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OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 831

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Civil Service Retirement System—Civil Service Retirement Spouse Equity Act Implementation

AGENCY: Office of Personnel Management.

ACTION: Interim rule with request for comments.

SUMMARY: The Office of Personnel Management (OPM) is amending its interim rules implementing the Civil Service Retirement Spouse Equity Act of 1984, as amended (CSRSEA). The interim rules regulate survivor elections, survivor annuities based on those elections, special survivor annuities for former spouses under CSRSEA, survivor annuities payable to widows and children, lump-sum death benefits, court orders affecting retirement benefits, and refunds of civil service retirement contributions. These amendments to the interim rules make several changes to clarify the current interim regulations, to eliminate ambiguous provisions, or to correct procedures that experience in implementing CSRSEA has demonstrated are unworkable. The changes relating to court orders affecting retirement or survivor annuity benefits are limited to updating terminology and interpretive guidelines.

DATES: Interim rules effective April 11, 1990; comments must be received on or before May 11, 1990.

ADDRESSES Send comments to Reginald M. Jones, Jr., Assistant Director for Retirement and Insurance Policy; Retirement and Insurance Group; Office of Personnel Management; P.O. Box 57; Washington, DC 20044; or deliver to OPM, room 4351, 1900 E Street NW., Washington, DC.

Send court orders awarding survivor annuity benefits under subpart Q of part 831 to Allotment Section, Office of Personnel Management, P.O. Box 17, Washington, DC 20044.

FOR FURTHER INFORMATION CONTACT: Harold L. Siegelman, (202) 632-4682.

SUPPLEMENTARY INFORMATION: On May 13, 1985, we published (at 50 FR 20064) interim regulations implementing the retirement provisions of CSRSEA, Pub. L. 98-615. These regulations restructured the existing regulations concerning the subjects covered by the Act, specifically civil service retirement survivor annuities, court orders affecting civil service retirement benefits, and lump-sum payments (employee refunds and lump-sum death benefits) under the Civil Service Retirement System.

On September 8, 1986, we published (at 51 FR 31927) interim regulations amending our interim regulations of May 13, 1985, to implement the changes in CSRSEA made by the the Federal Employees Benefits Improvements Act of 1986 (FEBIA), Public Law 99-251. These interim regulations also contained changes to the interim regulations of May 13, 1985, based on comments received in response to the interim regulations of May 13, 1985, and our operational experience under those regulations.

The current interim regulations do not address eligibility for multiple survivor benefits and the resulting problems associated with elections between benefits. Because of the changes in the interim regulations to address these eligibility and election problems, we decided that an additional comment period would be appropriate. The basis for these changes as well as their effect is discussed after the discussion of the comments on the current interim regulations and the changes required by the enactment of Pub. L. 100-238.

1. Changes Based on Public Law 100-238

Section 127 of Pub. L. 100-238, changed the requirements for a former spouse to qualify for a survivor annuity under section 4(b) of CSRSEA. This legislation extended the application deadline to May 7, 1989. It also restricted eligibility to former spouses who attained age 50 before May 8, 1987. In addition, former spouses divorced after May 7, 1987, cannot qualify for this benefit unless no other person is eligible for an annuity as a current spouse, former spouse, or the beneficiary of an insurable interest election. Sections 831.619 and 831.622 have been amended to reflect these changes.

2. Comments on Interim Regulations

Eleven comments on the interim regulations were received in response to the May 13, 1985 request for comments. Several of those comments were adopted in the September 8, 1986 amendments to the interim regulations. Two additional comments were received in response to our request for comments on the September 8, 1986 amendments to the interim regulations.

Many of the comments addressed provisions that were changed by legislation after those regulations were published. Several commenters suggested editorial changes. Two commenters were pleading for personal relief beyond the scope of the enabling legislation.

One commenter suggested that § 831.605(c) state whether the election should be expressed in terms of dollars or as a percentage of the retiree's annuity. The election may be stated in terms of: (1) A percentage of the retiree's annuity, (2) a percentage of the available survivor annuity, (3) a base amount of the retiree's annuity (55 percent of which will be the survivor annuity), or (4) a dollar amount for the survivor annuity. Regardless of the method used in the election, we must express the election as a base amount (method 3) to compute the initial amount of the reduction. Thereafter, the potential survivor annuity and reduction in the employee's annuity are affected by cost-of-living adjustments.

One commenter questioned § 831.606(i). Section 831.606(i) does not permit a retiree to end an insurable interest reduction to provide for a former spouse in order to elect a reduced annuity to provide a former spouse annuity. Such an election is permitted for a current spouse under certain conditions by § 831.606(h). We explained this distinction at 50 FR 20065, May 13, 1985, stating:

> Although revised section 8339(j)(5)(B) of title 5, United States Code, authorizes continuation of an annuity reduction to provide a former spouse annuity (after the death or remarriage of the former spouse) for the purpose of providing a current spouse annuity, nothing in CSRSEA authorizes a corresponding continuation to benefit a

former spouse after the death of a current spouse.

One commenter objected to § 831.606(j) that prohibits designation of contingent beneficiaries of an insurable interest annuity. Contingent beneficiaries are prohibited by section 8339(k)(1) of title 5, United States (Code. That section authorizes naming "an individual" as beneficiary of an insurable interest election. In addition, the statutory formula for determining the insurable interest reduction does not contemplate multiple beneficiaries.

One commenter suggested that § 831.607 require additional information on the form for spousal consent to receive less than maximum survivor annuity. The additional information requested would explain to the spouse how much was being surrendered by consenting to the election. Some of the information, such as the amount of the potential survivor benefit, is not available at the time a retirement application is filed. However, to impress upon the spouse the importance of the action being undertaken, we require that the form be signed before a notary public or some other public official.

One commenter objected to a time limit for changing an election under § 831.611. The commenter suggested that one change of election per year be permitted. Section 8339 (j) and (k) of title 5, United States Code, provides that elections with respect to current and former spouse annuities are irrevocable.

