includes Reservists

who are assigned to a Voluntary Training Unit in the Naval Reserve and Category E in the Air Force Reserve.

### § 875.205 Am I eligible as a retired member of the uniformed services?

(a) You are eligible to apply for coverage if you are a retired member of the uniformed services entitled to retired or retainer pay (including disability retirement pay).

(b) You are eligible to apply for coverage if you are a retired reservist who is currently receiving retirement pay.

(c) You are eligible to apply for coverage as a retired (''grey'') reservist, even if not yet receiving retirement pay.

[68 FR 5534, Feb. 4, 2003, as amended at 70 FR 30607, May 27, 2005]

### § 875.206 As a new active workforce member, when may I apply?

(a) As a new, newly eligible, or returning active workforce member, you may apply as follows:

(1) If you are a new active workforce member entering a position that conveys eligibility, you may apply for coverage within 60 days after becoming eligible.

(2) If you are entering a position that conveys eligibility as an active workforce member from a position that did not convey eligibility, you may apply for coverage within 60 days after becoming eligible.

(3) If you return to active service after a break in service of 180 days or more to a position that conveys eligibility, you may apply for coverage within 60 days after becoming eligible.

(b) Your spouse may also apply during that 60-day period after you become eligible.

(c) The underwriting requirements that will be required will be those applicable to active workforce members and their spouses during the last open season for enrollment before the date of your application.

(d) After the 60-day period ends, you may still apply for coverage, as may your spouse, but full underwriting requirements will apply.

(e) If your employing office determines that you were unable, for a cause beyond your control, to submit an application during the initial 60-day period, you may submit an application within 60 days after your employing office advises you of that determination. Similarly, your employing office may make this determination if your spouse is unable to submit an application during the same time period for a cause beyond his/her control. This employing office authority only applies within 6 months after the beginning date of the initial eligibility period. The underwriting requirements will be as specified in paragraph (c) of this section.

(f) Your other qualified relatives may apply for coverage at any time. They will be subject to full underwriting requirements.

[68 FR 5534, Feb. 4, 2003, as amended at 70 FR 30607, May 27, 2005]

### § 875.207 What happens if I am in nonpay status during an open season?

(a) If you return to a pay status from nonpay status during the open season, you have 60 days from the date of your return, or until the end of the open season, whichever gives you more time, to apply for coverage pursuant to the open season underwriting requirements for Federal civilian or Postal employees and members of the uniformed services.

(b) If you return to pay status from nonpay status after the open season, you have 60 days from the date of your return to apply for coverage pursuant to the underwriting requirements specified for Federal civilian or Postal employees and members of the uniformed services in the immediately preceding open season.

(c) Paragraphs (a) and (b) of this section apply only when you have been in nonpay status for more than one-half of an open season, unless you went into nonpay status for a reason beyond your control.

### § 875.208 May I apply as a qualified relative if the person on whom I am basing my eligibility status has died?

You may not apply as a qualified relative if the workforce member on whom you are basing your qualified relative status died prior to the time you apply for coverage, unless you are receiving a survivor annuity as the spouse or an insurable interest annuity

as the domestic partner of a deceased workforce member. In this case, your adult children and your current spouse or domestic partner are also considered to be qualified relatives.

[80 FR 66786, Oct. 30, 2015]

### § 875.209 How do I demonstrate that I am eligible to apply for coverage?

(a) When you submit your application for coverage, you must make known your status as a member of an eligible group.

(b) If the Carrier finds that you misrepresented your eligibility status, the Carrier has the right to void your coverage and return to you any premiums you paid, without interest. The incontestability provisions in § 875.408 do not apply to this section.

[68 FR 5534, Feb. 4, 2003, as amended at 72 FR 12037, Mar. 15, 2007]

### § 875.210 What happens if I become ineligible after I submit an application?

(a) You must be eligible at the time of your application and at the time your coverage is scheduled to go into effect. Except as noted in paragraph (b) of this section, if you lose your status as part of an eligible group before your coverage goes into effect, you are no longer eligible for FLTCIP coverage. You are required to inform the Carrier that you are no longer eligible.

(b) In two instances, you will continue to be eligible for coverage even if you lose your status as part of an eligible group after you submit an application for coverage, but before your coverage becomes effective. The two instances are:

(1) When you are involuntarily separated from Federal civilian service (except for misconduct) or from the uniformed services (except for a dishonorable discharge). In either of these events, your qualified relatives will continue to be eligible.

(2) When you are the qualified relative of a workforce member who dies.

### § 875.211 What happens if my eligibility status changes after I submit my application?

(a) If you applied as an active workforce member, and separate from service under the MRA+10 provisions of 5 U.S.C. 8412(g), or retire after you submit an application for coverage, but before your coverage becomes effective, you must reapply as an annuitant and submit to full underwriting requirements.

(b) If you applied as an active workforce member, and otherwise separate from service, but you are a qualified relative of another workforce member, you must reapply based on the additional underwriting requirements specified for that type of qualified relative.

[70 FR 30607, May 27, 2005]

### § 875.212 Is there a minimum application age?

Yes, there is a minimum application age. You must be at least 18 years old at the time you submit an application for coverage.

### § 875.213 May I apply as a qualified relative if I am the domestic partner of an employee or annuitant?

(a) You may apply for coverage as a qualified relative if you are a domestic partner, as described in § 875.101 of this chapter. As prescribed by OPM, you will be required to provide documentation to demonstrate that you meet these requirements, and you must submit to full underwriting requirements. However, as explained in § 875.210 of this chapter, if you lose your status as a domestic partner, and therefore a qualified relative, before your coverage goes into effect, you are no longer eligible for FLTCIP coverage.

(b) For purposes of this part, the term ''domestic partner'' is a person in a domestic partnership with an employee or annuitant of the same sex. The term ''domestic partnership'' is defined as a committed relationship between two adults, of the same sex, in which the partners—

(1) Are each other's sole domestic partner and intend to remain so indefinitely;

(2) Have a common residence, and intend to continue the arrangement indefinitely;

(3) Are at least 18 years of age and mentally competent to consent to a contract;

(4) Share responsibility for a significant measure of each other's financial obligations;

(5) Are not married to anyone else;

(6) Are not a domestic partner of anyone else;

(7) Are not related in a way that, if they were of opposite sex, would prohibit legal marriage in the State in which they reside; and

(8) Certify that they understand that willful falsification of the documentation described in paragraph (a) of this section may lead to disciplinary action and the recovery of the cost of benefits received related to such falsification and may constitute a criminal violation under 18 U.S.C. 1001.

[75 FR 30268, June 1, 2010, as amended at 80 FR 66786, Oct. 30, 2015]

## Subpart C—Cost

### § 875.301 Is there a Government contribution toward premiums?

There is no Government premium contribution toward the cost of long term care insurance.

### § 875.302 What are the options for making premium payments?

(a) Premium payments may be made by Federal payroll or annuity deduction, uniformed services retirement pay deduction, by pre-authorized debit, or by direct billing.

(b) You must continue to make premium payments when they are due for your coverage to stay in effect.

### § 875.303 How are premium payment errors corrected?

(a) If the Carrier finds that you have underpaid the premium rate for your age and/or level of coverage, you must pay retroactive premiums to the Carrier for the amount due. If you fail to pay back premiums within the time provided by the Carrier to correct the error, the Carrier may terminate your coverage.

(b) If the Carrier finds that you have overpaid premiums, the Carrier will either reimburse you or reduce a future premium payment(s) by the amount of the overpayment.

(c) If you die while you have coverage, any premiums paid for the period beyond the date of your death will be refunded to your estate or to an alternate payee. If there is no estate, the Carrier will determine whether to pay the refund to an alternate payee. If you cancel your coverage, any premiums paid in advance for the period following the effective date of your cancellation will be refunded to you.

(d) Any premiums you paid will be returned if you cancel coverage within the ''free look'' period specified in the benefit booklet.

### § 875.304 How does the Carrier account for FLTCIP funds?

The Carrier must keep account of all funds received under this section separate from all other funds. The Carrier may use FLTCIP funds only for purposes specifically related to the FLTCIP.

## Subpart D—Coverage

### § 875.401 How do I apply for coverage?

(a) To apply for coverage, you must complete the application in a form appropriate for your eligibility status as prescribed by the Carrier and approved by OPM.

(b) If you are the qualified relative of a workforce member, you may apply for coverage even if the workforce member does not apply for coverage.

### § 875.402 When will open seasons be held?

(a) The first open season for enrollment under this section began July 1, 2002, as described in a FEDERAL REGISTER Notice (67 FR 43691, June 28, 2002), including the open season ending date(s) and which eligible individuals may apply based on abbreviated underwriting.

(b) There are no regularly scheduled open seasons for long term care insurance. OPM will announce any subsequent open seasons via a FEDERAL REGISTER Notice. The Notice will include the requirements for applicants during the open season.

(c) In situations where new eligibility groups are added to the Program, and OPM determines that it is appropriate to have an open season, OPM will provide notice and set the requirements for a special open season limited to those eligible individuals.

[68 FR 5534, Feb. 4, 2003, as amended at 70 FR 30607, May 27, 2005]

### § 875.403 May I apply for coverage outside of an open season?

If you are eligible for coverage, you may submit an application at any time outside of an open season. You will be subject to full underwriting requirements. The only exceptions to the full underwriting requirements outside of an open season are described in § 875.206 and § 875.405.

[68 FR 5534, Feb. 4, 2003, as amended at 70 FR 30607, May 27, 2005]

### § 875.404 What is the effective date of coverage?

(a) The effective dates of coverage under open season enrollments will be announced in a FEDERAL REGISTER Notice that announces open season dates.

(b)(1) If you enroll at any time outside of an open season, your coverage effective date is the 1st day of the month after the date your application is approved.

(2) If you are an active workforce member and you are applying for coverage under abbreviated underwriting, you also must be actively at work at least 1 day during the calendar week immediately before the week which contains your coverage effective date for your coverage to become effective. You must inform the Carrier if you do not meet this requirement. In the event you do not meet this requirement, the Carrier will issue you a revised effective date, which will be the 1st day of the next month. You also must meet the actively at work requirement for any revised effective date for coverage to become effective, or you will be issued another revised effective date in the same manner.

[68 FR 5534, Feb. 4, 2003, as amended at 70 FR 30607, May 27, 2005]

### § 875.405 If I marry, may my new spouse apply for coverage; if I become a domestic partner, may my new domestic partner apply for coverage; and may other qualified relatives apply for coverage?

(a) *Marriage.* (1) If you are an active workforce member and you have married, your spouse is eligible to submit an application for coverage under this section within 60 days from the date of your marriage and will be subject to the underwriting requirements in force for the spouses of active workforce members during the most recent open season. You, however, are not eligible for abbreviated underwriting because of your marriage. You, your spouse, or both you and your spouse may apply for coverage during this 60-day period, but full underwriting will be required for you. After 60 days from the date of your marriage, you and/or your spouse may still apply for coverage but will be subject to full underwriting.

(2) If you are an active workforce member and you have entered into a domestic partnership, your domestic partner is eligible to submit an application for coverage under this section at any time from the commencing date of your domestic partnership and will be subject to full underwriting requirements. You are not eligible for abbreviated underwriting because of your domestic partnership. You, your domestic partner, or both you and your domestic partner may apply for coverage at any time, but full underwriting will be required for both of you.

(b) *Domestic partnership.* The new spouse or domestic partner of an annuitant or retired member of the uniformed services may apply for coverage with full underwriting at any time following the marriage or commencing date of the domestic partnership.

(c) *Other qualified relatives.* Other qualified relative(s) of a workforce member may apply for coverage with full underwriting at any time following the marriage or commencing date of the domestic partnership.

[80 FR 66786, Oct. 30, 2015]

### § 875.406 May I change my coverage?

(a) You may make the following changes to your coverage:

(1) You may apply to increase your coverage at any time. Full underwriting is required, except when an open season allows abbreviated underwriting.

(2) If you increase your coverage by adding to your daily benefit amount, the premiums for the additional coverage will be based on your age, prevailing premium rates, and coverage rules in effect at the time you purchase the additional coverage.

(3) For other types of coverage increases, your entire premium will be based on your age, prevailing premium rates, and coverage rules in effect at the time you purchase the increased coverage. Any increase in coverage will take effect on the 1st day of the month following the date the Carrier approves your request for an increase.

(b) You may decrease your coverage at any time, although any decrease will be subject to coverage rules at the time of the decrease. Decreased coverage takes effect on the 1st day of the month after the Carrier receives your request. You will not receive any refund of premiums paid for coverage you held before the decrease; however, your subsequent premiums will be reduced based on your new, lower level of coverage. The Carrier will refund or credit any portion of premium paid in advance for the period following the date on which you decrease your coverage.

(c) You may cancel your coverage at any time.

(1) If you cancel during the free look period, your premiums will be refunded to you.

(2) If you cancel your coverage at any time other than during the free look period, cancellation will take effect on your requested cancellation date or at the end of the period covered by your last premium payment, whichever occurs first. You will not receive any refund of premiums paid, other than any premiums paid in advance for the period following the effective date of your cancellation of coverage, and you will not have to pay any more premiums unless you owed retroactive premiums.

### § 875.407 Who makes insurability decisions?

The Carrier determines the insurability of all applicants. The Carrier's decision may not be appealed to OPM.

### § 875.408 What is the significance of incontestability?

(a) Incontestability means coverage issued based on an erroneous application may remain in effect. Such coverage will not remain in effect under any of the following conditions:

(1) If your coverage has been in force for less than 6 months, the Carrier may void your coverage upon a showing that information on your signed application that was material to your approval for coverage is different from what is shown in your medical records.

(2) If your coverage has been in force for at least 6 months but less than 2 years, the Carrier may void your coverage upon a showing that information on your signed application that was material to your approval for coverage is different from what is shown in your medical records and pertains to the condition for which benefits are sought.

(3) After your coverage has been in effect for 2 years, the Carrier may void your coverage only upon a showing that you knowingly and intentionally made a false or misleading statement or omitted information in your signed application for coverage regarding your health status that was material to your approval for coverage.

(4) If your coverage is voided, as described in paragraph (a)(1), (a)(2), or (a)(3) of this section, no claims will be paid. In addition, the provisions of § 875.104 relating to the procedures for resolving a dispute involving benefits eligibility or claims denials do not apply to your situation. You may request a review by the Carrier if you believe that your coverage was voided in error. You must submit your request in writing to the Carrier within 30 days of the date of the rescission letter (letter voiding your coverage).

(b) Your coverage can be contested at any time when the Carrier finds that you were not an eligible individual at the time you applied and were approved for coverage.

(c) If the Carrier voids coverage after it has paid benefits, it cannot recover the benefits already paid.

(d) Incontestability does not apply when you have not paid your premiums on a timely basis.

[68 FR 5534, Feb. 4, 2003, as amended at 72 FR 12037, Mar. 15, 2007]

### § 875.409 Must I provide an authorization to release medical information?

You must provide the Carrier with an authorization to release medical information when requested. The Carrier may deny a claim for benefits or void your coverage if the Carrier does not

receive an authorization to release medical information within 3 weeks after its request (4 weeks for those outside the United States).

### § 875.410 May I continue my coverage when I leave Federal or military service?

If you are an active workforce member, your coverage will automatically continue when you leave active service, as long as the Carrier continues to receive the required premium when due. However, once you leave active service, you are no longer eligible for any abbreviated underwriting provided during any future open season.

[68 FR 5534, Feb. 4, 2003, as amended at 72 FR 12038, Mar. 15, 2007]

### § 875.411 May I continue my coverage when I am no longer a qualified relative?

If you are already enrolled as a qualified relative, you may continue your FLTCIP coverage if you subsequently lose qualified relative status (such as upon divorce), as long as the Carrier receives the required premium when due.

### § 875.412 When will my coverage terminate?

Except as provided in paragraph (e) of this section, your coverage will terminate on the earliest of the following dates:

(a) The date you specify to the Carrier that you wish your coverage to end;

(b) The date of your death;

(c) The end of the period covered by your last premium payment if you do not pay the required premiums when due, after a grace period of 30 days; or

(d) The date you have exhausted your maximum lifetime benefit. (However, in this event, care coordination services will continue.)

(e) Termination of a domestic partnership does not terminate insurance coverage as long as the Carrier continues to receive the required premium when due.

[68 FR 5534, Feb. 4, 2003, as amended at 80 FR 66787, Oct. 30, 2015]

### § 875.413 Is it possible to have coverage reinstated?

(a) Under certain circumstances, your coverage can be reinstated. The Carrier will reinstate your coverage if it receives proof satisfactory to it, within 6 months from the termination date, that you suffered from a cognitive impairment or loss of functional capacity, before the grace period ended, that caused you to miss making premium payments. In that event, you will not be required to submit to underwriting. Your coverage will be reinstated retroactively to the termination date but you must pay back premiums for that period. The premium will be the same as it was prior to termination.

(b) If your coverage has terminated because you did not pay premiums or because you requested cancellation, the Carrier may reinstate your coverage within 12 months from the termination date at your request. You will be required to reapply based on full underwriting, and the Carrier will determine whether you are still insurable. If you are insurable, your coverage will be reinstated retroactively to the termination date and you must pay back premiums for that period. The premium will be the same as it was prior to termination.

### § 875.414 Will benefits be coordinated with other coverage?

Yes, benefits will be coordinated with other plans, following the coordination of benefits (COB) guidelines set by the National Association of Insurance Commissioners. The total benefits from all plans that pay a long term care benefit to you should not exceed the actual costs you incur. The other plans that are considered for COB purposes include government programs, group medical benefits, and other employer-sponsored long term care insurance plans. Medicaid, individual insurance policies, and association group insurance policies are not taken into consideration under this provision.

# PART 880—RETIREMENT AND INSURANCE BENEFITS DURING PERIODS OF UNEXPLAINED ABSENCE

### Subpart A—General

Sec.
880.101 Purpose and scope.
880.102 Regulatory structure.
880.103 Definitions.

### Subpart B—Procedures

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880.202 Referral to Associate Director.
880.203 Missing annuitant status and suspension of annuity.
880.204 Restoration of annuity.
880.205 Determinations of death.
880.206 Date of death.
880.207 Adjustment of accounts after finding of death.

### Subpart C—Continuation of Benefits

880.301 Purpose.
880.302 Payments of CSRS or FERS benefits.
880.303 FEHBP coverage.
880.304 FEGLI coverage.

AUTHORITY: 5 U.S.C. 8347(a), 8461(g), 8716, 8913.

SOURCE: 63 FR 10291, Mar. 3, 1998, unless otherwise noted.

## Subpart A—General

### § 880.101 Purpose and scope.

(a) The purpose of this part is to establish a uniform standard that OPM will use in its administration of benefits for CSRS, FERS, FEHBP and FEGLI in cases in which an annuitant becomes a missing annuitant.

(b) This part establishes the procedures that OPM will follow to—

(1) Determine—

(i) Who is a missing annuitant,

(ii) When a missing annuitant has died,

(iii) When benefits will be paid in missing annuitant cases, and

(iv) FEHBP coverage for family members of a missing annuitant; and

(2) Make adjustments to CSRS and FERS benefit payments, FEHBP coverage and premiums, and FEGLI benefit payments and premiums after a determination that a missing annuitant is dead.

(c) This part applies only to situations in which an individual who satisfies the statutory definition of an annuitant under section 8331(9) or section 8401(2) of title 5, United States Code, disappears and has not been determined to be dead by an authorized institution. This part does not apply to—

(1) An employee, regardless of whether the absence is covered by subchapter VII of chapter 55 of title 5, United States Code; or

(2) A separated employee who either—

(i) Does not meet the age and service requirements for an annuity, or

(ii) Has not filed an application for annuity.

### § 880.102 Regulatory structure.

(a) This part contains the following subparts:

(1) Subpart A contains general information about this part and related subjects.

(2) Subpart B establishes the procedures that OPM will follow in missing annuitant cases.

(3) Subpart C establishes the methodologies that OPM will apply in determining continuations of coverage and amounts of payments in missing annuitant cases.

(b) Part 831 of this chapter contains information about benefits under CSRS.

(c) Part 838 of this chapter contains information about benefits available to former spouses under court orders.

(d) Parts 841 through 844 of this chapter contain information about benefits under FERS.

(e) Part 870 of this chapter contains information about benefits under FEGLI.

(f) Part 890 of this chapter contains information about benefits under FEHBP.

(g) Part 1200 of this title contains information about Merit Systems Protection Board review of OPM decisions affecting interests in CSRS or FERS benefits.

(h) Part 1600 of this title contains information about benefits under the Thrift Savings Plan.

### § 880.103 Definitions.

For purposes of this part—

*Annuitant* means an individual who has separated from the Federal service with, and has retained, title to a CSRS or FERS annuity, has satisfied the age and service requirements for commencement of that annuity, and has filed an application for that annuity;

*Associate Director* means OPM's Associate Director for Retirement and Insurance or his or her designee;

*Authorized institution* means a government organization or official legally charged with making determinations of death in the State or country of the missing annuitant's domicile, citizenship, or disappearance;

*CSRS* means the Civil Service Retirement System established in subchapter III of chapter 83 of title 5, United States Code;

*FEGLI* means the Federal Employees Group Life Insurance program established in chapter 87 of title 5, United States Code;

*FEHBP* means the Federal Employees Health Benefits Program established in chapter 89 of title 5, United States Code;

*FERS* means the basic benefit portion of the Federal Employees Retirement System established in subchapters I, II, IV, V, and VI of chapter 84 of title 5, United States Code; *FERS* does not include benefits under the Thrift Savings Plan established under subchapters III and VII of chapter 84 of title 5, United States Code;

*Missing annuitant* means an individual who has acquired the status of missing annuitant under § 880.203(b).

## Subpart B—Procedures

### § 880.201 Purpose and scope.

This subpart establishes the procedures that OPM will use to—

(a) Determine that an individual is a missing annuitant;

(b) Suspend payment of annuity to a missing annuitant;

(c) Notify individuals affected by such a suspension of payments; and

(d) Determine that a missing annuitant has died.

### § 880.202 Referral to Associate Director.

Any OPM office that receives information concerning the possibility that an annuitant might have disappeared will notify the Associate Director.

### § 880.203 Missing annuitant status and suspension of annuity.

(a) Upon receipt of information concerning the possibility that an annuitant has disappeared, the Associate Director will conduct such inquiry as he or she determines to be necessary to determine whether the annuitant is alive and whether the annuitant's whereabouts can be determined.

(b) If during an inquiry under paragraph (a) of this section, or upon subsequent receipt of additional information, the Associate Director finds substantial evidence (as defined in § 1201.56(c)(1) of this title) to believe that an annuitant is either not alive or that the annuitant's whereabouts cannot be determined, the annuitant acquires the status of missing annuitant. The Associate Director will then—

(1) Suspend payments to the missing annuitant; and

(2) Notify individuals who may be able to qualify for payments under § 880.302 that—

(i) OPM has suspended the annuity payments to the missing annuitant;

(ii) Payment may be made under § 880.302, including the amount available for payment, how that amount was determined, and the documentation required (if any) to qualify for such payments; and

(iii) In response to an inquiry from any person seeking CSRS, FERS, FEHBP, or FEGLI benefits, OPM will provide information about documentation necessary to establish a claim for such benefits.

### § 880.204 Restoration of annuity.

(a) If the missing annuitant's whereabouts are determined, and he or she is alive and—

(1) Competent, OPM will resume payments to the annuitant and pay retroactive annuity for the period in missing status less any payment made to the family during that period; or

(2) Incompetent, OPM will resume payments to a representative payee under section 8345(e) or section 8466(c) of title 5, United States Code, and pay retroactive annuity for the period in

missing status less any payment made to the family during that period.

(b) If the missing annuitant's whereabouts cannot be determined, missing annuitant status continues until an authorized institution determines that the missing annuitant is dead. (See § 880.205.)

### § 880.205 Determinations of death.

OPM does not make findings of presumed death. A claimant for CSRS, FERS, or FEGLI death benefits (other than payments under § 880.302) or an individual seeking an adjustment of accounts under § 880.207 must submit a death certificate or other legal certification of death issued by an authorized institution.

### § 880.206 Date of death.

(a) Except as provided in paragraph (b) of this section, for the purpose of benefits administered by OPM, the date of death of a missing annuitant who has been determined to be dead by an authorized institution is the date of disappearance as determined by the Associate Director.

(b) For the purpose of determining whether a claim is untimely under any statute of limitations applicable to CSRS, FERS or FEGLI benefits (section 8345(i)(2), section 8466(b), or section 8705(b) through (d) of title 5, United States Code), the time between the date of disappearance and the date on which the authorized institution issues its decision that the missing annuitant is dead is excluded.

### § 880.207 Adjustment of accounts after finding of death.

After a missing annuitant is determined to be dead under § 880.205, OPM will review the case to determine whether additional benefits are payable or excess insurance premiums have been withheld.

## Subpart C—Continuation of Benefits

### § 880.301 Purpose.

This subpart establishes OPM's policy concerning the availability and amount of CSRS and FERS annuity payments and the continuation of FEHBP and FEGLI coverage and premiums while an annuitant is classified as a missing annuitant.

### § 880.302 Payments of CSRS or FERS benefits.

(a) OPM will pay an amount equal to the survivor annuity that would be payable as CSRS or FERS survivor annuity to an account in a financial institution designated (under electronic funds transfer regulations in part 209 or part 210 of Title 31, Code of Federal Regulations) by an individual who, if the missing annuitant were dead, would be entitled to receive payment of a survivor annuity.

(b) If more than one individual would qualify for survivor annuity payments in the event of the missing annuitant's death, OPM will make separate payments in the same manner as if the missing annuitant were dead.

### § 880.303 FEHBP coverage.

(a) If the missing annuitant had a family enrollment, the enrollment will be transferred to the eligible family members under § 890.303(c) of this chapter. If there is only one eligible family member, the enrollment will be changed to a self-only enrollment under § 890.306(r) of this chapter. The changes will be effective the first day of the pay period following the date of disappearance.

(b) If the missing annuitant was covered by a self only enrollment or if there is no eligible family member remaining, the enrollment terminates at midnight of the last day of the pay period in which he or she disappeared, subject to the temporary extension of coverage for conversion.

(c) If the missing annuitant is found to be alive, the coverage held before the disappearance is reinstated effective with the pay period during which the annuitant is found, unless the annuitant, or the annuitant's representative, requests that the enrollment be restored retroactively to the pay period in which the disappearance occurred.

### § 880.304 FEGLI coverage.

(a) FEGLI premiums will not be collected during periods when an annuitant is a missing annuitant.

(b)(1) If the annuity of a missing annuitant is restored under §880.204(a), OPM will deduct the amount of FEGLI premiums attributable to the period when the annuitant was a missing annuitant from any adjustment payment due the annuitant under §880.204(a).

(2) If a missing annuitant is determined to be dead under §880.205, FEGLI premiums and benefits will be computed using the date of death established under §880.206(a).

# PART 890—FEDERAL EMPLOYEES HEALTH BENEFITS PROGRAM

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SOURCE: 33 FR 12510, Sept. 4, 1968, unless otherwise noted.

## Subpart A—Administration and General Provisions

### § 890.101 Definitions; time computations.

(a) In this part, the terms *annuitant*, *carrier*, *employee*, *employee organization*, *former spouse*, *health benefits plan*, *member of family*, and *service*, have the meanings set forth in section 8901 of title 5, United States Code, and supplement the following definitions:

*Appropriate request* means a properly completed health benefits registration form or an alternative method acceptable to both the employing office and OPM. Alternative methods must be capable of transmitting to the health benefits plans the information they require before accepting an enrollment, change of enrollment, or cancellation. Electronic signatures, including the use of Personal Identification Numbers (PIN), have the same validity as a written signature.

*Basic employee death benefit* has the meaning set out at § 843.102. Survivors receiving this benefit are deemed to be ''annuitants'' for purposes of this chapter.

*Cancel* means to submit to the employing office an appropriate request electing not to be enrolled by an enrollee who is eligible to continue enrollment.

*Change the enrollment* means to submit to the employing office an appropriate request electing a change of enrollment to a different plan or option, or to a different type of coverage (self only, self plus one, or self and family).

*Claim* means a request for (i) payment of a health-related bill; or (ii) provision of a health-related service or supply.

*Compensation* means compensation under subchapter I of chapter 81 of title 5, United States Code, which is payable because of a job-related injury or disease.

*Compensationer* means an employee or former employee who is entitled to compensation and whom the Department of Labor determines is unable to return to duty. A compensationer is also an annuitant for purposes of chapter 89 of title 5, United States Code.

*Congressional staff member* means an individual who is a full-time or part-time employee employed by the official office of a Member of Congress, whether in Washington, DC or outside of Washington, DC.

*Covered individual* means an enrollee or a covered family member.

*Covered family member* means a member of the family of an enrollee with a self plus one or self and family enrollment who meets the requirements of §§ 890.302, 890.804, or 890.1106(a), as appropriate to the type of enrollee.

*Decrease enrollment type* means a change in enrollment from self and family to self plus one or to self only or a change from self plus one to self only.

*Election not to enroll* means to submit to the employing office an appropriate request electing not to be enrolled by an employee who is eligible to enroll.

*Eligible* means eligible under the law and this part to be enrolled.

*Employing office* means the office of an agency to which jurisdiction and responsibility for health benefits actions for an employee, an annuitant, a former spouse eligible for continued coverage under subpart H of this part,

or an individual eligible for temporary continuation of coverage under subpart K of this part, have been delegated.

(1) For an enrolled annuitant (including survivor annuitant, former spouse annuitant, and surviving spouses receiving a basic employee death benefit under 5 U.S.C. 8442(b)(1)(A)) who is not also an eligible employee, *employing office* is the office which has the authority to approve payment of annuity, basic employee death benefit, or workers' compensation for the annuitant concerned.

(2) For a former spouse of an annuitant whose marriage dissolved after the employee's retirement and who has entitlement to receive future annuity payments under sections 8341(h), 8345(j), 8445, or 8467 of title 5, United States Code, *employing office* is the office that has the authority to approve payment of annuity for the annuitant or former spouse concerned.

(3) For a former spouse of a current employee, and a former spouse of an annuitant or separated employee having title to a deferred annuity or to an immediate annuity under 5 U.S.C. 8412(g), whose marriage dissolved during the employee's Federal service, *employing office* is the agency that employed the employee or annuitant at the time the marriage was dissolved.

(4) For a surviving spouse in receipt of a basic employee death benefit under 5 U.S.C. 8442(b)(1)(A) who is not also an eligible employee, the *employing office* is the retirement system which has authority to approve the basic employee death benefit.

(5) For a former spouse of an employee or former employee of the Central Intelligence Agency (CIA) whose marriage was dissolved before May 7, 1985, and who meets the requirements under § 890.803(a)(3)(iv), the *employing office* is the CIA.

(6) For a former spouse of an employee or former employee of the Foreign Service whose marriage was dissolved before May 7, 1985, and who meets the requirements under § 890.803(a)(3)(v) of this part, the *employing office* is the Department of State.

(7) [Reserved]

(8) For a former spouse of an employee who separated from service after qualifying for an immediate annuity under 5 U.S.C. 8412(g), whose marriage dissolves after the employee separated from service but before the date the separated employee's annuity commences, and who is entitled to continued coverage under subpart H of this part, *employing office* is the office that has the authority to approve payment of annuity for the annuitant or former spouse concerned.

*Enroll* means to submit to the employing office an appropriate request electing to be enrolled in a health benefits plan.

*Enrolled* means an appropriate request has been accepted by the employing office and the enrollment in a health benefits plan approved by OPM under this part has not been terminated or cancelled.

*Enrollee* means the individual in whose name the enrollment is carried. The term includes employees, annuitants, former employees, former spouses, or children who are enrolled after completing an appropriate request under the provisions of §§ 890.301, 890.306, 890.601, 890.803, or 890.1103 or have continued an enrollment as an annuitant or survivor annuitant under 5 U.S.C. 8905(b) or § 890.303.

*Foster child* means a child who:

(1) Lives with an employee, former employee, or annuitant or with a child enrolled under § 890.1103(a)(2) in a regular parent-child relationship and

(2) Is expected to be raised to adulthood by the enrollee.

*Immediate annuity* means an annuity which begins to accrue not later than 1 month after the date enrollment under a health benefits plan would cease for an employee or member of family if he or she were not entitled to continue enrollment as an annuitant. Notwithstanding the foregoing, an annuity which commences on the birth of the posthumous child of an employee or annuitant is an immediate annuity. For an individual who separates from service upon meeting the requirements for an annuity under § 842.204(a)(1) of this chapter, immediate annuity includes an annuity for which the commencing date is postponed under § 842.204(c). For phased retirees, as defined in 5 U.S.C. 8336a and 8412a, a composite retirement annuity is an immediate annuity.

*Increase enrollment type* means a change in enrollment from self only to self plus one or to self and family or a change from self plus one to self and family.

*Letter of credit* is defined in 48 CFR 1602.170–10.

*Member of Congress* means a member of the Senate or of the House of Representatives, a Delegate to the House of Representatives, and the Resident Commissioner of Puerto Rico.

*Option* means a level of benefits. It does not include distinctions as to whether the members of the family are covered.

*OWCP* means the Office of Workers' Compensation Programs, U.S. Department of Labor, which administers subchapter I of chapter 81 of title 5, United States Code.

*Pay period* means the biweekly pay period established pursuant to section 5504 of title 5, United States Code, for the employees to whom that section applies and the regular pay period for employees not covered by that section. *Pay period*, as it relates to a former spouse or annuitant who is not actively receiving an annuity, including surviving spouses receiving a basic employee death benefit, and enrollees temporarily continuing coverage under subpart K of this part, means any regular pay period for employees of the agency to which jurisdiction and responsibility for health benefits actions for the enrollee have been delegated as provided under the definition of ''employing office'' in this section. *Pay period* for annuitants in active receipt of annuity means the period for which a single installment of annuity is customarily paid.

*Reconsideration* means the final level of administrative review of an employing office's initial decision to determine if the employing office correctly applied the law and regulations.

*Reimbursement* means a carrier's pursuit of a recovery if a covered individual has suffered an illness or injury and has received, in connection with that illness or injury, a payment from any party that may be liable, any applicable insurance policy, or a workers' compensation program or insurance policy, and the terms of the carrier's health benefits plan require the covered individual, as a result of such payment, to reimburse the carrier out of the payment to the extent of the benefits initially paid or provided. The right of reimbursement is cumulative with and not exclusive of the right of subrogation.

*Self and family enrollment* means an enrollment that covers the enrollee and all eligible family members.

*Self only enrollment* means an enrollment that covers only the enrollee.

*Self plus one enrollment* means an enrollment that covers the enrollee and one eligible family member.

*SHOP* has the meaning given in 45 CFR 155.20.

*Subrogation* means a carrier's pursuit of a recovery from any party that may be liable, any applicable insurance policy, or a workers' compensation program or insurance policy, as successor to the rights of a covered individual who suffered an illness or injury and has obtained benefits from that carrier's health benefits plan.

*Switch a covered family member* means, under a self plus one enrollment, to terminate or cancel the enrollment of the designated covered family member and designate another eligible family member for coverage.

*Underdeduction* means a failure to withhold the required amount of health benefits contributions from an individual's pay, annuity, or compensation. This definition includes both nondeductions (when none of the required amounts was withheld) and partial deductions (when only part of the required amount was withheld). Though FEHB contributions are required to cover a period of nonpay status, the nonpayment of contributions during such period does not result in an underdeduction.

(b) Whenever, in this part, a period of time is stated as a number of days or a number of days from an event, the period is computed in calendar days, excluding the day of the event. Whenever, in this part, a period of time is defined by beginning and ending dates, the period includes the beginning and ending dates.

[33 FR 12510, Sept. 4, 1968]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting § 890.101, see the List of CFR Sections Affected, which appears in the

Finding Aids section of the printed volume and at *www.fdsys.gov*.

**§ 890.102 Coverage.**

(a) Each employee, other than those excluded by paragraph (c) of this section, is eligible to be enrolled in a health benefits plan at the time and under the conditions prescribed in this part.

(b) An employee who serves in cooperation with non-Federal agencies and is paid in whole or in part from non-Federal funds may register to be enrolled within the period prescribed by OPM for the group of which the employee is a member following approval by OPM of arrangements providing that (1) the required withholdings and contributions will be made from Federally-controlled funds and timely deposited into the Employees Health Benefits Fund, or (2) the cooperating non-Federal agency will, by written agreement with the Federal agency, make the required withholdings and contributions from non-Federal funds and transmit them for timely deposit into the Employees Health Benefits Fund.

(c) The following employees are not eligible:

(1) An employee (other than an acting postmaster, a Presidential appointee appointed to fill an unexpired term, and an appointee whose appointment meets the definition of provisional appointment set out in §§ 316.401 and 316.403 of this chapter) who is serving under an appointment limited to 1 year or less and who has not completed 1 year of current continuous employment, excluding any break in service of 5 days or less.

(2) An employee who is expected to work less than 6 months in each year, except for an employee who receives an appointment of at least 1 year's duration as an Intern under § 213.3402(a) of this chapter and who is expected to be in a pay status for at least one-third of the total period of time from the date of the first appointment to the completion of the Internship Program.

(3) An intermittent employee—a non-full-time employee without a prearranged regular tour of duty.

(4) A beneficiary or patient employee in a Government hospital or home.

(5) An employee paid on a contract or fee basis, except an employee who is a citizen of the United States who is appointed by a contract between the employee and the Federal employing authority which requires his personal service and is paid on the basis of units of time.

(6) An employee paid on a piecework basis, except one whose work schedule provides for full-time service or part-time service with a regular tour of duty.

(7) An individual first employed by the government of the District of Columbia on or after October 1, 1987. However, this exclusion does not apply to:

(i) Employees of St. Elizabeths Hospital who accept offers of employment with the District of Columbia government without a break in service, as provided in section 6 of Pub. L. 98–621 (98 Stat. 3379);

(ii) The Corrections Trustee and the Pretrial Services, Defense Services, Parole, Adult Probation and Offender Supervision Trustee and employees of these Trustees who accept employment with the District of Columbia government within 3 days after separating from the Federal Government; and

(iii) Effective October 1, 1997, judges and nonjudicial employees of the District of Columbia Courts, as provided by Pub. L. 105–33 (111 Stat. 251).

(8) An individual first employed by the government of the District of Columbia on or after October 1, 1987. However, this exclusion does not apply to:

(i) Employees of St. Elizabeths Hospital who accept offers of employment with the District of Columbia government without a break in service, as provided in section 6 of Pub. L. 98–621 (98 Stat. 3379);

(ii) The Corrections Trustee and the Pretrial Services, Parole, Adult Probation and Offender Supervision Trustee and employees of these Trustees who accept employment with the District of Columbia government within 3 days after separating from the Federal Government;

(iii) Effective October 1, 1997, judges and nonjudicial employees of the District of Columbia Courts, as provided by Pub. L. 105–33 (111 Stat. 251); and

(iv) Effective April 1, 1999, employees of the Public Defender Service of the

District of Columbia, as provided by Pub. L. 105–274 (112 Stat. 2419).

(9) The following employees are not eligible to purchase a health benefit plan for which OPM contracts or which OPM approves under this paragraph (c), but may purchase health benefit plans, as defined in 5 U.S.C. 8901(6), that are offered by an appropriate SHOP as determined by the Director, pursuant to section 1312(d)(3)(D) of the Patient Protection and Affordable Care Act, Public Law 111–148, as amended by the Health Care and Education Reconciliation Act, Public Law 111–152 (the Affordable Care Act or the Act):

(i) A Member of Congress.

(ii) A congressional staff member, if the individual is determined by the employing office of the Member of Congress to meet the definition of congressional staff member in § 890.101 as of January 1, 2014, or in any subsequent calendar year. Designation as a congressional staff member shall be an annual designation made prior to November 2013 for the plan year effective January 1, 2014 and October of each year for subsequent years or at the time of hiring for individuals whose employment begins during the year. The designation shall be made for the duration of the year during which the staff member works for the Member of Congress beginning with the January 1st following the designation and continuing to December 31st of that year.

(d) Paragraph (c) of this section does not deny coverage to:

(1) An employee appointed to perform ''part-time career employment,'' as defined in section 3401(2) of title 5, United States Code, and 5 CFR part 340, subpart B; or

(2) An employee serving under an interim appointment established under § 772.102 of this chapter.

(e) With the exception of those employees or groups of employees listed in paragraph (e)(1) of this section, the Office of Personnel Management makes the final determination of the applicability of this section to specific employees or groups of employees.

(1) Employees identified in paragraph (c)(9)(i) and (ii) of this section.

(2) [Reserved]

(f) An employee of the District of Columbia Financial Responsibility and Management Assistance Authority (the Authority) who makes an election under the Technical Corrections to Financial Responsibility and Management Assistance Act (section 153 of Pub. L. 104–134, 110 Stat. 1321) to be considered a Federal employee for health benefits and other benefit purposes is subject to this part. If the employee is eligible to make an election to enroll under § 890.301, such election must be made within 60 days after the later of either the date the employment with the Authority begins or the date the Authority receives his or her election to be considered a Federal employee. Employees of the Authority who are former Federal employees are subject to the provisions of § 890.303(a), except that a former Federal employee employed by the Authority before October 26, 1996, and within 3 days following the termination of the Federal employment may make an election to enroll under § 890.301(c). Annuitants who have continued their coverage under this part as annuitants are not eligible to enroll under this paragraph. An election to enroll under this part is effective under the provisions of § 890.306(a) unless the employee requests the Authority to make the enrollment effective on the first day of the first pay period following the date the employee entered on duty in a pay status with the Authority.

(g) Notwithstanding any other provision in this part, the hiring of a Federal employee, whether in pay status or nonpay status, for a temporary, intermittent position with the decennial census has no effect on the withholding or Government contribution for his/her coverage or the determination of when 365 days in nonpay status ends.

(h) Notwithstanding paragraphs (c)(1) and (2) of this section, an employee who is in a position identified by OPM that provides emergency response services for wildland fire protection is eligible to be enrolled in a health benefits plan under this part.

(i) Notwithstanding paragraphs (c)(1) through (3) of this section, upon request by the employing agency, OPM may grant eligibility to employees performing similar types of emergency response services to enroll in a health

benefits plan under this part. In granting eligibility requests, OPM may limit the coverage of intermittent employees under a health benefits plan to the periods of time during which they are in a pay status.

(j)(1) Notwithstanding paragraphs (c)(1), (2), and (3) of this section, a non-Postal employee working on a temporary appointment, a non-Postal employee working on a seasonal schedule of less than 6 months in a year, or a non-Postal employee working on an intermittent schedule, for whom the employing office expects the total hours in pay status (including overtime hours) plus qualifying leave without pay hours to be at least 130 hours per calendar month, is eligible to enroll in a health benefits plan under this part as follows:

(i) If the employing office expects the employee to work at least 90 days, the employee is eligible to enroll upon notification of the employee's eligibility by the employing office, and

(ii) If the employing office expects the employee to work for fewer than 90 days and the employee actually works for fewer than 90 days, the employee will generally be ineligible to enroll in FEHB because the employee will not be employed at the end of the waiting period applicable to these employees. However, if the expectation changes and the employee is expected to work for 90 days or more, that individual is eligible to enroll upon notification by the employing office, but enrollment (including the effective date of coverage) must be no later than the end of the waiting period ending the 91st day after the first day of employment.

(2) An employee working on a temporary appointment, an employee working on a seasonal schedule of less than 6 months in a year, or an employee working on an intermittent schedule for whom the employing office expects the total hours in pay status (including overtime hours) plus qualifying leave without pay hours to be less than 130 hours per calendar month is generally ineligible to enroll in a health benefits plan under this part. If the expectation of hours of employment changes to 130 hours or more per month for a non-Postal employee, that employee is eligible to enroll in a health benefits plan under this part as described in paragraph (j)(1)(i) of this section.

(3) Once an employee is enrolled under this paragraph (j), eligibility will not be revoked, regardless of his or her actual work schedule or employer expectations in subsequent years, unless the employee separates from Federal service, receives a new appointment (in which case eligibility will be determined by the rules applicable to the new appointment), or exceeds 365 days in nonpay status in accordance with § 890.303(e) (subject to extension, if applicable, for qualifying leave without pay as defined at paragraph (j)(4) of this section).

(4) For purposes of this paragraph (j), ''qualifying leave without pay hours'' means hours of leave without pay for purposes of taking leave under the Family and Medical Leave Act, for performance of duty in the uniformed services under the Uniformed Services Employment and Reemployment Rights Act of 1994, 38 U.S.C. 4301 et seq., for receiving medical treatment under Executive Order 5396 (Jul. 7 1930), and for periods during which workers compensation is received under the Federal Employees Compensation Act, 5 U.S.C. chapter 81.

(5) Each temporary employee who is initially eligible for FEHB coverage on the basis of this paragraph (j) is entitled to enroll in accordance with § 890.301(a). A temporary employee who is currently eligible under 5 U.S.C. 8906a (with no Government contribution) but who is not enrolled on November 17, 2014, and who would also meet eligibility requirements on the basis of paragraph (j), is entitled to enroll (with a Government contribution) on the basis of paragraph (j) in accordance with § 890.301(h)(4)(ii). A temporary employee who is enrolled under 5 U.S.C. 8906a (with no Government contribution) on November 17, 2014, and who would also meet eligibility requirements on the basis of paragraph (j), is entitled to change enrollment (with a Government contribution) on the basis of paragraph (j) in accordance with § 890.301(h)(4)(ii).

(k) The Director, upon written request of an employer of employees other than those covered by 5 U.S.C.

8901(1)(A), may, in his or her sole discretion, waive application of paragraph (j) of this section to its employees when the employer demonstrates to the Director that the waiver is necessary to avoid an adverse impact on the employer's need to manage its workforce. However, a Tribal employer participating under 25 U.S.C. 1647b may provide a written notification to the Director that it has chosen not to apply paragraph (j) of this section for its workforce.

[33 FR 12510, Sept. 4, 1968]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting § 890.102, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and at *www.fdsys.gov*.

### § 890.103 Correction of errors.

(a) The employing office may make prospective corrections of administrative errors as to enrollment at any time. The employing office may make retroactive corrections of administrative errors that occur after December 31, 1994.

(b) OPM may order correction of an administrative error upon a showing satisfactory to OPM that it would be against equity and good conscience not to do so.

(c) The employing office may make retroactive correction of enrollee enrollment code errors if the enrollee reports the error by the end of the pay period following the one in which he or she received the first written documentation (i.e. pay statement or enrollment change confirmation) indicating the error.

(d) OPM may order the termination of an enrollment in any comprehensive medical plan described in section 8903(4) of title 5, United States Code, and permit the individual to enroll in another health benefits plan for purposes of this part, upon a showing satisfactory to OPM that the furnishing of adequate medical care is jeopardized by a seriously impaired relationship between a patient and the comprehensive medical plan's affiliated health care providers.

(e) Retroactive corrections are subject to withholdings and contributions under the provisions of § 890.502.

[45 FR 23637, Apr. 8, 1980, as amended at 53 FR 2, Jan. 4, 1988; 54 FR 52336, Dec. 21, 1989; 55 FR 22891, June 5, 1990; 59 FR 66437, Dec. 27, 1994; 62 FR 38435, July 18, 1997]

### § 890.104 Initial decision and reconsideration on enrollment.

(a) *Who may file*. Except as provided under § 890.1112, an individual may request an agency or retirement system to reconsider an initial decision of its employing office denying coverage or change of enrollment.

(b) *Initial employing office decision*. An employing office's decision is considered an initial decision as used in paragraph (a) of this section when rendered by the employing office in writing and stating the right to an independent level of review (reconsideration) by the agency or retirement system. However, an initial decision rendered at the highest level of review available within OPM is not subject to reconsideration.

(c) *Reconsideration*. (1) A request for reconsideration must be made in writing, must include the claimant's name, address, date of birth, Social Security number, name of carrier, reason(s) for the request, and, if applicable, retirement claim number.

(2) The reconsideration review must be an independent review designated at or above the level at which the initial decision was rendered.

(d) *Time limit*. A request for reconsideration of an initial decision must be filed within 30 calendar days from the date of the written decision stating the right to a reconsideration. The time limit on filing may be extended when the individual shows that he or she was not notified of the time limit and was not otherwise aware of it, or that he or she was prevented by circumstances beyond his or her control from making the request within the time limit. An agency or retirement system decision in response to a request for reconsideration of an employing office's decision is a final decision as described in paragraph (e) of this section.

(e) *Final decision*. After reconsideration, the agency or retirement system must issue a final decision, which must

be in writing and must fully set forth the findings and conclusions.

[59 FR 66437, Dec. 27, 1994]

### § 890.105 Filing claims for payment or service.

(a) *General.* (1) Each health benefits carrier resolves claims filed under the plan. All health benefits claims must be submitted initially to the carrier of the covered individual's health benefits plan. If the carrier denies a claim (or a portion of a claim), the covered individual may ask the carrier to reconsider its denial. If the carrier affirms its denial or fails to respond as required by paragraph (c) of this section, the covered individual may ask OPM to review the claim. A covered individual must exhaust both the carrier and OPM review processes specified in this section before seeking judicial review of the denied claim.

(2) This section applies to covered individuals and to other individuals or entities who are acting on the behalf of a covered individual and who have the covered individual's specific written consent to pursue payment of the disputed claim.

(b) *Time limits for reconsidering a claim.* (1) The covered individual has 6 months from the date of the notice to the covered individual that a claim (or a portion of a claim) was denied by the carrier in which to submit a written request for reconsideration to the carrier. The time limit for requesting reconsideration may be extended when the covered individual shows that he or she was prevented by circumstances beyond his or her control from making the request within the time limit.

(2) The carrier has 30 days after the date of receipt of a timely-filed request for reconsideration to:

(i) Affirm the denial in writing to the covered individual;

(ii) Pay the bill or provide the service; or

(iii) Request from the covered individual or provider additional information needed to make a decision on the claim. The carrier must simultaneously notify the covered individual of the information requested if it requests additional information from a provider. The carrier has 30 days after the date the information is received to affirm the denial in writing to the covered individual or pay the bill or provide the service. The carrier must make its decision based on the evidence it has if the covered individual or provider does not respond within 60 days after the date of the carrier's notice requesting additional information. The carrier must then send written notice to the covered individual of its decision on the claim. The covered individual may request OPM review as provided in paragraph (b)(3) of this section if the carrier fails to act within the time limit set forth in this paragraph (b)(2)(iii).

(3) The covered individual may write to OPM and request that OPM review the carrier's decision if the carrier either affirms its denial of a claim or fails to respond to a covered individual's written request for reconsideration within the time limit set forth in paragraph (b)(2) of this section. The covered individual must submit the request for OPM review within the time limit specified in paragraph (e)(1) of this section.

(4) The carrier may extend the time limit for a covered individual's submission of additional information to the carrier when the covered individual shows he or she was not notified of the time limit or was prevented by circumstances beyond his or her control from submitting the additional information.

(c) *Information required to process requests for reconsideration.* (1) The covered individual must put the request to the carrier to reconsider a claim in writing and give the reasons, in terms of applicable brochure provisions, that the denied claim should have been approved.

(2) If the carrier needs additional information from the covered individual to make a decision, it must:

(i) Specifically identify the information needed;

(ii) State the reason the information is required to make a decision on the claim;

(iii) Specify the time limit (60 days after the date of the carrier's request) for submitting the information; and

(iv) State the consequences of failure to respond within the time limit specified, as set out in paragraph (b)(2) of this section.

(d) *Carrier determinations*. The carrier must provide written notice to the covered individual of its determination. If the carrier affirms the initial denial, the notice must inform the covered individual of:

(1) The specific and detailed reasons for the denial;

(2) The covered individual's right to request a review by OPM; and

(3) The requirement that requests for OPM review must be received within 90 days after the date of the carrier's denial notice and include a copy of the denial notice as well as documents to support the covered individual's position.

(e) *OPM review*. (1) If the covered individual seeks further review of the denied claim, the covered individual must make a request to OPM to review the carrier's decision. Such a request to OPM must be made:

(i) Within 90 days after the date of the carrier's notice to the covered individual that the denial was affirmed;

(ii) If the carrier fails to respond to the covered individual as provided in paragraph (b)(2) of this section, within 120 days after the date of the covered individual's timely request for reconsideration by the carrier; or

(iii) Within 120 days after the date the carrier requests additional information from the covered individual, or the date the covered individual is notified that the carrier is requesting additional information from a provider. OPM may extend the time limit for a covered individual's request for OPM review when the covered individual shows he or she was not notified of the time limit or was prevented by circumstances beyond his or her control from submitting the request for OPM review within the time limit.

(2) In reviewing a claim denied by the carrier, OPM may:

(i) Request that the covered individual submit additional information;

(ii) Obtain an advisory opinion from an independent physician;

(iii) Obtain any other information as may in its judgment be required to make a determination; or

(iv) Make its decision based solely on the information the covered individual provided with his or her request for review.

(3) When OPM requests information from the carrier, the carrier must release the information within 30 days after the date of OPM's written request unless a different time limit is specified by OPM in its request.

(4) Within 90 days after receipt of the request for review, OPM will either:

(i) Give a written notice of its decision to the covered individual and the carrier; or

(ii) Notify the individual of the status of the review. If OPM does not receive requested evidence within 15 days after expiration of the applicable time limit in paragraph (e)(3) of this section, OPM may make its decision based solely on information available to it at that time and give a written notice of its decision to the covered individual and to the carrier.

(5) OPM, upon its own motion, may reopen its review if it receives evidence that was unavailable at the time of its original decision.

[61 FR 15178, Apr. 5, 1996]

### § 890.106 Carrier entitlement to pursue subrogation and reimbursement recoveries.

(a) All health benefit plan contracts shall provide that the Federal Employees Health Benefits (FEHB) carrier is entitled to pursue subrogation and reimbursement recoveries, and shall have a policy to pursue such recoveries in accordance with the terms of this section.

(b)(1) Any FEHB carriers' right to pursue and receive subrogation and reimbursement recoveries constitutes a condition of and a limitation on the nature of benefits or benefit payments and on the provision of benefits under the plan's coverage.

(2) Any health benefits plan contract that contains a subrogation or reimbursement clause shall provide that benefits and benefit payments are extended to a covered individual on the condition that the FEHB carrier may pursue and receive subrogation and reimbursement recoveries pursuant to the contract.

(c) Contracts shall provide that the FEHB carriers' rights to pursue and receive subrogation or reimbursement recoveries arise upon the occurrence of the following:

(1) The covered individual has received benefits or benefit payments as a result of an illness or injury; and

(2) The covered individual has accrued a right of action against a third party for causing that illness or injury; or has received a judgment, settlement or other recovery on the basis of that illness or injury; or is entitled to receive compensation or recovery on the basis of the illness or injury, including from insurers of individual (non-group) policies of liability insurance that are issued to and in the name of the enrollee or a covered family member.

(d) A FEHB carrier's exercise of its right to pursue and receive subrogation or reimbursement recoveries does not give rise to a claim within the meaning of 5 CFR 890.101 and is therefore not subject to the disputed claims process set forth at 5 CFR 890.105.

(e) Any subrogation or reimbursement recovery on the part of a FEHB carrier shall be effectuated against the recovery first (before any of the rights of any other parties are effectuated) and is not impacted by how the judgment, settlement, or other recovery is characterized, designated, or apportioned.

(f) Pursuant to a subrogation or reimbursement clause, the FEHB carrier may recover directly from any party that may be liable, or from the covered individual, or from any applicable insurance policy, or a workers' compensation program or insurance policy, all amounts available to or received by or on behalf of the covered individual by judgment, settlement, or other recovery, to the extent of the amount of benefits that have been paid or provided by the carrier.

(g) Any contract must contain a provision incorporating the carrier's subrogation and reimbursement rights as a condition of and a limitation on the nature of benefits or benefit payments and on the provision of benefits under the plan's coverage. The corresponding health benefits plan brochure must contain an explanation of the carrier's subrogation and reimbursement policy.

(h) A carrier's rights and responsibilities pertaining to subrogation and reimbursement under any FEHB contract relate to the nature, provision, and extent of coverage or benefits (including payments with respect to benefits) within the meaning of 5 U.S.C. 8902(m)(1). These rights and responsibilities are therefore effective notwithstanding any state or local law, or any regulation issued thereunder, which relates to health insurance or plans.

[80 FR 29204, May 21, 2015]

### § 890.107 Court review.

(a) A suit to compel enrollment under § 890.102 must be brought against the employing office that made the enrollment decision.

(b) A suit to review the legality of OPM's regulations under this part must be brought against the Office of Personnel Management.

(c) Federal Employees Health Benefits (FEHB) carriers resolve FEHB claims under authority of Federal statute (5 U.S.C. chapter 89). A covered individual may seek judicial review of OPM's final action on the denial of a health benefits claim. A legal action to review final action by OPM involving such denial of health benefits must be brought against OPM and not against the carrier or carrier's subcontractors. The recovery in such a suit shall be limited to a court order directing OPM to require the carrier to pay the amount of benefits in dispute.

(d) An action under paragraph (c) of this section to recover on a claim for health benefits:

(1) May not be brought prior to exhaustion of the administrative remedies provided in § 890.105;

(2) May not be brought later than December 31 of the 3rd year after the year in which the care or service was provided; and

(3) Will be limited to the record that was before OPM when it rendered its decision affirming the carrier's denial of benefits.

[61 FR 15179, Apr. 5, 1996]

### § 890.108 Will OPM waive requirements for continued coverage during retirement?

(a) Under 5 U.S.C. 8905(b), OPM may waive the eligibility requirements for health benefits coverage as an annuitant for an individual when, in its sole discretion, it determines that due to exceptional circumstances it would be against equity and good conscience not to allow a person to be enrolled in the FEHB Program as an annuitant.

(b) The individual's failure to satisfy the eligibility requirements must be due to exceptional circumstances. An individual requesting a waiver must provide OPM with evidence that:

(1) The individual intended to have FEHB coverage as an annuitant (retiree);

(2) The circumstances that prevented the individual from meeting the requirements of 5 U.S.C. 8905(b) were beyond the individual's control; and

(3) The individual acted reasonably to protect his or her right to continue coverage into retirement.

[72 FR 19100, Apr. 17, 2007]

### § 890.109 Exclusion of certain periods of eligibility when determining continued coverage during retirement.

(a) Except as provided in paragraph (b) of this section, periods during which temporary employees are eligible under 5 U.S.C. 8906a to receive health benefits by enrolling and paying the full subscription charge, but are not eligible to participate in a retirement system, are not considered when determining eligibility for continued coverage during retirement. For the purpose of continuing coverage during retirement, an employee is considered to have enrolled at his or her first opportunity if the employee registered to be enrolled when he or she received a permanent appointment entitling him or her to participate in a retirement system and to receive the Government contribution toward the health benefits premium payments.

(b) A temporary employee eligible under 5 U.S.C. 8906a may continue enrollment as a compensationer if he or she has been enrolled or covered as a family member under another enrollment under this part for:

(1) The 5 years of service immediately preceding the commencement of his or her monthly compensation; or

(2) During all periods of service since his or her first opportunity to enroll, if less than 5 years. For the purpose of this paragraph, an employee is considered to have enrolled at his or her first opportunity if the employee registered to be enrolled when he or she first became eligible under 5 U.S.C. 8906a.

[58 FR 47824, Sept. 13, 1993]

### § 890.110 Enrollment reconciliation.

(a) Each employing office must report to each carrier or its surrogate on a quarterly basis the names of the individuals who are enrolled in the carrier's plan in a format and containing such information as required by OPM.

(b) The carrier must compare the data provided with its own enrollment records. When the carrier finds in its total enrollment records individuals whose names do not appear in the report from the employing office of record, the carrier must request the employing office to provide the documentation necessary to resolve the discrepancy.

[63 FR 59459, Nov. 4, 1998; 63 FR 64761, Nov. 23, 1998]

### § 890.111 Continuation of eligibility for former Federal employees of the Civilian Marksmanship Program.

(a) A Federal employee who was employed by the Department of Defense to support the Civilian Marksmanship Program as of the day before the date of the transfer of the Program to the Corporation for the Promotion of Rifle Practice and Firearms Safety, and was offered and accepted employment by the Corporation as part of the transition described in section 1612(d) of Public Law 104–106, 110 Stat. 517, is deemed to be an employee for purposes of this part during continuous employment with the Corporation unless the individual files an election under § 831.206(c) or § 842.109(c) of this title. Such a covered individual is treated as if he or she were a Federal employee for purposes of this part, and of any other part within this title relating to the FEHB Program. The individual is

entitled to the benefits of, and is subject to all conditions under, the FEHB Program on the same basis as if the individual were an employee of the Federal Government.

(b) Cessation of employment with the Corporation for any period terminates eligibility for coverage under the FEHB Program as an employee during any subsequent employment by the Corporation.

(c) The Corporation must withhold from the pay of an individual described by paragraph (a) of this section an amount equal to the premiums withheld from the pay of a Federal employee for FEHB coverage and, in accordance with procedures established by OPM, pay into the Employees Health Benefits Fund the amounts deducted from the individual's pay.

(d) The Corporation must, in accordance with procedures established by OPM, pay into the Employees Health Benefits Fund amounts equal to any agency contributions required under the FEHB Program.

[74 FR 66567, Dec. 16, 2009]

### § 890.112 Continuation of coverage for certain Senate Restaurants employees.

(a) A Senate Restaurants employee who was an employee of the Architect of the Capitol on July 17, 2008, who accepted employment with the private business concern to which the Senate Restaurants' food service operations were transferred as described in section 1 of Public Law 110–279, and who elected to continue his or her Federal employee retirement benefits is deemed to be an employee for purposes of this part during continuous employment with the private business concern or its successor. The individual shall be entitled to the benefits of, and be subject to all conditions under, the FEHB Program on the same basis as if the individual were an employee of the Federal Government.

(b) Cessation of employment with the private business concern or its successor for any period terminates eligibility for coverage under the FEHB Program as an employee during any subsequent employment by the private business concern.

(c) The private business concern or its successor must make arrangements for the withholding from pay of an individual described by paragraph (a) of this section of an amount equal to the premiums withheld from Federal employees' pay for FEHB coverage and, in accordance with procedures established by OPM, pay into the Employees Health Benefits Fund the amounts deducted from the individual's pay.

(d) The private business concern or its successor shall, in accordance with procedures established by OPM, pay into the Employees Health Benefits Fund amounts equal to any agency contributions required under the FEHB Program.

[75 FR 76616, Dec. 9, 2010]

## Subpart B—Health Benefits Plans

### § 890.201 Minimum standards for health benefits plans.

(a) To qualify for approval by OPM, a health benefits plan shall meet the following standards. Once approved, a health benefits plan shall continue to meet the minimum standards. Failure on the part of the carrier's plan to meet the standards is cause for OPM's withdrawal of approval of the plan in accordance with 5 CFR 890.204. A health benefits plan shall:

(1) Comply with chapter 89 of title 5, United States Code, and this part, as amended from time to time.

(2) Accept the enrollment, in accordance with this part, and without regard to age, race, sex, health status, or hazardous nature of employment, of each eligible employee, annuitant, former spouse, former employee, or child, except that a plan that is sponsored or underwritten by an employee organization may not accept the enrollment of a person who is not a member of the organization, but it may not limit membership in the organization on account of the prohibited factors (age, race, sex, health status, or hazardous nature of employment). The carrier may terminate the enrollment of an enrollee other than a survivor annuitant, a former spouse continuing coverage under § 890.803, or person continuing coverage under § 890.1103(a) (2) or (3), in

a health benefits plan sponsored or underwritten by an employee organization on account of termination of membership in the organization. A carrier that wants to terminate the enrollment of an enrollee under this paragraph may do so by notifying the employing office in writing, with a copy of the notice to the enrollee. The termination is effective at the end of the pay period in which the employing office receives the notice. A comprehensive medical plan need not enroll an employee, annuitant, former employee, former spouse, or child residing outside the geographic areas specified by the plan.

(3) Provide health benefits for each enrollee and covered family member wherever they may be.

(4) Provide for conversion to a contract for health benefits regularly offered by the carrier, or an appropriate affiliate, for group conversion purposes, which must be guaranteed renewable, subject to such amendments as apply to all contracts of this class, except that it may be canceled for fraud, overinsurance, or nonpayment of periodic charges. A carrier must permit conversion within the time allowed by the temporary extension of coverage provided under § 890.401 for each enrollee and covered family member entitled to convert. When an employing office gives an enrollee written notice of his or her privilege of conversion, the carrier must permit conversion at any time before 31 days after the date of notice or 91 days after the enrollment is terminated, whichever is earlier. Belated conversion opportunities as provided in § 890.401(c) must also be permitted by the carrier. When OPM requests an extension of time for conversion because of delayed determination of ineligibility for immediate annuity, the carrier must permit conversion until the date specified by OPM in its request for extension. On conversion, the contract becomes effective as of the day following the last day of the temporary extension, and the enrollee or covered family member, as the case may be, must pay the entire cost thereof directly to the carrier. The nongroup contract may not deny or delay any benefit covered by the contract for a person converting from a plan approved under this part except to the extent that benefits are continued under the health benefits plan from which he or she converts.

(5) Provide that each enrollee receive an identification card or cards or other evidence of enrollment.

(6) Provide a standard rate structure that contains, for each option, one standard self only rate, one standard self plus one rate and one standard self and family rate.

(7) Maintain statistical records regarding the plan, separately from those of any other activities conducted or benefits offered by the carrier sponsoring or underwriting the plan.

(8) Provide for a special reserve for the plan. The carrier shall account for amounts retained by it as reserves for the plan separately from reserves maintained by it for other plans. The carrier shall invest the special reserve and income derived from the investment of the special reserve shall be credited to the special reserve. If the contract is terminated or approval of the plan is withdrawn, the carrier shall return the special reserve to the Employees Health Benefits Fund. However, in the case of a comprehensive medical plan, the carrier, without regard to the foregoing provisions of this paragraph, shall follow such financial procedures as are mutually agreed on by the carrier and OPM.

(9) Provide for continued enrollment to the end of the current pay period, or termination date, if earlier, of each enrollee enrolled at the effective date of termination of a contract. The carrier is entitled to subscription charges for this continued enrollment.

(10) Provide that any covered expenses incurred from January 1 to the effective date of an open season change count toward the losing carrier's prior year deductible. If the prior year deductible or family limit on deductibles of the losing carrier had previously been met, the enrolled individual (and eligible family members) shall be eligible for reimbursement by the losing carrier for covered expenses incurred during the current year. Reimbursement of covered expenses shall apply only to covered expenses incurred from January 1 to the effective date of the open season change. This section shall

not apply to any other permissible changes made during a contract year.

(11) Except where OPM determines otherwise, have 300 or more employees and annuitants, exclusive of family members, enrolled in the plan at some time during the preceding two contract terms.

(b) To be qualified to be approved by OPM and, once approved, to continue to be approved, a health benefits plan shall not:

(1) Deny a covered person a benefit provided by the plan for a service performed on or after the effective date of coverage solely because of a preexisting physical or mental condition.

(2) Require a waiting period for any covered person for benefits which it provides.

(3)(i) Have more than two options and a high deductible health plan (26 U.S.C. 223(c)(2)(A)) if the plan is described under 5 U.S.C. 8903(1) or (2); or

(ii) Have either more than three options, or more than two options and a high deductible health plan (26 U.S.C. 223(c)(2)(A)) if the plan is described under 5 U.S.C. 8903(3) or (4).

(4) Have an initiation, service, enrollment, or other fee or charge in addition to the rate charged for the plan, except that a comprehensive medical plan may impose an additional charge to be paid directly by the enrollee for certain medical supplies and services, if the supplies and services on which additional charges are imposed are clearly set forth in advance and are applicable to all enrollees. This subparagraph does not apply to charges for membership in employee organizations sponsoring or underwriting plans.

(5) Paragraphs (b)(1) and (2) of this section do not preclude a plan offering benefits for dentistry or cosmetic surgery, or both, limited to conditions arising after the effective date of coverage.

(c) The Director or his or her designee will determine whether to propose withdrawal of approval of the plan and hold a hearing based on the seriousness of the carrier's actions and its proposed method to effect corrective action.

(d) Nothing in this part shall limit or prevent a health insurance plan purchased through an appropriate SHOP as determined by the Director, pursuant to section 1312(d)(3)(D) of the Patient Protection and Affordable Care Act, Public Law 111–148, as amended by the Health Care and Education Reconciliation Act, Public Law 111–152 (the Affordable Care Act or the Act), by an employee otherwise covered by 5 U.S.C. 8901(1)(B) and (C) from being considered a ''health benefit plan under this chapter'' for purposes of 5 U.S.C. 8905(b) and 5 U.S.C. 8906.

[33 FR 12510, Sept. 4, 1968, as amended at 43 FR 52460, Nov. 13, 1978; 47 FR 14871, Apr. 6, 1982; 49 FR 48905, Dec. 17, 1984; 52 FR 10217, Mar. 31, 1987; 54 FR 52336, Dec. 21, 1989; 55 FR 9108, Mar. 12, 1990; 55 FR 22891, June 5, 1990; 69 FR 31721, June 7, 2004; 75 FR 76616, Dec. 9, 2010; 78 FR 60656, Oct. 2, 2013; 80 FR 55734, Sept. 17, 2015]

### § 890.202 Minimum standards for health benefits carriers.

The minimum standards for health benefits carriers for the FEHB Program shall be those contained in 48 CFR subpart 1609.70.

[57 FR 14324, Apr. 20, 1992]

### § 890.203 Application for approval of, and proposal of amendments to, health benefit plans.

(a) *New plan applications.* (1) The Director of OPM shall consider applications to participate in the FEHB Program from comprehensive medical plans (CMP's) at his or her discretion. CMP's are automatically invited to submit applications annually to participate in the FEHB Program unless otherwise notified by OPM. If the Director should determine that it is not beneficial to the enrollees and the Program to consider applications for a specific contract year, OPM will publish a notice with a 60 day comment period in the FEDERAL REGISTER no less than 7 months prior to the date applications would be due for the specific contract year for which applications will not be accepted.

(2) When applications are considered, CMP's should apply for approval by writing to the Office of Personnel Management, Washington, DC 20415. Application letters must be accompanied by any descriptive material, financial data, or other documentation required by OPM. Plans must submit the letter

and attachments in the OPM-specified format by January 31, or another date specified by OPM, of the year preceding the contract year for which applications are being accepted. Plans must submit evidence demonstrating they meet all requirements for approval by March 31 of the year preceding the contract year for which applications are being accepted. Plans that miss either deadline cannot be considered for participation in the next contract year. All newly approved plans must submit benefit and rate proposals to OPM by May 31 of the year preceding the contract year for which applications are being accepted in order to be considered for participation in that contract year. OPM may make counter-proposals at any time.

(3) OPM may approve such comprehensive medical plans as, in the judgment of OPM, may be in the best interest of enrollees in the Program. In addition to specific requirements set forth in 5 U.S.C. chapter 89, in chapter 1 and other relevant portions of title 48 of the Code of Federal Regulations, and in other sections of this part, to be approved, an applicant plan must actually be delivering medical care at the time of application; must be in compliance with applicable State licensing and operating requirements; must not be a Federal, State, local, or territorial governmental entity; and must not be debarred, suspended, or ineligible to participate in Government contracting or subcontracting for any reason, including fraudulent health care practices in other Federal health care programs.

(4) Applications must identify those individuals who have the legal authority and responsibility to enter into and guarantee contracts. The applications will be reviewed for evidence of substantial compliance with the following standards:

(i) *Health plan management:* Stable management with experience pertinent to the prepaid health care provider industry; sufficient operating experience to enable OPM to realistically evaluate the plan's past and expected future performance;

(ii) *Marketing:* A rate of enrollment that ensures equalization of income and expenses within projected timeframes and sufficient subscriber income to operate within budget thereafter; enrollment dispersed among groups such that there is not a concentration of enrollment with one or a few groups so that the loss of one or more contracts by the carrier would not jeopardize its financial viability; feasible projections of future enrollment and employer distribution, as well as the potential enrollment area for marketing purposes;

(iii) *Health care delivery system:* A health care delivery system providing reasonable access to and choice of quality primary and specialty medical care throughout the service area; specifically, in the individual practice setting, contractual arrangements for the services of a significant number of primary care and specialty physicians in the service area; and in the group practice setting, compliance with 5 U.S.C. 8903(4)(A) preferably demonstrated by full-time providers specializing in internal medicine, family practice, pediatrics, and obstetrics/gynecology; and

(iv) *Financial condition:* Establishment of firm budget projections and demonstrated success in meeting or exceeding those projections on a regular basis; evidence of the ability to sustain operation in the future and to meet obligations under the contract OPM might enter into with the plan; clearly specified committed funding to see the plan to an expected break-even point including a sufficient amount for unexpected contingencies; adequate current and projected funding, such as estimated premium income or commitment from a financially sound and acceptable parent organization or a mature stable entity outside the plan; insolvency protection, such as stop-loss reinsurance services and agreements with all plan providers that they will hold members harmless if, for any reason, the plan is unable to pay its providers.

(5) A comprehensive medical plan that has been certified either as a qualified Health Maintenance Organization (HMO) or as a qualified Competitive Medical Plan by the Department of Health and Human Services (HHS) at the time of application to OPM, and whose qualification status is not under investigation by HHS, will

need to submit only an abbreviated application to OPM. The extent of the data and documentation to be submitted by a plan so qualified by HHS, as well as by a non-qualified plan, for a particular review cycle may be obtained by writing directly to the Office of Insurance Programs, Retirement and Insurance Service, Office of Personnel Management, Washington, DC 20415.

(b) *Participating plans.* Changes in rates and benefits for approved health benefits plans shall be considered at the discretion of the Director of OPM. If the Director of OPM determines that it is beneficial to enrollees and the Federal Employees Health Benefits Program to invite health plan benefit and/or rate changes for a given contract period, a ''call letter'' shall be issued to the carrier approximately 9 months prior to the expiration of the current contract period. Any proposal for change shall be in writing, specifically describe the change proposed, and be signed by an authorized official of the carrier. OPM will review any requested proposal for change and will notify the carrier of its decision to accept or reject the change. OPM may make a counter proposal or at any time propose changes on its own motion. Benefits changes and rate proposals, when requested by OPM, shall be submitted not less than 7 months before the expiration of the then current contract period, unless the Director of OPM determines that a later date is acceptable. The negotiation period shall begin approximately 7 months before the expiration of the current contract period, and OPM shall seek to complete all benefit and rate negotiations no later than 4 months preceding the contract period to which they will apply. If OPM and the carrier do not reach agreement by this date, either party may give written notice of nonrenewal in accordance with § 890.205 of this part.

[37 FR 20668, Oct. 3, 1972, as amended at 41 FR 40090, Sept. 17, 1976; 43 FR 52461, Nov. 13, 1978; 48 FR 16232, Apr. 15, 1983; 50 FR 8315, Feb. 28, 1985; 52 FR 23934, June 26, 1987; 54 FR 52337, Dec. 21, 1989; 55 FR 22891, June 5, 1990; 57 FR 19374, May 6, 1992; 59 FR 62284, Dec. 5, 1994; 60 FR 62988, Dec. 8, 1995]

**§ 890.204 Withdrawal of approval of health benefits plans or carriers.**

(a) The Director may withdraw approval of a health benefits plan or carrier if the standards at § 890.201 of this part and 48 CFR subpart 1609.70 are not met. Such action carries with it the right to a hearing as provided in paragraph (a)(2) of this section.

(1) Before withdrawing approval, the Director or his or her representative shall notify the carrier of the plan, by certified mail, that OPM intends to withdraw approval of the health benefits plan and/or carrier. The notice shall set forth the reasons why approval is to be withdrawn. The carrier is entitled to reply in writing within 15 calendar days after its receipt of the notice, stating the reasons why approval should not be withdrawn.

(2) On receipt of the reply, or in the absence of a timely reply, the Director or representative shall set a date, time, and place for a hearing. The carrier shall be notified by certified mail at least 15 calendar days in advance of the hearing. The hearing officer shall be the Director, or a representative designated by the Director, who shall not otherwise have been a party to the initial administrative decision to issue a letter of intent to withdraw the plan's or carrier's approval. The hearing officer shall conduct the hearing unless it is waived in writing by the carrier. The carrier is entitled to appear by representative and present oral or documentary evidence, including rebuttal evidence, in opposition to the proposed action.

