Sunshine Act Meetings

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Vol. 57, No. 146
Wednesday, July 29, 1992

This section of the FEDERAL REGISTER contains notices of meetings published under the "Government in the Sunshine Act" (Pub. L. 94-409) 5 U.S.C. 552b(e)(3).

U.S. CONSUMER PRODUCT SAFETY COMMISSION

TIME AND DATE: 10:00 a.m., Wednesday, July 29, 1992.

LOCATION: Room 556, Westwood Towers, 5401 Westbard Avenue, Bethesda, Maryland.

STATUS: Open to the Public.

MATTERS TO BE CONSIDERED: Cigarette Lighters.

The Commission will consider a proposed consumer product safety standard that would require disposable and novelty lighters to meet specified requirements for child-resistance.

For a Recorded Message Containing the Latest Agenda Information, Call (301) 504–0709.

CONTACT PERSON FOR ADDITIONAL INFORMATION: Sheldon D. Butts, Office of the Secretary, 5401 Westbard Ave., Bethesda, Md. 20207 (301) 504–0800.

Dated: July 22, 1992.

Sheldon D. Butts,

Deputy Secretary.

[FR Doc. 92–18051 Filed 7–27–92; 2:30 pm]

BILLING CODE 6355–01–M

DEPARTMENT OF DEFENSE

UNIFORMED SERVICES UNIVERSITY OF THE HEALTH SCIENCES

"FEDERAL REGISTER" CITATION OF PREVIOUS ANNOUNCEMENT: 57 FR 31561.

PREVIOUSLY ANNOUNCED TIME AND DATE OF THE MEETING: 8:00 a.m., August 19, 1992.

CHANGES IN THE MEETING: Date of the meeting is August 10, 1992.

CONTRACT PERSON FOR MORE INFORMATION: David S. Trump, M.D., Executive Secretary of the Board of Regents, 301–295–3886.

Dated: July 27, 1992.

L.M. Bynum,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 92–18072 Filed 7–27–92; 3:12 pm]

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federal register

Wednesday
July 29, 1992

Part II

Federal Election Commission

11 CFR Parts 109, 110, and 114

Independent Expenditures; Corporate and Labor Organization Expenditures; Proposed Rule

FEDERAL ELECTION COMMISSION

11 CFR Parts 109, 110 and 114

[Notice 1992-11]

Independent Expenditures; Corporate and Labor Organization Expenditures

AGENCY: Federal Election Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Federal Election Commission is considering several revisions to parts 109, 110 and 114 of its regulations governing communications by corporations and labor organizations, including new provisions regarding independent expenditures by certain nonprofit corporations. These proposals would implement the Supreme Court's opinion in *Federal Election Commission* v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) ("*MCFL*"), and several subsequent judicial decisions. This notice also addresses issues raised by the National Right to Work Committee ("NRWC") in a Petition for Rulemaking filed with the Commission on February 24, 1987 in response to the *MCFL* opinion.

Please note that the draft rules that follow do not represent a final decision by the Commission regarding the NRWC petition or the *MCFL* decision. In several areas the Commission is considering different alternatives, which appear consecutively in the draft rules as A–1, A–2, B–1, B–2, etc., but which are not discussed in that order in the supplementary information which follows. Accordingly, a second public hearing has been scheduled to obtain further comment on the issues and proposed rules discussed in this notice. Further information is provided in the supplementary information which follows.

DATES: Comments must be received on or before September 18, 1992. The Commission will hold a hearing at 10 a.m. on October 14 and 15, 1992. Persons wishing to testify at the hearing must so indicate in their written comments.

ADDRESSES: Comments should be made in writing and addressed to: Ms. Susan E. Propper, Assistant General Counsel, 999 E Street NW., Washington, DC 20463. The hearing will be held in the Commission's ninth floor hearing room, 999 E Street NW., Washington, DC. Annotated and reorganized copies of this document, which may assist commenters in following the placement of the alternatives included in the proposed rules, are available for inspection and copying through the Commission's Public Disclosure Division, 999 E Street NW., Washington, DC 20463. In addition, copies of Agenda Document #92–86–A, which contains hypothetical advertisements to promote discussion by commenters on the concept of "express advocacy", are also available through the Public Disclosure Division.