One commenter raised two questions about § 831.618(a)(2) and (c). The first comment was that the regulatory language required the birth of a child to the marriage in order to fulfill the marriage duration requirement, thereby excluding adoptive children from fulfilling the requirement. The statute requires that the child be the "issue" of the marriage. The legal term "issue" does not include adopted children. We believe that the regulatory language is consistent with the statute. The other question was whether the child must be living to fulfill the marriage duration requirement. A deceased child (who was born alive), or a child born after the death of the employee, Member, or retiree (as long as the child is born alive), fulfills the marriage duration requirement. In the latter case, the current spouse annuity begins when the child is born, rather than on the day after the date of death of the employee, Member, or retiree because the spouse has no title to benefits before the birth of the child.

One commenter questioned the source of funding for benefits under § 831.622. No benefits under that section are funded through payments by retirees or former spouses, or the Civil Service Retirement and Disability Fund. Section 4(e) of CSRSEA provides that benefits under § 831.622 are funded by money not otherwise appropriated in the United States Treasury.

Several commenters questioned the portion of § 831.625 that provides that we will not reinstate a former spouse's survivor entitlement if the former spouse's remarriage before age 55 is terminated or annulled. This provision was fully explained when we issued the May 13, 1985 interim regulations. At that time, we stated:

Since no statutory provision permits reinstatement of former spouse annuities, paragraph (d) provides that remarriage permanently extinguishes them. The solemnization of the remarriage is the event terminating the former spouse's entitlement. Accordingly, even if the remarriage is later annulled the entitlement is not reinstated. This rule is necessary for essentially the same policy reasons cited by the Missouri Court of Appeals when finding that alimony should not be reinstated following annulment of a remarriage. In *Glass* v. *Glass* 546 S.W.2d 738 (Mo. App. 1977), the court supported its decision on the following policy considerations:

(1) A former husband is entitled to rely on the remarriage ceremony of the former wife to recommit assets previously used for alimony obligations to her. (2) Unless the remarriage ceremony is taken as conclusive, any latent grounds for annulment between the remarried spouse and her new husband may remain suspended until the offended spouse seeks annulment, so that the former husband's alimony obligations may never be certainly determined. (3) Even though both former spouses may be innocent, the more active of the two (the one whose remarriage is later annulled) should bear the loss from the misconduct of a stranger. (At 741.)

Similar policy considerations apply in the context of the former spouse's annuity entitlements. First, the retiree is entitled to rely on the remarriage ceremony to provide a current spouse annuity for a subsequent spouse. Second, unless the remarriage is taken as conclusive, any latent grounds for annulment could prevent a current spouse's entitlement from becoming certain. Third, the spouse whose marriage is annulled should bear the loss rather than the spouse with no involvement whatsoever. (50 FR 20067, May 13, 1985.)

One commenter questioned our use of this alimony analogy asserting that the former spouse had property rights in the former spouse annuity. The alimony illustration is appropriate because alimony, like a former spouse annuity, terminates upon remarriage. Property rights, unlike a former spouse annuity, do not terminate because of remarriage.

One commenter objected to the complexity of the interim regulations. CSRSEA, as amended, is an extremely complex piece of legislation. This problem is aggravated by its varied effective dates for different provisions and its special retroactive provisions covering limited classes of potential claimants. Considering the complexity of the basic legislation that these regulations implement, we cannot produce simple regulations that will adequately implement the statute.

3. Elections Between Survivor Benefits

These regulations add several provisions concerning elections between survivor benefits. Specific provisions are discussed below in connection with the sections that they are modifying. However, certain underlying principles that affected our resolution of these election problems should be explained.

First, we consider multiple survivor benefits based on the service of one employee. In many situations involving multiple survivor benefits based on the service of one employee, the statute is not as specific as we would have preferred for limiting a current or former spouse to one survivor annuity based on the service of a single employee. A few of the combined benefits (e.g., current spouse annuity for a spouse who is also the beneficiary of an insurable interest election) are expressly prohibited by statute, but the statute is silent on other combinations. Congress did not, in our view, intend to allow one person to receive multiple benefits based on the service of one employee in any situation.

In preparing regulations for adjudicating cases involving multiple survivor annuities based on the service of one employee, we sought an approach that provided decisional rules that are reasonable, consistent, and simple for adjudicating all multiple survivor annuity situations. Accordingly, we sought three characteristics in possible solutions for adjudicating cases involving possible multiple survivor annuities based on the service of one employee. These characteristics are:

1. Payment of multiple survivor annuities to the same person based on the service of one employee is never permitted.
2. The claimant is entitled to receive the largest of the annuities.
3. The claimant is entitled to the most favorable health benefits enrollment under any of the annuities, regardless of which annuity is actually paid.

We considered the entire class of cases that includes all situations in which a former spouse meets the statutory requirements for a survivor annuity under section 4(b)(1)(B) or 4(b)(4) of CSRSEA (5-criteria benefits) and another benefit, regardless of the order in which title to those benefits was perfected. Three features distinguish these cases from those not involving 5-criteria benefits. Five-criteria benefits:

—Always equal the maximum possible benefit,
—Are provided without cost to the retiree, and
—Are financed by General Revenues rather than by the Retirement Fund.

These characteristics led us to the decisional rule that in any case in which a former spouse is entitled to a 5-criteria benefit, the 5-criteria benefit is paid.

Administration is simplified by avoidance of mixed benefits, i.e., benefits which are authorized under different provisions of law. Preventing mixed payments under different statutory provisions is especially important when the 5-criteria benefits are involved because those benefits are funded differently than other benefits. Because the 5-criteria benefit is always the maximum, payment of the 5-criteria benefit whenever it is available prevents situations in which mixed payments are made under more than one provision.

The issue of cost to the retiree is slightly more complicated. No statutory provision authorizes the cancellation of a previously elected benefit or elimination of the reduction for a court-awarded benefit when the former spouse qualifies for the 5-criteria benefit. Accordingly, these reductions should continue.

On the other hand, nothing is gained by permitting a former spouse annuity election after the former spouse has already qualified (i.e., has filed an application and met all other requirements) for the 5-criteria benefit. Such an election will not be permitted. (In determining whether an election was filed after establishment of entitlement to a 5-criteria benefit, we will compare the date of receipt of the 5-criteria application to the date when the election would have become effective).

Applying this approach to cases involving 5-criteria benefits, we established the following decisional rules.