(i) A transcribed record shall be kept of the hearing and shall be the exclusive record of the proceeding.

(ii) After the hearing is held, or after OPM's receipt of the carrier's written waiver of the hearing, the Director shall make a decision on the record, taking into consideration any recommendation submitted by the hearing officer, and send it to the carrier by certified mail. A decision of the Director shall be considered a final decision for the purposes of this section. The Director, or his or her representative, may set a future effective date for withdrawal of approval.

(3) The Director, or his or her representative, may give written notice of

non-renewal of the contract of a carrier whose plan does not meet the minimum enrollee requirement in § 890.201(a)(11). However, the Director may defer withdrawing approval of a plan not meeting the requirement in § 890.201(a)(11) of this part when, in the judgment of OPM, the carrier shows good cause. The Director or representative may authorize a plan with fewer than 300 employees or annuitants to remain in the FEHB Program when he or she determines, in his or her discretion, that it is in the best interest of the Program (e.g., when the plan is the only plan available to enrollees in a rural area).

(b) During a current contract term, the Director, in his or her discretion, may reinstate approval of a plan or carrier under this section on a finding that the reasons for withdrawing approval no longer exist.

[55 FR 9109, Mar. 12, 1990, as amended at 57 FR 14324, Apr. 20, 1992]

### § 890.205 Nonrenewal of contracts of health benefits plans.

(a) Either OPM or the carrier may terminate a contract by giving a written notice of nonrenewal which includes an indication of the reason for the intended action.

(b) Where termination by notice of intent not to renew is made by OPM, the carrier contesting that notice may request that OPM review the proposed decision. Such review shall be conducted by the Director or a representative designated by the Director, who shall not otherwise have been a party to the initial decision to issue a notice of intent not to renew. A request for such review, which may include a request that a representative of the carrier appear personally before OPM, shall be in writing. That request must be received within 10 calendar days of the carrier's receipt of the notice of intent not to renew. Such request shall include a detailed statement as to why the carrier disagrees with OPM's notice of nonrenewal and shall be accompanied by appropriate supporting documentation. Where a carrier has requested review under this section, the final decision by OPM not to renew a health benefits contract shall be communicated to the carrier in writing not more than 30 days after OPM's receipt of the carrier's request for review, unless a later date is mutually agreed upon.

(c) In the absence of a timely request for review as set forth in paragraph (b) of this section, OPM's notice of intent not to renew will become final without further notification.

[57 FR 19374, May 6, 1992]

## Subpart C—Enrollment

### § 890.301 Opportunities for employees who are not participants in premium conversion to enroll or change enrollment; effective dates.

(a) *Initial opportunity to enroll.* An employee who becomes eligible may elect to enroll or not to enroll within 60 days after becoming eligible.

(b) *Effective date—generally.* Except as otherwise provided, an enrollment or change of enrollment takes effect on the first day of the first pay period that begins after the date the employing office receives an appropriate request to enroll or change the enrollment and that follows a pay period during any part of which the employee is in pay status.

(c) *Belated enrollment.* When an employing office determines that an employee was unable, for cause beyond his or her control, to enroll or change the enrollment within the time limits prescribed by this section, the employee may enroll or change the enrollment within 60 days after the employing office advises the employee of its determination.

(d) *Enrollment by proxy.* Subject to the discretion of the employing office, an employee's representative, having written authorization to do so, may enroll or change the enrollment for the employee.

(e) *Decreasing enrollment type.* (1) Subject to two exceptions, an employee may decrease enrollment type at any time. *Exceptions:*

(i) An employee participating in health insurance premium conversion may decrease enrollment type during an open season or because of and consistent with a qualifying life event as defined in part 892 of this chapter.

(ii) An employee who is subject to a court or administrative order as discussed in paragraph (g)(3) of this section may not decrease enrollment type in a way that eliminates coverage of a child identified in the order as long as the court or administrative order is still in effect and the employee has at least one child identified in the order who is still eligible under the FEHB Program, unless the employee provides documentation to the agency that he or she has other coverage for the child(ren). The employee may not elect self only as long as he or she has one child identified as covered, but may elect self plus one.

(2) A decrease in enrollment type takes effect on the first day of the first pay period that begins after the date the employing office receives an appropriate request to change the enrollment, except that at the request of the enrollee and upon a showing satisfactory to the employing office that there was no family member eligible for coverage under the self plus one or self and family enrollment, or only one family member eligible for coverage under the self and family enrollment, as appropriate, the employing office may make the change effective on the first day of the pay period following the one in which there was, in the case of a self plus one enrollment, no family member or, in the case of a self and family enrollment, only one or no family member.

(f) *Open season.* (1) An open season will be held each year from the Monday of the second full workweek in November through the Monday of the second full workweek in December.

(2) The Director of the Office of Personnel Management may modify the dates specified in paragraph (f)(1) of this section or hold additional open seasons.

(3) With one exception, during an open season, an eligible employee may enroll and an enrolled employee may decrease or increase enrollment type, may change from one plan or option to another, or may make any combination of these changes. *Exception:* An employee who is subject to a court or administrative order as discussed in paragraph (g)(3) of this section may not cancel his or her enrollment, decrease enrollment type, or change to a comprehensive medical plan that does not serve the area where his or her child or children live as long as the court or administrative order is still in effect, and the employee has at least one child identified in the order who is still eligible under the FEHB Program, unless the employee provides documentation to the agency that he or she has other coverage for the child(ren). The employee may not elect self only as long as he or she has one child identified as covered, but may elect self plus one.

(4)(i) An open season new enrollment takes effect on the first day of the first pay period that begins in the next following year and which follows a pay period during any part of which the employee is in a pay status.

(ii) An open season change of enrollment takes effect on the first day of the first pay period which begins in January of the next following year.

(5) When a belated open season enrollment or change of enrollment is accepted by the employing office under paragraph (c) of this section, it takes effect as required by paragraph (f)(4) of this section.

(g) *Change in family status.* (1) An eligible employee may enroll and an enrolled employee may decrease or increase enrollment type, change from one plan or option to another, or make any combination of these changes when the employee's family status changes, including a change in marital status or any other change in family status. The employee must enroll or change the enrollment within the period beginning 31 days before the date of the change in family status, and ending 60 days after the date of the change in family status.

(2) An enrollment or change of enrollment made in conjunction with the birth of a child, or the addition of a child as a new family member in some other manner, takes effect on the first day of the pay period in which the child is born or becomes an eligible family member.

(3)(i) If an employing office receives a court or administrative order on or after October 30, 2000, requiring an employee to provide health benefits for his or her child or children, the employing office will determine if the employee has a self plus one or self and

family enrollment, as appropriate, in a health benefits plan that provides full benefits in the area where the child or children live. If the employee does not have the required enrollment, the agency must notify him or her that it has received the court or administrative order and give the employee until the end of the following pay period to change his or her enrollment or provide documentation to the employing office that he or she has other coverage for the child or children. If the employee does not comply within these time frames, the employing office must enroll the employee involuntarily as stated in paragraph (g)(3)(ii) of this section.

(ii) If the employee is not enrolled or does not enroll, the agency must enroll him or her for self plus one or self and family coverage, as appropriate, in the option that provides the lower level of coverage in the Service Benefit Plan. If the employee is enrolled but does not increase the enrollment type in a way that is sufficient to cover the child or children, the employing office must change the enrollment to self plus one or self and family, as appropriate, in the same option and plan, as long as the plan provides full benefits in the area where the child or children live. If the employee is enrolled in a comprehensive medical plan that does not serve the area in which the child or children live, the employing office must change the enrollment to self plus one or self and family, as appropriate, in the option that provides the lower level of coverage in the Service Benefit Plan.

(4) Subject to two exceptions, the effective date of an involuntary enrollment under paragraph (g)(3) of this section is the 1st day of the pay period that begins after the date the employing office completes the enrollment request. *Exceptions:*

(i) If the court or administrative order requires an earlier effective date, the effective date will be the 1st day of the pay period that includes that date. Effective dates may not be retroactive to a date more than 2 years earlier, or prior to October 30, 2000.

(ii) If after an involuntary enrollment becomes effective and the employing office finds that circumstances beyond the employee's control prevented him or her from enrolling or changing the enrollment within the time limits in this section, the employee may change the enrollment prospectively within 60 days after the employing office advises the employee of its finding.

(h) *Change in employment status.* An eligible employee may enroll and an enrolled employee may decrease or increase enrollment type, change from one plan or option to another, or make any combination of these changes when the employee's employment status changes. Except as otherwise provided, an employee must enroll or change the enrollment within 60 days after the change in employment status. Employment status changes include, but are not limited to—

(1) A return to pay status following loss of coverage under either—

(i) Section 890.304(a)(1)(v) due to the expiration of 365 days in leave without pay (LWOP) status, or

(ii) Section 890.502(b)(5) due to the termination of coverage during LWOP status.

(2) Reemployment after a break in service of more than 3 days.

(3) Restoration to a civilian position after serving in the uniformed services under conditions that entitle him or her to benefits under part 353 of this chapter, or similar authority.

(4)(i) A change from a temporary appointment in which the employee is eligible to enroll under 5 U.S.C. 8906a, which requires payment of the full premium with no Government contribution, to an appointment that entitles the employee to receive the Government contribution.

(ii) A change in entitlement to Government contribution as a result of becoming eligible for coverage under § 890.102(j).

(5) Separation from Federal employment when the employee or the employee's spouse is pregnant and the employee supplies medical documentation of the pregnancy. An employee who enrolls or changes the enrollment under this paragraph (h)(5) must do so during his or her final pay period. The effective date of an enrollment or a change of enrollment under this paragraph (h)(5) is the first day of the pay period

which the employing office receives an appropriate request to enroll or change the enrollment.

(6) A transfer from a post of duty within a State of the United States or the District of Columbia to a post of duty outside a State of the United States or the District of Columbia, or the reverse. An employee who enrolls or changes the enrollment under this paragraph (h)(6) must do so within the period beginning 31 days before leaving the old post of duty and ending 60 days after arriving at the new post of duty.

(7) A change, without a break in service or after a separation of 3 days or less, to part-time career employment as defined in 5 U.S.C. 3401(2) and 5 CFR part 340, subpart B, or a change from such part-time career employment to full-time employment that entitles the employee to the full Government contribution.

(i) *Loss of coverage under this part or under another group insurance plan.* An eligible employee may enroll and an enrolled employee may decrease or increase enrollment type, change from one plan or option to another, or make any combination of these changes when the employee or an eligible family member of the employee loses coverage under this part or another group health benefits plan. Except as otherwise provided, an employee must enroll or change the enrollment within the period beginning 31 days before the date of loss of coverage, and ending 60 days after the date of loss of coverage. Losses of coverage include, but are not limited to—

(1) Loss of coverage under another FEHB enrollment due to the termination, cancellation, or a change to self plus one or to self only, of the covering enrollment.

(2) Loss of coverage under another federally-sponsored health benefits program.

(3) Loss of coverage due to the termination of membership in an employee organization sponsoring or underwriting an FEHB plan.

(4) Loss of coverage due to the discontinuance of an FEHB plan in whole or in part. For an employee who loses coverage under this paragraph (i)(4):

(i) If the discontinuance is at the end of a contract year, the employee must change the enrollment during the open season, unless OPM establishes a different time. If the discontinuance is at a time other than the end of the contract year, OPM must establish a time and effective date for the employee to change the enrollment.

(ii) If the whole plan is discontinued, an employee who does not change the enrollment within the time set in (i)(4)(i) of this section will be enrolled in the lowest-cost nationwide plan option, as defined in paragraph (n) of this section;

(iii) If one or more options of a plan are discontinued, an employee who does not change the enrollment will be enrolled in the remaining option of the plan, or in the case of a plan with two or more options remaining, the lowest-cost remaining option that is not a High Deductible Health Plan (HDHP).

(iv) If the discontinuance of the plan, whether permanent or temporary, is due to a disaster, an employee must change the enrollment within 60 days of the disaster, as announced by OPM. If an employee does not change the enrollment within the time frame announced by OPM, the employee will be enrolled in the lowest-cost nationwide plan option, as defined in paragraph (n) of this section. The effective date of enrollment changes under this provision will be set by OPM when it makes the announcement allowing such changes;

(v) An employee who is unable, for causes beyond his or her control, to make an enrollment change within the 60 days following a disaster and is, as a result, enrolled in the lowest-cost nationwide plan as defined in paragraph (n) of this section, may request a belated enrollment into the plan of his or her choice subject to the requirements of paragraph (c) of this section;

(5) Loss of coverage under the Medicaid program or similar State-sponsored program of medical assistance for the needy.

(6) Loss of coverage under a non-Federal health plan because an employee moves out of the commuting area to accept another position and the employee's non-federally employed spouse terminates employment to accompany the employee. An employee may enroll or change the enrollment within the

period beginning 31 days before the date the employee leaves employment in the old commuting area and ending 180 days after entry on duty at place of employment in the new commuting area.

(7) Loss of coverage under a non-Federal health plan.

(j) *Move from comprehensive medical plan's area.* An employee in a comprehensive medical plan who moves or becomes employed outside the geographic area from which the plan accepts enrollments, or if already outside this area, moves or becomes employed further from this area, may change the enrollment upon notifying the employing office of the move or change of place of employment. Similarly, an employee whose covered family member moves outside the geographic area from which the plan accepts enrollments, or if already outside this area, moves further from this area, may change the enrollment upon notifying the employing office of the family member's move. The change of enrollment takes effect on the first day of the pay period that begins after the employing office receives an appropriate request.

(k) *On becoming eligible for Medicare.* An employee may change the enrollment from one plan or option to another at any time beginning on the 30th day before becoming eligible for coverage under title XVIII of the Social Security Act (Medicare). A change of enrollment based on becoming eligible for Medicare may be made only once.

(l) *Salary of temporary employee insufficient to pay withholdings.* If the salary of a temporary employee eligible under 5 U.S.C. 8906a is not sufficient to pay the withholdings for the plan in which the employee is enrolled, the employing office shall notify the employee of the plans available at a cost that does not exceed the employee's salary. The employee may enroll in another plan whose cost is no greater than his or her salary within 60 days after receiving such notification from the employing office. The change of enrollment takes effect immediately upon termination of the prior enrollment.

(m) *An employee or eligible family member becomes eligible for premium assistance under Medicaid or a State Children's Health Insurance Program (CHIP).* An eligible employee may enroll and an enrolled employee may decrease or increase enrollment type, change from one plan or option to another, or make any combination of these changes when the employee or an eligible family member of the employee becomes eligible for premium assistance under a Medicaid plan or CHIP. An employee must enroll or change his or her enrollment within 60 days after the date the employee or family member is determined to be eligible for assistance.

(n) OPM will annually determine the lowest-cost nationwide plan option calculated based on the enrollee share of the cost of a self only enrollment. The plan option identified may not be a High Deductible Health Plan (HDHP) or an option from a health benefits plan that charges an association or membership fee. OPM reserves the right to designate an alternate plan for automatic enrollments if OPM determines circumstances dictate this.

[62 FR 38435, July 18, 1997; 62 FR 49557, Sept. 22, 1997, as amended at 65 FR 44646, July 19, 2000; 68 FR 56524, Oct. 1, 2003; 69 FR 56928, Sept. 23, 2004; 72 FR 1912, Jan. 17, 2007; 75 FR 76616, Dec. 9, 2010; 79 FR 62329, Oct. 17, 2014; 80 FR 55734, Sept. 17, 2015; 80 FR 65882, Oct. 28, 2015]

### § 890.302 Coverage of family members.

(a)(1) An enrollment for self plus one includes the enrollee and one eligible family member. An enrollment for self and family includes all family members who are eligible to be covered by the enrollment. Except as provided in paragraph (a)(2) of this section, no employee, former employee, annuitant, child, or former spouse may enroll or be covered as a family member if he or she is already covered under another person's self plus one or self and family enrollment in the FEHB Program.

(2) *Dual enrollment.* (i) A dual enrollment exists when an individual is covered under more than one FEHB Program enrollment. Dual enrollments are prohibited except when an eligible individual would otherwise not have access to coverage and the dual enrollment has been authorized by the employing office.

(ii) *Exception*. An individual described in paragraph (a)(2)(i) of this section may enroll if he or she or his or her eligible family members would otherwise not have access to coverage, in which case the individual may enroll in his or her own right for self only, self plus one, or self and family coverage, as appropriate. However, an eligible individual is entitled to receive benefits under only one enrollment regardless of whether he or she qualifies as a family member under a spouse's or parent's enrollment. To ensure that no person receives benefits under more than one enrollment, each enrollee must promptly notify the insurance carrier as to which person(s) will be covered under his or her enrollment. These individuals are not covered under the other enrollment. Examples include but are not limited to:

(A) To protect the interests of married or legally separated Federal employees, annuitants, and their children, an employee or annuitant may enroll in his or her own right in a self only, self plus one, or self and family enrollment, as appropriate, even though his or her spouse also has a self plus one or self and family enrollment if the employee, annuitant, or his or her children live apart from the spouse and would otherwise not have access to coverage due to a service area restriction and the spouse refuses to change health plans.

(B) When an employee who is under age 26 and covered under a parent's self plus one or self and family enrollment acquires an eligible family member, the employee may elect to enroll for self plus one or self and family coverage.

(iii) Children are entitled to receive benefits under only one enrollment regardless of whether the children qualify as family members under the enrollment of both parents or of a parent and a stepparent and regardless of whether the parents are married, unmarried, divorced, legally separated, or in a domestic partnership. To ensure that no person receives benefits under more than one enrollment, each enrollee must promptly notify the insurance carrier as to which family members will be covered under his or her enrollment. These individuals are not covered under the other enrollment.

(b)(1) A child under the age of 26, or a child of any age who is incapable of self-support because of a mental or physical disability which existed before age 26, is considered to be a family member eligible to be covered by the enrollment of an enrolled employee or annuitant or a former employee or child enrolled under § 890.1103 of this part if he or she is—

(i) A child born within marriage;

(ii) A recognized natural child;

(iii) An adopted child;

(iv) A stepchild; or

(v) A foster child.

(2) *Meaning of stepchild*. Except as provided in paragraph (b)(5) of this section, for purposes of this part, the term ''stepchild'' refers to the child of an enrollee's spouse or domestic partner and shall continue to refer to such child after the enrollee's divorce from the spouse, termination of the domestic partnership, or death of the spouse or domestic partner, so long as the child continues to live with the enrollee in a regular parent-child relationship. Coverage of children of domestic partners terminates on January 1, 2016, unless an agency requests, and OPM grants, the agency a continued coverage exception for enrollees living overseas. This continued coverage exception will be available to overseas employees and all coverage, under such an exception, will end on September 30, 2018.

(3) *Meaning of domestic partner*. For purposes of this part, the term ''domestic partner'' is a person in a domestic partnership with an employee, annuitant, former employee or child enrolled under § 890.1103.

(4) *Meaning of domestic partnership*. For purposes of this part, the term ''domestic partnership'' is defined as a committed relationship between two adults of the same sex, in which the partners—

(i) Are each other's sole domestic partner and intend to remain so indefinitely;

(ii) Maintain a common residence, and intend to continue to do so (or would maintain a common residence but for an assignment abroad or other employment-related, financial, or similar obstacle);

(iii) Are at least 18 years of age and mentally competent to consent to a contract;

(iv) Share responsibility for a significant measure of each other's financial obligations;

(v) Are not married or joined in a civil union to anyone else;

(vi) Are not a domestic partner of anyone else;

(vii) Are not related in a way that, if they were of opposite sex, would prohibit legal marriage in the U.S. jurisdiction in which the domestic partnership was formed;

(viii) Provide documentation demonstrating fulfillment of the requirements of paragraphs (b)(4)(i) through (vii) of this section as prescribed by OPM; and

(ix) Certify that they understand that willful falsification of the documentation described in paragraph (b)(4)(viii) of this section may lead to disciplinary action and the recovery of the cost of benefits received related to such falsification and may constitute a criminal violation under 18 U.S.C. 1001.

(x) Certify that they would marry but for the failure of their state of residence to permit same-sex marriage.

(5) Notwithstanding the provisions of paragraph (b)(2) of this section, the child of an enrollee and a domestic partner who otherwise meet the requirements of paragraphs (b)(4)(i) through (viii) of this section but live in a state that has authorized marriage by same-sex couples prior to the first day of Open Season, shall not be considered a stepchild who is the child of a domestic partner in the following plan year. The determination of whether a state's marriage laws render a child ineligible for coverage as a stepchild who is the child of a domestic partner shall be made once annually, based on the law of the state where the same-sex couple lives on the last day before Open Season begins for the following plan year. A child's eligibility for coverage as a stepchild who is the child of a domestic partner in a particular plan year shall not be affected by a mid-year change to a state's marriage law or by the couple's relocation to a different state. For mid-year enrollment changes involving the addition of a new stepchild, as defined by this regulation, outside of Open Season, the determination of whether a state's marriage laws render the child ineligible for coverage shall be made at the time the employee notifies the employing office of his or her desire to cover the child.

(6) *Termination of domestic partnership.* An enrollee or his or her domestic partner must notify the employing office within thirty calendar days in the event that any of the conditions listed in paragraphs (b)(4)((i) through (vii) of this section are no longer met, in which case a domestic partnership will be deemed terminated.

(7) *Tax issues.* The fair market value of coverage provided to a stepchild who is the child of a domestic partner will be taxed in accordance with applicable tax laws unless the enrollee establishes that the stepchild qualifies for favorable tax treatment.

(c) *Child incapable of self-support.* When an individual's enrollment for self plus one or self and family includes a child who has become 26 years of age and is incapable of self-support, the employing office must require such enrollee to submit a physician's certificate verifying the child's disability. The certificate must—

(1) State that the child is incapable of self-support because of a physical or mental disability that existed before the child became 26 years of age and that can be expected to continue for more than 1 year;

(2) Include a statement of the name of the child, the nature of the disability, the period of time it has existed, and its probable future course and duration; and,

(3) Be signed by the physician and show the physician's office address. The employing office must require the enrollee to submit the certificate on or before the date the child becomes 26 years of age. However, the employing office may accept otherwise satisfactory evidence of incapacity that is not timely filed.

(d) *Renewal of certificates of incapacity.* The employing office must require an enrollee who has submitted a certificate of incapacity to renew that certificate on the expiration of the minimum period of disability certified.

(e) *Determination of incapacity.* (1) Except as provided in paragraph (e)(2) of this section, the employing office shall make determinations of incapacity.

(2) Either the employing office or the carrier may make a determination of incapacity if a medical condition, as specified by OPM, exists that would cause a child to be incapable of self-support during adulthood.

(f) *Switching a covered family member.* (1) An enrollee with a self plus one enrollment may switch his or her covered family member during the annual Open Season, upon a change in family status, upon a change in coverage, or upon a change in eligibility, so long as switching a covered family member is consistent with the event that has taken place.

(2) Switching a covered family member under a self plus one enrollment will be effective on the first day of the first pay period that begins after the date the employing office receives an appropriate request to switch the covered family member.

[78 FR 64876, Oct. 30, 2013, as amended at 80 FR 55735, Sept. 17, 2015; 81 FR 86906, Dec. 2, 2016]

### § 890.303 Continuation of enrollment.

(a) *On transfer or retirement.* (1) Except as otherwise provided by this part, the enrollment of an employee or annuitant eligible to continue enrollment continues without change when he or she moves from one employing office to another, without a break in service of more than 3 days, whether the personnel action is designated as a transfer or not.

(2) In order for an employee to continue an enrollment as an annuitant, he or she must meet the participation requirements set forth at 8905(b) of title 5, United States Code, for continuing an enrollment as an annuitant as of the commencing date of his or her annuity or monthly compensation.

(3) For the purpose of this part, an employee is considered to have enrolled at his or her first opportunity if the employee enrolled during the first of the periods set forth in § 890.301 in which he or she was eligible to enroll or was covered at that time by the enrollment of another employee or annuitant, or whose enrollment was effective not later than December 31, 1964.

(4) Enrollment or eligibility for enrollment under subparts H or K of this part of an individual who is not an employee eligible for coverage under other provisions of this part is not considered in determining whether a retiring employee has met the participation requirements of § 8905(b) of title 5, U.S. Code. Coverage under subparts H or K of this part of an individual who is an employee eligible for coverage under other provisions of this part may be considered in determining whether a retiring employee has met the participation requirements.

(b) *Change of enrolled employees to certain excluded positions.* Employees and annuitants enrolled under this part who move, without a break in service or after a separation of 3 days or less, to an employment in which they are excluded by § 890.102(c), continue to be enrolled unless excluded by paragraphs (c)(4), (5), (6), (7), or (9) of § 890.102.

(c) *On death.* The enrollment of a deceased employee or annuitant who is enrolled for self plus one or self and family (as opposed to self only) is transferred automatically to his or her eligible survivor annuitant(s) covered by the enrollment, as applicable. For self and family, the enrollment is considered to be that of:

(1) The survivor annuitant from whose annuity all or the greatest portion of the withholding for health benefits is made; or

(2) The surviving spouse entitled to a basic employee death benefit. The enrollment covers members of the family of the deceased employee or annuitant. In those instances in which the annuity is split among surviving family members, multiple enrollments are allowed. A remarried spouse is not a member of the family of the deceased employee or annuitant unless annuity under section 8341 or 8442 of title 5, United States Code, continues after remarriage.

(d)(1) *Survivor annuitants.* If an employee who is entitled to health benefits coverage as a survivor annuitant elects to enroll or to continue to be enrolled under his eligibility as an employee, and is thereafter separated

without entitlement to continued enrollment based on his own service, he is entitled to reinstatement of his employee-acquired enrollment on application to his retirement office. Reinstatement is effective immediately after termination of his employee-acquired enrollment if the application is received by the retirement office within 60 days of separation; otherwise reinstatement is effective on the first day of the first pay period after receipt of the application. The retirement office shall withhold from the annuity that the former employee receives as a survivor annuitant, the amounts necessary to pay his share of the cost of the enrollment.

(2) *Employee becomes a survivor annuitant.* (i) If an employee who is entitled to health benefits coverage as a survivor annuitant elects to enroll or to continue to be enrolled under his or her eligibility as an employee, and is thereafter separated without entitlement to continued enrollment based on his or her own service, the employee is entitled to reinstatement of the enrollment as a survivor annuitant on application to the retirement office. Reinstatement as a survivor annuitant is effective on the day after the termination date of the employee-acquired enrollment if the application is received by the retirement office within 60 days of separation; otherwise, reinstatement is effective on the first day of the first pay period after receipt of the application. The retirement office shall withhold from the annuity that the former employee receives as a survivor annuitant the amounts necessary to pay the health benefits premium.

(ii) If the surviving spouse of a deceased employee or annuitant is enrolled as an employee with a self plus one or self and family enrollment (or, if both the decedent and the surviving spouse were enrolled in a self only or self plus one enrollment) at the time the surviving spouse becomes a survivor annuitant and the surviving spouse is thereafter separated without entitlement to continued enrollment as a retiree, the surviving spouse is entitled to enroll as a survivor annuitant. The change from coverage as an employee to coverage as a survivor annuitant must be made within 30 days of separation from service.

(iii) Except for an employee who meets the definition of former spouse under 5 U.S.C. 8901(10) based on an individual's deferred annuity under 5 U.S.C. 8341(h) or 8445(f), the employee survivor of an annuitant receiving deferred retirement benefits is not eligible for FEHB Program enrollment as a survivor annuitant and therefore may not enroll as a survivor annuitant based on coverage obtained as an employee.

(3) *Insurable interest survivor annuity.* A current spouse who is an insurable interest beneficiary under § 831.606(b) or § 842.605(b) of this title is eligible to continue health benefits enrollment as an insurable interest survivor annuitant so long as he or she was covered as a family member at the time of the annuitant's death. This entitlement applies even if the spouse is eligible for continued enrollment as a survivor annuitant under another section of 5 CFR parts 831 or 843. To prevent dual coverage, the spouse must be covered under only one health benefits enrollment under this part.

(e) *In nonpay status.* (1) Except as otherwise provided by law, the enrollment of an employee continues while he/she is in nonpay status for up to 365 days. The 365 days' nonpay status may be continuous or broken by periods of less than 4 consecutive months in pay status. If an employee has at least 4 consecutive months in pay status after a period of nonpay status he/she is entitled to begin the 365 days' continuation of enrollment anew. For the purposes of this paragraph, 4 consecutive months in pay status means any 4-month period during which the employee is in pay status for at least part of each pay period.

(2) However, in the case of an employee who is employed under an OPM approved career-related work-study program under Schedule D of at least one year's duration and who is expected to be in a pay status during not less than one-third of the total period of time from the date of the first appointment to the completion of the

work-study program, his/her enrollment continues while he/she is in nonpay status so long as he/she is participating in the work-study program.

(f) [Reserved]

(g) *Former spouse entitled to coverage as employee or member of family*. An individual entitled to health benefits as a former spouse who also has or becomes entitled to health benefits coverage as a Federal employee or as a family member under another enrollment under this part may defer or suspend coverage as a former spouse and continue his or her coverage as an employee or family member. The former spouse must have established entitlement to the health benefits coverage under § 890.803 of this part and filed all required documents with the employing office responsible for maintaining the former spouse enrollment within the time limits specified in § 890.805 of this part. The employing office shall note in the former spouse's file that the former spouse health benefits enrollment is being deferred or suspended until coverage as a Federal employee or as a family member ends. Upon loss of coverage as a Federal employee or as a family member, the individual is entitled to enroll or resume the enrollment as a former spouse, provided he or she remains eligible as such. A former spouse who enrolls because he or she lost coverage under another enrollment under this part for a reason other than cancellation must meet the requirements of § 890.301(g)(2). A former spouse who enrolls because he or she lost coverage under another enrollment under this part as a result of cancellation of the covering enrollment must meet the requirements of § 890.301(g)(4).

(h) *Temporary continuation of coverage*. Certain former employees who lose coverage because of a separation from Federal service, certain children who lose coverage because they cease to meet the requirements for coverage as children, and certain former spouses who lose coverage because their marriage to the enrollee ends and who are not eligible for coverage under subpart H of this part may elect temporary continuation of coverage under the provisions of subpart K of this part.

(i) *Service in the uniformed services*. (1) The enrollment of an individual who separates, enters military furlough, or is placed in nonpay status to serve in the uniformed services under conditions that entitle him or her to benefits under part 353 of this chapter, or similar authority, may continue for the 24-month period beginning on the date that the employee is placed on leave without pay or separated from service to perform active duty in the uniformed services, provided that the individual continues to be entitled to benefits under part 353 of this chapter, or similar authority. As provided for by 5 U.S.C. 8905(a), the continuation of enrollment for up to 24 months applies to employees called or ordered to active duty in support of a contingency operation on or after September 14, 2001. The enrollment of an employee who met the requirements of chapter 43 of title 38, United States Code, on or after December 10, 2004, may continue for the 24-month period beginning on the date that the employee is placed on leave without pay or separated from service to perform active duty in the uniformed services, provided that the employee continues to be entitled to continued coverage under part 353 of this chapter, or similar authority.

(2) An employee in nonpay status is entitled to continued coverage under paragraph (e) of this section if the employee's entitlement to benefits under part 353 of this chapter, or similar authority, ends before the expiration of 365 days in nonpay status.

(3) If the enrollment of an employee had terminated due to the expiration of 365 days in nonpay status or because of the employee's separation from service, it may be reinstated for the remainder of the 24-month period beginning on the date that the employee is placed on leave without pay or separated from service to perform active duty in the uniformed services, provided that the employee continues to be entitled to continued coverage under part 353 of this chapter, or similar authority.

[33 FR 12510, Sept. 4, 1968]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting § 890.303, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and at *www.fdsys.gov*.

**§ 890.304 Termination of enrollment.**

(a) *Employees.* (1) An employee's enrollment terminates, subject to the temporary extension of coverage for conversion, at midnight of the earliest of the following dates:

(i) The last day of the pay period in which he/she is separated from the service other than by retirement under conditions entitling him/her to continue his/her enrollment.

(ii) The last day of the pay period in which he or she separates after meeting the requirements for an immediate annuity under § 842.204(a)(1) of this chapter, but postpones receipt of annuity as provided by § 842.204(c).

(iii) The last day of the pay period in which his or her employment status or the eligibility of his or her position changes so that he or she is excluded from enrollment.

(iv) The last day of the pay period in which he dies, unless he leaves a member of the family entitled to continue enrollment as a survivor annuitant.

(v) The last day of the pay period which includes the day on which the continuation of enrollment under § 890.303(e) expires, or, if he/she is not entitled to any further continuation because he/she has not had 4 consecutive months of pay status since exhausting his/her 365 days' continuation of coverage in nonpay status, the last day of his/her last pay period in pay status.

(vi) The day he or she is separated, furloughed, or placed on leave of absence to serve in the uniformed services under conditions entitling him or her to benefits under part 353 of this chapter, or similar authority, for the purpose of performing duty not limited to 30 days or less, provided the employee elects in writing to have the enrollment so terminated.

(vii) For an employee who separates to serve in the uniformed services under conditions entitling him or her to benefits under part 353 of this chapter, or similar authority, for the purpose of performing duty not limited to 30 days or less, the date that is 24 months after the date that the employee is placed on leave without pay or separated from service to perform active duty in the uniformed services, or the date entitlement to benefits under part 353 of this chapter, or similar authority, ends, whichever is earlier, unless the enrollment is terminated under paragraph (a)(1)(vi) of this section.

(viii) For an employee who is furloughed or placed on leave of absence under conditions entitling him or her to benefits under part 353 of this chapter, or similar authority, the date that is 24 months after the date that the employee is placed on leave without pay or separated from service to perform active duty to serve in the uniformed services, or the date entitlement to benefits under part 353 of this chapter, or similar authority, ends, whichever is earlier, but not earlier than the date the enrollment would otherwise terminate under paragraph (a)(1)(v) of this section.

(2) If the pay of a temporary employee eligible under 5 U.S.C. 8906a is insufficient to pay the withholdings for the plan in which the employee is enrolled, and the employee does not, or cannot, elect a plan under § 890.301(l) at a cost to him or her not in excess of the pay, the employing office must terminate the employee's enrollment effective as of the end of the last period for which withholding was made. Each temporary employee whose enrollment is so terminated is entitled to a 31-day extension of coverage for conversion.

(b) *Annuitants.* (1) If the annuity of an annuitant is insufficient to pay the withholdings for the plan in which the annuitant is enrolled, the annuitant may elect one of the two opportunities offered under § 890.306(q) of this part (electing a plan with a withholding not in excess of the annuity; or, paying premiums directly to the retirement system in accordance with § 890.502(f) of this part). The retirement system will send two notices to the annuitant, including one by certified mail return receipt requested. Continuation of coverage rests upon electing direct payment or new coverage within 15 days (45 days for annuitants residing overseas) after receipt of the final notice. Except as provided in paragraph (b)(3) of this section, the enrollment of an individual who fails to make an election within the specified time frame will be

terminated. An annuitant whose enrollment is terminated because of failure to make an election may not reenroll or reinstate coverage, except as provided in paragraph (b)(2) of this section. Each annuitant whose enrollment is so terminated is entitled to a 31-day extension of coverage for conversion.

(2) If the individual was prevented by circumstances beyond his or her control from making an election within the time limit after receipt of the final notice, he or she may request reinstatement of coverage by writing to the retirement system. The retirement system will determine if the individual is eligible for reinstatement of coverage; and, when the determination is affirmative, the individual's coverage may be reinstated retroactively to the date of termination or prospectively. If the determination is negative, the individual may request reconsideration of the decision from OPM.

(3) If the annuitant does not make an election under paragraph (b)(1) of this section and is enrolled in the high option of a plan that has two options, the annuitant is deemed to have elected enrollment in the standard option of the same plan unless the annuity is insufficient to pay the withholdings for the standard option.

(4) An annuitant's enrollment terminates, subject to the temporary extension of coverage for conversion, at midnight of the last day of the pay period in which he dies, unless he leaves a member of the family entitled to continue enrollment as a survivor annuitant, or, if his enrollment is not terminated by death, at midnight of the earliest of the following dates:

(i) The last day of the last pay period for which he is entitled to annuity, unless he is eligible for continued enrollment as an employee in which case his enrollment continues without change.

(ii) The last day of the pay period in which his title to compensation under subchapter I of chapter 81 of title 5, United States Code, terminates, or in which he is held by the Secretary of Labor to be able to return to duty, unless he is eligible for continued enrollment as an employee or as an annuitant under a retirement system for civilian employees in which case his enrollment continues without change.

(iii) The day he enters on active duty in a uniformed service for the purpose of performing duty not limited to 30 days or less, provided the annuitant elects, in writing, to terminate the enrollment.

(iv) The last day of the month preceding the month in which a survivor annuitant in receipt of basic employee death benefits under 5 U.S.C. 8442(b)(1)(A) remarries before attaining age 55.

(c) *Coverage of family members.* The coverage of a family member of an enrollee terminates, subject to the temporary extension of coverage for conversion, at midnight of the earlier of the following dates:

(1) The day on which he or she ceases to be a family member;

(2) The day the enrollee ceases to be enrolled, unless the family member is entitled, as a survivor annuitant, to continued enrollment, or is entitled to continued coverage under the enrollment of another.

(d) *Cancellation or suspension.* (1)(i) An employee who participates in health insurance premium conversion as provided in part 892 of this chapter may cancel his or her enrollment only during an open season or because of and consistent with a qualifying life event defined in § 892.101 of this chapter.

(ii) Subject to the provisions of paragraph (d)(iii) of this section, an enrollee who does not participate in premium conversion may cancel his or her enrollment at any time by filing an appropriate request with the employing office. The cancellation is effective at the end of the last day of the pay period in which the employing office receives the appropriate request canceling the enrollment.

(iii) An employee who is subject to a court or administrative order as discussed in § 890.301(g)(3), or an annuitant who was subject to such a court or administrative order at the time of his or her retirement, may not cancel or suspend his or her enrollment as long as the court or administrative order is still in effect and the enrollee has at least one child identified in the order who is still eligible under the FEHB Program, unless the employee or annuitant provides documentation to the

agency that he or she has other coverage for the child or children.

(2) An annuitant or survivor annuitant may suspend enrollment in FEHB for the purpose of enrolling in a Medicare-sponsored plan under sections 1833, 1876, or 1851 of the Social Security Act, or to enroll in the Medicaid program or a similar State-sponsored program of medical assistance for the needy, or to use Peace Corps or CHAMPVA or TRICARE (including coverage provided by the Uniformed Services Family Health Plan) or TRICARE-for-Life instead of FEHB coverage. To suspend FEHB coverage, documentation of eligibility for coverage under the non-FEHB program must be submitted to the retirement system. If the documentation is received within the period beginning 31 days before and ending 31 days after the effective date of the enrollment in the Medicare-sponsored plan, or the Medicaid or similar program, or within 31 days before or after the day designated by the annuitant or survivor annuitant as the day he or she wants to suspend FEHB coverage to use Peace Corps or CHAMPVA or TRICARE (including the Uniformed Services Family Health Plan) or TRICARE-for-Life instead of FEHB coverage, then suspension will be effective at the end of the day before the effective date of the enrollment or the end of the day before the day designated. Otherwise, the suspension is effective the first day of the first pay period that begins after the date the retirement system receives the documentation.

(3) The enrollee and covered family members are not entitled to the temporary extension of coverage for conversion or to convert to an individual contract for health benefits.

(e) *Temporary continuation of coverage.* Employees and family members are entitled to temporary continuation of coverage only as provided under subpart K of this part.

[33 FR 12510, Sept. 4, 1968]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting § 890.304, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and at *www.fdsys.gov*.

### § 890.305 Reinstatement of enrollment after military service.

(a) The enrollment of an employee or annuitant whose enrollment was terminated under § 890.304(a)(1)(vi), (vii), or (viii) or § 890.304(b)(4)(iii) is automatically reinstated on the day the employee is restored to a civilian position under the provisions of part 353 of this chapter, or similar authority, or on the day the annuitant is separated from the uniformed services, as the case may be.

(b) An employee whose employing office terminates his or her enrollment because his or her order to enter on duty in a uniformed service is for a period longer than 30 days, and who retires on an immediate annuity from his or her Federal civilian position while on such duty, may reinstate his or her enrollment by asking to do so within 60 days after retirement. In the absence of such a request, the retirement system automatically reinstates the enrollment on the day the person separates from the uniformed service. For the retirement system to reinstate the enrollment, the individual must have been covered under this part since his or her first opportunity or for the 5 years of civilian service (excluding the period of uniformed service) immediately preceding the civilian retirement, whichever is shorter.

[43 FR 52460, Nov. 13, 1978, as amended at 59 FR 60296, Nov. 23, 1994; 60 FR 45658, Sept. 1, 1995; 64 FR 31488, June 11, 1999]

### § 890.306 When can annuitants or survivor annuitants change enrollment or reenroll and what are the effective dates?

(a) *Requirements to continue coverage.* (1) To be eligible to continue coverage in a plan under this part, a former employee in receipt of an annuity must meet the statutory requirements under 5 U.S.C. 8905(b) of having retired on an immediate annuity and having been covered by a plan under this part for the 5 years of service immediately before retirement, or if less than 5 years, for all service since his or her first opportunity to enroll, unless OPM waives the requirement under § 890.108.

(2) To be eligible to continue coverage in a plan under this part, a survivor annuitant must be covered as a

family member when the employee or annuitant dies.

(b) *Effective date—generally*. Except as otherwise provided, an annuitant's change of enrollment takes effect on the first day of the first pay period that begins after the date the employing office receives an appropriate request to change the enrollment.

(c) *Belated enrollment*. When an employing office determines that an annuitant was unable, for cause beyond his or her control, to continue coverage by enrolling in his or her own name or change the enrollment within the time limits prescribed by this section, the annuitant may do so within 60 days after the employing office advises the annuitant of its determination.

(d) *Enrollment by proxy*. Subject to the discretion of the employing office, an annuitant's representative, having written authorization to do so, may continue the annuitant's coverage by enrolling in the annuitant's own name, or change the enrollment for the annuitant.

(e) *Decreasing enrollment type*. (1) With one exception, an annuitant may decrease enrollment type at any time. Exception: An annuitant who, as an employee, was subject to a court or administrative order as discussed in § 890.301(g)(3) at the time he or she retired may not, after retirement, decrease enrollment type in a way that eliminates coverage of a child identified in the order as long as the court or administrative order is still in effect and the annuitant has at least one child identified in the order who is still eligible under the FEHB Program, unless the annuitant provides documentation to the retirement system that he or she has other coverage for the child or children. The annuitant may not elect self only as long as he or she has one child identified as covered, but may elect self plus one.

(2) A decrease in enrollment type takes effect on the first day of the first pay period that begins after the date the employing office receives an appropriate request to change the enrollment, except that at the request of the annuitant and upon a showing satisfactory to the employing office that there was no family member eligible for coverage under the self plus one or self and family enrollment, or only one family member eligible for coverage under the self and family enrollment, as appropriate, the employing office may make the change effective on the first day of the pay period following the one in which there was, in the case of a self plus one enrollment, no family member or, in the case of a self and family enrollment, only one or no family member.

(f) *Open season*. (1) During an open season as provided by § 890.301(f)—

(i) With one exception, an enrolled annuitant may decrease or increase enrollment type, may change from one plan or option to another, or may make any combination of these changes. Exception: An annuitant who, as an employee, was subject to a court or administrative order as discussed in § 890.301(g)(3) at the time he or she retired may not cancel or suspend his or her enrollment, decrease enrollment type in a way that eliminates coverage of a child identified in the order or change to a comprehensive medical plan that does not serve the area where his or her child or children live after retirement as long as the court or administrative order is still in effect and the annuitant has at least one child identified in the order who is still eligible under the FEHB Program, unless the annuitant provides documentation to the retirement system that he or she has other coverage for the child or children. The annuitant may not elect self only as long as he or she has one child identified as covered, but may elect self plus one.

(ii) An annuitant or survivor annuitant who suspended enrollment under this part to enroll in a Medicare-sponsored plan under sections 1833, 1876, or 1851 of the Social Security Act, or to enroll in a Medicaid or similar State-sponsored program of medical assistance for the needy, or to use Peace Corps or CHAMPVA or TRICARE (including the Uniformed Services Family Health Plan) or TRICARE-for-Life coverage instead of FEHB coverage, may reenroll.

(2) An open season reenrollment or change of enrollment takes effect on the first day of the first pay period that begins in January of the next following year.

(3) When a belated open season reenrollment or change of enrollment is accepted by the employing office under paragraph (c) of this section, it takes effect as required by paragraph (f)(2) of this section.

(g) *Change in family status.* (1) An enrolled former employee in receipt of an annuity may decrease or increase enrollment type, change from one plan or option to another, or make any combination of these changes when the annuitant's family status changes, including a change in marital status or any other change in family status. In the case of an enrolled survivor annuitant, a change in family status based on additional family members occurs only if the additional family members are family members of the deceased employee or annuitant. The annuitant must change the enrollment within the period beginning 31 days before the date of the change in family status, and ending 60 days after the date of the change in family status.

(2) A change of enrollment made in conjunction with the birth of a child, or the addition of a child as a new family member in some other manner, takes effect on the first day of the pay period in which the child is born or becomes an eligible family member.

(h) *Reenrollment of annuitants or survivor annuitants who suspended enrollment to enroll in a Medicare-sponsored plan, or a Medicaid or similar State-sponsored program; or to use Peace Corps or CHAMPVA or TRICARE (including the Uniformed Services Family Health Plan) or TRICARE-for-Life coverage instead of FEHB coverage.* (1) An annuitant or survivor annuitant who had been enrolled (or was eligible to enroll) for coverage under this part and suspended the enrollment for the purpose of enrolling in a Medicare sponsored plan under sections 1833, 1876, or 1851 of the Social Security Act, or to enroll in the Medicaid program or a similar State-sponsored program of medical assistance for the needy, or to use Peace Corps or CHAMPVA or TRICARE (including the Uniformed Services Family Health Plan) or TRICARE-for-Life coverage instead of the FEHB Program (as provided by § 890.304(d)), and who subsequently involuntarily loses coverage under one of these programs, may immediately reenroll in any available FEHB plan under this part at any time beginning 31 days before and ending 60 days after the loss of coverage. A reenrollment under this paragraph (h) of this section takes effect on the date following the effective date of the loss of coverage as shown on the documentation from the non-FEHB coverage. If the request to reenroll is not received by the retirement system within the time period specified, the annuitant must wait until the next available Open Season to reenroll.

(2) An annuitant or survivor annuitant who suspended enrollment in the FEHB Program to enroll in a Medicare sponsored plan or the Medicaid or similar State-sponsored program of medical assistance for the needy, or to use Peace Corps or CHAMPVA or TRICARE (including the Uniformed Services Family Health Plan) or TRICARE-for-Life, but now wants to reenroll in the FEHB Program for any reason other than an involuntary loss of coverage, may do so during the next available Open Season (as provided by paragraph (f) of this section).

(i) [Reserved]

(j) *Annuitants who apply for postponed minimum retirement age plus 10 years of service (MRA plus 10) annuity.* (1) A former employee who meets the requirements for an immediate annuity under 5 U.S.C. 8412(g) and for continuation of coverage under 5 U.S.C. 8905(b) at the time of separation, and whose enrollment is terminated under § 890.304(a)(1)(ii) may enroll in a health benefits plan under this part within 60 days after OPM mails the former employee a notice of eligibility. If such former employee dies before the end of this 60-day election period, a survivor who is entitled to a survivor annuity may enroll in a health benefits plan under this part within 60 days after OPM mails the survivor a notice of eligibility.

(2) The former employee's enrollment takes effect on the first day of the month following the month in which OPM receives the appropriate request or on the commencing date of annuity, whichever is later. A survivor's enrollment takes effect on the first day of the month following the month in

which OPM receives the appropriate request.

(k) *Restoration of annuity or compensation payments.* (1) A disability annuitant who was enrolled in a health benefits plan under this part immediately before his or her disability annuity was terminated because of restoration to earning capacity or recovery from disability, and whose disability annuity is restored under 5 U.S.C. 8337(e) after December 31, 1983, or 8455(b), may enroll in a health benefits plan under this part within 60 days after OPM mails a notice of insurance eligibility. The enrollment takes effect on the first day of the month after the date OPM receives the appropriate request.

(2) An annuitant who was enrolled in a health benefits plan under this part immediately before his or her compensation was terminated because OWCP determined that he or she had recovered from the job-related injury or disease, and whose compensation is restored due to a recurrence of disability, may enroll in a health benefits plan under this part within 60 days after OWCP mails a notice of insurance eligibility. The enrollment takes effect on the first day of the pay period after the date OWCP receives the appropriate request.

(3) A surviving spouse who was covered by a health benefits enrollment under this part immediately before his or her survivor annuity was terminated because of remarriage, and whose survivor annuity is later restored, may enroll in a health benefits plan under this part within 60 days after OPM mails a notice of eligibility. The enrollment takes effect on either—

(i) The first day of the month after the date OPM receives the appropriate request; or

(ii) The date of restoration of the survivor annuity or October 1, 1976, whichever is later.

(4) A surviving child who was covered by a health benefits enrollment under this part immediately before his or her survivor annuity was terminated because he or she ceased being a student, and whose survivor annuity is later restored, may enroll in a health benefits plan under this part within 60 days after OPM mails a notice of eligibility. The enrollment takes effect on the first day of the month after the date OPM receives the appropriate request or the date of restoration of the survivor annuity, whichever is later.

(5) A surviving child who was covered by a health benefits enrollment under this part immediately before his or her survivor annuity was terminated because he or she married, and whose survivor annuity is later restored because the marriage ended, may enroll in a health benefits plan under this part within 60 days after OPM mails a notice of eligibility. The enrollment takes effect on the first day of the month after the date OPM receives the appropriate request or the date of restoration of the survivor annuity, whichever is later.

(6) A surviving spouse who received a basic employee death benefit under 5 U.S.C. 8442(b)(1)(A) and who was covered by a health benefits enrollment under this part immediately before remarriage prior to age 55, may enroll in a health benefits plan under this part upon termination of the remarriage. The survivor must provide OPM with a certified copy of the notice of death or the court order terminating the marriage. The surviving spouse must enroll within 60 days after OPM mails a notice of eligibility. The enrollment takes effect on the first day of the month after the date OPM receives the appropriate request and the notice of death or court order terminating the remarriage.

(l) *Loss of coverage under this part or under another group insurance plan.* An annuitant who meets the requirements of paragraph (a) of this section, and who is not enrolled but is covered by another enrollment under this part may continue coverage by enrolling in his or her own name when the annuitant loses coverage under the other enrollment under this part. An enrolled annuitant may decrease or increase enrollment type, change from one plan or option to another, or make any combination of these changes when the annuitant or an eligible family member of the annuitant loses coverage under this part or under another group health benefits plan. Except as otherwise provided, an annuitant must enroll or change the enrollment within the period beginning 31 days before the date

of loss of coverage and ending 60 days after the date of loss of coverage. Losses of coverage include, but are not limited to—

(1) Loss of coverage under another FEHB enrollment due to the termination, cancellation, or a change to self plus one or self only, of the covering enrollment;

(2) Loss of coverage under another federally-sponsored health benefits program;

(3) Loss of coverage due to the termination of membership in an employee organization sponsoring or underwriting an FEHB plan;

(4) Loss of coverage due to the discontinuance of an FEHB plan in whole or in part. For an annuitant who loses coverage under this paragraph (l)(4)—

(i) If the discontinuance is at the end of a contract year, the annuitant must change the enrollment during the open season, unless OPM establishes a different time. If the discontinuance is at a time other than the end of the contract year, OPM must establish a time and effective date for the annuitant to change the enrollment;

(ii) If a plan discontinues all of its existing options, an annuitant who does not change his or her enrollment is deemed to have enrolled in the lowest-cost nationwide plan option, as defined in § 890.301(n); except when the annuity is insufficient to pay the withholdings, then paragraph (q) of this section applies.

(iii) If one or more options of a plan are discontinued, an annuitant who does not change the enrollment will be enrolled in the remaining option of the plan, or in the case of a plan with two or more options remaining, the lowest-cost remaining option that is not a High Deductible Health Plan (HDHP). In the event that the annuity is insufficient to pay the withholdings, then paragraph (q) of this section applies;

(iv) After an involuntary enrollment under paragraph (l)(4)(ii) or (iii) of this section becomes effective, the annuitant may change the enrollment to another option of the plan into which he or she was enrolled or another health plan of his or her choice prospectively within 90-days after OPM advises the annuitant of the new enrollment;

(v) If the discontinuance of the plan, whether permanent or temporary, is due to a disaster, an annuitant must change the enrollment within 60 days of the disaster, as announced by OPM. If an annuitant does not change the enrollment within the time frame announced by OPM, the annuitant will be enrolled in the lowest-cost nationwide plan option, as defined in § 890.301(n). The effective date of enrollment changes under this provision will be set by OPM when it makes the announcement allowing such changes;

(vi) An annuitant who is unable, for causes beyond his or her control, to make an enrollment change within the 60 days following a disaster and is, as a result, enrolled in the lowest-cost nationwide plan as defined in § 890.301(n), may request a belated enrollment into the plan of his or her choice subject to the requirements of paragraph (c) of this section.

(5) Loss of coverage under the Medicaid program or similar State-sponsored program of medical assistance for the needy.

(6) Loss of coverage under a non-Federal health plan.

(m) *Move from comprehensive medical plan's area.* An annuitant in a comprehensive medical plan who moves or becomes employed outside the geographic area from which the plan accepts enrollments, or, if already outside this area, moves or becomes employed further from this area, may change the enrollment upon notifying the employing office of the move or change of place of employment. Similarly, an annuitant whose covered family member moves outside the geographic area from which the plan accepts enrollments, or if already outside this area, moves further from this area, may change the enrollment upon notifying the employing office of the family member's move. The change of enrollment takes effect on the first day of the pay period that begins after the employing office receives an appropriate request.

(n) *Overseas post of duty.* An annuitant may decrease or increase enrollment type, change from one plan or option to another, or make any combination of these changes within 60 days after the retirement or death of the

employee on whose service title to annuity is based, if the employee was stationed at a post of duty outside a State of the United States or the District of Columbia at the time of retirement or death.

(o) *On return from a uniformed service.* An enrolled annuitant who enters on duty in a uniformed service for 31 days or more may change the enrollment within 60 days after separation from the uniformed service.

(p) *On becoming eligible for Medicare.* An annuitant may change the enrollment from one plan or option to another at any time beginning on the 30th day before becoming eligible for coverage under title XVIII of the Social Security Act (Medicare). A change of enrollment based on becoming eligible for Medicare may be made only once.

(q) *Annuity insufficient to pay withholdings.* (1) If an annuity is insufficient to pay the withholdings for the plan that the annuitant is enrolled in, the retirement system must provide the annuitant with information regarding the available plans and written notification of the opportunity to either—

(i) Pay the premium directly to the retirement system in accordance with § 890.502(d); or

(ii) Enroll in any plan in which the annuitant's share of the premium is less than the amount of annuity. If the annuitant elects to change to a lower cost enrollment, the change takes effect immediately upon loss of coverage under the prior enrollment. The exemptions from debt collection procedures that are provided under § 831.1305(d)(2) and § 845.205(d)(2) of this chapter apply to elections under this paragraph (q)(1)(ii).

(2) If the annuitant is enrolled in the high option of a plan that has two options, and does not change the enrollment to a plan in which the annuitant's share of the premium is less than the amount of annuity or does not elect to pay premiums directly, the annuitant is deemed to have enrolled in the standard option of the same plan, unless the annuity is insufficient to pay the withholdings for the standard option.

(3) An annuitant whose enrollment was terminated because the amount of annuity was insufficient to cover the enrollee's share of the premium may apply to be reinstated in any available plan or option.

(4) An annuitant who can show evidence that he or she previously changed to a lower cost option, plan, or to a self-only enrollment prior to May 29, 1990, because the annuity was insufficient to cover the withholdings for the plan in which he or she was enrolled, may apply to change the enrollment to any available plan or option in which the enrollee's share of the total premium exceeds his or her monthly annuity.

(5) The effective date of the reinstatement of enrollment of an annuitant whose enrollment was terminated, or the change of enrollment of an annuitant who previously changed enrollment because his or her annuity was insufficient to cover the annuitant's share of the total premium, and who elects to pay premiums directly to the retirement system in accordance with § 890.502(f) is either—

(i) The first day of the first pay period that begins after the appropriate request is received by the retirement system; or,

(ii) The later of the date the enrollment was terminated or changed, or May 29, 1990.

(6) Retroactive reinstatement or change of enrollment is contingent upon payment of appropriate contributions retroactive to the effective date of the reinstatement or the change of enrollment. For the purpose of this paragraph (q)(6), a previous cancellation of enrollment because of insufficient annuity to cover the full amount of the withholdings is deemed to be a termination of enrollment.

(r) *Sole survivor.* When an employee or annuitant enrolled for self plus one or self and family dies, leaving a survivor annuitant who is entitled to continue the enrollment, and it is apparent from available records that the survivor annuitant is the sole survivor entitled to continue the enrollment, the office of the retirement system which is acting as employing office must decrease the enrollment to self only, effective on the commencing date of the survivor

annuity. On request of the survivor annuitant made within 31 days after the first installment of annuity is paid, the office of the retirement system which is acting as employing office must rescind the action retroactive to the effective date of the change to self only, with corresponding adjustment in withholdings and contributions.

(s) *Election between survivor annuities.* A surviving spouse, irrespective of whether his or her survivor annuity continued or was terminated upon remarriage, who was covered by an enrollment under this part immediately before the remarriage, may elect to continue an enrollment under this part acquired as a dependent by virtue of the remarriage or to enroll in his or her own right (by virtue of entitlement to the original survivor annuity) in any plan or option under this part within 60 days after the termination of the remarriage and entitlement to a survivor annuity.

[62 FR 38437, July 18, 1997, as amended at 66 FR 49086, Sept. 26, 2001; 67 FR 41306, June 18, 2002; 68 FR 56525, Oct. 1, 2003; 69 FR 31722, June 7, 2004; 69 FR 56928, Sept. 23, 2004; 70 FR 33798, June 10, 2005; 70 FR 71749, Nov. 30, 2005; 72 FR 1912, Jan. 17, 2007; 80 FR 55735, Sept. 17, 2015; 80 FR 65882, Oct. 28, 2015]

### § 890.307 Waiver or suspension of annuity or compensation.

(a) Except as provided in paragraphs (b) and (f) of this section, when annuity or compensation is entirely waived or suspended, the annuitant's enrollment continues for not more than 3 months (not more than 12 weeks for annuitants whose compensation under subchapter I of chapter 81 of title 5, United States Code, is paid each 4 weeks). If the waiver or suspension continues beyond this period, the employing office will notify the annuitant in writing that the employing office will terminate the enrollment effective at the end of the period, subject to the temporary extension of coverage for conversion, unless the annuitant elects to make payment of the premium directly to the employing office during the period of waiver. If the annuitant elects to have the enrollment terminated, the employing office automatically reinstates the enrollment on a prospective basis when the annuitant again receives payment of annuity or compensation. The employing office will make the withholding for the period of waiver or suspension during which enrollment was continued (i.e., 3 months or less).

(b) If the annuitant elects to pay premiums directly, he or she must send to the employing office his or her share of the subscription charge for the enrollment for every pay period during which the enrollment continues, exclusive of the 31-day temporary extension of coverage for conversion provided in § 890.401. The annuitant must pay after each pay period he or she is covered in accordance with a schedule established by the employing office. If the employing office does not receive payment by the date due, the employing office must notify the annuitant in writing that continuation of coverage depends upon payment being made within 15 days (45 days for annuitants residing overseas) after receipt of the notice. If no further payments are made, the employing office terminates the enrollment 60 days after the date of the notice (90 days for annuitants residing overseas). The employing office automatically reinstates enrollment on a prospective basis when payment of annuity or compensation resumes.

(c) If the annuitant is prevented by circumstances beyond his or her control from paying within 15 days after receipt of the notice, he or she may request reinstatement of coverage by writing to the employing office. The annuitant must file the request within 30 calendar days from the date of termination, and must include supporting documentation. The employing office will determine if the annuitant is eligible for reinstatement of coverage; and, when the determination is affirmative, reinstate the coverage of the annuitant retroactive to the date of termination. If the determination is negative, the annuitant may request a review of the decision as provided in § 890.104.

(d) Termination of enrollment for failure to pay premiums within the time frame established in accordance with paragraph (b) of this section is retroactive to the end of the last pay period for which the employing office timely received payment.

(e) The employing office will submit all direct premium payments along

with its regular health benefits premiums to OPM in accordance with procedures established by OPM.

(f) If suspension of annuity or compensation is because of reemployment, the reemploying office must make the withholding currently and enrollment continues during reemployment.

[59 FR 60296, Nov. 23, 1994, as amended at 59 FR 67607, Dec. 30, 1994]

**§ 890.308 Disenrollment.**

(a)(1) Except as otherwise provided in this section, a carrier that cannot reconcile its record of an individual's enrollment with agency enrollment records or does not receive documentation necessary to resolve the discrepancy from the employing office within 31 days of a request must provide written notice to the individual that the employing office of record does not show him or her as enrolled in the carrier's plan and that he or she will be disenrolled 31 calendar days after the date of the notice unless the enrollee provides appropriate documentation to resolve the discrepancy. Appropriate documentation includes, but is not limited to, a copy of the Standard Form 2809 (basic enrollment document) (or a letter confirming an electronic transaction), the Standard Form 2810 transferring the enrollment into the gaining employing office (or the equivalent electronic submission), copies of earnings and leave statements or annuity statements showing withholdings for the health benefits plan, or a document or other credible information from the enrollee's employing office stating that the individual is entitled to continued enrollment in the plan and that the premiums are being paid. After receiving documentation from the enrollee, the carrier must notify both the enrollee and the employing office of record of their decision on the information.

(2) If the carrier does not receive documentation required under paragraph (a)(1) of this section within the specified time frame, the carrier should disenroll the individual, without further notice.

(3) The enrollee may request his or her employing office to reconsider the carrier's decision to disenroll the individual. The request for reconsideration must be made in writing and must include the enrollee's name, address, Social Security Number or other personal identification number, name of carrier, reason(s) for the request, and, if applicable, retirement claim number. The employing office must notify the carrier when a request for reconsideration of the decision to disenroll the individual is made.

(4) A request for reconsideration of the carrier's decision must be filed within 60 calendar days after the date of the carrier's disenrollment notice. The time limit on filing may be extended when the individual shows that he or she was not notified of the time limit and was not otherwise aware of it, or that he or she was prevented by circumstances beyond his or her control from making the request within the time limit.

(5) After reconsideration, the employing office must issue a written notice of its final decision to the individual and notify the carrier of the decision. The notice must fully set forth the findings and conclusions on which the decision was based. If upon reconsideration the employing office determines the individual is entitled to continued enrollment in the plan, the disenrollment under paragraph (a)(2) of this section is void and coverage is reinstated retroactively.

(6) If, at any time after the disenrollment has occurred, the employing office or OPM determines that another section of this part applies to the individual's enrollment or the carrier discovers or receives appropriate documentation showing that another section of this part applies to the individual's enrollment, the disenrollment under paragraph (a)(2) of this section is void and coverage is reinstated retroactively.

(b) When a carrier receives, from any reliable source, information of the death of an enrollee with a self only enrollment, the carrier may take action to disenroll the individual on the date set forth in § 890.304(a)(1)(iv) or § 890.304(b)(4), as appropriate. When the date of death is unknown, the carrier may take action to disenroll the individual on the date which is the last day of the pay period in which information of the death is received. Reliable

sources include, but are not limited to, claims for hospital or physician costs incurred at time of death and correspondence returned from the Postal Service noting that the addressee is deceased. If, at any time after the disenrollment has occurred, the employing office or OPM determines that another section of this part applies to the individual's enrollment or the carrier discovers or receives appropriate documentation showing that another section of this part applies to the individual's enrollment, the disenrollment under this paragraph (b) is void and coverage is reinstated retroactively.

(c)(1) When a child survivor annuitant covered under a self only enrollment reaches age 22, the carrier may take action to disenroll the individual effective with the date set forth in § 890.304(c)(1) unless records with the carrier indicate that the child is incapable of self support due to a physical or mental disability. The carrier must provide the enrollee with a written notice of disenrollment prescribed or approved by OPM prior to the date set forth in § 890.304(c)(1).

(2) The child survivor annuitant may request the retirement system to reconsider the carrier's decision to disenroll the individual. The request for reconsideration must be made in writing and include the enrollee's name, address, Social Security Number or other identifier, name of carrier, reason(s) for the request, and the survivor annuity claim number. The retirement system must notify the carrier when a request for reconsideration of the carrier's decision to disenroll the individual is made.

(3) A request for reconsideration of the carrier's decision must be filed with the retirement system within 60 calendar days from the date of the carrier's disenrollment notice. The time limit on filing may be extended when the individual shows that he or she was not notified of the time limit and was not otherwise aware of it, or that he or she was prevented by circumstances beyond his or her control from making the request within the time limit.

(4) After reconsideration, the retirement system must issue a written notice of its final decision to the child survivor annuitant and notify the carrier of the decision. The notice must fully set forth the findings and conclusions on which the decision was based. If upon reconsideration the retirement system determines that he or she is entitled to continued enrollment in the plan, the disenrollment under paragraph (c)(1) of this section is void and coverage is reinstated retroactively.

(5) If, at any time after the disenrollment has occurred, the employing office or OPM determines that another provision of this part applies to the individual's enrollment or the carrier discovers or receives appropriate documentation showing that another section of this part applies to the individual's enrollment, the disenrollment under paragraph (c)(1) of this section is void and coverage is reinstated retroactively.

(d) When an enrollee notifies the carrier that he or she has separated from Federal employment and is no longer eligible for enrollment, the carrier must disenroll the individual on the last day of the pay period in which the separation occurred, if known, otherwise the carrier must disenroll the employee on the date the employee provides as the date of separation. The carrier must provide the enrollee with a written notice of disenrollment prescribed or approved by OPM.

[63 FR 59459, Nov. 4, 1998]

## Subpart D—Temporary Extension of Coverage and Conversion

### § 890.401 Temporary extension of coverage and conversion.

(a) *Thirty-one day extension and conversion.* (1) An enrollee whose enrollment is terminated other than by cancellation of the enrollment or discontinuance of the plan, in whole or part, and a covered family member whose coverage is terminated other than by cancellation of the enrollment or discontinuance of the plan, in whole or in part, is entitled to a 31-day extension of coverage for self only, self plus one, or self and family, as the case may be, without contributions by the enrollee or the Government, during which period he or she is entitled to exercise the right of conversion provided for by

this part. The 31-day extension of coverage and the right of conversion for any person ends on the effective date of a new enrollment under this part covering the person.

(2) Termination of an enrollment under this subpart for failure to pay premiums is considered a cancellation of the enrollment for the purposes of this section.

(b) *Continuation of benefits.* (1) Any person who has been granted a 31-day extension of coverage in accordance with paragraph (a) of this section and who is confined in a hospital or other institution for care or treatment on the 31st day of the temporary extension is entitled to continuation of the benefits of the plan during the continuance of the confinement but not beyond the 60th day after the end of the temporary extension.

(2) Except when a plan is discontinued in whole or in part or the Associate Director for Retirement and Insurance orders an enrollment change, a person whose enrollment has been changed from one plan to another, or from one option of a plan to the other option of that plan, and who is confined to a hospital or other institution for care or treatment on the last day of enrollment under the prior plan or option, is entitled to continuation of the benefits of the prior plan or option during the continuance of the confinement. Continuation of benefits shall not extend beyond the 91st day after the last day of enrollment in the prior plan or option. The plan or option to which enrollment has been changed shall not pay benefits with respect to that person while he or she is entitled to any inpatient benefits under the prior plan or option. The gaining plan or option shall begin coverage according to the limits of its FEHB Program contract on the day after the day all inpatient benefits have been exhausted under the prior plan or option or the 92nd day after the last day of enrollment in the prior plan or option, whichever is earlier. For the purposes of this paragraph, ''exhausted'' means paid or provided to the maximum benefit available under the contract.

(3) *Exception.* The limit on the number of confinement days allowed to be covered under the continuation of benefits specified by paragraph (b)(2) of this subpart does not apply to confinements in a hospital or other institution when the charges and benefit payments for the services provided are covered by the limit specified in subpart I of this part. In these cases, the benefits continue until the end of the confinement.

(c)(1) The employing agency must notify the enrollee of the termination of the enrollment and of the right to convert to an individual policy within 60 days after the date the enrollment terminates.

(2) The individual whose enrollment terminates must request conversion information from the losing carrier within 31 days of the date of the agency notice of the termination of the enrollment and of the right to convert.

(3) When an agency fails to provide the notification required in paragraph (c)(1) of this section within 60 days of the date the enrollment terminates, or the individual fails for other reasons beyond his or her control to request conversion as required in paragraph (c)(2) of this section, he or she may request conversion to an individual policy by writing directly to the carrier. Such a request must be filed within 6 months after the individual became eligible to convert his or her group coverage and must be accompanied by verification of termination of the enrollment; e.g., an SF 50, showing the individual's separation from the service. In addition, the individual must show that he or she was not notified of the termination of the enrollment and of the right to convert, and was not otherwise aware of it, or that he or she was unable, for cause beyond his or her control, to convert. The carrier will determine if the individual is eligible to convert; and when the determination is affirmative, the individual may convert within 31 days of the determination. If the determination by the carrier is negative, the individual may request a review of the carrier's determination from OPM.

(4) When an individual converts his or her coverage anytime after the group coverage has ended, the individual plan coverage is retroactive to the day following the day the temporary extension of group coverage ended. The individual must pay the

premiums due for the retroactive period.

(5) An individual who fails to exercise his or her rights to convert to an individual policy within 31 days after receiving notice of the right to convert from the carrier is deemed to have declined the right to convert unless the carrier, or, upon review, OPM determines the failure was for cause beyond his or her control.

[33 FR 12510, Sept. 4, 1968, as amended at 52 FR 10217, Mar. 31, 1987; 54 FR 52339, Dec. 21, 1989; 55 FR 22891, June 5, 1990; 57 FR 10609, Mar. 27, 1992; 57 FR 21191, May 19, 1992; 80 FR 55736, Sept. 17, 2015]

## Subpart E—Contributions and Withholdings

AUTHORITY: 5 U.S.C. 8913; Sec. 890.303 also issued under Sec. 50 U.S.C. 403p, 22 U.S.C. 4069c and 4069c–1; Subpart L also issued under Sec. 599C of Public Law 101–513, 104 Stat. 2064, as amended; Sec. 890.102 also issued under Secs. 11202(f), 11232(e), 11246(b) and (c) of Public Law 105–33, 111 Stat. 251; Sec. 721 of Public Law 105–261, 112 Stat. 2061 unless otherwise noted; Sec. 890.111 also issued under Sec. 1622(b) of Public Law 104–106, 110 Stat. 515.

### § 890.501 Government contributions.

(a) The Government contribution toward subscription charges under all health benefits plans, for each enrolled employee who is paid biweekly, is the amount provided in section 8906 of title 5, United States Code, plus 4 percent of that amount.

(b) In accordance with the provisions of 5 U.S.C. 8906(a) which take effect with the contract year that begins in January 1999, OPM will determine the amounts representing the weighted average of subscription charges in effect for each contract year, for self only, self plus one, and self and family enrollments, as follows:

(1) The determination of the weighted average of subscription charges will only include those health benefits plans which are continuing FEHB Program participation from one contract year to the next.

(i) If OPM and the carrier for a plan that will continue participation have closed negotiations on rates for the upcoming contract year by September 1 of the current contract year, i.e., the determination year, OPM will use the plan's negotiated subscription charges for the upcoming contract year in the determination of the weighted average of subscription charges.

(ii) If OPM and the carrier for a plan that applied to continue participation have not closed rate negotiations for the upcoming contract year by September 1 of the determination year, OPM will make a deemed adjustment to such plan's subscription charges for the current contract year for purposes of counting eligible enrollees of the plan in the determination of weighted average charges for the upcoming contract year. The deemed adjustment will equal any increase or decrease OPM finds in its determination of the weighted average of subscription charges for the upcoming contract year for all plans with which OPM has closed rates on September 1 of the determination year.

(iii) There will be no subsequent adjustment in the weighted average charges applicable to the upcoming contract year to reflect rate negotiations closed after September 1 of the determination year.

(2) Except as otherwise specified in paragraphs (b)(2) (i) and (b)(2)(ii) of this section, the weight OPM gives to each subscription charge for purposes of determining the weighted average of subscription charges for the upcoming contract year will be proportionate to the number of individuals who, as of March 31 of the determination year, are enrolled in the plan or benefits option to which such charge applies and are eligible for a Government health benefits contribution in the upcoming contract year.

(i) When a subscription charge for an upcoming contract year applies to a plan that is the result of a merger of two or more plans which contract separately with OPM during the determination year, or applies to a plan which will cease to offer two benefits options, OPM will combine the self only enrollments, the self plus one enrollments, and the self and family enrollments from the merging plans, or from a plan's benefits options, for purposes of weighting subscription charges in effect for the successor plan for the upcoming contract year.

(ii) When a comprehensive medical plan (CMP) varies subscription charges for different portions of the plan's service area and the plan's contract for the upcoming contract year will reconfigure geographic areas associated with subscription charges, so that there will not be a direct correlation between enrollment in the determination year and rating areas for the upcoming contract year, OPM will estimate what portion of the plan's enrollees on March 31 of the determination year will be subject to each of the plan's subscription rates for the upcoming contract year.

(3) After OPM weights each subscription charge as provided in paragraph (b)(2) of this section, OPM will compute the total of subscription charges associated with self only enrollments, self plus one enrollments, and self and family enrollments, respectively. OPM will divide each subscription charge total by the total number of enrollments such amount represents to obtain the program-wide weighted average subscription charges for self only and for self plus one and self and family enrollments, respectively.

(c) The Government contribution for annuitants and for employees who are not paid biweekly is a percentage of that fixed by paragraphs (a) and (b) of this section proportionate to the length of the pay period, rounding fractions of a cent to the nearest cent.

(d) The Government contribution for employees whose annual pay is paid during a period shorter than 52 workweeks is determined on an annual basis and prorated over the number of installments of pay regularly paid during the year.

(e) Except as provided in paragraphs (f) and (g) of this section, the employing office must make a contribution for an employee for each pay period during which the enrollment continues.

(f) Temporary employees enrolled under 5 U.S.C. 8906a must pay the full subscription charge including the Government contribution. Employees with provisional appointments under § 316.403 of this chapter are not considered to be enrolled under 5 U.S.C. 8906a for the purposes of this paragraph.

(g) The Government contribution for an employee who enters the uniformed services and whose enrollment continues under § 890.303(i) ceases after 365 days in nonpay status.

(h) The Government contribution for an employee who enrolls in a health benefit plan offered through an appropriate SHOP as determined by the Director pursuant to section 1312(d)(3)(D) of the Patient Protection and Affordable Care Act, Public Law 111–148, as amended by the Health Care and Education Reconciliation Act, Public Law 111–152 (the Affordable Care Act or the Act) shall be calculated in the same manner as for other employees.

(2) Government contributions and employee withholdings for employees who enroll in a health benefit plan offered through an appropriate SHOP as determined by the Director, pursuant to section 1312(d)(3)(D) of the Patient Protection and Affordable Care Act, Public Law 111–148, as amended by the Health Care and Education Reconciliation Act, Public Law 111–152 (the Affordable Care Act or the Act) shall be accounted for pursuant to section 8909 of title 5 and such monies shall only be available for payment of premiums, and costs in accordance with section 8909(a)(2) of title 5.