FOR FURTHER INFORMATION CONTACT: Ms. Susan E. Propper, Assistant General Counsel, (202) 219–3690 or toll free (800) 424–9530. The Public Disclosure Division may be contacted at (202) 219–4140 or toll free (800) 424–9530.

SUPPLEMENTARY INFORMATION: The Commission is seeking public comment on proposed revisions to 11 CFR 109.1, 110.13, and 114.1 through 114.4, 114.12 and proposed new section 114.10 in light of recent judicial interpretations of 2 U.S.C. 441b. This section of the Federal Election Campaign Act of 1971 ("the Act" or "FECA") generally prohibits corporations and labor organizations from using general treasury monies to make contributions or expenditures in connection with federal elections. However, the proposed rules would recognize several exceptions, which are based on the Supreme Court's decision in the *MCFL* case. These proposals would only apply to expenditures, since *MCFL* did not limit the prohibitions on contributions.

First, the Commission is considering replacing the partisan/nonpartisan standards in current 11 CFR part 114 with new language at draft § 114.2 prohibiting corporations and labor organizations from making expenditures for communications to the general public expressly advocating the election or defeat of federal candidates. Revised language is also being considered in 11 CFR 109.1 to provide further guidance as to what types of communications constitute express advocacy as interpreted in *Buckley* v. *Valeo*, 424 U.S. 1, 44 n. 52 (1976) ("*Buckley*"), *MCFL* and *Federal Election Commission* v. *Furgatch*, 807 F.2d 857 (9th Cir.), *cert. denied*, 108 S. Ct. 151 (1987) ("*Furgatch*").

In addition, the attached draft rules include substantial changes to the specific provisions in §§ 114.3 and 114.4, regarding candidate debates, candidate appearances, voter guides, voting records, voter registration activities and get-out-the-vote drives. In *Buckley*, the Supreme Court made a distinction between independent expenditures and contributions. The Court observed, "[u]nlike contributions, such independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive. The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate." *Buckley* at 47. Thus, *Buckley* could be interpreted to prohibit all contacts with candidates. However, the Commission recognizes that some limited forms of contact may be necessary to preserve the current range of permissible activity. Therefore, these proposals draw a distinction between permissible contacts with candidates which are necessary to conduct these activities, and more extensive coordination that will result in in-kind contributions.

Finally, the proposed rule at 11 CFR 114.10 would set forth criteria for determining when nonprofit corporations possess the three features essential to the Supreme Court's decision that corporations like Massachusetts Citizens for Life, Inc. may not be bound by the restrictions in section 441b on independent expenditures. The draft regulations would expressly permit qualifying corporations to use general treasury funds for independent expenditures, and would explain the reporting obligations when exempt corporations make independent expenditures.

A. Background

In the *Massachusetts Citizens for Life* decision, the Supreme Court interpreted section 441b of the FECA to mean that expenditures for communications must constitute express advocacy to be subject to the prohibition of that section. *MCFL* at 249. For the first time, the Supreme Court also distinguished between different types of corporations in considering the constitutionality of 2 U.S.C. 441b. The Supreme Court concluded that nonprofit corporations having certain essential features do not possess the characteristics which Congress legitimately perceived as having the potential to exert an undesirable influence on the electoral process. These essential features consist of: (1) Being formed for the express purpose of promoting political ideas and not engaging in business activities; (2) having no shareholders or other persons affiliated so as to have a claim on assets or earnings or other economic disincentives for disassociating; and (3) not being established by a business corporation or a labor union, and having a policy of not accepting contributions from such entities. *MCFL* at 264. Thus, the Court held that section 441b's prohibition of independent expenditures

is unconstitutional as applied to incorporated entities such as MCFL, Inc.

The *MCFL* case involved a nonprofit corporation organized to promote specific ideological beliefs. Massachusetts Citizens for Life, Inc. was financed by voluntary contributions from members of the public who shared its beliefs, and by other fundraising activities, such as bake sales and raffles. The case arose because the corporation expended general treasury monies for the production and public distribution of a special newsletter which indicated whether certain clearly identified federal candidates supported or opposed its positions on particular issues. The newsletter also urged readers to vote "pro-life."