Court-awarded former spouse annuity and 5-criteria benefit (one divorce)—This combination arises whenever a State court (in terminating the marriage of a pre-May 7, 1985 retiree) awarded a former spouse annuity to a former spouse who meets the age and marriage duration requirement for a 5-criteria benefit and whose marriage is terminated between May 6, 1985, and May 8, 1987. The former spouse will be paid the 5-criteria benefit. As required by section 8339(h)(2) of title 5, United States Code, the retiree's annuity reduction will continue. The former spouse is entitled to health benefits coverage provided application is made within the time limits associated with either annuity entitlement.

Five-criteria benefit and court-awarded former spouse annuity (two divorces)—This combination arises when a former spouse who has qualified for a 5-criteria benefit remarries the retiree after age 55, and in a subsequent divorce decree is awarded a court-awarded former spouse annuity. This situation differs from the previous one only because in this situation the court-awarded entitlement was established later. That difference has no effect. The former spouse will be paid the 5-criteria benefit. As required by section 8339(h)(2) of title 5, United States Code, the retiree's annuity will be reduced. The former spouse is entitled to health benefits coverage provided application is made within the time limits associated with either annuity entitlement.

Survivor annuity as the beneficiary of insurable interest election and 5-criteria benefit—This combination arises whenever a pre-May 7, 1985 retiree had elected an insurable interest annuity to benefit a former spouse who later qualifies for a 5-criteria benefit based on a divorce between September 14, 1978, and May 8, 1987, if the retiree did not elect to replace the insurable interest benefit with a former spouse annuity under section 4(b)(1)(A) of CSRSEA. In this situation the insurable interest entitlement will always be established first. The retiree's annuity reduction will continue unless the former spouse loses entitlement under the insurable interest election. The former spouse will be paid the 5-criteria benefit. If the former spouse loses entitlement to the 5-criteria benefit (by remarriage before age 55), the insurable interest annuity will be paid provided the insurable interest reduction continues until the retiree's death. The former spouse is entitled to health benefits coverage provided application is made within the time limits associated with the 5-criteria benefit.

Five-criteria benefit and elected former spouse annuity—This combination arises when a former spouse who has qualified for a 5-criteria benefit remarries the retiree after age 55, and the retiree after a subsequent divorce elects to provide a former spouse annuity. The former spouse will be paid the 5-criteria benefit. The election cannot provide additional benefits and is therefore void. No annuity reduction is taken. The former spouse is entitled to health benefits coverage provided application is made within the time limits associated with the 5-criteria benefit.

Five-criteria benefit and current spouse annuity—This combination arises when a former spouse who has qualified for a 5-criteria benefit remarries the retiree after age 55, and the retiree elects to provide a current spouse annuity for that spouse. We recognize that the remarriage does not alter a former spouse's legal status as a former spouse, and to provide a consistent rule, we must pay the 5-criteria benefit. The later election to provide a current spouse annuity cannot provide additional benefits and is therefore void. No annuity reduction is taken. Health benefits coverage is provided (including the government share) if the spouse is eligible to continue enrollment as a family member after the retiree's death. Otherwise, health benefits coverage is available as a former spouse provided application is made within the time limits associated with the 5-criteria benefit.

Other situations do not involve 5-criteria benefits. Some of these cases include situations in which a former spouse qualifies for an insurable interest benefit and either an elected or court-awarded benefit. Whether the former spouse benefit is elected or court-awarded results in substantial differences.

Court-awarded former spouse annuity and survivor annuity based on an insurable interest election—This combination arises when a retiring employee elects an insurable interest annuity to benefit a former spouse who has been awarded a former spouse annuity by court order. If the insurable interest benefit is larger, then the insurable interest benefit would be paid and the court-awarded benefit would provide contingent coverage in case eligibility for the insurable interest benefit is lost. If the court awarded benefit is larger, the insurable interest election is void because it is contrary to the court order. (Of course, in the similar situation in which a retiree elects to provide a former spouse annuity that is smaller than a court-awarded former spouse annuity, the election is also void as provided in § 831.605(c) or § 831.612(b) of title 5, Code of Federal Regulations.) The retiree's annuity reduction is the reduction appropriate for the benefit in effect. If a valid insurable interest election is made (i.e., the insurable interest election would provide the larger benefit), health benefits coverage is available as a former spouse if elected under the time limits applicable to either benefit.

Otherwise, health benefits coverage (as a former spouse) is available if elected within the time limits applicable to the court-awarded benefit.

Survivor annuity based on an insurable interest election and elected former spouse annuity—This combination arises when a retiring employee elects an insurable interest annuity to benefit a former spouse and also elects to provide a former spouse annuity for that former spouse. A retiring employee must choose which election to make and cannot make both. The reduction in the retiree's annuity will be based on the benefit chosen. Former spouse health benefits coverage is available under either election if timely application is made.

Section 8339(j)(5) (C) and (k) of title 5, United States Code, prohibits a current spouse from receiving both a current spouse annuity and a survivor annuity as the beneficiary of an insurable interest election. Congress did not intend CSRSEA to allow an individual to receive multiple survivor benefits as a former spouse that would not be available had the divorce never occurred. CSRSEA was intended to preserve the reasonable expectations of former spouses that rights acquired during marriage would not be lost as a result of a divorce. This restriction can be seen throughout CSRSEA. For example, section 8341(h) makes ineffective State court orders that attempt to award former spouse annuities to former spouses who have waived entitlement to a current spouse annuity. Similarly, the effective date language in section 4(a)(1) of CSRSEA provided that State court awards of former spouse annuities to former spouses of retirees who retired before May 7, 1985, could be honored only if a survivor annuity had been elected to benefit that former spouse.

Court-awarded former spouse annuity and current spouse annuity—This combination arises when a former spouse who has been awarded a partial former spouse annuity by court order remarries the retiree after age 55, and the retiree who elects to provide a full or (larger partial) current spouse annuity. In these cases, the reduction and payment would be based on the election with the court-awarded benefit contingent on the loss of the elected benefit. Of course, the retiring employee can control the total amount of survivor annuity base not obligated by court order up to 55 percent of the retiree's annuity. Health benefits coverage is provided a spouse (includes government share) if eligible to continue enrollment as a family member after the retiree's death. Otherwise, health benefits coverage is available (as a former spouse) provided application is made within the time limits associated with the court-awarded benefit.