[33 FR 12510, Sept. 4, 1968, as amended at 47 FR 30963, July 16, 1982; 54 FR 7756, Feb. 23, 1989; 56 FR 10143, Mar. 11, 1991; 60 FR 45658, Sept. 1, 1995; 63 FR 45934, Aug. 28, 1998; 64 FR 31488, June 11, 1999; 78 FR 60656, Oct. 2, 2013; 80 FR 55736, Sept. 17, 2015]

EDITORIAL NOTE: At 79 FR 46638, Aug. 8, 2014, § 890.501 was amended by adding paragraph (h); however, the amendatory instruction could not be followed because paragraph (h) already appeared in the section.

### § 890.502 Withholdings, contributions, LWOP, premiums, and direct premium payment.

(a) *Employee and annuitant withholdings and contributions.* (1) Employees and annuitants are responsible for paying the enrollee share of the cost of enrollment for every pay period during which they are enrolled. An employee or annuitant incurs a debt to the United States in the amount of the proper employee or annuitant withholding required for each pay period during which they are enrolled if the appropriate health benefits withholdings or direct premium payments are not made.

(2) An individual is not required to pay withholdings for the period between the end of the pay period in which he or she separates from service and the commencing date of an immediate annuity, if later.

(3) Temporary employees who are eligible to enroll under 5 U.S.C. 8906a must pay the full subscription charges including both the employee share and the Government contribution. Employees with provisional appointments under § 316.403 of this chapter are not considered eligible for coverage under 5 U.S.C. 8906a for the purpose of this paragraph.

(4) The employing office must calculate the withholding for employees whose annual pay is paid during a period shorter than 52 workweeks on an annual basis and prorate the withholding over the number of installments of pay regularly paid during the year.

(5) The employing office must make the withholding required from enrolled survivor annuitants in the following order. First, withhold from the annuity of a surviving spouse, if there is one. If that annuity is less than the amount required, withhold to the extent necessary from the annuity of the youngest child, and if necessary, from the annuity of the next older child, in succession, until the withholding is met.

(6) Surviving spouses who have a basic employee death benefit under 5 U.S.C. 8442(b)(1)(A) and annuitants whose health benefits premiums are more than the amount of their annuities may pay their portion of the health benefits premium directly to the retirement system acting as their employing office, as described in paragraph (d) of this section.

(b) *Procedures when an employee enters a leave without pay (LWOP) status or pay is insufficient to cover premium.* The employing office must tell the employee about available health benefits choices as soon as it becomes aware that an employee's premium payments cannot be made because he or she will be or is already in a leave without pay (LWOP) status or any other type of nonpay status. (This does not apply when nonpay is as a result of a lapse of appropriations.) The employing office must also tell the employee about available choices when an employee's pay is not enough to cover the premiums.

(1) The employing office must give the employee written notice of the choices and consequences as described in paragraphs (b)(2)(i) and (ii) of this section and will send a letter by first class mail if it cannot give it to the employee directly. If it mails the notice, it is deemed to be received within 5 days.

(2) The employee must elect in writing to either continue health benefits coverage or terminate it. (Exception: An employee who is subject to a court or administrative order as discussed in § 890.301(g)(3) cannot elect to terminate his or her enrollment as long as the court/administrative order is still in effect and the employee has at least one child identified in the order who is still eligible under the FEHB Program, unless the employee provides documentation that he or she has other coverage for the child(ren).) The employee may continue coverage by choosing one of the following ways to pay and returning the signed form to the employing office within 31 days after he or she receives the notice (45 days for an employee residing overseas). When an employee mails the signed form, its postmark will be used as the date the form is returned to the employing office. If an employee elects to continue coverage, he or she must elect in writing one of the following:

(i) Pay the premium directly to the agency and keep the payments current. The employee must also agree that if he or she does not pay the premiums currently, the employing office will recover the amount of accrued unpaid premiums as a debt under paragraph (b)(2)(ii) of this section.

(ii) If the employee does not wish to pay the premium directly to the agency and keep payments current, he or she may agree that upon returning to employment or upon pay becoming sufficient to cover the premiums, the employing office will deduct, in addition to the current pay period's premiums, an amount equal to the premiums for a pay period during which the employee

was in a leave without pay (LWOP) status or pay was not enough to cover premiums. The employing office will continue using this method to deduct the accrued unpaid premiums from salary until the debt is recovered in full. The employee must also agree that if he or she does not return to work or the employing office cannot recover the debt in full from salary, the employing office may recover the debt from whatever other sources it normally has available for recovery of a debt to the Federal Government.

(3) If the employee does not return the signed form within the time period described in paragraph (b)(2) of this section, the employing office will terminate the enrollment and notify the employee in writing of the termination.

(4)(i) If the employee is prevented by circumstances beyond his or her control from returning a signed form to the employing office within the time period described in paragraph (b)(2) of this section, he or she may write to the employing office and request reinstatement of the enrollment. The employee must describe the circumstances that prevented him or her from returning the form. The request for reinstatement must be made within 30 calendar days from the date the employing office gives the employee notice of the termination. The employing office will determine if the employee is eligible for reinstatement of coverage. When the determination is affirmative, the employing office will reinstate the coverage of the employee retroactive to the date of termination. If the determination is negative, the employee may request a review of the decision from the employing agency (see § 890.104).

(ii) If the employee is subject to a court or administrative order as discussed in § 890.301(g)(3), the coverage cannot terminate. If the employee does not return the signed form, the coverage will continue and the employee will incur a debt to the Federal Government as discussed in paragraphs (b)(2)(i) and (b)(2)(ii) of this section.

(5) Terminations of enrollment under paragraphs (b)(2) and (3) of this section are retroactive to the end of the last pay period in which the premium was withheld from pay. The employee and covered family members, if any, are entitled to the temporary extension of coverage for conversion and may convert to an individual contract for health benefits. An employee whose coverage is terminated may enroll upon his or her return to duty in pay status in a position in which the employee is eligible for coverage under this part.

(c) *Procedures when agency underwithholds premiums.* (1) An agency that withholds less than the amount due for health benefits contributions from an individual's pay, annuity, or compensation must submit an amount equal to the uncollected employee contributions and any applicable agency contributions to OPM for deposit in the Employees Health Benefits Fund.

(2) The agency must make the deposit to OPM as soon as possible, but no later than 60 calendar days after it determines the amount of an under-deduction that has occurred, regardless of whether or when the agency recovers the under-deduction. A subsequent agency decision on whether to waive collection of the overpayment of pay caused by failure to properly withhold employee health benefits contributions will be made under 5 U.S.C. 5584 as implemented by 4 CFR chapter I, subchapter G, unless the agency involved is excluded from 5 U.S.C. 5584, in which case any applicable authority to waive the collection may be used.

(d) *Direct premium payments for annuitants.* (1) If an annuity, excluding an annuity under subchapter III of chapter 84 (Thrift Savings Plan), is too low to cover the health benefits premium, or if a surviving spouse receives a basic employee death benefit, the retirement system must provide written information to the annuitant or surviving spouse. The information must describe the health benefits plans available, and include the opportunity to either:

(i) Enroll in a health benefits plan in which the enrollee's share of the premium is less than the annuity amount; or

(ii) Pay the premium directly to the retirement system.

(2) The retirement system must accept direct payment for health benefits premiums in these circumstances. The

annuitant or surviving spouse must continue direct payment of the premium even if the annuity increases to the extent that it covers the premium.

(3) The annuitant or surviving spouse must pay the retirement system his or her share of the premium for the enrollment for every pay period during which the enrollment continues, except for the 31-day temporary extension of coverage. The individual must make the payment after each pay period in which he or she is covered using a schedule set up by the retirement system. If the retirement system does not receive payment by the due date, it must notify the individual in writing that continued coverage depends upon payment being made within 15 days (45 days for annuitants or surviving spouses residing overseas) after the notice is received. If no subsequent payments are made, the retirement system terminates the enrollment 60 days after the date of the notice (90 days for annuitants or surviving spouses residing overseas). An annuitant or surviving spouse whose enrollment terminated due to nonpayment of premium may not reenroll or reinstate coverage unless there are circumstances beyond his or her control as provided in paragraph (d)(4) of this section.

(4) If the annuitant or surviving spouse is prevented by circumstances beyond his or her control from paying the premium within 15 days after receiving the notice, he or she may ask the retirement system to reinstate the enrollment by writing the retirement system. The individual must describe the circumstances and send the request within 30 calendar days from the termination date. The retirement system will determine if the annuitant or surviving spouse is eligible for reinstatement of coverage. When the determination is affirmative, the retirement system will reinstate the coverage retroactive to the date of termination. If the determination is negative, then the individual may request a review of the decision from the retirement system, as described in § 890.104.

(5) Termination of enrollment for failure to pay premiums within the time frame described in paragraph (d)(3) of this section is retroactive to the end of the last pay period for which payment was timely received.

(6) The retirement system will submit all direct premium payments along with its regular health benefits premiums to OPM according to procedures established by OPM.

(e) *Procedures for direct payment of premiums during LWOP after 365 days.* (1) An employee who is granted leave without pay (LWOP) under subpart L of part 630 of this chapter (Family and Medical Leave) after 365 days of continued coverage under § 890.303(e) must pay the employee contributions directly to the employing office and keep payments current.

(2) The employee must make payments after the pay period in which the employee is covered according to a schedule set up by the employing office. If the employing office does not receive the payment by the date due, it must notify the employee in writing that continued coverage depends upon payment being made within 15 days (45 days for employees residing overseas) after the notice is received. If no subsequent payments are made, the employing office terminates the enrollment 60 days after the date of the notice (90 days for enrollees residing overseas).

(3) If the enrollee was prevented by circumstances beyond his or her control from making payment within the timeframe in paragraph (e)(2) of this section, he or she may ask the employing office to reinstate the enrollment by writing to the employing office. The employee must file the request within 30 calendar days from the date of termination and must include supporting documentation.

(4) The employing office determines whether the employee is eligible for reinstatement of coverage. When the determination is affirmative, the employing office will reinstate the coverage of the employee retroactive to the date of termination. If the determination is negative, the employee may request the employing agency to review the decision as provided under § 890.104.

(5) An employee whose coverage is terminated under paragraph (e)(2) of this section may enroll if he or she returns to duty in a pay status in a position in which the employee is eligible for coverage under this part.

(f) *Uniformed services.* (1) Except as provided in paragraph (f)(2) of this section, an employee whose coverage continues under § 890.303(i) is responsible for payment of the employee share of the cost of enrollment for every pay period for which the enrollment continues for the first 365 days of continued coverage as set forth under paragraph (b) of this section. For coverage that continues after 365 days in nonpay status, the employee must pay, on a current basis, the full subscription charge, including both the employee and Government shares, plus an additional 2 percent of the full subscription charge.

(2) As provided by 5 U.S.C. 8906(e)(3), an employing agency may pay both the Government and employee contributions and any additional administrative expenses for the cost of coverage for the employee and the employee's family for a period of 24 months for employees called or ordered to active duty in support of a contingency operation on or after September 14, 2001. The payment of Government and employee contributions and any additional administrative expenses authorized by this section only applies to employees while they are serving in support of a contingency operation, and eligibility for these payments terminates when the employee ceases to be on orders for a contingency operation. Payment of these contributions and expenses is solely at the discretion of the employing agency.

[33 FR 12510, Sept. 4, 1968]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting § 890.502, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and at *www.fdsys.gov*.

### § 890.503 Reserves.

(a) The enrollment charge consists of the rate approved by OPM for payment to the plan for each enrollee, plus 4 percent, of which one part is for an administrative reserve and 3 parts are for a contingency reserve for the plan.

(b) The administrative reserve is credited with the one one-hundred-and-fourth of the enrollment charge set aside for the administrative reserve. The administrative reserve is available for payment of administrative expenses of OPM incurred under this part, and for such other purposes as may be authorized by law.

(c)(1) *Contingency reserve.* The contingency reserve for each plan is credited with—

(i) The three one-hundred-and-fourths of the enrollment charge set aside for the contingency reserve from the enrollment charges for employees and annuitants enrolled for that plan;

(ii) Amounts transferred in accordance with law from other contingency reserves and the administrative reserve;

(iii) Income from investment of the reserve;

(iv) Its proportionate share of the income from investment of the administrative reserve; and

(v) Any return of reserves of the plan.

(2) *Contingency reserve minimum balance.* The preferred minimum balance for the contingency reserve for community-rated plans is 1 month's subscription charges at the average recurring monthly rate paid from the Employees Health Benefits Fund for the plan during the most recent contract period. The preferred minimum balance for the contingency reserve for experience-rated plans is 1½ times an amount equal to the sum of an average month's paid claims plus an average month's administrative expenses and retentions, as determined under paragraph (c)(3) of this section. Amounts in excess of the preferred minimum balance for a contingency reserve account may be used with respect to the plan from which the reserve derives: To defray increases in future rates; to increase plan benefits, or to reduce contributions of eligible subscribers and the Government under the program through devices such as temporary suspension of, or reduction in, required contributions or a refund of contributions to eligible subscribers and the Government.

(3) *OPM/carrier reserve transfers.* The target level for total reserves of an experience-rated plan is 3½ times an amount equal to the sum of an average month's paid claims plus an average month's administrative expenses and retentions. Reserves include funds set aside for incurred-but-unpaid benefit

claims and the ''special'' reserve representing the cumulative difference between income to the plan (subscription income plus interest on investments) and plan expenses (benefit costs plus administrative expenses and retentions). Included as carrier reserves is the balance in the letter of credit (LOC) account maintained by OPM for the plan. For the purposes of this section, an average month's paid claims is one-sixth of the total claims paid during the last 6 months of the most recent contract period, and an average month's administrative expenses and retentions is one-twelfth of the administrative expenses and retentions for the most recent contract period.

(i) When, as of the end of a contract period, the total of all the reserves for an experience-rated plan is less than the target level described in the first four sentences of paragraph (c)(3) of this section, the carrier is entitled to payment from the contingency reserve. Such contingency reserve payment shall equal the lesser of: An amount equal to the difference between the target level for the plan's reserves and the total of the reserves for the plan, or an amount equal to the excess, if any, of the contingency reserve over the preferred minimum balance. OMP must authorize this payment promptly after accepting the accounting statement for the contract period. The contingency reserve payment so authorized will be made available to the carrier's LOC account.

(ii) When, as of the end of a contract period, the total of all reserves of an experience-rated plan amounts to more than the plan's target level, the excess over the plan's target level must be credited to the contingency reserve maintained by OPM for the plan. OPM will withdraw the excess amount from the plan's LOC account, based on reporting in the annual accounting statement for the year, no sooner than May 1, of the following year. If the accounting statement is not filed by the time limit specified in the plan's contract with OPM, OPM will estimate the amount of the excess reserves and may withdraw that amount from the plan's LOC account, or begin the process of offsetting that amount from subscription payments, no sooner than May 1. The amount withdrawn from the plan's LOC account, or offset from subscription payments, will be credited to that plan's contingency reserve.

(4) OPM may, by agreement with the carrier, approve community rating for a comprehensive plan. If the contingency reserve of the carrier of a community-rated plan exceeds the preferred minimum balance, as described in paragraph (c)(2) of this section, the carrier may request OPM to pay to the plan a portion of the reserve not greater than the excess of the contingency reserve over the preferred minimum balance. The carrier shall state the reason for the request. OPM will decide whether to allow the request in whole or in part and will advise the plan of its decision.

(5) *Special contingency reserve transfers.* In addition to those amounts, if any, paid under paragraphs (c)(2) through (c)(4) of this section, OPM may authorize such other payments from the contingency reserve as in the judgment of OPM may be in the best interest of employees and annuitants enrolled in the program. A carrier for a plan may apply to OPM at any time for a payment from the contingency reserve when the carrier has good cause, such as unexpected claims experience and variations from expected community rates. In the administration of this part, OPM will accord a high priority to deciding whether to allow requests under this paragraph in whole or in part and will promptly advise the carrier of its decision. Amounts paid from the contingency reserve under paragraphs (c)(2) through (5) of this section shall be reported as subscription income in the year in which paid. By agreement with the carrier and where good cause exists, OPM may accept payment from carrier reserves for credit to the contingency reserve in an amount and under conditions other than those specified in paragraph (c) of this section. For carriers funded by LOC, the returned amount will be withdrawn from the plan's LOC account.

(6) *Subsidization penalty reserve.* This reserve account shall be credited with all subsidization penalties levied against community rated plans outlined in 48 CFR 1615.402(c)(3)(ii)(B). The funds in this account shall be annually

distributed to the contingency reserves of all community rated plans subject to the FEHB-specific medical loss ratio threshold on a pro-rata basis. The funds will not be used for one specific carrier or plan.

[33 FR 12510, Sept. 4, 1968, as amended at 37 FR 20668, Oct. 3, 1972; 43 FR 52460, Nov. 13, 1978; 51 FR 7430, Mar. 4, 1985; 52 FR 3212, Feb. 3, 1987; 54 FR 52339, Dec. 21, 1989; 55 FR 22891, June 5, 1990; 57 FR 14324, Apr. 20, 1992; 76 FR 38284, June 29, 2011]

### § 890.504 Disposition of contingency reserves upon reorganization or merger of plans.

Upon reorganization or merger of a plan, OPM must credit to the surviving plan the reserves of the reorganized or merged plan. If more than one plan survives, the reserves must be divided among the surviving plans in proportion to the number of enrollees continuing to subscribe to the surviving plans.

[54 FR 52339, Dec. 21, 1989; 55 FR 22891, June 5, 1990]

### § 890.505 Recurring premium payments to carriers.

The procedures for payment of premiums, contingency reserve, and interest distribution to FEHB Program carriers shall be those contained in 48 CFR subpart 1632.170.

[57 FR 14324, Apr. 20, 1992]

## Subpart F—Transfers From Retired Federal Employees Health Benefits Program

### § 890.601 Coverage.

An annuitant (a retired employee or survivor under part 891 of this chapter) who is enrolled, or is eligible to enroll, under the Retired Federal Employees Health Benefits Program (part 891 of this chapter) is eligible to enroll under the Federal Employees Health Benefits Program under this part.

[39 FR 20055, June 6, 1974]

### § 890.602 Opportunity to change enrollment.

An annuitant eligible to enroll under § 890.601 may elect to enroll on and after August 8, 1978.

[43 FR 35018, Aug. 8, 1978, as amended at 62 FR 38440, July 18, 1997]

### § 890.603 Effective date.

The effective date of an enrollment under § 890.602 is the first day of the first pay period after the election is received by the retirement system, but not earlier than January 1, 1979.

[43 FR 35018, Aug. 8, 1978; 43 FR 38569, Aug. 29, 1978]

### § 890.604 [Reserved]

### § 890.605 Persons confined on effective date.

Benefits may not be limited for persons who, on the effective date of an enrollment under § 890.602, are confined in a hospital or institution.

[43 FR 35018, Aug. 8, 1978]

## Subpart G [Reserved]

## Subpart H—Benefits for Former Spouses

SOURCE: 51 FR 15748, Apr. 28, 1986, unless otherwise noted.

### § 890.801 Introduction.

This subpart sets forth policies and procedures for obtaining health benefits coverage that are unique to former spouses of Federal employees and retirees.

### § 890.802 Definition.

In this subpart, a *Qualifying court order* means a court order acceptable for processing as defined in § 838.103 of this chapter or qualifying court order as defined in § 838.1003 of this chapter.

[57 FR 33599, July 29, 1992]

### § 890.803 Who may enroll.

(a) Except as specified in paragraph (b) of this section, a former spouse is eligible to enroll in a health benefits plan under this part provided that—

(1) The former spouse whose marriage to an employee, employee annuitant, or a former Central Intelligence Agency (CIA) or Foreign Service employee is dissolved has not remarried before age 55; and

(2) The former spouse was enrolled in a health benefits plan under this part as a family member at any time during the 18 months preceding the date of the dissolution of marriage; and

(3)(i) The former spouse currently receives, or has future title to receive (A) a portion of annuity payable to the employee upon retirement based on a qualifying court order for purposes of 5 U.S.C. 8345(j) or 5 U.S.C. 8467; (B) survivor annuity benefits based on a qualifying court order for purposes of 5 U.S.C. 8341(h) or 5 U.S.C. 8445; or (C) a survivor annuity elected by the employee under 5 U.S.C. 8339(j)(3) or 5 U.S.C. 8417(b), including a former spouse who is designated as an insurable interest pursuant to §§ 831.613(a) and (b) and 842.605(a) and (b) of this chapter (or benefits similar to those under this paragraph under another retirement system for Government employees); *or*

(ii) The former spouse was married to an employee who retired before May 7, 1985, and (A) the employee annuitant elects to provide a survivor annuity to the former spouse under procedures prescribed in § 831.682 of this title; or (B) the former spouse satisfies all of the conditions for a survivor annuity in § 831.683 of this title; *or*

(iii) The former spouse was married to an employee who died before May 7, 1985, and the employee was eligible for an immediate annuity on or before the date of death, *and* the former spouse satisfies all of the conditions for a survivor annuity in § 831.683 of this title, or

(iv) The former spouse was married to an employee or former employee of the Central Intelligence Agency (CIA) for at least 10 years during the employee's CIA service, at least 5 years of which both the employee and the former spouse spent outside the United States, and the marriage was dissolved before May 7, 1985; *or*,

(v) The former spouse was married to an employee or former employee of the Foreign Service for at least 10 years during the employee's government service, and the marriage was dissolved before May 7, 1985.

(b) Except as contained in paragraphs (a)(3) (iv) and (v) of this section, a former spouse of an employee who separates from Federal service before becoming eligible for immediate annuity is eligible to enroll only if the former spouse's marriage to the employee was dissolved before the employee left Federal service.

(c) If a former spouse cannot apply for benefits on his or her own behalf because of a mental or physical disability, application may be filed by a court-appointed guardian.

[51 FR 15748, Apr. 28, 1986, as amended at 52 FR 39497, Oct. 22, 1987, and 53 FR 32368, Aug. 25, 1988; 53 FR 45070, Nov. 8, 1988; 57 FR 21192, May 19, 1992; 58 FR 52882, Oct. 13, 1993; 62 FR 38440, July 18, 1997]

### § 890.804 Coverage.

(a) *Type of enrollment.* A former spouse who meets the requirements of § 890.803 may elect coverage for self only, self plus one, or self and family. A self and family enrollment covers only the former spouse and all eligible children of both the former spouse and the employee, former employee, or employee annuitant, provided such children are not otherwise covered by a health plan under this part. A self plus one enrollment covers only the former spouse and one eligible child of both the former spouse and the employee, former employee, or employee annuitant, provided the child is not otherwise covered by a health plan under this part. A child must be under age 26 or incapable of self-support because of a mental or physical disability existing before age 26. No person may be covered by two enrollments.

(b) A child is considered to be the child of the former spouse or the employee, former employee, or employee annuitant if he or she is—

(1) A natural child; or

(2) An adopted child.

(c) *Child incapable of self-support.* When a former spouse enrolls for a family enrollment which includes a child who has become 26 years of age and is incapable of self-support, the employing office shall determine such

child's eligibility in accordance with § 890.302(c), (d), and (e).

[78 FR 64877, Oct. 30, 2013, as amended at 80 FR 55737, Sept. 17, 2015]

### § 890.805 Application time limitations.

(a) Except for former spouses meeting the requirements in § 890.803(a)(3)(iv) and (v) of this part, former spouses must apply for health benefits coverage—

(1) Within 60 days after dissolution of the marriage to the Federal employee; or

(2) Within 60 days after the date of OPM's notice of eligibility to enroll based on entitlement to one of the following:

(i) A former spouse annuity elected under 5 U.S.C. 8339(j)(3), 5 U.S.C. 8417(b), or 5 CFR 831.682;

(ii) A former spouse annuity under § 831.683;

(iii) A former spouse insurable interest annuity under 5 U.S.C. 8339(k)(1) or 8420(a);

(iv) A former spouse annuity under 5 U.S.C. 8341(h) or 8445(f);

(v) An apportionment under 5 U.S.C. 8345(j) or 8467; or

(3) Within 60 days after the date of the notice of eligibility to enroll based on entitlement to a former spouse annuity under another retirement system for Government employees.

(b) Former spouses who meet the requirements in § 890.803(a)(3)(iv) of this part must apply for health benefits coverage by April 1, 1987. Where circumstances warrant, the former spouse may request that the filing date be waived. The authority of the Director of Central Intelligence to direct OPM to waive the filing date has been delegated to CIA's Office of Personnel. Requests for waiver should be addressed to the Office of Personnel, Retirement Division, Central Intelligence Agency, Washington, DC 20505. OPM will waive the April 1, 1987, filing date upon notification to do so from the Director of Central Intelligence.

(c) Former spouses who meet the requirements in § 890.803(a)(3)(v) of this part must apply for health benefits coverage by October 7, 1988. Where circumstances warrant, the former spouse may request the Secretary of State to waive the filing date. The authority of the Secretary of State to waive the filing date has been delegated to the Department of State's Retirement Division. Requests for waiver should be addressed to the Department of State, Retirement Division, Washington, DC 20520. OPM will accept the waiver upon notification to do so from the Department of State.

[51 FR 15748, Apr. 28, 1986, as amended at 53 FR 45071, Nov. 8, 1988; 57 FR 21192, May 19, 1992; 58 FR 52882, Oct. 13, 1993; 62 FR 38440, July 18, 1997]

### § 890.806 When can former spouses change enrollment or reenroll and what are the effective dates?

(a) *Initial opportunity to enroll.* A former spouse who has met the eligibility requirements of § 890.803 and the application time limitation requirements of § 890.805 may enroll at any time after the employing office establishes that these requirements have been met.

(b) *Effective date—generally.* (1) Except as otherwise provided, an enrollment takes effect on the first day of the first pay period that begins after the date the employing office receives an appropriate request and satisfactory proof of eligibility as required by paragraph (a) of this section. If a former spouse requests immediate coverage, and the employing office receives an appropriate request and satisfactory proof of eligibility within 60 days after the date of divorce, the enrollment may be made effective on the same day that temporary continuation of coverage under subpart K of this part would otherwise take effect.

(2) A change of enrollment takes effect on the first day of the first pay period that begins after the date the employing office receives the appropriate request.

(c) *Belated enrollment.* When an employing office determines that a former spouse was unable, for cause beyond his or her control, to enroll or change the enrollment within the time limits prescribed by this section, the former spouse may do so within 60 days after the employing office advises the former spouse of its determination.

(d) *Enrollment by proxy.* Subject to the discretion of the employing office,

a former spouse's representative, having written authorization to do so, may enroll or change the enrollment for the former spouse.

(e) *Decreasing enrollment type.* (1) A former spouse may decrease enrollment type at any time.

(2) A decrease in enrollment type takes effect on the first day of the first pay period that begins after the date the employing office receives an appropriate request to change the enrollment, except that at the request of the former spouse and upon a showing satisfactory to the employing office that there was no family member eligible for coverage under the self plus one or self and family enrollment, or only one family member eligible for coverage under the self and family enrollment, as appropriate, the employing office may make the change effective on the first day of the pay period following the one in which there was, in the case of a self plus one enrollment, no family member or, in the case of a self and family enrollment, only one or no family member.

(f) *Open season.* (1) During an open season as provided by § 890.301(f)—

(i) An enrolled former spouse may decrease enrollment type, increase enrollment type provided the family member(s) to be covered under the enrollment is eligible for coverage under § 890.804, change from one plan or option to another, or make any combination of these changes.

(ii) A former spouse who suspended the enrollment under this part for the purpose of enrolling in a Medicare sponsored plan under sections 1833, 1876, or 1851 of the Social Security Act, or to enroll in the Medicaid program or a similar State-sponsored program of medical assistance for the needy, or to use Peace Corps or CHAMPVA or TRICARE (including the Uniformed Services Family Health Plan) or TRICARE-for-Life coverage instead of FEHB coverage, may reenroll.

(2) An open season reenrollment or change of enrollment takes effect on the first day of the first pay period that begins in January of the next following year.

(3) When a belated open season reenrollment or change of enrollment is accepted by the employing office under paragraph (c) of this section, it takes effect as required by paragraph (f)(2) of this section.

(g) *Change in family status.* (1) An enrolled former spouse may increase enrollment type, change from one plan or option to another, or make any combination of these changes within the period beginning 31 days before and ending 60 days after the birth or acquisition of a child who meets the eligibility requirements of § 890.804.

(2) A change in enrollment under paragraph (g)(1) of this section takes effect on the first day of the pay period in which the child is born or becomes an eligible family member.

(h) *Reenrollment of former spouses who suspended enrollment to enroll in a Medicare sponsored plan, or the Medicaid or similar State-sponsored program, or to use Peace Corps or CHAMPVA or TRICARE (including the Uniformed Services Family Health Plan) or TRICARE-for-Life coverage instead of FEHB coverage.* (1) A former spouse who had been enrolled for coverage under this part and suspended enrollment for the purpose of enrolling in a Medicare sponsored plan under sections 1833, 1876, or 1851 of the Social Security Act, or to enroll in Medicaid or similar State-sponsored program of medical assistance for the needy, or to use Peace Corps or CHAMPVA or TRICARE (including the Uniformed Services Family Health Plan) or TRICARE-for-Life coverage instead of FEHB (as provided in § 890.807(e)), or who meets the eligibility requirements of § 890.803 and the application time limitation requirements of § 890.805, but postponed enrollment in the FEHB Program for the purpose of enrolling in one of these non-FEHB programs, and who subsequently involuntarily loses coverage under one of these programs, may immediately reenroll in any available FEHB plan under this part at any time beginning 31 days before and ending 60 days after the loss of coverage. A reenrollment under this paragraph (h) of this section takes effect on the date following the effective date of the loss of coverage as shown on the documentation from the non-FEHB coverage. If the request to reenroll is not

received by the employing office or retirement system within the time period specified, the former spouse must wait until the next available Open Season to reenroll.

(2) A former spouse who suspended enrollment in the FEHB Program to enroll in a Medicare sponsored plan, or the Medicaid program or a similar State-sponsored program of medical assistance for the needy, or to use Peace Corps or CHAMPVA or TRICARE (including the Uniformed Services Family Health Plan) or the TRICARE-for-Life program, but now wants to reenroll in the FEHB Program for any reason other than an involuntary loss of coverage, may do so during the next available Open Season (as provided by paragraph (f) of this section).

(i) [Reserved]

(j) *Loss of coverage under this part or under another group insurance plan.* An enrolled former spouse may decrease or increase enrollment type, change from one plan or option to another or make any combination of these changes when the former spouse or a child who meets the eligibility requirements under § 890.804 loses coverage under another enrollment under this part or under another group health benefits plan. Except as otherwise provided, the former spouse must change the enrollment within the period beginning 31 days before the date of loss of coverage and ending 60 days after the date of loss of coverage, provided he or she continues to meet the eligibility requirements under § 890.803. Losses of coverage include but are not limited to—

(1) Loss of coverage under another FEHB enrollment due to the termination, cancellation, or a change to self plus one or self only, of the covering enrollment;

(2) Loss of coverage under another federally-sponsored health benefits program;

(3) Loss of coverage due to the termination of membership in an employee organization sponsoring or underwriting an FEHB plan;

(4) Loss of coverage due to the discontinuance of an FEHB plan in whole or in part. For a former spouse who loses coverage under this paragraph (j)(4)—

(i) If the discontinuance is at the end of a contract year, the former spouse must change the enrollment during the open season, unless OPM establishes a different time. If the discontinuance is at a time other than the end of the contract year, OPM must establish a time and effective date for the former spouse to change the enrollment;

(ii) If the whole plan is discontinued, a former spouse who does not change the enrollment within the time set will be enrolled in the lowest-cost nationwide plan option, as defined in § 890.301(n);

(iii) If one or more options of a plan are discontinued, a former spouse who does not change the enrollment will be enrolled in the remaining option of the plan, or in the case of a plan with two or more options remaining, the lowest-cost remaining option that is not a High Deductible Health Plan (HDHP);

(iv) If the discontinuance of the plan, whether permanent or temporary, is due to a disaster, the former spouse must change the enrollment within 60 days of the disaster, as announced by OPM. If a former spouse does not change the enrollment within the time frame announced by OPM, the former spouse will be enrolled in the lowest-cost nationwide plan option, as defined in § 890.301(n) of this section. The effective date of enrollment changes under this provision will be set by OPM when it makes the announcement allowing such changes;

(v) A former spouse who is unable, for causes beyond his or her control, to make an enrollment change within the 60 days following a disaster and is, as a result, enrolled in the lowest-cost nationwide plan as defined in § 890.301(n), may request a belated enrollment into the plan of his or her choice subject to the requirements of paragraph (c) of this section.

(5) Loss of coverage under the Medicaid program or similar State-sponsored program of Medical assistance for the needy.

(6) Loss of coverage under a non-Federal health plan.

(k) *Move from comprehensive medical plan's area.* A former spouse in a comprehensive medical plan who moves or

becomes employed outside the geographic area from which the plan accepts enrollments, or, if already outside this area, moves or becomes employed further from this area, may change the enrollment upon notifying the employing office of the move or change of place of employment. Similarly, a former spouse whose covered family member moves outside the geographic area from which the plan accepts enrollments, or if already outside this area, moves further from this area, may change the enrollment upon notifying the employing office of the family member's move. The change of enrollment takes effect on the first day of the pay period that begins after the employing office receives an appropriate request.

(l) *On becoming eligible for Medicare.* A former spouse may change the enrollment from one plan or option to another at any time beginning on the 30th day before becoming eligible for coverage under title XVIII of the Social Security Act (Medicare). A change of enrollment based on becoming eligible for Medicare may be made only once.

(m) *Annuity insufficient to pay withholdings.* (1) If the annuity of a former spouse is insufficient to pay the full subscription charge for the plan in which he or she is enrolled, the retirement system must provide the former spouse with information regarding the available plans and written notification of the opportunity to either—

(i) Pay the premium directly to the retirement system in accordance with § 890.808(d); or

(ii) Enroll in any plan with a full premium that is less than the amount of annuity. If the former spouse elects to change to a lower cost enrollment, the change takes effect immediately upon loss of coverage under the prior enrollment.

(2) If the former spouse is enrolled in the high option of a plan that has two options, and does not elect a plan with a full premium that is less than the annuity or does not elect to pay premiums directly, he or she is deemed to have enrolled in the standard option of the same plan unless the annuity is insufficient to pay the full subscription charge for the standard option.

(3) A former spouse who is enrolled in a plan with only one option, who fails to make the election required by this paragraph (m)(3) will be subject to the provisions of § 890.807(c).

[62 FR 38440, July 18, 1997; 62 FR 49557, Sept. 22, 1997, as amended at 66 FR 49087, Sept. 26, 2001; 67 FR 41307, June 18, 2002; 70 FR 71749, Nov. 30, 2005; 72 FR 1912, Jan. 17, 2007; 80 FR 55737, Sept. 17, 2015; 80 FR 65883, Oct. 28, 2015]

### § 890.807 When do enrollments terminate, cancel or suspend?

(a)(1) Except for former spouses meeting the requirements in § 890.803(a)(3) (iv) and (v) of this part, a former spouse's enrollment terminates, subject to the temporary extension of coverage for conversion, at midnight of the last day of the pay period in which the earliest of the following events occurs:

(i) Court order ceases to provide entitlement to survivor annuity or portion of retirement annuity under a retirement system for Government employees.

(ii) Former spouse remarries before age 55.

(iii) Former spouse dies.

(iv) Employee or annuitant on whose service the benefits are based dies and no survivor annuity is payable.

(v) Separated employee on whose service the benefits are based dies before the requirements for deferred annuity have been met.

(vi) Employee on whose service benefits are based leaves Federal service before establishing title to an immediate annuity or a deferred annuity.

(vii) Refund of retirement money is paid to the separated employee on whose service the health benefits are based.

(2) OPM may authorize a longer time frame for the temporary extension of coverage for conversion than the 31 days provided in § 890.401(a) if in OPM's judgment the former spouse could not have known that (1) the employee on whose service benefits are based left Federal service before establishing title to an immediate or deferred annuity; or (2) the separated employee on whose service the benefits are based died before the requirements for deferred annuity had been met. In such cases, the right of conversion may be

exercised up to 31 days after the employing office's notice of termination. The former spouse must pay the full premium (employee's and Government's share) during the extended period, exclusive of the 31–day period following the notice.

(3) Termination of enrollment for failure to pay premiums within the time frame established in accordance with § 890.808(d)(1) is retroactive to the end of the last pay period for which payment has been timely received.

(4) A former spouse whose enrollment is terminated under this paragraph may not reenroll.

(b) The enrollment of a former spouse who meets the requirements in § 890.803(a)(3) (iv) or (v) of this part terminates, subject to the temporary extension of coverage for conversion, at midnight of the last day of the pay period in which the earliest of the following events occurs:

(1) Former spouse remarries before age 55.

(2) Former spouse dies.

(c) *Failure to make an election under § 890.806(m).* (1) If the annuity is insufficient to pay the full subscription charge due for the plan in which the former spouse is enrolled, the former spouse may elect one of the two opportunities offered under § 890.806(m) (electing a plan with a full subscription charge that is less than the annuity; or paying premiums directly to the retirement system in accordance with § 890.808(d)). Except as provided in paragraph (c)(3) of this section the enrollment of a former spouse who fails to make an election within the specified time frame will be terminated.

(2) If the individual was prevented by circumstances beyond his or her control from making an election within the time limit after receipt of the final notice, he or she may request reinstatement of coverage by writing to the retirement system. The retirement system will determine if the individual is eligible for reinstatement of coverage; and, when the determination is affirmative, the individual's coverage may be reinstated retroactively to the date of termination or prospectively. If the determination is negative, the individual may request reconsideration of the decision from OPM.

(3) If the former spouse does not make an election under paragraph (c)(1) of this section and is enrolled in the high option of a plan that has two options, the former spouse is deemed to have elected enrollment in the standard option of the same plan unless the annuity is insufficient to pay the full withholdings for the standard option.

(d) *Coverage of members of the family.* The coverage of a member of the family of a former spouse terminates, subject to the temporary extension of coverage for conversion, at midnight of the earlier of the following dates:

(1) The day on which the individual ceases to be an eligible family member.

(2) The day the former spouse ceases to be enrolled, unless the family member is entitled as a survivor annuitant to continued enrollment or is entitled to continued coverage under the enrollment of another.

(e) *Cancellation.* (1) A former spouse may cancel his or her enrollment at any time by filing an appropriate request with the employing office. The cancellation takes effect on the last day of the pay period in which the appropriate request cancelling the enrollment is received by the employing office.

(2) A former spouse may suspend enrollment in FEHB for the purpose of enrolling in a Medicare sponsored plan under sections 1833, 1876, or 1851 of the Social Security Act, or to enroll in the Medicaid program or a similar State-sponsored program of medical assistance for the needy, or to use Peace Corps or CHAMPVA or TRICARE (including the Uniformed Services Family Health Plan) or TRICARE-for-Life coverage instead of FEHB coverage. To suspend FEHB coverage, documentation of eligibility for coverage under the non-FEHB Program must be submitted to the employing office or retirement system. If the documentation is received within the period beginning 31 days before and ending 31 days after the effective date of the enrollment in the Medicare sponsored plan, or the Medicaid or similar program, or within 31 days before or after the day designated by the former spouse as the day he or she wants to suspend FEHB coverage to use Peace Corps or CHAMPVA or TRICARE (including the

Uniformed Services Family Health Plan) or TRICARE-for-Life coverage instead of FEHB coverage, then the suspension will be effective at the end of the day before the effective date of the enrollment or the end of the day before the day designated. Otherwise, the suspension is effective the first day of the first pay period that begins after the date the employing office or retirement system receives the documentation.

(3) The former spouse and family members, if any, are not entitled to the temporary extension of coverage for conversion or to convert to an individual contract for health benefits.

(4) A former spouse who cancels his or her enrollment for any reason may not later reenroll in the FEHB Program.

[51 FR 15748, Apr. 28, 1986, as amended at 52 FR 39497, Oct. 22, 1987, and 53 FR 32368, Aug. 25, 1988; 53 FR 45071, Nov. 8, 1988; 56 FR 25997, June 6, 1991; 57 FR 48162, Oct. 22, 1992; 62 FR 38441, July 18, 1997; 62 FR 53223, Oct. 14, 1997; 66 FR 49088, Sept. 26, 2001; 67 FR 41307, June 18, 2002; 70 FR 71749, Nov. 30, 2005]

### § 890.808 Employing office responsibilities.

(a) *Application for benefits*. The former spouse's application for health benefits may be in the form of a Standard Form 2809, letter, or written statement to the employing office. Former spouses applying for benefits under § 890.803(a)(3)(iv) of this part must also include with their application a request for waiver of the application time limitation in accordance with § 890.805(b) of this part. Former spouses applying for benefits under § 890.803(a)(3)(v) of this part must also include with their application a request for waiver of the application time limitation in accordance with § 890.805(c) of this part.

(b) *Administration of the enrollment process*. (1) The employing office will set up a method for accepting applications for enrollment informing the former spouse what documents to submit and where to submit them for an eligibility determination, and collecting premium payments. The method will include procedures for verifying the eligibility requirements under § 890.803(a) (1) and (2) of this part. The employing office must obtain OPM, Foreign Service Retirement and Disability System (FSRDS), or CIA Retirement and Disability System (CIARDS) documentation that the former spouse meets the additional requirement under § 890.803(a)(3) (i), (ii), (iii), (iv), or (v) of this part. A request for the retirement system's determination whether a court order is a qualifying court order for health benefits enrollment under this subpart must be accompanied by the documentation specified in § 838.221, § 838.721, or § 838.1005 of this chapter.

(2) The employing office will send the former spouse notice, in writing, of its decision. When an employing office informs a former spouse of his or her eligibility to enroll, it will identify the documents on which it based its decision and will include a premium payment schedule and statement of the requirements for continued enrollment under § 890.803. If the former spouse does not qualify for health benefits coverage, the employing office must give the former spouse a reconsideration right under § 890.104. Reconsideration requests from former spouses applying for benefits under § 890.803(a)(3)(iv) of this part must be directed to the Office of Personnel, Retirement Division, Central Intelligence Agency, Washington, DC 20505. Reconsideration requests from former spouses applying for benefits under § 890.803(a)(3)(v) of this part must be directed to the Department of State, Retirement Division, Washington, DC 20520.

(3) The agency employing office will maintain a health benefits file for the former spouse as a file separate from the personnel records of the employee or former employee. The retirement system acting as employing office for the former spouse may file the former spouse health benefits records in with the annuitant's retirement records.

(4) The former spouse will be required to certify that he or she meets the requirements listed in § 890.803 and that he or she will notify the employing office within 31 days of an event that results in failure to meet one or more of the requirements.

(c) *Qualifying court order*. Subject to a 31-day extension period for conversion,

the duration of health benefits coverage will coincide with any period specified in the qualifying court order providing for an annuity. A court order not meeting the requirements under part 838 of this chapter will not be used to establish or continue entitlement to a former spouse's health benefits coverage.

(d) *Premium payments.* (1) The former spouse must remit to the employing office the full subscription charge for the enrollment for every pay period during which the enrollment continues, exclusive of the 31-day temporary extension of coverage for conversion provided in §§ 890.401 and 890.807(a)(2). Payment must be made after the pay period in which the former spouse is covered in accordance with a schedule established by the employing office (see definition of *pay period* under § 890.101(a)). If the employing office does not receive payment by the due date the employing office must notify the former spouse in writing that continuation of coverage depends upon payment being made within 15 days (45 days for enrollees residing overseas) after receipt of the notice. If no subsequent payments are made, the employing office terminates the enrollment 60 days (90 days for enrollees residing overseas) after the date of the notice. Termination for nonpayment of premium is considered a voluntary cancellation under § 890.807(d). A former spouse whose enrollment is terminated because of nonpayment of premium may not reenroll or reinstate coverage except as provided in paragraph (d)(2) of this section.

(2) If the individual was prevented by circumstances beyond his or her control from making payment within 15 days after receipt of the notice, he or she may request reinstatement of coverage by writing to the employing office. Such a request must be filed within 30 calendar days from the date of termination and must be accompanied by verification that the individual was prevented by circumstances beyond his or her control from paying within the time limit. The employing office will determine if the individual is eligible for reinstatement of coverage; and, when the determination is affirmative, the individual's coverage may be reinstated retroactively to the date of termination. If the determination is negative, the individual may request a review of the decision from the employing agency as provided under § 890.104.

(3) The employing office will submit all premium payments collected from former spouses along with its regular health benefits payments to OPM in accordance with procedures established by that Office.

(e) *Withholding from annuity.* The retirement system acting as employing office for a former spouse will establish a method for withholding the full subscription charge from the former spouse's annuity check. When the annuity is insufficient to cover the full subscription charge, the retirement system will follow the procedures specified in § 890.806(l).

[51 FR 15748, Apr. 28, 1986, as amended at 52 FR 2506, Jan. 23, 1987; 52 FR 39497, Oct. 22, 1987, and 53 FR 32368, Aug. 25, 1988; 53 FR 45071, Nov. 8, 1988; 56 FR 25997, June 6, 1991; 57 FR 21192, May 19, 1992; 57 FR 33598, July 29, 1992; 59 FR 60297, Nov. 23, 1994; 59 FR 67607, Dec. 30, 1994; 61 FR 37810, July 22, 1996; 62 FR 38442, July 18, 1997]

## Subpart I—Limit on Inpatient Hospital Charges, Physician Charges, and FEHB Benefit Payments

SOURCE: 57 FR 10610, Mar. 27, 1992, unless otherwise noted.

### § 890.901 Purpose.

This subpart identifies the individuals whose charges and FEHB benefit payments for inpatient hospital services and/or physician services may be limited and sets forth the circumstances of the limit.

[60 FR 26668, May 18, 1995]

### § 890.902 Definition.

For purposes of this subpart, *Retired enrolled individual* means an individual who:

(a)(1) Is covered by a Federal Employees Health Benefits plan (including individuals covered under 5 U.S.C. 8905a) described by 5 U.S.C. 8903(1), (2) and (3), or 5 U.S.C. 8903a and is:

(i) An annuitant as defined in 5 U.S.C. 8901(3); or

(ii) A former spouse as defined in 5 U.S.C. 8901(10) or enrolled for continued coverage under 5 U.S.C. 8905a(f); or

(2) Is a family member covered by the family enrollment of an annuitant or former spouse as defined in 5 U.S.C. 8901, or a former spouse enrolled for continued coverage under 5 U.S.C. 8905a(f); and

(b) Is not employed in a position which confers FEHB coverage; and

(c) Is age 65 or older or becomes age 65 while receiving inpatient hospital services or physician services; and

(d) Is not covered by Medicare part A and/or part B.

[57 FR 10610, Mar. 27, 1992, as amended at 60 FR 26668, May 18, 1995]

### § 890.903 Covered services.

(a) The limitation on the charges and FEHB benefit payments for inpatient hospital services apply to inpatient hospital services which are:

(1) Covered under both Medicare part A and the retired enrolled individual's FEHB plan; and

(2) Supplied to a retired enrolled individual who does not have Medicare part A; and

(3) Provided by hospital providers who have in force participation agreements with the Secretary of Health and Human Services (HHS) consistent with sections 1814(a) and 1866 of the Social Security Act, and receive Medicare part A payments in accordance with the diagnosis related group (DRG) based prospective payment system (PPS).

(b) The limitation on the charges and FEHB benefit payments for physician services apply to physician services, (as defined in section 1848(j) of the Social Security Act), which are:

(1) Covered under both Medicare part B and the retired enrolled individual's FEHB plan; and

(2) Supplied to a retired enrolled individual who does not have Medicare part B.

[60 FR 26668, May 18, 1995]

### § 890.904 Determination of FEHB benefit payment.

(a) The FEHB plan's benefit payment for inpatient hospital services under this subpart is the amount calculated by the FEHB plan, using information and instructions provided by the Department of Health and Human Services (HHS) and guidelines specified by OPM, as equivalent to the Medicare Part A payment under the DRG-based PPS (this is, the amount payable before the Medicare deductible, coinsurance and lifetime limits are applied), reduced by any FEHB plan deductible, coinsurance, copayment, or preadmission certification penalty that is the responsibility of the retired enrolled individual.

(b) The FEHB plan's benefit payment for physician services under this subpart is determined by taking the lower of the following amounts:

(1) The amount determined by the FEHB plan, which is equivalent to the Medicare part B payment under the Medicare Participating Physician Fee Schedule for Medicare participating physicians and the Medicare Nonparticipating Physician Fee Schedule for Medicare nonparticipating physicians (the amount payable before the Medicare deductible and coinsurance are applied); or

(2) The actual billed charges; and

(3) Reducing the lower amount by any FEHB plan deductible, coinsurance, or copayment that is the responsibility of the retired enrolled individual.

[58 FR 38663, July 20, 1993, as amended at 60 FR 26668, May 18, 1995]

### § 890.905 Limits on inpatient hospital and physician charges.

(a) Hospitals may not collect from FEHB plans and retired enrolled individuals for inpatient hospital services more than the amount determined to be equivalent to the Medicare part A payment under the DRG-based PPS.

(b) Medicare participating providers may not collect from FEHB plans and retired enrolled individuals for physician services more than the amount determined to be equivalent to the Medicare part B payment under the Medicare Participating Physician Fee Schedule.

(c) Medicare nonparticipating providers may not collect from FEHB plans and retired enrolled individuals for physician services more than the

amount determined to be equivalent to the Medicare limiting charge amount.

[60 FR 26668, May 18, 1995; 60 FR 28019, May 26, 1995]

### § 890.906 Retired enrolled individuals coinsurance payments.

(a) A retired enrolled individual's coinsurance responsibility for inpatient hospital services is calculated in accordance with the plan's contractual benefit structure and is based on the amount determined to be equivalent to the Medicare part A payment under the DRG-based PPS.

(b) A retired enrolled individual's coinsurance responsibility for physician services is calculated in accordance with the plan's contractual benefit structure and is based on the lower of the actual charges or the amount determined to be equivalent to the Medicare part B payment under the Medicare Participating Physician Fee Schedule for Medicare participating physicians and the Medicare Nonparticipating Physician Fee Schedule for Medicare nonparticipating physicians.

[60 FR 26668, May 18, 1995]

### § 890.907 Effective dates.

(a) The limitation specified in this subpart applies to inpatient hospital admissions commencing on or after January 1, 1992.

(b) The limitation specified in this subpart applies to physician services supplied on or after January 1, 1995.

[60 FR 26668, May 18, 1995]

### § 890.908 Notification of HHS.

An FEHB plan, under the oversight of OPM, will notify the Secretary of HHS, or the Secretary's designee, if the plan finds that:

(a) A hospital knowingly and willfully collects, on a repeated basis, more than the amount determined to be equivalent to the Medicare part A payment under the DRG-based PPS.

(b) A Medicare participating physician or supplier knowingly and willfully collects, on a repeated basis, more than the amount determined to be equivalent to the Medicare part B payment under the Medicare Participating Physician Fee Schedule.

(c) A Medicare nonparticipating physician or supplier knowingly and willfully charges, on a repeated basis, more than the amount determined to be equivalent to the Medicare limiting charge amount.

[60 FR 26668, May 18, 1995]

### § 890.909 End-of-year settlements.

Neither OPM, nor the FEHB plans, will perform end-of-year settlements with, or make retroactive adjustments as a result of retroactive changes in the Medicare payment calculation information to, hospital providers who have received FEHB benefit payments under this subpart.

[57 FR 10610, Mar. 27, 1992. Redesignated at 60 FR 26668, May 18, 1995]

### § 890.910 Provider information.

The hospital provider information used to calculate the amount equivalent to the Medicare part A payment will be updated on an annual basis.

[57 FR 10610, Mar. 27, 1992. Redesignated at 60 FR 26668, May 18, 1995]

## Subpart J—Administrative Sanctions Imposed Against Health Care Providers

AUTHORITY: 5 U.S.C. 8902a.

SOURCE: 68 FR 5475, Feb. 3, 2003, unless otherwise noted.

GENERAL PROVISIONS AND DEFINITIONS

### § 890.1001 Scope and purpose.

(a) *Scope.* This subpart implements 5 U.S.C. 8902a, as amended by Public Law 105–266 (October 19, 1998). It establishes a system of administrative sanctions that OPM may, or in some cases, must apply to health care providers who have committed certain violations. The sanctions include debarment, suspension, civil monetary penalties, and financial assessments.

(b) *Purpose.* OPM uses the authorities in this subpart to protect the health and safety of the persons who obtain their health insurance coverage through the FEHBP and to assure the financial and programmatic integrity of FEHBP transactions.

**§ 890.1002 Use of terminology.**

Unless otherwise indicated, within this subpart the words ''health care provider,'' ''provider,'' and ''he'' mean a health care provider(s) of either gender or as a business entity, in either the singular or plural. The acronym ''OPM'' and the pronoun ''it'' connote the U.S. Office of Personnel Management.

**§ 890.1003 Definitions.**

In this subpart:

*Carrier* means an entity responsible for operating a health benefits plan described by 5 U.S.C. 8903 or 8903a.

*Community* means a geographically-defined area in which a provider furnishes health care services or supplies and for which he may request a limited waiver of debarment in accordance with this subpart. *Defined service area* has the same meaning as community.

*Contest* means a health care provider's request for the debarring or suspending official to reconsider a proposed sanction or the length or amount of a proposed sanction.

*Control interest* means that a health care provider:

(1) Has a direct and/or indirect ownership interest of 5 percent or more in an entity;

(2) Owns a whole or part interest in a mortgage, deed of trust, note, or other obligation secured by the entity or the entity's property or assets, equating to a direct interest of 5 percent or more of the total property or assets of the entity;

(3) Serves as an officer or director of the entity, if the entity is organized as a corporation;

(4) Is a partner in the entity, if the entity is organized as a partnership;

(5) Serves as a managing employee of the entity, including but not limited to employment as a general manager, business manager, administrator, or other position exercising, either directly or through other employees, operational or managerial control over the activities of the entity or any portion of the entity;

(6) Exercises substantive control over an entity or a critical influence over the activities of the entity or some portion of thereof, whether or not employed by the entity; or

(7) Acts as an agent of the entity.

*Conviction* or *convicted* has the meaning set forth in 5 U.S.C. 8902a(a)(1)(C).

*Covered individual* means an employee, annuitant, family member, or former spouse covered by a health benefits plan described by 5 U.S.C. 8903 or 8903a or an individual eligible to be covered by such a plan under 5 U.S.C. 8905(d).

*Days* means calendar days, unless specifically indicated otherwise.

*Debarment* means a decision by OPM's debarring official to prohibit payment of FEHBP funds to a health care provider, based on 5 U.S.C. 8902a (b), (c), or (d) and this subpart.

*Debarring official* means an OPM employee authorized to issue debarments and financial sanctions under this subpart.

*FEHBP* means the Federal Employees Health Benefits Program.

*Health care services or supplies* means health care or services and supplies such as diagnosis and treatment; drugs and biologicals; supplies, appliances and equipment; and hospitals, clinics, or other institutional entities that furnish supplies and services.

*Incarceration* means imprisonment, or any type of confinement with or without supervised release, including but not limited to home detention, community confinement, house arrest, or similar arrangements.

*Limited waiver* means an approval by the debarring official of a health care provider's request to receive payments of FEHBP funds for items or services rendered in a defined geographical area, notwithstanding debarment, because the provider is the sole community provider or sole source of essential specialized services in a community.

*Mandatory debarment* means a debarment based on 5 U.S.C. 8902a(b).

*Office* or *OPM* means the United States Office of Personnel Management or the component thereof responsible for conducting the administrative sanctions program described by this subpart.

*Permissive debarment* means a debarment based on 5 U.S.C. 8902a(c) or (d).

*Provider* or *provider of health care services or supplies* means a physician, hospital, clinic, or other individual or entity that, directly or indirectly, furnishes health care services or supplies.

*Reinstatement* means a decision by OPM to terminate a health care provider's debarment and to restore his eligibility to receive payment of FEHBP funds.

*Sanction* or *administrative sanction* means any administrative action authorized by 5 U.S.C. 8902a or this subpart, including debarment, suspension, civil monetary penalties, and financial assessments.

*Should know* or *should have known* has the meaning set forth in 5 U.S.C. 8902a(a)(1)(D).

*Sole community provider* means a provider who is the only source of primary medical care within a defined service area.

*Sole source of essential specialized services in a community* means a health care provider who is the only source of specialized health care items or services in a defined service area and that items or services furnished by a non-specialist cannot be substituted without jeopardizing the health or safety of covered individuals.

*Suspending official* means an OPM employee authorized to issue suspensions under 5 U.S.C. 8902a and this subpart.

MANDATORY DEBARMENTS

### § 890.1004 Bases for mandatory debarments.

(a) *Debarment required.* OPM shall debar a provider who is described by any category of offense set forth in 5 U.S.C. 8902a(b).

(b) *Direct involvement with an OPM program unnecessary.* The conduct underlying the basis for a provider's mandatory debarment need not have involved an FEHBP covered individual or transaction, or any other OPM program.

### § 890.1005 Time limits for OPM to initiate mandatory debarments.

OPM shall send a provider a written notice of a proposed mandatory debarment within 6 years of the event that forms the basis for the debarment. If the basis for the proposed debarment is a conviction, the notice shall be sent within 6 years of the date of the conviction. If the basis is another agency's suspension, debarment, or exclusion, the OPM notice shall be sent within 6 years of the effective date of the other agency's action.

### § 890.1006 Notice of proposed mandatory debarment.

(a) *Written notice.* OPM shall inform a provider of his proposed debarment by written notice sent not less than 30 days prior to the proposed effective date.

(b) *Contents of the notice.* The notice shall contain information indicating the:

(1) Effective date of the debarment;

(2) Minimum length of the debarment;

(3) Basis for the debarment;

(4) Provisions of law and regulation authorizing the debarment;

(5) Effect of the debarment;

(6) Provider's right to contest the debarment to the debarring official;

(7) Provider's right to request OPM to reduce the length of debarment, if it exceeds the minimum period required by law or this subpart; and

(8) Procedures the provider shall be required to follow to apply for reinstatement at the end of his period of debarment, and to seek a waiver of the debarment on the basis that he is the sole health care provider or the sole source of essential specialized services in a community.

(c) *Methods of sending notice.* OPM shall send the notice of proposed debarment and the final decision notice (if a contest is filed) to the provider's last known address by first class mail, or, at OPM's option, by express delivery service.

(d) *Delivery to attorney, agent, or representatives.* (1) If OPM proposes to debar an individual health care provider, it may send the notice of proposed debarment directly to the provider or to any other person designated by the provider to act as a representative in debarment proceedings.

(2) In the case of a health care provider that is an entity, OPM shall deem notice sent to any owner, partner, director, officer, registered agent for

service of process, attorney, or managing employee as constituting notice to the entity.

(e) *Presumed timeframes for receipt of notice.* OPM computes timeframes associated with the delivery notices described in paragraph (c) of this section so that:

(1) When OPM sends notice by a method that provides a confirmation of receipt, OPM deems that the provider received the notice at the time indicated in the confirmation; and

(2) When OPM sends notice by a method that does not provide a confirmation of receipt, OPM deems that the provider received the notice 5 business days after it was sent.

(f) *Procedures if notice cannot be delivered.* (1) If OPM learns that a notice was undeliverable as addressed or routed, OPM shall make reasonable efforts to obtain a current and accurate address, and to resend the notice to that address, or it shall use alternative methods of sending the notice, in accordance with paragraph (c) of this section.

(2) If a notice cannot be delivered after reasonable followup efforts as described in paragraph (f)(1) of this section, OPM shall presume that the provider received notice 5 days after the latest date on which a notice was sent.

(g) *Use of electronic means to transmit notice.* [Reserved]

### § 890.1007 Minimum length of mandatory debarments.

(a) *Debarment based on a conviction.* The statutory minimum period of debarment for a mandatory debarment based on a conviction is 3 years.

(b) *Debarment based on another agency's action.* A debarment based on another Federal agency's debarment, suspension, or exclusion remains in effect until the originating agency terminates its sanction.

### § 890.1008 Mandatory debarment for longer than the minimum length.

(a) *Aggravating factors.* OPM may debar a provider for longer than the 3-year minimum period for mandatory debarments if aggravating factors are associated with the basis for the debarment. The factors OPM considers to be aggravating are:

(1) Whether the FEHBP incurred a financial loss as the result of the acts underlying the conviction, or similar acts that were not adjudicated, and the level of such loss. In determining the amount of financial loss, OPM shall not consider any amounts of restitution that a provider may have paid;

(2) Whether the sentence imposed by the court included incarceration;

(3) Whether the underlying offense(s), or similar acts not adjudicated, occurred repeatedly over a period of time, and whether there is evidence that the offense(s) was planned in advance;

(4) Whether the provider has a prior record of criminal, civil, or administrative adjudication of related offenses or similar acts; or

(5) Whether the actions underlying the conviction, or similar acts that were not adjudicated, adversely affected the physical, mental, or financial well-being of one or more covered individuals or other persons.

(b) *Mitigating factors.* If the aggravating factors justify a debarment longer than the 3 year minimum period for mandatory debarments, OPM shall also consider whether mitigating factors may justify reducing the debarment period to not less than 3 years. The factors that OPM considers to be mitigating are:

(1) Whether the conviction(s) on which the debarment is based consist entirely or primarily of misdemeanor offenses;

(2) Whether court records, including associated sentencing reports, contain an official determination that the provider had a physical, mental, or emotional condition before or during the commission of the offenses underlying the conviction that reduced his level of culpability; or

(3) Whether the provider's cooperation with Federal and/or State investigative officials resulted in criminal convictions, civil recoveries, or administrative actions against other individuals, or served as the basis for identifying program weaknesses. Restitution made by the provider for funds wrongfully, improperly, or illegally received from Federal or State programs may also be considered as a mitigating circumstance.

(c) *Maximum period of debarment.* There is no limit on the maximum period of a mandatory debarment based on a conviction.

### § 890.1009 Contesting proposed mandatory debarments.

(a) *Contesting the debarment.* Within 30 days after receiving OPM's notice of proposed mandatory debarment, a provider may submit information, documents, and written arguments in opposition to the proposed debarment. OPM's notice shall contain specific information about where and how to submit this material. If a timely contest is not filed, the proposed debarment shall become effective as stated in the notice, without further action by OPM.

(b) *Requesting a reduction of the debarment period.* If OPM proposes a mandatory debarment for a period longer than the 3-year minimum required by 5 U.S.C. 8902a(g)(3), the provider may request a reduction of the debarment period to not less than 3 years, without contesting the debarment itself.

(c) *Personal appearance before the debarring official.* In addition to providing written material, the provider may appear before the debarring official personally or through a representative to present oral arguments in support of his contest. OPM's notice shall contain specific information about arranging an in-person presentation.

### § 890.1010 Debarring official's decision of contest.

(a) *Prior adjudication is dispositive.* Evidence indicating that a provider was formally adjudicated for a violation of any type set forth in 5 U.S.C. 8902a(b) fully satisfies the standard of proof for a mandatory debarment.

(b) *Debarring official's decision.* The debarring official shall issue a written decision, based on the entire administrative record, within 30 days after the record closes to receipt of information. The debarring official may extend this decision period for good cause.

(c) *No further administrative proceedings.* The debarring official's decisions regarding mandatory debarment and the period of debarment are final and are not subject to further administrative review.

PERMISSIVE DEBARMENTS

### § 890.1011 Bases for permissive debarments.

(a) *Licensure actions.* OPM may debar a health care provider to whom the provisions of 5 U.S.C. 8902a(c)(1) apply. OPM may take this action even if the provider retains current and valid professional licensure in another State(s).

(b) *Ownership or control interests.* OPM may debar a health care provider based on ownership or control of or by a debarred provider, as set forth in 5 U.S.C. 8902a(c)(2) and (3).

(c) *False, deceptive, or wrongful claims practices.* OPM may debar a provider who commits claims-related violations as set forth in 5 U.S.C. 8902a(c)(4) and (5) and 5 U.S.C. 8902a(d)(1) and (2).

(d) *Failure to furnish required information.* OPM may debar a provider who knowingly fails to provide information requested by an FEHBP carrier or OPM, as set forth in 5 U.S.C. 8902a(d)(3).

### § 890.1012 Time limits for OPM to initiate permissive debarments.

(a) *Licensure cases.* If the basis for the proposed debarment is a licensure action, OPM shall send the provider a notice of proposed debarment within 6 years of the effective date of the State licensing authority's revocation, suspension, restriction, or nonrenewal action, or the date on which the provider surrendered his license to the State authority.

(b) *Ownership or control.* If the basis for the proposed debarment is ownership or control of an entity by a sanctioned person, or ownership or control of a sanctioned entity by a person who knew or should have known of the basis for the entity's sanction, OPM shall send a notice of proposed debarment within 6 years of the effective date of the sanction on which the proposed debarment is based.

(c) *False, deceptive, or wrongful claims practices.* If the basis for the proposed debarment involves a claim filed with a FEHBP carrier, OPM shall send the provider a notice of proposed debarment within 6 years of the date he presented the claim for payment to the covered person's FEHBP carrier.

(d) *Failure to furnish requested information*. If the basis for the proposed debarment involves a provider's failure to furnish information requested by OPM or an FEHBP carrier, OPM shall send the notice of proposed debarment within 6 years of the date on which the carrier or OPM requested the provider to furnish the information in question.

**§ 890.1013 Deciding whether to propose a permissive debarment.**

(a) *Review factors*. The factors OPM shall consider in deciding whether to propose a provider's debarment under a permissive debarment authority are:

(1) The nature of any claims involved in the basis for the proposed debarment and the circumstances under which they were presented to FEHBP carriers;

(2) The improper conduct involved in the basis for the proposed debarment, and the provider's degree of culpability and history of prior offenses;

(3) The extent to which the provider poses or may pose a risk to the health and safety of FEHBP-covered individuals or to the integrity of FEHBP transactions; and

(4) Other factors specifically relevant to the provider's debarment that shall be considered in the interests of fairness.

(b) *Absence of a factor*. The absence of a factor shall be considered neutral, and shall have no effect on OPM's decision.

(c) *Specialized review in certain cases*. In determining whether to propose debarment under 5 U.S.C 8902a(c)(4) for providing items or services substantially in excess of the needs of a covered individual or for providing items or services that fail to meet professionally-recognized quality standards, OPM shall obtain the input of trained reviewers, based on written medical protocols developed by physicians. If OPM cannot reach a decision on this basis, it shall consult with a physician in an appropriate specialty area.

**§ 890.1014 Notice of proposed permissive debarment.**

Notice of a proposed permissive debarment shall contain the information set forth in § 890.1006.

**§ 890.1015 Minimum and maximum length of permissive debarments.**

(a) *No mandatory minimum or upper limit on length of permissive debarment*. There is neither a mandatory minimum debarment period nor a limitation on the maximum length of a debarment under any permissive debarment authority.

(b) *Debarring official's process in setting period of permissive debarment*. The debarring official shall set the period of each debarment issued under a permissive debarment authority after considering the factors set forth in § 890.1016 and the factors set forth in the applicable section from among §§ 890.1017 through 890.1021.

**§ 890.1016 Aggravating and mitigating factors used to determine the length of permissive debarments.**

(a) *Aggravating factors*. The presence of aggravating circumstances may support an OPM determination to increase the length of a debarment beyond the nominal periods set forth in §§ 890.1017 through 890.1021. The factors that OPM considers as aggravating are:

(1) Whether the provider's actions underlying the basis for the debarment, or similar acts, had an adverse impact on the physical or mental health or well-being of one or more FEHBP-covered individuals or other persons.

(2) Whether the provider has a documented history of prior criminal wrongdoing; civil violations related to health care items or services; improper conduct; or administrative violations addressed by a Federal or State agency. OPM may consider matters involving violence, patient abuse, drug abuse, or controlled substances convictions or violations to be particularly serious.

(3) Whether the provider's actions underlying the basis for the debarment, or similar acts, resulted in financial loss to the FEHBP, FEHBP-covered individuals, or other persons. In determining whether, or to what extent, a financial loss occurred, OPM shall not consider any amounts of restitution that the provider may have paid.

(4) Whether the provider's false, wrongful, or improper claims to FEHBP carriers were numerous, submitted over a prolonged period of time,

or part of an on-going pattern of wrongful acts.

(5) Whether the provider was specifically aware of or directly responsible for the acts constituting the basis for the debarment.

(6) Whether the provider attempted to obstruct, hinder, or impede official inquiries into the wrongful conduct underlying the debarment.

(b) *Mitigating factors*. The presence of mitigating circumstances may support an OPM determination to shorten the length of a debarment below the nominal periods set forth in §§ 890.1017 through 890.1021, respectively. The factors that OPM considers as mitigating are:

(1) Whether the provider's cooperation with Federal, State, or local authorities resulted in criminal convictions, civil recoveries, or administrative actions against other violators, or served as the basis for official determinations of program weaknesses or vulnerabilities. Restitution that the provider made for funds wrongfully, improperly, or illegally received from Federal or State programs may also be considered as a mitigating factor.

(2) Whether official records of judicial proceedings or the proceedings of State licensing authorities contain a formal determination that the provider had a physical, mental, or emotional condition that reduced his level of culpability before or during the period in which he committed the violations in question.

(c) *Absence of factors*. The absence of aggravating or mitigating factors shall have no effect to either increase or lower the nominal period of debarment.

### § 890.1017 Determining length of debarment based on revocation or suspension of a provider's professional licensure.

(a) *Indefinite term of debarment*. Subject to the exceptions set forth in paragraph (b) of this section, debarment under 5 U.S.C. 8902a(c)(1) shall be for an indefinite period coinciding with the period during which the provider's license is revoked, suspended, restricted, surrendered, or otherwise not in effect in the State whose action formed the basis for OPM's debarment.

(b) *Aggravating circumstances*. If any of the aggravating circumstances set forth in § 890.1016 apply, OPM may debar the provider for an additional period beyond the duration of the licensure revocation or suspension.

### § 890.1018 Determining length of debarment for an entity owned or controlled by a sanctioned provider.

OPM shall determine the length of debarments of entities under 5 U.S.C. 8902a(c)(2) based on the type of violation committed by the person with an ownership or control interest. The types of violations actionable under this provision are:

(a) *Owner/controller's debarment*. The debarment of an entity based on debarment of an individual with an ownership or control interest shall be for a period concurrent with the individual's debarment. If any aggravating or mitigating circumstances set forth in § 890.1016 apply solely to the entity and were not considered in setting the period of the individual's debarment, OPM may debar the entity for a period longer or shorter than the individual's debarment.

(b) *Owner/controller's conviction*. The debarment of an entity based on the criminal conviction of a person with an ownership or control interest for an offense listed in 5 U.S.C. 8902a(b)(1)–(4) shall be for a period of not less than 3 years, subject to adjustment for any aggravating or mitigating circumstances set forth in § 890.1016 applying solely to the entity.

(c) *Owner/controller's civil monetary penalty*. The debarment of an entity based on a civil monetary penalty imposed on a person with an ownership or control interest, shall be for a period of not less than 3 years, subject to adjustment for any aggravating or mitigating circumstances set forth in § 890.1016 applying solely to the entity.

### § 890.1019 Determining length of debarment based on ownership or control of a sanctioned entity.

OPM shall determine the length of debarments of individual providers under 5 U.S.C. 8902a(c)(3) based on the type of violation committed by the sanctioned entity owned or controlled by the person with an ownership or

control interest. The types of violations actionable under this provision are:

(a) *Entity's debarment*. If a provider's debarment is based on his ownership or control of a debarred entity, the debarment shall be concurrent with the entity's debarment. If any of the aggravating or mitigating circumstances identified in § 890.1016 applies directly to the provider that owns or controls the debarred entity and was not considered in setting the period of the entity's debarment, OPM may debar the provider for a period longer or shorter, respectively, than the entity's debarment.

(b) *Entity's conviction*. If a provider's debarment is based on the criminal conviction of an entity he owns or controls for an offense listed in 5 U.S.C. 8902a(b)(1)–(4), OPM shall debar the provider for a period of no less than 3 years, subject to adjustment for any aggravating or mitigating circumstances identified in § 890.1016 that apply to the provider as an individual.

(c) *Entity's civil monetary penalty*. If a provider's debarment is based on a civil monetary penalty imposed on an entity he owns or controls, OPM shall debar him for 3 years, subject to adjustment on the basis of the aggravating and mitigating circumstances listed in § 890.1016 that apply to the provider as an individual.

**§ 890.1020 Determining length of debarment based on false, wrongful, or deceptive claims.**

Debarments under 5 U.S.C. 8902a(c)(4) and (5) and 5 U.S.C. 8902a(d)(1) and (2) shall be for a period of 3 years, subject to adjustment based on the aggravating and mitigating factors listed in § 890.1016.

**§ 890.1021 Determining length of debarment based on failure to furnish information needed to resolve claims.**

Debarments under 5 U.S.C. 8902a(d)(3) shall be for a period of 3 years, subject to adjustment based on the aggravating and mitigating factors listed in § 890.1016.

**§ 890.1022 Contesting proposed permissive debarments.**

(a) *Right to contest a proposed debarment*. A provider proposed for debarment under a permissive debarment authority may challenge the debarment by filing a written contest with the debarring official during the 30-day notice period indicated in the notice of proposed debarment. In the absence of a timely contest, the debarment shall become effective as stated in the notice, without further action by OPM.

(b) *Challenging the length of a proposed debarment*. A provider may contest the length of the proposed debarment, while not challenging the debarment itself, or may contest both the length of a debarment and the debarment itself in the same contest.

**§ 890.1023 Information considered in deciding a contest.**

(a) *Documents and oral and written arguments*. A provider may submit documents and written arguments in opposition to the proposed debarment and/or the length of the proposed debarment, and may appear personally or through a representative before the debarring official to provide other relevant information.

(b) *Specific factual basis for contesting the proposed debarment*. A provider's oral and written arguments shall identify the specific facts that contradict the basis for the proposed debarment as stated in the notice of proposed debarment. A general or unsupported denial of the basis for debarment does not raise a genuine dispute over facts material to the debarment, and the debarring official shall not give such a denial any probative weight.

(c) *Mandatory disclosures*. Regardless of the basis for the contest, providers are required to disclose certain types of background information, in addition to any other information submitted during the contest. Failure to provide such information completely and accurately may be a basis for OPM to initiate further legal or administrative action against the provider. The specific items of information that shall be furnished to OPM are:

(1) Any existing, proposed, or prior exclusion, debarment, penalty, or other sanction imposed on the provider by a

Federal, State, or local government agency, including any administrative agreement that purports to affect only a single agency;

(2) Any criminal or civil legal proceeding not referenced in the notice of proposed debarment that arose from facts relevant to the basis for debarment stated in the notice; and

(3) Any entity in which the provider has a control interest, as that term is defined in § 890.1003.

### § 890.1024 Standard and burden of proof for deciding contests.

OPM shall demonstrate, by a preponderance of the evidence in the administrative record as a whole, that a provider has committed a sanctionable violation.

### § 890.1025 Cases where additional fact-finding is not required.

In each contest, the debarring official shall determine whether a further fact-finding proceeding is required in addition to presentation of arguments, documents, and information. An additional fact-finding proceeding is not required when:

(a) *Prior adjudication*. The proposed debarment is based on facts determined in a prior due process adjudication. Examples of prior due process proceedings include, but are not limited to, the adjudication procedures associated with:

(1) Licensure revocation, suspension, restriction, or nonrenewal by a State licensing authority;

(2) Debarment, exclusion, suspension, civil monetary penalties, or similar legal or administrative adjudications by Federal, State, or local agencies;

(3) A criminal conviction or civil judgment; or

(4) An action by a provider that constitutes a waiver of his right to a due process adjudication, such as surrender of professional license during the pendency of a disciplinary hearing, entering a guilty plea or confession of judgment in a judicial proceeding, or signing a settlement agreement stipulating facts that constitute a sanctionable violation.

(b) *Material facts not in dispute*. The provider's contest does not identify a bona fide dispute concerning facts material to the basis for the proposed debarment.

### § 890.1026 Procedures if a fact-finding proceeding is not required.

(a) *Debarring official's procedures*. If a fact-finding proceeding is not required, the debarring official shall issue a final decision of a provider's contest within 30 days after the record closes for submitting evidence, arguments, and information as part of the contest. The debarring official may extend this timeframe for good cause.