When the case reached the Supreme Court, MCFL argued, *inter alia*, that its special newsletter did not expressly advocate the election or defeat of a clearly identified federal candidate, and that only communications containing express advocacy should be prohibited under 2 U.S.C. 441b. First, the Supreme Court stated that "an expenditure must constitute 'express advocacy' in order to be subject to the probation of § 441b." *MCFL* at 249. The Supreme Court then ruled that MCFL's publication "goes beyond issue discussion to express electoral advocacy. * * * The 'Special Edition' thus falls squarely within § 441b, for it represents express advocacy of the election of particular candidates distributed to members of the general public." *Id.* at 249–50.

Based on this portion of the decision, the National Right to Work Committee filed a Petition for Rulemaking urging the Commission to revise 11 CFR 114.3 and 114.4 to conform to the statement in the *MCFL* opinion that "express advocacy" is the appropriate standard for determining when independent communications by corporations and labor organizations are prohibited under section 411b. See Rulemaking Petition; National Right to Work Committee, Notice of Availability, 52 FR 16275 (May 4, 1987). Thus, the petition took the position that the Commission's partisan/nonpartisan standards governing corporate and labor organization communications to the entity's restricted class and the general public are unconstitutional under *MCFL*.

The Commission subsequently sought public input on whether to initiate a rulemaking to determine the extent to which *MCFL* case necessitated either changes in the part 114 rules governing independent expenditures by certain nonprofit incorporated advocacy groups possessing the three features essential to the holding in *MCFL*, or changes in the scope of the "independent expenditure" provisions at 11 CFR part 109, or the implementation of an "express advocacy" test for all corporations and labor organizations covered by 11 CFR part 114. An Advance Notice of Proposed Rulemaking, published on January 7, 1988 (53 FR 416), presented these issues. The Commission indicated in the Advance Notice that it viewed the express advocacy statement in *MCFL* as dicta, noting that the statement was unnecessary to the resolution of the case, and thus did not represent a final resolution of the issue by the Court. ANPRM, 53 FR 416. The Advance Notice also raised the following ancillary questions concerning this portion of the opinion: 1. Should the Commission revise its regulations at that time, or wait until the Court has an opportunity to clarify this area in a case where the issue is squarely presented? 2. Should the Commission revise the 441b regulations to distinguish between independent expenditures that solely involve communications and other activities where communication plays little or no part? 3. Can the nonpartisan standard in 11 CFR 114.4 be interpreted consistently with an express advocacy test, thus eliminating the need for regulatory revision? 4. To what extent and how should the Commission revise the definition of "expressly advocating" in 11 CFR 109.1(b)(2) in light of the *MCFL* and *Furgatch* opinions?

Over 17,000 comments were received in response to the Advance Notice. The vast majority of the commenters submitted virtually identical letters urging the Commission to act favorably on NRWC's rulemaking petition, and/or to confine the regulations to communications expressly advocating election or defeat of candidates, so as to avoid impinging upon the freedom of speech rights upheld by the Supreme Court. The Commission received detailed comments from several sources. A public hearing was held on November 16, 1988, at which two commenters testified as to how the Commission should implement the *MCFL* opinion. The detailed comments and testimony reflect a wide range of views as to how the Commission should proceed in response to the *MCFL* opinion. Some commenters supported adoption of an express advocacy standard and opposed the Commission's position that this statement in the opinion was dicta that need not be followed. However, these comments disagreed as to how broadly or narrowly to define express advocacy. Some believed that the concept should be narrowly limited to the phrases enumerated by the Supreme Court in *Buckley*, so as to avoid impinging upon the First Amendment rights. However, others pointed to statements in the *MCFL* and *Furgatch* opinions to support a substantially broader interpretation of express advocacy. The Commission also received suggestions concerning election-related activities by business corporations or labor unions where no communication is involved, such as providing the use of facilities to a candidate's campaign. One possibility suggested was to treat such activity as an impermissible in-kind contribution made in connection with a federal election, but not to treat it as an impermissible expenditure. Another suggestion was to adopt an express advocacy standard for contributions as well as expenditures and to treat providing corporate or union facilities as a form of express advocacy. Finally, the Commission notes that two other commenters, including one of the testifying witnesses, favored simply retaining the current statutorily-created prohibition against both contributions and expenditures in connection with federal elections, while creating an exception allowing certain incorporated nonprofit advocacy groups to make independent expenditures.