Although CSRS has never permitted multiple survivor annuities based on the service of one employee, the system permits multiple survivor annuities in some situations when the benefits are based on the service of different employees. Two statutory exceptions prohibit multiple survivor benefits in specific situations.

Section 8341(b)(3) of title 5, United States Code, provides in pertinent part:

> A spouse acquired after retirement is entitled to a survivor annuity under this subsection only upon electing this annuity instead of any other survivor benefit to which he may be entitled under [CSRS] or another retirement system for Government employees.

This provision requires a current spouse to elect between survivor annuities if either is based on a post-retirement marriage.

Former spouses should be treated similarly. Congress did not intend CSRSEA to allow an individual to receive multiple survivor benefits as a former spouse that would not be available had the divorce never occurred. The legislation was intended to preserve the reasonable expectations of former spouses that rights acquired during marriage would not be lost as a result of the divorce. This restriction can be seen throughout CSRSEA. For example, section 8341(h) makes ineffective State court orders that attempt to award former spouse annuities to former spouses who have waived entitlement to a current spouse annuity. Similarly, the effective date language in section 4(a)(1) of CSRSEA provided that State court awards of former spouse annuities to former spouses of retirees who retired before May 7, 1985, could be honored only if a spousal survivor annuity had been elected to benefit the same person.

Section 8341(g) of title 5, United States Code, provides:

> In the case of a surviving spouse whose annuity under this section terminated because of remarriage before becoming 55 years of age, annuity at the same rate shall be restored on the day the remarriage is dissolved by death, annulment, or divorce, if—
>
> (1) The surviving spouse elects to receive this annuity instead of a survivor benefit to which he 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 returned to the Fund.

This provision requires a current spouse to choose between the restored annuity and any annuity based on the remarriage.

Restoration of former spouse annuities is not authorized by statute. Accordingly, no election problem can arise based on termination of the remarriage of a former spouse annuitant.

In the situations in which dual entitlement arose from the service of one employee, we provide the most favorable health benefits coverage under either entitlement. A similar rule is appropriate when an election is required between entitlements based on the service of more than one employee. This approach is consistent with the spirit of § 890.301(w) of Title 5, Code of Federal Regulations.

4. Changes to Clarify or Correct the Interim Regulations

The amendment to Subpart A specifies the method for computing interest on the deposits required to make an election under § 831.611(b). The methodology is the same as used to compute interest on other deposits required for survivor elections, except, as required by statute, the rate of interest for deposits involving elections under § 831.611(b) varies annually, rather than being fixed at the 6 percent rate applicable to other survivor elections. Section 831.105(h) states the methodology for other survivor elections and the new § 831.105(j) uses this methodology for deposits required for elections under § 831.611(b).

The amendment to § 831.601 clarifies that subpart F generally applies only to former employees and Members who retire under provisions of law permitting election of survivor annuities.

The amendment to § 831.605(c) clarifies that an election that violates that section by conflicting with a qualifying court order or exceeding the maximum total survivor annuity authorized is not entirely void, but is void only to the extent that it violates the statutory requirements repeated in this section. Whenever possible, the election would be adjusted rather than voided outright. For example, if we had a court order awarding a former spouse annuity equal to 25 percent of the employee's annuity, an election to provide a full survivor annuity to another former spouse would be void to the extent that it tried to award the 25 percent already awarded by court order, but would be a valid election of a former spouse annuity equal to 30 percent of the employee's annuity, the maximum amount remaining available for the election.

The amendment to § 831.605(d) clarifies that the reduction in the employee's annuity can terminate when the former spouse loses entitlement to a future survivor annuity by operation of the court order awarding the survivor annuity, as well as for the events already stated by that section, namely, the former spouse's remarriage before age 55 or death.

The amendment to § 831.605(f) clarifies that former spouse annuities can be elected for more than one former spouse, or a current spouse and one or more former spouses, as long as the total amount of the survivor annuities does not exceed the maximum permitted. When an employee provides more than one survivor annuity to current and former spouses, the reduction is based on the combined amount of all of the survivor annuities.

To understand § 831.606, the reader must understand the terms used in that section. Section 831.603 defines "insurable interest annuity" as "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." The person receiving the survivor annuity is called "the beneficiary of the insurable interest election."

The amendment to § 831.606(c) clarifies, as explained above, that one former spouse cannot receive both a former spouse annuity and a survivor annuity as the beneficiary of an insurable interest election from the same retired employee or Member. Section 8339(j)(5) (C) and (k) of title 5, United States Code, prohibits a current spouse from receiving both a current spouse annuity and a survivor annuity as the beneficiary of an insurable interest election. Congress did not intend CSRSEA to allow an individual to receive multiple survivor benefits as a former spouse that would not be available had the divorce never occurred. CSRSEA was intended to preserve the reasonable expectations of former spouses that rights acquired during marriage would not be lost as a result of a divorce. This restriction can be seen throughout CSRSEA. For example, section 8341(h) makes ineffective the provisions of State court orders that attempt to award former spouse annuities to former spouses who have waived entitlement to a current spouse annuity. Similarly, the effective date language in section 4(a)(1) of CSRSEA provided that State court awards of former spouse annuities to former spouses of retirees who retired before May 7, 1985, could be honored only if a survivor annuity had been elected to benefit that former spouse.

The amendment to § 831.606(h) corrects an oversight in that paragraph. A former spouse can lose entitlement to a former spouse annuity by the terms of the court order awarding the former spouse annuity, death, or remarriage before age 55. Interim § 831.606(h) mistakenly failed to include the first of these methods of terminating the former spouse's entitlement.

The amendment to § 831.606(k) corrects an oversight. The interim regulations failed to state that the insurable interest reduction in the retiree's annuity stops if the beneficiary of the insurable interest annuity dies. The amended section states that the retiree's annuity reduction stops effective on the first day of the month after the month in which the death of the beneficiary occurs.

The amendment to § 831.607 authorizes designated OPM employees to verify and witness spousal consent to an election not to provide the maximum survivor annuity. Under the prior interim regulation the spousal consent form had to be completed before a notary public or other official authorized to administer oaths. This requirement was intended to impress upon the spouse the importance of the action being taken, to minimize the opportunity for coercion, and to eliminate forged consent forms. In a limited number of cases, permitting designated OPM employees to substitute for a notary public will be more convenient to the retiring employee and spouse, as well as the Government, without jeopardizing attainment of any of those goals.