(b) *No further administrative review available*. There are no further OPM administrative proceedings after the presiding official's final decision. A provider adversely affected by the decision may appeal under 5 U.S.C. 8902a(h)(2) to the appropriate U.S. district court.

### § 890.1027 Cases where an additional fact-finding proceeding is required.

(a) *Criteria for holding fact-finding proceeding*. The debarring official shall request another OPM official (''presiding official'') to hold an additional fact-finding proceeding if:

(1) Facts material to the proposed debarment have not been adjudicated in a prior due process proceeding; and

(2) These facts are genuinely in dispute, based on the entire administrative record available to the debarring official.

(b) *Qualification to serve as presiding official*. The presiding official is designated by the OPM Director or another OPM official authorized by the Director to make such designations. The presiding official shall be a senior official who is qualified to conduct informal adjudicative proceedings and who has had no previous contact with the proposed debarment or the contest.

(c) *Effect on contest*. The debarring official shall defer a final decision on the contest pending the results of the fact-finding proceeding.

### § 890.1028 Conducting a fact-finding proceeding.

(a) *Informal proceeding*. The presiding official may conduct the fact-finding proceedings as informally as practicable, consistent with principles of fundamental fairness. Formal rules of

evidence or procedure do not apply to these proceedings.

(b) *Proceeding limited to disputed material facts.* The presiding official shall consider only the genuinely disputed facts identified by the debarring official as material to the basis for the debarment. Matters that have been previously adjudicated or that are not in bona fide dispute within the administrative record shall not be considered by presiding official.

(c) *Provider's right to present information, evidence, and arguments.* A provider may appear before the presiding official with counsel, submit oral and written arguments and documentary evidence, present witnesses on his own behalf, question any witnesses testifying in support of the debarment, and challenge the accuracy of any other evidence that the agency offers as a basis for the debarment.

(d) *Record of proceedings.* The presiding official shall make an audio recording of the proceedings and shall provide a copy to the provider at no charge. If the provider wishes to have a transcribed record, OPM shall arrange for production of one which may be purchased at cost.

(e) *Presiding official's findings.* The presiding official shall resolve all of the disputed facts identified by the debarring official, on the basis of a preponderance of the evidence contained within the entire administrative record. The presiding official shall issue a written report of all findings of fact to the debarring official within 30 days after the record of the fact-finding proceeding closes.

### § 890.1029 Deciding a contest after a fact-finding proceeding.

(a) *Findings shall be accepted.* The debarring official shall accept the presiding official's findings of fact, unless they are arbitrary, capricious, or clearly erroneous. If the debarring official concludes that the factual findings are not acceptable, they may be remanded to the presiding official for additional proceedings in accordance with § 890.1028.

(b) *Timeframe for final decision.* The debarring official shall issue a final written decision on a contest within 30 days after receiving the presiding official's findings. The debarring official may extend this decision period for good cause.

(c) *Debarring official's final decision.* (1) The debarring official shall observe the evidentiary standards and burdens of proof stated in § 890.1024 in reaching a final decision.

(2) In any case where a final decision is made to debar a provider, the debarring official has the discretion to set the period of debarment, subject to the factors identified in §§ 890.1016 through 1021.

(3) The debarring official has the discretion to decide not to impose debarment in any case involving a permissive debarment authority.

(d) *No further administrative proceedings.* No further administrative proceedings shall be conducted after the debarring official's final decision in a contest involving an additional fact-finding hearing. A provider adversely affected by the debarring official's final decision in a contested case may appeal under 5 U.S.C. 8902a(h)(2) to the appropriate U. S. district court.

## SUSPENSION

### § 890.1030 Effect of a suspension.

(a) *Temporary action pending formal proceedings.* Suspension is a temporary action pending completion of an investigation or ensuing criminal, civil, or administrative proceedings.

(b) *Immediate effect.* Suspension is effective immediately upon the suspending official's decision, without prior notice to the provider.

(c) *Effect equivalent to debarment.* The effect of a suspension is the same as the effect of a debarment. A suspended provider may not receive payment from FEHBP funds for items or services furnished to FEHBP-covered persons while suspended.

### § 890.1031 Grounds for suspension.

(a) *Basis for suspension.* OPM may suspend a provider if:

(1) OPM obtains reliable evidence indicating that one of the grounds for suspension listed in paragraph (b) of this section applies to the provider; and

(2) The suspending official determines under paragraph (c) of this section that immediate action to suspend the provider is necessary to protect the health and safety of persons covered by FEHBP.

(b) *Grounds for suspension.* Evidence constituting grounds for a suspension may include, but is not limited to:

(1) Indictment or conviction of a provider for a criminal offense that is a basis for mandatory debarment under this subpart;

(2) Indictment or conviction of a provider for a criminal offense that reflects a risk to the health, safety, or well-being of FEHBP-covered individuals;

(3) Other credible evidence indicating, in the judgment of the suspending official, that a provider has committed a violation that would warrant debarment under this subpart. This may include, but is not limited to:

(i) Civil judgments;

(ii) Notice that a Federal, State, or local government agency has debarred, suspended, or excluded a provider from participating in a program or revoked or declined to renew a professional license; or

(iii) Other official findings by Federal, State, or local bodies that determine factual or legal matters.

(c) *Determining need for immediate action.* Suspension is intended to protect the public interest, including the health and safety of covered individuals or the integrity of FEHBP funds. The suspending official has wide discretion to decide whether to suspend a provider. A specific finding of immediacy or necessity is not required to issue a suspension. The suspending official may draw reasonable inferences from the nature of the alleged misconduct and from a provider's actual or potential transactions with the FEHBP.

### § 890.1032 Length of suspension.

(a) *Initial period.* The initial term of all suspensions shall be an indefinite period not to exceed 12 months.

(b) *Formal legal proceedings not initiated.* If formal legal or administrative proceedings have not begun against a provider within 12 months after the effective date of his suspension, the suspending official may:

(1) Terminate the suspension; or

(2) If requested by the Department of Justice, the cognizant United States Attorney's Office, or other responsible Federal, State, or local prosecuting official, extend the suspension for an additional period, not to exceed 6 months.

(c) *Formal proceedings initiated.* If formal criminal, civil, or administrative proceedings are initiated against a suspended provider, the suspension may continue indefinitely, pending the outcome of those proceedings.

(d) *Terminating the suspension.* The suspending official may terminate a suspension at any time, and shall terminate it after 18 months, unless formal proceedings have begun within that period.

### § 890.1033 Notice of suspension.

(a) *Written notice.* OPM shall send written notice of suspension according to the procedures and methods described in § 890.1006(c)–(f).

(b) *Contents of notice.* The suspension notice shall contain information indicating that:

(1) The provider has been suspended, effective on the date of the notice;

(2) The initial period of the suspension;

(3) The basis for the suspension;

(4) The provisions of law and regulation authorizing the suspension;

(5) The effect of the suspension; and

(6) The provider's rights to contest the suspension.

### § 890.1034 Counting a period of suspension as part of a subsequent debarment.

The debarring official may consider the provider's contiguous period of suspension when determining the length of a debarment.

### § 890.1035 Provider contests of suspensions.

(a) *Filing a contest of the suspension.* A provider may challenge a suspension by filing a contest, in writing, with the suspending official not later than 30 days after receiving notice of suspension. The suspension shall remain in effect during the contest, unless rescinded by the suspending official.

(b) *Informal proceeding*. The suspending official shall use informal, flexible procedures to conduct the contest. Formal rules of evidence and procedure do not apply to this proceeding.

**§ 890.1036 Information considered in deciding a contest.**

(a) *Presenting information and arguments to the suspending official*. A provider may submit documents and written arguments in opposition to the suspension, and may appear personally, or through a representative, before the suspending official to provide any other relevant information.

(b) *Specific factual basis for contesting the suspension*. The provider shall identify specific facts that contradict the basis for the suspension as stated in the suspension notice. A general denial of the basis for suspension does not raise a genuine dispute over facts material to the suspension, and the suspending official shall not give such a denial any probative weight.

(c) *Mandatory disclosures*. Any provider contesting a suspension shall disclose the items of information set forth in § 890.1023(c). Failure to provide such information completely and accurately may be a basis for OPM to initiate further legal or administrative action against the provider.

**§ 890.1037 Cases where additional fact-finding is not required.**

The suspending official may decide a contest without an additional fact-finding process if:

(a) *Previously adjudicated facts*. The suspension is based on an indictment or on facts determined by a prior adjudication in which the provider was afforded due process rights. Examples of due process proceedings include, but are not limited to, the adjudication procedures associated with licensure revocation, suspension, restriction, or nonrenewal by a State licensing authority; similar administrative adjudications by Federal, State, or local agencies; a criminal conviction or civil judgment; or an action by the provider that constitutes a waiver of his right to a due process adjudication, such as surrender of professional licensure during the pendency of a disciplinary hearing, entering a guilty plea or confession of judgment in a judicial proceeding, or signing a settlement agreement stipulating facts that constitute a sanctionable violation. Neither the existence of the prior adjudication nor any of the underlying circumstances are considered to be subject to genuine factual dispute as part of the suspension proceeding.

(b) *Advisory by law enforcement officials*. OPM is advised by the Department of Justice, the appropriate U.S. Attorney's Office, a State attorney general's office, or a State or local prosecutor's office that proceedings before a presiding official would prejudice the substantial interests of the Government in pending or contemplated legal proceedings based on the same facts as the suspension.

(c) *No bona fide dispute of material facts*. The information, arguments, and documents submitted to the suspending official do not establish that there is a *bona fide* factual dispute regarding facts material to the suspension.

**§ 890.1038 Deciding a contest without additional fact-finding.**

(a) *Written decision*. The suspending official shall issue a written decision on the contest within 30 days after the record closes for submitting evidence, arguments, and information. The suspending official may extend this timeframe for good cause.

(b) *No further administrative review available*. The suspending official's decision is final and is not subject to further administrative review.

**§ 890.1039 Cases where additional fact-finding is required.**

(a) *Criteria for holding fact-finding proceeding*. The debarring official shall request another OPM official (''presiding official'') to hold an additional fact-finding proceeding if:

(1) Facts material to the suspension have not been adjudicated in a prior due process proceeding; and

(2) These facts are genuinely in dispute, based on the entire administrative record available to the debarring official.

(b) *Qualification to serve as presiding official*. The presiding official is designated by the OPM Director or another OPM official authorized by the Director to make such designations. The presiding official shall be a senior official who is qualified to conduct informal adjudicative proceedings and who has had no previous contact with the suspension or the contest.

(c) *Effect on contest*. The suspending official shall defer a final decision on the contest pending the results of the fact-finding proceeding.

**§ 890.1040 Conducting a fact-finding proceeding.**

(a) *Informal proceeding*. The presiding official may conduct the fact-finding proceedings as informally as practicable, consistent with principles of fundamental fairness. Specific rules of evidence or procedure do not apply to these proceedings.

(b) *Proceeding limited to disputed material facts*. The presiding official shall consider only the genuinely disputed facts identified by the suspending official as relevant to the basis for the suspension. Matters that have been previously adjudicated or which are not in bona fide dispute within the record shall not be considered by the presiding official.

(c) *Right to present information, evidence, and arguments*. A provider may appear before the presiding official with counsel, submit oral and written arguments and documentary evidence, present witnesses, question any witnesses testifying in support of the suspension, and challenge the accuracy of any other evidence that the agency offers as a basis for the suspension.

(d) *Record of proceedings*. The presiding official shall make an audio recording of the proceedings and shall provide a copy to the provider at no charge. If the provider wishes to have a transcribed record, OPM shall arrange for production of one which may be purchased at cost.

(e) *Presiding official's findings*. The presiding official shall resolve all of the disputed facts identified by the suspending official, on the basis of a preponderance of the evidence in the entire administrative record. Within 30 days after the record of the proceeding closes, the presiding official shall issue a written report of all findings of fact to the suspending official.

**§ 890.1041 Deciding a contest after a fact-finding proceeding.**

(a) *Presiding official's findings shall be accepted*. The suspending official shall accept the presiding official's findings, unless they are arbitrary, capricious, or clearly erroneous.

(b) *Suspending official's decision*. Within 30 days after receiving the presiding official's report, the suspending official shall issue a final written decision that either sustains, modifies, or terminates the suspension. The suspending official may extend this period for good cause.

(c) *Effect on subsequent debarment or suspension proceedings*. A decision by the suspending official to modify or terminate a suspension shall not prevent OPM from subsequently debarring the same provider, or any other Federal agency from either suspending or debarring the provider, based on the same facts.

EFFECT OF DEBARMENT

**§ 890.1042 Effective dates of debarments.**

(a) *Minimum notice period*. A debarment shall take effect not sooner than 30 days after the date of OPM's notice of proposed debarment, unless the debarring official specifically determines that the health or safety of covered individuals or the integrity of the FEHBP warrants an earlier effective date. In such a situation, the notice shall specifically inform the provider that the debarring official decided to shorten or eliminate the 30-day notice period.

(b) *Uncontested debarments*. If a provider does not file a contest within the 30-day notice period, the proposed debarment shall take effect on the date stated in the notice of proposed debarment, without further procedures, actions, or notice by OPM.

(c) *Contested debarments and requests for reducing the period of debarment*. If a provider files a contest within the 30-day notice period, the proposed debarment shall not go into effect until the debarring official issues a final written decision, unless the health or safety of

covered individuals or the integrity of the FEHBP requires the debarment to be effective while the contest is pending.

### § 890.1043 Effect of debarment on a provider.

(a) *FEHBP payments prohibited*. A debarred provider is not eligible to receive payment, directly or indirectly, from FEHBP funds for items or services furnished to a covered individual on or after the effective date of the debarment. Also, a provider shall not accept an assignment of a claim for items or services furnished to a covered individual during the period of debarment. These restrictions shall remain in effect until the provider is reinstated by OPM.

(b) *Governmentwide effect*. Debarment precludes a provider from participating in all other Federal agencies' procurement and nonprocurement programs and activities, as required by section 2455 of the Federal Acquisition Streamlining Act of 1994 (Pub. L. 103–355). Other agencies may grant a waiver or exception under their own regulations, to permit a provider to participate in their programs, notwithstanding the OPM debarment.

(c) *Civil or criminal liability*. A provider may be subject to civil monetary penalties under this subpart or criminal liability under other Federal statutes for knowingly filing claims, causing claims to be filed, or accepting payment from FEHBP carriers for items or services furnished to a covered individual during a period of debarment .

NOTIFYING OUTSIDE PARTIES ABOUT DEBARMENT AND SUSPENSION ACTIONS

### § 890.1044 Entities notified of OPM-issued debarments and suspensions.

When OPM debars or suspends a provider under this subpart, OPM shall notify:

(a) All FEHBP carriers;

(b) The General Services Administration, for publication in the comprehensive Governmentwide list of Federal agency exclusions;

(c) Other Federal agencies that administer health care or health benefits programs; and

(d) State and local agencies, authorities, boards, or other organizations with health care licensing or certification responsibilities.

### § 890.1045 Informing persons covered by FEHBP about debarment or suspension of their provider.

FEHBP carriers are required to notify covered individuals who have obtained items or services from a debarred or suspended provider within one year of the date of the debarment or suspension of:

(a) The existence of the provider's debarment or suspension;

(b) The minimum period remaining in the provider's period of debarment; and

(c) The requirement that OPM terminate the debarment or suspension before FEHBP funds can be paid for items or services the provider furnishes to covered individuals.

EXCEPTIONS TO THE EFFECT OF DEBARMENTS

### § 890.1046 Effect of debarment or suspension on payments for services furnished in emergency situations.

A debarred or suspended health care provider may receive FEHBP funds paid for items or services furnished on an emergency basis if the FEHBP carrier serving the covered individual determines that:

(a) The provider's treatment was essential to the health and safety of the covered individual; and

(b) No other source of equivalent treatment was reasonably available.

[69 FR 9920, Mar. 3, 2004]

### § 890.1047 Special rules for institutional providers.

(a) *Covered individual admitted before debarment or suspension*. If a covered person is admitted as an inpatient before the effective date of an institutional provider's debarment or suspension, that provider may continue to receive payment of FEHBP funds for inpatient institutional services until the covered person is released or transferred, unless the debarring or suspending official terminates payments under paragraph (b) of this section.

(b) *Health and safety of covered individuals.* If the debarring or suspending official determines that the health and safety of covered persons would be at risk if they remain in a debarred or suspended institution, OPM may terminate FEHBP payments at any time.

(c) *Notice of payment limitations.* If OPM limits any payment under paragraph (b) of this section, it must immediately send written notice of its action to the institutional provider.

(d) *Finality of debarring or suspending official's decision.* The debarring or suspending official's decision to limit or deny payments under paragraph (b) of this section is not subject to administrative review or reconsideration.

[69 FR 9920, Mar. 3, 2004]

### § 890.1048 Waiver of debarment for a provider that is the sole source of health care services in a community.

(a) *Application required.* A provider may apply for a limited waiver of debarment at any time after receiving OPM's notice of proposed debarment. Suspended providers are not eligible to request a waiver of suspension.

(b) *Criteria for granting waiver.* To receive a waiver, a provider shall clearly demonstrate that:

(1) The provider is the *sole community provider* or the *sole source of essential specialized services in a community;*

(2) A limited waiver of debarment would be in the best interests of covered individuals in the defined service area;

(3) There are reasonable assurances that the actions which formed the basis for the debarment shall not recur; and

(4) There is no basis under this subpart for continuing the debarment.

(c) *Waiver applies only in the defined service area.* A limited waiver applies only to items or services provided within the defined service area where a provider is the *sole community provider* or *sole source of essential specialized services.*

(d) *Governmentwide effect continues.* A limited waiver applies only to a provider's FEHBP transactions. Even if OPM waives a debarment for FEHBP purposes, the governmentwide effect under section 2455 of the Federal Acquisition Streamlining Act of 1994 (Pub. L. 103–355) continues for all other Federal agencies' procurement and nonprocurement programs and activities.

(e) *Waiver rescinded if circumstances change.* OPM shall rescind the limited waiver when any of its underlying bases no longer apply. If OPM rescinds the limited waiver, the provider's debarment shall resume full effect for all FEHBP transactions. Events warranting rescission include, but are not limited to:

(1) The provider ceases to furnish items or services in the defined service area;

(2) Another provider begins to furnish equivalent items or services in the defined service area, so that the provider who received a waiver is no longer the sole provider or sole source; or

(3) The actions that formed the basis for the provider's debarment, or similar acts, recur.

(f) *Effect on period of debarment.* The minimum period of debarment is established when the debarment is initially imposed. A subsequent decision to grant, deny, or rescind a limited waiver shall not change that period.

(g) *Application is necessary for reinstatement.* A provider who has received a limited waiver shall apply for reinstatement at the end of the debarment period, even if a limited waiver is in effect when the debarment expires.

(h) *Finality of debarring official's decision.* The debarring official's decision to grant or deny a limited waiver is final and not subject to further administrative review or reconsideration.

## SPECIAL EXCEPTIONS TO PROTECT COVERED PERSONS

### § 890.1049 Claims for non-emergency items or services furnished by a debarred or suspended provider.

(a) *Covered individual unaware of debarment or suspension.* FEHBP funds may be paid for items or services furnished by a debarred or suspended provider if, at the time the items or services were furnished, the covered individual did not know, and could not reasonably be expected to have known, that the provider was debarred or suspended. This provision is intended solely to protect the interests of FEHBP-

covered persons who obtain services from a debarred or suspended provider in good faith and without knowledge that the provider has been sanctioned. It does not authorize debarred or suspended providers to submit claims for payment to FEHBP carriers.

(b) *Notice sent by carrier*. When paying a claim under the authority of paragraph (a) of this section, an FEHBP carrier must send a written notice to the covered individual, stating:

(1) That the provider is debarred or suspended and is prohibited from receiving payment of FEHBP funds for items or services furnished after the effective date of the debarment or suspension;

(2) That claims may not be paid for items or services furnished by the debarred or suspended provider after the covered individual is informed of the debarment or suspension;

(3) That the current claim is being paid as a legally-authorized exception to the effect of the debarment or suspension in order to protect covered individuals who obtain items or services without knowledge of their provider's debarment or suspension;

(4) That FEHBP carriers are required to deny payment of any claim for items or services rendered by a debarred or suspended provider 15 days or longer after the date of the notice described in paragraph (b) of this section, unless the covered individual had no knowledge of the provider's debarment or suspension when the items or services were rendered;

(5) The minimum period remaining in the provider's debarment or suspension; and

(6) That FEHBP funds cannot otherwise be paid to the provider until OPM terminates the debarment or suspension.

[69 FR 9920, Mar. 3, 2004]

### § 890.1050 Exception to a provider's debarment for an individual enrollee.

(a) *Request by a covered individual*. Any individual enrolled in FEHBP may submit a request through their FEHBP carrier for continued payment of items or services furnished by a debarred provider to any person covered under the enrollment. Requests shall not be accepted for continued payments to suspended providers.

(b) *OPM action on the request*. OPM shall consider the recommendation of the FEHBP carrier before acting on the request. To be approved, the request shall demonstrate that:

(1) Interrupting an existing, ongoing course of treatment by the provider would have a detrimental effect on the covered individual's health or safety; or

(2) The covered individual does not have access to an alternative source of the same or equivalent health care items or services within a reasonably accessible service area.

(c) *Scope of the exception*. An approved exception applies only to the covered individual(s) who requested it, or on whose behalf it was requested. The governmentwide effect of the provider's debarment under section 2455 of the Federal Acquisition Streamlining Act (Pub. L. 103–355) is not altered by an exception.

(d) *Provider requests not allowed*. OPM shall not consider an exception request submitted by a provider on behalf of a covered individual.

(e) *Debarring official's decision is final*. The debarring official's decision on an exception request is not subject to further administrative review or reconsideration.

REINSTATEMENT

### § 890.1051 Applying for reinstatement when period of debarment expires.

(a) *Application required*. Reinstatement is not automatic when the minimum period of a provider's debarment expires. The provider shall apply in writing to OPM, supplying specific information about the reinstatement criteria outlined in paragraph (c) of this section.

(b) *Reinstatement date*. A debarred provider may submit a reinstatement application not earlier than 60 days before the nominal expiration date of the debarment. However, in no case shall OPM reinstate a provider before the minimum period of debarment expires.

(c) *Reinstatement criteria*. To be approved, the provider's reinstatement application shall clearly demonstrate that:

(1) There are reasonable assurances that the actions resulting in the provider's debarment have not recurred and will not recur;

(2) There is no basis under this subpart for continuing the provider's debarment; and

(3) There is no pending criminal, civil, or administrative action that would subject the provider to debarment by OPM.

(d) *Written notice of OPM action.* OPM shall inform the provider in writing of its decision regarding the reinstatement application.

(e) *Limitation on reapplication.* If OPM denies a provider's reinstatement application, the provider is not eligible to reapply for 1 year after the date of the denial.

### § 890.1052 Reinstatements without application.

OPM shall reinstate a provider without a reinstatement application if:

(a) *Conviction reversed.* The conviction on which the provider's debarment was based is reversed or vacated by a final decision of the highest appeals court with jurisdiction over the case; and the prosecutorial authority with jurisdiction over the case has declined to retry it, or the deadline for retrial has expired without action by the prosecutor.

(b) *Sanction terminated.* A sanction imposed by another Federal agency, on which the debarment was based, is terminated by that agency.

(c) *Court order.* A Federal court orders OPM to stay, rescind, or terminate a provider's debarment.

(d) *Written notice.* When reinstating a provider without an application, OPM shall send the provider written notice of the basis and effective date of his reinstatement.

### § 890.1053 Table of procedures and effective dates for reinstatements.

The procedures and effective dates for reinstatements under this subpart are:

| Basis for debarment | Application required? | Effective date |
|---|---|---|
| Period of debarment expires | Yes | After debarment expires. |
| Conviction reversed on final appeal/no retrial possible | No | Retroactive (start of debarment). |
| Other agency sanction ends | No | Ending date of sanction. |
| Court orders reinstatement | No | Retroactive (start of debarment). |

### § 890.1054 Agencies and entities to be notified of reinstatements.

OPM shall inform the FEHBP carriers, Government agencies and other organizations that were originally notified of a provider's debarment when a provider is reinstated under § 890.1051 or § 890.1052.

### § 890.1055 Contesting a denial of reinstatement.

(a) *Obtaining reconsideration of the initial decision.* A provider may contest OPM's decision to deny a reinstatement application by submitting documents and written arguments to the debarring official within 30 days of receiving the notice described in § 890.1051(d). In addition, the provider may request to appear in person to present oral arguments to the debarring official. The provider may be accompanied by counsel when making a personal appearance.

(b) *Debarring official's final decision on reinstatement.* The debarring official shall issue a final written decision, based on the entire administrative record, within 30 days after the record closes to receipt of information. The debarring official may extend the decision period for good cause.

(c) *Finality of debarring official's decision.* The debarring official's final decision regarding a provider's reinstatement is not subject to further administrative review or reconsideration.

## CIVIL MONETARY PENALTIES AND FINANCIAL ASSESSMENTS

SOURCE: 69 FR 9921, Mar. 3, 2004, unless otherwise noted.

**§ 890.1060 Purpose and scope of civil monetary penalties and assessments.**

(a) *Civil monetary penalty*. A civil monetary penalty is an amount that OPM may impose on a health care provider who commits one of the violations listed in § 890.1061. Penalties are intended to protect the integrity of FEHBP by deterring repeat violations by the same provider and by reducing the likelihood of future violations by other providers.

(b) *Assessment*. An assessment is an amount that OPM may impose on a provider, calculated by reference to the claims involved in the underlying violations. Assessments are intended to recognize monetary losses, costs, and damages sustained by OPM as the result of a provider's violations.

(c) *Definitions*. In §§ 890.1060 through 890.1072:

*Penalty* means civil monetary penalty; and

*Penalties and assessments* may connote the singular or plural forms of either of those terms, and may represent either the conjunctive or disjunctive sense.

(d) *Relationship to debarment and suspension*. In addition to imposing penalties and assessments, OPM may concurrently debar or suspend a provider from participating in the FEHBP on the basis of the same violations.

(e) *Relationship to other penalties provided by law*. The penalties, assessments, debarment, and suspension imposed by OPM are in addition to any other penalties that may be prescribed by law or regulation administered by an agency of the Federal Government or any State.

**§ 890.1061 Bases for penalties and assessments.**

(a) *Improper claims*. OPM may impose penalties and assessments on a provider if a claim presented by that provider for payment from FEHBP funds meets the criteria set forth in 5 U.S.C. 8902a(d)(1).

(b) *False or misleading statements*. OPM may impose penalties and assessments on a provider who makes a false statement or misrepresentation as set forth in 5 U.S.C. 8902a(d)(2).

(c) *Failing to provide claims-related information*. OPM may impose penalties and assessments on a provider who knowingly fails to provide claims-related information as otherwise required by law.

**§ 890.1062 Deciding whether to impose penalties and assessments.**

(a) *Authority of debarring official*. The debarring official has discretionary authority to impose penalties and assessments in accordance with 5 U.S.C. 8902a and this subpart.

(b) *Factors to be considered*. In deciding whether to impose penalties and assessments against a provider that has committed one of the violations identified in § 890.1061, OPM must consider:

(1) The number and frequency of the provider's violations;

(2) The period of time over which the violations were committed;

(3) The provider's culpability for the specific conduct underlying the violations;

(4) The nature of any claims involved in the violations and the circumstances under which the claims were presented to FEHBP carriers;

(5) The provider's history of prior offenses or improper conduct, including any actions that could have constituted a basis for a suspension, debarment, penalty, or assessment by any Federal or State agency, whether or not any sanction was actually imposed;

(6) The monetary amount of any damages, losses, and costs, as described in § 890.1064(c), attributable to the provider's violations; and

(7) Such other factors as justice may require.

(c) *Additional factors when penalty or assessment is based on provisions of § 890.1061(b) or (c)*. In the case of violations involving false or misleading statements or the failure to provide claims-related information, OPM must also consider:

(1) The nature and circumstances of the provider's failure to properly report information; and

(2) The materiality and significance of the false statements or misrepresentations the provider made or caused to be made, or the information that the provider knowingly did not report.

**§ 890.1063 Maximum amounts of penalties and assessments.**

OPM may impose penalties and assessments in amounts not to exceed those set forth in U.S.C. 8902a(d).

**§ 890.1064 Determining the amounts of penalties and assessments to be imposed on a provider.**

(a) *Authority of debarring official.* The debarring official has discretionary authority to set the amounts of penalties and assessments in accordance with law and this subpart.

(b) *Factors considered in determining amounts of penalties and assessments.* In determining the amounts of penalties and assessments to impose on a provider, the debarring official must consider:

(1) The Government's interests in being fully compensated for all damages, losses, and costs associated with the provider's violations, including:

(i) Amounts wrongfully paid from FEHBP funds as the result of the provider's violations and interest on those amounts, at rates determined by the Department of the Treasury;

(ii) All costs incurred by OPM in investigating a provider's sanctionable misconduct; and

(iii) All costs incurred in OPM's administrative review of the case, including every phase of the administrative sanctions processes described by this subpart;

(2) The Government's interests in deterring future misconduct by health care providers;

(3) The provider's personal financial situation, or, in the case of an entity, the entity's financial situation;

(4) All of the factors set forth in § 890.1062(b) and (c); and

(5) The presence of aggravating or less serious circumstances, as described in paragraphs (c)(1) through (c)(7) of this section.

(c) *Aggravated and less serious circumstances.* The presence of aggravating circumstances may cause OPM to impose penalties and assessments at a higher level within the authorized range, while less serious violations may warrant sanctions of relatively lower amounts. Paragraphs (c)(1) through (c)(7) of this section provide examples of aggravated and less serious violations. These examples are illustrative only, and are not intended to represent an exhaustive list of all possible types of violations.

(1) The existence of many separate violations, or of violations committed over an extended period of time, constitutes an aggravating circumstance. OPM may consider conduct involving a small number of violations, committed either infrequently or within a brief period of time, to be less serious.

(2) Violations for which a provider had direct knowledge of the material facts (for example, submitting claims that the provider knew to contain false, inaccurate, or misleading information), or for which the provider did not cooperate with OPM's or an FEHBP carrier's investigations, constitute aggravating circumstances. OPM may consider violations where the provider did not have direct knowledge of the material facts, or in which the provider cooperated with post-violation investigative efforts, to be less serious.

(3) Violations resulting in substantial damages, losses, and costs to OPM, the FEHBP, or FEHBP-covered persons constitute aggravating circumstances. Violations producing a small or negligible overall financial impact may be considered to be less serious.

(4) A pattern of conduct reflecting numerous improper claims, high-dollar false claims, or improper claims involving several types of items or services constitutes aggravating circumstances. OPM may consider a small number of improper claims for relatively low dollar amounts to be less serious.

(5) Every violation involving any harm, or the risk of harm, to the health and safety of an FEHBP enrollee, must be considered an aggravating circumstance.

(6) Any prior violation described in § 890.1062(b)(5) constitutes an aggravating circumstance. OPM may consider repeated or multiple prior violations to represent an especially serious form of aggravating circumstances.

(7) OPM may consider other circumstances or actions to be aggravating or less serious within the context of an individual case, as the interests of justice require.

**§ 890.1065 Deciding whether to suspend or debar a provider in a case that also involves penalties and assessments.**

In a case where both penalties and assessments and debarment are proposed concurrently, OPM must decide the proposed debarment under the same criteria and procedures as if it had been proposed separately from penalties and assessments.

**§ 890.1066 Notice of proposed penalties and assessments.**

(a) *Written notice.* OPM must inform a provider of proposed penalties and assessments by written notice, sent via certified mail with return receipt requested, to the provider's last known street or post office address. OPM may, at its discretion, use an express service that furnishes a verification of delivery instead of postal mail.

(b) *Statutory limitations period.* OPM must send the notice to the provider within 6 years of the date on which the claim underlying the proposed penalties and assessments was presented to an FEHBP carrier. If the proposed penalties and assessments do not involve a claim presented for payment, OPM must send the notice within 6 years of the date of the actions on which the proposed penalties and assessments are based.

(c) *Contents of the notice.* OPM's notice must contain, at a minimum:

(1) The statement that OPM proposes to impose penalties and/or assessments against the provider;

(2) Identification of the actions, conduct, and claims that comprise the basis for the proposed penalties and assessments;

(3) The amount of the proposed penalties and assessments, and an explanation of how OPM determined those amounts;

(4) The statutory and regulatory bases for the proposed penalties and assessments; and

(5) Instructions for responding to the notice, including specific explanations regarding:

(i) The provider's right to contest the imposition and/or amounts of penalties and assessments before they are formally imposed; and

(ii) OPM's right, if the provider does not contest the proposed penalties and assessments within 30 days of the date he receives the notice, to implement them immediately without further administrative appeal or recourse.

(d) *Proposing debarment in the same notice.* OPM may propose a provider's debarment in the same notice that also proposes penalties and assessments. In this case, the notice must also provide the elements of information required to appear in a notice of proposed debarment under § 890.1006(b).

(e) *Procedures if the notice cannot be delivered.* OPM must apply the provisions of § 890.1006(f) if the notice of proposed penalties and assessments cannot be delivered as originally addressed.

(f) *Sending notice by electronic means.* [Reserved]

**§ 890.1067 Provider contests of proposed penalties and assessments.**

(a) *Contesting proposed sanctions.* A provider may formally contest the proposed penalties and assessments by sending a written notice to the debarring official within 30 days after receiving the notice described in § 890.1066. The debarring official must apply the administrative procedures set forth in §§ 890.1069 and 890.1070 to decide the contest.

(b) *Contesting debarments and financial sanctions concurrently.* If OPM proposes debarment and penalties and assessments in the same notice, the provider may contest both the debarment and the financial sanctions in the same proceeding. If the provider pursues a combined contest, the requirements set forth in §§ 890.1022 through 890.1024, as well as this section, apply.

(c) *Settling or compromising proposed sanctions.* The debarring official may settle or compromise proposed sanctions at any time before issuing a final decision under § 890.1070.

**§ 890.1068 Effect of not contesting proposed penalties and assessments.**

(a) *Proposed sanctions may be implemented immediately.* In the absence of a timely response by a provider as required in the notice described in § 890.1066, the debarring official may issue a final decision implementing the

proposed financial sanctions immediately, without further procedures.

(b) *Debarring official sends notice after implementing sanctions.* Immediately upon issuing a final decision under paragraph (a), the debarring official must send the provider written notice, via certified return receipt mail or express delivery service, stating:

(1) The amount of penalties and assessments imposed;

(2) The date on which they were imposed; and

(3) The means by which the provider may pay the penalties and assessments.

(c) *No appeal rights.* A provider may not pursue a further administrative or judicial appeal of the debarring official's final decision implementing any sanctions if a timely contest was not filed in response to OPM's notice under § 890.1066.

**§ 890.1069 Information the debarring official must consider in deciding a provider's contest of proposed penalties and assessments.**

(a) *Documentary material and written arguments.* As part of a provider's contest, the provider must furnish a written statement of reasons why the proposed penalties and assessments should not be imposed and/or why the amounts proposed are excessive.

(b) *Mandatory disclosures.* In addition to any other information submitted during the contest, the provider must inform the debarring official in writing of:

(1) Any existing, proposed, or prior exclusion, debarment, penalty, assessment, or other sanction that was imposed by a Federal, State, or local government agency, including any administrative agreement that purports to affect only a single agency; and

(2) Any current or prior criminal or civil legal proceeding that was based on the same facts as the penalties and assessments proposed by OPM.

(c) *In-person appearance.* A provider may request a personal appearance (in person, by telephone conference, or through a representative) to provide testimony and oral arguments to the debarring official.

**§ 890.1070 Deciding contests of proposed penalties and assessments.**

(a) *Debarring official reviews entire administrative record.* After the provider submits the information and evidence authorized or required by § 890.1069, the debarring official shall review the entire official record to determine if the contest can be decided without additional administrative proceedings, or if an evidentiary hearing is required to resolve disputed material facts.

(b) *Previously determined facts.* Any facts relating to the basis for the proposed penalties and assessments that were determined in prior due process proceedings are binding on the debarring official in deciding the contest. ''Prior due process proceedings'' are those set forth in § 890.1025(a)(1) through (4).

(c) *Deciding the contest without further proceedings.* To decide the contest without further administrative proceedings, the debarring official must determine that:

(1) The preponderance of the evidence in the administrative record as a whole demonstrates that the provider committed a sanctionable violation described in § 890.1061; and

(2) The evidentiary record contains no *bona fide* dispute of any fact material to the proposed financial sanction. A ''material fact'' is a fact essential to determining whether a provider committed a sanctionable violation for which penalties and assessments may be imposed.

(d) *Final decision without further proceedings.* If the debarring official determines that paragraphs (c)(1) and (c)(2) of this section both apply, a final decision may be issued, imposing financial sanctions in amounts not exceeding those proposed in the notice to the provider described in § 890.1066.

(e) *Insufficient evidence.* If the debarring official determines that a preponderance of the evidence does not demonstrate that the provider committed a sanctionable violation described in § 890.1061, the notice of proposed sanctions described in § 890.1066 must be withdrawn.

(f) *Disputed material facts.* If the debarring official determines that the administrative record contains a *bona fide* dispute about any fact material to

the proposed sanction, he must refer the case for a fact-finding hearing to resolve the disputed fact or facts. The provisions of § 890.1027(b) and (c), 890.1028, and 890.1029(a) and (b) will govern such a hearing.

(g) *Final decision after fact-finding hearing*. After receiving the report of the fact-finding hearing, the debarring official must apply the provisions of paragraphs (c), (d), and (e) of this section to reach a final decision on the provider's contest.

### § 890.1071 Further appeal rights after final decision to impose penalties and assessments.

If the debarring official's final decision imposes any penalties and assessments, the affected provider may appeal it to the appropriate United States district court under the provisions of 5 U.S.C. 8902a(h)(2).

### § 890.1072 Collecting penalties and assessments.

(a) *Agreed-upon payment schedule*. At the time OPM imposes penalties and assessments, or the amounts are settled or compromised, the provider must be afforded the opportunity to arrange an agreed-upon payment schedule.

(b) *No agreed-upon payment schedule*. In the absence of an agreed-upon payment schedule, OPM must collect penalties and assessments under its regular procedures for resolving debts owed to the Employees Health Benefits Fund.

(c) *Offsets*. As part of its debt collection efforts, OPM may request other Federal agencies to offset the penalties and assessments against amounts that the agencies may owe to the provider, including Federal income tax refunds.

(d) *Civil lawsuit*. If necessary to obtain payment of penalties and assessments, the United States may file a civil lawsuit as set forth in 5 U.S.C. 8902(i).

(e) *Crediting payments*. OPM must deposit payments of penalties and assessments into the Employees Health Benefits Fund.

## Subpart K—Temporary Continuation of Coverage

SOURCE: 54 FR 52339, Dec. 21, 1989, unless otherwise noted.

### § 890.1101 Purpose.

This subpart identifies the individuals who may temporarily continue coverage after the coverage would otherwise terminate under this part and sets forth the circumstances of their enrollment.

### § 890.1102 Definitions.

In this subpart—

*Gross misconduct* means a flagrant and extreme transgression of law or established rule of action for which an employee is separated and concerning which a judicial or administrative finding of gross misconduct has been made.

*Qualifying event* means any of the following events that qualify an individual for temporary continuation of coverage under subpart K of this part:

(1) A separation from Government service.

(2) A divorce or annulment.

(3) A change in circumstances that causes an individual to become ineligible to be considered a child who is a covered family member under this part.

[54 FR 52339, Dec. 21, 1989, as amended at 78 FR 64878, Oct. 30, 2013]

### § 890.1103 Eligibility.

(a) Except as provided by paragraph (b) of this section, individuals described by this section are eligible to elect temporary continuation of coverage under this subpart. Eligible individuals are as follows:

(1) Former employees whose coverage ends because of a separation from Federal service under any circumstances except an involuntary separation for gross misconduct.

(2) Individuals whose coverage as children under the self plus one or self and family enrollment of an employee, former employee, or annuitant ends because they cease meeting the requirements for being considered covered family members. For the purpose of this section, children who are enrolled under this part as survivors of deceased

employees or annuitants are considered to be children under a self plus one or self and family enrollment of an employee or annuitant at the time of the qualifying event.

(3) Former spouses of employees, of former employees having continued self plus one or self and family coverage under this subpart, or of annuitants, if the former spouse would be eligible for continued coverage under subpart H of this part except for failure to meet the requirement of § 890.803(a)(1) or (3) or the documentation requirements of § 890.806(a), including former spouses who lose eligibility under subpart H within 36 months after termination of the marriage because they ceased meeting the requirement of § 890.803(a)(1) or (3).

(b) An individual who is otherwise eligible for benefits under this part (excluding the temporary extension of coverage and conversion privilege set forth in subpart D of this part) is not entitled to continued coverage under this subpart.

[54 FR 52339, Dec. 21, 1989, as amended at 78 FR 64878, Oct. 30, 2013; 80 FR 55737, Sept. 17, 2015]

### § 890.1104 Notification by agency.

(a) In the case of a former employee who is eligible to elect temporary continuation of coverage under § 890.1103(a)(1), the employing office must notify the former employee concerning his or her rights under this subpart no later than 30 days after the end of the temporary extension of coverage provided under § 890.401.

(b)(1) In the case of a child who is eligible to elect temporary continuation of coverage under § 890.1103(a)(2), the enrollee may, within 60 days after the qualifying event, provide written notice to the employing office of the child's change in status and requesting information about temporary continuation of coverage. The written notice must include the child's name and address and the date of the terminating event.

(2) If the notice described in paragraph (b)(1) of this section is received by the employing office within 60 days after the date on which the child ceased meeting the requirements for being considered a covered family member, the employing office must notify the child of his or her rights under this subpart within 14 days after receiving the notice.

(3) This paragraph does not preclude the employing office from notifying the child of his or her rights based on oral or written notification by the child, another family member, or any other source that the child no longer meets the requirements for being considered a covered family member.

(c)(1) In the case of a former spouse who is eligible to elect temporary continuation of coverage under § 890.1103(a)(3), the employee or the former spouse may, within 60 days after the termination of the marriage or the loss of coverage under subpart H of this part, notify the employing office of the terminating event and request information about temporary continuation of coverage. The notice must include the name and address of the former spouse and the date of the terminating event.

(2) The employing office must notify the former spouse of his or her rights under this subpart within 14 days after receiving the notice described in paragraph (c)(1) of this section.

(d) If the employing office cannot give the notice required by this section to the employee, child, or former spouse directly, it must send the notice by first class mail. A notice that is mailed is deemed to be received 5 days after the date of the notice.

[54 FR 52339, Dec. 21, 1989, as amended at 57 FR 21192, May 19, 1992; 78 FR 64878, Oct. 30, 2013]

### § 890.1105 Initial election of temporary continuation of coverage; application time limitations and effective dates.

(a) The election of temporary continuation of coverage may be in the form of a Standard Form 2809, letter, or written statement to the employing office.

(b) *Former employees.* A former employee's election under this subpart must be submitted to the employing office within 60 days after the later of—

(1) The date of separation; or

(2) The date the former employee received the notice from the employing office.

(c) *Children*. A child's election under this subpart must be submitted to the employing office within 60 days after the later of—

(1) The date of the qualifying event; or

(2) If the employee notified the employing office within the 60-day time period specified under § 890.1104(b)(1) of this part, the date the child received the notice from the employing office. If the employee did not notify the employing office within the specified time period, the child's opportunity to elect continued coverage ends 60 days after the qualifying event.

(d) *Former spouses*. (1) A former spouse's election must be received by the employing office within 60 days after the later of—

(i) The date of the qualifying event; or

(ii) The date coverage under subpart H of this part was lost because of remarriage or loss of qualifying court order, if the loss of coverage under subpart H occurred before the expiration of the 36-month period specified in § 890.1107(c); or

(iii) If the employee, annuitant, or former spouse notified the employing office of the termination of the marriage within the time period specified in § 890.1104(c)(1), the date the former spouse received the notice from the employing office described in § 890.1104(c)(2). If the employee, annuitant, or former spouse did not notify the employing office within the specified time period, the former spouse's opportunity to elect continued coverage ends 60 days after the qualifying event.

(2) The effective date of former spouse coverage is the later of—

(i) The date determined under paragraph (g) of this section; or

(ii) The date of the divorce or annulment.

(e) If an individual who is eligible for temporary continuation of coverage under this section is unable to file an election on his or her own behalf because of a mental or physical disability, an election may be filed by a court-appointed guardian.

(f) *Belated elections*. Except as provided in paragraphs (c)(2) and (d)(1)(iii) of this section, when an employing office determines that an eligible individual was unable, for cause beyond his or her control, to elect temporary continuation of coverage within the time limits prescribed by this section, that office must accept the election within 60 days after it advises the individual of that determination.

(g) *Effective date of coverage*. Except as provided in paragraph (d)(2)(ii) of this section, the effective date of temporary continuation of coverage is the day after other coverage under this part expires, including the 31-day temporary extension of coverage under § 890.401. If an individual elects temporary continuation of coverage after the 31-day temporary extension of coverage expires, but before the expiration of the applicable election period specified in this section, coverage is restored retroactively, with appropriate contributions and claims, to the same extent and effect as though no break in coverage occurred.

[54 FR 52339, Dec. 21, 1989, as amended at 62 FR 38442, July 18, 1997]

### § 890.1106 Coverage.

(a) *Type of enrollment*. An individual who enrolls under this subpart may elect coverage for self only, self plus one, or self and family.

(1) For an enrollee who is eligible for continued coverage under § 890.1103(a)(1) or (2), a covered family member is an individual whose relationship to the enrollee meets the requirements of 5 U.S.C. 8901(5) and who meets any applicable requirements of 5 CFR 890.302 of this part.

(2) For a former spouse who is eligible for continued coverage under § 890.1103(3) of this part, a covered family member is an individual who meets the requirements of § 890.804 of this part.

(b) *Plans and options*. An individual who elects to continue coverage under this subpart may enroll in a plan or option different from the plan or option covering the individual at the time of the qualifying event.

[54 FR 52339, Dec. 21, 1989, as amended at 80 FR 55737, Sept. 17, 2015]

**§ 890.1107 Length of temporary continuation of coverage.**

(a) In the case of a former employee who is eligible for continued coverage under § 890.1103(a)(1), the temporary continuation of coverage ends on the date that is 18 months after the date of separation, unless it is terminated earlier under the provisions of § 890.1110.

(b)(1) Except as provided in paragraph (b)(2) of this section, in the case of individuals who are eligible for continued coverage under § 890.1103(a)(2), the temporary continuation of coverage ends on the date that is 36 months after the date the individual first ceases to meet the requirements for being considered a child who is a covered family member, unless it is terminated earlier under the provisions of § 890.1110.

(2) The temporary continuation of coverage ends on the date that is 36 months after the date of the separation from service on which the former employee's continuation of coverage is based, unless it is terminated earlier under the provisions of § 890.1110, in the case of individuals who—

(i) Are eligible for continued coverage under § 890.1103(a)(2); and

(ii) As of the day before ceasing to meet the requirements for being considered children who are covered family members, were covered family members of a former employee receiving continued coverage under this subpart; and

(iii) Cease meeting the requirements for being considered children who are covered family members before the end of the 18-month period specified in paragraph (a) of this section.

(c)(1) Except as provided in paragraph (c)(2) of this section, in the case of former spouses who are eligible for continued coverage under § 890.1103(a)(3), the temporary continuation of coverage ends on the date that is 36 months after the former spouse ceased meeting the requirements for coverage as a family member, unless it is terminated earlier under the provisions of § 890.1110.

(2) The temporary continuation of coverage ends on the date that is 36 months after the date of the separation from service on which the former employee's continuation of coverage is based, unless it is terminated earlier under the provisions of § 890.1110, in the case of a former spouse—

(i) Who is eligible for continued coverage under § 890.1103(a)(3); and

(ii) Whose marriage to the former employee terminates after the former employee's separation but before the expiration of the 18-month period specified in paragraph (a) of this section.

[54 FR 52339, Dec. 21, 1989, as amended at 78 FR 64878, Oct. 30, 2013]

**§ 890.1108 Opportunities to change enrollment; effective dates.**

(a) *Effective date—generally.* Except as otherwise provided, a change of enrollment takes effect on the first day of the first pay period that begins after the date the employing office receives an appropriate request to change the enrollment.

(b) *Belated change of enrollment.* When an employing office determines that an enrollee was unable, for cause beyond his or her control, to change the enrollment within the time limits prescribed by this section, the enrollee may do so within 60 days after the employing office advises the enrollee of its determination.

(c) *Change of enrollment by proxy.* Subject to the discretion of the employing office, an enrollee's representative, having written authorization to do so, may change the enrollment for the enrollee.

(d) *Decreasing enrollment type.* (1) An enrollee may decrease enrollment type at any time.

(2) A decrease in enrollment type takes effect on the first day of the first pay period that begins after the date the employing office receives an appropriate request to change the enrollment, except that at the request of the enrollee and upon a showing satisfactory to the employing office that there was no family member eligible for coverage under the self plus one or self and family enrollment, or only one family member eligible for coverage under the self and family enrollment, as appropriate, the employing office may make the change effective on the first day of the pay period following the one in which there was, in the case of a self plus one enrollment, no family member

or, in the case of a self and family enrollment, only one or no family member.

(e) *Open season.* (1) During an open season as provided by § 890.301(f), an enrollee (except for a former spouse who is eligible for continued coverage under § 890.1103(a)(3)) may decrease or increase enrollment type, change from one plan or option to another, or make any combination of these changes. A former spouse who is eligible for continued coverage under § 890.1103(a)(3) may change from one plan or option to another, but may not increase enrollment type unless the individual to be covered under the self plus one or self and family enrollment qualifies as a family member under § 890.1106(a)(2).

(2) An open season change of enrollment takes effect on the first day of the first pay period that begins in January of the next following year.

(3) When a belated open season change of enrollment is accepted by the employing office under paragraph (b) of this section, it takes effect as required by paragraph (e)(2) of this section.

(f) *Change in family status.* (1) Except for a former spouse, an enrollee may decrease or increase enrollment type, change from one plan or option to another, or make any combination of these changes when the enrollee's family status changes, including a change in marital status or any other change in family status. The enrollee must change the enrollment within the period beginning 31 days before the date of the change in family status, and ending 60 days after the date of the change in family status.

(2) A former spouse who is covered under this section may increase enrollment type, change from one plan or option to another, or make any combination of these changes within the period beginning 31 days before and ending 60 days after the birth or acquisition of a child who qualifies as a covered family member under § 890.1106(a)(2).

(3) A change of enrollment made in conjunction with the birth of a child, or the addition of a child as a new family member in some other manner, takes effect on the first day of the pay period in which the child is born or becomes an eligible family member.

(g) *Reenrollment of individuals who lose other coverage under this part.* An individual whose continued coverage under this section terminates because of the provisions of § 890.1110(a)(3) (termination due to other coverage under another provision of this part) may reenroll if the coverage that terminated the enrollment under this part ends, but not later than the expiration of the period described in § 890.1107. Coverage does not extend beyond the expiration of the period described in § 890.1107. The effective date of the reenrollment is the day following the termination of the coverage described in § 890.1110(a)(3).

(h) *Loss of coverage under this part or under another group insurance plan.* An enrollee may decrease or increase enrollment type, change from one plan or option to another, or make any combination of these changes when the enrollee loses coverage under this part or a qualified family member of the enrollee loses coverage under this part or under another group health benefits plan. Except as otherwise provided, an enrollee must change the enrollment within the period beginning 31 days before the date of loss of coverage and ending 60 days after the date of loss of coverage. Losses of coverage include, but are not limited to—

(1) Loss of coverage under another FEHB enrollment due to the termination, cancellation, or change to self plus one or to self only, of the covering enrollment.

(2) Loss of coverage under another federally-sponsored health benefits program.

(3) Loss of coverage due to the termination of membership in an employee organization sponsoring or underwriting an FEHB plan.

(4) Loss of coverage due to the discontinuance of an FEHB plan, in whole or in part. For an enrollee who loses coverage under this paragraph (h)(4)—

(i) If the discontinuance is at the end of a contract year, the enrollee must change the enrollment during the open season, unless OPM establishes a different time. If the discontinuance is at a time other than the end of the contract year, OPM must establish a time and effective date for the enrollee to change the enrollment.

(ii) If the whole plan is discontinued, an enrollee who does not change the enrollment within the time set will be enrolled in the lowest-cost nationwide plan option, as defined in § 890.301(n);

(iii) If one or more options of a plan are discontinued, an enrollee who does not change the enrollment will enrolled in the remaining option of the plan, or in the case of a plan with two or more options remaining, the lowest-cost remaining option that is not a High Deductible Health Plan (HDHP);

(iv) If the discontinuance of the plan, whether permanent or temporary, is due to a disaster, the enrollee must change the enrollment within 60 days of the disaster, as announced by OPM. If the enrollee does not change the enrollment within the time frame announced by OPM, the enrollee will be enrolled in the lowest-cost nationwide plan option, as defined in § 890.301(n). The effective date of enrollment changes under this provision will be set by OPM when it makes the announcement allowing such changes;

(v) An enrollee who is unable, for causes beyond his or her control, to make an enrollment change within the 60 days following a disaster and is, as a result, enrolled in the lowest-cost nationwide plan as defined in § 890.301(n), may request a belated enrollment into the plan of his or her choice subject to the requirements of paragraph (c) of this section.

(5) Loss of coverage under the Medicaid program or similar State-sponsored program of medical assistance for the needy.

(6) Loss of coverage under a non-Federal health plan.

(i) *Move from comprehensive medical plan's area.* An enrollee in a comprehensive medical plan who moves or becomes employed outside the geographic area from which the plan accepts enrollments, or, if already outside this area, moves or becomes employed further from this area, may change the enrollment upon notifying the employing office of the move or change of place of employment. Similarly, an enrollee whose covered family member moves outside the geographic area from which the plan accepts enrollments, or if already outside this area, moves further from this area, may change the enrollment upon notifying the employing office of the family member's move. The change of enrollment takes effect on the first day of the pay period that begins after the employing office receives an appropriate request.

(j) *On becoming eligible for Medicare.* An enrollee may change the enrollment from one plan or option to another at any time beginning on the 30th day before becoming eligible for coverage under title XVIII of the Social Security Act (Medicare). A change of enrollment based on becoming eligible for Medicare may be made only once.

[62 FR 38442, July 18, 1997, as amended at 72 FR 1912, Jan. 17, 2007; 80 FR 55737, Sept. 17, 2015; 80 FR 65883, Oct. 28, 2015]

### § 890.1109 Premium payments.

(a) Except as provided in paragraph (b) of this section, the enrollee must pay the full enrollment charge as determined under § 890.503(a), including both the Government contributions and employee withholdings, plus the administrative charge described under § 890.1113, for every pay period during which the enrollment continues, exclusive of the 31-day temporary extension of coverage for conversion provided under § 890.401 of this part.

(b) If the enrollee is not covered under this subpart for the full pay period, he or she pays the premium charge for only the days actually covered. The daily premium rate is an amount equal to the monthly rate (including the administrative charge) multiplied by 12 and divided by 365.

(c) The enrollee must make the payment after the pay period during which he or she is covered in accordance with a schedule established by the employing office. If the employing office does not receive the payment by the date due, the employing office must notify the enrollee in writing that continuation of coverage depends upon payment being made within 15 days (45 days for enrollees residing overseas) after receipt of the notice. If no subsequent payments are made, the employing office terminates the enrollment 60 days (90 days for enrollees residing overseas) after the date of the notice. An enrollee whose coverage terminates

because of nonpayment may not reenroll or reinstate coverage except as provided under paragraph (d) of this section.

(d)(1) If the enrollee was prevented by circumstances beyond his or her control from making payment within the timeframe specified in paragraph (c) of this section, he or she may request reinstatement of coverage by writing to the employing office. The request must be filed within 30 calendar days from the date of termination and must be accompanied by verification that the enrollee was prevented by circumstances beyond his or her control from paying within the time limit.

(2) The employing office determines whether the individual is eligible for reinstatement of coverage. If the determination is affirmative, coverage is reinstated retroactively to the date of termination. If the determination is negative, the individual may request a review of the decision from the employing agency as provided under § 890.104.

[54 FR 52339, Dec. 21, 1989, as amended at 59 FR 67607, Dec. 30, 1994; 61 FR 37810, July 22, 1996]

### § 890.1110 Termination of enrollment or coverage.

(a) *General*. An enrollment under this subpart terminates at midnight of the earlier of the following dates:

(1) The date the temporary continuation of coverage expires as set forth in § 890.1107, subject to the temporary extension of coverage for conversion.

(2) The last day of the pay period in which the enrollee dies.

(3) The day before the effective date of coverage under another provision of this part.

(4) The date provided under paragraphs (b) or (c) of this section.

(b) *Failure to pay premiums*. Termination of enrollment for failure to pay premiums within the timeframe established under § 890.1109 of this part is retroactive to the end of the last pay period for which payment was timely received. The enrollee and covered family members, if any, are not entitled to the temporary extension of coverage for conversion or to convert to an individual contract for health benefits.

(c) *Cancellation*. An enrollee may cancel his or her enrollment as provided under § 890.304(d) of this part.

(d) *Family member coverage*. The coverage of a family member terminates under the conditions set forth in § 890.304(c). Covered family members of former employees and former spouses are entitled to temporary continuation of coverage only as set forth under § 890.1103.

### § 890.1111 Employing office responsibilities.

(a) *Providing information to employees*. Employing offices are responsible for providing employees who are eligible to enroll under this part with literature developed by OPM that sets forth their rights under this subpart. This literature must be distributed to employees prior to each open season occurring under § 890.301.

(b) *Administration of the enrollment process*. The employing office must establish procedures for notifying the former employee, child, or former spouse about his or her eligibility to enroll, including what documents are needed to determine eligibility, and for accepting enrollment registrations.

(c) *Collecting premiums*. (1) Collection of the contributions is the responsibility of the employing office of the employee or annuitant at the time of the qualifying event.

(2) The employing office must submit all premium payments collected from enrollees along with its regular health benefits payments to OPM in accordance with procedures established by that Office.

(d) *Health benefits file*. The employing office must maintain a health benefits file for the enrollee as a file separate from the personnel records of the employee or former employee. This file may be destroyed 2 years after the end of the calendar year during which the 18- or 36-month period described in § 890.1107 (a) or (b)(1) expires.

[54 FR 52339, Dec. 21, 1989, as amended at 55 FR 22891, June 5, 1990]

### § 890.1112 Denial of continuation of coverage due to involuntary separation for gross misconduct.

(a) *Notice of denial.* (1) When an employing office determines that the offense for which an employee is being removed constitutes gross misconduct for the purpose of this subpart, the employing office must notify the employee in writing of its intention to deny temporary continuation of coverage. The notice must set forth the reason for the denial and give the employee a reasonable amount of time to respond. The notice must be made no later than the date of separation.

(2) If the employee is being removed under the authority of part 752 of this chapter (or other law, Executive Order, or regulation that prescribes procedures for removing employees because of misconduct), the notification requirement of paragraph (a)(1) of this section may be combined with the notification requirement of such authority.

(b) *Employee's response.* (1) The employee must be allowed a reasonable time for response, but not less than 7 days. The employee may respond orally or in writing and is entitled to be represented by an attorney or other representative.

(2) The agency must designate an official to hear the employee's oral answer who has the authority either to make or recommend a final decision on the denial. The right to answer orally does not include the right to a formal hearing with examination of witnesses.

(c) *Final decision.* If the employee responds to the notice of denial, the employing office must issue a final decision in writing that fully sets forth its findings and conclusions. The agency's decision is not subject to reconsideration by OPM.

(d) *Resignation in lieu of involuntary separation.* If an employee resigns after receiving the employing office's notification of intent to separate the employee involuntarily but before the scheduled separation date, his or her separation is considered involuntary for the purpose of this subpart.

### § 890.1113 The administrative charge.

(a) OPM has determined that the administrative charge as provided under 5 U.S.C. 8905a(d)(1)(A)(ii) is 2 percent of the enrollment charge described in § 890.503(a).

(b) It is OPM's responsibility to establish procedures for receiving the administrative payment into the Employees Health Benefits Fund and for making this amount available to the employing office.

[54 FR 52339, Dec. 21, 1989, as amended at 55 FR 22891, June 5, 1990]

## Subpart L—Benefits for United States Hostages in Iraq and Kuwait and United States Hostages Captured in Lebanon

SOURCE: 55 FR 50537, Dec. 7, 1990, unless otherwise noted.

### § 890.1201 Purpose.

This subpart sets forth the circumstances under which individuals are covered under this part in accordance with the provisions of section 599C of Public Law 101–513.

### § 890.1202 Definitions.

In this subpart—

*Covered family members* as it applies to individuals covered under this subpart has the same meaning as set forth in § 890.101(a). For eligible survivors of individuals enrolled under this subpart, a self plus one enrollment covers only the survivor or former spouse and one eligible child of both the survivor or former spouse and hostage. A self and family enrollment covers only the survivor or former spouse and any eligible children of both the survivor or former spouse and hostage.

*Hostage* and *hostage status* have the meaning set forth in section 599C of Public Law 101–513.

*Pay period* for individuals enrolled under this subpart means the pay period established by the U.S. Department of State for paying individuals covered under Public Law 101–513.

*Period of eligibility* means the period beginning on the effective date set forth in § 890.1204 of this subpart and ending 60 months after hostage status ended for hostages in Lebanon and 12

months after hostage status ended for hostages in Iraq and Kuwait.

[55 FR 50537, Dec. 7, 1990, as amended at 57 FR 43132, Sept. 18, 1992; 78 FR 64878, Oct. 30, 2013; 80 FR 55738, Sept. 17, 2015]

### § 890.1203 Coverage.

(a) An individual is covered under this subpart when the U.S. Department of State determines that the individual is eligible for coverage under section 599C of Public Law 101–513.

(b) An individual who is covered under this subpart is covered under the Standard Option of the Service Benefit Plan. The individual has a self and family enrollment unless the U.S. Department of State determines that the individual is married and has no eligible children, or is unmarried and has one eligible child, in which case the individual is covered under a self plus one enrollment, or unless the U.S. Department of State determines that the individual is unmarried and has no eligible children, in which case the individual has a self only enrollment.

(c) Individuals covered under this subpart are deemed ineligible for enrollment in any FEHB plan or option other than the Standard Option of the Service Benefit Plan.

(d) Eligible surviving family members of an individual covered under this subpart whose hostage status ended because of death or who dies during the 60 months or 12 months following the end of hostage status are eligible to continue enrollment under this part. The enrollment terminates no later than 60 months or 12 months after hostage status ended.

(e) An individual covered by this subpart is not considered an employee for the purpose of this part.

(f) Eligibility for coverage under this subpart shall be subject to the availability of funds under section 599C(e) of Public Law 101–513.

[55 FR 50537, Dec. 7, 1990, as amended at 57 FR 43132, Sept. 18, 1992; 78 FR 64878, Oct. 30, 2013; 80 FR 55738, Sept. 17, 2015]

### § 890.1204 Effective date of coverage.

Unless the U.S. Department of State determines that a later date is appropriate, coverage under § 890.1203(b) is effective on August 2, 1990, for hostages in Iraq and Kuwait and on the later of the date hostage status began or June 1, 1982, for hostages in Lebanon.

[57 FR 43132, Sept. 18, 1992]

### § 890.1205 Change in type of enrollment.

(a) Individuals covered under this subpart or eligible survivors enrolled under this subpart may increase enrollment type if they acquire an eligible family member. The change may be made at the written request of the enrollee at any time after the family member is acquired. An increase in enrollment type under this paragraph (a) becomes effective on the 1st day of the pay period after the pay period during which the request is received by the U.S. Department of State, except that a change based on the birth or addition of a child as a new family member is effective on the 1st day of the pay period during which the child is born or otherwise becomes a new family member.

(b) Individuals covered under this subpart or eligible survivors enrolled under this subpart may decrease enrollment type from a self and family enrollment when the last eligible family member (other than the enrollee) ceases to be a family member or only one family member remains; and may decrease enrollment type from a self plus one enrollment when no family member remains. The change may be made at the written request of the enrollee at any time after the last family member is lost and it becomes effective on the 1st day of the pay period after the pay period during which the request is received by the U.S. Department of State.

(c) A family member may file a request to change the type of enrollment on behalf of a hostage during the period of hostage status or on behalf of an eligible former hostage who cannot file the election on his or her own behalf because of a mental or physical disability.

[55 FR 50537, Dec. 7, 1990, as amended at 80 FR 55738, Sept. 17, 2015]

### § 890.1206 Cancellation of coverage.

(a) An individual who is covered under § 890.1203(b) may cancel his or her

enrollment at any time by written request. The cancellation is effective on the 1st day of the pay period after the pay period in which it is received by the U.S. Department of State.

(b) An individual who cancels his or her coverage under this section cannot reacquire coverage unless the U.S. Department of State determines that it would be against equity and good conscience not to allow the individual to be enrolled.

(c) A cancellation of coverage must be made by the enrolled individual and cannot be made by a representative acting on the individual's behalf.

### § 890.1207 Termination of coverage.

(a) Coverage of an individual under § 890.1203(b) terminates 60 months or 12 months after hostage status ended unless the individual cancels the coverage earlier.

(b) Enrollees and family members are eligible for temporary extension of coverage for conversion as set forth in subpart D of this part unless the covering enrollment is terminated by cancellation.

[55 FR 50537, Dec. 7, 1990, as amended at 57 FR 43132, Sept. 18, 1992]

### § 890.1208 Premiums.

(a) Government and employee contributions (premiums) required under §§ 890.501 and 890.502 of this part are paid from the appropriation provided under section 599C(e) of Public Law 101–513.

(b) If the individual is not covered under this subpart for the full pay period, premiums are paid only for the days he or she is actually covered. The daily premium rate is an amount equal to the monthly premium rate multiplied by 12 and divided by 365.

(c) The payments required by this section may be accepted by OPM from the State Department appropriation in advance if necessary to fund the 12-month period of coverage beginning on the earlier of:

(1) The day after sanctions or hostilities end; or

(2) The day after the individual's period of hostage status ends.

(d) OPM will place any funds received under paragraph (c) of this section in an account established for this purpose. OPM will make the disbursements specified under 48 CFR subpart 1632.170 from this account when the appropriate pay period occurs.

[55 FR 50537, Dec. 7, 1990, as amended at 57 FR 14325, Apr. 20, 1992]

### § 890.1209 Responsibilities of the U.S. Department of State.

(a) The U.S. Department of State functions as the ''employing office'' for individuals covered under this subpart.

(b) The U.S. Department of State must determine the eligibility of individuals who qualify under Public Law 101–513 for coverage under this part. This determination includes the determination as to whether the individual is barred from coverage under chapter 89 of title 5 U.S. Code by reason of other health insurance coverage as provided in section 599C of Public Law 101–513.

(c) The U.S. Department of State must determine the number of eligible family members, if any, for the purpose of coverage under a self only, self plus one, or self and family enrollment as set forth in § 890.1203(b). If the number of eligible family members of the individual cannot be determined, the U.S. Department of State must enroll the individual for self and family coverage.

[55 FR 50537, Dec. 7, 1990, as amended at 80 FR 55738, Sept. 17, 2015]

### § 890.1210 Reconsideration and appeal rights.

(a) Under procedures set forth by the U.S. Department of State, an individual may request the U.S. Department of State to reconsider an initial decision it has made denying coverage or a change in the type of enrollment under this subpart.

(b) Neither the initial decision nor the reconsideration decision of the U.S. Department of State is subject to reconsideration by OPM.

## Subpart M—Department of Defense Federal Employees Health Benefits Program Demonstration Project

SOURCE: 65 FR 35260, June 2, 2000, unless otherwise noted.

**§ 890.1301 Purpose.**

The purpose of this subpart is to implement section 721 of the National Defense Authorization Act for 1999, Public Law 105–261. This section amended chapter 55 of title 10, United States Code, and chapter 89 of title 5, United States Code, to establish a demonstration project under which certain Medicare and other eligible Department of Defense (DoD) beneficiaries can enroll in health benefit plans offered under the Federal Employees Health Benefits (FEHB) Program in certain geographic areas. The legislation was signed into law on October 17, 1998. The demonstration project will run for a period of three years. The legislation requires the Office of Personnel Management (OPM) and DoD to jointly produce and submit two reports to Congress designed to assess the viability of expanding access to the FEHB Program to certain Medicare and other eligible DoD beneficiaries permanently. OPM is authorizing certain differences from regular FEHB Program practices in order to ensure the successful implementation of the demonstration project. This regulation authorizes those differences.

**§ 890.1302 Duration.**

The demonstration project will run from January 1, 2000, through December 31, 2002.

**§ 890.1303 Eligibility.**

(a) To enroll in the demonstration project, an individual must live within one of the demonstration areas and meet the definition of an eligible beneficiary in 10 U.S.C. 1108(b). An eligible beneficiary under this subpart is—

(1) A member or former member of the uniformed services described in section 1074(b) of title 10, United States Code, who is entitled to hospital insurance benefits under part A of title XVIII of the Social Security Act (42 U.S.C. 1395c *et seq.*);

(2) An individual who is an unremarried former spouse of a member or former member described in section 1072(2)(F) or section 1072(2)(G) of title 10, United States Code;

(3) An individual who is—

(i) A dependent of a deceased member or former member described in section 1076(b) or 1076(a)(2)(B) of title 10, United States Code, or of a member who died while on active duty for a period of more than 30 days; and

(ii) A ''member of family'' as defined in section 8901(5) of title 5, United States Code; or

(4) An individual who is—

(i) A dependent of a living member or former member described in section 1076(b)(1) of title 10, United States Code, who is entitled to hospital insurance benefits under part A of title XVIII of the Social Security Act, regardless of the member's or former member's eligibility for such hospital insurance benefits; and

(ii) A ''member of family'' as defined in section 8901(5) of title 5, United States Code.

(b) An eligible beneficiary may enroll in an FEHB plan under chapter 89 of title 5, United States Code, for self-only coverage or for self and family coverage. A self and family enrollment will include coverage of a dependent of the military member or former member who meets the definition of a ''member of family'' in section 8901(5) of title 5, United States Code. A self and family enrollment will not cover a person related to the eligible beneficiary that does not qualify as a ''member of family'' (as defined in section 8901(5) of title 5, United States Code) of the military member or former member.

(c) A person eligible for coverage under this subpart shall not be required to satisfy any eligibility criteria specified in chapter 89 of title 5, United States Code, or in other subparts of this part (except as provided in paragraphs (a)(3), (a)(4), and (b) of this section) as a condition for enrollment in health benefit plans offered through the FEHB Program under the demonstration project.

(d) When determining whether an individual is a ''member of family'' under section 8901(5) of title 5, United States Code, for purposes of paragraph (a)(3) and (a)(4) of this section, a DoD member or former member described in section 1076(b) or 1076(a)(2)(B) of title 10, United States Code, shall be deemed to be an employee under chapter 89 of title 5, United States Code. The sole purpose for deeming these members or

former members of the uniformed services employees under chapter 89 of title 5, United States Code, is to determine which of their dependents can enroll as eligible beneficiaries in the demonstration project.

(e) A person who is eligible to enroll in the FEHB Program as an employee as defined in section 8901(1) of title 5, United States Code, is not eligible to enroll in an FEHB plan under the demonstration project.

**§ 890.1304 Enrollment.**

(a) Open Season for eligible beneficiaries will be held concurrent with the Open Season for regular FEHB enrollees. Open Seasons will be held in the years 1999, 2000 and 2001. Eligible beneficiaries will be able to enroll for coverage, change enrollment tiers (e.g., self-only or self and family), or change health benefit plans or plan options during these periods.

(b) Enrolled eligible beneficiaries are required to pay associate membership dues if they enroll in open employee organization sponsored plans that are participating in the demonstration project.

(c) DoD will deny enrollment of eligible beneficiaries when the total number of eligible beneficiaries and family members enrolled in the demonstration project reaches 66,000.

(d) Eligible beneficiaries can enroll only in health plans offered by health benefit carriers who are participating in the demonstration project.

(e) Eligible beneficiaries and family members enrolled in the demonstration project are not eligible to obtain services from military medical treatment facilities or to enroll in a health care plan under the TRICARE Program.

(f) An eligible beneficiary enrolled in an FEHB plan under the demonstration project may change health benefits plans and coverage in the same manner as any other FEHB Program enrollee, except as provided for in this subpart.

**§ 890.1305 Termination and cancellation.**

(a) If an enrolled eligible beneficiary moves out of a demonstration area, the enrollment of the eligible beneficiary and all family members will be terminated. If an enrolled eligible beneficiary moves to an area located within a demonstration area, he or she will continue to be eligible to participate in the demonstration project. If the eligible beneficiary was enrolled prior to the move in an HMO that does not serve the new demonstration area, the eligible beneficiary will have an opportunity to select a new health plan offered by a carrier participating in the demonstration project in the new area. If the eligible beneficiary was enrolled in a fee-for-service plan prior to the move and moves to another area that is within an existing demonstration area, the eligible beneficiary can maintain his or her current coverage.

(b) If an enrolled eligible beneficiary disenrolls, cancels, or terminates enrollment for any reason, he or she will not be eligible to reenroll in the demonstration project. Once coverage ends, eligible beneficiaries and all family members have the right to resume all of the benefits to which they are entitled to under title 10 of the United States Code. Medicare-covered eligible beneficiaries and their eligible family members who had Medigap policies prior to their enrollment in the demonstration project are entitled to reinstate that coverage under the conditions stated in section 1108(l) of title 10, United States Code.

(c) Eligible beneficiaries and their family members are eligible for Temporary Continuation of Coverage (TCC) under the conditions and for the durations described in subpart K or until the end of the demonstration project, whichever occurs first. The effective date of TCC for eligible beneficiaries or their eligible family members will be the day after other coverage under this subpart ends. Eligible beneficiaries or their eligible family members selecting TCC must enroll in a health plan offered by a carrier participating in the demonstration project. If an eligible beneficiary or eligible family member enrolled in DoD TCC moves from a demonstration project area, coverage ends. DoD TCC enrollees will be responsible for paying the entire DoD premium rate (OPM's approved net-to-carrier DoD rate plus 4 percent for contingency and administration reserves) plus 2 percent of this premium rate for administration of the program. DoD

will make arrangements to collect premiums plus the 2 percent administrative charge from eligible beneficiaries and forward them to OPM's Employees Health Benefits Fund. OPM will establish procedures for receiving the 2 percent administrative payment into the Employees Health Benefits Fund and making this amount available to DoD for administration of the program.

(d) Enrolled eligible beneficiaries are not eligible for the temporary extension of coverage and conversion opportunities described in subpart D of this part.

### § 890.1306 Government premium contributions.

The Secretary of Defense is responsible for the government contribution for enrolled eligible beneficiaries and family members. The government contribution toward demonstration project premium rates will be determined in accordance with subpart E of this part.

### § 890.1307 Data collection.

Each carrier will compile, maintain, and when requested by OPM or DoD, report data on its plan's experience necessary to produce reports containing the following information and analysis:

(a) The number of eligible beneficiaries who elect to participate in the demonstration project.

(b) The number of eligible beneficiaries who elected to participate in the demonstration project and did not have Medicare Part B coverage before electing to participate.

(c) The costs of health benefits charges and the costs (direct and indirect) of administering the benefits and services provided to eligible beneficiaries who elect to participate in the demonstration project as compared to similarly situated enrollees in the FEHB Program.

(d) Prescription drug costs for demonstration project beneficiaries.

### § 890.1308 Carrier participation.

(a) All carriers who participate in the FEHB Program and provide benefits to enrollees in the geographic areas selected as demonstration project areas must participate in the demonstration project, except as provided for in paragraphs (b), (c), and (d) of this section.

(b) Carriers who have less than 300 FEHB enrollees may, but are not required to, participate in the demonstration project.

(c) Carriers may, but are not required to, participate in the demonstration project if their service area overlaps a small portion (as determined by OPM) of a demonstration project geographic area.

(d) Carriers offering fee-for-service plans with enrollment limited to specific groups will not participate in the demonstration project.