Subsequently, in *Austin* v. *Michigan Chamber of Commerce*, 494 U.S. 652 (1990) ("*Austin*"), the Supreme Court provided additional guidance as to the nature of the exception it created in *MCFL* for certain nonprofit corporations through its interpretation of a Michigan statute containing prohibitions very similar to section 441b of the FECA. In other litigation, two lower courts relied upon an express advocacy standard to evaluate corporate communications under section 441b of the FECA. In *Faucher* v. *Federal Election Commission*, 743 F. Supp. 64, (D.Me. 1990) ("*Faucher*"), the court invalidated the Commission's voter guide regulations at 11 CFR 114.4(b)(5)(i). The Court concluded that the Commission's voter guide rule is not authorized by the FECA "as interpreted by the Supreme Court in [*MCFL*], to the extent that the regulation makes the permissibility of voter guides * * * hinge upon on whether such guides are 'nonpartisan' in a broad sense that includes issue advocacy rather than the narrower test of 'express advocacy'." *Id.* at 72. Similarly, in *Federal Election Commission* v. *National Organization of Women*, 713 F. Supp. 428 (D.D.C. 1989) ("NOW"), another district court applied an express advocacy test to determine whether section 441b permitted an incorporated membership organization to use general treasury funds for solicitation letters directed to the general public. The court

concluded that the letters in question did not go beyond issue discussion to express electoral advocacy. The Commission subsequently appealed both of these lower court decisions.

The Commission also issued a second notice seeking further comments on what changes to its regulations are warranted in light of the additional guidance provided by the Supreme Court's decision in *Austin*. See 55 FR 40397 (Oct. 3, 1990), comment period extended 55 FR 45809 (Oct. 31, 1990). The second notice also welcomed comments on the express advocacy questions raised by the *Faucher* and *NOW* decisions.

Eight commenters responded to the second notice, including some who reiterated their earlier positions. Most, but not all, of the commenters urged the Commission to adopt an express advocacy test for purposes of section 441b expenditures. Although one comment favored the development of definitions which precisely set out what activity will be deemed within the scope of the FECA under such a standard, another comment supported the use of a case by case approach. There was also some support for modifying the regulations to reflect the approach taken in the *Furgatch* opinion regarding what constitutes express advocacy. The Commission also received specific suggestions for delineating the class of nonprofit corporations falling within *MCFL*'s exemption. Two comments advocated a broad scope for the exemption created in *MCFL*, although a third comment emphasized the narrowness of the group of organizations possessing the three essential features delineated in *MCFL* and *Austin*.

Subsequently, the District Court's decision in *Faucher* was upheld by the Court of Appeals for the First Circuit. *Faucher* v. *Federal Election Commission*, 928 F.2d 468 (1st Cir. 1991), *cert. denied*, _____U.S._____, 112 S. Ct. 79 (1991). Consequently, the Commission sought certiorari in *Faucher*, continuing to argue that the express advocacy standard should not be made applicable to the 441b prohibition on corporate expenditures. On October 7, 1991, the Supreme Court denied the petition for certiorari, and thus declined to consider narrowing or otherwise modifying the statements made in *MCFL*. Accordingly, the Commission moved for the dismissal of its appeal in *NOW* and is resuming consideration of several substantial changes to its regulations necessitated by the *MCFL* decision.

The draft rules would codify the reduced scope of the prohibition on corporate expenditures. The proposed language would set forth the general rule that corporations and labor organizations are prohibited from making expenditures for communications to the general public expressly advocating the election or defeat of a clearly identified candidate. The draft regulations would also establish criteria for determining whether nonprofit corporations qualify for the exemption from section 441b's prohibition on independent expenditures. The proposals are explained more fully below. Please note that the attached draft rules do not represent a final decision by the Commission regarding the NRWC petition or the issues presented in this rulemaking.