Interim § 831.608(b) failed to specify what we expected in a court determination supporting a request that we waive the spousal consent requirement for a retiring employee's election not to provide the maximum survivor annuity for the spouse. The revised paragraph states the specific findings that we expect to see in the court determination. These findings are intended to assure that the court affords due process to the spouse before the spouse's interest in a survivor annuity is waived.

The amendment to § 831.612(b) corrects several minor omissions in the interim regulations. Section 831.612(b)(2) has been amended to correct the survivor annuity rate payable to former spouses of retirees who separated before October 11, 1962. The corrected provision is similar to §§ 831.605(c) and 831.614(a). The amendment to § 831.612(b)(3) edits that language to clarify that the prescribed form need not be the same form used for elections under § 831.607(c), but the form used must contain the same information as the form required for elections under § 831.607.

The amendment to § 831.612(b)(4) and (b)(5) applies to elections to provide former spouse annuities a rule similar to the longstanding rule applicable to post-retirement survivor elections for a current spouse before CSRSEA. In these "old-law" cases, for a retiree who was married at the time of retirement, the survivor annuity provided for a spouse acquired after retirement cannot vary from the survivor annuity elected for the spouse at the time of retirement. This is another situation involving the general intent of CSRSEA that a current spouse without eligibility for survivor benefits cannot achieve greater rights merely by obtaining a divorce. This issue is discussed in more detail in connection with § 831.606(c). Section 831.612(b)(5) only applies to retirees who retired before May 7, 1985, had a survivor election in effect for the spouse involved on May 7, 1985, and were divorced from that spouse on or after May 7, 1985.

The amendment to § 831.612(d) eliminates the cross reference to § 831.605(d) for instructions on when the reduction in the retiree's annuity terminates. The amended paragraph makes no substantive change. Section 831.612(e) states the statutory formula for computing the reductions in the retiree's annuity for elections made under § 831.612.

Section 831.613 was revised to correct several minor omissions and eliminate ambiguities. The change in § 831.613(b)(2) clarifies that a retiree who was married at retirement and whose spouse consented under § 831.604 not to receive the maximum survivor annuity, but who divorces and later remarries that spouse, may not elect to provide a greater survivor annuity than was elected at retirement with that spouse's consent.

Section 831.613 (b)(3) and (b)(4) clarifies that no deposit is required unless the marriage lasts long enough for the spouse acquired after retirement to meet the marriage duration requirements for entitlement to a survivor annuity. Normally, the marriage must last at least 9 months to qualify. However, marriages of less than 9 months duration can qualify if a child is born of the marriage (or of a previous marriage of the same couple), if the couple was previously married and the combined length of all the marriages of the couple are at least 9 months, or if the retiree's death results from an accident within the meaning of § 831.618(d).

Although the deposit requirement does not attach until the marriage lasts long enough to qualify for a survivor annuity, the election is irrevocable as soon as OPM receives it.

Sections 831.615 and 831.616 restate the existing rules affecting children's survivor annuities. The language has been taken from the regulations governing the Federal Employees Retirement System, specifically, §§ 843.403 through 843.406 and 843.410 of title 5, Code of Federal Regulations.

Section 831.620 has been restructured to separate the general rule on commencing date of survivor annuities from the numerous special statutory exceptions. Paragraph (a) states the general rule that the annuity begins to accrue on the day after the date of death of the employee, Member, or retiree. Paragraph (b)(1) states the special statutory commencing dates that apply to current spouses. Paragraph (b)(2) states the special statutory commencing dates applicable to former spouse annuities.

The addition of paragraph (g) to § 831.621 is to include in the regulations the statutory rule for terminating the annuity reduction for a election made under that section. Similar provisions are included in §§ 831.605, 831.606, and 831.612.

Sections 831.621(h) and 831.622(e) provide that a former spouse cannot receive more than one survivor annuity based on the service of a single employee or Member. The rationale for this policy is discussed above. The basis for this approach is further illustrated in connection with § 831.622. As applied to § 831.622, Congressional intent not to allow multiple benefits to a former spouse based on the service of one employee or Member can be seen in the introductory language to section 4(b)(1)(B) of CSRSEA which limits eligibility for benefits under § 831.622 to former spouses not eligible for a former spouse annuity based on the retiree's election.

Generally, a surviving spouse or former spouse may receive more than one civil service retirement survivor annuity as long as the annuities are based on the service of different employees or Members. However, section 8341 of title 5, United States Code, provides two exceptions to that general rule by requiring an election between survivor benefits. Section 8341(g) of title 5, United States Code, prohibits receipt of a reinstated survivor annuity which terminated because of remarriage before age 55 and any survivor benefit based on the remarriage. Section 831.630(a) states this election requirement.

Section 8341(b)(3) of title 5, United States Code, requires an election between a survivor annuity based on a marriage to someone who was already a retiree at the time of the marriage and any other survivor benefit payable under CSRS or any other retirement system for Government employees. Section 831.630 (b) and (c) implements this election requirement. Two regulatory sections governing types of survivor annuities are not included on the list that can trigger an election requirement because both types require that the relationship be established prior to retirement. Insurable interest elections under § 831.606 are available only at the time of retirement. Former spouse annuities under § 831.622 require 10 years of marriage during periods of Federal employment. Neither of these annuities can trigger the election requirement. However, like any other annuity, they can be affected if another annuity triggers the election requirement. Some examples follow:

Example 1. Employee A dies and Spouse A receives a survivor annuity based on Employee A's service. After reaching age 55, Spouse A marries an active employee, Employee B. Upon Employee B's death, Spouse A is entitled to both annuities. However, if Employee B had been a retiree at the time of the marriage to Spouse A, Spouse A could receive only one of the survivor annuities.

Example 2. Spouse A is receiving two survivor annuities based on the service of deceased employees (the second marriage was after reaching age 55). Spouse A marries a retiree who elects a reduced annuity to provide a survivor annuity for Spouse A. The retiree dies a year later. Spouse A must choose whether to retain the combined survivor annuities of the deceased employees or to take instead the survivor annuity based on the service of the deceased retiree.