## Subpart N—Federal Employees Health Benefits For Employees of Certain Indian Tribal Employers

SOURCE: 81 FR 95405, Dec. 28, 2016, unless otherwise noted.

EFFECTIVE DATE NOTE: At 81 FR 95405, Dec. 28, 2016, subpart N was added, effective Feb. 27, 2017.

### § 890.1401 Purpose.

This subpart sets forth the conditions for coverage, rights, and benefits under Chapter 89 of title 5, United States Code, according to the provisions of 25 U.S.C. 1647b.

### § 890.1402 Definitions and deemed references.

(a) In this subpart—

*Billing unit* is a subdivision of the tribal employer's workforce that aligns tribal employees for purposes of administering FEHB enrollment and collection of payment. A billing unit may be either governmental or commercial or a combination of both. So long as a tribal employer purchases FEHB for at least one billing unit that is carrying out at least one program under ISDEAA or IHCIA, the tribal employer may purchase FEHB for other billing units without regard to its programs.

*Pay period* is the interval of time for which a paycheck is issued by the tribal employer for work performed by the tribal employee.

*Paymaster* is the entity designated by OPM as responsible for receiving FEHB premiums from the tribal employer,

forwarding premiums to the Employees Health Benefits Fund, and maintaining enrollment records for all participating tribal employers.

*Payment* is the sum of the tribal employer's share of premium plus the tribal employees' share of premium plus any administrative fees or costs required under this subpart, due for the enrollment, in the aggregate, of the tribal employer's tribal employees.

*Tribal employee* is a full-time or part-time common law employee of a tribal employer. An individual is a common law employee if, based on all the facts and circumstances, the tribal employer has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. This determination is based on all facts and circumstances and shall be guided by the factors described by the Internal Revenue Service in Rev. Rul. 87–41, 1987–1 C.B. 296 and referenced in Joint Committee on Taxation report JCX–26–07 *Present Law and Background Relating to Worker Classification for Federal Tax Purposes*, dated May 7, 2007, and the determination shall be consistent with the tribal employer's determination of common law employee status for Federal employment tax purposes, if any. For purposes of this subpart, tribal employees do not include retirees or annuitants of a tribal employer, volunteers of a tribal employer, or others who are not common law employees of a tribal employer. Categories of excluded tribal employees are described at § 890.1405(b). FEHB benefits available to tribal employees are set forth in this subpart and to the extent there exists any ambiguity or inconsistency between this subpart and other subparts of part 890, the terms of this subpart will govern FEHB benefits available to tribal employees.

*Tribal employer* is an Indian tribe or tribal organization (as those terms are defined in 25 U.S.C. Chapter 18, ''Indian Health Care'') carrying out at least one program under the Indian Self-Determination and Education Assistance Act or an urban Indian organization (as that term is defined in 25 U.S.C. Chapter 18, ''Indian Health Care'') carrying out at least one program under the title V of the Indian Health Care Improvement Act, provided that the tribe, tribal organization, or urban Indian organization certifies entitlement to purchase FEHB according to the process described in Subpart N. FEHB benefits that tribal employers are entitled to purchase for their tribal employees are set forth in this subpart and to the extent there exists any ambiguity or inconsistency between this subpart and other subparts of part 890, the terms of this subpart will govern FEHB benefits available for purchase by tribal employers.

(b) In this subpart, wherever reference is made to other subparts of part 890—

(1) A reference to employee is deemed a reference to tribal employee;

(2) A reference to employer is deemed a reference to tribal employer;

(3) A reference to enrollee is deemed a reference to a tribal employee in whose name the enrollment is carried;

(4) A reference to employing agency, employing office, or agency is deemed a reference to tribal employer, and/or if the reference involves the subject of a paymaster function, the paymaster, as appropriate;

(5) A reference to United States, Federal Government, or Government in the capacity of an employer is deemed a reference to tribal employer;

(6) A reference to Federal Service or Government Service is deemed a reference to employment with a tribal employer;

(7) A reference to annuitant, survivor annuitant, or an individual with entitlement to an annuity is deemed inapplicable in the context of this subpart; and

(8) A reference incorporated into this subpart that does not otherwise apply to tribal employees and tribal employers shall have no meaning and is deemed inapplicable in the context of this subpart.

### § 890.1403 Tribal employer purchase of FEHB requires current deposit of premium payment and timely payment of administrative fee.

(a) A tribal employer shall be entitled to purchase coverage, rights, and benefits for its tribal employees under Chapter 89 of title 5, United States

Code, if premium payment for the coverage, rights, and benefits for the period of employment with such tribal employer is currently deposited in the Employees Health Benefits Fund, and if the administrative fee is timely paid to the paymaster.

(b) Premium payment will be considered currently deposited if received by the Employees Health Benefits Fund before, during, or within fourteen days after the end of the month covered by the premium payment.

(c) Administrative fee will be considered timely paid if received by the paymaster before, during, or within fourteen days after the end of the month covered by the administrative fee.

(d) Purchase of FEHB coverage by a tribal employer confers all the rights and benefits of FEHB as set forth in Subpart N to the tribal employer and tribal employee.

### § 890.1404 Tribal employer election and agreement to purchase FEHB.

(a) A tribal employer that intends to purchase FEHB for its tribal employees shall notify OPM by email or telephone.

(1) A tribal employer must purchase FEHB for at least one billing unit carrying out programs or activities under the tribal employer's ISDEAA or IHCIA contract.

(2) For so long as a tribal employer continues to purchase FEHB for at least one billing unit carrying out programs or activities under a tribal employer's ISDEAA or IHCIA contract, the tribal employer may purchase FEHB for one or more billing units without regard to whether they are carrying out programs or activities under the tribal employer's ISDEAA or IHCIA contract.

(b) A tribal employer must enter into an agreement with OPM to purchase FEHB. This agreement will include—

(1) The name, job title, and contact information of the individual responsible for health insurance coverage decisions for the tribal employer;

(2) The date on which the tribal employer will begin to purchase FEHB coverage;

(3) The approximate number of tribal employees who will be eligible to enroll;

(4) A certification that the eligible tribal employees within the enrolling billing unit will not have alternate tribal employer-sponsored health insurance coverage available concurrent with FEHB;

(5) A certification and documentation demonstrating that the tribal employer is entitled to purchase FEHB as either: An Indian tribe or tribal organization carrying out at least one program under the Indian Self-Determination and Education Assistance Act; or an urban Indian organization carrying out at least one program under title V of the Indian Health Care Improvement Act;

(6) Agreement by the tribal employer that its purchase of FEHB makes the tribal employer responsible for administering the program in accordance with this subpart, subject to Federal Government audit with respect to such purchase and administration, and subject to OPM authority to direct the administration of the program, including but not limited to the correction of errors;

(7) Agreement that the tribal employer will establish or identify an independent dispute resolution panel to adjudicate appeals of determinations made by a tribal employer regarding an individual's status as a tribal employee eligible to enroll in FEHB, eligibility of family members, and eligibility to change enrollment. This panel must have authority to enforce eligibility decisions;

(8) A certification that the tribal employer will supply necessary enrollment information and payment to the paymaster;

(9) Agreement to provide notice to OPM in the event that the tribal employer is no longer carrying out at least one program under the ISDEAA or title V of IHCIA; and

(10) Other terms and conditions as appropriate.

(c) A tribal employer may make an initial election to purchase FEHB at any time. A tribal employer purchasing FEHB shall commit to purchase FEHB for at least the remainder of the calendar year in which the agreement is signed. Elections will be automatically renewable year to year unless revoked

by the tribal employer or terminated by OPM.

(d) If a tribal employer revokes the initial election, OPM must be given 60 days notice. The tribal employer may not re-elect to purchase FEHB until the first annual open season that falls at least twelve months after the revocation. If the tribal employer revokes an election to participate a second time, the tribal employer may not re-elect to purchase FEHB until the first open season that falls at least twenty-four months after the second revocation.

(e) OPM maintains final authority, in consultation with the United States Department of the Interior and the United States Department of Health and Human Services, to determine whether a tribal employer is entitled to purchase FEHB as either—

(1) An Indian tribe or tribal organization carrying out at least one program under the Indian Self-Determination and Education Assistance Act; or

(2) An urban Indian organization carrying out at least one program under title V of the Indian Health Care Improvement Act.

(f) If a tribe, tribal organization or urban Indian organization believes it has been improperly denied the entitlement to purchase FEHB, it may appeal the denial to OPM. The appeal will be given an independent level of review within OPM and the decision on review will be final.

### § 890.1405 Tribal employees eligible for enrollment.

(a) A tribal employee who is a full-time or part-time common law employee of a tribal employer is eligible to enroll in FEHB if that tribal employer has elected to purchase FEHB coverage for the tribal employees of that tribal employer's billing unit, except that a tribal employee described in paragraph (b) of this section is not eligible to enroll in FEHB.

(b) Status as a tribal employee under § 890.1402(a) for purposes of eligibility to enroll in FEHB is initially made based on a reasonable determination by the tribal employer. OPM maintains final authority to correct errors regarding FEHB enrollment as set forth at § 890.1406.

(c) Retirees, annuitants, volunteers, compensationers under Federal worker's disability programs past 365 days, and others who are not common law employees of the tribal employer are not eligible to enroll under this subpart.

(d) The following tribal employees are not eligible to enroll in FEHB—

(1) A tribal employee whose employment is limited to one year or less and who has not completed one year of continuous employment, including any break in service of 5 days or less;

(2) A tribal employee who is expected to work less than 6 months in one year;

(3) An intermittent tribal employee—a non-full-time tribal employee without a prearranged regular tour of duty;

(4) A beneficiary or patient employee in a Government or tribal hospital or home; and

(5) A tribal employee paid on a piecework basis, except one whose work schedule provides for full-time service or part-time service with a regular tour of duty.

(e) Notwithstanding paragraphs (d)(1), (2), and (3) of this section a tribal employee working on a temporary appointment, a tribal employee working on a seasonal schedule of less than 6 months in a year, or a tribal employee working on an intermittent schedule, for whom the tribal employer expects the total hours in pay status (including overtime hours) plus qualifying leave without pay hours to be at least 130 hours per calendar month, is eligible to enroll in FEHB according to terms described in § 890.102(j) unless the tribal employer provides written notification to the Director as described in § 890.102(k).

(f) The tribal employer initially determines eligibility of a tribal employee to enroll in FEHB, eligibility of family members, and eligibility of tribal employee to change enrollment. The tribal employer's initial decision may be appealed pursuant to § 890.1415.

(g) A tribal employee who is eligible and enrolls in FEHB under this subpart will have the option of enrolling in any FEHB open fee-for-service plan or health maintenance organization (HMO), consumer driven health plan (CDHP), or high deductible health plan (HDHP) available to Federal employees

in the same geographic location as the tribal employee. The tribal employee will have the same choice of self only, self plus one, or self and family enrollment as is available to Federal employees.

(h) Family members of tribal employees will be covered by FEHB according to terms described at § 890.302. Children of tribal employees, whether married or not married, and whether or not dependent, are covered under a self and family enrollment or a self plus one enrollment (if the child is the designated covered family member) up to the age of 26. Former spouses of tribal employees are not former spouses as described at 5 U.S.C. 8901(10) and are not eligible to elect coverage under subpart H.

(i) Eligibility for FEHB under this subpart does not identify an individual as a Federal employee for any purpose, nor does it convey any additional rights or privileges of Federal employment.

### § 890.1406 Correction of enrollment errors.

Correction of errors regarding FEHB enrollment for tribal employees takes place according to the terms described in § 890.103.

### § 890.1407 Enrollment process; effective dates.

(a) *FEHB election for tribal employers.* Tribal employers may purchase FEHB coverage for their tribal employees after an agreement is accepted by OPM. Tribal employers will not be permitted to access FEHB if the tribal employer contributes toward, or offers, an alternative employer-sponsored health insurance plan for tribal employees within the billing unit(s) for which the employer seeks to purchase FEHB coverage, with the exception of a collectively bargained alternative plan. A stand-alone dental, vision, or disability plan is not considered alternative health insurance.

(b) Opportunities for tribal employees to enroll—

(1) Upon electing to purchase FEHB, a tribal employer will establish an initial enrollment opportunity for tribal employees. A tribal employee's enrollment upon an initial enrollment opportunity becomes effective as prescribed by OPM.

(2) After the initial enrollment opportunity, described in § 890.1407(b)(1), tribal employees are subject to the same initial enrollment period, belated enrollment rules, enrollment by proxy, and open season as Federal employees, as described at § 890.301(a), (b), (c), and (f).

(3) A tribal employee who enrolls after the initial enrollment opportunity and who does not elect premium conversion through his or her tribal employer's premium conversion plan, if one is available, will be subject to the enrollment and qualifying life event rules described at § 890.301 and effective dates described at § 890.301(b) and (f).

(4) A tribal employee who enrolls after the initial enrollment opportunity and who elects premium conversion through his or her tribal employer's premium conversion plan, if one is available, will be subject to the enrollment rules, qualifying life event rules and effective dates described at §§ 892.207, 892.208 and 892.210 of this chapter (together with § 890.301 as referenced therein).

### § 890.1408 Change in enrollment type, plan, or option.

(a) A tribal employee enrolled under this subpart may increase or decrease his or her enrollment, or may change enrollment from one plan or option to another, as described in § 890.301 (for tribal employees who did not elect premium conversion) or part 892 of this chapter (for tribal employees who did elect premium conversion).

(b) A change in enrollment type, plan, or option under this section becomes effective as described in § 890.301 (for tribal employees who did not elect premium conversion) or part 892 of this chapter (for tribal employees who did elect premium conversion).

### § 890.1409 Cancellation of coverage or decreases in enrollment.

(a) A tribal employee enrolled under this subpart may cancel enrollment as described at § 890.304(d) or decrease his or her enrollment as described at § 890.301. A tribal employee who does not participate in premium conversion

may cancel his or her enrollment or decrease his or her enrollment at any time by request to the tribal employer, unless there is a legally binding court or administrative order requiring coverage of a child as described at § 890.301(g)(3). A tribal employee who participates in premium conversion may cancel his or her enrollment as provided by § 892.209 or decrease his or her enrollment as provided by § 892.208 of this chapter only during open season or because of and consistent with a qualifying life event.

(b) A cancellation of enrollment becomes effective as described at § 890.304(d). A decrease in enrollment becomes effective as described in § 890.301(e)(2).

(c) A tribal employee who cancels his or her enrollment under this section or decreases his or her enrollment may reenroll or increase his or her enrollment only during open season or because of and consistent with a qualifying life event.

**§ 890.1410 Termination of enrollment and 31-day temporary extension of coverage; and conversion to individual policy.**

(a) Tribal Employee Separation—

(1) Enrollment of a tribal employee under this subpart terminates due to separation from employment with the tribal employer for reasons of resignation, dismissal, or retirement. Termination of enrollment is effective at midnight of the last day of the pay period in which the tribal employee separates from employment.

(2) A former tribal employee who is separated under this subpart due to resignation, dismissal, or retirement and covered family members are entitled to a 31-day temporary extension of coverage without premium contribution and may convert to an individual policy as described at § 890.401.

(b) Death of tribal employee—

(1) Enrollment of a tribal employee terminates at midnight of the last day of the pay period in which the tribal employee dies.

(2) If, at the time of death, the deceased tribal employee was enrolled in self and family FEHB coverage:

(i) The surviving spouse is entitled to a 31-day temporary extension of coverage without premium contribution and may convert to an individual policy as described at § 890.401;

(ii) The covered children of the deceased tribal employee are entitled to a 31-day temporary extension of coverage without premium contribution and may convert to an individual policy as described at § 890.401.

(3) If, at the time of death, the deceased tribal employee was enrolled in self plus one FEHB coverage, only the designated covered family member is entitled to a 31-day temporary extension of coverage without premium contribution and may convert to an individual policy as described at § 890.401.

(c) Termination of family member coverage—

(1) Coverage of a family member of a tribal employee who was covered under this subpart terminates, subject to the 31-day temporary extension of coverage, for conversion, at midnight of the earlier of the following dates:

(i) The day on which he or she ceases to be a family member; or

(ii) The day the tribal employee's enrollment terminates, unless the family member is entitled to continued coverage under the enrollment of another.

(2) Family members who lose coverage under this subsection are entitled to a 31-day temporary extension of coverage without premium contribution and may convert to an individual policy as described at § 890.401.

(d) Tribal employer loses entitlement to purchase FEHB—

(1) Coverage of a tribal employee and family members under this subpart, except TCC that is already elected and in effect, terminates at midnight of the last day of the calendar year in which a tribal employer is no longer entitled to purchase FEHB. FEHB can terminate earlier at the request of the tribal employer.

(2) Following the termination described in § 890.1410(d)(1), enrolled tribal employees and covered family members are entitled to a 31-day temporary extension of coverage without premium contribution and may convert to an individual policy as described at § 890.401.

(e) Tribal employer revokes election to purchase FEHB—

(1) If a tribal employer voluntarily revokes its election to purchase FEHB,

tribal employees will be entitled to a 31-day temporary extension of coverage and may convert to an individual policy as described at § 890.401. In such a case, the FEHB enrollment terminates effective the first day for which premium payment is not received and the 31-day temporary extension of coverage, for conversion begins immediately thereafter.

(2) [Reserved]

(f) Failure to currently deposit premium payment—

(1) If premium payment is not currently deposited in the Employees Health Benefits Fund, the tribal employer's entitlement to purchase FEHB can be terminated, and all enrollments affected by the paymaster's failure to obtain current deposit of premium payment will be terminated, for non-payment.

(2) Enrollments of all of the tribal employer's tribal employees affected by the paymaster's failure to obtain current deposit of premium payment will be terminated effective midnight of the last day of the month for which payment was received.

(3) In the case of termination of enrollment due to non-payment, affected tribal employees will be entitled to a 31-day temporary extension of coverage without premium contribution and may convert to an individual policy as described at § 890.401. The 31-day extension of coverage begins immediately upon termination of enrollment.

(4) In the event that a tribal employer elects to purchase FEHB for its tribal employees but does not currently deposit premium payment in the first month that it is due, the enrollment of tribal employees affected by the paymaster's failure to obtain current deposit of premium payment will be terminated effective midnight of the last day of the month for which premium payment was not currently deposited. Tribal employees affected by the paymaster's failure to obtain current deposit of premium payment will not be entitled to a 31-day temporary extension of coverage and may not convert to an individual policy as described at § 890.401.

(5) Any outstanding premium due for coverage in arrears will be treated as a debt owed solely by the tribal employer.

### § 890.1411 Temporary Continuation of Coverage (TCC).

(a) For purposes of this subpart, temporary continuation of coverage (TCC) is described by 5 U.S.C. 8905a and subpart K of this part. The administrative fee for TCC for tribal employees is the same as for Federal employees, with no specific tribal administrative fee as described in § 890.1413(e).

(b) A former tribal employee who is separated under this subpart due to resignation, dismissal, or retirement may elect TCC, unless the separation is due to gross misconduct as defined in § 890.1102.

(c) Eligibility for TCC for tribal employees follows procedures provided in § 890.1103 of subpart K of this part, except that former spouses of tribal employees are not eligible for TCC.

### § 890.1412 Non-pay status, insufficient pay, or change to ineligible position.

(a) *Non-pay status for 365 days.* Enrollment of a tribal employee and coverage of family members may continue for up to 365 days during which the tribal employee is in a non-pay status (as described at § 890.303(e)(1)) under terms described at § 890.502(b). Enrollment terminates at midnight of the last day of the pay period which includes the 365th consecutive day of nonpay status or the last day of leave under the Family and Medical Leave Act, whichever is later. The tribal employee and covered family members are entitled to a 31-day temporary extension of coverage without premium contribution and may convert to an individual policy as described at § 890.401.

(b) *Insufficient pay.* If the pay of a non-temporary tribal employee who is enrolled in FEHB is insufficient to pay for the tribal employee's share of premiums, the tribal employer must follow the procedure described at § 890.502(b). If the enrollment is terminated due to insufficient pay, the tribal employee and covered family members are entitled to a 31-day temporary extension of coverage without premium contribution and may convert to an individual policy as described at § 890.401.

(c) *Insufficient pay for temporary tribal employees.* If the pay of a temporary tribal employee who meets eligibility requirements described at 5 U.S.C. 8906a is insufficient to pay the tribal employee's share of premiums as described at § 890.304(a)(2), and the tribal employee does not or cannot elect a plan at a cost to him or her not in excess of the pay, the tribal employee's enrollment must be terminated as described at § 890.304(a)(2). The tribal employee and covered family members are entitled to a 31-day temporary extension of coverage without premium contribution and may convert to an individual policy as described at § 890.401.

(d) *Change to ineligible position.* A tribal employee who moves from an FEHB eligible to a non-FEHB-eligible position at a tribal employer will be eligible to continue FEHB enrollment as described in § 890.303(b).

(e) Non-pay status due to Uniformed Service—

(1) Enrollment of a tribal employee and coverage of family members terminates at midnight of the earliest of the dates described at § 890.304(a)(1)(vi) through (viii). The tribal employee and covered family members are entitled to a 31-day temporary extension of coverage without premium contribution and may convert to an individual policy as described at § 890.401.

(2) Enrollment is reinstated on the date the tribal employee is restored to duty in an eligible position with the tribal employer upon return from Uniformed Service, pursuant to applicable law, provided that the tribal employer continues to purchase FEHB for its tribal employees in the affected tribal employee's billing unit on that date.

### § 890.1413 Premiums and administrative fee.

(a) Premium contributions and withholdings described at §§ 890.501 and 890.502 must be paid by the tribal employer and the tribal employee, except that the term OPM as used in § 890.502(c) is deemed to be a reference to the paymaster, as appropriate, for purposes of this subpart. There is no Government contribution as that term is used in 5 U.S.C. 8906.

(b) *Contribution requirements.* (1) A tribal employer must contribute at least the monthly equivalent of the minimum Government contribution for a specific FEHB plan as described in 5 U.S.C. 8906;

(2) There is no cap on the percentage of premium that a tribal employer may contribute, as long as the contribution and withholding arrangement is not designed to encourage or discourage enrollment in any particular plan or plan option;

(3) A tribal employer may vary the contribution amount by type of FEHB enrollment (self only, self plus one, self and family), providing it is done in a uniform manner and meets the requirements described in § 890.1413(b)(1) and (2); and

(4) A tribal employer may vary the contribution amount by billing unit, providing each billing unit meets the requirements described in § 890.1413(b)(1) through (3).

(c) A tribal employer may, but is not required to, prorate the tribal employer and tribal employee share of premium attributable to enrollment of its part-time tribal employees working between 16 and 32 hours per week by prorating shares in proportion to the percentage of time that a tribal employee in a comparable full time position is regularly scheduled to work.

(d) Tribal employee and tribal employer contributions to premiums under this subpart will be aggregated by the tribal employer. The tribal employee and tribal employer contributions must be available for receipt by the paymaster on an agreed upon date. The paymaster will receive the premium contributions together with the fee described at paragraph (e) of this section and will deposit only the premium payment into the Employees Health Benefits Fund described in 5 U.S.C. 8909.

(e) A fee determined annually by OPM will be charged in addition to premium for each enrollment of a tribal employee. The fee may be used for other purposes as determined by OPM. The fee must be paid entirely by the tribal employer as part of the payment to purchase FEHB for tribal employees, and must be available for collection by the paymaster, together with the aggregate tribal employee and tribal employer contributions.

**§ 890.1414 Responsibilities of the tribal employer.**

(a) The tribal employer pays premiums for tribal employees enrolled under this subpart pursuant to §§ 890.1403 and 890.1413.

(b) The tribal employer must determine the eligibility of individuals who attempt to enroll for coverage under this subpart and enroll those it finds eligible.

(c) The tribal employer must determine whether eligible tribal employees have eligible family member(s) and allow coverage under a self plus one or self and family enrollment as described in § 890.302 for those it finds eligible.

(d) The tribal employer must establish or identify an independent dispute resolution panel for reconsideration of enrollment and eligibility decisions as described in § 890.1415.

(e) The tribal employer has the following notification responsibilities. The tribal employer must—

(1) Notify OPM and tribal employees in writing of intent to revoke election to purchase FEHB at least 60 days before such revocation described at § 890.1404(d);

(2) Promptly notify tribal employees and OPM if there is a change in the tribal employer's entitlement to purchase FEHB described at § 890.1410(d);

(3) Promptly notify affected tribal employees of termination of enrollment due to non-payment, the 31-day temporary extension of coverage and its ending date described at § 890.1410(f)(2) through (3); and

(4) Promptly notify affected tribal employees of termination of enrollment due to non-payment described at § 890.1410(f)(4).

**§ 890.1415 Reconsideration of enrollment and eligibility decisions and appeal rights.**

(a) The tribal employer shall establish or identify an independent dispute resolution panel to adjudicate appeals of determinations made by a tribal employer denying an individual's status as a tribal employee eligible to enroll in FEHB or denying a change in the type of enrollment (*i.e.:* to or from self only coverage) under this subpart. Such panel shall be authorized to enforce enrollment and eligibility decisions. The tribal employer shall notify affected individuals of this panel and its functions.

(b) Under procedures set forth by the tribal employer, an individual may file a written request to the independent dispute resolution panel to reconsider an initial decision of the tribal employer under this subpart. A reconsideration decision made by the panel must be issued to the individual in writing and must fully state the findings and reasons for the findings. The panel may consider information from the tribal employer, the individual, or another source. The panel must retain a file of its documentation until December 31 of the 3rd year after the year in which the decision was made, and must provide the file to OPM upon request.

(c) If the panel determines that the individual is ineligible to enroll in FEHB as a tribal employee or to change enrollment, the individual may request that OPM reconsider the denial. Such a request must be made in writing and any decision by OPM will be binding on the tribal employer.

(d) OPM may request a panel decision file during the retention period described at paragraph (b) of this section. Panel decisions remain subject to final OPM authority to correct errors, as set forth in § 890.1406.

**§ 890.1416 Filing claims for payment or service and court review.**

(a) Tribal employees may file claims for payment or service as described at § 890.105.

(b) Tribal employees may invoke the provisions for court review described at § 890.107(b) through (d).

**§ 890.1417 No continuation of FEHB enrollment into retirement from employment with a tribal employer.**

(a) An FEHB enrollment cannot be continued into retirement from employment with a tribal employer.

(b) A Federal annuitant may continue FEHB enrollment into retirement from Federal service if the requirements of 5 U.S.C. 8905(b) for carrying FEHB coverage into retirement are satisfied through enrollment, or coverage as a family member, either through a Federal employing office or

a tribal employer, or any combination thereof.

(c) A Federal annuitant who is employed after retirement by a tribal employer in an FEHB eligible position may participate in FEHB through the tribal employer. In such a case, the Federal annuitant's retirement system will transfer the FEHB enrollment to the tribal employer, in a similar manner as for a Federal annuitant who is employed by a Federal agency after retirement.

(d) A tribal employee who becomes a survivor annuitant as described in § 890.303(d)(2) is entitled to reinstatement of health benefits coverage as a Federal employee would under the same circumstances.

### § 890.1418 No continuation of FEHB enrollment in compensationer status past 365 days.

A tribal employee who is not also a Federal employee who becomes eligible for one of the Department of Labor's disability compensation programs may not continue FEHB coverage in leave without pay status past 365 days.

# PART 891—RETIRED FEDERAL EMPLOYEES HEALTH BENEFITS

## Subpart A—Administration and General Provisions

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## Subpart B—Election and Change of Election

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891.502 Standards for carrier of uniform plan.

AUTHORITY: 80 Stat. 607; 5 U.S.C. 8913.

SOURCE: 33 FR 12516, Sept. 4, 1968, unless otherwise noted.

## Subpart A—Administration and General Provisions

### § 891.101 Relationship to part 890 of this chapter.

This part does not apply to the Federal Employees Health Benefits Program which is governed by part 890 of this chapter. Part 890 of this chapter does not apply to the Retired Federal Employees Health Benefits Program which is governed by this part.

### § 891.102 Definitions.

In this part:

(a) *Annuity* means the periodic payment due a former employee or his/her survivors by reason of past service, but does not include compensation paid under subchapter I of chapter 81 of title 5, United States Code.

(b) *Annuity period* means the period for which an installment of annuity is paid.

(c) *Bureau of Employees' Compensation* means the Bureau of Employees' Compensation, Department of Labor.

(d) *Carrier* means a voluntary association, corporation, partnership, or other nongovernmental organization which lawfully offers a health benefits plan.

(e) *Compensation* means monthly compensation paid under subchapter I of chapter 81 of title 5, United States Code, and includes compensation payable every 4 weeks.

(f) *Elect* means to file with the retirement office under which retired or with the Bureau of Employees' Compensation, as the case may be, a properly completed form, prescribed by OPM for the purpose, giving notice of intention (1) to subscribe to the uniform plan, (2) to receive a Government contribution toward the cost of a private health benefits plan, or (3) not to participate in the program.

(g) *Employee* means an appointive or elective officer or employee in or under

the executive, judicial, or legislative branch of the United States Government, including a Government-owned or controlled corporation (but not including any corporation under the supervision of the Farm Credit Administration, of which corporation any member of the board of directors is elected or appointed by private interests), or of the government of the District of Columbia, and includes an Official Reporter of Debates of the Senate and a person employed by the Official Reporters of Debates of the Senate in connection with the performance of their official duties, and an employee of Gallaudet College, but does not include (1) a member of a ''uniformed service'' as that term is defined in section 1072 of title 10, United States Code, (2) a noncitizen employee whose permanent-duty station is located outside a State of the United States or the District of Columbia, or (3) an employee of the Tennessee Valley Authority.

(h) *Government* means the Government of the United States of America and the government of the District of Columbia.

(i) *Health benefits plan* means an individual or group insurance policy or contract, medical or hospital service arrangement, membership or subscription contract, or similar agreement provided by a carrier for a stated periodic premium or subscription charge for the purpose of providing, paying for, or reimbursing expenses for hospital care, surgical or medical diagnosis, care, and treatment, drugs and medicines, remedial care, or other medical supplies and services, or any combination of these.

(j) *Immediate annuity* means (1) as applied to a retired employee, an annuity which begins to accrue not later than 1 month after the date of the separation from the service on which title to the annuity is based; and (2) as applied to a survivor, an annuity which begins to accrue not later than 1 month (i) after the date of death of the employee or annuitant whose service forms the basis for the annuity, or (ii) after the birth of a posthumous child of such an employee or annuitant.

(k) *Member of family* means a former employee's spouse and any unmarried child (1) under 19 years of age (including (i) an adopted child, and (ii) a stepchild or recognized natural child who lives with the former employee in a regular parent-child relationship or did so at the time of the former employee's death); or (2) regardless of age who is incapable of self-support because of mental or physical disability that existed before the child became 19 years of age. As used in this paragraph, *Former employee* means the former employee on whose service title to annuity is based.

(l) *Private health benefits plan* means a health benefits plan other than the uniform plan.

(m) *Retired employee* includes (1) a former employee retired under subchapter III of chapter 83 of title 5, United States Code, or other retirement system for civilian employees of the Government (not including the social security system), (2) an employee or former employee receiving compensation under subchapter I of chapter 81 of title 5, United States Code, and (3) persons who are entitled to annuity or compensation as members of the family of a deceased employee or of a deceased retired employee qualifying under paragraphs (m) (1) and (2) of this section.

(n) *Retirement office* means (1) any office responsible for the administration of a retirement system for civilian employees of the Government; and (2) the Bureau of Employees' Compensation.

(o) *Service* means service which is creditable for the purposes of subchapter III of chapter 83 of title 5, United States Code.

(p) *Survivor* means a person who is entitled to annuity or compensation as a member of the family of a deceased employee or deceased retired employee.

(q) *Uniform plan* means the health benefits plan for which OPM contracts pursuant to section 3, 74 Stat. 849.

### § 891.103 Eligibility.

(a) *General conditions of eligibility*. (1) A retired employee who is enrolled or covered by the enrollment of another under part 890 of this chapter, or who is covered by the election of another retired employee under this part, is ineligible to subscribe to the uniform plan

or to receive a Government contribution toward the cost of a private health benefits plan.

(2) A retired employee is ineligible to subscribe to the uniform plan if his/her annuity or compensation is not sufficient to cover the necessary withholding.

(3) An annuitant who enrolled under § 890.601, and who later cancels such enrollment, is ineligible to subscribe to the uniform plan or to receive a Government contribution toward the cost of a private health benefits plan.

(b) *Retired employees (other than survivors) entitled to annuity.* A retired employee (other than a survivor) who is entitled to an annuity is eligible for the benefits provided by this part if—

(1) He/She retired before his/her first pay period beginning after June 30, 1960;

(2) He/She retired on immediate annuity;

(3) He/She had at least 12 years of creditable service, or retired under a disability provision of his/her retirement system;

(4) He/She retired from employment which was not in the Tennessee Valley Authority or in a corporation under the supervision of the Farm Credit Administration, of which corporation any member of the board of directors was elected or appointed by private interests; and

(5) At the time of retirement, he/she was a citizen, or a noncitizen having a permanent-duty station within the several States or the District of Columbia on the day before retirement.

For the purpose of this paragraph, an employee is considered to have retired before his/her first pay period beginning after June 30, 1960, if his/her annuity began to accrue before his/her first pay period after June 30, 1960, or if he/she was eligible under paragraph (d) of this section until the date his/her annuity began to accrue.

(c) *Survivors entitled to annuity.* A survivor who is entitled to annuity is eligible for the benefits provided by this part if he/she is:

(1) In receipt of immediate annuity as the survivor of (i) an employee who died before his/her first pay period beginning after June 30, 1960; or (ii) a retired employee whose annuity began to accrue before his/her first pay period beginning after June 30, 1960;

(2) The survivor of (i) an employee who had at least 5 years' creditable service, (ii) a former employee who retired having at least 12 years' creditable service and received an immediate annuity, or (iii) a former employee who retired under a disability provision of his/her retirement system; and

(3) Not receiving annuity as the survivor of a person who at the time of the retirement or death, as the case may be, on which annuity is based, was an employee of the Tennessee Valley Authority or of any corporation under the jurisdiction of the Farm Credit Administration of which corporation any member of the board of directors was elected or appointed by private interests, or was a noncitizen having a permanent-duty station outside the several States and the District of Columbia.

(d) *Retired employees (other than survivors) entitled to compensation.* A retired employee (other than a survivor) who is entitled to compensation is eligible for the benefits provided by this part if—

(1) He/She is receiving monthly compensation for an injury sustained or illness contracted before his/her first pay period beginning after June 30, 1960;

(2) He/She is held by the Secretary of Labor to be unable to return to duty;

(3) He/She is receiving compensation based on employment which was not in the Tennessee Valley Authority or in a corporation under the supervision of the Farm Credit Administration, of which corporation any member of the board of directors was elected or appointed by private interests; and

(4) At the time of sustaining the injury or contracting the illness, as the case may be, on which compensation is based, he/she was a citizen, or a noncitizen having a permanent-duty station within the several States or the District of Columbia at that time.

(e) *Family members entitled to compensation.* A member of a family who is receiving compensation is eligible for the benefits provided by this part if he/she is:

(1) A survivor beneficiary of (i) an employee who completed 5 years of

service and died as a result of injury or illness which is compensable under subchapter I of chapter 81 of title 5, United States Code, and which was sustained or contracted before his/her first pay period beginning after June 30, 1960, or (ii) a former employee who was separated after having completed at least 5 years of service and who died while receiving monthly compensation under that subchapter on account of injury sustained or illness contracted before his/her first pay period beginning after June 30, 1960, and who has been held by the Secretary of Labor to have been unable to return to duty; and

(2) Not receiving compensation as the survivor of a person who at the time of sustaining the injury or contracting the illness, as the case may be, on which compensation is based, was an employee of the Tennessee Valley Authority or of any corporation under the jurisdiction of the Farm Credit Administration of which corporation any member of the board of directors was elected or appointed by private interests, or was a noncitizen having a permanent-duty station outside the several States and the District of Columbia.

(f) *Determinations of eligibility.* The Associate Director for Compensation of OPM, on request, shall determine the eligibility of a retired employee, or class of retired employees, to make the elections and receive the Government contributions provided for by this part.

[33 FR 12516, Sept. 4, 1968, as amended at 43 FR 35018, Aug. 8, 1978]

### § 891.104 Responsibilities of retirement offices.

(a) The Office of Worker's Compensation Program is responsible only for retired employees who are receiving compensation from the Office and is responsible even though the retired employee has retired under another retirement office from which he/she is not currently receiving annuity. If the retired employee is currently receiving annuity from another retirement office, that retirement office, rather than the Office of Worker's Compensation Program, will have the responsibilities imposed on retirement offices by this part for that retired employee.

(b) Retirement offices are responsible, in accordance with regulations and instructions issued by OPM, for withholding from the annuity or compensation of each retired employee within the jurisdiction of the retirement office who elects to subscribe to the uniform plan his/her share of the cost, for forwarding the amount withheld to the Retired Federal Employees Health Benefits Fund, and for reporting to OPM amounts required for Government contribution for these retired employees.

(c) Retirement offices are responsible, in accordance with regulations and instructions issued by OPM, for reporting to OPM amounts required for Government contributions to retired employees within the jurisdiction of the retirement office who have elected to receive a Government contribution toward the cost of a private health benefits plan, and for paying the Government contributions to these retired employees.

(d) Retirement offices are responsible for advising retired employees within the jurisdiction of the retirement office of the rights and obligations of retired employees under this part.

(e) When one or more of the family members is a child 19 years of age or older who is incapable of self-support because of mental or physical disability which existed before the child became 19 years of age, the appropriate retirement office shall obtain the necessary evidence and make a determination of incapacity.

(f) Retirement offices are responsible, in accordance with regulations and instructions issued by OPM, for verifying continuing eligibility of retired employees to receive Government contributions.

### § 891.105 Correction of errors.

OPM may order correction of administrative errors at any time upon a showing satisfactory to OPM that it would be against equity and good conscience not to do so.

[45 FR 23637, Apr. 8, 1980]

### § 891.106 Reconsideration.

(a) *Who may file.* A retired employee may request OPM to reconsider its initial decision that he/she is not eligible

to make an election or to receive a Government contribution under the part or that he/she may not enroll another individual as a family member.

(b) *Initial OPM decision.* An OPM decision shall be considered an initial decision as used in § 891.106(a) of this part, when rendered by OPM in writing and stating the right to reconsideration. However, a decision initially rendered at the highest level of review available within OPM will not be subject to reconsideration.

(c) *Reconsideration.* A request for reconsideration must be made in writing, must include the claimant's name, address, date of birth, claim number, if appropriate, and reasons for the request.

(d) *Time limit.* A request for reconsideration of an initial OPM decision must be filed within 30 calendar days from the date of OPM's initial decision. OPM may extend the time limit on filing when the individual shows that he/she was not notified of the time limit and was not otherwise aware of it, or that he/she was prevented by circumstances beyond his/her control from making the request within the time limit.

(e) *Final decision.* After reconsideration, OPM shall issue a final decision which shall be in writing and shall fully set forth the findings and conclusions of OPM.

[45 FR 23637, Apr. 8, 1980]

## Subpart B—Election and Change of Election

### § 891.201 Election.

(a) The original period for election by each eligible retired employee was during the months of March and April 1961. Failure to elect when eligible to do so is deemed an election not to participate in the program unless the failure is determined by the retirement office to be for cause beyond the control of the retired employee. In any case in which annuity or compensation is being paid to a payee in behalf of a retired employee, the payee shall make the election for the retired employee.

(b) (1) A retired employee may elect to participate in the program for self alone or for self and family.

(2) Survivors, if actually or constructively living in the same household, have only one right of election among them. The election shall be made by the payee. The fact that one payee is receiving annuity or compensation for all members of the family is prima facie evidence that they are living in the same household. The existence of more than one payee is prima facie evidence that each payee and the survivors in whose behalf the payee is receiving annuity or compensation constitute a separate household, and each payee may elect for the survivors in whose behalf he is receiving annuity or compensation, but where a family is receiving annuity or compensation through more than one payee, one payee, with the consent of the other payees, may elect for the whole family.

(3) A retired employee may not be covered under more than one election.

(4) A retired employee who is entitled to more than one annuity or to compensation and annuity is entitled to only one election.

(c) Each retired employee who elects to receive a Government contribution toward the cost of a private health benefits plan shall file with his election a certificate of the carrier, on the form prescribed by OPM for the purpose, that he is a subscriber to a health benefits plan. OPM, or the appropriate retirement office, at any time may require that a retired employee renew the certificate, or may take such other action as it considers desirable to verify the continuing eligibility of the retired employee to receive a Government contribution. The appropriate retirement office may suspend the Government contribution when there is a reasonable doubt of the retired employee's continuing eligibility to receive the Government contribution.

(d) In the discretion of the retirement office, a representative of the retired employee having a written authorization to do so may elect for him.

(e) A person who was not eligible, during the months of March and April 1961, to elect to subscribe to the uniform plan or to receive a Government contribution toward the cost of a private health benefits plan, may apply to the appropriate retirement office when he becomes eligible. If the retirement

office determines that he is eligible, it shall notify the retired employee that he is eligible to make an election in accordance with paragraphs (a) to (d) of this section within 60 days of the date of the notice. If the retirement office determines that a retired employee was unable, for cause beyond his control, to make an election within the time limits prescribed by this section, it shall notify the retired employee that he is eligible to make an election in accordance with paragraphs (a) to (d) of this section within 60 days of the date of the notice. Elections made under this paragraph are effective, for a retired employee receiving annuity and a survivor receiving compensation, on the first day of the third month following the month in which the retirement office receives the election. Withholdings and contributions are effective for months beginning on and after the first day of the second month following the month in which the retirement office receives the election. For any other retired employee receiving compensation, changes of election made under this paragraph are effective on the first day of the third 4-week period following the 4-week period in which the Bureau of Employees' Compensation receives the election, and withholdings and contributions are effective beginning with the second 4-week period following receipt of the election. This paragraph does not apply to retired employees who have been, at any time, covered by the election of another under this part.

(f) Retired employees and survivors who, on January 1, 1973, were enrolled for either basic coverage only or major medical coverage only of the Uniform Plan are, effective January 1, 1973, automatically enrolled in basic plus major medical coverage of the Uniform Plan.

[33 FR 12516, Sept. 4, 1968, as amended at 37 FR 20845, Dec. 20, 1972]

### § 891.202 Change of election.

(a) When used in this section, ''month'' includes the 4-week period for which a retired employee (other than a survivor) receives compensation.

(b) A retired employee shall change his election in accordance with the following table:

TABLE OF REQUIRED CHANGES

| Event requiring change | Type of election to which requirement applies | Change required | Effective date of change |
|---|---|---|---|
| (1) Loss of member of family by death or otherwise, leaving only one person covered by the election. | Election for self and family for uniform or private health benefits plan. | Change to self alone ..... | First day of month following the event requiring change. Changes in withholdings and contributions are effective for annuity or compensation accruing for the month in which the event requiring change occurs. |
| (2) Termination of subscription to a private health benefits plan for all persons covered by the election but the retired employee making the election [1]. | Election for self and family for private health benefits plan. | .....do ..... | Do. |
| (3) Termination of subscription to a private health benefits plan for all persons covered by the election [1]. | Election for self alone or for self and family for private health benefits plan. | Change to not participating (optional change may be made in accordance with paragraph (c) of this section). | Do. |

[1] If the termination is immediately succeeded by a similar subscription in another private health benefits plan a change of election is not required, but the retired employee shall file a certificate of the new carrier that he is a subscriber. A form for the certificate may be obtained from the retirement office.

(c) An annuitant may change his or her election in accordance with the following table by notifying his or her retirement system at any time:

TABLE OF OPTIONAL CHANGES

| Change permitted | Type of election from which changing | Effective date of change |
|---|---|---|
| (1) Change to not participating .... | Election for self alone or self and family for uniform or private health benefits plan. | First day of month specified in notice to retirement system, or first day of month following receipt of notice by retirement system, whichever is later. Changes in withholdings and contributions are effective for annuity or compensation accruing for the month preceding the effective date of the change. |
| (2) Change to self alone in same plan. | Election for self and family for uniform plan or private health benefits plan. | Do. |
| (3) Change to private health benefits plan for self alone or self and family. | Election for self alone or self and family for uniform plan. | Do. |
| (4) Change to self and family in same plan. | Election for self alone for uniform or private health benefits plan. | First day of fourth month following the month in which notice is received by retirement system. Changes in withholdings and contributions are effective for annuity or compensation accruing for the third month following month in which notice is received by the retirement system. |
| (5) Change to self alone or self and family for uniform plan or private health benefits plan. | Election not to participate ..... | Do. |

[33 FR 12516, Sept. 4, 1968, as amended at 43 FR 35018, Aug. 8, 1978]

## Subpart C—Suspension and Termination

### § 891.301 Suspension and termination.

(a) When used in this section, ''month'' includes the 4-week period for which a retired employee (other than a survivor) receives compensation.

(b) When compensation is entirely suspended or annuity is entirely waived or suspended, Government contributions are suspended. If the election is to subscribe to the uniform plan, and the annuity or compensation is suspended, or the annuity is waived to the extent that the retired employee's share of the cost cannot be withheld, withholdings and Government contributions are suspended, but the subscription continues.

(c) If the waiver or suspension covers 3 months or less, Government contributions and withholdings for the period of waiver or suspension shall be made when annuity payment is resumed. If the waiver or suspension covers more than 3 months, the retired employee's election is terminated effective at the end of the third month of waiver or suspension. A terminated election is renewed when annuity or compensation payment is resumed. When a terminated election is renewed pursuant to this paragraph, withholdings and Government contributions shall be made for the first 3 months of the waiver or suspension. Withholdings and Government contributions shall be made for annuity or compensation accruing after the election is renewed.

(d) If title of a retired employee to annuity or compensation is terminated, his eligibility under this part is terminated.

(e) If the eligibility of a retired employee is terminated and other members of the same family continue to be eligible under this part, the election of the former retired employee continues for the remainder of the family unless and until changed in accordance with § 891.202.

## Subpart D—Contributions and Withholdings

### § 891.401 Government contributions.

(a) *For retired employees and survivors receiving an annuity.* (1) Each month, an amount equal to the current monthly premium paid by an individual for supplementary medical insurance under title XVIII of the Social Security Act (Medicare) for such month shall be paid

by the Office of Personnel Management, through the appropriate retirement office, to each retired employee or survivor who:

(i) Is in receipt of annuity for such month;

(ii) Is eligible for coverage under this part; and

(iii) Elects to receive a Government contribution toward his or her cost of coverage for:

(A) A private health insurance plan in which he or she is a subscriber for self-only; or

(B) Supplementary medical insurance under Medicare.

(2) Each month, an amount equal to the current monthly premium paid by an individual for supplementary medical insurance under title XVIII of the Social Security Act (Medicare) for such month shall be contributed, by the Office of Personnel Management, for each retired employee or survivor who is in receipt of annuity and who has elected to enroll for self-only in the uniform plan.

(3) Each month, an amount equal to twice the current monthly premium paid by an individual for supplementary medical insurance under title XVIII of the Social Security Act (Medicare) for such month shall be paid by the Office of Personnel Management, through the appropriate retirement office, for each retired employee or survivor who:

(i) Is in receipt of an annuity for such month;

(ii) Is eligible for coverage under this part; and

(iii) Elects to receive a Government contribution toward the cost of coverage for self and family under:

(A) A private plan or plans; or

(B) Supplementary medical insurance under Medicare.

(4) Each month, an amount equal to twice the current monthly premium paid by an individual for supplementary medical insurance under title XVIII of the Social Security Act (Medicare) for such month shall be contributed, by the Office of Personnel Management, for each retired employee or survivor who is in receipt of annuity and who has elected to enroll for self and family in the uniform plan.

(b) *For retired employees and survivors receiving compensation.* (1) For each retired employee or survivor who is in receipt of compensation and who meets the requirements of paragraph (a)(1) of this section, other than the requirement of being in receipt of an annuity, the Office of Personnel Management shall contribute, through the Office of Workers' Compensation Programs, an amount equal to 93⅓ percent of the current monthly premium paid by an individual for supplementary medical insurance under title XVIII of the Social Security Act (Medicare) rounded to the nearest cent, counting one-half cent and over as a whole cent, for each 4-week period in which payment of such compensation is made.

(2) For each retired employee or survivor who is in receipt of compensation and who has elected to enroll for self-only in the uniform plan, the Office of Personnel Management shall contribute, during each 4-week period in which payment of such compensation is made, an amount equal to 93⅓ percent of the current monthly premium paid by an individual for supplementary medical insurance under title XVIII of the Social Security Act (Medicare) rounded to the nearest cent, counting one-half cent and over as a whole cent.

(3) For each retired employee or survivor who is in receipt of compensation and who meets the requirements of paragraph (a)(3) of this section, other than the requirement of being in receipt of an annuity, the Office of Personnel Management shall contribute, through the Office of Workers' Compensation Programs, an amount equal to 186⅔ percent of the current monthly premium paid by an individual for supplementary medical insurance under title XVIII of the Social Security Act (Medicare) rounded to the nearest cent, counting one-half cent and over as a whole cent, for each 4-week period in which payment of such compensation is made.

(4) For each retired employee or survivor who is receiving compensation and has elected to enroll for self and family in the uniform plan, the Office of Personnel Management shall contribute, during each 4-week period in which payment of such compensation

is made, an amount equal to 186⅔ percent of the current monthly premium paid by an individual for supplementary insurance under title XVIII of the Social Security Act (Medicare) rounded to the nearest cent, counting one-half cent and over as a whole cent.

(5) If the current monthly rate for supplementary medical insurance under Medicare changes to a new rate within a 4-week period in which compensation is paid, the amount to be contributed for that 4-week period will be a prorated amount determined by:

(i) Multiplying the number of days in the 4-week pay period occurring at the former monthly rate (the rate in effect at the beginning of the pay period) by the former rate for a 4-week pay period;

(ii) Multiplying the number of days in the 4-week pay period occurring at the new rate (the rate in effect at the end of the 4-week pay period) by the new 4-week rate;

(iii) Adding the products of paragraphs (b)(5) (i) and (ii) of this section; and

(iv) Dividing the sum by 28 and rounding to the nearest cent, counting one-half cent and over as a whole cent.

(c) So that the Government contribution provided under this section is paid or contributed in advance, it shall be included in the payment of annuity or compensation for the month or pay period immediately preceding the month or pay period for which the Government contribution is due.

(d) An election to subscribe to the uniform plan constitutes an agreement by the retired employee or survivor that the retirement office may withhold from his or her annuity or compensation his or her share of the cost of the plan, as provided by this part.

(e) The Government shall contribute to the Retired Federal Employees Health Benefits Fund two percent of the total Government contribution authorized by this section for payment of expenses incurred by the Office of Personnel Management in administering this part.

[45 FR 30611, May 9, 1980]

### § 891.402 Withholdings.

The appropriate retirement office shall withhold from the annuity or compensation of each of its retired employees who has elected to subscribe to the uniform plan so much as is necessary to pay his share of the cost of his subscription. The withholdings shall be forwarded, in accordance with OPM instructions, to the Retired Employees Health Benefits Fund.

## Subpart E—Standards for Uniform Plan and Carrier

### § 891.501 Standards for uniform plan.

The uniform plan shall be open to all eligible retired employees and members of their families, without regard to race, sex, health status, or age. It shall not deny or limit benefits because of any preexisting condition. It shall offer basic plus major medical coverage. It shall provide a 31-day extension of coverage on termination of subscription other than by change of election or termination of the contract. A person confined in hospital for care or treatment on the 31st day of the extension of coverage shall be entitled to continuation of the benefits of the contract during the continuance of the confinement, but not beyond the 60th day following the end of the extension of coverage. The uniform plan shall be experience-rated.

[33 FR 12516, Sept. 4, 1968, as amended at 43 FR 35018, Aug. 8, 1978]

### § 891.502 Standards for carrier of uniform plan.

In the most recent year for which data are available, the carrier of the uniform plan shall have made at least 1 percent of all group health insurance benefit payments in the United States. If the carrier is an insurance company, it must be licensed to issue group health insurance in all the States of the United States and the District of Columbia.

# PART 892—FEDERAL FLEXIBLE BENEFITS PLAN: PRE-TAX PAYMENT OF HEALTH BENEFITS PREMIUMS

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AUTHORITY: 5 U.S.C. 8913; 5 U.S.C. 1103(a)(7); 26 U.S.C. 125.

SOURCE: 65 FR 44646, July 19, 2000, unless otherwise noted.

## Subpart A—Administration and General Provisions

### § 892.101 Definitions.

*Days* mean calendar days.

*Dependent* means a family member who is both eligible for coverage under the FEHB Program and either a dependent as defined in section 152 of the Internal Revenue Code or a child as defined in section 152(f)(1) of the Internal Revenue Code who is under age 27 as of the end of the employee's taxable year.

*FEHB Program* means the Federal Employees Health Benefits Program described in 5 U.S.C. 8901.

*Open Season* means the period of time each year as described in § 890.301(f) of this chapter when all individuals eligible for FEHB coverage have the opportunity to enroll or change their enrollment. These changes become effective with the first pay period that begins in the following year. For additional open seasons authorized by OPM, the effective date is specified.

*OPM* means the Office of Personnel Management.

*Qualifying life event* means an event that may permit changes to your FEHB enrollment as well as changes to your premium conversion election as described in Treasury regulations at 26 CFR 1.125–4. For purposes of determining whether a qualifying life event has occurred under this part, a stepchild who is the child of an employee's domestic partner as defined in part 890 of this chapter shall be treated as though the child were a dependent within the meaning of 26 CFR 1.125–4 even if the child does not so qualify under such Treasury regulations. Such events include the following:

(1) Change in family status that results in an increase or decrease in the number of eligible family members as follows:

(i) Marriage, divorce, annulment, legal separation;

(ii) Birth, adoption, acquiring a foster child that meets the definition in § 890.101(a) or a stepchild, issuance of a court order requiring an employee to provide coverage for a child;

(iii) Last dependent child loses coverage, for example, the child reaches age 26, disabled child becomes capable of self support, child acquires other coverage by court order; and

(iv) Death of a spouse or dependent.

(2) Any change in employment status that could result in entitlement to coverage; for example:

(i) Reemployment after a break in service of more than 3 days;

(ii) Return to pay status from non-pay status if employee previously elected to terminate coverage (if employee did not elect to terminate see § 892.101 (5);

(iii) Return to receiving pay sufficient to cover premium withholdings if coverage terminated;

(iv) Your spouse or dependent changes hours from either full-time to part-time status, or the reverse, which significantly affects their eligibility for coverage;

(v) Start or end of a period of unpaid leave of absence (leave without pay [LWOP], or other non-pay status) by you or your spouse. A period of unpaid leave is a continuous unpaid leave of absence of more than one pay period; and

(vi) Start or end of your spouse's employment that affects you or your spouse's eligibility for coverage.

(3) Any change in employment status that could affect the cost of insurance, including:

(i) Change from temporary appointment with eligibility for coverage under 5 U.S.C. 8906a to an appointment that permits receipt of government contribution; and

(ii) Change from full-time to part-time status or the reverse.

(4) An employee is restored to a civilian position after serving in uniformed services as described in § 890.304 (a)(vi)(vii).

(5) Start of non-pay status and end of non-pay status if employee did not terminate coverage (if coverage terminated see § 892.101 (2)(ii)).

(6) An employee enrolled in a health maintenance organization (HMO) or a covered family member moves or becomes employed outside the geographic area from which the carrier accepts enrollments, or if already lives or works outside the area, moves further from this area.

(7) Transfer from a post of duty within the United States to a post of duty outside the United States, or the reverse.

(8) Separation from Federal employment when the employee or employee's spouse is pregnant.

(9) An employee becomes entitled to Medicare. (For change to self only, self plus one, cancellation, or change in premium conversion status see paragraph (11) of this definition.)

(10) An employee or eligible family member loses coverage under FEHB or another group insurance coverage including the following:

(i) Loss of coverage due to termination of membership in an employee organization sponsoring the FEHB plan;

(ii) Loss of coverage of employee or eligible family member due to discontinuance in whole or part of FEHB plan;

(iii) Loss of coverage under another Federally-sponsored health benefits program, including, TRICARE, Medicare, or Indian Health Service;

(iv) Loss of coverage under Medicaid or similar State-sponsored program of medical assistance for the needy; and

(v) Loss of coverage under a non-Federal health plan, including foreign, State or local government, or private sector group health plan as described in § 890.301 (i)(6).

(11) An employee or eligible family member gains coverage under FEHB or another group insurance plan, including the following:

(i) Another Federally-sponsored health benefits program, including, TRICARE, Medicare, or Indian Health Service;

(ii) Medicaid or similar State-sponsored program of medical assistance for the needy; and

(iii) A non-Federal health plan, including foreign, State or local government, or private sector group plan.

(12) A change in an employee's spouse or dependent's coverage options, for example:

(i) Employer starts offering a different type of coverage;

(ii) Employer stops offering the type of coverage that the employee's spouse or dependent has (if no other coverage is available);

(iii) A health maintenance organization (HMO) adds a geographic service area that now makes the employee's spouse eligible to enroll in that HMO;

(iv) Employee's spouse is enrolled in an HMO that removes a geographic area that makes the spouse ineligible

for coverage under that HMO, but other health plans or options are available (if no other coverage is available see § 892.101 (10); and

(v) Change in the cost of coverage.

(13) An employee or eligible family member becomes eligible for premium assistance under Medicaid or a State Children's Health Insurance Program (CHIP). An eligible employee may enroll and an enrolled employee may decrease or increase enrollment type, change from one plan or option to another, or make any combination of these changes when the employee or an eligible family member of the employee becomes eligible for premium assistance under a Medicaid plan or a State Children's Health Insurance Program. An employee must enroll or change his or her enrollment within 60 days after the date the employee or family member is determined to be eligible for assistance.

[65 FR 44646, July 19, 2000, as amended at 68 FR 56527, Oct. 1, 2003; 75 FR 76616, Dec. 9, 2010; 78 FR 64878, Oct. 30, 2013; 80 FR 55738, Sept. 17, 2015]

### § 892.102 What is premium conversion and how does it work?

Premium conversion is a method of reducing your taxable income by the amount of your contribution to your FEHB insurance premium. If you are a participant in the premium conversion plan, Section 125 of the Internal Revenue Code allows you to reduce your salary (through an employer allotment) and provide that portion of your salary back to your employer. Instead of being paid to you as taxable income, this allotted amount is used to purchase your FEHB insurance for you. The effect is that your taxable income is reduced. Because taxable income is reduced, the amount of tax you pay is reduced. You save on Federal income tax, Social Security and Medicare tax and in most States and localities, State and local income taxes. There is one exception, however. If your FEHB enrollment covers a stepchild who is the child of a domestic partner as defined in part 890 of this chapter, and that stepchild does not qualify for favorable tax treatment under applicable tax laws, then the portion of the allotted amount described above that represents the employee's contribution toward the fair market value of FEHB coverage provided to the child will be separately imputed to the employee as income and subject to applicable taxes.

[65 FR 44646, July 19, 2000, as amended at 78 FR 64878, Oct. 30, 2013]

### § 892.103 What can I do if I disagree with my agency's decision about my pre-or post-tax election?

You may use the reconsideration procedure set out at §§ 890.104 of this chapter to request an agency to reconsider its initial decision affecting your participation in the premium conversion plan.

## Subpart B—Eligibility and Participation

### § 892.201 Who is covered by the premium conversion plan?

(a) All employees in the Executive Branch of the Federal Government who are participating in the FEHB Program (as described in 5 U.S.C. 8901), and whose pay is issued by an agency of the Executive Branch of the Federal Government, are automatically covered by the premium conversion plan. Certain reemployed annuitants may be considered employees for purposes of premium conversion, as described in subpart D of this part.

(b) Employees of organizations that have established a premium conversion plan under separate authority prior to October 2000 may not participate in the premium conversion plan described here because they are already covered by their employing agency's plan.

(c) Individuals enrolled in FEHB who are not employees of the Executive Branch of the Federal government or are not employees of the Federal government, will be covered by the premium conversion plan if their employer signs an adoption agreement that is accepted by OPM.

(d) Individuals enrolled in FEHB who are appointed by an agency in the Executive Branch, but whose pay is not issued by that agency, will be covered by the premium conversion plan if the entity that makes their FEHB contribution signs an adoption agreement that is accepted by OPM.

(e) Individuals may waive premium conversion by filing a waiver form with their employer in accordance with this part.

### § 892.202 Are retirees eligible for the premium conversion plan?

No, only current employees who are enrolled in the FEHB Program are covered by the premium conversion plan. Former employees are not eligible. If you are a reemployed annuitant, see subpart D of this part.

### § 892.203 When will my premium conversion begin?

If you are newly employed or newly eligible for FEHB in a covered Executive Branch agency (as described in § 892.201(a)), your salary reduction (through a Federal allotment) and pretax benefit will be effective on the 1st day of the first pay period beginning on or after your employing agency receives your enrollment.

[68 FR 56528, Oct. 1, 2003]

### § 892.204 How do I waive participation in premium conversion before the benefit first becomes effective?

You must file a waiver form by the date set by your employing office, but not later than the day before the effective date of coverage. The waiver form is available from your employing office.

### § 892.205 May I waive participation in premium conversion after the initial implementation?

Yes, but the opportunity to waive premium conversion is limited. You may waive premium conversion:

(a) During the annual FEHB open season. The effective date of the waiver will be the first day of the first pay period that begins in the following calendar year;

(b) At the same time as you sign up for FEHB when first hired or hired as a reemployed annuitant. Employees who leave Federal service and are rehired after a three-day break in service or in a different calendar year also may waive;

(c) In conjunction with a change in FEHB enrollment, on account of and consistent with a qualifying life event (see § 892.101); or

(d) When you have a qualifying life event and the waiver is on account of and consistent with that qualifying life event (even if you do not change your FEHB enrollment). You have 60 days after the qualifying life event to file a waiver with your employer. The waiver is effective on the first day of the pay period following the date your employer receives the waiver.

### § 892.206 Can I cancel my waiver and participate in premium conversion?

Yes, you may cancel a waiver and participate in premium conversion if:

(a) You have a qualifying life event; the change in FEHB coverage is consistent with the qualifying life event; and you complete an election form to participate in premium conversion within 60 days after the qualifying life event; or

(b) You cancel your waiver during an open season, including an extended open season authorized by OPM.

### § 892.207 Can I make changes to my FEHB enrollment while I am participating in premium conversion?

(a) Subject to the exceptions described in paragraphs (b) and (c) of this section, you can make changes to your FEHB enrollment for the same reasons and with the same effective dates listed in § 890.301 of this chapter.

(b) However, if you are participating in premium conversion there are two exceptions: You must have a qualifying life event to decrease enrollment type, switch a covered family member, or to cancel FEHB coverage entirely. (*See* §§ 892.209 and 892.210.) Your change in enrollment must be consistent with and correspond to your qualifying life event as described in § 892.101. These limitations apply only to changes you may wish to make outside open season.

(c) If you are subject to a court or administrative order as discussed in § 890.301(g)(3) of this chapter, your employing agency can limit a change to your enrollment as long as the court or administrative order is still in effect and you have at least one child identified in the order who is still eligible under the FEHB Program, unless you provide documentation to your agency that you have other coverage for your

child or children. *See also* § 892.208 and § 892.209.

(d) During the first plan year in which the self plus one enrollment type is available, OPM will administer a limited enrollment period for enrollees who participate in premium conversion. During this limited enrollment period, enrollees who participate in premium conversion will be allowed to decrease enrollment from self and family to self plus one during a time period determined by OPM. No other changes, including changes in plan or plan option or increases in enrollment, will be allowed. Enrollments will be effective on the first day of the first pay period following the one in which the appropriate request is received by the employing office.

[69 FR 56929, Sept. 23, 2004, as amended at 80 FR 55739, Sept. 17, 2015]

### § 892.208 Can I decrease my enrollment type at any time?

If you are participating in premium conversion you may decrease your FEHB enrollment type under either of the following circumstances:

(a) *During the annual open season.* A decrease in enrollment type made during the annual open season takes effect on the 1st day of the first pay period that begins in the next year.

(b) *Within 60 days after you have a qualifying life event.* A decrease in enrollment type made because of a qualifying life event takes effect on the first day of the first pay period that begins after the date your employing office receives your appropriate request. Your change in enrollment must be consistent with and correspond to your qualifying life event. For example, if you get divorced and have no dependent children, changing to self only would be consistent with that qualifying life event. As another example, if both you and your spouse are Federal employees, and your youngest dependent turns age 26, changing from a self and family to a self plus one or two self only enrollments would be consistent and appropriate for that event.

(c) If you are subject to a court or administrative order as discussed in § 890.301(g)(3), you may not decrease enrollment type in a way that eliminates coverage of a child identified in the order as long as the court or administrative order is still in effect and you have at least one child identified in the order who is still eligible under the FEHB Program, unless you provide documentation to your agency that you have other coverage for your child or children. See also §§ 892.207 and 892.209. If you are subject to a court or administrative order as discussed in § 890.301(g)(3), you may not change your enrollment to self plus one as long as the court or administrative order is still in effect and you have more than one child identified in the order who is still eligible under the FEHB Program, unless you provide documentation to your agency that you have other coverage for your children. See also §§ 892.207 and 892.209.

[80 FR 55739, Sept. 17, 2015]

### § 892.209 Can I cancel FEHB coverage at any time?

If you are participating in premium conversion you may cancel your FEHB coverage:

(a) *During the annual open season.* A cancellation made during the annual open season is effective at midnight of the day before the first day of the first pay period that begins in the next year.

(b) *Within 60 days after you have a qualifying life event.* A cancellation made because of a qualifying life event takes effect at midnight of the last day of the pay period in which your employing office receives your appropriate request to cancel your enrollment. Your cancellation of coverage must be consistent with and correspond to your qualifying life event. For example, if you get married and you gain other insurance coverage because your spouse's employer provides health insurance for your spouse and you, then canceling FEHB coverage would be consistent with that qualifying life event. If you add an eligible family member, canceling coverage would generally not be consistent with that qualifying life event.

(c) If you are subject to a court or administrative order as discussed in § 890.301(g)(3) of this chapter, you may not cancel your coverage as long as the court or administrative order is still in effect and you have at least one child

identified in the order who is still eligible under the FEHB Program, unless you provide documentation to your agency that you have other coverage for your child or children.

[65 FR 44646, July 19, 2000, as amended at 68 FR 56525, 56528, Oct. 1, 2003; 69 FR 56929, Sept. 23, 2004]

### § 892.210 Does premium conversion change the effective date of an FEHB enrollment, change in enrollment, or cancellation of enrollment?

No. If you are participating in premium conversion, the effective date of an FEHB enrollment, change in enrollment, or cancellation of enrollment is the same effective date as provided in § 890.301 of this chapter.

### § 892.211 What options are available to me if I go on a period of leave without pay (LWOP) or other types of non-pay status?

(a) Your commencement of a period of LWOP is a qualifying life event as described in § 892.101. You may change your premium conversion election (waive if you now participate, or participate if you now waive).

(b)(1) You may continue your FEHB coverage by agreeing in advance of LWOP to one of the payment options described in paragraph (b)(2), (b)(3), or (b)(4) of this section.

(2) *Pre-pay*. Prior to commencement of your LWOP you may allot through payroll deduction the amount that will be due for your share of your FEHB premium during your LWOP period, if your employing agency, at its discretion, allows you to do so. Contributions under the pre-pay option may be made through premium conversion on a pre-tax basis. Alternatively, you may pre-pay premiums for the LWOP period on an after-tax basis.

(3) *Direct pay*. Under the direct pay option, you may pay your share of your FEHB premium on the same schedule of payments that would be made if you were not on LWOP, as described in § 890.502(b) of this chapter. You must make the premium payments directly to your employing agency. The payments you make under the direct pay option are not subject to premium conversion, and are made on an after-tax basis.

(4) *Catch-up*. Under the catch-up option, you must agree in advance of the LWOP period that: you will continue FEHB coverage while on LWOP; your employer will advance your share of your FEHB premium during your LWOP period; and you will repay the advanced amounts when you return from LWOP. (Described in § 890.502(b) of this chapter.) Your catch-up contributions may be made through premium conversion.

(5) If you remain in FEHB upon your return from LWOP, your catch-up premiums and current premiums will be paid at the same time.

(c) Your return from LWOP constitutes a qualifying life event as described in § 892.101. You may change your premium conversion election (waive if you now participate, or participate if you now waive). The election you choose upon return from LWOP will apply to your current as well as your catch-up premiums.

[68 FR 56528, Oct. 1, 2003]

## Subpart C—Contributions and Withholdings

### § 892.301 How do I pay my premium?

As a participant in premium conversion, instead of having your premium withheld from after-tax salary, your salary will be reduced (through a Federal allotment) by the amount equal to your FEHB premium, which you will allot to your agency. The allotment from salary satisfies the FEHB premium payment requirement of 5 U.S.C. 8906. Your employer is authorized to accept this allotment under § 550.311(a)(7) and § 550.312 of this chapter or, for employers not subject to those regulations, a similar mechanism. Your agency will use the allotment to pay your share of your FEHB premium. This will reduce your taxable income as described in § 892.102.

[65 FR 44646, July 19, 2000, as amended at 71 FR 66828, Nov. 17, 2006]

### § 892.302 Will the Government contribution continue?

Yes, your employer will still pay the same share of your premium as provided in the Federal Employees Health

Benefits Act, and § 890.501 of this chapter. Employee allotments do not count toward the Government's statutory maximum contribution.

### § 892.303 Can I pay my premiums directly by check under the premium conversion plan?

No, your employer must take your contribution to your FEHB premium from your salary to qualify for pre-tax treatment.

## Subpart D—Reemployed Annuitants and Survivor Annuitants

### § 892.401 Am I eligible for premium conversion if I retire and then come back to work for the Federal Government?

(a) If you are a retired individual enrolled in FEHB who is receiving an annuity and you are reemployed in a position that conveys FEHB eligibility and is covered by the premium conversion plan, you are automatically covered by premium conversion, unless you waive participation as described in § 892.205.

(b)(1) If you do not waive premium conversion, your FEHB coverage will be transferred to your employing agency, and your employing agency will assume responsibility for contributing the Government share of your FEHB coverage. Your coverage, including what FEHB plans you are eligible to enroll in, will be based on your status as an active employee and your employing agency will deduct your premiums from your salary.

(2) If you elect to waive participation in premium conversion, you will keep your FEHB coverage as an annuitant, but your contributions towards your FEHB premiums will be made on an after-tax basis. Your employing agency must receive your waiver no later than 60 days after the date you return to Federal employment. A waiver will be effective at the beginning of the first pay period after your employer receives it.

(c) If you did not carry FEHB into retirement and you are reemployed as an employee in a position covered by the premium conversion plan, you may enroll in the FEHB Program as a new employee as described in § 890.301 of this chapter. Upon enrolling in FEHB, you are automatically covered by the premium conversion plan, unless you waive participation as described in § 892.205.

(d) Your status as an annuitant under the retirement regulations and your right to continue FEHB as an annuitant following your period of reemployment is unaffected.

[65 FR 44646, July 19, 2000, as amended at 68 FR 56529, Oct. 1, 2003]

### § 892.402 I am a survivor annuitant as well as an active Federal employee; am I eligible for premium conversion?

(a) If you are a survivor annuitant enrolled in FEHB who is receiving an annuity and you are employed in a position that conveys FEHB eligibility and is covered by the premium conversion plan, you are eligible to participate in premium conversion.

(b)(1) If you wish to participate in premium conversion, you must notify your employing agency. Your employing agency will transfer in your FEHB coverage from the retirement system, and your employing agency will assume responsibility for contributing the government share of your FEHB coverage. Your coverage, including what FEHB plans you are eligible to enroll in, will be based on your status as an active employee and your employing agency will deduct your premiums from your salary.

(2) If you do not notify your employing agency that you wish to participate in premium conversion, you will keep your FEHB coverage as a survivor annuitant, but your contributions towards your FEHB premiums will be made on an after-tax basis. Your status as an annuitant under the retirement regulations and your right to continue FEHB as a survivor annuitant following your period of employment is unaffected.

[68 FR 56529, Oct. 1, 2003]

# PART 894—FEDERAL EMPLOYEES DENTAL AND VISION INSURANCE PROGRAM

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## Subpart A—Administration and General Provisions

### § 894.101 Definitions.

This part is written as if the reader were an applicant or enrollee. Accordingly, the terms ''you,'' ''your,'' etc., refer, as appropriate, to the applicant or enrollee.

*Acquiring an eligible child* means one of the following:

(1) Birth of a child;

(2) Adoption of a child;

(3) Acquisition of a foster child as described in § 890.101(a)(8) of this chapter;

(4) Acquisition of a stepchild who lives with the enrollee in a regular parent-child relationship;

(5) Establishment of a recognized natural child;

(6) Residence change of the enrollee's stepchild or recognized natural child who moves in with the enrollee; and

(7) An otherwise eligible child becoming unmarried due to divorce or annulment of marriage, or death.

*Administrator* means the entity with which the Office of Personnel Management contracts to manage the enrollment and premium payment process for the Federal Employees Dental and Vision Insurance Program (FEDVIP).

*Annuitant* means an individual defined at 5 U.S.C. 8901(3). Generally, the term means a former employee who is entitled to an immediate annuity or a disability annuity under a retirement system established for employees. The term also generally includes those receiving a survivor annuity due to the death of a Federal employee or annuitant (survivor annuitants) and those receiving compensation from the Office of Workers' Compensation Programs (compensationers). The term does not include former employees who retire with a deferred annuity under 5 U.S.C. 8413, or former spouses of annuitants.

*Carrier* means a company with which the Office of Personnel Management contracts to provide dental and/or vision benefits.

*Child* means one of the following:

(1)(i) A child born within marriage;

(ii) An adopted child;

(iii) A stepchild or foster child who lives with the enrollee in a regular parent-child relationship; or

(iv) A recognized natural child.

(2) This definition does not include a grandchild (unless the grandchild meets all the requirements of a foster child as stated in § 890.101(a)(8) of this chapter).

(3) The child must be unmarried and under age 22. A child age 22 or over is eligible if the child is incapable of self-support because of a physical or mental disability that existed before the child reached age 22.

*Compensation* has the same meaning as found under subchapter I of chapter 81 of title 5, United States Code, which is payable because of an on-the-job injury or disease.

*Compensationer* means an individual who is receiving compensation and who the Department of Labor determines is unable to return to duty.

*Covered position* means a position in which an employee is not excluded from FEDVIP eligibility by law or regulation.

*Days* means calendar days.

*Dependent* means an unmarried child who is living with or receiving regular and substantial support from the enrollee.

*Domestic partner* means a person in a domestic partnership with an employee or annuitant.

*Domestic partnership* means a committed relationship between two adults of the same sex, in which the partners—

(1) Are each other's sole domestic partner and intend to remain so indefinitely;

(2) Maintain a common residence, and intend to continue to do so (or would maintain a common residence but for an assignment abroad or other employment-related, financial, or similar obstacle);

(3) Are at least 18 years of age and mentally competent to consent to a contract;

(4) Share responsibility for a significant measure of each other's financial obligations;

(5) Are not married or joined in a civil union to anyone else;

(6) Are not a domestic partner of anyone else;

(7) Are not related in a way that, if they were of opposite sex, would prohibit legal marriage in the U.S. jurisdiction in which the domestic partnership was formed;

(8) Provide documentation demonstrating fulfillment of the requirements of paragraphs (1) through (7) of this definition as prescribed by OPM; and

(9) Certify that they understand that willful falsification of the documentation described in paragraph (8) of this definition may lead to disciplinary action and the recovery of the cost of benefits received related to such falsification and may constitute a criminal violation under 18 U.S.C. 1001.

(10) Certify that they would marry but for the failure of their state of residence to permit same-sex marriage.

(11) Termination of Domestic Partnership. An enrollee or his or her domestic partner must notify the employing office within thirty calendar days in the event that any of the conditions listed in paragraphs (1) through (7) of this definition are no longer met, in which case a domestic partnership will be deemed terminated.