B. The Express Advocacy Standard

The proposed rules which follow incorporate an express advocacy standard in several sections of 11 CFR part 114. First, new language in § 114.2 would prohibit corporations and labor organizations from making expenditures for communications to the general public that expressly advocate the selection or defeat of a clearly identified candidate, group of candidates, or candidates of a clearly identified political party. However, the draft regulations would not change the current prohibition against contributions made by corporations and labor organizations in connection with federal elections. It is important to note that the new provision prohibiting expenditures for communications containing express advocacy would apply to all corporations and labor organizations except for nonprofit corporations meeting certain criteria, as explained in new § 114.10. Thus, nonprofit corporations satisfying the criteria under § 114.10 would be permitted to make expenditures for communications to the general public which contain express advocacy, including registration and voting communications, official registration and voting information, voting records and voter guides, if made independently of any candidates. If the nonprofit corporation did have contact with candidates in conducting these activities, it would be subject to the rules set forth in § 114.4 regarding the limited extent of such contact and could not include express advocacy. However, if the communication or activity did involve express advocacy, any coordination would compromise the independence of the communications and possible future communications, resulting in prohibited in-kind contributions.

The draft would preserve the distinction in the current regulations between the rules governing communications to the restricted class (set forth at 11 CFR 114.3) and the rules governing communications beyond the restricted class (as set out in 11 CFR 114.4). However, the proposals would delete the more restrictive language in current § 114.3(a)(1) prohibiting corporate and labor organization expenditures for "partisan" communications to the general public. Section 114.3 would continue to permit corporations and labor organizations to communicate with their restricted classes on any subject. The references to "partisan" activities would be replaced with narrower provisions that would only apply to communications containing express advocacy. For example, § 114.3(b) would be revised to state more explicitly that only communications expressly advocating the election or defeat of a clearly identified candidate are subject to the reporting requirements of 11 CFR 100.8(b)(4) and 104.6.

The provisions of § 114.4 regarding communications by corporations and labor organizations to persons outside the restricted class would also be substantially revised and reorganized. The nonpartisan standards found in the current regulations would be replaced by language prohibiting express advocacy in candidate appearances, debates, voter guides, voting records, and voter registration and get-out-the-vote drives. Section 114.4(c)(1) would also include language to clarify that the term "general public" includes anyone who is not in the restricted class.

Similarly, the draft which follows would delete the term "partisan" from § 114.12(b). As revised, this provision would permit corporations and labor organizations to make meeting rooms available to a particular candidate or political committee if the room is made available to any other candidate or committee upon request.

Finally, please note that a definition of "restricted class" would be added at 11 CFR 114.1(j). This definition would clarify that the terms "restricted class" and "solicitable class" may not be coextensive. For example, a trade association's restricted class consists of its members and its own executive and administrative employees and their families. In contrast, the trade association's solicitable class also includes its member corporations' stockholders and the executive and administrative personnel, if the member corporations have approved the solicitations.

C. Defining Express Advocacy

The Commission seeks comments on two alternative sets of revisions to the definition of express advocacy set out in 11 CFR 109.1(b)(2). Both Alternatives A–1 and A–2 would continue to list the specific phrases set forth in the *Buckley* opinion as examples of express advocacy. They would also indicate that "express advocacy" includes other expressions of support or opposition, as suggested by the Supreme Court in *Buckley* and *MCFL*, and as delineated by the Ninth Circuit in *Furgatch*. For example, under Alternative A–1, express advocacy would include suggestions to take actions such as to contribute or to participate in campaign activity. In contrast, Alternative A–2 would indicate that express advocacy constitutes an exhortation, and that there must be no other reasonable interpretation of the exhortation other than encouraging the candidate's election or defeat, rather than another type of action on a specific issue. Alternative A–2 would also indicate that a communication constitutes an exhortation if it is made within a specified number of days before an election, and it does not encourage any type of action on any specific issue. Comments are requested as to what an appropriate time frame should be. This time period could be as short as 14 days, or as long as six months, prior to an election, or any other time period considered reasonable.

MCFL makes clear that isolated portions of a communication are not to be read separately in determining whether a communication constituted express advocacy. Instead, the communication should be read as a whole. See 479 U.S. at 249–50. Further, the *Furgatch* opinion evaluated the contents of the communication in question "as a whole, and with limited reference to external events." *Id.* at 864. For example, external factors of significance in *Furgatch* included the existence of an upcoming presidential election and the timing of the advertisement a week before the general election. Similarly, the Commission's proposed changes in both alternatives would recognize that all statements and expressions included in the communication must be evaluated in terms of pertinent external factors such as the context and timing of the communication. In addition, both proposed definitions would clarify that communications consisting of several pieces of paper will be read together.