Example 3. Spouse A marries a retiree who elected a reduced annuity to provide a survivor annuity to Spouse A. The retiree dies a year later. After reaching age 55, Spouse A marries an employee. A year later the employee dies. Because one of the annuities is based on a postretirement marriage, Spouse A must elect which annuity to receive. The order of the marriages does not matter.

Section 831.630 also continues a long-standing interpretation that lump-sum payments of unpaid, accrued annuity due the employee and the employee's unexpended contributions are not included in "any other survivor benefit" within the meaning of that phrase as it is used in section 8341 (b) and (g), of title 5, United States Code. An election of such benefits and spousal annuity benefits is never required under CSRS. However, an election may be required between a CSRS survivor annuity and the FERS basic employee death benefit.

Example 4. Spouse A is receiving a current spouse annuity based on the death of a CSRS employee who dies in service. At age 40, Spouse A marries an employee covered by FERS causing the CSRS annuity to terminate for remarriage before age 55. A year later, the employee dies having served 6 years under FERS. Spouse A is entitled to the FERS retirement deductions plus either the reinstated CSRS annuity or the FERS basic employee death benefit, but not both.

The amendment to the definition of Associate Director is necessary to conform with a change in the position title. OPM no longer has an Associate Director for Compensation.

The guidelines for interpreting State court orders have been updated to respond to additional problems that have arisen since publication of the existing guidelines. Existing guidelines have been edited to improve clarity and new guidelines added to address ambiguities that we have discovered in recent orders.

We receive a substantial number of State court orders that have been 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, we do 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. We 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.

On page 15 of the report by the Committee on Post Office and Civil Service of the House of Representatives (H. Rept. No. 98–1054) on the bill which became CSRSEA, the committee stated that the regulations to implement the spousal notification requirement before an employee could be paid a refund of retirement deductions should conform to the notification procedures that we had been using under pre-CSRSEA law when a retiring employee had to notify (rather than obtain consent from) a current spouse to elect less than the maximum survivor benefit. The amendments to § 831.2007 do this for the situations when OPM cannot obtain proof of delivery of the notification. These changes are intended to prevent a current or former spouse from evading a notice that a separated employee has applied for a refund of retirement deductions. When OPM has no reason to believe that the address provided by the employee is incorrect and that the former spouse has prevented delivery by failing to claim or refusing the notice when we send it by certified mail, notice will be sent by first class mail to complete the notification process. This was the procedure under 5 CFR 831.601(c)(1984) to which our regulations should conform.

The amendments to § 831.2009 correct three problems that we have encountered in processing State court orders affecting refund cases. Paragraph (e) has been added to specify exactly when an order must be received to affect a refund payment. Refund checks cannot be stopped instantly. Nor can we instantly associate a court order with a pending refund application. We process over 150,000 refund applications a year. When the current or former spouse notification form states that a court order was sent to us, we will wait a few days anticipating receipt of the order. However, in all other situations, we require a substantial time to alert our processing personnel that we have received a court order that must be associated with any future refund application. In the past, we have relied on § 831.1711(a)(3) for establishing when court orders must be received to affect refunds as well as annuity payments, but that section is designed for handling only the latter. Section 831.2009(e) provides a rule designed specifically for refunds.

Unfortunately, we are receiving an increasing number of forged or otherwise fraudulent notification forms. To the extent possible, we will take legal action against a former employee submitting such a fraudulent form. To impress upon refund applicants the importance with which we view this matter, we are requiring that a refund applicant's certification on current and former spouses be under oath before an appropriate official. We hope that this will reduce some of the fraud. We have also added § 831.2009(f) which provides that if the current or former spouse can demonstrate that harm resulted from the fraud, the current or former spouse's rights will be protected, and this section lists the elements that must be proven for the current or former spouse to show injury.

We continue to receive state court orders or other documents attempting to block refund payments. We are required by section 8342 of title 5, United State Code, to pay a refund when certain statutory requirements are met. We cannot stop payment except based on a court order that meets the statutory requirements for preventing payment of refunds under section 8342(j)(1)(B) of title 5, United States Code. Section 831.2009(g) states this rule and lists the statutory requirements that the order must meet.

Under section 553(b)(3)(B) and (d)(3) of title 5, United States Code, I find that good cause exists for waiving the general notice of proposed rulemaking and for making these regulations effective in less than 30 days. The regulations are effective upon publication to prevent harm to persons entitled to benefits. Delaying rulemaking would be contrary to the public interest because such a delay could require delayed payments. Although later payments could be retroactive to the date of entitlement, delay could seriously harm entitled persons with an immediate need for payment.

E.O. 12291, Federal Regulation

I have determined that this is not a major rule as defined under section 1(b) of E.O. 12291, Federal Regulation.

Regulatory Flexibility Act

I certify that this regulation will not have a significant economic impact on a substantial number of small entities because the regulation will only affect Federal agencies and retirement payments to retired and former Government employees and their survivors and former spouses.

List of Subjects in 5 CFR Part 831

Administrative practice and procedure, Claims, Disability benefits, Firefighters, Government employees, Income taxes, Intergovernmental relations, Law enforcement officers, Pensions, Retirement.

U.S. Office of Personnel Management.

Constance B. Newman,

Director.

Accordingly, OPM is amending 5 CFR part 831 as follows:

PART 831—RETIREMENT

Subpart A—Administration and General Provisions

1. The authority citation for subpart A of Part 831 continues to read as follows:

Authority: 5 U.S.C. 8347; § 831.102 also issued under 5 U.S.C. 8334; § 831.106 also issued under 5 U.S.C. 552a; § 831.108 also issued under 5 U.S.C. 8336(d)(2).

2. In § 831.105, paragraph (j) is added to read as follows:

§ 831.105 Computation of interest.

* * * * *

(j) Interest under § 831.629 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.

Subpart F—Survivor Annuities

3. The authority citation for subpart F of part 831 continues to read as follows:

Authority: 5 U.S.C. 8347; § 831.621 also issued under section 201(d) of the Federal Employees Benefits Improvement Act of 1986, Pub. L. 99-251.

4. Section 831.601 is revised to read as follows:

§ 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 §§ 831.621 and 831.622 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.