*Employee* means an individual defined in 5 U.S.C. 8901. For the purposes of this subpart, the term employee additionally means an employee of the United States Postal Service and an employee of the District of Columbia courts.

*Enrollment reconsideration* means the Administrator's review of its initial enrollment decision to determine if it followed the law and regulations correctly in making the initial decision concerning FEDVIP eligibility.

*Family member* means a spouse (including a spouse under a valid common law marriage) and/or unmarried dependent child(ren).

*OPM* means the Office of Personnel Management.

*OWCP* means the Office of Workers' Compensation Programs, U.S. Department of Labor.

*Premium conversion* means the payment of FEDVIP premiums using pretax dollars. See § 892.102 of this chapter for a discussion of how premium conversion works.

*QLE* means a qualifying life event.

*Recognized natural child* means a biological child born outside of marriage. A recognized natural child is an eligible family member if the child lives with the enrollee or receives financial support from the enrollee.

*Regular parent-child relationship* means that the enrollee is exercising parental authority, responsibility, and control over the child; is caring for, supporting the child; and is making the decisions about the child's education and medical care.

*Stepchild* means:

(1) Except as provided in paragraph (2), the child of an enrollee's spouse or domestic partner and shall continue to refer to such child after the enrollee's divorce from the spouse, termination of the domestic partnership, or death of the spouse or domestic partner, so long as the child continues to live with the enrollee in a regular parent-child relationship.

(2) The child of an enrollee and a domestic partner who otherwise meet the requirements of paragraphs (1) through (8) of the definition of *Domestic partnership* in this section, but live in a state that has authorized marriage by same-sex couples prior to the first day of Open Season, shall not be considered a stepchild who is the child of a domestic partner in the following plan year. The determination of whether a state's marriage laws render a child ineligible for coverage as a stepchild who is the child of a domestic partner shall be made once annually, based on the law of the state where the same-sex couple lives on the last day before Open Season begins for enrollment for the following year. A child's eligibility for coverage as a stepchild who is the child of a domestic partner in a particular plan year shall not be affected by a mid-year change to a state's marriage law or by the couple's relocation to a different state. For midyear enrollment changes involving the addition of a new stepchild, as defined by this regulation, outside of Open Season, the determination of whether a state's marriage laws render the child ineligible for coverage shall be made at the time the employee notifies the employing office of his or her desire to cover the child. Coverage of children of domestic partners terminates on January 1, 2016,

unless an agency requests, and OPM grants, the agency a continued coverage exception for enrollees living overseas. Continued coverage exceptions will only be granted to children of domestic partners living overseas and all coverage exceptions will end on September 30, 2018.

*Type of enrollment* means one of the following:

(1) Self only;

(2) Self plus one; or

(3) Self and family.

[73 FR 50184, Aug. 26, 2008, as amended at 78 FR 64879, Oct. 30, 2013; 81 FR 86906, Dec. 2, 2016]

### § 894.102 If I have a pre-existing dental or vision condition, may I join FEDVIP?

Yes. Pre-existing conditions do not exclude you from coverage under FEDVIP. The *Administrator* may not deny an individual the right to enroll solely because of a preexisting dental or vision condition.

### § 894.103 How do I enroll?

You may enroll through an *Administrator* contracted by OPM to facilitate the enrollment process. Your Federal agency, retirement system, or *OWCP* office will advise you of the enrollment process available to you.

### § 894.104 Who makes enrollment decisions and reconsiderations?

The *Administrator* makes enrollment decisions and the *Administrator* reviews requests for reconsideration of an enrollment decision. The *Administrator's* initial enrollment decision denying enrollment or an opportunity to change coverage must be in writing and must inform you about your right to reconsideration.

### § 894.105 Who may correct an error in my enrollment?

(a) The *Administrator* may correct administrative errors about the processing of your enrollment or changes in enrollment.

(b) OPM may order correction of an administrative error if it receives evidence that it would be against equity (fairness) and good conscience not to order the correction. This decision is made at the discretion of OPM and is not subject to review.

(c) If the correction gives you retroactive coverage, you must pay the premiums for all periods of the retroactive coverage. These premiums will not be on a pre-tax basis (they are not subject to premium conversion).

## Subpart B—Coverage and Types of Enrollment

### § 894.201 What types of enrollments are available under FEDVIP?

FEDVIP has three *types of enrollment:*

(a) Self only, which covers only the enrolled *employee* or *annuitant;*

(b) Self plus one, which covers the enrolled *employee* or *annuitant* plus one eligible family member; and

(c) Self and family, which covers the enrolled *employee* or *annuitant* and all eligible *family members*.

### § 894.202 If I enroll for self plus one, may I decide which family member to cover?

Yes, if you enroll for self plus one, you must state at the time you enroll which eligible *family member* you want to cover under your enrollment.

### § 894.203 If I have a self plus one enrollment, when may I change which family member I want to cover or change to self only?

You may change your covered *family member* under a self plus one enrollment or change to self only coverage in the following situations:

(a) During the annual open season;

(b) If your covered *family member* dies during the year; or

(c) If your covered *family member* loses eligibility during the year.

### § 894.204 May I be enrolled in more than one dental or vision plan at a time?

You may be enrolled in a FEDVIP dental plan and a separate FEDVIP vision plan at the same time. But no one may enroll or be covered as a family member in a FEDVIP dental or vision plan if he or she is covered under another person's FEDVIP dental or vision self plus one or self and family enrollment, except as provided under § 890.302

(a)(2) through (4) of this chapter, with respect to dual enrollments.

## Subpart C—Eligibility

### § 894.301 Am I eligible to enroll in the FEDVIP?

You are eligible if—

(a) You meet the definition of *employee* in 5 U.S.C. 8901(1), unless you are in an excluded position;

(b) You are an employee of the United States Postal Service or the District of Columbia courts; or

(c)(1) You were employed by the Architect of the Capitol as a Senate Restaurants employee the day before the food services operations of the Senate Restaurants were transferred to a private business concern; and

(2) You accepted employment by the business concern and elected to continue your Federal retirement benefits and your FEDVIP coverage. You continue to be eligible for FEDVIP coverage as long as you remain employed by the business concern or its successor.

[75 FR 20514, Apr. 20, 2010]

### § 894.302 What is an excluded position?

Excluded positions are described in 5 U.S.C. 8901(1)(i), (ii), (iii), and (iv) and 5 CFR 890.102(c), except that employees of the United States Postal Service and District of Columbia courts are not excluded positions.

You are in an excluded position if you are:

(a) An *employee* of a corporation supervised by the Farm Credit Administration, if private interests elect or appoint a member of the board of directors.

(b) An *employee* who is not a citizen or national of the United States and your permanent duty station is outside the United States. *Exception:* You are eligible if you met the definition of *employee* on September 30, 1979, by service in an Executive agency, the United States Postal Service, or the Smithsonian Institution in the area that was then known as the Canal Zone.

(c) An *employee* of the Tennessee Valley Authority.

(d) An individual first employed by the Government of the District of Columbia on or after October 1, 1987, except employees of the District of Columbia Courts and those employees defined at § 890.102 (c)(8) of this chapter.

(e) Serving under an appointment limited to 1 year or less. *Exceptions:* You are eligible if:

(1) You are an acting postmaster;

(2) You are a Presidential appointee appointed to fill an unexpired term;

(3) You are an *employee* with a provisional appointment, as defined in § 316.401 and § 316.403 of this chapter; or

(4) You have completed 1 year of current continuous employment, excluding any break in service of 5 *days* or less.

(f) Expected to work fewer than six months in each year. *Exception:* you are eligible if you receive an appointment of at least one year's duration as an Intern under § 213.3402(a) of this chapter. To qualify, you must be expected to be in a pay status for at least one-third of the total period of time from the date of the first appointment to the completion of the work-study program.

(g) An intermittent *employee* (a non-full-time *employee* without a prearranged regular tour of duty).

(h) A beneficiary or patient *employee* in a Government hospital or home.

(i) Paid on a contract or fee basis. *Exception:* You are eligible if you are a United States citizen, and you are appointed by a contract between you and the Federal employing authority. To qualify, your contract must require your personal service, and you must be paid on the basis of units of time.

(j) Paid on a piecework basis. *Exception:* You are eligible if your work schedule provides for full-time or part-time service, and you have a regularly scheduled tour of duty.

(k) The following positions are not excluded positions:

(1) An employee appointed to perform ''part-time career employment,'' as defined in section 3401 (2) of title 5, U.S.C., and 5 CFR part 430, subpart B; or

(2) An employee serving under an interim appointment established under § 772.102 of this chapter.

[73 FR 50184, Aug. 26, 2008, as amended at 75 FR 20514, Apr. 20, 2010; 79 FR 532, Jan. 6, 2014; 81 FR 58382, Aug. 25, 2016]

### § 894.303 What happens to my enrollment if I transfer to an excluded position?

(a) If you have FEDVIP coverage and you transfer to a position excluded under § 894.302(a) through (d), your enrollment stops.

(b) If you have FEDVIP coverage and you transfer to a position excluded under § 894.302(e) through (j) with no break in service of more than 3 days, your enrollment is not affected. If you have a break in service of more than 3 days, your enrollment stops.

(c) If you did not elect to enroll in FEDVIP and then transfer to an excluded position, you lose all rights to enroll at that time.

### § 894.304 Am I eligible to enroll if I'm retired or receiving workers' compensation?

If you are retired, receiving workers' *compensation*, or are a survivor *annuitant*, you are eligible if you meet the definition of *annuitant* in 5 U.S.C. 8901(3).

### § 894.305 Am I eligible to enroll if I am a former spouse receiving an apportionment of annuity?

No. Former spouses receiving an apportionment of annuity are not eligible to enroll in FEDVIP.

### § 894.306 Are foster children eligible as family members?

Yes, foster children may be eligible for coverage as family members under FEDVIP.

### § 894.307 Are disabled children age 22 or over eligible as family members?

A *child* age 22 or over is an eligible family member if the *child* is incapable of self-support because of a physical or mental disability that existed before the *child* reached age 22.

### § 894.308 How do I establish the dependency of my recognized natural child?

(a) Dependency is established for a recognized natural child who lives with the enrollee in a regular parent-child relationship, a recognized natural child for whom a judicial determination of support has been obtained, or a recognized natural child to whose support the enrollee makes regular and substantial contributions.

(b) The following are examples of proof of regular and substantial support. More than one of the following proofs may be required to show support of a recognized natural child who does not live with the enrollee in a regular parent-child relationship and for whom a judicial determination of support has not been obtained:

(1) Evidence of eligibility as a dependent child for benefits under other State or Federal programs;

(2) Proof of inclusion of the child as a dependent on the enrollee's income tax returns;

(3) Canceled checks, money orders, or receipts for periodic payments from the enrollee for or on behalf of the child.

(4) Evidence of goods or services which show regular and substantial contributions of considerable value;

(5) Any other evidence which OPM shall find to be sufficient proof of support or of paternity or maternity.

[78 FR 64879, Oct. 30, 2013]

## Subpart D—Cost of Coverage

### § 894.401 How do I pay premiums?

(a) *Employees* pay premiums through payroll allotments.

(b) *Annuitants* and survivor *annuitants* pay premiums through annuity allotments.

(c) *Compensationers* pay premiums through allotments from *compensation* payments.

(d) In limited circumstances, individuals may make direct premium payments. See § 894.405.

### § 894.402 Do the premiums I pay reflect the cost of providing benefits?

The premiums you pay shall reasonably and equitably reflect the cost of the benefits provided.

### § 894.403 Are FEDVIP premiums paid on a pre-tax basis?

(a) Your FEDVIP premiums are paid on a pre-tax basis (called premium conversion) if you are an active *employee*, your salary is sufficient to make the premium allotments, and your agency is able to make pre-tax allotments. However, if your enrollment covers a

stepchild who is the child of a domestic partner as defined in § 894.101, and that stepchild does not qualify for favorable tax treatment under applicable tax laws, the allotted amount of premium that represents the fair market value of the FEDVIP coverage provided to the stepchild will be separately imputed to the employee as income and subject to applicable taxes.

(b) Your FEDVIP premiums are *not* paid on a pre-tax basis if:

(1) You are an *employee* in nonpay status or an *employee* whose salary is not high enough to make premium allotments, or your agency is unable to make pre-tax allotments;

(2) You are an *annuitant*, a survivor *annuitant*, or a *compensationer*;

(3) Your enrollment change was made effective retroactively which resulted in additional premium withholdings, unless it is as a result of birth or adoption of a *child*.

(4) You have been approved to pay premiums directly to the *Administrator*.

[73 FR 50184, Aug. 26, 2008, as amended at 78 FR 64879, Oct. 30, 2013]

### § 894.404 May I opt out of premium conversion?

No, all enrolled employees whose salary is sufficient to make premium allotments and whose agency is able to make pre-tax allotments must participate in premium conversion.

### § 894.405 What happens if I go into nonpay status or if my pay/annuity is insufficient to cover the allotments?

(a) If your pay, *annuity*, or *compensation* is too low to cover the premium allotments, or if you go into a nonpay status, contact the *Administrator* to arrange to pay your premiums directly to the Administrator.

(b) If you do not make the premium payments, your FEDVIP coverage will stop. You will not be able to reenroll until the next open season after:

(1) You are in pay status; or

(2) Your pay is sufficient to make the premium allotments.

## Subpart E—Enrollment and Changing Enrollment

### § 894.501 When may I enroll?

You may enroll:

(a) During the annual open season;

(b) Within 60 *days* after you first become eligible as:

(1) A new *employee*;

(2) A previously ineligible *employee* who transfers to a covered position; or

(3) A new survivor *annuitant*, if not already covered under FEDVIP.

(c) Within 60 days of when you return to service following a break in service of at least 30 days;

(d) From 31 days before you or an eligible family member loses other dental/vision coverage to 60 days after a QLE that allows you to enroll;

(e) From 31 days before you get married to 60 days after; or

(f) Within 60 days after returning to Federal employment after being on leave without pay if you did not have Federal dental or vision coverage prior to going on leave without pay, or your coverage was terminated or canceled during your period of leave without pay.

[73 FR 50184, Aug. 26, 2008, as amended at 75 FR 20514, Apr. 20, 2010; 79 FR 41405, July 16, 2014]

### § 894.502 What are the Qualifying Life Events (QLEs) that allow me to enroll?

(a) You or an eligible *family member* lose other dental/vision coverage;

(b) Your annuity or compensation is restored after having been terminated;

(c) You return to pay status after being on leave without pay due to deployment to active military duty;

(d) You get married; or

(e) You return to Federal employment after being on leave without pay if you did not have Federal dental or vision coverage prior to going on leave without pay, or your coverage was terminated or canceled during your period of leave without pay.

[73 FR 50184, Aug. 26, 2008, as amended at 79 FR 41405, July 16, 2014]

### § 894.503 Are belated enrollments or changes allowed?

(a) The time limit for enrolling or changing your enrollment may be extended up to 3 months after the date you became newly eligible or had a *QLE* or after the end of an open season. To qualify, you must demonstrate to the *Administrator* that you were not able to enroll or change your enrollment on time for reasons beyond your control.

(b) If the *Administrator* allows you to make a belated enrollment or enrollment change, you must enroll or change within 30 *days* after the *Administrator* notifies you of its determination.

### § 894.504 When is my enrollment effective?

(a) Open season enrollments are effective on the date set by OPM.

(b) If you enroll when you first become eligible your enrollment is effective the 1st *day* of the pay period following the one in which the *Administrator* receives your enrollment, but no earlier than December 31, 2006.

(c)(1) A belated open season enrollment is effective retroactive to the date it would have been effective if you had made a timely enrollment or request for a change.

(2) Any other belated enrollment or change is effective retroactive to the 1st *day* of the pay period following the one in which you became newly eligible or the date of your *QLE*.

(3) You are responsible for any retroactive premiums due to a belated enrollment or request for a change.

### § 894.505 Are retroactive premiums paid with pre-tax dollars (premium conversion)?

Retroactive premiums are not paid under premium conversion, except when you are changing your enrollment retroactively as a result of birth or adoption of a *child*. Any additional withholdings for retroactive premiums that are due must be made with after-tax dollars. The *Administrator* will bill you directly for any retroactive premiums that must be paid with after-tax dollars.

### § 894.506 How often will there be open seasons?

There will be an annual open season for FEDVIP at the same time as the annual Federal Benefits Open Season.

### § 894.507 After I'm enrolled, may I change from one dental or vision plan or plan option to another?

(a) You may change from one dental and/or vision plan to another plan or one plan option to another option in that same plan during the annual open season, when you get married, or when you return to Federal employment after being on leave without pay if you did not have Federal dental or vision coverage prior to going on leave without pay, or your coverage was terminated or canceled during your period of leave without pay.

(b)(1) If you are enrolled in a dental or vision plan with a geographically restricted service area, and you or a covered eligible *family member* move out of the service area, you may change to a different dental or vision plan that serves that area.

(2) You may make this change at any time before or after the move, once you or a covered eligible *family member* has a new address.

(3) The enrollment change is effective the first day of the pay period following the pay period in which you make the change.

(4) You may not change your *type of enrollment* unless you also have a *QLE* that allows you to change your *type of enrollment*.

[73 FR 50184, Aug. 26, 2008, as amended at 79 FR 41406, July 16, 2014]

### § 894.508 When may I increase my type of enrollment?

(a) You may increase your *type of enrollment:*

(1) during the annual open season; or

(2) If you have a *QLE* that is consistent with increasing your *type of enrollment*.

(b) Increasing your *type of enrollment* means going from:

(1) Self only to self plus one;

(2) Self only to self and family; or

(3) Self plus one to self and family.

(c) You may increase your *type of enrollment* during the time period beginning 31 *days* before the *QLE* and ending 60 *days* after the *QLE*.

(d) Your new *type of enrollment* is effective the 1st *day* of the pay period following the pay period in which you make the change.

(e) You may not change from one dental or vision plan to another, except as stated in § 894.507.

[73 FR 50184, Aug. 26, 2008, as amended at 79 FR 41406, July 16, 2014]

### § 894.509 What are the QLEs that are consistent with increasing my type of enrollment?

(a) Marriage;

(b) *Acquiring an eligible child*; or

(c) Loss of other dental or vision coverage by an eligible *family member*.

### § 894.510 When may I decrease my type of enrollment?

(a) You may decrease your type of enrollment

(1) During the annual open season; or

(2) If you have a *QLE* that is consistent with decreasing your *type of enrollment*,

(b) Decreasing your *type of enrollment* means going from:

(1) Self and family to self plus one;

(2) Self and family to self only; or

(3) Self plus one to self only.

(c)(1) Except as provided in paragraph (c)(2) of this section, you may decrease your type of enrollment only during the period beginning 31 days before your QLE and ending 60 days after your QLE.

(2) You may make any of the following enrollment changes at any time beginning 31 days before a QLE listed in § 894.511(a):

(i) A decrease in your self plus one enrollment;

(ii) A decrease in your self and family enrollment to a self plus one enrollment, when you have only one remaining eligible family member; or

(iii) A decrease in your self and family enrollment to a self only enrollment, when you have no remaining eligible family members.

(d)(1) Except as provided in paragraph (d)(2) of this section, your change in enrollment is effective the first day of the first pay period following the one in which you make the change.

(2) If you are making an enrollment change described in paragraph (c)(2) of this section, your change in enrollment is effective on the first day of the first pay period following the QLE on which the enrollment change is based.

(e) You may not change from one dental or vision plan or option to another, except as stated in § 894.507(b).

[73 FR 50184, Aug. 26, 2008, as amended at 75 FR 20514, Apr. 20, 2010]

### § 894.511 What are the QLEs that are consistent with decreasing my type of enrollment?

(a) Loss of an eligible *family member* due to:

(1) Divorce;

(2) Death; or

(3) Loss of eligibility of a previously enrolled *child*.

(b) Your spouse deploys to active military service.

### § 894.512 What happens if I leave Federal Government and then return?

(a) Your FEDVIP coverage terminates at the end of the pay period in which you separate from government service. *Exception:* If you separate for retirement or while in receipt of workers' *compensation* as defined in § 894.701, your FEDVIP coverage continues.

(b)(1) If you return to Federal service after a break in service of fewer than 30 *days*, and you were not previously enrolled in FEDVIP, you may not enroll until the next open season or unless you have a *QLE* that allows you to enroll.

(2) If you return to Federal service after a break in service of fewer than 30 *days*, and you were previously enrolled in FEDVIP, you may reenroll in the same plan(s) and plan option and with the same *type of enrollment* you had before you separated. *Exceptions:*

(i) If you were enrolled in a dental or vision plan with a restricted geographic service area, and you have since moved out of the plan's service area, you may change to a different dental or vision plan that serves that area.

(ii) If you have since gained or lost an eligible *family member*, you may

change your *type of enrollment* consistent with the change in the number of eligible *family members*.

(3) If you return to Federal service as a new hire after a break in service of 30 *days* or more, you may enroll if you were not previously enrolled, change your dental or vision plan, and/or change your *type of enrollment*.

## Subpart F—Termination or Cancellation of Coverage

### § 894.601 When does my FEDVIP coverage stop?

(a) If you no longer meet the definition of an eligible *employee* or *annuitant*, your FEDVIP coverage stops at the end of the pay period in which you were last eligible.

(b) If you go into a period of nonpay or insufficient pay, and you do not make direct premium payments, your FEDVIP coverage stops at the end of the pay period for which your agency, retirement system, or *OWCP* last made a premium allotment from your pay.

(c) If you are making direct premium payments, and you stop making the payments, your FEDVIP coverage stops at the end of the pay period for which you last made a payment.

(d) If you cancel your enrollment during an open season, your FEDVIP coverage stops at midnight of the *day* before the effective date of an open season change as set by OPM.

(e) If you are enrolled with a combination dental and vision *carrier* with a restricted service area, and you move outside the *carrier's* service area to a service area that does not offer a combination *carrier* and you change to a dental only or vision only *carrier*, your existing combination plan coverage will stop at midnight of the *day* before the effective date of your new plan coverage.

(f) If your FEDVIP carrier discontinues participation in the program at the end of the contract year, then you must change to another *carrier* during the open season, unless OPM establishes a different time. If the discontinuance is at a time other than the end of the contract year, OPM will establish a time and effective date for you to change your carrier. If you do not change your carrier within the time set by OPM, your coverage will stop at midnight of the *day* before the effective date set by OPM for coverage with another *carrier*.

### § 894.602 May I cancel my enrollment at any time?

No. You may only cancel your enrollment during an open season. *Exceptions:* You may cancel your dental and/or vision enrollment if you transfer to an eligible position with a Federal agency that provides dental and/or vision coverage with 50 percent or more employer-paid premiums. You may also cancel upon your deployment or your spouse's deployment to active military duty. These cancellations will become effective at the end of the pay period that you submit your request.

### § 894.603 Is there an extension of coverage and right to convert when my coverage stops or when a covered family member loses eligibility?

No. There is no extension of coverage or right to convert to an individual policy or Temporary Continuation of Coverage (TCC) when your FEDVIP coverage stops or when a *family member* loses eligibility under the Program.

## Subpart G—Annuitants and Compensationers

### § 894.701 May I keep my dental and/or vision coverage when I retire or start receiving workers' compensation?

(a) Your FEDVIP coverage continues if you retire on an immediate annuity or on a disability annuity, or start receiving *compensation* from OWCP.

(b) If you retire on a Minimum Retirement Age +10 annuity that you elect to postpone in accordance with 5 U.S.C. 8412(g), your FEDVIP coverage will stop when you separate from service. However, you may enroll again within 60 *days* of when your annuity starts.

(c) If you retire on a deferred annuity in accordance with 5 U.S.C. 8413, your FEDVIP coverage stops and you are not eligible to enroll.

### § 894.702 May I participate in open season and make changes to my enrollment as an annuitant or compensationer?

Yes. *Annuitants* and *compensationers* may participate in open season and make enrollment changes under the same circumstances as active *employees*.

### § 894.703 How long does my coverage as an annuitant or compensationer last?

Your coverage as an *annuitant* or *compensationer* continues as long as you continue receiving an annuity or *compensation* and pay your premiums, unless you cancel your coverage during an open season or terminate coverage due to insufficient annuity or *compensation*.

### § 894.704 What happens if I retire and then come back to work for the Federal Government?

(a) If you have FEDVIP coverage as an *annuitant*, and you become reemployed in an eligible position in Federal service, you must contact the *Administrator* so it can send the request for allotments to your agency so your agency can start making the allotments from your pay.

(b) If you did not enroll in FEDVIP coverage as an *annuitant* and become reemployed in an eligible Federal position, you have 60 *days* to enroll in FEDVIP.

(c) If you enroll as an employee the *Administrator* will stop sending requests for allotments from your annuity.

(d) If your reemployment terminates, you must notify the *Administrator* within 30 days to have your allotments withheld from your annuity payments. Otherwise, your FEDVIP coverage will terminate due to non-payment of premiums.

## Subpart H—Benefits in Underserved Areas

### § 894.801 Will benefits be available in underserved areas?

(a) Dental and vision plans under FEDVIP will include underserved areas in their service areas and provide benefits to enrollees in underserved areas.

(b) In any area where a FEDVIP dental or vision plan does not meet OPM access standards, including underserved areas, enrollees may receive services from non-network providers.

(c) Contracts under FEDVIP shall include access standards as defined by OPM and payment levels for services to non-network providers in areas that do not meet access standards.

# PART 900—INTERGOVERNMENTAL PERSONNEL ACT PROGRAMS

## Subparts A–C [Reserved]

## Subpart D—Nondiscrimination in Federally Assisted Programs in the Office of Personnel Management—Effectuation of Title VI of the Civil Rights Act of 1964

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## Subpart E [Reserved]

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**Subpart G—Nondiscrimination on the Basis of Handicap in Federally Assisted Programs of the Office of Personnel Management**

900.701 Purpose.
900.702 Applicability.
900.703 Definitions.
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900.705 Program accessibility.
900.706 Employment practices.
900.707 Certification required.
900.708 Self-evaluation.
900.709 Notice and consultation.
900.710 Procedure for effecting compliance.

AUTHORITY: Sec. 503, Pub. L. 91–648, 84 Stat. 1926 (42 U.S.C. 4763), unless otherwise noted.

SOURCE: 36 FR 15515, Aug. 17, 1971, unless otherwise noted.

## Subparts A–C [Reserved]

## Subpart D—Nondiscrimination in Federally Assisted Programs in the Office of Personnel Management—Effectuation of Title VI of the Civil Rights Act of 1964

AUTHORITY: Sec. 602, 78 Stat. 252 (42 U.S.C. 2000d–1).

SOURCE: 38 FR 17920, July 5, 1973, unless otherwise noted.

### § 900.401 Purpose.

The purpose of this subpart is to effectuate the provisions of title VI of the Civil Rights Act of 1964 (hereafter referred to as title VI) to the end that a person in the United States shall not, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under a program or activity receiving Federal financial assistance from OPM.

### § 900.402 Application of this subpart.

(a) This subpart applies to each program for which Federal financial assistance is authorized under a law administered by OPM, including the federally assisted programs listed in appendix A to this subpart. It also applies to money paid, property transferred, or other Federal financial assistance extended under a program after the effective date of this subpart pursuant to an application approved before that effective date. This subpart does not apply to:

(1) Federal financial assistance by way of insurance or guaranty contracts;

(2) Money paid, property transferred, or other assistance extended under a program before the effective date of this subpart, except when the assistance was subject to the title VI regulations of an agency whose responsibilities are now exercised by OPM;

(3) Assistance to any individual who is the ultimate beneficiary under a program; or

(4) Employment practices, under a program, of an employer, employment agency, or labor organization, except to the extent described in § 900.404(c).

The fact that a program is not listed in appendix A to this subpart does not mean, if title VI is otherwise applicable, that the program is not covered. Other programs under statutes now in force or hereinafter enacted may be added to appendix A to this subpart.

(b) In a program receiving Federal financial assistance in the form, or for the acquisition, of real property or an interest in real property, to the extent that rights to space on, over, or under that property are included as part of the program receiving that assistance, the nondiscrimination requirement of this subpart extends to a facility located wholly or in part in that space.

### § 900.403 Definitions.

Unless the context requires otherwise, in this subpart:

(a) *Applicant* means a person who submits an application, request, or plan required to be approved by OPM, or by a primary recipient, as a condition to eligibility for Federal financial assistance, and *application* means that application, request, or plan.

(b) *Facility* includes all or any part of structures, equipment, or other real or personal property or interests therein, and the provision of facilities includes the construction, expansion, renovation, remodeling, alteration, or acquisition of facilities.

(c) *Federal financial assistance* includes:

(1) Grants and loans of Federal funds;

(2) The grant or donation of Federal property and interests in property;

(3) The detail of Federal personnel;

(4) The sale and lease of, and the permission to use (on other than a casual or transient basis), Federal property or any interest in the property without consideration or at a nominal consideration, or at a consideration which is reduced for the purpose of assisting the recipient, or in recognition of the public interest to be served by the sale or lease to the recipient; and

(5) A Federal agreement, arrangement, or other contract which has as one of its purposes the provision of assistance.

(d) *Primary recipient* means a recipient that is authorized or required to extend Federal financial assistance to another recipient for the purpose of carrying out a program.

(e) *Program* includes a program, project, or activity for the provision of services, financial aid, or other benefits to individuals (including education or training or other services whether provided through employees of the recipient of Federal financial assistance or provided by others through contracts or other arrangements with the recipient, and including work opportunities), or for the provision of facilities for furnishing services, financial aid, or other benefits to individuals. The services, financial aid, or other benefits provided under a program receiving Federal financial assistance are deemed to include a service, financial aid, or other benefits provided with the aid of Federal financial assistance or with the aid of any non-Federal funds, property, or other resources required to be expended or made available for the program to meet the matching requirements or other conditions which must be met in order to receive the Federal financial assistance, and to include services, financial aid, or other benefits provided in or through a facility provided with the aid of Federal financial assistance or non-Federal resources.

(f) *Recipient* may mean any State, the District of Columbia, the Commonwealth of Puerto Rico, a territory or possession of the United States, or any political subdivision thereof, or instrumentality thereof, any public or private agency, institution, or organization, or other entity, or any individual in any State, the District of Columbia, the Commonwealth of Puerto Rico, or territory or possession of the United States, to whom Federal financial assistance is extended, directly or through another recipient, for any program, including any successor, assignee, or transferee thereof, but the term does not include any ultimate beneficiary under a program.

(g) *Director* means the Director of the Office of Personnel Management, or any person to whom he has delegated his authority in the matter concerned.

### § 900.404 Discrimination prohibited.

(a) *General*. A person in the United States shall not, on the ground of race, color, or national origin be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under, a program to which this subpart applies.

(b) *Specific discriminatory actions prohibited*. (1) A recipient under a program to which this subpart applies may not, directly or through contractual or other arrangements, on the ground of race, color, or national origin—

(i) Deny a person a service, financial aid, or other benefit provided under the program;

(ii) Provide a service, financial aid, or other benefit to a person which is different, or is provided in a different manner, from that provided to others under the program;

(iii) Subject a person to segregation or separate treatment in any matter related to his receipt of a service, financial aid, or other benefit under the program;

(iv) Restrict a person in any way in the enjoyment of an advantage or privilege enjoyed by others receiving a service, financial aid, or other benefit under the program;

(v) Treat a person differently from others in determining whether he satisfies an admission, enrollment, quota, eligibility, membership, or other requirement or condition which persons must meet in order to be provided a

service, financial aid, or other benefit provided under the program; or

(vi) Deny a person an opportunity to participate in the program through the provision of services or otherwise or afford him an opportunity to do so which is different from that afforded others under the program.

(2) A recipient, in determining the types of services, financial aid, or other benefits, or facilities which will be provided under a program or the class of persons to whom, or the situations in which, the services, financial aid, other benefits, or facilities will be provided under a program, or the class of persons to be afforded an opportunity to participate in a program, may not, directly or through contractual or other arrangements, utilize criteria or methods of administration which have the effect of subjecting persons to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program with respect to individuals of a particular race, color, or national origin.

(3) As used in this section, the services, financial aid, or other benefits provided under a program receiving Federal financial assistance include a service, financial aid, or other benefit provided in or through a facility provided with the aid of Federal financial assistance.

(4) The enumeration of specific forms of prohibited discrimination in this paragraph does not limit the generality of the prohibition in paragraph (a) of this section.

(5) Examples demonstrating the application of the provisions of this section to certain programs receiving Federal financial assistance from OPM are contained in appendix C of this subpart.

(6) (i) In administering a program regarding which the recipient had previously discriminated against persons on the ground of race, color, or national origin, the recipient shall take affirmative action to overcome the effects of prior discrimination.

(ii) Even in the absence of prior discrimination a recipient in administering a program shall take affirmative action as required by OPM to overcome the effect of conditions which resulted in limiting participation by persons of a particular race, color, or national origin.

(iii) Any affirmative action under this paragraph shall be consistent with the principles stated in the Intergovernmental Personnel Act of 1970, 84 Stat. 1909.

(c) *Employment practices.* (1) When a primary objective of a program of Federal financial assistance to which this subpart applies is to provide employment, a recipient or other party subject to this subpart shall not, directly or through contractual or other arrangements, subject a person to discrimination on the ground of race, color, or national origin in its employment practices under the program (including recruitment or recruitment advertising, hiring, firing, upgrading, promotion, demotion, transfer, layoff, termination, rates of pay, or other forms of compensation or benefits, selection for training or apprenticeship, use of facilities, and treatment of employees). A recipient shall take affirmative action to insure that applicants are employed, and employees are treated during employment, without regard to race, color, or national origin. The requirements applicable to construction employment under a program are those specified in or pursuant to Part III of Executive Order 11246 or any Executive order which supersedes it.

(2) Federal financial assistance to programs under laws funded or administered by OPM which have as a primary objective the providing of employment include those set forth in appendix B to this subpart.

(3) In regard to Federal financial assistance which does not have providing employment as a primary objective, the provisions of paragraph (c)(1) of this section apply to the employment practices of the recipient if discrimination on the ground of race, color, or national origin in the employment practices tends, on the ground of race, color, or national origin, to exclude persons from participation in, to deny them the benefits of, or to subject them to discrimination under, the program receiving Federal financial assistance. The provisions of paragraph (c)(1) of this section apply to the extent

necessary to assure equality of opportunity to and nondiscriminatory treatment of beneficiaries.

(d) In determining the site or location of facilities, a recipient or applicant may not make selections with the purpose or effect of excluding individuals from, denying them the benefits of, or subjecting them to discrimination under, a program to which this subpart applies, on the ground of race, color, or national origin; or with the purpose or effect of defeating or substantially impairing the accomplishments of the objectives of title VI or this subpart.

**§ 900.405 Assurances required.**

(a) *General.* (1) An application for Federal financial assistance to carry out a program to which this subpart applies, except a program to which paragraph (d) of this section applies, and every application for Federal financial assistance to provide a facility shall, as a condition to its approval and the extension of Federal financial assistance pursuant to the application, contain or be accompanied by, assurances that the program will be conducted or the facility operated in compliance with the requirements imposed by or pursuant to this subpart. Every program of Federal financial assistance shall require the submission of these assurances. In the case where the Federal financial assistance is to provide or is in the form of personal property, or real property or interest therein or structures thereon, the assurances shall obligate the recipient, or, in the case of a subsequent transfer, the transferee, for the period during which the property is used for a purpose for which the Federal financial assistance is extended or for another purpose involving the provision of similar services or benefits, or for as long as the recipient retains ownership or possession of the property, whichever is longer. In other cases, the assurances obligate the recipient for the period during which the Federal financial assistance is extended to the program. In the case where the assistance is sought for the construction of a facility or part of a facility, the assurances shall extend to the entire facility and to the facilities operated in connection therewith. OPM shall specify the form of the foregoing assurances for each program, and the extent to which like assurances will be required of subgrantees, contractors and subcontractors, transferees, successors in interest, and other participants in the program. The assurances shall include provisions which give the United States the right to seek judicial enforcement.

(2) When Federal financial assistance is provided in the form of a transfer of real property, structures, or improvements thereon, or interest therein, from the Federal Government, the instrument effecting or recording the transfer shall contain a covenant running with the land assuring nondiscrimination for the period during which the real property is used for a purpose for which the Federal financial assistance is extended or for another purpose involving the provision of similar services or benefits. When no transfer of property or interest therein from the Federal Government is involved, but property is acquired or improved under a program of Federal financial assistance, the recipient shall agree to include a covenant in any subsequent transfer of the property. When the property is obtained from the Federal Government, the covenant may also include a condition coupled with a right to be reserved by OPM to revert title to the property in the event of a breach of the covenant where, in the discretion of OPM, such a condition and right of reverter is appropriate to the program under which the real property is obtained and to the nature of the grant and the grantee. In the event a transferee of real property proposes to mortgage or otherwise encumber the real property as security for financing construction of new, or improvement of existing, facilities on property for the purposes for which the property was transferred, OPM may agree, on request of the transferee and if necessary to accomplish the financing, and on conditions as he deems appropriate, to subordinate a right of reversion to the lien of a mortgage or other encumbrance.

(b) *Assurances from government agencies.* In the case of an application from a department, agency, or office of a State or local government for Federal

financial assistance for a specified purpose, the assurance required by this section shall extend to any other department, agency, or office of the same governmental unit if the policies of the other department, agency, or office will substantially affect the project for which Federal financial assistance is requested. That requirement may be waived by the responsible OPM official if the applicant establishes, to the satisfaction of the responsible OPM official, that the practices in other agencies or parts or programs of the governmental unit will in no way affect (1) its practices in the program for which Federal financial assistance is sought, or (2) the beneficiaries of or participants in or persons affected by the program, or (3) full compliance with this subpart as respects the program.

(c) *Assurance from academic and other institutions.* (1) In the case of an application for Federal financial assistance by an academic institution, the assurance required by this section extends to admission practices and to all other practices relating to the treatment of students.

(2) The assurance required by an academic institution, detention or correctional facility, or any other institution or facility, relating to the institution's practices with respect to admission or other treatment of individuals as students, patients, wards, inmates, persons subject to control, or clients of the institution or facility or to the opportunity to participate in the provision of services, disposition, treatment, or benefits to these individuals, is applicable to the entire institution or facility unless the applicant establishes, to the satisfaction of the responsible OPM official, that the practices in designated parts or programs of the institution or facility will in no way affect its practices in the program of the institution or facility for which Federal financial assistance is sought, or the beneficiaries of or participants in the program. If the assistance sought is for the construction of a facility or part of a facility, the assurance shall extend to the entire facility and to facilities operated in connection therewith.

(d) *Continuing State programs.* Every application by a State or a State agency to carry out a program involving continuing Federal financial assistance to which this subpart applies (including the programs listed in appendix A to this subpart) shall as a condition to its approval and the extension of Federal financial assistance pursuant to the application (1) contain or be accompanied by a statement that the program is (or, in the case of a new program, will be) conducted in compliance with the requirements imposed by or pursuant to this subpart, and (2) provide or be accompanied by provision for methods of administration for the program as are found by OPM to give reasonable guarantee that the applicant and all recipients of Federal financial assistance under the program will comply with the requirements imposed by or pursuant to this subpart.

### § 900.406 Compliance information.

(a) *Cooperation and assistance.* OPM, to the fullest extent practicable, shall seek the cooperation of recipients in obtaining compliance with this subpart and shall provide assistance and guidance to recipients to help them comply voluntarily with this subpart.

(b) *Compliance reports.* Each recipient shall keep records and submit to OPM timely, complete, and accurate compliance reports at the times, and in the form and containing the information OPM may determine necessary to enable it to ascertain whether the recipient has complied or is complying with this subpart. In the case of a program under which a primary recipient extends Federal financial assistance to other recipients, the other recipients shall also submit compliance reports to the primary recipient as may be necessary to enable the primary recipient to carry out its obligations under this subpart.

(c) *Access to sources of information.* Each recipient shall permit access by OPM during normal business hours to its books, records, accounts, and other sources of information, and its facilities as may be pertinent to ascertain compliance with this subpart. When information required of a recipient is in the exclusive possession of another agency, institution, or person and this agency, institution, or person fails or refuses to furnish this information, the recipient shall so certify in its report

and shall set forth what efforts it has made to obtain the information.

(d) *Information to beneficiaries and participants.* Each recipient shall make available to participants, beneficiaries, and other interested persons the information regarding the provisions of this subpart and its applicability to the program under which the recipient received Federal financial assistance, and make this information available to them in the manner, as OPM finds necessary, to apprise the persons of the protections against discrimination assured them by title VI and this subpart.

**§ 900.407 Conduct of investigations.**

(a) *Periodic compliance reviews.* OPM may from time to time review the practices of recipients to determine whether they are complying with this subpart.

(b) *Complaints.* Any person who believes himself or any specific class of persons to be subjected to discrimination prohibited by this subpart may by himself or by a representative file with the Director, Office of Personnel Management a written complaint. A complaint shall be filed not later than 90 days after the date of the alleged discrimination, unless the time for filing is extended by OPM.

(c) *Investigations.* OPM will make a prompt investigation whenever a compliance review, report, complaint, or other information indicates a possible failure to comply with this subpart. The investigation will include, when appropriate, a review of the pertinent practices and policies of the recipient, the circumstances under which the possible noncompliance with this subpart occurred, and other factors relevant to a determination as to whether the recipient has failed to comply with this subpart.

(d) *Resolution of matters.* (1) If an investigation pursuant to paragraph (c) of this section indicates a failure to comply with this subpart, OPM will so inform the recipient and the matter will be resolved by voluntary means whenever possible. If it has been determined that the matter cannot be resolved by voluntary means, action will be taken as provided for in § 900.408.

(2) If an investigation does not warrant action pursuant to paragraph (d)(1) of this section, OPM will so inform, in writing, the recipient and the complainant, if any.

(e) *Intimidatory or retaliatory acts prohibited.* A recipient or other person shall not intimidate, threaten, coerce, or discriminate against an individual for the purpose of interfering with a right or privilege secured by section 601 of title VI or this subpart, or because he has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subpart. The identity of complainants shall be kept confidential; except to the extent necessary to carry out the purposes of this subpart, including the conduct of an investigation, hearing, or judicial proceeding arising thereunder.

**§ 900.408 Procedure for effecting compliance.**

(a) *General.* (1) If there appears to be a failure or threatened failure to comply with this subpart, and if the noncompliance or threatened noncompliance cannot be corrected by informal means, compliance with this subpart may be effected by the suspension or termination of or refusal to grant or to continue Federal financial assistance or by other means authorized by law.

(2) Other means may include, but are not limited to, (i) a reference to the Department of Justice with a recommendation that appropriate proceedings be brought to enforce the rights of the United States under a law of the United States (including other titles of the Civil Rights Act of 1964), or an assurance or other contractual undertaking, and (ii) an applicable proceeding under State or local law.

(b) *Noncompliance with § 900.405.* If an applicant fails or refuses to furnish an assurance required under § 900.405 or otherwise fails or refuses to comply with a requirement imposed by or pursuant to that section, Federal financial assistance may be refused in accordance with the procedures of paragraph (c) of this section. OPM shall not be required to provide assistance in that case during the pendency of the administrative proceedings under this paragraph. Subject, however, to § 900.412,

OPM shall continue assistance during the pendency of the proceedings where the assistance is due and payable pursuant to an application approved prior to the effective date of this subpart.

(c) *Termination of or refusal to grant or to continue Federal financial assistance.* An order suspending, terminating, or refusing to grant or to continue Federal financial assistance shall not become effective until—

(1) OPM has advised the applicant or recipient of his failure to comply and has determined that compliance cannot be secured by informal voluntary means;

(2) There has been an express finding on the record, after opportunity for hearing, of a failure by the applicant or recipient to comply with a requirement imposed by or pursuant to this subpart;

(3) The action has been approved by the Office of Personnel Management pursuant to § 900.410(e); and

(4) The expiration of 30 days after the Director, Office of Personnel Management has filed with the committee of the House and the committee of the Senate having legislative jurisdiction over the program involved, a full written report of the circumstances and the grounds for the action.

An action to suspend or terminate or refuse to grant or to continue Federal financial assistance shall be limited to the particular political entity, or part thereof, or other applicant or recipient as to whom a finding has been made and shall be limited in its effect to the particular program, or part thereof, in which the noncompliance has been so found.

(d) *Other means authorized by law.* An action to effect compliance with title VI by other means authorized by law shall not be taken by OPM until—

(1) OPM has determined that compliance cannot be secured by voluntary means;

(2) The recipient or other person has been notified of its failure to comply and of the action to be taken to effect compliance; and

(3) The expiration of at least 10 days from the mailing of a notice to the recipient or person. During this period of at least 10 days, additional efforts shall be made to persuade the recipient or other person to comply with the regulation and to take corrective action as may be appropriate.

**§ 900.409 Hearings.**

(a) *Opportunity for hearing.* When an opportunity for a hearing is required by § 900.408(c), reasonable notice shall be given by registered or certified mail, return receipt requested, to the affected applicant or recipient. This notice shall advise the applicant or recipient of the action proposed to be taken, the specific provision under which the proposed action against it is to be taken, and the matters of fact or law asserted as the basis for this action, and either (1) fix a date not less than 20 days after the date of notice within which the applicant or recipient may request of OPM that the matter be scheduled for hearing or (2) advise the applicant or recipient that the matter in question has been set down for hearing at a stated time and place. The time and place so fixed shall be reasonable and subject to change for cause. The complainant, if any, shall be advised of the time and place of the hearing. An applicant or recipient may waive a hearing and submit written information and argument for the record. The failure of an applicant or recipient to request a hearing under this paragraph or to appear at a hearing for which a date has been set is deemed to be a waiver of the right to a hearing under section 602 of title VI and § 900.408(c) and consent to the making of a decision on the basis of the information as is available.

(b) *Time and place of hearing.* Hearings shall be held at the offices of OPM in Washington, DC, at a time fixed by OPM unless it determines that the convenience of the applicant or recipient or of OPM requires that another place be selected. Hearings shall be held before the Director of Office of Personnel Management, or at his/her discretion, before a hearing examiner appointed in accordance with section 3105 of title 5, United States Code, or detailed under section 3344 of title 5, United States Code.

(c) *Right to counsel.* In all proceedings under this section, the applicant or recipient and OPM have the right to be represented by counsel.

(d) *Procedures, evidence, and record.* (1) The hearing, decision, and an administrative review thereof shall be conducted in conformity with sections 554 through 557 of title 5, United States Code, and in accordance with the rules of procedure as are proper (and not inconsistent with this section) relating to the conduct of the hearing, giving of notices subsequent to those provided for in paragraph (a) of this section, taking of testimony, exhibits, arguments and briefs, requests for findings, and other related matters. Both OPM and the applicant or recipient are entitled to introduce relevant evidence on the issues as stated in the notice for hearing or as determined by the officer conducting the hearing at the outset of or during the hearing.

(2) Technical rules of evidence do not apply to hearings conducted pursuant to this subpart, but rules or principles designed to assure production of the most credible evidence available and to subject testimony to test by cross-examination shall be applied where determined reasonably necessary by the officer conducting the hearing. The hearing officer may exclude irrelevant, immaterial, or unduly repetitious evidence. Documents and other evidence offered or taken for the record shall be open to examination by the parties and opportunity shall be given to refute facts and arguments advanced on either side of the issues. A transcript shall be made of the oral evidence except to the extent the substance thereof is stipulated for the record. Decisions shall be based on the hearing record and written findings shall be made.

(e) *Consolidated or joint hearings.* In cases in which the same or related facts are asserted to constitute noncompliance with this subpart with respect to two or more programs to which this subpart applies, or noncompliance with this subpart and the regulations of one or more other Federal departments or agencies issued under title VI, OPM may, by agreement with the other departments or agencies, when applicable, provide for the conduct of consolidated or joint hearings, and for the application to these hearings of rules or procedures not inconsistent with this subpart. Final decisions in these cases, insofar as this regulation is concerned, shall be made in accordance with § 900.410.

**§ 900.410 Decisions and notices.**

(a) *Procedure on decisions by hearing examiner.* If the hearing is held by a hearing examiner, the hearing examiner shall either make an initial decision, if so authorized, or certify the entire record including his recommended findings and proposed decision to the Director of Office of Personnel Management, for a final decision, and a copy of the initial decision or certification shall be mailed to the applicant or recipient. When the initial decision is made by the hearing examiner, the applicant or recipient may, within 30 days after the mailing of a notice of initial decision, file with the Director of Office of Personnel Management his exceptions to the initial decision, with his reasons therefore. In the absence of exceptions, the Director, Office of Personnel Management may, on his/her own motion, within 45 days after the initial decision, serve on the applicant or recipient a notice that he/she will review the decision. On the filing of the exceptions or of notice of review, the Director, Office of Personnel Management shall review the initial decision and issue his/her own decision thereon including the reasons therefor. In the absence of either exceptions or a notice of review the initial decision, subject to paragraph (e) of this section, shall constitute the final decision of OPM.

(b) *Decisions on record or review by the Office of Personnel Management.* When a record is certified to the Office of Personnel Management for decision or the Office of Personnel Management reviews the decision of a hearing examiner pursuant to paragraph (a) of this section, or when the Office of Personnel Management conducts the hearing, the applicant or recipient shall be given reasonable opportunity to file with it briefs or other written statements of the recipient's contentions, and a written copy of the final decision of the Office of Personnel Management will be sent to the applicant or recipient and to the complainant, if any.

(c) *Decisions on record where a hearing is waived.* When a hearing is waived pursuant to § 900.409, a decision shall be

made by the Office of Personnel Management on the record and a written copy of the decision shall be sent to the applicant or recipient, and to the complainant, if any.

(d) *Rulings required*. Each decision of a hearing examiner or the Office of Personnel Management shall set forth a ruling on each finding, conclusion, or exception presented, and shall identify the requirement or requirements imposed by or pursuant to this subpart with which it is found that the applicant or recipient has failed to comply.

(e) *Approval by OPM*. A final decision by an official of OPM other than by the Director, which provides for the suspension or termination of, or the refusal to grant or continue Federal financial assistance, or the imposition of any other sanction available under this subpart or title VI, shall promptly be transmitted to the Director, Office of Personnel Management, who may approve the decision, vacate it, or remit or mitigate a sanction imposed.

(f) *Content of orders*. The final decision may provide for suspension or termination of, or refusal to grant or continue Federal financial assistance, in whole or in part, under the program involved, and may contain the terms, conditions, and other provisions as are consistent with and will effectuate the purposes of title VI and this subpart, including provisions designed to assure that Federal financial assistance will not thereafter be extended under the programs to the applicant or recipient determined by the decision to be in default in its performance of an assurance given by it under this subpart, or to have otherwise failed to comply with this subpart, unless and until it corrects its noncompliance and satisfies OPM that it will fully comply with this subpart.

(g) *Post termination proceedings*. (1) An applicant or recipient adversely affected by an order issued under paragraph (f) of this section shall be restored to full eligibility to receive Federal financial assistance if it satisfies the terms and conditions of the order for eligibility, or if it brings itself into compliance with this subpart and provides reasonable assurance that it will fully comply with this subpart.

(2) An applicant or recipient adversely affected by an order entered pursuant to paragraph (f) of this section may at any time request the Director, Office of Personnel Management to restore fully its eligibility to receive Federal financial assistance. A request shall be supported by information showing that the applicant or recipient has met the requirements of paragraph (g)(1) of this section. If the Director, Office of Personnel Management determines that those requirements have been satisfied, he/she shall restore the eligibility.

(3) If OPM denies a request, the applicant or recipient may submit a request for hearing in writing, specifying why it believes OPM is in error. The applicant or recipient shall be given an expeditious hearing, with a decision on the record in accordance with the rules or procedures issued by OPM. The applicant or recipient shall be restored to eligibility if it proves at the hearing that it satisfied the requirements of paragraph (g)(1) of this section. While proceedings under this paragraph are pending, the sanctions imposed by the order issued under paragraph (f) of this section remain in effect.

### § 900.411 Judicial review.

Action taken pursuant to section 602 of title VI is subject to judicial review as provided in section 603 of title VI.

### § 900.412 Effect on other regulations, forms, and instructions.

(a) *Effect on other regulations*. Regulations, orders, or like directions issued before the effective date of this subpart by OPM which impose requirements designed to prohibit discrimination against individuals on the ground of race, color, or national origin under a program to which this subpart applies, and which authorizes the suspension or termination of or refusal to grant or to continue Federal financial assistance to an applicant for or recipient of assistance under a program for failure to comply with the requirements, are superseded to the extent that discrimination is prohibited by this subpart, except that nothing in this subpart relieves a person of an obligation assumed or imposed under a superseded regulation, order, instruction, or like

direction, before the effective date of this subpart. This subpart does not supersede any of the following (including future amendments thereof): (1) Executive Order 11246 (3 CFR, 1965 Supp.) and regulations issued thereunder or (2) any other orders, regulations, or instructions, insofar as these orders, regulations, or instructions prohibit discrimination on the ground of race, color, or national origin in a program or situation to which this subpart is inapplicable, or prohibit discrimination on any other ground.

(b) *Forms and instructions.* OPM shall issue and promptly make available to all interested persons forms and detailed instructions and procedures for effectuating this subpart as applied to programs to which this subpart applies, and for which it is responsible.

(c) *Supervision and coordination.* The Director, Office of Personnel Management may from time to time assign to officials of OPM, or to officials of other departments or agencies of the Government with the consent of the departments or agencies, responsibilities in connection with the effectuation of the purposes of title VI and this subpart (other than responsibilities for final decision as provided in §900.410), including the achievement of effective coordination and maximum uniformity within OPM and within the executive branch in the application of title VI and this subpart to similar programs and in similar situations. An action taken, determination made, or requirement imposed by an official of another department or agency acting pursuant to an assignment of responsibility under this paragraph shall have the same effect as though the action had been taken by OPM.

APPENDIX A TO SUBPART D OF PART 900—ACTIVITIES TO WHICH THIS SUBPART APPLIES

1. Personnel mobility assignments of OPM personnel pursuant to title 5, U.S.C. chapter 33 and 5 CFR part 334 (36 FR 6488).

[38 FR 17920, July 5, 1973, as amended at 48 FR 6311, Feb. 11, 1983]

APPENDIX B TO SUBPART D OF PART 900—ACTIVITIES TO WHICH THIS SUBPART APPLIES WHEN A PRIMARY OBJECTIVE OF THE FEDERAL ASSISTANCE IS TO PROVIDE EMPLOYMENT

1. None at this time.

APPENDIX C TO SUBPART D OF PART 900—APPLICATION OF SUBPART D, PART 900, TO PROGRAMS RECEIVING FEDERAL FINANCIAL ASSISTANCE OF THE OFFICE OF PERSONNEL MANAGEMENT

Nondiscrimination in Federally assisted programs or projects:

*Examples.* The following examples without being exhaustive illustrate the application of the nondiscrimination provisions of the Civil Rights Act of 1964 of this subpart in programs receiving financial assistance under programs of the Office of Personnel Management.

(1) Recipients of IPA financial assistance for training programs or fellowships may not differentiate between employees who are eligible for training or fellowships on the ground of race, color, or national origin.

(2) Recipients of IPA financial assistance for training programs may not provide facilities for training with the purpose or effect of separating employees on the ground of race, color, or national origin.

## Subpart E [Reserved]

## Subpart F—Standards for a Merit System of Personnel Administration

AUTHORITY: 42 U.S.C. 4728, 4763; E.O. 11589, 3 CFR part 557 (1971–75 Compilation); 5 U.S.C. 2301, 2302, E.O. 11478, 3 CFR 1966–1970 Comp., page 803, unless otherwise noted, E.O. 13087; and E.O. 13152.

SOURCE: 48 FR 9210, Mar. 4, 1983, unless otherwise noted.

### §900.601 Purpose.

(a) The purpose of these regulations is to implement provisions of title II of the Intergovernmental Personnel Act of 1970, as amended, relating to Federally required merit personnel systems in State and local agencies, in a manner that recognizes fully the rights, powers, and responsibilities of State and local governments and encourages innovation and allows for diversity among State and local governments in the design, execution, and management

of their systems of personnel administration, as provided by that Act.

(b) Certain Federal grant programs require, as a condition of eligibility, that State and local agencies that receive grants establish merit personnel systems for their personnel engaged in administration of the grant-aided program. These merit personnel systems are in some cases required by specific Federal grant statutes and in other cases are required by regulations of the Federal grantor agencies. Title II of the Act gives the U.S. Office of Personnel Management authority to prescribe standards for these Federally required merit personnel systems.

### § 900.602 Applicability.

(a) Sections 900.603–604 apply to those State and local governments that are required to operate merit personnel systems as a condition of eligibility for Federal assistance or participation in an intergovernmental program. Merit personnel systems are required for State and local personnel engaged in the administration of assistance and other intergovernmental programs, irrespective of the source of funds for their salaries, where Federal laws or regulations require the establishment and maintenance of such systems. A reasonable number of positions, however, may be exempted from merit personnel system coverage.

(b) Section 900.605 applies to Federal agencies that operate Federal assistance or intergovernmental programs.

### § 900.603 Standards for a merit system of personnel administration.

The quality of public service can be improved by the development of systems of personnel administration consistent with such merit principles as—

(a) Recruiting, selecting, and advancing employees on the basis of their relative ability, knowledge, and skills, including open consideration of qualified applicants for initial appointment.

(b) Providing equitable and adequate compensation.

(c) Training employees, as needed, to assure high quality performance.

(d) Retaining employees on the basis of the adequacy of their performance, correcting inadequate performance, and separating employees whose inadequate performance cannot be corrected.

(e) Assuring fair treatment of applicants and employees in all aspects of personnel administration without regard to race, color, religion, sex (including pregnancy and gender identity), national origin, age (as defined by the Age Discrimination in Employment Act of 1967, as amended), disability, genetic information (including family medical history), marital status, political affiliation, sexual orientation, status as parent, labor organization affiliation or nonaffiliation in accordance with chapter 71 of title V, or any other non-merit-based factor, or retaliation for exercising rights with respect to the categories enumerated above, where retaliation rights are available, and with proper regard for their privacy and constitutional rights as citizens. This ''fair treatment'' principle includes compliance with the Federal equal employment opportunity and nondiscrimination laws.

(f) Assuring that employees are protected against coercion for partisan political purposes and are prohibited from using their official authority for the purpose of interfering with or affecting the result of an election or a nomination for office.

[48 FR 9210, Mar. 4, 1983, as amended at 79 FR 43923, July 29, 2014]

### § 900.604 Compliance.

(a) *Certification by Chief Executives.* (1) Certification of agreement by a chief executive of a State or local jurisdiction to maintain a system of personnel administration in conformance with these Standards satisfies any applicable Federal merit personnel requirements of the Federal assistance or other programs to which personnel standards on a merit basis are applicable.

(2) Chief executives will maintain these certifications and make them available to the Office of Personnel Management.

(3) In the absence of certification by the chief executive, compliance with the Standards may be certified by the heads of those State and local agencies

that are required to have merit personnel systems as a condition of Federal assistance or other intergovernmental programs.

(b) *Resolution of Compliance Issues.* (1) Chief executives of State and local jurisdictions operating covered programs are responsible for supervising compliance by personnel systems in their jurisdictions with the Standards. They shall resolve all questions regarding compliance by personnel systems in their jurisdictions with the Standards. Findings and supporting documentation with regard to specific compliance issues shall be maintained by the chief executive, or a personal designee, and shall be forwarded, on request, to the Office of Personnel Management.

(2) The merit principles apply to systems of personnel administration. The Intergovernmental Personnel Act does not authorize OPM to exercise any authority, direction or control over the selection, assignment, advancement, retention, compensation, or other personnel action with respect to any individual State or local employee.

(3) When a chief executive requests the assistance of the Office of Personnel Management, the Office will provide consultation and technical advice to aid the State or local government in complying with the Standards.

(4) The Office of Personnel Management will advise Federal agencies on application of the Standards in resolving compliance issues and will recommend actions to carry out the purposes of the Intergovernmental Personnel Act. Questions regarding interpretation of the Standards will be referred to the Office of Personnel Management.

[48 FR 9210, Mar. 4, 1983; 48 FR 10801, Mar. 15, 1983, as amended at 62 FR 33971, June 24, 1997; 62 FR 53223, Oct. 14, 1997]

### § 900.605 Establishing a merit requirement.

Federal agencies may adopt regulations that require the establishment of a merit personnel system as a condition for receiving Federal assistance or otherwise participating in an intergovernmental program only with the prior approval of the Office of Personnel Management. All existing regulations will be submitted to the Office of Personnel Management for review.

## APPENDIX A TO SUBPART F OF PART 900—STANDARDS FOR A MERIT SYSTEM OF PERSONNEL ADMINISTRATION

Part I: The following programs have a statutory requirement for the establishment and maintenance of personnel standards on a merit basis.

*Program, Legislation, and Statutory Reference*

Food Stamp, Food Stamp Act of 1977, as amended; 7 U.S.C. 2020(e)(6)(B).

Employment Security (Unemployment Insurance and Employment Services), Social Security Act (Title III), as amended by the Social Security Act Amendments of 1939, Section 301, on August 10, 1939, and the Wagner-Peyser Act, as amended by Pub. L. 81–775, section 2, on September 8, 1950; 42 U.S.C. 503(a)(1) and 29 U.S.C. 49d(b).

Grants to States for Old-Age Assistance for the Aged (Title I of the Social Security Act); 42 U.S.C. 302(a)(5)(A).[1]

Aid to Families with Dependent Children, (Title IV–A of the Social Security Act); 42 U.S.C. 602(a)(5).[2]

Grants to States for Aid to the Blind, (Title X of the Social Security Act); 42 U.S.C. 1202(a)(5)(A).[1]

Grants to States for Aid to the Permanently and Totally Disabled, (Title XIV of the Social Security Act); 42 U.S.C. 1352(a)(5)(A).[1]

Grants to States for Aid to the Aged, Blind or Disabled. (Title XVI of the Social Security Act); 42 U.S.C. 1382(a)(5)(A).[1]

Medical Assistance (Medicaid), Social Security Act (Title XIX), as amended, section 1902 (a)(4)(A); 42 U.S.C. 1396(a)(4)(A).

State and Community Programs on Aging (Older Americans), Older Americans Act of 1965 (Title III), as amended by the Comprehensive Older Americans Act Amendments of 1976, section 307 on October 18, 1978; 42 U.S.C. 3027(a)(4).

Federal Payments for Foster Care and Adoption Assistance, (Title IV–E of the Social Security Act); 42 U.S.C. 671(a)(5).

Part II: The following programs have a regulatory requirement for the establishment and maintenance of personnel standards on a merit basis.

[1] Public Law 92–603 repealed Titles I, X, XIV and XVI of the Social Security Act effective January 1, 1974, except that ''such repeal does not apply to Puerto Rico, Guam, and the Virgin Islands.''

[2] Public Law 104–193 repealed the Aid to Families with Dependent Children program effective July 1, 1997.

*Program, Legislation, and Regulatory Reference*

Occupational Safety and Health Standards, Williams-Steiger Occupational Safety and Health Act of 1970; Occupational Safety and Health State Plans for the Development and Enforcement of State Standards; Department of Labor, 29 CFR 1902.3(h).

Occupational Safety and Health Statistics, Williams-Steiger Occupational Safety and Health Act of 1970; BLS Grant Application Kit, May 1, 1973, Supplemental Assurance No. 15A.

Robert T. Stafford Disaster Assistance and Emergency Relief Act (42 U.S.C. 5196b), as amended; 44 CFR 302.4.

[62 FR 33971, June 24, 1997]

## Subpart G—Nondiscrimination on the Basis of Handicap in Federally Assisted Programs of the Office of Personnel Management

AUTHORITY: 29 U.S.C. 794.

SOURCE: 45 FR 75569, Nov. 14, 1980, unless otherwise noted.

### § 900.701 Purpose.

The purpose of this part is to effectuate section 504 of the Rehabilitation Act of 1973, to eliminate discrimination on the basis of handicap in any program or activity receiving Federal financial assistance from the Office of Personnel Management (OPM).

### § 900.702 Applicability.

This subpart applies to each activity, program or project receiving Federal financial assistance from the Office of Personnel Management from the date this subpart is approved. The duration of the applicability is the period of time for which the assistance is authorized.

### § 900.703 Definitions.

Unless the content requires otherwise, in this subpart:

(a) *Recipient* means any State or its political subdivisions, any instrumentality of a State or its political subdivisions, any public or private agency, institution, organization, or other entity, or any person to which Federal financial assistance is extended directly or through another recipient, including any successor, assignee, or transferee of a recipient, but excluding the ultimate beneficiary of the assistance.

(b) *Federal financial assistance* means any grant, loan, contract, (other than a procurement contract or a contract of insurance or guaranty), or any other arrangement by which the agency provides or otherwise makes available assistance in the form of:

(1) Funds;

(2) Services of Federal personnel; or

(3) Real and personal property or any interest in or use of such property, including:

(i) Transfers or leases of such property for less than fair market value or for reduced consideration; and

(ii) Proceeds from a subsequent transfer or lease of such property if the Federal share of its fair market value is not returned to the Federal Government.

(c) *Facility* means all or any portion of buildings, structures, equipment, roads, walks, parking lots, or other real or personal property or interest in such property.

(d) *Handicapped person* means any person who has a physical or mental impairment that substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment.

(1) As used in paragraph (d) of this section, the phrase: *physical or mental impairment* means:

(i) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; and endocrine; or

(ii) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

The term *physical or mental impairment* includes, but is not limited to, such diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, drug addiction and alcoholism.

(2) *Major life activities* means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(3) *Has a record of such impairment* means has a history of, or has been misclassified as having a mental or physical impairment that substantially limits one or more major life activities.

(4) *Is regarded as having an impairment* means:

(i) Has a physical or mental impairment that does not substantially limit major life activities but is treated by a recipient as constituting such a limitation;

(ii) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or

(iii) Has none of the impairments defined in paragraph (d) of this section but is treated by a recipient as having such an impairment.

(e) Qualified handicapped person means:

(1) With respect to employment, a handicapped person who with reasonable accommodation, can perform the essential functions of the job in question.

(2) With respect to other services, a handicapped person who meets the essential eligibility requirements for the receipt of such services.

(f) Ultimate beneficiary means one among a class of persons who are entitled to benefit from or otherwise participate in, programs receiving Federal financial assistance and to whom the protections of this subpart apply.

### § 900.704 Discrimination prohibited.

(a) No qualified handicapped person shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity which receives or benefits from Federal financial assistance from the Office of Personnel Management.

(b) (1) A recipient, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of handicap:

(i) Deny a qualified handicapped person the opportunity to participate in or benefit from the aid, benefit, or service;

(ii) Afford a qualified handicapped person an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;

(iii) Provide a qualified handicapped person with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit or to reach the same level of achievement as that provided to others;

(iv) Provide different or separate aid, benefits, or services to handicapped persons or to any class of handicapped persons than is provided to others unless such action is necessary to provide qualified handicapped persons with aid, benefits, or services that are as effective as those provided to others;

(v) Aid or perpetuate discrimination against a qualified handicapped person by providing significant assistance to an agency, organization or person that discriminates on the basis of handicap in providing any aid, benefit, or service to beneficiaries of the recipient's program;

(vi) Deny a qualified person the opportunity to participate as a member of planning or advisory boards; or

(vii) Otherwise limit a qualified handicapped person in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving aid, benefit, or service.

(2) A recipient may not deny a qualified handicapped person the opportunity to participate in programs or activities that are not separate or different, despite the existence of permissibly separate or different programs or activities.

(3) A recipient may not, directly or through contractual or other arrangements, utilize criteria or methods of administration:

(i) That have the effect of subjecting qualified handicapped persons to discrimination on the basis of handicap,

(ii) That have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of

the recipient's program with respect to handicapped persons, or

(iii) That perpetuate the discrimination of another recipient if both recipients are subject to common administrative control or are agencies of the same State.

(4) A recipient may not, in determining the site or location of a facility, make selections:

(i) That have the effect of excluding handicapped persons from, denying them the benefits of, or otherwise subjecting them to discrimination under any program or activity that receives or benefits from Federal financial assistance, or

(ii) That have the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the program or activity with respect to handicapped persons.

(c) The exclusion of nonhandicapped persons from the benefits of a program limited by Federal statute or Executive order to handicapped persons or the exclusion of a specific class of handicapped persons from a program limited by Federal statute or Executive order to a different class of handicapped persons is not prohibited by this part.

(d) Recipients shall administer programs and activities in the most integrated setting appropriate to the needs of qualified handicapped persons.

(e) Recipients shall take appropriate steps to ensure that communications with their applicants, employees and beneficiaries are available to persons with impaired vision and hearing.

**§ 900.705 Program accessibility.**

(a) No qualified handicapped person shall, because a recipient's facilities are inaccessible to or unusable by handicapped persons, be denied the benefits of, be excluded from participation in or otherwise be subjected to discrimination under any program or activity to which this subpart applies.

(b) A recipient shall operate each program or activity so that the program or activity, when viewed in its entirety, is readily accessible to and usable by handicapped persons. This paragraph does not necessarily require a recipient to make each of its existing facilities or every part of an existing facility accessible to and usable by handicapped persons. Where structural changes are necessary to make programs or activities in existing facilities accessible, such changes shall be made as soon as practicable, but in no event later than three years after the effective date of the regulation.

(c) A recipient may comply with the requirements of paragraph (b) of this section through such means as redesign of equipment, reassignment of services to accessible buildings, assignment of aides to beneficiaries, home visits, alteration of facilities or any other methods that result in making its program or activity accessible to handicapped persons. A recipient is not required to make structural changes in existing facilities where other methods are effective in achieving compliance with this section.

(d) New facilities shall be designed and constructed to be readily accessible to and usable by handicapped persons. Alterations to existing facilities shall, to the maximum extent feasible, be designed and constructed to be readily accessible to and usable by handicapped persons.

(e) In the event that structural changes to facilities are necessary to meet the requirements of this section, a recipient shall develop within 12 months of the effective date of this subpart a transition plan setting forth the steps necessary to complete such changes. The plan shall be developed with the assistance of interested persons, including handicapped persons or organizations representing handicapped persons.

(f)(1) Effective as of August 23, 1990. Design, construction, or alteration of buildings in conformance with sections 3–8 of the Uniform Federal Accessibility Standards (UFAS) (appendix A to 41 CFR subpart 101–19.6) shall be deemed to comply with the requirements of this section with respect to those buildings. Departures from particular technical and scoping requirements of UFAS by the use of other methods are permitted where substantially equivalent or greater access to and usability of the building is provided.

(2) For purposes of this section, section 4.1.6(1)(g) of UFAS shall be interpreted to exempt from the requirements of UFAS only mechanical rooms and other spaces that, because of their intended use, will not require accessibility to the public or beneficiaries or result in the employment or residence therein of persons with physical handicaps.

(3) This section does not require recipients to make building alterations that have little likelihood of being accomplished without removing or altering a load-bearing structural member.

[45 FR 75569, Nov. 14, 1980, as amended at 55 FR 29999, July 28, 1990]

### § 900.706 Employment practices.

(a) *General.* (1) No qualified handicapped person shall, on the basis of handicap, be subjected to discrimination in employment under a program or activity that receives or benefits from Federal financial assistance from OPM.

(2) A recipient shall make all decisions concerning employment under any program or activity to which this subpart applies in a manner which ensures that discrimination on the basis of handicap does not occur and may not limit, segregate, or classify applicants or employees in any way that adversely affects their opportunities or status because of handicap.

(3) The prohibition against discrimination in employment applies to the following activities:

(i) Recruitment, advertising, and the processing of applications for employment;

(ii) Hiring, upgrading, promotion, award of tenure, demotion, transfer, layoff, termination, right of return from layoff, and rehiring;

(iii) Rates of pay or any other form of compensation and changes in compensation;

(iv) Job assignments, job classifications, organizational structures, position descriptions, lines of progression, and seniority lists;

(v) Leaves of absence, sick leave, or any other leave;

(vi) Fringe benefits available by virtue of employment, whether or not administered by the recipient;

(vii) Selection and financial support for training, including apprenticeship, professional meetings, conferences, and other related activities, and selection for leaves of absence to pursue training;

(viii) Employer sponsored activities, including social or recreational programs; and

(ix) Any other term, condition, or privilege of employment.

(4) A recipient may not participate in a contractual or other relationship that has the effect of subjecting qualified handicapped applicants or employees to discrimination prohibited by this subpart. The relationships referred to in this paragraph include relationships with employment and referral agencies, with labor unions, with organizations providing or administering fringe benefits to employees of the recipient, and with organizations providing training and apprenticeship programs.

(b) *Reasonable accommodation.* (1) A recipient shall make reasonable accommodation to the known physical or mental limitations of an otherwise qualified handicapped applicant or employee under any program or activity receiving Federal financial assistance from OPM unless the recipient can demonstrate that the accommodation would impose an undue hardship on the operation of its program.

(2) Reasonable accommodation may include, but shall not be limited to, making facilities readily accessible to and usable by handicapped persons, acquisition or modification of equipment or devices, appropriate adjustment or modification of examinations, the provision of readers and interpreters, job restructuring and providing part-time or modified work schedules and other similar actions.

(3) In determining pursuant to paragraph (b)(1) of this section whether an accommodation would impose an undue hardship on the operation of the recipient in question, factors to be considered by OPM include:

(i) The overall size of the recipient's program with respect to the number of employees, number and type of facilities and size of budget;

(ii) The type of operation, including the composition and structure of the work force; and

(iii) The nature and the cost of the accommodation.

(c) *Employment criteria.* (1) A recipient involved in activities receiving Federal financial assistance may not make use of any employment test or other selection criterion that screens out or tends to screen out handicapped persons or any class of handicapped persons in any program or activity that receives Federal financial assistance unless the test score or other selection criterion, as used by the recipient, is shown to be job-related for the position in question and alternative job-related tests or criteria that do not screen out as many handicapped persons are not shown by the Office of Personnel Management's Personnel Research and Development Center to be available.

(2) A recipient shall select and administer tests concerning employment so as to ensure that, when administered under any program or activity that receives Federal financial assistance from OPM, to an applicant or employee who has a handicap that impairs sensory, manual, or speaking skills, the test results accurately reflect the applicant's or employee's ability to perform the duties of the type of position in question rather than reflecting the applicant's or employee's impaired sensory, manual, or speaking skills (except where those skills are the factors that the test purports to measure).

(d) *Preemployment inquiries.* (1) Except as provided in paragraph (d)(2) of this section, a recipient, when considering an applicant for employment under any program or activity receiving Federal financial assistance from OPM, may not conduct a preemployment medical examination and may not make preemployment inquiry of an applicant as to whether the applicant is a handicapped person or as to the nature or severity of a handicap. A recipient may, however, make preemployment inquiry into an applicant's ability to perform job-related functions.

(2) Nothing in this section shall prohibit an organization from conditioning an offer of employment under any program or activity receiving Federal financial assistance from OPM on the results of a medical examination conducted prior to the employee's entrance on duty: *Provided,* That (i) All entering employees are subjected to such an examination regardless of handicap or when a preemployment medical questionnaire used for positions which do not routinely require medical examination indicates a condition for which further examination is required because of the job-related nature of the condition; and

(ii) The results of such an examination are used in accordance with the requirements of this subpart.

### § 900.707 Certification required.

(a) *General.* Each application to OPM for financial assistance, as a condition to its approval and the extension of financial assistance, shall contain or be accompanied by, a certification from the applicant in a form prescribed by OPM that the program will be conducted in compliance with the requirements of this subpart. The assurance shall obligate the recipient for the period during which the financial assistance is extended to the program.

(b) *Certification from subgrantees.* A certification shall be required of all subgrantees receiving financial assistance from OPM to the effect that all programs or parts thereof carried out by subgrantees shall be in compliance with the requirements of this subpart. The recipient shall be responsible for securing the certification from subgrantees.