The two alternatives differ as to the application of the requirement that the candidates be "clearly identified." Alternative A–1 indicates that this includes candidates of a clearly identified political party and a clearly identified group of candidates, such as the "pro-life" candidates in the *MCFL* case. Alternative A–2 would not specifically mention clearly identified groups of candidates, but would include messages such as "Vote Republican" or "Vote Democratic" if made within a specified period prior to a special or general election or an open primary. Again, this time period could be as short as 14 days, or as long as 6 months, prior to an election, or any other time period considered reasonable. Alternatively, the period between the primary and general elections could be viewed as the time when such messages refer to clearly identified candidates. In contrast, under Alternative A–1, these phrases would refer to clearly identified candidates if made at any time after specific individuals have become Republican or Democratic candidates within the meaning of the FECA in the geographic area in which the communication is made. As a general matter, the Commission seeks comments on when a message such as "Vote Democratic" or "Vote Republican" refers to one or more clearly identified candidates, rather than being just a message of support for a party. Finally, Alternative A–2 would also specifically state that "with respect to an election" includes references such as "Smith '92" or "Jones is the One."

The Commission is also considering a third option for defining "express advocacy" in lieu of the two alternatives presented in the proposed rules. By revising the existing definition of "expressly advocating" in Part 109, the two alternatives set forth in the proposed rules continue the Commission's current approach of applying the same definition of "express advocacy" in all contexts under the FECA. However, the Commission could decide to draft a new definition of "express advocacy" for inclusion in Part 114 that would apply only to corporations and labor organizations governed by that Part. The purpose of drafting a separate definition would be to focus more specifically on implementing the *MCFL* Court's dictate that "express advocacy" is the standard when determining what is an expenditure under 2 U.S.C. 441b. This definition would center on whether a communication urged action with respect to a federal election rather than on whether the communication also related to a clearly identified candidate. Thus, this approach would take a different view of "express advocacy" for organizations subject to the prohibitions of section 441b.

To illustrate the difficulty involved in applying an "express advocacy" standard, the Commission has included Agenda Document #92–86–A in the rulemaking record. This document contains seven hypothetical advertisements, each of which is assumed to be published within two weeks of an election. These examples are available on request through the Commission's Public Disclosure Division and may assist commenters in analyzing the proposals contained in this Notice.

D. Specific Activities

Sections 110.13, 114.3 and 114.4 set forth proposed changes to the rules governing candidate appearances, candidate debates, voting records, voter guides, registration and voting communications, the distribution of official registration and voting information, and supporting or conducting registration and get-out-the-vote drives. The draft rules also contain new language that would set forth the Commission's current policies regarding endorsements of candidates and facilitating the making of contributions. Alternative proposals would address the use of corporate or labor organization logos, trademarks and letterhead. As noted above, the primary change in the proposed amendments is the new language indicating that corporate or labor organization expenditures for communications to those outside the restricted class may not contain express advocacy.

Another significant change would be the addition of new language in §§ 109.1, 110.13, 114.2, 114.3, and 114.4 indicating when corporate and labor organization expenses will be treated as impermissible in-kind contributions to particular candidates. Prior to the *MCFL* decision, the Commission had not needed to examine the extent to which corporate and labor organization expenditures could be treated as in-kind contributions, because such expenditures in connection with elections were prohibited, unless subject to a specific exemption. Under the proposed regulations, coordination of corporate or labor organization activities with candidates may result in prohibited in-kind contributions or may compromise the independence of future activities, although certain limited contact is specifically permitted by §§ 114.3 and 114.4. For example, an in-kind contribution would be made if discussions between a corporation's staff and candidates or their campaign staff go beyond the limited contact

reasonably necessary to carry out permissible activities such as preparing voter guides for distribution to the general public. Limited contact, in this example, would include discussions of the format, structure and timing of an appearance or voter guide, and discussions of a candidate's positions on issues relevant to the activity. Please note that, in the case of a communication just to the restricted class, exceeding the limitations on contact will not cause that activity or future communications to the restricted class to be considered in-kind contributions. However, discussions of specific campaign strategy or tactics in the context of any activity conducted under § 114.3 or § 114.4 may compromise the ability of a corporation's or labor organization's separate segregated fund to make independent expenditures in the future. Moreover, such discussions may also cause future activities under § 114.4 to be treated as prohibited in-kind contributions by the corporation or labor organization.