5. In § 831.605, the section heading, the introductory text of paragraph (c), the introductory text of paragraph (d), the introductory text of paragraph (f)(1), and paragraph (f)(2) are revised to read as follows:

§ 831.605 Election at time of retirement of a fully reduced annuity or a partially reduced annuity to provide a former spouse annuity.

* * * * *

(c) An election under paragraph (a) or (b) of this section is void to the extent that it—

* * * * *

(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—

* * * * *

(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—

* * * * *

(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.

6. In § 831.606, paragraphs (c)(5) and (k)(3) are added and paragraphs (h)(1) and (3) are revised, to read as follows:

§ 831.606 Election of insurable interest annuity.

* * * * *

(c) * * *

(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 § 831.612 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.

* * * * *

(h) (1) Except as provided in § 831.605(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 § 831.612 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.

* * * * *

(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.

* * * * *

(k) * * *

(3) An annuity reduction under this section terminates on the first day of the month after the beneficiary of the insurable interest annuity dies.

7. In § 831.607, paragraph (d) is added to read as follows:

§ 831.607 Election of a self-only annuity or partially reduced annuity by married employees and members.

* * * * *

(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.

8. In § 831.608, paragraph (b) is revised to read as follows:

§ 831.608 Waiver of spousal consent requirement.

* * * * *

(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.

9. In § 831.612, paragraphs (b)(2), (b)(3), (b)(4), and (d) are revised and paragraphs (b)(5) and (e) are added to read as follows:

§ 831.612 Post-retirement election of fully reduced annuity or partially reduced annuity to provide a former spouse annuity.

* * * * *

(b) * * *

(2) If it would cause the combined current and former spouse annuities to exceed 55 percent (or 50 percent if based on a separation before October 11, 1962) of the retiree's annuity; or

(3) In the case of a married retiree, if the current spouse does not consent to the election on a form as described in § 831.607(c) and spousal consent is not waived by OPM in accordance with § 831.608; or

(4) 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 § 831.604 (a)(1) or (a)(2); or

(5) 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.

* * * * *

(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 § 831.612) 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.

10. Section 831.613 is revised to read as follows:

§ 831.613 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 § 831.604 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 § 831.608; 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 § 831.607 at the time of retirement;

(B) The election at the time of retirement was made with spousal consent in accordance with § 831.607; 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 § 831.618 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) Except as provided in § 831.621 or § 831.622, an election under this section is not effective to the extent that it conflicts with a qualifying court order or would cause the combined current and former spouse annuities to exceed 55 percent (or 50 percent if based on a separation before October 11, 1962) of the retiree's annuity.

(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.

11. Sections 831.615 and 831.616 are revised to read as follows:

§ 831.615 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 considered 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.

§ 831.616 School attendance.

For a child who has attained age 18 to be eligible to receive an annuity as a student, the child must meet all other requirements applicable to a child who has not attained age 18. In addition, 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. 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.

12. In § 831.619, paragraph (b) is revised to read as follows:

§ 831.619 Time for filing applications for death benefits.

* * * * *

(b) A former spouse claiming eligibility for an annuity based on § 831.622 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 § 831.622 if the former spouse is eligible on that date.

13. In § 831.620, paragraphs (b), (c), (d), and (e) are redesignated paragraphs (c), (d), (e), and (f), respectively; and paragraph (a) is revised and paragraph (b) is added to read as follows:

§ 831.620 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 § 831.622, 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 § 831.1705 are received in OPM.

* * * * *

14. In § 831.621, paragraphs (g), (h), and (i) are added to read as follows:

§ 831.621 Election by a retiree who retired before May 7, 1985, to provide a former spouse annuity.

* * * * *

(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 § 831.622 (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.

15. In § 831.622, paragraphs (a)(1)(i), (a)(1)(iv), (a)(1)(v), (a)(2)(iii), and (a)(2)(iv) are revised and paragraph (e) is added to read as follows:

§ 831.622 Annuities for former spouses of employees or Members retired before May 7, 1985.

(a)(1) * * *

(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.

* * * * *

(iv) The former spouse applies to OPM for a survivor annuity, in accordance with paragraph (b) of this section and § 831.619(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) * * *

(iii) The former spouse applies to OPM for a survivor annuity, in accordance with paragraph (b) of this section and § 831.619(b), before May 8, 1989.

(iv) The former spouse is at least 50 years old on May 7, 1987, and when filing the application.

* * * * *

(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.

16. In § 831.628, paragraph (b)(5) is added to read as follows:

§ 831.628 Changes in elections to provide a current spouse annuity by a retiree who retired before May 28, 1986.

* * * * *

(b) * * *

(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 § 831.604 to the extent of the election.

* * * * *

17. Section 831.630 is added to read as follows:

§ 831.630 Elections between survivor annuities.

(a) A current spouse annuity cannot be reinstated under § 831.625 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 § 831.613 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 § 831.612, or § 831.621, 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.

Subpart Q—Court Orders Affecting Civil Service Retirement Benefits

18. The authority citation for subpart Q of part 831 continues to read as follows:

Authority: 5 U.S.C. 8347.

§ 831.1703 [Amended]

19. In § 831.1703, the definition of "Associate Director" is revised to read as follows:

"*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.

* * * * *

20. Appendix A to subpart Q of part 831 is revised to read as follows:

Appendix A to Subpart Q of Part 831—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 5305 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 831.1704(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 Q of Part 831). 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 § 831.1703.

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 § 831.1703).

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 831.1704(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 831.1704(b)).

21. Appendix B to subpart Q of part 831 is revised to read as follows:

Appendix B to Subpart Q of Part 831—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 831.1704(b).)

Subpart T—Payment of Lump Sums

22. The authority citation for subpart T of part 831 continues to read as follows:

Authority: 5 U.S.C. 8347.

23. In § 831.2007, paragraph (b) is redesignated paragraph (b)(1), and paragraph (b)(2) is added, paragraph (d)(2) is revised and paragraph (e) is added to read as follows:

§ 831.2007 Notification of current and/or former spouse before payment of lump sum.

* * * * *

(b) * * *

(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. The applicant will be required to execute the form before a notary public or other official authorized to administer oaths.

* * * * *

(d) * * *

(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 re-mailed before paying the refund.