### § 900.708 Self-evaluation.

(a) Each recipient shall, within one year of the receipt of financial assistance, conduct or have conducted an evaluation of its compliance with this subpart with the assistance of interested persons, including handicapped persons or organizations representing handicapped persons. Each such recipient shall evaluate its current policies and practices and their effects, and modify any that do not meet the requirements of this part. Each such recipient shall permit the Office of Personnel Management, during normal business hours, to examine its self-evaluation along with its books, records, accounts, facilities and other

sources of information as may be useful to determine whether there has been compliance with this subpart. Self-evaluation required under other Federal programs may be accepted by OPM if the information pertaining to activities receiving financial assistance from OPM is included and the records are available to OPM representatives.

(b) Each recipient shall modify, after consultation with interested persons and organizations, including handicapped persons, any policies and practices that do not meet the requirements of this subpart; and

(c) Each recipient shall take, after consultation with interested persons, including handicapped persons or organizations representing handicapped persons, appropriate remedial steps to eliminate the effects of any discrimination that resulted from adherence to these policies and practices.

### § 900.709 Notice and consultation.

(a) Programs and activities receiving OPM financial support shall take appropriate initial and continuing steps to notify participants, beneficiaries, applicants, and employees, including those with impaired vision or hearing, that it does not discriminate on the basis of handicap in violation of Section 504 and this subpart.

(b) As appropriate, a recipient shall consult with interested persons, including handicapped persons or organizations representing handicapped persons, in achieving compliance with this subpart.

### § 900.710 Procedure for effecting compliance.

When the Office of Personnel Management determines that a recipient has failed or threatens to fail to comply with this subpart and the noncompliance or threatened noncompliance cannot be corrected by informal means, OPM may suspend or terminate or refuse to grant or continue financial assistance as provided in § 900.408 of title 5 of the Code of Federal Regulations.

## PART 911—PROCEDURES FOR STATES AND LOCALITIES TO REQUEST INDEMNIFICATION

Sec.
911.101 Scope and purpose.
911.102 General definitions.
911.103 Eligibility for indemnification.
911.104 Procedures for requesting an indemnification agreement.
911.105 Terms of indemnification.

AUTHORITY: Title VIII, Access to Criminal History Records for National Security Purposes, of the Intelligence Authorization Act for Fiscal Year 1986, Pub. L. 99–169, sections 801–803, 99 Stat. 1002, 1008–1011 (1985) (codified in part at 5 U.S.C. 9101).

SOURCE: 52 FR 4491, Feb. 12, 1987, unless otherwise noted.

### § 911.101 Scope and purpose.

(a) The Office of Personnel Management (OPM) has the right to criminal history record information of State and local criminal justice agencies to determine whether a person may—

(1) Be eligible for access to classified information;

(2) Be assigned to sensitive national security duties; or

(3) Continue to be assigned to sensitive national security duties.

(b) This part sets out the conditions under which OPM may sign an agreement to indemnify and hold harmless a State or locality against claims for damages, costs, and other monetary loss caused by disclosure or use of criminal history record information by OPM.

(c) The procedures set forth in this part do not apply to situations when OPM seeks access to the criminal history records of another Federal agency.

(d) By law these provisions implementing 5 U.S.C. 9101(b)(3) will expire December 4, 1988, unless the duration of this section is extended or limited by Congress.

### § 911.102 General definitions.

In this part—

*Criminal history record information* means information collected by criminal justice agencies on individuals consisting of identifiable descriptions and notations of arrests, indictments, informations, or other formal criminal charges, and any disposition arising

therefrom, sentencing, correction supervision, and release. The term does not include identification information such as fingerprint records to the extent that such information does not indicate involvement of the individual in the criminal justice system. The term does not include those records of a State or locality sealed pursuant to law from access by State and local criminal justice agencies of that State or locality.

*Criminal justice agency* includes Federal, State, and local agencies and means (a) courts; or (b) a Government agency or any subunit thereof which performs the administration of criminal justice pursuant to a statute or Executive order, and which allocates a substantial part of its annual budget to the administration of criminal justice.

*Locality* means any local government authority or agency or component thereof within a State having jurisdiction over matters at a county, municipal, or other local government level.

*State* means any of the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Northern Mariana Islands, Guam, the Virgin Islands, American Samoa, the Trust Territory of Pacific Islands, and any other territory or possession of the United States.

**§911.103 Eligibility for indemnification.**

As provided for under 5 U.S.C. 9101(b)(3), a State or locality may request an indemnification agreement.

(a) To be eligible for an indemnification agreement, a State or locality must have had a law in effect on December 4, 1985, that prohibited or had the effect of prohibiting the disclosure of criminal history record information to OPM.

(b) A State or locality is also eligible for an indemnification agreement if it meets the conditions of paragraph (a) of this section, but nevertheless provided criminal history record information to OPM on or before December 4, 1985.

**§911.104 Procedures for requesting an indemnification agreement.**

When requesting an indemnification agreement, the State or locality must—

(a) Certify that on December 4, 1985, the State or locality had in effect a law that prohibited or had the effect of prohibiting the disclosure of criminal history record information to OPM;

(b) Attach a copy of the law to the request for an indemnification agreement;

(c) Notify OPM, at the address below, of its eligibility for an indemnification agreement.

Office of Personnel Management, Office of Federal Investigations, P.O. Box 886, Washington, DC 20044

**§911.105 Terms of indemnification.**

The terms of the indemnification agreement must conform to the following provisions:

(a) *Eligibility*. The State or locality must certify that its law prohibits or has the effect of prohibiting the disclosure of criminal history record information to OPM for the purposes described in §911.101(a) and that such law was in effect on December 4, 1985.

(b) *Liability*. (1) OPM must agree to indemnify and hold harmless the State or locality from any claim for damages, costs, and other monetary loss arising from the disclosure or negligent use by OPM of criminal history record information obtained from that State or locality pursuant to 5 U.S.C. 9101(b). The indemnification will include the officers, employees, and agents of the State or locality.

(2) The indemnification agreement will not extend to any act or omission prior to the transmittal of the criminal history record information to OPM.

(3) The indemnification agreement will not extend to any negligent acts on the part of the State or locality in compiling, transcribing, or failing to delete or purge any of the information transmitted.

(c) *Consent and access requirements*. By requesting the release of criminal history record information from the State or locality, OPM represents that—

(1) It has obtained the written consent of the individual under investigation to request criminal history record information about the individual from criminal justice agencies in accordance with 5 U.S.C. 9101, after advising the individual of the purposes for which the information is intended to be used by a Privacy Act of 1974 (5 U.S.C. 552a), or an equivalent, notice; and

(2) Upon request, OPM will provide the individual access to criminal history record information received from the State or locality, as required by 5 U.S.C. 9101(d).

(d) *Purpose requirements.* OPM will use the criminal history record information only for the purposes stated in §911.101(a).

(e) *Notice, litigation, and settlement procedures.* (1) The State or locality must give notice of any claim against it on or before the 10th day after the day on which a claim against it is received, or it has notice of such a claim.

(2) The notice must be given to the Attorney General and to the United States Attorney of the district embracing the place wherein the claim is made.

(3) The Attorney General will make all determinations regarding the settlement or defense of such claims.

# PART 919—GOVERNMENTWIDE DEBARMENT AND SUSPENSION (NONPROCUREMENT)

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APPENDIX TO PART 919—COVERED TRANSACTIONS

AUTHORITY: Sec. 2455, Pub. L. 103–355, 108 Stat. 3327; E.O. 12549, 3 CFR, 1986 Comp., p.189; E.O. 12689, 3 CFR, 1989 Comp., p.235.

SOURCE: 68 FR 66544, 66561, Nov. 26, 2003, unless otherwise noted. Redesignated at 68 FR 74161, Dec. 23, 2003.

## § 919.25 How is this part organized?

(a) This part is subdivided into ten subparts. Each subpart contains information related to a broad topic or specific audience with special responsibilities, as shown in the following table:

| In subpart . . . | You will find provisions related to . . . |
|---|---|
| A | general information about this rule. |
| B | the types of OPM transactions that are covered by the Governmentwide nonprocurement suspension and debarment system. |
| C | the responsibilities of persons who participate in covered transactions. |
| D | the responsibilities of OPM officials who are authorized to enter into covered transactions. |
| E | the responsibilities of Federal agencies for the *Excluded Parties List System* (Disseminated by the General Services Administration). |
| F | the general principles governing suspension, debarment, voluntary exclusion and settlement. |
| G | suspension actions. |
| H | debarment actions. |
| I | definitions of terms used in this part. |
| J | [Reserved] |

(b) The following table shows which subparts may be of special interest to you, depending on who you are:

| If you are . . . | See subpart(s) . . . |
|---|---|
| (1) a participant or principal in a nonprocurement transaction. | A, B, C, and I. |
| (2) a respondent in a suspension action | A, B, F, G and I. |
| (3) a respondent in a debarment action | A, B, F, H and I. |
| (4) a suspending official | A, B, D, E, F, G and I. |
| (5) a debarring official | A, B, D, E, F, H and I. |
| (6) a(n) OPM official authorized to enter into a covered transaction. | A, B, D, E and I. |
| (7) Reserved | J. |

## § 919.50 How is this part written?

(a) This part uses a ''plain language'' format to make it easier for the general public and business community to use. The section headings and text, often in the form of questions and answers, must be read together.

(b) Pronouns used within this part, such as ''I'' and ''you,'' change from subpart to subpart depending on the audience being addressed. The pronoun ''we'' always is the OPM.

(c) The ''Covered Transactions'' diagram in the appendix to this part shows the levels or ''tiers'' at which the OPM enforces an exclusion under this part.

### §919.75 Do terms in this part have special meanings?

This part uses terms throughout the text that have special meaning. Those terms are defined in Subpart I of this part. For example, three important terms are—

(a) *Exclusion or excluded,* which refers only to discretionary actions taken by a suspending or debarring official under this part or the Federal Acquisition Regulation (48 CFR part 9, subpart 9.4);

(b) *Disqualification or disqualified,* which refers to prohibitions under specific statutes, executive orders (other than Executive Order 12549 and Executive Order 12689), or other authorities. Disqualifications frequently are not subject to the discretion of an agency official, may have a different scope than exclusions, or have special conditions that apply to the disqualification; and

(c) *Ineligibility or ineligible,* which generally refers to a person who is either excluded or disqualified.

## Subpart A—General

### §919.100 What does this part do?

This part adopts a governmentwide system of debarment and suspension for OPM nonprocurement activities. It also provides for reciprocal exclusion of persons who have been excluded under the Federal Acquisition Regulation, and provides for the consolidated listing of all persons who are excluded, or disqualified by statute, executive order, or other legal authority. This part satisfies the requirements in section 3 of Executive Order 12549, ''Debarment and Suspension'' (3 CFR 1986 Comp., p. 189), Executive Order 12689, ''Debarment and Suspension'' (3 CFR 1989 Comp., p. 235) and 31 U.S.C. 6101 note (Section 2455, Public Law 103–355, 108 Stat. 3327).

### §919.105 Does this part apply to me?

Portions of this part (see table at §919.25(b)) apply to you if you are a(n)—

(a) Person who has been, is, or may reasonably be expected to be, a participant or principal in a covered transaction;

(b) Respondent (a person against whom the OPM has initiated a debarment or suspension action);

(c) OPM debarring or suspending official; or

(d) OPM official who is authorized to enter into covered transactions with non-Federal parties.

### §919.110 What is the purpose of the nonprocurement debarment and suspension system?

(a) To protect the public interest, the Federal Government ensures the integrity of Federal programs by conducting business only with responsible persons.

(b) A Federal agency uses the nonprocurement debarment and suspension system to exclude from Federal programs persons who are not presently responsible.

(c) An exclusion is a serious action that a Federal agency may take only to protect the public interest. A Federal agency may not exclude a person or commodity for the purposes of punishment.

### §919.115 How does an exclusion restrict a person's involvement in covered transactions?

With the exceptions stated in §§919.120, 919.315, and 919.420, a person who is excluded by the OPM or any other Federal agency may not:

(a) Be a participant in a(n) OPM transaction that is a covered transaction under subpart B of this part;

(b) Be a participant in a transaction of any other Federal agency that is a covered transaction under that agency's regulation for debarment and suspension; or

(c) Act as a principal of a person participating in one of those covered transactions.

### §919.120 May we grant an exception to let an excluded person participate in a covered transaction?

(a) The Debarring Official may grant an exception permitting an excluded person to participate in a particular covered transaction. If the Debarring Official grants an exception, the exception must be in writing and state the reason(s) for deviating from the governmentwide policy in Executive Order 12549.

(b) An exception granted by one agency for an excluded person does not extend to the covered transactions of another agency.

### § 919.125 Does an exclusion under the nonprocurement system affect a person's eligibility for Federal procurement contracts?

If any Federal agency excludes a person under its nonprocurement common rule on or after August 25, 1995, the excluded person is also ineligible to participate in Federal procurement transactions under the FAR. Therefore, an exclusion under this part has reciprocal effect in Federal procurement transactions.

### § 919.130 Does exclusion under the Federal procurement system affect a person's eligibility to participate in nonprocurement transactions?

If any Federal agency excludes a person under the FAR on or after August 25, 1995, the excluded person is also ineligible to participate in nonprocurement covered transactions under this part. Therefore, an exclusion under the FAR has reciprocal effect in Federal nonprocurement transactions.

### § 919.135 May the OPM exclude a person who is not currently participating in a nonprocurement transaction?

Given a cause that justifies an exclusion under this part, we may exclude any person who has been involved, is currently involved, or may reasonably be expected to be involved in a covered transaction.

### § 919.140 How do I know if a person is excluded?

Check the *Excluded Parties List System (EPLS)* to determine whether a person is excluded. The General Services Administration (GSA) maintains the *EPLS* and makes it available, as detailed in subpart E of this part. When a Federal agency takes an action to exclude a person under the nonprocurement or procurement debarment and suspension system, the agency enters the information about the excluded person into the *EPLS*.

### § 919.145 Does this part address persons who are disqualified, as well as those who are excluded from nonprocurement transactions?

Except if provided for in Subpart J of this part, this part—

(a) Addresses disqualified persons only to—

(1) Provide for their inclusion in the *EPLS;* and

(2) State responsibilities of Federal agencies and participants to check for disqualified persons before entering into covered transactions.

(b) Does not specify the—

(1) OPM transactions for which a disqualified person is ineligible. Those transactions vary on a case-by-case basis, because they depend on the language of the specific statute, Executive order, or regulation that caused the disqualification;

(2) Entities to which the disqualification applies; or

(3) Process that the agency uses to disqualify a person. Unlike exclusion, disqualification is frequently not a discretionary action that a Federal agency takes.

## Subpart B—Covered Transactions

### § 919.200 What is a covered transaction?

A covered transaction is a nonprocurement or procurement transaction that is subject to the prohibitions of this part. It may be a transaction at—

(a) The primary tier, between a Federal agency and a person (see appendix to this part); or

(b) A lower tier, between a participant in a covered transaction and another person.

### § 919.205 Why is it important if a particular transaction is a covered transaction?

The importance of a covered transaction depends upon who you are.

(a) As a participant in the transaction, you have the responsibilities laid out in Subpart C of this part. Those include responsibilities to the person or Federal agency at the next higher tier from whom you received

the transaction, if any. They also include responsibilities if you subsequently enter into other covered transactions with persons at the next lower tier.

(b) As a Federal official who enters into a primary tier transaction, you have the responsibilities laid out in subpart D of this part.

(c) As an excluded person, you may not be a participant or principal in the transaction unless—

(1) The person who entered into the transaction with you allows you to continue your involvement in a transaction that predates your exclusion, as permitted under §919.310 or §919.415; or

(2) A(n) OPM official obtains an exception from the Debarring Official to allow you to be involved in the transaction, as permitted under §919.120.

### §919.210 Which nonprocurement transactions are covered transactions?

All nonprocurement transactions, as defined in §919.970, are covered transactions unless listed in §919.215. (See appendix to this part.)

### §919.215 Which nonprocurement transactions are not covered transactions?

The following types of nonprocurement transactions are not covered transactions:

(a) A direct award to—

(1) A foreign government or foreign governmental entity;

(2) A public international organization;

(3) An entity owned (in whole or in part) or controlled by a foreign government; or

(4) Any other entity consisting wholly or partially of one or more foreign governments or foreign governmental entities.

(b) A benefit to an individual as a personal entitlement without regard to the individual's present responsibility (but benefits received in an individual's business capacity are not excepted). For example, if a person receives social security benefits under the Supplemental Security Income provisions of the Social Security Act, 42 U.S.C. 1301 *et seq.*, those benefits are not covered transactions and, therefore, are not affected if the person is excluded.

(c) Federal employment.

(d) A transaction that the OPM needs to respond to a national or agency-recognized emergency or disaster.

(e) A permit, license, certificate, or similar instrument issued as a means to regulate public health, safety, or the environment, unless the OPM specifically designates it to be a covered transaction.

(f) An incidental benefit that results from ordinary governmental operations.

(g) Any other transaction if the application of an exclusion to the transaction is prohibited by law.

### §919.220 Are any procurement contracts included as covered transactions?

(a) Covered transactions under this part—

(1) Do not include any procurement contracts awarded directly by a Federal agency; but

(2) Do include some procurement contracts awarded by non-Federal participants in nonprocurement covered transactions (see appendix to this part).

(b) Specifically, a contract for goods or services is a covered transaction if any of the following applies:

(1) The contract is awarded by a participant in a nonprocurement transaction that is covered under §919.210, and the amount of the contract is expected to equal or exceed $25,000.

(2) The contract requires the consent of a(n) OPM official. In that case, the contract, regardless of the amount, always is a covered transaction, and it does not matter who awarded it. For example, it could be a subcontract awarded by a contractor at a tier below a nonprocurement transaction, as shown in the appendix to this part.

(3) The contract is for federally-required audit services.

### §919.225 How do I know if a transaction in which I may participate is a covered transaction?

As a participant in a transaction, you will know that it is a covered transaction because the agency regulations governing the transaction, the appropriate agency official, or participant at the next higher tier who enters into the transaction with you, will tell

you that you must comply with applicable portions of this part.

## Subpart C—Responsibilities of Participants Regarding Transactions

DOING BUSINESS WITH OTHER PERSONS

### § 919.300 What must I do before I enter into a covered transaction with another person at the next lower tier?

When you enter into a covered transaction with another person at the next lower tier, you must verify that the person with whom you intend to do business is not excluded or disqualified. You do this by:

(a) Checking the *EPLS;* or

(b) Collecting a certification from that person if allowed by this rule; or

(c) Adding a clause or condition to the covered transaction with that person.

### § 919.305 May I enter into a covered transaction with an excluded or disqualified person?

(a) You as a participant may not enter into a covered transaction with an excluded person, unless the OPM grants an exception under § 919.120.

(b) You may not enter into any transaction with a person who is disqualified from that transaction, unless you have obtained an exception under the disqualifying statute, Executive order, or regulation.

### § 919.310 What must I do if a Federal agency excludes a person with whom I am already doing business in a covered transaction?

(a) You as a participant may continue covered transactions with an excluded person if the transactions were in existence when the agency excluded the person. However, you are not required to continue the transactions, and you may consider termination. You should make a decision about whether to terminate and the type of termination action, if any, only after a thorough review to ensure that the action is proper and appropriate.

(b) You may not renew or extend covered transactions (other than no-cost time extensions) with any excluded person, unless the OPM grants an exception under § 919.120.

### § 919.315 May I use the services of an excluded person as a principal under a covered transaction?

(a) You as a participant may continue to use the services of an excluded person as a principal under a covered transaction if you were using the services of that person in the transaction before the person was excluded. However, you are not required to continue using that person's services as a principal. You should make a decision about whether to discontinue that person's services only after a thorough review to ensure that the action is proper and appropriate.

(b) You may not begin to use the services of an excluded person as a principal under a covered transaction unless the OPM grants an exception under § 919.120.

### § 919.320 Must I verify that principals of my covered transactions are eligible to participate?

Yes, you as a participant are responsible for determining whether any of your principals of your covered transactions is excluded or disqualified from participating in the transaction. You may decide the method and frequency by which you do so. You may, but you are not required to, check the *EPLS*.

### § 919.325 What happens if I do business with an excluded person in a covered transaction?

If as a participant you knowingly do business with an excluded person, we may disallow costs, annul or terminate the transaction, issue a stop work order, debar or suspend you, or take other remedies as appropriate.

### § 919.330 What requirements must I pass down to persons at lower tiers with whom I intend to do business?

Before entering into a covered transaction with a participant at the next lower tier, you must require that participant to—

(a) Comply with this subpart as a condition of participation in the transaction. You may do so using any method(s), unless § 919.440 requires you to use specific methods.

(b) Pass the requirement to comply with this subpart to each person with whom the participant enters into a covered transaction at the next lower tier.

DISCLOSING INFORMATION—PRIMARY TIER PARTICIPANTS

**§919.335 What information must I provide before entering into a covered transaction with the OPM?**

Before you enter into a covered transaction at the primary tier, you as the participant must notify the OPM office that is entering into the transaction with you, if you know that you or any of the principals for that covered transaction:

(a) Are presently excluded or disqualified;

(b) Have been convicted within the preceding three years of any of the offenses listed in §919.800(a) or had a civil judgment rendered against you for one of those offenses within that time period;

(c) Are presently indicted for or otherwise criminally or civilly charged by a governmental entity (Federal, State or local) with commission of any of the offenses listed in §919.800(a); or

(d) Have had one or more public transactions (Federal, State, or local) terminated within the preceding three years for cause or default.

**§919.340 If I disclose unfavorable information required under §919.335, will I be prevented from participating in the transaction?**

As a primary tier participant, your disclosure of unfavorable information about yourself or a principal under §919.335 will not necessarily cause us to deny your participation in the covered transaction. We will consider the information when we determine whether to enter into the covered transaction. We also will consider any additional information or explanation that you elect to submit with the disclosed information.

**§919.345 What happens if I fail to disclose information required under §919.335?**

If we later determine that you failed to disclose information under §919.335 that you knew at the time you entered into the covered transaction, we may—

(a) Terminate the transaction for material failure to comply with the terms and conditions of the transaction; or

(b) Pursue any other available remedies, including suspension and debarment.

**§919.350 What must I do if I learn of information required under §919.335 after entering into a covered transaction with the OPM?**

At any time after you enter into a covered transaction, you must give immediate written notice to the OPM office with which you entered into the transaction if you learn either that—

(a) You failed to disclose information earlier, as required by §919.335; or

(b) Due to changed circumstances, you or any of the principals for the transaction now meet any of the criteria in §919.335.

DISCLOSING INFORMATION—LOWER TIER PARTICIPANTS

**§919.355 What information must I provide to a higher tier participant before entering into a covered transaction with that participant?**

Before you enter into a covered transaction with a person at the next higher tier, you as a lower tier participant must notify that person if you know that you or any of the principals are presently excluded or disqualified.

**§919.360 What happens if I fail to disclose the information required under §919.355?**

If we later determine that you failed to tell the person at the higher tier that you were excluded or disqualified at the time you entered into the covered transaction with that person, we may pursue any available remedies, including suspension and debarment.

**§919.365 What must I do if I learn of information required under §919.355 after entering into a covered transaction with a higher tier participant?**

At any time after you enter into a lower tier covered transaction with a

person at a higher tier, you must provide immediate written notice to that person if you learn either that—

(a) You failed to disclose information earlier, as required by § 919.355; or

(b) Due to changed circumstances, you or any of the principals for the transaction now meet any of the criteria in § 919.355.

## Subpart D—Responsibilities of OPM Officials Regarding Transactions

### § 919.400 May I enter into a transaction with an excluded or disqualified person?

(a) You as an agency official may not enter into a covered transaction with an excluded person unless you obtain an exception under § 919.120.

(b) You may not enter into any transaction with a person who is disqualified from that transaction, unless you obtain a waiver or exception under the statute, Executive order, or regulation that is the basis for the person's disqualification.

### § 919.405 May I enter into a covered transaction with a participant if a principal of the transaction is excluded?

As an agency official, you may not enter into a covered transaction with a participant if you know that a principal of the transaction is excluded, unless you obtain an exception under § 919.120.

### § 919.410 May I approve a participant's use of the services of an excluded person?

After entering into a covered transaction with a participant, you as an agency official may not approve a participant's use of an excluded person as a principal under that transaction, unless you obtain an exception under § 919.120.

### § 919.415 What must I do if a Federal agency excludes the participant or a principal after I enter into a covered transaction?

(a) You as an agency official may continue covered transactions with an excluded person, or under which an excluded person is a principal, if the transactions were in existence when the person was excluded. You are not required to continue the transactions, however, and you may consider termination. You should make a decision about whether to terminate and the type of termination action, if any, only after a thorough review to ensure that the action is proper.

(b) You may not renew or extend covered transactions (other than no-cost time extensions) with any excluded person, or under which an excluded person is a principal, unless you obtain an exception under § 919.120.

### § 919.420 May I approve a transaction with an excluded or disqualified person at a lower tier?

If a transaction at a lower tier is subject to your approval, you as an agency official may not approve—

(a) A covered transaction with a person who is currently excluded, unless you obtain an exception under § 919.120; or

(b) A transaction with a person who is disqualified from that transaction, unless you obtain a waiver or exception under the statute, Executive order, or regulation that is the basis for the person's disqualification.

### § 919.425 When do I check to see if a person is excluded or disqualified?

As an agency official, you must check to see if a person is excluded or disqualified before you—

(a) Enter into a primary tier covered transaction;

(b) Approve a principal in a primary tier covered transaction;

(c) Approve a lower tier participant if agency approval of the lower tier participant is required; or

(d) Approve a principal in connection with a lower tier transaction if agency approval of the principal is required.

### § 919.430 How do I check to see if a person is excluded or disqualified?

You check to see if a person is excluded or disqualified in two ways:

(a) You as an agency official must check the *EPLS* when you take any action listed in § 919.425.

(b) You must review information that a participant gives you, as required by

§919.335, about its status or the status of the principals of a transaction.

### §919.435 What must I require of a primary tier participant?

You as an agency official must require each participant in a primary tier covered transaction to—

(a) Comply with subpart C of this part as a condition of participation in the transaction; and

(b) Communicate the requirement to comply with Subpart C of this part to persons at the next lower tier with whom the primary tier participant enters into covered transactions.

### §919.440 What method do I use to communicate those requirements to participants?

To communicate the requirement, you must include a term or condition in the transaction requiring the participants' compliance with subpart C of this part and requiring them to include a similar term or condition in lower-tier covered transactions.

### §919.445 What action may I take if a primary tier participant knowingly does business with an excluded or disqualified person?

If a participant knowingly does business with an excluded or disqualified person, you as an agency official may refer the matter for suspension and debarment consideration. You may also disallow costs, annul or terminate the transaction, issue a stop work order, or take any other appropriate remedy.

### §919.450 What action may I take if a primary tier participant fails to disclose the information required under §919.335?

If you as an agency official determine that a participant failed to disclose information, as required by §919.335, at the time it entered into a covered transaction with you, you may—

(a) Terminate the transaction for material failure to comply with the terms and conditions of the transaction; or

(b) Pursue any other available remedies, including suspension and debarment.

### §919.455 What may I do if a lower tier participant fails to disclose the information required under §919.355 to the next higher tier?

If you as an agency official determine that a lower tier participant failed to disclose information, as required by §919.355, at the time it entered into a covered transaction with a participant at the next higher tier, you may pursue any remedies available to you, including the initiation of a suspension or debarment action.

## Subpart E—Excluded Parties List System

### §919.500 What is the purpose of the Excluded Parties List System (EPLS)?

The *EPLS* is a widely available source of the most current information about persons who are excluded or disqualified from covered transactions.

### §919.505 Who uses the EPLS?

(a) Federal agency officials use the *EPLS* to determine whether to enter into a transaction with a person, as required under §919.430.

(b) Participants also may, but are not required to, use the *EPLS* to determine if—

(1) Principals of their transactions are excluded or disqualified, as required under §919.320; or

(2) Persons with whom they are entering into covered transactions at the next lower tier are excluded or disqualified.

(c) The *EPLS* is available to the general public.

### §919.510 Who maintains the EPLS?

In accordance with the OMB guidelines, the General Services Administration (GSA) maintains the *EPLS*. When a Federal agency takes an action to exclude a person under the nonprocurement or procurement debarment and suspension system, the agency enters the information about the excluded person into the *EPLS*.

### §919.515 What specific information is in the EPLS?

(a) At a minimum, the *EPLS* indicates—

(1) The full name (where available) and address of each excluded or disqualified person, in alphabetical order, with cross references if more than one name is involved in a single action;

(2) The type of action;

(3) The cause for the action;

(4) The scope of the action;

(5) Any termination date for the action;

(6) The agency and name and telephone number of the agency point of contact for the action; and

(7) The Dun and Bradstreet Number (DUNS), or other similar code approved by the GSA, of the excluded or disqualified person, if available.

(b)(1) The database for the *EPLS* includes a field for the Taxpayer Identification Number (TIN) (the social security number (SSN) for an individual) of an excluded or disqualified person.

(2) Agencies disclose the SSN of an individual to verify the identity of an individual, only if permitted under the Privacy Act of 1974 and, if appropriate, the Computer Matching and Privacy Protection Act of 1988, as codified in 5 U.S.C. 552(a).

### § 919.520 Who places the information into the EPLS?

Federal officials who take actions to exclude persons under this part or officials who are responsible for identifying disqualified persons must enter the following information about those persons into the *EPLS*:

(a) Information required by § 919.515(a);

(b) The Taxpayer Identification Number (TIN) of the excluded or disqualified person, including the social security number (SSN) for an individual, if the number is available and may be disclosed under law;

(c) Information about an excluded or disqualified person, generally within five working days, after—

(1) Taking an exclusion action;

(2) Modifying or rescinding an exclusion action;

(3) Finding that a person is disqualified; or

(4) Finding that there has been a change in the status of a person who is listed as disqualified.

### § 919.525 Whom do I ask if I have questions about a person in the EPLS?

If you have questions about a person in the *EPLS*, ask the point of contact for the Federal agency that placed the person's name into the *EPLS*. You may find the agency point of contact from the *EPLS*.

### § 919.530 Where can I find the EPLS?

(a) You may access the *EPLS* through the Internet, currently at *http://epls.arnet.gov*.

(b) As of November 26, 2003, you may also subscribe to a printed version. However, we anticipate discontinuing the printed version. Until it is discontinued, you may obtain the printed version by purchasing a yearly subscription from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402, or by calling the Government Printing Office Inquiry and Order Desk at (202) 783–3238.

## Subpart F—General Principles Relating to Suspension and Debarment Actions

### § 919.600 How do suspension and debarment actions start?

When we receive information from any source concerning a cause for suspension or debarment, we will promptly report and investigate it. We refer the question of whether to suspend or debar you to our suspending or debarring official for consideration, if appropriate.

### § 919.605 How does suspension differ from debarment?

Suspension differs from debarment in that—

| A suspending official . . . | A debarring official . . . |
|---|---|
| (a) Imposes suspension as a temporary status of ineligibility for procurement and nonprocurement transactions, pending completion of an investigation or legal proceedings. | Imposes debarment for a specified period as a final determination that a person is not presently responsible. |

| A suspending official . . . | A debarring official . . . |
|---|---|
| (b) Must— ..... | Must conclude, based on a *preponderance of the evidence,* that the person has engaged in conduct that warrants debarment. |
| (1) Have *adequate evidence* that there may be a cause for debarment of a person; and. | |
| (2) Conclude that *immediate action* is necessary to protect the Federal interest. | |
| (c) Usually imposes the suspension *first,* and then promptly notifies the suspended person, giving the person an opportunity to contest the suspension and have it lifted. | Imposes debarment *after* giving the respondent notice of the action and an opportunity to contest the proposed debarment. |

### §919.610 What procedures does the OPM use in suspension and debarment actions?

In deciding whether to suspend or debar you, we handle the actions as informally as practicable, consistent with principles of fundamental fairness.

(a) For suspension actions, we use the procedures in this subpart and subpart G of this part.

(b) For debarment actions, we use the procedures in this subpart and subpart H of this part.

### §919.615 How does the OPM notify a person of a suspension or debarment action?

(a) The suspending or debarring official sends a written notice to the last known street address, facsimile number, or e-mail address of—

(1) You or your identified counsel; or

(2) Your agent for service of process, or any of your partners, officers, directors, owners, or joint venturers.

(b) The notice is effective if sent to any of these persons.

### §919.620 Do Federal agencies coordinate suspension and debarment actions?

Yes, when more than one Federal agency has an interest in a suspension or debarment, the agencies may consider designating one agency as the lead agency for making the decision. Agencies are encouraged to establish methods and procedures for coordinating their suspension and debarment actions.

### §919.625 What is the scope of a suspension or debarment?

If you are suspended or debarred, the suspension or debarment is effective as follows:

(a) Your suspension or debarment constitutes suspension or debarment of all of your divisions and other organizational elements from all covered transactions, unless the suspension or debarment decision is limited—

(1) By its terms to one or more specifically identified individuals, divisions, or other organizational elements; or

(2) To specific types of transactions.

(b) Any affiliate of a participant may be included in a suspension or debarment action if the suspending or debarring official—

(1) Officially names the affiliate in the notice; and

(2) Gives the affiliate an opportunity to contest the action.

### §919.630 May the OPM impute conduct of one person to another?

For purposes of actions taken under this rule, we may impute conduct as follows:

(a) *Conduct imputed from an individual to an organization.* We may impute the fraudulent, criminal, or other improper conduct of any officer, director, shareholder, partner, employee, or other individual associated with an organization, to that organization when the improper conduct occurred in connection with the individual's performance of duties for or on behalf of that organization, or with the organization's knowledge, approval or acquiescence. The organization's acceptance of the benefits derived from the conduct is evidence of knowledge, approval or acquiescence.

(b) *Conduct imputed from an organization to an individual, or between individuals.* We may impute the fraudulent, criminal, or other improper conduct of any organization to an individual, or from one individual to another individual, if the individual to whom the improper conduct is imputed either participated in, had knowledge of, or reason to know of the improper conduct.

(c) *Conduct imputed from one organization to another organization.* We may impute the fraudulent, criminal, or

other improper conduct of one organization to another organization when the improper conduct occurred in connection with a partnership, joint venture, joint application, association or similar arrangement, or when the organization to whom the improper conduct is imputed has the power to direct, manage, control or influence the activities of the organization responsible for the improper conduct. Acceptance of the benefits derived from the conduct is evidence of knowledge, approval or acquiescence.

### § 919.635 May the OPM settle a debarment or suspension action?

Yes, we may settle a debarment or suspension action at any time if it is in the best interest of the Federal Government.

### § 919.640 May a settlement include a voluntary exclusion?

Yes, if we enter into a settlement with you in which you agree to be excluded, it is called a voluntary exclusion and has governmentwide effect.

### § 919.645 Do other Federal agencies know if the OPM agrees to a voluntary exclusion?

(a) Yes, we enter information regarding a voluntary exclusion into the *EPLS*.

(b) Also, any agency or person may contact us to find out the details of a voluntary exclusion.

## Subpart G—Suspension

### § 919.700 When may the suspending official issue a suspension?

Suspension is a serious action. Using the procedures of this subpart and subpart F of this part, the suspending official may impose suspension only when that official determines that—

(a) There exists an indictment for, or other adequate evidence to suspect, an offense listed under § 919.800(a), or

(b) There exists adequate evidence to suspect any other cause for debarment listed under § 919.800(b) through (d); and

(c) Immediate action is necessary to protect the public interest.

### § 919.705 What does the suspending official consider in issuing a suspension?

(a) In determining the adequacy of the evidence to support the suspension, the suspending official considers how much information is available, how credible it is given the circumstances, whether or not important allegations are corroborated, and what inferences can reasonably be drawn as a result. During this assessment, the suspending official may examine the basic documents, including grants, cooperative agreements, loan authorizations, contracts, and other relevant documents.

(b) An indictment, conviction, civil judgment, or other official findings by Federal, State, or local bodies that determine factual and/or legal matters, constitutes adequate evidence for purposes of suspension actions.

(c) In deciding whether immediate action is needed to protect the public interest, the suspending official has wide discretion. For example, the suspending official may infer the necessity for immediate action to protect the public interest either from the nature of the circumstances giving rise to a cause for suspension or from potential business relationships or involvement with a program of the Federal Government.

### § 919.710 When does a suspension take effect?

A suspension is effective when the suspending official signs the decision to suspend.

### § 919.715 What notice does the suspending official give me if I am suspended?

After deciding to suspend you, the suspending official promptly sends you a Notice of Suspension advising you—

(a) That you have been suspended;

(b) That your suspension is based on—

(1) An indictment;

(2) A conviction;

(3) Other adequate evidence that you have committed irregularities which seriously reflect on the propriety of further Federal Government dealings with you; or

(4) Conduct of another person that has been imputed to you, or your affiliation with a suspended or debarred person;

(c) Of any other irregularities in terms sufficient to put you on notice without disclosing the Federal Government's evidence;

(d) Of the cause(s) upon which we relied under §919.700 for imposing suspension;

(e) That your suspension is for a temporary period pending the completion of an investigation or resulting legal or debarment proceedings;

(f) Of the applicable provisions of this subpart, Subpart F of this part, and any other OPM procedures governing suspension decision making; and

(g) Of the governmentwide effect of your suspension from procurement and nonprocurement programs and activities.

### §919.720 How may I contest a suspension?

If you as a respondent wish to contest a suspension, you or your representative must provide the suspending official with information in opposition to the suspension. You may do this orally or in writing, but any information provided orally that you consider important must also be submitted in writing for the official record.

### §919.725 How much time do I have to contest a suspension?

(a) As a respondent you or your representative must either send, or make arrangements to appear and present, the information and argument to the suspending official within 30 days after you receive the Notice of Suspension.

(b) We consider the notice to be received by you—

(1) When delivered, if we mail the notice to the last known street address, or five days after we send it if the letter is undeliverable;

(2) When sent, if we send the notice by facsimile or five days after we send it if the facsimile is undeliverable; or

(3) When delivered, if we send the notice by e-mail or five days after we send it if the e-mail is undeliverable.

### §919.730 What information must I provide to the suspending official if I contest a suspension?

(a) In addition to any information and argument in opposition, as a respondent your submission to the suspending official must identify—

(1) Specific facts that contradict the statements contained in the Notice of Suspension. A general denial is insufficient to raise a genuine dispute over facts material to the suspension;

(2) All existing, proposed, or prior exclusions under regulations implementing E.O. 12549 and all similar actions taken by Federal, state, or local agencies, including administrative agreements that affect only those agencies;

(3) All criminal and civil proceedings not included in the Notice of Suspension that grew out of facts relevant to the cause(s) stated in the notice; and

(4) All of your affiliates.

(b) If you fail to disclose this information, or provide false information, the OPM may seek further criminal, civil or administrative action against you, as appropriate.

### §919.735 Under what conditions do I get an additional opportunity to challenge the facts on which the suspension is based?

(a) You as a respondent will not have an additional opportunity to challenge the facts if the suspending official determines that—

(1) Your suspension is based upon an indictment, conviction, civil judgment, or other finding by a Federal, State, or local body for which an opportunity to contest the facts was provided;

(2) Your presentation in opposition contains only general denials to information contained in the Notice of Suspension;

(3) The issues raised in your presentation in opposition to the suspension are not factual in nature, or are not material to the suspending official's initial decision to suspend, or the official's decision whether to continue the suspension; or

(4) On the basis of advice from the Department of Justice, an office of the United States Attorney, a State attorney general's office, or a State or local

prosecutor's office, that substantial interests of the government in pending or contemplated legal proceedings based on the same facts as the suspension would be prejudiced by conducting fact-finding.

(b) You will have an opportunity to challenge the facts if the suspending official determines that—

(1) The conditions in paragraph (a) of this section do not exist; and

(2) Your presentation in opposition raises a genuine dispute over facts material to the suspension.

(c) If you have an opportunity to challenge disputed material facts under this section, the suspending official or designee must conduct additional proceedings to resolve those facts.

### § 919.740 Are suspension proceedings formal?

(a) Suspension proceedings are conducted in a fair and informal manner. The suspending official may use flexible procedures to allow you to present matters in opposition. In so doing, the suspending official is not required to follow formal rules of evidence or procedure in creating an official record upon which the official will base a final suspension decision.

(b) You as a respondent or your representative must submit any documentary evidence you want the suspending official to consider.

### § 919.745 How is fact-finding conducted?

(a) If fact-finding is conducted—

(1) You may present witnesses and other evidence, and confront any witness presented; and

(2) The fact-finder must prepare written findings of fact for the record.

(b) A transcribed record of fact-finding proceedings must be made, unless you as a respondent and the OPM agree to waive it in advance. If you want a copy of the transcribed record, you may purchase it.

### § 919.750 What does the suspending official consider in deciding whether to continue or terminate my suspension?

(a) The suspending official bases the decision on all information contained in the official record. The record includes—

(1) All information in support of the suspending official's initial decision to suspend you;

(2) Any further information and argument presented in support of, or opposition to, the suspension; and

(3) Any transcribed record of fact-finding proceedings.

(b) The suspending official may refer disputed material facts to another official for findings of fact. The suspending official may reject any resulting findings, in whole or in part, only after specifically determining them to be arbitrary, capricious, or clearly erroneous.

### § 919.755 When will I know whether the suspension is continued or terminated?

The suspending official must make a written decision whether to continue, modify, or terminate your suspension within 45 days of closing the official record. The official record closes upon the suspending official's receipt of final submissions, information and findings of fact, if any. The suspending official may extend that period for good cause.

### § 919.760 How long may my suspension last?

(a) If legal or debarment proceedings are initiated at the time of, or during your suspension, the suspension may continue until the conclusion of those proceedings. However, if proceedings are not initiated, a suspension may not exceed 12 months.

(b) The suspending official may extend the 12 month limit under paragraph (a) of this section for an additional 6 months if an office of a U.S. Assistant Attorney General, U.S. Attorney, or other responsible prosecuting official requests an extension in writing. In no event may a suspension exceed 18 months without initiating proceedings under paragraph (a) of this section.

(c) The suspending official must notify the appropriate officials under paragraph (b) of this section of an impending termination of a suspension at least 30 days before the 12 month period expires to allow the officials an opportunity to request an extension.

## Subpart H—Debarment

### §919.800 What are the causes for debarment?

We may debar a person for—

(a) Conviction of or civil judgment for—

(1) Commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public or private agreement or transaction;

(2) Violation of Federal or State antitrust statutes, including those proscribing price fixing between competitors, allocation of customers between competitors, and bid rigging;

(3) Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, receiving stolen property, making false claims, or obstruction of justice; or

(4) Commission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects your present responsibility;

(b) Violation of the terms of a public agreement or transaction so serious as to affect the integrity of an agency program, such as—

(1) A willful failure to perform in accordance with the terms of one or more public agreements or transactions;

(2) A history of failure to perform or of unsatisfactory performance of one or more public agreements or transactions; or

(3) A willful violation of a statutory or regulatory provision or requirement applicable to a public agreement or transaction;

(c) Any of the following causes:

(1) A nonprocurement debarment by any Federal agency taken before October 1, 1988, or a procurement debarment by any Federal agency taken pursuant to 48 CFR part 9, subpart 9.4, before August 25, 1995;

(2) Knowingly doing business with an ineligible person, except as permitted under §919.120;

(3) Failure to pay a single substantial debt, or a number of outstanding debts (including disallowed costs and overpayments, but not including sums owed the Federal Government under the Internal Revenue Code) owed to any Federal agency or instrumentality, provided the debt is uncontested by the debtor or, if contested, provided that the debtor's legal and administrative remedies have been exhausted;

(4) Violation of a material provision of a voluntary exclusion agreement entered into under §919.640 or of any settlement of a debarment or suspension action; or

(5) Violation of the provisions of the Drug-Free Workplace Act of 1988 (41 U.S.C. 701); or

(d) Any other cause of so serious or compelling a nature that it affects your present responsibility.

### §919.805 What notice does the debarring official give me if I am proposed for debarment?

After consideration of the causes in §919.800 of this subpart, if the debarring official proposes to debar you, the official sends you a Notice of Proposed Debarment, pursuant to §919.615, advising you—

(a) That the debarring official is considering debarring you;

(b) Of the reasons for proposing to debar you in terms sufficient to put you on notice of the conduct or transactions upon which the proposed debarment is based;

(c) Of the cause(s) under §919.800 upon which the debarring official relied for proposing your debarment;

(d) Of the applicable provisions of this subpart, Subpart F of this part, and any other OPM procedures governing debarment; and

(e) Of the governmentwide effect of a debarment from procurement and nonprocurement programs and activities.

### §919.810 When does a debarment take effect?

A debarment is not effective until the debarring official issues a decision. The debarring official does not issue a decision until the respondent has had an opportunity to contest the proposed debarment.

### §919.815 How may I contest a proposed debarment?

If you as a respondent wish to contest a proposed debarment, you or your

representative must provide the debarring official with information in opposition to the proposed debarment. You may do this orally or in writing, but any information provided orally that you consider important must also be submitted in writing for the official record.

### § 919.820 How much time do I have to contest a proposed debarment?

(a) As a respondent you or your representative must either send, or make arrangements to appear and present, the information and argument to the debarring official within 30 days after you receive the Notice of Proposed Debarment.

(b) We consider the Notice of Proposed Debarment to be received by you—

(1) When delivered, if we mail the notice to the last known street address, or five days after we send it if the letter is undeliverable;

(2) When sent, if we send the notice by facsimile or five days after we send it if the facsimile is undeliverable; or

(3) When delivered, if we send the notice by e-mail or five days after we send it if the e-mail is undeliverable.

### § 919.825 What information must I provide to the debarring official if I contest a proposed debarment?

(a) In addition to any information and argument in opposition, as a respondent your submission to the debarring official must identify—

(1) Specific facts that contradict the statements contained in the Notice of Proposed Debarment. Include any information about any of the factors listed in § 919.860. A general denial is insufficient to raise a genuine dispute over facts material to the debarment;

(2) All existing, proposed, or prior exclusions under regulations implementing E.O. 12549 and all similar actions taken by Federal, State, or local agencies, including administrative agreements that affect only those agencies;

(3) All criminal and civil proceedings not included in the Notice of Proposed Debarment that grew out of facts relevant to the cause(s) stated in the notice; and

(4) All of your affiliates.

(b) If you fail to disclose this information, or provide false information, the OPM may seek further criminal, civil or administrative action against you, as appropriate.

### § 919.830 Under what conditions do I get an additional opportunity to challenge the facts on which a proposed debarment is based?

(a) You as a respondent will not have an additional opportunity to challenge the facts if the debarring official determines that—

(1) Your debarment is based upon a conviction or civil judgment;

(2) Your presentation in opposition contains only general denials to information contained in the Notice of Proposed Debarment; or

(3) The issues raised in your presentation in opposition to the proposed debarment are not factual in nature, or are not material to the debarring official's decision whether to debar.

(b) You will have an additional opportunity to challenge the facts if the debarring official determines that—

(1) The conditions in paragraph (a) of this section do not exist; and

(2) Your presentation in opposition raises a genuine dispute over facts material to the proposed debarment.

(c) If you have an opportunity to challenge disputed material facts under this section, the debarring official or designee must conduct additional proceedings to resolve those facts.

### § 919.835 Are debarment proceedings formal?

(a) Debarment proceedings are conducted in a fair and informal manner. The debarring official may use flexible procedures to allow you as a respondent to present matters in opposition. In so doing, the debarring official is not required to follow formal rules of evidence or procedure in creating an official record upon which the official will base the decision whether to debar.

(b) You or your representative must submit any documentary evidence you want the debarring official to consider.

### § 919.840 How is fact-finding conducted?

(a) If fact-finding is conducted—

(1) You may present witnesses and other evidence, and confront any witness presented; and

(2) The fact-finder must prepare written findings of fact for the record.

(b) A transcribed record of fact-finding proceedings must be made, unless you as a respondent and the OPM agree to waive it in advance. If you want a copy of the transcribed record, you may purchase it.

### §919.845 What does the debarring official consider in deciding whether to debar me?

(a) The debarring official may debar you for any of the causes in §919.800. However, the official need not debar you even if a cause for debarment exists. The official may consider the seriousness of your acts or omissions and the mitigating or aggravating factors set forth at §919.860.

(b) The debarring official bases the decision on all information contained in the official record. The record includes—

(1) All information in support of the debarring official's proposed debarment;

(2) Any further information and argument presented in support of, or in opposition to, the proposed debarment; and

(3) Any transcribed record of fact-finding proceedings.

(c) The debarring official may refer disputed material facts to another official for findings of fact. The debarring official may reject any resultant findings, in whole or in part, only after specifically determining them to be arbitrary, capricious, or clearly erroneous.

### §919.850 What is the standard of proof in a debarment action?

(a) In any debarment action, we must establish the cause for debarment by a preponderance of the evidence.

(b) If the proposed debarment is based upon a conviction or civil judgment, the standard of proof is met.

### §919.855 Who has the burden of proof in a debarment action?

(a) We have the burden to prove that a cause for debarment exists.

(b) Once a cause for debarment is established, you as a respondent have the burden of demonstrating to the satisfaction of the debarring official that you are presently responsible and that debarment is not necessary.

### §919.860 What factors may influence the debarring official's decision?

This section lists the mitigating and aggravating factors that the debarring official may consider in determining whether to debar you and the length of your debarment period. The debarring official may consider other factors if appropriate in light of the circumstances of a particular case. The existence or nonexistence of any factor, such as one of those set forth in this section, is not necessarily determinative of your present responsibility. In making a debarment decision, the debarring official may consider the following factors:

(a) The actual or potential harm or impact that results or may result from the wrongdoing.

(b) The frequency of incidents and/or duration of the wrongdoing.

(c) Whether there is a pattern or prior history of wrongdoing. For example, if you have been found by another Federal agency or a State agency to have engaged in wrongdoing similar to that found in the debarment action, the existence of this fact may be used by the debarring official in determining that you have a pattern or prior history of wrongdoing.

(d) Whether you are or have been excluded or disqualified by an agency of the Federal Government or have not been allowed to participate in State or local contracts or assistance agreements on a basis of conduct similar to one or more of the causes for debarment specified in this part.

(e) Whether you have entered into an administrative agreement with a Federal agency or a State or local government that is not governmentwide but is based on conduct similar to one or more of the causes for debarment specified in this part.

(f) Whether and to what extent you planned, initiated, or carried out the wrongdoing.

(g) Whether you have accepted responsibility for the wrongdoing and

recognize the seriousness of the misconduct that led to the cause for debarment.

(h) Whether you have paid or agreed to pay all criminal, civil and administrative liabilities for the improper activity, including any investigative or administrative costs incurred by the government, and have made or agreed to make full restitution.

(i) Whether you have cooperated fully with the government agencies during the investigation and any court or administrative action. In determining the extent of cooperation, the debarring official may consider when the cooperation began and whether you disclosed all pertinent information known to you.

(j) Whether the wrongdoing was pervasive within your organization.

(k) The kind of positions held by the individuals involved in the wrongdoing.

(l) Whether your organization took appropriate corrective action or remedial measures, such as establishing ethics training and implementing programs to prevent recurrence.

(m) Whether your principals tolerated the offense.

(n) Whether you brought the activity cited as a basis for the debarment to the attention of the appropriate government agency in a timely manner.

(o) Whether you have fully investigated the circumstances surrounding the cause for debarment and, if so, made the result of the investigation available to the debarring official.

(p) Whether you had effective standards of conduct and internal control systems in place at the time the questioned conduct occurred.

(q) Whether you have taken appropriate disciplinary action against the individuals responsible for the activity which constitutes the cause for debarment.

(r) Whether you have had adequate time to eliminate the circumstances within your organization that led to the cause for the debarment.

(s) Other factors that are appropriate to the circumstances of a particular case.

### § 919.865 How long may my debarment last?

(a) If the debarring official decides to debar you, your period of debarment will be based on the seriousness of the cause(s) upon which your debarment is based. Generally, debarment should not exceed three years. However, if circumstances warrant, the debarring official may impose a longer period of debarment.

(b) In determining the period of debarment, the debarring official may consider the factors in § 919.860. If a suspension has preceded your debarment, the debarring official must consider the time you were suspended.

(c) If the debarment is for a violation of the provisions of the Drug-Free Workplace Act of 1988, your period of debarment may not exceed five years.

### § 919.870 When do I know if the debarring official debars me?

(a) The debarring official must make a written decision whether to debar within 45 days of closing the official record. The official record closes upon the debarring official's receipt of final submissions, information and findings of fact, if any. The debarring official may extend that period for good cause.

(b) The debarring official sends you written notice, pursuant to § 919.615 that the official decided, either—

(1) Not to debar you; or

(2) To debar you. In this event, the notice:

(i) Refers to the Notice of Proposed Debarment;

(ii) Specifies the reasons for your debarment;

(iii) States the period of your debarment, including the effective dates; and

(iv) Advises you that your debarment is effective for covered transactions and contracts that are subject to the Federal Acquisition Regulation (48 CFR chapter 1), throughout the executive branch of the Federal Government unless an agency head or an authorized designee grants an exception.

### § 919.875 May I ask the debarring official to reconsider a decision to debar me?

Yes, as a debarred person you may ask the debarring official to reconsider

the debarment decision or to reduce the time period or scope of the debarment. However, you must put your request in writing and support it with documentation.

### § 919.880 What factors may influence the debarring official during reconsideration?

The debarring official may reduce or terminate your debarment based on—

(a) Newly discovered material evidence;

(b) A reversal of the conviction or civil judgment upon which your debarment was based;

(c) A bona fide change in ownership or management;

(d) Elimination of other causes for which the debarment was imposed; or

(e) Other reasons the debarring official finds appropriate.

### § 919.885 May the debarring official extend a debarment?

(a) Yes, the debarring official may extend a debarment for an additional period, if that official determines that an extension is necessary to protect the public interest.

(b) However, the debarring official may not extend a debarment solely on the basis of the facts and circumstances upon which the initial debarment action was based.

(c) If the debarring official decides that a debarment for an additional period is necessary, the debarring official must follow the applicable procedures in this subpart, and subpart F of this part, to extend the debarment.

## Subpart I—Definitions

### § 919.900 Adequate evidence.

*Adequate evidence* means information sufficient to support the reasonable belief that a particular act or omission has occurred.

### § 919.905 Affiliate.

Persons are *affiliates* of each other if, directly or indirectly, either one controls or has the power to control the other or a third person controls or has the power to control both. The ways we use to determine control include, but are not limited to—

(a) Interlocking management or ownership;

(b) Identity of interests among family members;

(c) Shared facilities and equipment;

(d) Common use of employees; or

(e) A business entity which has been organized following the exclusion of a person which has the same or similar management, ownership, or principal employees as the excluded person.

### § 919.910 Agency.

*Agency* means any United States executive department, military department, defense agency, or any other agency of the executive branch. Other agencies of the Federal government are not considered ''agencies'' for the purposes of this part unless they issue regulations adopting the governmentwide Debarment and Suspension system under Executive orders 12549 and 12689.

### § 919.915 Agent or representative.

*Agent or representative* means any person who acts on behalf of, or who is authorized to commit, a participant in a covered transaction.

### § 919.920 Civil judgment.

*Civil judgment* means the disposition of a civil action by any court of competent jurisdiction, whether by verdict, decision, settlement, stipulation, other disposition which creates a civil liability for the complained of wrongful acts, or a final determination of liability under the Program Fraud Civil Remedies Act of 1988 (31 U.S.C. 3801–3812).

### § 919.925 Conviction.

*Conviction* means—

(a) A judgment or any other determination of guilt of a criminal offense by any court of competent jurisdiction, whether entered upon a verdict or plea, including a plea of nolo contendere; or

(b) Any other resolution that is the functional equivalent of a judgment, including probation before judgment and deferred prosecution. A disposition without the participation of the court is the functional equivalent of a judgment only if it includes an admission of guilt.

**§ 919.930 Debarment.**

*Debarment* means an action taken by a debarring official under subpart H of this part to exclude a person from participating in covered transactions and transactions covered under the Federal Acquisition Regulation (48 CFR chapter 1). A person so excluded is debarred.

**§ 919.935 Debarring official.**

(a) *Debarring official* means an agency official who is authorized to impose debarment. A debarring official is either—

(1) The agency head; or

(2) An official designated by the agency head.

(b) [Reserved]

**§ 919.940 Disqualified.**

*Disqualified* means that a person is prohibited from participating in specified Federal procurement or nonprocurement transactions as required under a statute, Executive order (other than Executive Orders 12549 and 12689) or other authority. Examples of disqualifications include persons prohibited under—

(a) The Davis-Bacon Act (40 U.S.C. 276(a));

(b) The equal employment opportunity acts and Executive orders; or

(c) The Clean Air Act (42 U.S.C. 7606), Clean Water Act (33 U.S.C. 1368) and Executive Order 11738 (3 CFR, 1973 Comp., p. 799).

**§ 919.945 Excluded or exclusion.**

*Excluded or exclusion* means—

(a) That a person or commodity is prohibited from being a participant in covered transactions, whether the person has been suspended; debarred; proposed for debarment under 48 CFR part 9, subpart 9.4; voluntarily excluded; or

(b) The act of excluding a person.

**§ 919.950 Excluded Parties List System.**

*Excluded Parties List System (EPLS)* means the list maintained and disseminated by the General Services Administration (GSA) containing the names and other information about persons who are ineligible. The *EPLS* system includes the printed version entitled, ''List of Parties Excluded or Disqualified from Federal Procurement and Nonprocurement Programs,'' so long as published.

**§ 919.955 Indictment.**

*Indictment* means an indictment for a criminal offense. A presentment, information, or other filing by a competent authority charging a criminal offense shall be given the same effect as an indictment.

**§ 919.960 Ineligible or ineligibility.**

*Ineligible or ineligibility* means that a person or commodity is prohibited from covered transactions because of an exclusion or disqualification.

**§ 919.965 Legal proceedings.**

*Legal proceedings* means any criminal proceeding or any civil judicial proceeding, including a proceeding under the Program Fraud Civil Remedies Act (31 U.S.C. 3801–3812), to which the Federal Government or a State or local government or quasi-governmental authority is a party. The term also includes appeals from those proceedings.

**§ 919.970 Nonprocurement transaction.**

(a) *Nonprocurement transaction* means any transaction, regardless of type (except procurement contracts), including, but not limited to the following:

(1) Grants.

(2) Cooperative agreements.

(3) Scholarships.

(4) Fellowships.

(5) Contracts of assistance.

(6) Loans.

(7) Loan guarantees.

(8) Subsidies.

(9) Insurances.

(10) Payments for specified uses.

(11) Donation agreements.

(b) A nonprocurement transaction at any tier does not require the transfer of Federal funds.

**§ 919.975 Notice.**

*Notice* means a written communication served in person, sent by certified mail or its equivalent, or sent electronically by e-mail or facsimile. (See § 919.615.)

**§ 919.980 Participant.**

*Participant* means any person who submits a proposal for or who enters into a covered transaction, including

an agent or representative of a participant.

### § 919.985 Person.

*Person* means any individual, corporation, partnership, association, unit of government, or legal entity, however organized.

### § 919.990 Preponderance of the evidence.

*Preponderance of the evidence* means proof by information that, compared with information opposing it, leads to the conclusion that the fact at issue is more probably true than not.

### § 919.995 Principal.

*Principal* means—

(a) An officer, director, owner, partner, principal investigator, or other person within a participant with management or supervisory responsibilities related to a covered transaction; or

(b) A consultant or other person, whether or not employed by the participant or paid with Federal funds, who—

(1) Is in a position to handle Federal funds;

(2) Is in a position to influence or control the use of those funds; or,

(3) Occupies a technical or professional position capable of substantially influencing the development or outcome of an activity required to perform the covered transaction.

### § 919.1000 Respondent.

*Respondent* means a person against whom an agency has initiated a debarment or suspension action.

### § 919.1005 State.

(a) *State* means—

(1) Any of the states of the United States;

(2) The District of Columbia;

(3) The Commonwealth of Puerto Rico;

(4) Any territory or possession of the United States; or

(5) Any agency or instrumentality of a state.

(b) For purposes of this part, *State* does not include institutions of higher education, hospitals, or units of local government.

### § 919.1010 Suspending official.

(a) *Suspending official* means an agency official who is authorized to impose suspension. The suspending official is either:

(1) The agency head; or

(2) An official designated by the agency head.

(b) [Reserved]

### § 919.1015 Suspension.

*Suspension* is an action taken by a suspending official under subpart G of this part that immediately prohibits a person from participating in covered transactions and transactions covered under the Federal Acquisition Regulation (48 CFR chapter 1) for a temporary period, pending completion of an agency investigation and any judicial or administrative proceedings that may ensue. A person so excluded is suspended.

### § 919.1020 Voluntary exclusion or voluntarily excluded.

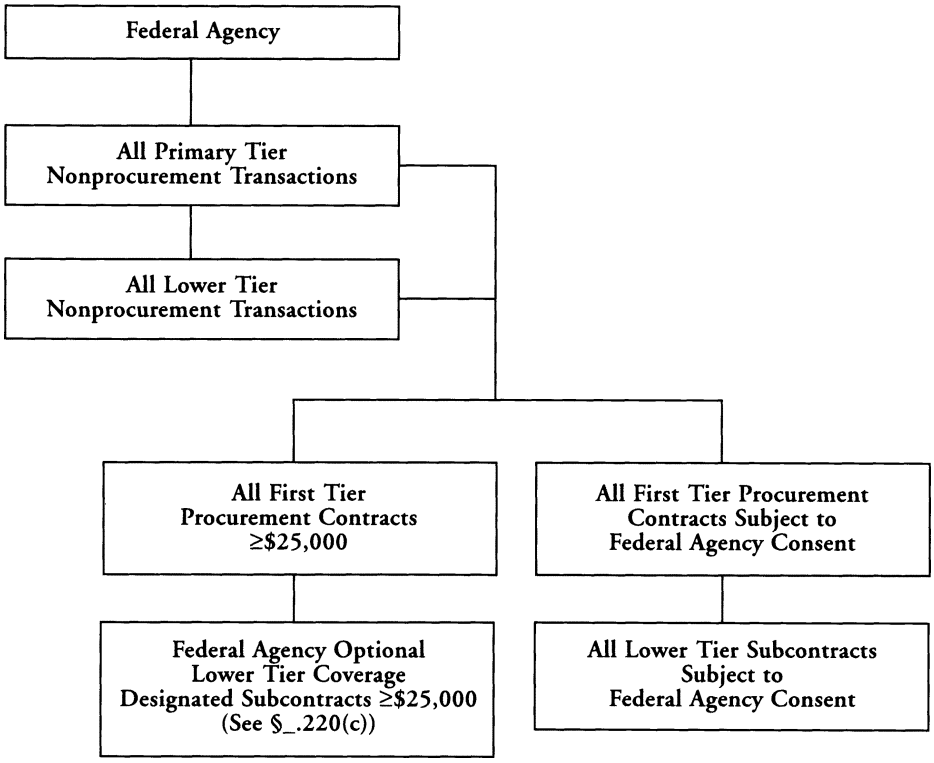
(a) *Voluntary exclusion* means a person's agreement to be excluded under the terms of a settlement between the person and one or more agencies. Voluntary exclusion must have governmentwide effect.

(b) *Voluntarily excluded* means the status of a person who has agreed to a voluntary exclusion.

## Subpart J [Reserved]

APPENDIX TO PART 919—COVERED TRANSACTIONS

**COVERED TRANSACTIONS**




## PART 930—PROGRAMS FOR SPECIFIC POSITIONS AND EXAMINATIONS (MISCELLANEOUS)

### Subpart A—Motor Vehicle Operators

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## Subpart A—Motor Vehicle Operators

AUTHORITY: 5 U.S.C. 3301, 3320, 7301; 40 U.S.C. 491; E.O. 10577, 3 CFR, 1954–1958 Comp., p. 218; E.O. 11222, 3 CFR, 1964–1965 Comp., p. 306. (Separate authority is listed under § 930.107).

SOURCE: 50 FR 34669, Aug. 27, 1985, unless otherwise noted.

### § 930.101 Purpose.

This subpart governs agencies in authorizing employees to operate Government-owned or -leased (acquired for other than short term use for which the Government does not have full control and accountability) motor vehicles for official purposes within the States of the Union, the District of Columbia, Puerto Rico, and the territories and possessions of the United States.

### § 930.102 Definitions.

In this subpart:

*Agency* means a department, independent establishment, or other unit of the executive branch of the Federal Government, including a wholly owned Government corporation, in the States of the Union, the District of Columbia, Puerto Rico, and the territories and possessions of the United States.

*Employee* means an employee of an agency in either the competitive or excepted service or an enrollee of the Job Corps established by section 102 of the Economic Opportunity Act of 1964 (42 U.S.C. 2712).

*Identification card* means the United States Government Motor Vehicle Operator's Identification Card, Optional Form 346, or an agency-issued identification card that names the types of Government-owned or -leased vehicles the holder is authorized to operate.

*Identification document* means an official identification form issued by an agency that properly identifies the individual as a Federal employee of the agency.

*Incidental operator* means an employee, other than one occupying a position officially classified as a motor vehicle operator, who is required to operate a Government-owned or -leased motor vehicle to properly carry out his or her assigned duties.

*Motor vehicle* means a vehicle designed and operated principally for highway transportation of property or passengers, but does not include a vehicle (a) designed or used for military field training, combat, or tactical purposes; (b) used principally within the confines of a regularly established military post, camp, or depot; or (c) regularly used by an agency in the performance of investigative, law enforcement, or intelligence duties if the head of the agency determines that exclusive control of the vehicle is essential to the effective performance of those duties.

*Operator* means an employee who is regularly required to operate Government-owned or -leased motor vehicles and is occupying a position officially classified as motor vehicle operator.

*Road test* means OPM's Test No. 544 or similar road tests developed by Federal agencies to evaluate the competency of prospective operators.

*State license* means a valid driver's license that would be required for the operation of similar vehicles for other than official Government business by the States, District of Columbia, Puerto Rico, or territory or possession of the United States in which the employee is domiciled or principally employed.

### § 930.103 Coverage.

This subpart governs agencies in authorizing their employees to operate Government-owned or -leased motor vehicles for official purposes within the States of the Union, the District of Columbia, Puerto Rico, and the territories or possessions of the United States and establishes minimum procedures to ensure the safe and efficient operation of such vehicles.

### § 930.104 Objectives.

This subpart requires that agencies (a) establish an efficient and effective

system to identify those Federal employees who are qualified and authorized to operate Government-owned or -leased motor vehicles while on official Government business; and (b) periodically review the competence and physical qualifications of these Federal employees to operate such vehicles safely.

### § 930.105 Minimum requirements for competitive and excepted service positions.

(a) An agency may fill motor vehicle operator positions in the competitive or excepted services by any of the methods normally authorized for filling positions. Applicants for motor vehicle operator positions and incidental operators must meet the following requirements for these positions:

(1) Possess a safe driving record;

(2) Possess a valid State license;

(3) Except as provided in § 930.107, pass a road test; and

(4) Demonstrate that they are medically qualified to operate the appropriate motor vehicle safely in accordance with the standards and procedures established in this part.

(b) Agencies may establish additional requirements to assure that the objectives of this subpart are met.

[50 FR 34669, Aug. 27, 1985, as amended at 60 FR 3067, Jan. 13, 1995]

### § 930.106 Details in the competitive service.

An agency may detail an employee to an operator position in the competitive service for 30 days or less when the employee possesses a State license. For details exceeding 30 days, the employee must meet all the requirements of § 930.105 and any applicable OPM and agency regulations governing such details.

[60 FR 3067, Jan. 13, 1995]

### § 930.107 Waiver of road test.

Under the following conditions, OPM or an agency head or his or her designated representative may waive the road test:

(a) OPM waives the road test requirement for operators of vehicles of one ton load capacity or less who possess a current driver's license from one of the 50 States, District of Columbia, or Puerto Rico, where the employee is domiciled or principally employed, except for operators of buses and vehicles used for: (1) Transportation of dangerous materials; (2) law enforcement; or (3) emergency services.

(b) OPM waives the road test for operators, and agencies may waive the road test for incidental operators of any class of vehicle, who possess a current driver's license for the specific type of vehicle to be operated from one of the 50 States, District of Columbia, or Puerto Rico, where the employee is domiciled or principally employed.

(c) An agency head may waive the road test for operators and incidental operators not covered by paragraphs (a) and (b) of this section, but only when in his or her opinion it is impractical to apply it, and then only for an employee whose competence as a driver has been established by his or her past driving record.

(5 U.S.C. 1104; Pub. L. 95–454, sec. 3(5))

### § 930.108 Periodic medical evaluation.

At least once every 4 years, each agency will ensure that employees who operate Government-owned or leased vehicles are medically able to do so without undue risk to themselves or others. When there is a question about an employee's ability to operate a motor vehicle safely, the employee may be referred for a medical examination in accordance with the provisions of part 339 of this chapter.

[60 FR 3067, Jan. 13, 1995]

### § 930.109 Periodic review and renewal of authorization.

(a) At least once every 4 years, each agency will review each employee's authorization to operate Government-owned or -leased motor vehicles.

(b) An agency may renew the employee's authorization only after the appropriate agency official has determined that the employee is medically qualified and continues to demonstrate competence to operate the type of motor vehicle to which assigned based on a continued safe driving record.

[50 FR 34669, Aug. 27, 1985, as amended at 60 FR 3067, Jan. 13, 1995]

### § 930.110 Identification of authorized operators and incidental operators.

Agencies must have procedures to identify employees who are authorized to operate Government-owned or -leased motor vehicles. Such procedures must provide for adequate control of access to vehicles and assure that the other requirements of this subpart are met.

[50 FR 34669, Aug. 27, 1985, as amended at 66 FR 66712, Dec. 27, 2001]

### § 930.111 State license in possession.

An operator or incidental operator will have a State license in his or her possession at all times while driving a Government-owned or -leased motor vehicle on a public highway.

### § 930.112 Identification card or document in possession.

The operator or incidental operator will have a valid agency identification card or document (e.g., building pass or credential) in his or her possession at all times while driving a Government-owned or -leased motor vehicle.

### § 930.113 Corrective action.

An agency will take adverse, disciplinary, or other appropriate action against an operator or an incidental operator in accordance with applicable laws and regulations. Agency orders and directives will include the following reasons among those constituting sufficient cause for such action against an operator or an incidental operator:

(a) The employee is convicted of operating under the intoxicating influence of alcohol, narcotics, or pathogenic drugs.

(b) The employee is convicted of leaving the scene of an accident without making his or her identity known.

(c) The employee is not qualified to operate a Government-owned or -leased vehicle safely because of a physical or medical condition. In making such a determination, agencies should consult a Federal medical officer or other medical authority as appropriate.

(d) The employee's State license is revoked.

(e) The employee's State license is suspended. However, the agency may continue the employee in his or her position for operation of Government-owned or -leased motor vehicles on other than public highways for not to exceed 45 days from the date of suspension of the State license.

### § 930.114 Reports required.

An agency will submit to OPM, on request (a) a copy of agency orders and directives issued in compliance with this subpart; and (b) such other reports as OPM may require for adequate administration and evaluation of the motor vehicle operator program.

### § 930.115 Requests for waiver of requirements.

Agencies may request authority from OPM to waive requirements in this subpart. OPM may grant exceptions or waivers when it finds these waivers or exceptions are in the interest of good administration and meet the objectives of this program.

[50 FR 34669, Aug. 27, 1985, as amended at 66 FR 66712, Dec. 27, 2001]

## Subpart B—Administrative Law Judge Program

AUTHORITY: 5 U.S.C. 1104(a), 1302(a), 1305, 3105, 3301, 3304, 3323(b), 3344, 4301(2)(D), 5372, 7521, and E.O. 10577, 3 CFR, 1954–1958 Comp., p. 219.

SOURCE: 72 FR 12954, Mar. 20, 2007, unless otherwise noted.

### § 930.201 Coverage.

(a) This subpart applies to individuals appointed under 5 U.S.C. 3105 for proceedings required to be conducted in accordance with 5 U.S.C. 556 and 557 and to administrative law judge positions.

(b) Administrative law judge positions are in the competitive service. Except as otherwise stated in this subpart, the rules and regulations applicable to positions in the competitive service apply to administrative law judge positions.

(c) The title ''administrative law judge'' is the official title for an administrative law judge position. Each agency must use only this title for personnel, budget, and fiscal purposes.

(d) The Director of OPM, or designee, shall prescribe the examination methodology in the design of each administrative law judge examination.

(e) OPM does not hire administrative law judges for other agencies but has the authority to:

(1) Recruit and examine applicants for administrative law judge positions, including developing and administering the administrative law judge examinations under 5 U.S.C. 3301, 3304, 1104(a), and 1302, and Executive Order 10577, as amended, except OPM is not required to use the examination scoring process in 5 CFR 337.101(a);

(2) Assure that decisions concerning the appointment, pay, and tenure of administrative law judges in Federal agencies are consistent with applicable laws and regulations;

(3) Establish classification and qualification standards for administrative law judge positions;

(4) Approve noncompetitive personnel actions for administrative law judges, including but not limited to promotions, transfers, reinstatements, restorations, and reassignments;

(5) Approve personnel actions related to pay for administrative law judges under § 930.205(c), (f)(2), (g), and (j);

(6) Approve an intra-agency detail or assignment of an administrative law judge to a non-administrative law judge position that lasts more than 120 days or when an administrative law judge cumulates a total of more than 120 days for more than one detail or assignment within the preceding 12 months;

(7) Arrange the temporary detail (loan) of an administrative law judge from one agency to another under the provisions of the administrative law judge loan program in § 930.208;

(8) Arrange temporary reemployment of retired administrative law judges to meet changing agency workloads under the provisions of the Senior Administrative Law Judge Program in § 930.209;

(9) Maintain and administer the administrative law judge priority referral program under § 930.210(c);

(10) Promulgate regulations for purposes of sections 3105, 3344, 4301(2)(D) and 5372 of title 5, U.S.C.; and

(11) Ensure the independence of the administrative law judge.

(f) An agency employing administrative law judges under 5 U.S.C. 3105 has:

(1) The authority to appoint as many administrative law judges as necessary for proceedings conducted under 5 U.S.C. 556 and 557;

(2) The authority to assign an administrative law judge to cases in rotation so far as is practicable;

(3) The responsibility to ensure the independence of the administrative law judge; and

(4) The responsibility to obtain OPM's approval before taking any of the personnel actions described in paragraphs (e)(4) through (8) of this section.

### § 930.202 Definitions.

In this subpart:

*Administrative law judge position* means a position in which any portion of the duties requires the appointment of an administrative law judge under 5 U.S.C. 3105.

*Agency* has the same meaning given in 5 U.S.C. 551(1).

*Detail* means the temporary assignment of an administrative law judge from one administrative law judge position to another administrative law judge position without change in civil service or pay status.

*Removal* means discharge of an administrative law judge from the position of an administrative law judge or involuntary reassignment, demotion, or promotion to a position other than that of an administrative law judge.

*Senior administrative law judge* means a retired administrative law judge who is reemployed under a temporary appointment under 5 U.S.C. 3323(b)(2) and § 930.209 of this chapter.

*Superior qualifications* means an appointment made at a rate above the minimum rate based on such qualifications as experience practicing law before the hiring agency; experience practicing before another forum in a field of law relevant to the hiring agency; or an outstanding reputation among others in a field of law relevant to the hiring agency.

### § 930.203 Cost of competitive examination.

Each agency employing administrative law judges must reimburse OPM

for the cost of developing and administering the administrative law judge examination. Each agency is charged a pro rata share of the examination cost, based on the actual number of administrative law judges the agency employs. OPM computes the cost of the examination program on an annual basis and notifies the employing agencies of their respective shares after the calculations are made.

**§ 930.204 Appointments and conditions of employment.**

(a) *Appointment.* An agency may appoint an individual to an administrative law judge position only with prior approval of OPM, except when it makes its selection from the list of eligibles provided by OPM. An administrative law judge receives a career appointment and is exempt from the probationary period requirements under part 315 of this chapter. An administrative law judge appointment is subject to investigation, and an administrative law judge is subject to the suitability requirements in part 731 of this chapter.