24. In § 831.2009, paragraphs (e), (f) and (g) are added to read as follows:

§ 831.2009 Court orders or decrees preventing payment of lump sums.

* * * * *

(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 § 831.1705 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 section § 831.2007(c) 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 § 831.1705 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 or a portion of the employee's or Member's future annuity benefit; or

(2) Part 581 of this chapter.

[FR Doc. 90-5573 Filed 3-9-90; 8:45 am]
BILLING CODE 6325-01-M

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5 CFR Part 890

RIN 3206-AD37

Federal Employees Health Benefits Program Withdrawal of Carrier and Plan Approval

AGENCY: Office of Personnel Management.

ACTION: Final rulemaking.

SUMMARY: The Office of Personnel Management (OPM) is amending the Federal Employees Health Benefits (FEHB) Program regulations to provide additional details on the circumstances, behaviors, and/or practices that could lead to OPM's withdrawing approval of either a health benefits plan or a carrier for that plan to continue its participation in the FEHB Program. These revisions incorporate a number of standards for carrier performance currently found in another body of regulations, the Federal Acquisition Regulation (FAR) as supplemented by the Federal Employees Health Benefits Acquisition Regulation (FEHBAR). The regulation also provides some specific examples based on those standards of the types of situations that could give rise to OPM's withdrawing approval for either a health benefits plan or a carrier to continue in the Program.

EFFECTIVE DATE: April 11, 1990.

FOR FURTHER INFORMATION CONTACT: Mary Ann Mercer, (202) 632-4634, ext. 6747.

SUPPLEMENTARY INFORMATION: On February 16, 1989, OPM published proposed regulations (54 FR 7039) which would consolidate the minimum requirements/standards required of FEHB Program carriers and provide the carriers with a greater understanding as to what actions on their part might warrant OPM's withdrawal of approval under § 890.204 of the FEHB regulations. The regulation also proposed procedures for withdrawing approval in greater detail than in previous regulations.

OPM received comments from two FEHBP carriers, two unions sponsoring FEHBP employee organization plans, one organization sponsoring an FEHBP comprehensive medical plan, one underwriter, an association of nurses, an association of retired Federal employees, and one Federal agency. The comments, which were generally supportive of the regulation, are addressed below along with OPM's response.

The FEHB statute gives OPM the authority to withdraw approval of a plan and terminate a carrier's contract if the carrier did not enroll at least 300 employees and annuitants at any time during the preceding two contract terms (5 U.S.C. 8902(e)). OPM included this statutory authority in the proposed regulation to emphasize that OPM considers it a minimum standard and that OPM may withdraw approval of a plan when the condition is not met.

Two comments were received concerning the inclusion of the "300-member rule" as a minimum standard. Even though § 890.201(a)(11) clearly gives OPM the authority to waive the standard for extenuating circumstances, the commenters are concerned that the circumstances under which OPM would consider granting a waiver will be too narrow. They suggest that such details as quality of service, number of Federal employees in the plan's service area, Federal experience with the HMO, and the plan's location in a medically underserved area should be considered before a decision is made to withdraw approval. We wish to reassure the commenters that the circumstance cited in § 890.204(b) (renumbered as § 890.204(a)(3) in the final regulation) is merely an example of an extenuating circumstance that OPM would consider (note "e.g.") and that all relevant information, including those items enumerated by the commenters, will be considered in OPM's evaluation of a carrier's ability to continue in the FEHB Program.

Further, one of the commenters expressed concern that § 890.204(b) requires OPM to send the carrier notice of withdrawal of approval of its plan before it considers all extenuating circumstances. OPM agrees that it would be counterproductive to issue written notice of non-renewal prior to considering all relevant information, and OPM does not intend to proceed in such a manner. The final regulation clarifies this provision.

We have made a technical change to 5 CFR 890.204(a)(3) by deleting the stipulation that OPM notify a carrier whose plan does not meet the minimum enrollee requirement at least 60 days before the contract renewal date. This deletion was made to conform the regulation to the Renewal and Withdrawal of Approval clause at 48 CFR 1652.249-70.

Two commenters were concerned about the application of provisions in § 890.202(b)(5), (b)(6) and (c)(5), relating to cost accounting and cost accounting systems, to community rated comprehensive medical plans. The commenters requested that OPM revise the regulation to clarify that systems of cost accounting will be a required prudent business practice only in contracts in which, and to the extent, cost analysis is a factor. We believe that these sections of the regulation are clear in their application. Section 890.202(b)(5) states that prudent business practice includes "A system for accounting for costs incurred under the contract, *when required*" (underlining supplied). The items under § 890.202(c) relate to a carrier's responsibility "under its contract." Section 890.202(b)(6) calls for accurate accounting reports of actual, allowable, allocable, and reasonable costs incurred in the administration of the contract. OPM's contracts with community rated comprehensive medical plans do not require the segregation and pricing of FEHB medical utilization and the allocation of indirect and administrative costs. Provisions relating to determining rates and reporting actual costs, therefore, would not apply to community rated plans.

One underwriter is concerned that the proposed rules impose more severe penalties on carriers than does the False Claims Act, 31 U.S.C. 3729 *et seq.* The underwriter correctly concludes that charging an unallowable cost against a contract through mistake or negligence would constitute a false claim under § 890.202(a)(1), while the same action would not constitute a false claim under the False Claims Act because that Act limits its scope to actions involving actual knowledge of the false information, deliberate ignorance of the truth or falsity of information, or reckless disregard of the truth or falsity of the information. The underwriter suggests that OPM qualify § 890.202(c)(1) by referencing the False Claims Act.

OPM is not required to adopt the criteria of the False Claims Act in this regulation. As administrator of the FEHB Program, OPM has an obligation to establish criteria that meet the needs of the Program. OPM deems it necessary for the integrity of the FEHB Program to be able to withdraw approval of a carrier that exhibits a *pattern* of poor conduct even though the carrier's action is the result of negligence or mistake. We have determined that a continuous and repetitive "pattern" of negligent or erroneous actions is neither a desirable nor an acceptable business practice for an FEHB Program carrier, and we do not wish to surrender the right to withdraw approval for such actions.

Three comments relate to due process under the withdrawal of approval procedures in § 890.204. One commenter was concerned that § 890.204 does not