(b) *Licensure.* At the time of application and any new appointment, the individual must possess a professional license to practice law and be authorized to practice law under the laws of a State, the District of Columbia, the Commonwealth of Puerto Rico, or any territorial court established under the United States Constitution. Judicial status is acceptable in lieu of ''active'' status in States that prohibit sitting judges from maintaining ''active'' status to practice law. Being in ''good standing'' is also acceptable in lieu of ''active'' status in States where the licensing authority considers ''good standing'' as having a current license to practice law.

(c) *Appointment of incumbents of newly classified administrative law judge positions.* An agency may give an incumbent employee an administrative law judge career appointment if that employee is serving in the position when it is classified as an administrative law judge position on the basis of legislation, Executive order, or a decision of a court and if:

(1) The employee has competitive status or is serving in an excepted position under a permanent appointment;

(2) The employee is serving in an administrative law judge position on the day the legislation, Executive order, or decision of the court on which the classification of the position is based becomes effective;

(3) OPM receives a recommendation for the employee's appointment from the agency concerned; and

(4) OPM determines the employee meets the qualification requirements and has passed the current examination for an administrative law judge position.

(d) *Appointment of an employee from a non-administrative law judge position.* Except as provided in paragraphs (a) and (c) of this section, an agency may not appoint an employee who is serving in a position other than an administrative law judge position to an administrative law judge position.

(e) *Promotion.* (1) Except as otherwise stated in this paragraph, 5 CFR part 335 applies in the promotion of administrative law judges.

(2) To reclassify an administrative law judge position at a higher level, the agency must submit a request to OPM. When OPM approves the higher level classification, OPM will direct the promotion of the administrative law judge occupying the position prior to the reclassification.

(f) *Reassignment.* Prior to OPM's approval, the agency must provide a bona fide management reason for the reassignment.

(g) *Reinstatement.* An agency may reinstate a former administrative law judge who served under 5 U.S.C. 3105, passed an OPM administrative law judge competitive examination, and meets the professional license requirement in paragraph (b) of this section.

(h) *Transfer.* An agency may not transfer an individual from one administrative law judge position to another administrative law judge position within 1 year after the individual's last appointment, unless the gaining and losing agencies agree to the transfer.

(i) *Conformity.* Actions under this section must be consistent with § 930.201(f).

[72 FR 12954, Mar. 20, 2007, as amended at 73 FR 41235, July 18, 2008; 78 FR 71989, Dec. 2, 2013]

**§ 930.205 Administrative law judge pay system.**

(a) OPM assigns each administrative law judge position to one of the three levels of basic pay, AL–3, AL–2 or AL–1 of the administrative law judge pay system established under 5 U.S.C. 5372 in accordance with this section. Pay level AL–3 has six rates of basic pay, A, B, C, D, E, and F.

(1) The rate of basic pay for AL–3, rate A, may not be less than 65 percent of the rate of basic pay for level IV of the Executive Schedule. The rate of basic pay for AL–1 may not exceed the rate for level IV of the Executive Schedule.

(2) The President determines the appropriate adjustment for each level in the administrative law judge pay system, subject to paragraph (a)(1) of this section. Such adjustments take effect on the 1st day of the first pay period beginning on or after the first day of the month in which adjustments in the General Schedule rates of basic pay under 5 U.S.C. 5303 take effect.

(3) An agency must use the following procedures to convert an administrative law judge's annual rate of basic pay to an hourly, daily, weekly, or biweekly rate:

(i) To derive an hourly rate, divide the annual rate of pay by 2,087 and round to the nearest cent, counting one-half cent and over as the next higher cent.

(ii) To derive a daily rate, multiply the hourly rate by the number of daily hours of service required by the administrative law judge's basic daily tour of duty.

(iii) To derive a weekly or biweekly rate, multiply the hourly rate by 40 or 80, respectively.

(b) Pay level AL–3 is the basic pay level for administrative law judge positions filled through a competitive examination.

(c) Subject to OPM approval, agencies may establish administrative law judge positions in pay levels AL–2 and AL–1. Administrative law judge positions are placed at these levels when they involve significant administrative and managerial responsibilities.

(d) Administrative law judges must serve at least 1 year in each AL pay level, or in an equivalent or higher level in positions in the Federal service, before advancing to the next higher level and may advance only one level at a time.

(e) Except as provided in paragraph (f) of this section, upon appointment to an administrative law judge position and placement in level AL–3, an administrative law judge is paid at the minimum rate A of AL–3. He or she is automatically advanced successively to rates B, C, and D of that level upon completion of 52 weeks of service in the next lower rate, and to rates E and F of that level upon completion of 104 weeks of service in the next lower rate. Time in a non-pay status is generally creditable service when computing the 52- or 104-week period as long as it does not exceed 2 weeks per year for each 52 weeks of service. However, absence due to uniformed service or compensable injury is fully creditable upon reemployment as provided in part 353 of this chapter.

(f) Upon appointment to a position at AL–3, an administrative law judge may be paid at the minimum rate A, unless the administrative law judge is eligible for the higher rate B, C, D, E, or F because of prior service or superior qualifications, as provided in paragraphs (f)(1) and (f)(2) of this section.

(1) An agency may offer an administrative law judge applicant with prior Federal service a higher than minimum rate up to the lowest rate of basic pay that equals or exceeds the applicant's highest previous Federal rate of basic pay, not to exceed the maximum rate F.

(2) With prior OPM approval, an agency may pay the rate of pay that is next above the applicant's existing pay or earnings up to the maximum rate F. The agency may offer a higher than minimum rate to:

(i) An administrative law judge applicant with superior qualifications (as defined in § 930.202) who is within reach for appointment from an administrative law judge certificate of eligibles; or

(ii) A former administrative law judge with superior qualifications who is eligible for reinstatement.

(g) With prior OPM approval, an agency, on a one-time basis, may advance an administrative law judge in

an AL–3 position with added administrative and managerial duties and responsibilities one rate above the administrative law judge's current AL–3 pay rate, up to the maximum rate F.

(h) Upon appointment to an administrative law judge position placed at AL–2 or AL–1, an administrative law judge is paid at the established rate for the level.

(i) An employing agency may reduce the level or rate of basic pay of an administrative law judge under § 930.211.

(j) With prior OPM approval, an employing agency may reduce the level of basic pay of an administrative law judge if the administrative law judge submits to the employing agency a written request for a voluntary reduction due to personal reasons.

### § 930.206 Performance rating and awards.

(a) An agency may not rate the job performance of an administrative law judge.

(b) An agency may not grant any monetary or honorary award or incentive under 5 U.S.C. 4502, 4503, or 4504, or under any other authority, to an administrative law judge.

### § 930.207 Details and assignments to other duties within the same agency.

(a) An agency may detail an administrative law judge from one administrative law judge position to another administrative law judge position within the same agency in accordance with 5 U.S.C. 3341.

(b) An agency may not detail an employee who is not an administrative law judge to an administrative law judge position.

(c) An agency may assign an administrative law judge to perform non-administrative law judge duties only when:

(1) The other duties are consistent with administrative law judge duties and responsibilities;

(2) The assignment is to last no longer than 120 days; and

(3) The administrative law judge has not had a total of more than 120 days of such assignments or details within the preceding 12 months.

(d) OPM may authorize a waiver of paragraphs (c)(2) and (c)(3) of this section if an agency shows that it is in the public interest to do so. In determining whether a waiver is justified, OPM may consider, but is not restricted to considering, such factors as unusual case load or special expertise of the detailee.

### § 930.208 Administrative Law Judge Loan Program—detail to other agencies.

(a) In accordance with 5 U.S.C. 3344, OPM administers an Administrative Law Judge Loan Program that coordinates the loan/detail of an administrative law judge from one agency to another. An agency may request from OPM the services of an administrative law judge if the agency is occasionally or temporarily insufficiently staffed with administrative law judges, or an agency may loan the services of its administrative law judges to other agencies if there is insufficient work to fully occupy the administrative law judges' work schedule.

(b) An agency's request to OPM for the services of an administrative law judge must:

(1) Identify and briefly describe the nature of the cases(s) to be heard;

(2) Specify the legal authority for which the use of an administrative law judge is required; and

(3) Demonstrate, as appropriate, that the agency has no administrative law judge available to hear the case(s).

(c) The services of an administrative law judge under this program are made from the starting date of the detail until the end of the current fiscal year, but may be extended into the next fiscal year with OPM's approval. Decisions for an extension are made by OPM on a case-by-case basis.

(d) The agency requesting the services of an administrative law judge under this program is responsible for reimbursing the agency that employs the administrative law judge for the cost of the service.

### § 930.209 Senior Administrative Law Judge Program.

(a) OPM administers a Senior Administrative Law Judge Program in accordance with 5 U.S.C. 3323(b)(2). The

Senior Administrative Law Judge Program is subject to the requirements and limitations in this section.

(b) A senior administrative law judge must meet the:

(1) Annuitant requirements under 5 U.S.C. 3323;

(2) Professional license requirement in § 930.204(b); and

(3) Investigations and suitability requirements in part 731 of this chapter.

(c) Under the Senior Administrative Law Judge Program, OPM authorizes agencies that have temporary, irregular workload requirements for conducting proceedings in accordance with 5 U.S.C. 556 and 557 to temporarily reemploy administrative law judge annuitants. If OPM is unable to identify an administrative law judge under § 930.208 who meets the agency's qualification requirements, OPM will approve the agency's request.

(d) An agency wishing to temporarily reemploy an administrative law judge must submit a written request to OPM. The request must:

(1) Identify the statutory authority under which the administrative law judge is expected to conduct proceedings;

(2) Demonstrate the agency's temporary or irregular workload requirements for conducting proceedings;

(3) Specify the tour of duty, location, period of time, or particular cases(s) for the requested reemployment; and

(4) Describe any special qualifications the retired administrative law judge possesses that are required of the position, such as experience in a particular field, agency, or substantive area of law.

(e) OPM establishes the terms of the appointment for a senior administrative law judge. The senior administrative law judge may be reemployed either for a specified period not to exceed 1 year or for such time as may be necessary for the senior administrative law judge to conduct and complete the hearing and issue decisions for one or more specified cases. Upon agency request, OPM may reduce or extend such period of reemployment, as necessary, to coincide with changing staffing requirements.

(f) A senior administrative law judge serves subject to the same limitations as any other administrative law judge employed under this subpart and 5 U.S.C. 3105.

(g) A senior administrative law judge is paid the rate of basic pay for the pay level at which the position has been classified. If the position is classified at pay level AL–3, the senior administrative law judge is paid the lowest rate of basic pay in AL–3 that equals or exceeds the highest previous rate of basic pay attained by the individual as an administrative law judge immediately before retirement, up to the maximum rate F.

### § 930.210 Reduction in force.

(a) *Retention preference regulations.* Except as modified by this section, the reduction in force regulations in part 351 of this chapter apply to administrative law judges.

(b) *Determination of retention standing.* In determining retention standing in a reduction in force, each agency lists its administrative law judges by group and subgroup according to tenure of employment, veterans' preference, and service date as outlined in part 351 of this chapter. Because administrative law judges are not given performance ratings (see § 930.206), the provisions in part 351 of this chapter referring to the effect of performance ratings on retention standing are not applicable to administrative law judges.

(c) *Placement assistance.* (1) An administrative law judge who is reached in an agency's reduction in force and receives a notification of separation is eligible for placement assistance under the agency's reemployment priority list established and maintained in accordance with subpart B of part 330 of this chapter.

(2) An administrative law judge who is reached by an agency in a reduction in force and who is notified of being separated, furloughed for more than 30 days, or demoted, is entitled to have his or her name placed on OPM's administrative law judge priority referral list for the level in which last served and for all lower levels.

(i) To have his or her name placed on the OPM priority referral list, a displaced administrative law judge must provide OPM with a request for priority referral placement, a resume or

equivalent, a list of acceptable geographical locations, and a copy of the reduction in force notice at any time after the receipt of the specific reduction in force notice, but not later than 90 days after the date of separation, furlough for more than 30 days, or demotion.

(ii) Eligibility on the OPM priority referral list expires 2 years after the effective date of the reduction in force action.

(iii) Referral and selection of administrative law judges are made without regard to selective certification or special qualification procedures.

(iv) Termination of eligibility on the OPM priority referral list takes place when an administrative law judge submits a written request to terminate eligibility, accepts a permanent full-time administrative law judge position, or declines one full-time employment offer as an administrative law judge at or above the level held when reached for reduction in force at geographic locations indicated as acceptable under paragraph (c)(2)(i) of this section.

(3) When there is no administrative law judge available on the agency's reemployment priority list, an agency may fill a vacant administrative law judge position only from OPM's priority referral list, unless the agency obtains prior approval from OPM to fill the vacant position through competitive examining, promotion, transfer, reassignment, or reinstatement procedures. OPM will grant such approvals only under extraordinary circumstances. The agency must demonstrate that the potential administrative law judge candidate possesses experience and qualifications superior to any available displaced administrative law judge on OPM's priority referral list.

### § 930.211 Actions against administrative law judges.

(a) *Procedures.* An agency may remove, suspend, reduce in level, reduce in pay, or furlough for 30 days or less an administrative law judge only for good cause established and determined by the Merit Systems Protection Board on the record and after opportunity for a hearing before the Board as prescribed in 5 U.S.C. 7521 and 5 CFR part 1201. Procedures for adverse actions by agencies under part 752 of this chapter do not apply to actions against administrative law judges.

(b) *Status during removal proceedings.* In exceptional cases when there are circumstances in which the retention of an administrative law judge in his or her position, pending adjudication of the existence of good cause for his or her removal, is detrimental to the interests of the Federal Government, the agency may:

(1) Assign the administrative law judge to duties consistent with his or her normal duties in which these circumstances would not exist;

(2) Place the administrative law judge on leave with his or her consent;

(3) Carry the administrative law judge on annual leave, sick leave, leave without pay, or absence without leave, as appropriate, if he or she is voluntarily absent for reasons not originating with the agency; or

(4) If the alternatives in paragraphs (b)(1) through (b)(3) of this section are not available, the agency may consider placing the administrative law judge in a paid non-duty or administrative leave status.

(c) *Exceptions from procedures.* The procedures in paragraphs (a) and (b) of this section do not apply:

(1) In making dismissals or taking other actions under 5 CFR part 731;

(2) In making dismissals or other actions made by agencies in the interest of national security under 5 U.S.C. 7532;

(3) To reduction in force actions taken by agencies under 5 U.S.C. 3502; or

(4) In any action initiated by the Office of Special Counsel under 5 U.S.C. 1215.

## Subpart C—Information Security Responsibilities for Employees who Manage or Use Federal Information Systems

AUTHORITY: 5 U.S.C. 4118; Pub. L. 107–347, 116 Stat. 2899.

SOURCE: 69 FR 32836, June 14, 2004, unless otherwise noted.

**§ 930.301 Information systems security awareness training program.**

Each Executive Agency must develop a plan for Federal information systems security awareness and training and

(a) Identify employees with significant information security responsibilities and provide role-specific training in accordance with National Institute of Standards and Technology (NIST) standards and guidance available on the NIST Web site, *http://csrc.nist.gov/publications/nistpubs/*, as follows:

(1) All users of Federal information systems must be exposed to security awareness materials at least annually. Users of Federal information systems include employees, contractors, students, guest researchers, visitors, and others who may need access to Federal information systems and applications.

(2) Executives must receive training in information security basics and policy level training in security planning and management.

(3) Program and functional managers must receive training in information security basics; management and implementation level training in security planning and system/application security management; and management and implementation level training in system/application life cycle management, risk management, and contingency planning.

(4) Chief Information Officers (CIOs), IT security program managers, auditors, and other security-oriented personnel (e.g., system and network administrators, and system/application security officers) must receive training in information security basics and broad training in security planning, system and application security management, system/application life cycle management, risk management, and contingency planning.

(5) IT function management and operations personnel must receive training in information security basics; management and implementation level training in security planning and system/application security management; and management and implementation level training in system/application life cycle management, risk management, and contingency planning.

(b) Provide the Federal information systems security awareness material/exposure outlined in NIST guidance on IT security awareness and training to all new employees before allowing them access to the systems.

(c) Provide information systems security refresher training for agency employees as frequently as determined necessary by the agency, based on the sensitivity of the information that the employees use or process.

(d) Provide training whenever there is a significant change in the agency information system environment or procedures or when an employee enters a new position that requires additional role-specific training.

# PART 950—SOLICITATION OF FEDERAL CIVILIAN AND UNIFORMED SERVICE PERSONNEL FOR CONTRIBUTIONS TO PRIVATE VOLUNTARY ORGANIZATIONS

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AUTHORITY: E.O. 12353 (March 23, 1982), 47 FR 12785 (March 25, 1982), 3 CFR, 1982 Comp., p. 139; E.O. 12404 (February 10, 1983), 48 FR 6685 (February 15, 1983); Pub. L. 100–202, and Pub. L. 102–393 (5 U.S.C. 1101 Note).

SOURCE: 79 FR 21586, Apr. 17, 2014, unless otherwise noted.

## Subpart A—General Provisions

### § 950.101 Definitions.

As used in this part:

*Administrative Expenses* means the overhead costs of the participating organization based on information from the Internal Revenue Service Form 990.

*Application Fee* means a non-refundable fee paid by a charitable organization in each campaign period for which it seeks to participate.

*Campaign Expenses* means the cost of the administration of the campaign by the Central Campaign Administrator and any Outreach Coordinators.

*Central Campaign Administrator* means the organization(s) responsible for developing and maintaining the CFC Web site and charity application module, and to which OPM may assign responsibility for making distributions to charities.

*Charity List* means the official list of charities approved by OPM for inclusion in the CFC.

*Combined Federal Campaign* or *Campaign* or *CFC* means the charitable fundraising program established and administered by the Director of the Office of Personnel Management (OPM) pursuant to Executive Order No. 12353, as amended by Executive Order No. 12404, and all subsidiary units of such program.

*Director* means the Director of the Office of Personnel Management or his/her designee.

*Distribution fee* means amount assessed against pledges received should the application and listing fees not cover all the costs of the campaign.

*Employee* means any person employed by the Government of the United States or any branch, unit, or instrumentality thereof, including persons in the civil service, uniformed service, foreign service, and the postal service.

*Family Support and Youth Activities (FSYA)* means an organization on a domestic military base recognized by the Department of Defense as providing programs for military families on the base.

*Family Support and Youth Programs (FSYP)* means an organization on a non- domestic military base recognized by the Department of Defense as providing programs for military families on the base.

*Federation* or *Federated Group* means a group of voluntary charitable human health and welfare organizations created to supply common fundraising, administrative, and management services to its constituent members.

*Independent Organization* means a charitable organization that is not a member of a federation for the purposes of the Combined Federal Campaign.

*International General Designation Option* means an option available to donors under which his or her gift is distributed to all of the international organizations listed in the International Section of the Charity List in the same proportion as all of the international organizations received designations in the local CFC. This option will have the code IIIII.

*International Organization* means a charitable organization that provides services either exclusively or in a substantial preponderance to persons in areas outside of the United States.

*Listing Fee* means a non-refundable annual fee charged only to charitable organizations approved for participation.

*Local Federal Coordinating Committee* means the group of Federal officials designated by the Director to oversee the CFC in a zone and to assist the Director with the charity application reviews.

*Organization* or *Charitable Organization* means a non-profit, philanthropic, human health and welfare organization.

*Outreach Coordinator* means an individual or an entity hired by the Local Federal Coordinating Committee to conduct marketing activities, arrange for events such as Charity Fairs, and educate charities and donors regarding the program.

*Services* means the real services, benefits, assistance or program activities provided by charitable organizations. These may include, but are not limited to, medical research and assistance, education, financial assistance, mentoring, conservation efforts, spiritual development, the arts, and advocacy.

*Solicitation* means any action requesting a monetary donation, either by payroll deduction or credit card, on behalf of charitable organizations.

### § 950.102 Scope of the Combined Federal Campaign.

(a) The CFC is the only authorized solicitation of employees in the Federal workplace on behalf of charitable organizations. A campaign may be conducted only during the period running from September 1 through January 15, as determined by the Director. It must be conducted at every Federal agency in accordance with the regulations in this part. No other monetary solicitation on behalf of charitable organizations may be conducted in the Federal workplace, except as follows:

(1) Federal agencies must provide information about the CFC to new employees at orientation. New employees may make pledges within 30 days of entry on duty, if outside of the campaign period.

(2) The Director may grant permission for solicitations of Federal employees, outside the CFC, in support of victims in cases of emergencies and disasters. Emergencies and disasters are defined as any hurricane, tornado storm, flood, high water, wind-driven water, tidal wave, tsunami, earthquake, volcanic eruption, landslide, mudslide, snowstorm, drought, fire, explosion, or other catastrophe in any part of the world. Any special solicitations will be managed through a Disaster Relief Program developed by OPM.

(b) The regulations in this part do not apply to the collection of gifts-in-kind, such as food, clothing and toys, or to the solicitation of Federal employees outside of the Federal workplace as defined by the applicable Agency Head consistent with General Services Administration regulations and any other applicable laws or regulations.

(c) The Director may exercise general supervision over all operations of the CFC, and take all necessary steps to ensure the achievement of campaign objectives, including but not limited to the following:

(1) Any disputes relating to the interpretation or implementation of this part may be submitted to the Director for resolution. The decisions of the Director are final for administrative purposes.

(2) The Director may audit, investigate, and report on the administration of any campaign, the organization that administers the campaign, and any national, international and local federation, federation member or independent organization that participates in the campaign for compliance with these regulations. The Director may resolve any issues reported and assess sanctions or penalties, as warranted under § 950.503.

(d) Current Federal civilian and active duty military employees may make contributions using payroll deduction or by electronic means, including credit/debit cards and e-checks, as approved by the Director. Contractor personnel, credit union employees and other persons present on Federal premises, as well as retired Federal employees, may make single contributions to the CFC by electronic means, including credit cards, as approved by the Director. For the first five campaign periods after implementation of these regulations, LFCCs will be permitted to still provide donors the option of using non-electronic pledging based on guidance issued by OPM.

(e) Heads of departments or agencies may establish policies and procedures applicable to solicitations conducted by organizations composed of civilian

employees or members of the uniformed services among their own members for organizational support or for the benefit of welfare funds for their members. Such solicitations are not subject to these regulations, and therefore do not require permission of the Director.

**§ 950.103 Establishing Local Federal Coordinating Committees.**

(a) The Director, in his or her sole discretion, will establish, maintain, and, from time to time, revise an official list of campaign zones.

(b) For each campaign zone, the Director will establish a Local Federal Coordinating Committee (LFCC) for the purpose of governing the campaign for that zone. It will be the responsibility of the Federal Executive Board or lead agency (as identified by the Director) in the zone to ensure an active and diverse membership, with a minimum of three members. The LFCC shall consist of the following:

(1) Members to be drawn from local Federal inter-agency organizations, such as Federal Executive Boards, or from personnel assigned to the military installation and/or agency identified as the lead agency in that zone;

(2) Representation from local Federal Agencies located within the zone, representing a cross-section of agencies with regard to personnel types and locations; and

(3) If approved by the Director, representatives of employee unions and other employee groups.

(c) The members of each LFCC must select a Chair and a Vice Chair. The Chair and Vice Chair positions will be rotated among the LFCC members. The term of the Chair and Vice Chair may not exceed three consecutive years. Any LFCC Chair or Vice Chair is subject to removal by the Director, in his sole and unreviewable discretion.

(d) The LFCC will ensure that, to the extent reasonably possible, every employee is given the opportunity to participate in the CFC.

**§ 950.104 Local Federal Coordinating Committee responsibilities.**

(a) The LFCC is to serve as the central source of information regarding the CFC among Federal employees in their zone. All members of the LFCC must develop an understanding of campaign regulations and procedures.

(b) The responsibilities of the LFCC members include, but are not limited to, the following:

(1) Attend required LFCC training and obtain certification in LFCC operations;

(2) Maintain minutes of LFCC meetings and respond promptly to any request for information from the Director;

(3) Name a LFCC Chair and Vice Chair and notify the Director when there is a change in either position;

(4) Assist in determining the eligibility of organizations that apply to participate in the campaign as required and assigned by OPM;

(5) Provide training to employees in the methods of non-coercive solicitation;

(6) Provide instructions to employees regarding the process for making donations and designating the charitable organizations to receive their donations.

(7) Take appropriate measures to protect potential donors from coercion to participate in the campaign.

(8) Bring any allegations of potential donor coercion to the attention of the employee's agency and provide a mechanism to review employee complaints of undue coercion in Federal fundraising. Federal agencies shall provide procedures and assign responsibility for the investigation of such complaints. The agency official responsible for conducting the campaign is responsible for informing employees of the proper channels for pursuing such complaints.

(9) Notify the Director of issues concerning the campaign that the LFCC cannot resolve by applying these regulations. The LFCC must abide by the Director's decisions on all matters concerning the campaign.

(10) Review, approve and provide authorization to the Central Campaign Administrator for payments to the outreach coordinator in an efficient and effective manner as outlined in the agreement between OPM and the Central Campaign Administrator.

(11) Conduct an effective and efficient campaign in a fair and even-handed

manner aimed at collecting the greatest amount of charitable contributions possible. LFCC's should afford federated groups and agencies with representatives in the campaign area adequate opportunity to offer suggestions relating to the operation of the campaign.

(c) The LFCC may hire an Outreach Coordinator to provide local operation marketing support to their campaign, including developing marketing plans and materials, employee training, campaign event and activity support, and the printing and distribution of CFC Charity Lists and pledge forms as permitted in 5 CFR § 950.102(d).

(d) Monitor the work of the Outreach Coordinator, ensuring compliance with these regulations, as well as performance as outlined in agreement with the LFCC.

### § 950.105 Federal Agency Head responsibilities.

(a) The agency head at each Federal installation within a campaign area should:

(1) Become familiar with all CFC regulations.

(2) Cooperate with the members of the LFCC in organizing and conducting the campaign.

(3) Initiate official campaigns within their offices or installations and provide support for the campaign.

(4) Assure the campaign is conducted in accordance with these regulations.

(5) Appoint an employee to oversee the Agency campaign.

(6) Establish a network of employees in support of the Agency's campaign.

(b) Agency heads may not discontinue solicitation of Federal employees during the campaign solicitation period within their organization without the written approval of the Director.

### § 950.106 Central Campaign Administrator (CCA).

(a) OPM may contract with one or more organizations classified by the Internal Revenue Service as 501(c)(3) organizations, to perform the centralized fiscal and administrative functions of the CFC. One organization will be responsible for developing and maintaining a centralized Web site for the CFC that will include an online application function for charities applying to participate in the CFC and an online pledging function for Federal donor use. All organizations will be responsible for disbursing funds received from the Federal payroll offices or service providers. If OPM contracts with more than one organization, the disbursement responsibilities will be divided between them based on Federal Shared Service Centers and Federal payroll offices. For example, if OPM contracts with four organizations, one would handle all agencies that use the National Finance Center as their Shared Service Center regardless of the location of the donor or the agency. Only non-CFC participating organizations may be selected as CCAs.

(b) In the event that there is no qualified CCA, no workplace solicitation of any Federal employee may be authorized and CFC payroll allotments would not be accepted or honored.

### § 950.107 Campaign expense recovery.

(a) The costs of outreach approved by the LFCC, training and traveling for the LFCC, and CCA will be recovered through application/listing fees and/or distribution fees paid by charitable organizations . The fee structure will be determined annually by the Director based on estimated costs of administering the central campaign and local marketing efforts. This structure will be announced no later than October 31 of the year preceding the campaign. Any excess funds from applications fees over expenses will be rolled over to the following campaign and be considered when setting the rates. Marketing expenses will not exceed a percentage of receipts as determined by the Director. No expenses for food or entertainment may be reimbursed to the Outreach Coordinator. Only travel-related food expenses may be reimbursed to the LFCC in accordance with the Federal Travel Regulations.

(b) Charity application fees are due at the time of the filing of the application or the application deadline, whichever occurs last. A charity that has not paid the full application fee at that time may not participate in the CFC that campaign year.

(c) An additional listing fee will be applied to all charities approved for participation. These charities will not be listed in paper or electronic Charity Lists, and CFC contributions will not be processed on their behalf, if they do not submit the listing fee prior to the annual date set by OPM.

(d) The distribution fee will be assessed against pledges received should the application and listing fees not cover all the costs of the campaign.

### § 950.108 Preventing coercive activity.

True voluntary giving is fundamental to Federal fundraising activities. Actions that do not allow free choices or create the appearance that employees do not have a free choice to give or not to give, or to publicize their gifts or to keep them confidential, are contrary to Federal fundraising policy. Activities contrary to the non-coercive intent of Federal fundraising policy are not permitted in campaigns. They include, but are not limited to:

(a) Solicitation of employees by their supervisor or by any individual in their supervisory chain of command. This does not prohibit the head of an agency to perform the usual activities associated with the campaign kick-off and to demonstrate his or her support of the CFC in employee newsletters or other routine communications with the Federal employees.

(b) Supervisory inquiries about whether an employee chose to participate or not to participate or the amount of an employee's donation. Supervisors may be given nothing more than summary information about the major units that they supervise.

(c) Setting of 100 percent participation goals.

(d) Establishing personal dollar goals and quotas.

(e) Developing and using lists of non-contributors.

(f) Providing and using contributor lists for purposes other than the routine collection and forwarding of contributions and allotments, and as allowed under § 950.501.

(g) Using as a factor in a supervisor's performance appraisal the results of the solicitation in the supervisor's unit or organization.

### § 950.109 Avoidance of conflict of interest.

Any Federal employee who serves on the LFCC, or as a Federal agency fundraising program employee, shall not serve in any official capacity or participate in any decisions where, because of membership on the board or other affiliation with a charitable organization, there could be or appear to be a conflict of interest under any statute, regulation, Executive order, or applicable agency standards of conduct.

### § 950.110 CCA Prohibited discrimination.

Discrimination for or against any individual or group on account of race, ethnicity, color, religion, sex (including pregnancy and gender identity), national origin, age, disability, sexual orientation, genetic information, or any other non-merit-based factor is prohibited in all aspects of the management and the execution of the CFC. Nothing herein denies eligibility to any organization, which is otherwise eligible under this part to participate in the CFC, merely because such organization is organized by, on behalf of, or to serve persons of a particular race, ethnicity, color, religion, sex, gender identity, national origin, age, disability, sexual orientation, or genetic background.

## Subpart B—Eligibility Provisions

### § 950.201 Charity eligibility.

(a) The Director shall annually:

(1) Determine the timetable and other procedures regarding application for inclusion in the Charity List; and

(2) Determine which organizations among those that apply qualify to be included in the National/International, International and Local parts of the Charity List. In order to determine whether an organization may participate in the campaign, the Director may request evidence of corrective action regarding any prior violation of regulation or directive, sanction, or penalty, as appropriate. The Director retains the ultimate authority to decide whether the organization has demonstrated, to the Director's satisfaction, that the organization has taken appropriate corrective action. Failure

to demonstrate satisfactory corrective action or to respond to the Director's request for information within 10 business days of the date of the request may result in a determination that the organization will not be included in the Charity List.

(b) The Charity List will include each organization's CFC code and other information as determined by OPM.

(c) A charity must submit the full application the initial year it applies to participate in the CFC. In lieu of a full application, a charity may submit a verification application for the two years immediately following its submission of a full application.

(1) A verification application consists of certification of all applicable statements required by §§ 950.202 and 950.203, and submission of an IRS Form 990 or pro forma IRS Form 990, as defined in § 950.203(a)(3).

(2) An organization that did not apply or was not approved for participation in the preceding campaign must submit a full application.

**§ 950.202 Charity eligibility requirements.**

(a) The requirements for an organization to be listed in the Charity List shall include the following:

(1) Certification that it provides or conducts real services, benefits, assistance, or program activities (hereafter listed as ''services''), in 15 or more different states or one or more foreign countries over the 3 calendar year period immediately preceding January 1 of the campaign application year. A schedule listing a detailed description of the services in each state (minimum 15) or foreign countries (minimum 1), including the year of service and documenting the location and date and year of each service, and the number of beneficiaries of each such service must be included with the CFC application. The schedule must make a clear showing of national or international presence. Broad descriptions of services and identical repetitive narratives will not be accepted in the sole discretion of OPM if they do not allow OPM to adequately determine that real services were provided or to accurately determine the individuals or entities who benefited. It must be clear in the documentation submitted that the organization provided at least one human health and welfare service in the calendar year prior to the year for which the organization is applying. Publications or other documents in lieu of a schedule detailing this information are not acceptable.

(i) Local charitable organizations are not required to have provided services in 15 states or a foreign country over the prior 3 years. The schedule for local organizations is only required to document services in their local area. Local organizations must also certify that the Organization Address submitted with the application is the primary location where the organization's services are rendered and/or its records are maintained.

(ii) This requirement cannot be met solely by the provision of services via telephone, unless the service is emergency in nature such as a suicide prevention hotline. The requirement is also not met solely by disseminating information and publications via the U.S. Postal Service or the Internet, unless it meets the criteria for web- based services as described in § 950.202(a)(1)(iii), or a combination thereof.

(iii) Real services for web-based service organizations may be considered if the organization provides service logs or other records indicating the geographic distribution of users in each state. The organization must demonstrate the scope of services received by users over the three-year period immediately preceding the start of the campaign year involved. Reports that reflect only the number of hits or visits to a Web site are not sufficient to establish the provision of real services. In addition, two of the three following types of information must be provided to demonstrate the provision of real services, benefits, assistance, or program activities:

(A) Evidence that recipients, including members of the general public, dues paying members or affiliate organizations, have registered for use of the Web site;

(B) Summary reports that document customer feedback, through service satisfaction or utilization surveys,

demonstration of two-way communications, such as an online class, or other mechanisms; and

(C) Documented evidence that recipients of web-based services paid a fee for the service.

(iv) Providing listings of affiliated groups does not demonstrate provision of real services by the applicant. Location of residence of organization members or location of residence of visitors to a facility does not substantiate provision of services. Schedules that describe activities conducted by an entity other than the applicant, such as a chapter or a support group, must include information documenting the applicant's role in the delivery of the service. Details may include items such as whether the chapter is funded by the applicant or how the applicant assisted in the delivery of the service. Applications that fail to include a description of how the applicant itself provides service may result in a denial.

(v) Organizations that provide student scholarships or fellowships must indicate the state in which the recipient resides, not the state of the school or place of fellowship. Mere dissemination of information does not demonstrate acceptable provision of real services.

(vi) While it is not expected that an organization maintain an office in each state or foreign country, a clear showing must be made of the actual services, benefits, assistance or activities provided in each state or foreign country. Organizations that provide services in one location may only count the state in which the services are provided toward their eligibility to participate on the national charity list. However, an organization may have beneficiaries from several states and want service to those beneficiaries considered toward the 15-state requirement to participate on the national Charity List. If an organization can document that the services are subsidized or were provided free-of-charge, and list the value of those services to each of the beneficiaries, then the service to the beneficiary may be considered a service in the state of the beneficiary's residence, similar to a financial grant or scholarship. For example, a medical institution providing free housing to family members of the patient during the length of the patient's stay must list the location of the medical institution, the city/state of residence of each beneficiary, the dates of service, and the value of the housing provided to each beneficiary's family members.

(vii) An organization's role in providing information to the media, such as authorship of an article for a newspaper, magazine, or journal, or serving as an interviewee or reference for a television news program, or the authorship of a book, does not in itself constitute a real service for CFC purposes. Likewise, the production and/or distribution of information, such as a report based on research, surveys conducted by the applicant organization, or publication of a policy position paper, does not, in itself, constitute an eligible service. With regard to media-related activities, research, and reports, the applicant must describe the manner in which beneficiaries requested or used the document or information in order to establish the provision of a real services, benefit, assistance, or program activity.

(viii) De minimis services, benefits, assistance, or other program activities in any state or foreign country will not be accepted as a basis for qualification as a national or international organization. Factors that OPM will consider in determining whether an organization's services, benefits, assistance or other program activities are de minimis include, but are not limited to: nature and extent of the service, benefit, assistance or activity; frequency, continuity, and duration; value of financial assistance awarded to individuals or entities; impact on, or benefit to, beneficiaries; and number of beneficiaries.

(2) Certification that it is an organization recognized by the Internal Revenue Service as tax exempt under 26 U.S.C. 501(c)(3) to which contributions are deductible under 26 U.S.C. 170(c)(2). The CFC will verify that each applicant's name and Employer Identification Number appears in the IRS Business Master File (BMF). If the organization does not appear in the BMF, one of the following must accompany the application:

(i) An affirmation letter from the IRS, dated on or after January 1 of the campaign year to which the organization is applying, that verifies the organization's current 501(c)(3) tax-exempt status.

(ii) A local affiliate of a national organization that is not separately incorporated must submit a certification from the Chief Executive Officer (CEO) or CEO equivalent of the national organization stating that it operates as a bonafide chapter or affiliate in good standing of the national organization and is covered by the national organization's 26 U.S.C. 501(c)(3) tax exemption. The letter must be signed and dated on or after October 1 of the calendar year preceding the campaign year for which the organization is applying.

(iii) For central organizations that are churches, the CFC will accept a copy of its most recently published listing (such as a church directory) of section 501(c)(3) organizations that are included in the group exemption held by the central organization. A subordinate may alternatively obtain a letter from the central organization affirming the subordinate's status as an organization exempt under section 501(c)(3) of the Internal Revenue Code that is included in the group exemption held by the central organization.

(iv) Family Support and Youth Activities (FSYA) located on military installations in the United States and Family Support and Youth Programs (FSYP) located on military installations overseas must provide a copy of certification by the commander of a military installation, as outlined in paragraphs (a)(3) and (4) of this section, to demonstrate tax-exempt status.

(3) Family support and youth activities or programs certified by the commander of a military installation as meeting the eligibility criteria contained in paragraphs (a)(3) and (4) of this section may appear on the list of local organizations and be supported from CFC funds. Family support and youth activities may participate in the CFC as a member of a federation at the discretion of the certifying commander.

(4) A family support and youth activity or program must:

(i) Be a nonprofit, tax-exempt organization that provides family service programs or youth activity programs to personnel in the Command and be a Non-Appropriated Fund Instrumentality that supports the installation MWR/FSYA/FSYP program. The activity must not receive a majority of its financial support from appropriated funds.

(ii) Have a high degree of integrity and responsibility in the conduct of their affairs. Contributions received must be used effectively for the announced purposes of the organization.

(iii) Be directed by the base Non-Appropriated Fund Council or an active voluntary board of directors which serves without compensation and holds regular meetings.

(iv) Conduct its fiscal operations in accordance with a detailed annual budget, prepared and approved at the beginning of the fiscal year. Any significant variations from the approved budget must have prior authorization from the Non-Appropriated Fund Council or the directors. The family support and youth activities must have accounting procedures acceptable to an installation auditor and the inspector general.

(v) Have a policy and practice of nondiscrimination on the basis of race, color, religion, sex, sexual orientation, gender identity or national origin applicable to persons served by the organization.

(vi) Prepare an annual report which includes a full description of the organization's activities and accomplishments. These reports must be made available to the public upon request.

### § 950.203 Public accountability standards.

(a) To ensure organizations wishing to solicit donations from Federal employees in the workplace are portraying accurately their programs and benefits, each organization seeking eligibility must meet annually applicable standards and certification requirements. Each organization, other than FSYA or FSYP, wishing to participate must:

(1) Certify that the organization is a human health and welfare organization

providing services, benefits, or assistance to, or conducting activities affecting, human health and welfare. The organization's application must provide documentation describing the health and human welfare benefits provided by the organization within the previous calendar year;

(2) Subject to the exceptions listed in this section, certify that it accounts for its funds on an accrual basis in accordance with United States or International generally accepted accounting principles and that an audit of its fiscal operations is completed annually by an independent certified public accountant in accordance with generally accepted auditing standards. A copy of the organization's most recent annual audited financial statements must be included with the application. The statements must include all statements required for voluntary health and welfare organizations by the United States Financial Accounting Standards Board or the International Accounting Standards Board. The audited financial statements must cover the fiscal period ending not more than 18 months prior to the January of the year of the campaign for which the organization is applying. For example, the audited financial statements included in the 2014 application must cover the fiscal period ending on or after June 30, 2012.

(i) An organization with annual revenue of less than $100,000 reported on its IRS Form 990 or pro forma IRS Form 990 submitted to the CFC is not required to undergo an audit, submit audited financial statements, or to account for its funds on an accrual basis in accordance with generally accepted accounting principles. Rather, the organization must certify that it has controls in place to ensure that funds are properly accounted for and that it can provide accurate and timely financial information to interested parties.

(ii) An organization with annual revenue of at least $100,000 but less than $250,000 is not required to undergo an audit. The organization must certify that its financial statements are reviewed by an independent certified public accountant on an annual basis or are audited by an independent public accountant on an annual basis. A copy of the reviewed or audited financial statements must be included with the application.

(3) Certify that it prepares and submits to the IRS a complete copy of the organization's IRS Form 990 or that it is not required to prepare and submit an IRS Form 990 to the IRS. Provide a completed copy of the organization's IRS Form 990 submitted to the IRS covering a fiscal period ending not more than 18 months prior to the January of the year of the campaign for which the organization is applying, including signature, and all supplemental schedules, with the application, or if not required to file an IRS Form 990, provide a pro forma IRS Form 990. Pro forma IRS Form 990 instructions will be posted on the OPM Web site and included in the application instructions. IRS Forms 990EZ, 990PF, and comparable forms are not acceptable substitutes. The IRS Form 990 and audited financial statements, if required, must cover the same fiscal period.

(4) Provide a computation of the organization's percentage of total support and revenue spent on administrative and fundraising. This percentage shall be computed from information on the IRS Form 990 submitted pursuant to paragraph (a)(3) of this section.

(5) Certify that the organization is directed by an active and responsible governing body whose members have no material conflict of interest and, a majority of which serve without compensation.

(6) Certify that the organization's fundraising practices prohibit the sale or lease of its CFC contributor lists.

(7) Certify that its publicity and promotional activities are based upon its actual program and operations, are truthful and non-deceptive, and make no exaggerated or misleading claims.

(8) Certify that contributions are effectively used for the announced purposes of the charitable organization.

(9) Provide a statement that the certifying official is authorized by the organization to certify and affirm all statements required for inclusion on the Charity List.

(b) The Director shall review these applications for accuracy, completeness, and compliance with these regulations. Failure to supply any of this

information may be judged a failure to comply with the requirements of public accountability, and the charitable organization may be ruled ineligible for inclusion on the Charity List.

(c) The Director may request such additional information as the Director deems necessary to complete these reviews. An organization that fails to comply with such requests within 10 calendar days from the date of receipt of the request may be judged ineligible.

(d) The required certifications and documentation must have been completed and submitted prior to the application filing deadline.

(e) The Director may waive any of these standards and certifications upon a showing of extenuating circumstances.

### § 950.204 Eligibility decisions and appeals.

(a) Organizations applying for participation in the CFC will be notified of the eligibility decision electronically via the email address(es) listed in the charity application.

(b) Organizations that apply and are denied eligibility for inclusion on the Charity List may appeal the decision by submitting a request for reconsideration. This request must be received within 10 business days from the date the decision to deny eligibility was sent via email and shall be limited to those facts justifying the reversal of the original decision.

(c) All appeals must:

(1) Be in writing;

(2) Be received by the Director within 10 business days of the date the decision to deny the application was sent via email;

(3) Include a statement explaining the reason(s) why eligibility should be granted; and

(4) Include a copy of the communication from OPM disapproving the original application and supporting information to justify the reversal of the original decision.

(d) Applications or appeals of an adverse eligibility determination must be submitted in a timely manner as indicated above.

(e) Appeals may not be used to supplement applications with documents that did not exist or were not set forth in final form prior to the application deadline. For example, audited financial statements that were not prepared or were in draft form at the time of the deadline cannot be used to document eligibility. Similarly, charities that had applied for, but had not obtained, 501(c)(3) status from the IRS by the CFC application deadline are not eligible to participate for that campaign year.

(f) The Director's decision is final for administrative purposes.

## Subpart C—Federations

### § 950.301 Federation eligibility.

(a) The Director may recognize federations that conform to the requirements set by the Director and are eligible to receive designations. In order to determine whether the Director will recognize a federation, the Director may request evidence of corrective action regarding any prior violation of regulation or directive, sanction, or penalty, as appropriate. The Director retains the ultimate authority to decide whether the federation has demonstrated, to the Director's satisfaction, that the federation has taken appropriate corrective action. Failure to demonstrate satisfactory corrective action or to respond to the Director's request for information within 10 business days of the date of the request may result in a determination that the federation will not be included in the Charity List. The Director also reserves the authority to place a moratorium on the recognition of federations from time to time.

(b) By applying for inclusion in the CFC, federations consent to allow the Director complete access to its and its members' CFC books and records and to respond to requests for information by the Director.

(c) An organization may apply to the Director for inclusion as a federation to participate in the CFC if the applicant has, as members of the proposed federation, 15 or more charitable organizations, in addition to the federation itself, that meet the eligibility criteria of §§ 950.202 and 950.203. The federation must submit the applications of all its proposed member organizations annually.

(d) After an organization has been granted federation status, it may certify that its member organizations meet all eligibility criteria of § 950.202 and § 950.203 to be included on the Charity List. Federation status in a prior campaign is not a guarantee of federation status in a subsequent campaign. Failure to meet minimum federation eligibility requirements shall not be deemed to be a withdrawal of federation status subject to a hearing on the record.

(e) An applicant for federation status must annually certify and/or demonstrate:

(1) That all member organizations seeking participation in the CFC are qualified for inclusion on the National/International or International or Local part of the Charity List. Applicants must provide a complete list of those member organizations it certified in addition to each organization's complete application.

(2) That it meets the eligibility requirements and public accountability standards contained in § 950.202 and § 950.203. The federation can demonstrate that it has met the eligibility requirement in § 950.202(a) either through its own services, benefits, assistance or program activities or through its 15 members' activities.

(i) The federation must complete the certification set forth at § 950.203(a)(2) without regard to the amount of revenue reported on its IRS Form 990 and must provide a copy of its audited financial statements. The audited financial statements provided must verify that the federation is honoring designations made to each member organization by distributing a proportionate share of receipts based on donor designations to each member. The audit requirement is waived for newly created federations operating for less than two years from the date of its IRS tax-exemption letter to the closing date of the CFC application period.

(ii) The federation must provide a listing of its board of directors, beginning and ending dates of each member's current term of office, and the board's meeting dates and locations for the calendar year prior to the year of the campaign for which the organization is applying.

(3) That it does not employ in its CFC operations the services of private consultants, consulting firms, advertising agencies or similar business organizations to perform its policy-making or decision-making functions in the CFC. It may, however, contract with entities or individuals such as banks, accountants, lawyers, and other vendors of goods and/or services to assist in accomplishing its administrative tasks.

(f) The Director will notify a federation if it is determined that the federation does not meet the eligibility requirements of this section. A federation may appeal an adverse eligibility decision in accordance with § 950.204.

(g) The Director may waive any eligibility criteria for federation status if it is determined that such a waiver will be in the best interest of the CFC.

(h) Two organizations—American Red Cross and United Service Organization—are exempt from the 15- member requirement of paragraph (c) of this section.

**§ 950.302 Responsibilities of federations.**

(a) Federations must ensure that only those member organizations that comply with all eligibility requirements included in these regulations are certified for participation in the CFC.

(b) The Director may elect to review, accept or reject the certifications of the eligibility of the members of federations. If the Director requests information supporting a certification of eligibility, that information shall be furnished promptly. Failure to furnish such information within 10 business days of the receipt of the request constitutes grounds for the denial of national eligibility of that member.

(c) Each federation, as fiscal agent for its member organizations, must ensure that Federal employee designations are honored in that each member organization receives its proportionate share of receipts based on the results of each individual campaign. The proportionate share of receipts is determined by donor designations to the individual member organization as compared to total campaign designations.

(d) Federations must disburse CFC funds to each member organization

without any further deductions. Membership dues, fees, or other charges to member organizations must be assessed outside of the CFC disbursement process.

(e) Federations must disburse CFC funds to member organizations on a quarterly basis, at a minimum. The disbursements must be made within the months of June, September, December, and March.

(f) Disbursements to federation members that include funds from a non-CFC campaign must include a report that clearly identifies the amount of CFC funds.

## Subpart D—Campaign Information

### § 950.401 Campaign and publicity information.

(a) The specific campaign marketing and publicity information will be developed locally, except as specified in the regulations in this subpart. All information must be reviewed and approved by the LFCC for compliance with these regulations and will be developed and supplied by the LFCC or contracted agent.

(b) During the CFC solicitation period, a participating CFC organization may distribute bona fide educational information describing its services or programs. The organization must be granted permission by the Federal agency installation head, or designee to distribute the material. CFC Coordinators, Keyworkers, other employees or members of the LFCC, are not authorized to grant permission for the distribution of such information. If one organization is granted permission to distribute educational information, then the Federal agency installation head must allow any other requesting CFC organization to distribute educational information.

(c) Organizations and federations are encouraged to publicize their activities outside Federal facilities and to broadcast messages aimed at Federal employees in an attempt to solicit their contributions through the media and other outlets.

(d) Agency Heads are further authorized to permit the distribution by organizations of promotional information to Federal personnel in public areas of Federal workplaces in connection with the CFC, provided that the manner of distribution accords equal treatment to all charitable organizations furnishing such information for local use, and further provided that no such distribution shall utilize Federal personnel on official duty or interfere with Federal government activities. LFCC members and other campaign personnel are to be particularly aware of the prohibition of assisting any charitable organization or federated group in distributing any type of literature, especially during the campaign. Nothing in this section shall be construed to require a LFCC to distribute or arrange for the distribution of any material other than LFCC approved marketing materials.

(e) The Campaign Charity List and pledge form are the official sources of CFC information and shall be made available in electronic format to all potential contributors. The Charity List and pledging system must inform employees of their right to make a choice to contribute or not to contribute.

(f) Campaign marketing materials must be comprised of a simple and attractive design that is donor focused and has fundraising appeal and essential working information. The design must focus on the CFC without undue use of charitable organization symbols and logos or other distractions that compete for the donor's attention.

(g) The following applies specifically to the campaign Charity List:

(1) OPM will provide the approved Charity List as well as general campaign information. This will include:

(i) An explanation of the payroll deduction privilege.

(ii) A description and explanation of other electronic pledging, to include credit cards.

(iii) A statement that the donor may only designate charitable organizations or federations that are listed in the Charity List and that write-ins are prohibited.

(iv) Instructions as to how an employee may obtain more specific information about the programs and the finances of the organizations participating in the campaign.

(v) A description of employees' rights to pursue complaints of undue pressure

or coercion in Federal fundraising activities.

(2) The Charity List will consist of National/International, International, and Local organizations. The order of these organizations will be rotated annually in accordance with OPM instructions. The order of listing of the federated and independent organizations will be determined by a random selection process. The order of organizations within each federation will be determined by the federation. The order within the National/International, International and Local independent groups will be alphabetical. Absent specific instructions from OPM to the contrary, each participating organization and federated group listing must include a description, not to exceed 256 characters, of its services and programs, plus a Web site address and telephone number for the Federal donor to obtain further information about the group's services, benefits, and administrative expenses. Each listing will include the organization's administration and fundraising percentage as calculated pursuant to § 950.203(a)(4). Neither the percentage of administrative and fundraising expenses, nor the Web site address or telephone number count toward the 256 character description.

(3) Each federation and charitable organization will be assigned a code in a manner determined by the Director. At the beginning of each federated group's listing will be the federation's name, code number, 256 character description, percentage of administrative and fundraising expenses, Web site address and telephone number. Each organization will be identified as National/International, International and Local, respectively.

(h) *Listing of national and local affiliate*. Listing of a national organization, as well as its local affiliate organization, is permitted. Each national or local organization must individually meet all of the eligibility criteria and submit independent documentation as required in § 950.202 and § 950.203 to be included in the Charity List. However, a local affiliate of a national organization that is not separately incorporated, in lieu of its own 26 U.S.C. 501(c)(3) tax exemption letter and, to the extent required by § 950.203(a)(2), audited financial statements, may submit the national organization's 26 U.S.C. 501(c)(3) tax exemption letter and audited financial statements, but must provide its own pro forma IRS Form 990, as defined in § 950.203(a)(3), for CFC purposes. The local affiliate must submit a certification from the Chief Executive Officer (CEO) or CEO equivalent of the national organization stating that it operates as a bonafide chapter or affiliate in good standing of the national organization and is covered by the national organization's 26 U.S.C. 501(c)(3) tax exemption, IRS Form 990 and audited financial statements.

(i) *Listing local offices*. Listing of a local organization, as well as its satellite offices, is permitted, as long as there is no more than one location within a county or parish. Each office must individually meet all of the eligibility criteria and submit independent documentation as required in § 950.202 and § 950.203 to be included in the Charity List. However, a satellite office that is not separately incorporated, in lieu of its own 26 U.S.C. 501(c)(3) tax exemption letter and, to the extent required by § 950.203(a)(2), audited financial statements, may submit the local organization's 26 U.S.C. 501(c)(3) tax exemption letter and audited financial statements, but must provide its own pro forma IRS Form 990, as defined in § 950.203(a)(3), for CFC purposes. The satellite office must submit a certification from the Chief Executive Officer (CEO) or CEO equivalent of the local organization stating that it operates as a bonafide office in good standing and is covered by the local organization's 26 U.S.C. 501(c)(3) tax exemption, IRS Form 990 and audited financial statements.

(j) *Multiple listing prohibited*. Except as provided in paragraphs (h) and (i) of this section, once an organization is deemed eligible, it is entitled to only one listing in the Charity List, regardless of the number of federations to which that organization belongs.

### § 950.402 Pledge form.

(a) The Director will provide guidance with regard to the data required for electronic pledge processing.

(b) An employee may not make a designation to an organization not listed in the Charity List. All pledges must be designated to specific CFC participating organization(s). No undesignated pledges will be allowed.

## Subpart E—Miscellaneous Provisions

### § 950.501 Release of contributor information.

(a) The pledge form, designed pursuant to § 950.402, must allow a contributor to indicate if the contributor will allow his or her name, contribution amount, and home contact information to be forwarded to the charitable organization or organizations designated.

(b) The pledge form shall permit a contributor to specify which information, if any, he or she wishes released to organizations receiving his or her donations.

(c) It is the responsibility of the CCA to forward the contributor information for those who have indicated that they wish this information to be released to the recipient organization directly, if the organization is independent, and to the organization's federation if the organization is a member of a federation. The contributor information must be forwarded as soon as practicable after the completion of the campaign, but in no case later than a date to be determined by OPM. The date will be part of the annual timetable issued by the Director under § 950.601(b). The federation is responsible for ensuring the information is released to the appropriate member organization. The CCA may not sell or make any other use of this information. Federations may not retain donor information for their own use unless the donor made a direct designation to the federation itself. This policy also prohibits the sharing of donor information, even free of charge.

### § 950.502 Solicitation methods.

(a) Employee solicitations shall be conducted during duty hours using methods that permit true voluntary giving and shall reserve to the individual the option of disclosing any gift or keeping it confidential. Campaign kick-offs, victory events, awards, and other non-solicitation events to build support for the CFC are encouraged.

(b) Special CFC events are permitted during the campaign if approved by the appropriate agency head or government official, consistent with agency ethics regulations. No costs for food or entertainment at a special event may be charged to the CFC. CFC special events must be undertaken in the spirit of generating interest in the CFC and be open to all individuals without regard to whether an individual participates in the CFC. If prizes are offered, they must be modest in nature and value. Examples of appropriate prizes may include opportunities for lunch with agency officials, agency parking spaces for a specific time period, and gifts of minimal financial value. Any special CFC event and associated prize or gift must be approved in advance by the Agency's ethics official to ensure that the special event is consistent with Office of Government Ethics regulations and its own regulations and policy. No funds may be raised or collected at these events.

### § 950.503 Sanctions and penalties.

(a)(1) The Director may impose sanctions or penalties on a federation, charitable organization or Outreach Coordinator for violating these regulations, other applicable provisions of law, or any directive or instruction from the Director. The Director will determine the appropriate sanction and/or penalty, up to and including expulsion from the CFC. In determining the appropriate sanction and/or penalty, the Director will consider previous violations, harm to Federal employee confidence in the CFC, and any other relevant factors. A federation, charitable organization or Outreach Coordinator will be notified in writing of the Director's intent to sanction and/or penalize and will have 10 business days from the date of receipt of the notice to submit a written response. The Director's final decision will be communicated in writing to the federation, charitable organization or marketing organization.

(2) The Director may withdraw federation status with respect to a National/International, International or Local federation that makes a false certification or fails to comply with

any directive of the Director, or to respond in a timely fashion to a request by the Director for information or cooperation, including with respect to an investigation or in the settlement of disbursements. As stated in § 950.301(d), failure to meet minimum federation eligibility requirements shall not be deemed to be a withdrawal of federation status subject to a hearing on the record. Eligibility decisions shall follow the procedures in § 950.301(f). A federation will be notified in writing of the Director's intent to withdraw federation status for a period of up to one campaign and will have 10 business days from the date of receipt of the notice to submit a written response. On receipt of the response, or in the absence of a timely response, the Director or representative shall set a date, time, and place for a hearing. The federation shall be notified at least 10 business days in advance of the hearing. A hearing shall be conducted by a hearing officer designated by the Director unless it is waived in writing by the federation. After the hearing is held, or after the Director's receipt of the federation's written waiver of the hearing, the Director shall make a final decision on the record, taking into consideration the recommendation submitted by the hearing officer. The Director's final decision will be communicated in writing to the federation.

(3) A federation, charitable organization or Outreach Coordinator sanctioned or penalized under any provision of these regulations must demonstrate to the satisfaction of the Director that it has taken corrective action to resolve the reason for sanction and/or penalty and has implemented reasonable and appropriate controls to ensure that the situation will not occur again prior to being allowed to participate in subsequent CFCs.

(b) At the Director's discretion, CCAs, payroll offices and Federations may be directed to suspend distribution of current and future CFC donations from Federal employees to recipient organizations. CCAs, payroll offices and Federations shall immediately place suspended contributions in an interest bearing account until directed to do otherwise.

### § 950.504 Records retention.

Federations, CCAs and other participants in the CFC shall retain documents pertinent to the campaign for at least three completed campaigns. For example, documentation regarding the 2014 campaign must be retained through the completion of the 2016, 2017 and 2018 campaigns (*i.e.* until early 2020). Documents requested by OPM must be made available within 10 business days of the request.

### § 950.505 Sanctions compliance certification.

Each federation, federation member and independent organization applying for participation in the CFC must, as a condition of participation, complete a certification that it is in compliance with all statutes, Executive orders, and regulations restricting or prohibiting U.S. persons from engaging in transactions and dealings with countries, entities or individuals subject to economic sanctions administered by the U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC). Should any change in circumstances pertaining to this certification occur at any time, the organization must notify OPM's Office of CFC immediately. OPM will take such steps as it deems appropriate under the circumstances, including, but not limited to, notifying OFAC and/or other enforcement authorities of such change, suspending disbursement of CFC funds not yet disbursed, retracting (to the extent practicable) CFC funds already disbursed, and suspending or expelling the organization from the CFC.

## Subpart F—CFC Timetable

### § 950.601 Campaign schedule.

(a) The Combined Federal Campaign will be conducted according to the following timetable.

(1) During a period between December and January, as determined by the Director, OPM will accept applications from organizations seeking to be listed on the Charity List.

(2) The Director will determine a date after the closing of the receipt of applications by which the Director will

issue notices to each applicant organization of the results of the Director's review. The date will be part of the annual timetable issued by the Director under paragraph (b) of this section.

(3) The Director will determine the dates of the solicitation period, not to begin prior to September 1 or end later than January 15 of each year.

(b) The Director will issue a timetable annually for accepting and processing applications. The Director will issue the timetable for a campaign no later than October 31 of the year preceding the campaign.

## Subpart G—Payroll Withholding

### § 950.701 Payroll allotment.

The policies and procedures in this section are authorized for payroll withholding operations in accordance with the Office of Personnel Management Pay Administration regulations in part 550 of this Title.

(a) *Applicability*. Voluntary payroll allotments will be authorized by all Federal departments and agencies for payment of charitable contributions to local CFC organizations.

(b) *Allotters*. The allotment privilege will be made available to Federal personnel as follows:

(1) Employees whose net pay regularly is sufficient to cover the allotment are eligible. An employee serving under an appointment limited to 1 year or less may make an allotment to a CFC when an appropriate official of the employing Federal agency determines that the employee will continue employment for a period sufficient to justify an allotment. This includes military reservists, National Guard, and other part-time and intermittent employees who are regularly employed.

(2) Members of the Uniformed Services are eligible, excluding those on only short-term assignment (less than 3 months).

(c) *Authorization*. Allotments will be totally voluntary and will be based upon contributor's individual authorization.

(1) The CFC Pledge Form, in conformance with § 950.402, is the only form for authorization of the CFC payroll allotment and may be reproduced. The pledge forms and official Charity List will be made available to employees electronically when charitable contributions are solicited.

(2) The electronic pledge is transmitted to the contributor's servicing payroll office in real time via the centralized pledge system.

(d) *Duration*. Authorization of allotments will be in the form of a term allotment. Term authorizations will be in effect for 1 full year—26, 24, or 12 pay periods depending on the allotter's pay schedule—starting with the first pay period after January 15 and ending with the last pay period that includes January 15 of the following year. Three months of employment is considered the minimum amount of time that is reasonable for establishing an allotment.

(e) *Amount*. Allotters will make a single allotment that is apportioned into equal amounts for deductions each pay period during the year.

(1) The minimum amount of the allotment will not be less than $1 per payday per charitable organization, with no restriction on the size of the increment above that minimum.

(2) No change of amount will be authorized for term allotments.

(3) No deduction will be made for any period in which the allotter's net pay, after all legal and previously authorized deductions, is insufficient to cover the CFC allotment. No adjustment will be made in subsequent periods to make up for missed deductions.

(f) *Discontinuance*. Term allotments will be discontinued automatically on expiration of the 1 year withholding period, or on the death, retirement, or separation of the allotter from the Federal service, whichever is earlier.

(1) An allotter may revoke a term authorization at any time by requesting it in writing from the payroll office. Discontinuance will be effective the first pay period beginning after receipt of the written revocation in the payroll office.

(2) A discontinued allotment will not be reinstated.

(g) *Transfer*. When an allotter moves to another organizational unit, whether in the same office or a different Department or agency, his or her allotment authorization must be transferred to the new payroll office.

## Subpart H—Accounting and Distribution

### § 950.801 Accounting and distribution.

(a) *Remittance.* One electronic funds of the transfer (EFT) will be transmitted by the payroll office each pay period, in the gross amount of deductions on the basis of current authorizations, to the CCA.

(1) The EFT will be accompanied by an electronic transmittal identifying the Federal agency, the dates of the pay period, the pay period number, employee names and deduction amounts per individual employee.

(b) *Accounting.* (1) OPM may require Federal payroll offices to oversee the establishment of individual allotment accounts, the deductions each pay period, and the reconciliation of employee accounts in accordance with agency and Federal Accounting Standards and Office of Management and Budget requirements. OPM may further require that Federal payroll offices ensure the accuracy of remittances, as supported by current allotment authorizations, and internal accounting and auditing requirements.

(2) The CCA shall notify the federations, national and international organizations, and local organizations as soon as practicable after the completion of the campaign, but in no case later than a date to be determined by OPM, of the amounts, if any, designated to them and their member agencies. The date will be part of the annual timetable issued by the Director under § 950.601(b). The CCA is also responsible for distributing credit card, debit card, e-check, check and money order receipts and payroll deductions transmitted by the payroll offices. It is responsible for the accuracy of disbursements it transmits to recipients. The CCA will distribute all CFC receipts beginning April 1, and monthly thereafter. It shall remit the contributions to each organization or to the federation, if any, of which the organization is a member. At the close of each disbursement period, the CFC account shall have a balance of zero, based on the last reconciled bank statement.

(3) Federated organizations, or their designated agents, are responsible for:

(i) The accuracy of distribution among the charitable organizations of remittances from the CCA; and

(ii) Arrangements for an independent audit conducted by a certified public accountant agreed upon by the participating charitable organizations.

# PART 960—FEDERAL EXECUTIVE BOARDS

Sec.

960.101 Definitions.
960.102 Authority and status.
960.103 Location.
960.104 Membership.
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AUTHORITY: Memorandum of the President for Heads of Departments and Agencies (November 10, 1961).

SOURCE: 49 FR 34194, Aug. 29, 1984, unless otherwise noted.

### § 960.101 Definitions.

For purposes of this part:

(a) The term *Director* means the Director of the United States Office of Personnel Management.

(b) The term *Executive agency* means a department, agency, or independent establishment in the Executive Branch.

(c) The term *metropolitan area* means a geographic zone surrounding a major city, as defined and delimited from time to time by the Director.

(d) The term *principal area officer* means, with respect to an Executive agency, the senior official of the Executive agency who is located in a metropolitan area and who has no superior official within that metropolitan area other than in the Regional Office of the Executive agency. Where an Executive agency maintains facilities of more than one bureau or other subdivision within the metropolitan area, and where the heads of those facilities are in separate chains of command within the Executive agency, then the Executive agency may have more than one principal area officer.

(e) The term *principal regional officer* means, with respect to an Executive agency, the senior official in a Regional Office of the Executive agency.

(f) The term *special representative* means, with respect to an Executive agency, an official who is not subject to the supervision of a principal regional officer or a principal area officer and who is specifically designated by the head of the Executive agency to serve as the personal representative of the head of the Executive agency.

**§ 960.102 Authority and status.**

Federal Executive Boards are established by direction of the President in order to strengthen the management and administration of Executive Branch activities in selected centers of field operations. Federal Executive Boards are organized and function under the authority of the Director.

**§ 960.103 Location.**

Federal Executive Boards have been established and shall continue in the following metropolitan areas: Albuquerque-Santa Fe, Atlanta, Baltimore, Boston, Buffalo, Chicago, Cincinnati, Cleveland, Dallas-Fort Worth, Denver, Detroit, Honolulu, Houston, Kansas City, Los Angeles, Miami, Minneapolis-St. Paul, New Orleans, New York, Newark, Philadelphia, Pittsburgh, Portland, St. Louis, San Francisco, and Seattle. The Director may, from time to time, dissolve, merge, or divide any of the foregoing Federal Executive Boards, or establish new Federal Executive Boards, as he may deem necessary, proper or convenient.

**§ 960.104 Membership.**

(a) *Presidential Directive*. The President has directed the heads of agencies to arrange for the leading officials of their respective agencies' field activities to participate personally in the work of Federal Executive Boards.

(b) *Members*. The head of every Executive agency shall designate, by title of office, the principal regional officer, if any, and the principal area officer or officers, if any, who shall represent the agency on each Federal Executive Board; and by name and title of office, the special representative, if any, who shall represent the head of the agency on each Federal Executive Board. Such designations shall be made in writing and transmitted to the Director, and may be transmitted through the Chairmen of the Federal Executive Boards. Designations may be amended at any time by the head of the Executive agency.

(c) *Alternate Members*. Each member of a Federal Executive Board may designate an alternate member, who shall attend meetings and otherwise serve in the absence of the member. An alternate member shall be the deputy or principal assistant to the member or another senior official of the member's organization.

**§ 960.105 Officers and organization.**

(a) *By-Laws*. A Federal Executive Board shall adopt by-laws or other rules for its internal governance, subject to the approval of the Director. Such by-laws and other rules may reflect the particular needs, resources, and customs of each Federal Executive Board, provided that they are not inconsistent with the provisions of this part or with the directives of the President or the Director. To the extent that such by-laws and other rules conflict with these provisions or the directives of the President or the Director, such by-laws and other rules shall be null and void.

(b) *Chairman*. Each Federal Executive Board shall have a Chairman, who shall be elected by the members from among their number, and who shall serve for a term of office not to exceed one year.

(c) *Staff*. As they deem necessary and proper, members shall, from time to time, designate personnel from their respective organizations to serve as the staff, or otherwise to participate in the activities, of the Federal Executive Board. Other personnel may be engaged, by appointment, contract, or otherwise, only with the approval of the Director.

(d) Unless otherwise expressly provided by law, by directive of the President or the Director, or by the by-laws of the Federal Executive Board, every committee, subcommittee council, and other sub-unit of the Federal Executive Board, and every affiliation of the Federal Executive Board with external organizations, shall expire upon expiration of the term of office of the Chairman. Such a committee, subcommittee, council, other sub-unit, or

affiliation may be reestablished or renewed by affirmative action of the Federal Executive Board.

(e) *Board Actions.* Actions of a Federal Executive Board shall be taken only with the approval of a majority of the members thereof. This authority may not be delegated. All activities of a Federal Executive Board shall conform to applicable laws and shall reflect prudent uses of official time and funds.

**§ 960.106 OPM leadership.**

(a) *Role of the Director.* The Director is responsible to the President for the organizational and programmatic activities of the Federal Executive Boards. The Director shall direct and oversee the operations of Federal Executive Boards consistent with law and with the directives of the President. He may, from time to time, consult with, and require the advice of, the Chairman, members, and staff of the Federal Executive Boards.

(b) *Role of the Director's Regional Representatives.* The Chairman of each Federal Executive Board shall report to the Director through the Director's Regional Representative, an official of the Office of Personnel Management. The Director's Regional Representatives shall oversee the activities of, and periodically visit and meet with, the Federal Executive Boards.

(c) *Communications.* The Office of Personnel Management shall maintain channels of communication from the Director through the Director's Regional Representatives to the Chairmen of the Federal Executive Boards, and between and among the Federal Executive Boards through the Director and the Director's Regional Representatives. Any Executive agency may use these channels to communicate with the Director and with the Federal Executive Boards. Chairmen of Federal Executive Boards may communicate with the Director on recommendations for action at the national level, on significant management problems that cannot be addressed at the local level, and on other matters of interest to the Executive Branch.

(d) *Reports.* Each Federal Executive Board shall transmit to the Director, over the signature of its Chairman, an annual work plan and an annual report to the Director on the significant programs and activities of the Federal Executive Board in each fiscal year. Each work plan shall set forth the proposed general agenda for the succeeding fiscal year. The work plan shall be subject to the approval of the Director. Each annual report shall describe and evaluate the preceding fiscal year's activities. The work plan for Fiscal Year 1985 shall be submitted on or before July 1, 1984, and the annual report for Fiscal Year 1984 shall be submitted on or before January 1, 1985. Subsequent annual reports shall be submitted on or before January 1 and subsequent annual work plans shall be submitted on or before July 1 in every year thereafter. In addition, members of Federal Executive Boards shall keep the headquarters of their respective Executive agencies informed of their activities by timely reports through appropriate agency channels.

(e) *Conferences.* The Director may, from time to time, convene regional and national conferences of Chairmen and other representatives of Federal Executive Boards.

**§ 960.107 Authorized activities.**

(a) Each Federal Executive Board shall serve as an instrument of outreach for the national headquarters of the Executive Branch to Executive Branch activities in the metropolitan area. Each Federal Executive Board shall consider common management and program problems and develop cooperative arrangements that will promote the general objectives of the Government and of the several Executive agencies in the metropolitan area. Efforts of members, alternates, and staff in those areas shall be made with the guidance and approval of the Director; within the range of the delegated authority and discretion they hold; within the resources available; and consistent with the missions of the Executive agencies involved.

(b) Each Federal Executive Board shall: (1) Provide a forum for the exchange of information between Washington and the field and among field elements in the metropolitan area about programs and management methods and problems; (2) develop

local coordinated approaches to the development and operation of programs that have common characteristics; (3) communicate management initiatives and other concerns from Washington to the field to achieve better mutual understanding and support; and (4) refer problems that cannot be solved locally to the national level.

(c) Subject to the guidance of the Director, the Federal Executive Boards shall be responsible for:

(1) Presidential initiatives on management reforms; personnel initiatives of the Office of Personnel Management; programs led by the Office of Management and Budget, such as Reform '88 and the President's Council on Integrity and Efficiency; and facilities planning led by the General Services Administration;

(2) The local Combined Federal Campaign, under the direction of the Director;

(3) The sharing of technical knowledge and resources in finance, internal auditing, personnel management, automated data processing applications, interagency use of computer installations, and similar commonly beneficial activities;

(4) The pooling of resources to provide, as efficiently as possible, and at the least possible cost to the taxpayers, common services such as employee first-aid, cardiopulmonary resuscitation (''CPR''), CPR training, preventative health programs, assistance to the aging, blood donor programs, and savings bond drives;

(5) Encouragement of employee initiative and better performance through special recognition and other incentive programs, and provision of assistance in the implementation and upgrading of performance management systems;

(6) Emergency operations, such as under hazardous weather conditions; responding to blood donation needs; and communicating related leave policies;

(7) Recognition of the service of American Veterans and dissemination of information relating to programs and benefits available for veterans in the Federal service; and

(8) Such other programs, projects, and operations as may be set forth in the annual work plan approved by the Director.

(d) The Office of Personnel Management shall advise Federal Executive Boards on activities in the areas of performance appraisal and incentives, interagency training programs, the educational development of Government employees, improvement of labor-management relations, equal employment opportunity, the Federal Women's Program, the Federal Equal Opportunity Recruitment Program, the Hispanic Employment Program, the Veterans Employment Program, and selective placement programs for handicapped individuals.

(e) The Director may, from time to time, direct one or more of the Federal Executive Boards to address such specific programs or undertake such cooperative activities as he may deem necessary or proper.

### § 960.108 Additional rules and directives.

The Director may, from time to time, issue further rules and guidance for, and directives to, the Federal Executive Boards.

[49 FR 34194, Aug. 29, 1984, as amended at 66 FR 66712, Dec. 27, 2001]

## PART 990 [RESERVED]

# SUBCHAPTER C—REGULATIONS GOVERNING EMPLOYEES OF THE OFFICE OF PERSONNEL MANAGEMENT

## PART 1001—OPM EMPLOYEE RESPONSIBILITIES AND CONDUCT

Sec.

1001.101 In addition to this part, what other rules of conduct apply to Office of Personnel Management employees?

1001.102 What are the Privacy Act rules of conduct?

AUTHORITY: 5 U.S.C. 552a, 7301.

SOURCE: 71 FR 43345, Aug. 1, 2006, unless otherwise noted.

### § 1001.101 In addition to this part, what other rules of conduct apply to Office of Personnel Management employees?

In addition to the regulations contained in this part, employees of the Office of Personnel Management should refer to:

(a) The Executive Branch Financial Disclosure, Qualified Trusts, and Certificates of Divestiture regulations at 5 CFR part 2634;

(b) The Standards of Ethical Conduct for Employees of the Executive Branch at 5 CFR part 2635;

(c) The Limitations on Outside Earned Income, Employment and Affiliations for Certain Noncareer Employees regulations at 5 CFR part 2636;

(d) Regulations Concerning Post Employment Conflict of Interest at 5 CFR part 2637;

(e) Post-employment Conflict of Interest Restrictions regulations at 5 CFR part 2641;

(f) The Supplemental Standards of Ethical Conduct for Employees of the Office of Personnel Management at 5 CFR part 4501;

(g) The Employee Responsibilities and Conduct regulations at 5 CFR part 735;

(h) The restrictions upon use of political referrals in employment matters at 5 U.S.C. 3303.

### § 1001.102 What are the Privacy Act rules of conduct?

(a) An employee shall avoid any action that results in the appearance of using public office to collect or gain access to personal data about individuals beyond that required by or authorized for the performance of duties.

(b) An employee shall not use any personal data about individuals for any purpose other than as is required and authorized in the performance of assigned duties. An employee shall not disclose any such information to other agencies or persons not expressly authorized to receive or have access to such information. An employee shall make any authorized disclosures in accordance with established regulations and procedures.

(c) Each employee who has access to or is engaged in any way in the handling of information subject to the Privacy Act, 5 U.S.C. 552a, shall be familiar with the regulations of this subsection as well as the pertinent provisions of the Privacy Act relating to the treatment of such information.

## PARTS 1002–1199 [RESERVED]

# FINDING AIDS

A list of CFR titles, subtitles, chapters, subchapters and parts, and an alphabetical list of agencies publishing in the CFR are included in the CFR Index and Finding Aids volume to the Code of Federal Regulations which is published separately and revised annually.

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