Finally, § 114.4 would be restructured to follow the format of § 114.3. Section 114.4 would begin with a general explanation of the types of communications that may be made to the general public, to rank and file employees, and solely to the restricted class.

1. Candidate Appearances

The Commission seeks comments on several questions regarding corporate and labor organization funding of candidate appearances before the restricted class and other employees, and on several possible amendments to the regulations at 11 CFR 114.3(c)(2) and 114.4(b)(2).

Proposed § 114.4(b)(2) would follow the current rules at § 114.4(a)(2) by allowing rank and file employees who are not in the restricted class to attend candidate appearances organized by corporations or labor organizations. The Commission is seeking comments on several questions that have been raised concerning candidate appearances under this section. First, if rank and file employees outside the restricted class attend the candidate appearance, one question that could be resolved in these rules is whether the candidate may solicit and collect contributions during the appearance. For example, should the candidate be able to pass the hat or place donation boxes in the room? Both the present and the proposed language prohibits the corporation or labor organization from soliciting contributions during these candidate appearances. The draft rules would also incorporate the Commission's established policy that corporations and labor organizations are not permitted to facilitate the making of contributions to candidates, such as by providing envelopes addressed to the candidate. See, *e.g.*, AO 1987–29, n. 2. Thus, the question is whether a candidate should be able to use donation boxes during an appearance without this being treated as impermissible facilitation by the corporation or labor organization.

In situations where one candidate appears at a corporate or labor organization event, the attached draft of § 114.4(b)(2) would follow the current provisions by requiring corporations to let the other candidates for that office come and speak if they so request. However, comments are sought on possibly requiring a corporation to notify the other candidates in advance whenever they invite a candidate to appear. Prior notification would provide the other candidates with a real opportunity to request comparable appearances. In cases where a candidate shows up to shake hands on corporate premises, without a prior invitation, notice could be given to the other candidates as soon as feasible.

Comments are also requested on new language in § 114.4(b)(2) that would not allow the corporation or labor organization to favor one candidate through the structure or format of the candidate appearance. One example of this may be giving rank and file employees time off to listen to one candidate but not to listen to others. Another example arises where candidates receive unequal time or facilities, unless it is clearly impractical to provide all candidates with similar opportunities, such as where a candidate requests to appear after a labor organization's convention is over.

Several issues have arisen regarding § 114.3(c)(2), which governs the presence of news media at candidate appearances before only the restricted class. For example, a news organization may wish to reprint or broadcast the candidate's appearance in its entirety. Concerns have been raised that a candidate appearance before a corporation's or labor organization's restricted class would be transformed by this type of gavel to gavel coverage into a general public appearance. Accordingly, the Commission seeks comments on two alternative proposals, which have several parts located in §§ 114.3(c)(2) (i) and (iii) and 114.4(b)(2)(viii). In § 114.3(c)(2)(iii), Alternative C–1 would indicate that such coverage is permissible provided that two conditions are met. First, if the corporation or labor organization permits one media representative to cover the appearance, all *bona fide* media organizations must be given the opportunity to cover the event. This could be accomplished through pooling arrangements, if necessary. Secondly, if the corporation or labor organization permits the news media to cover an appearance by one candidate, the news media must be given the opportunity to cover all other candidates who appear. Alternative C–2, found in § 114.3(c)(2)(i) would indicate that the corporation or labor organization may not permit the media to cover such candidate appearances before just the restricted class. Instead, under Alternative C–2 at § 114.4(b)(2)(viii), in addition to the two requirements on media access, media coverage of candidate appearances is only permissible if rank and file employees may also attend, all candidates for the same seat who request to appear are given a similar opportunity, and the corporation or labor organization does not expressly advocate, or encourage the audience to expressly advocate, the election or defeat of any candidate. Both Alternatives C–1 and C–2 would also replace the current language allowing "limited invited guests" to attend candidate appearances with more specific language covering guests who are being honored or speaking or participating in the event.

It is important to note that the amendments under consideration would not change the Commission's analysis of cases in which a corporation invites the general public to attend a speech. In those cases, the Commission would continue to examine whether the individual is appearing as a candidate or in another capacity, such as an officeholder or a prominent speaker on a particular issue. See, *e.g.*, AO 1992–6.

The Commission is, however, considering a possible new exception that would permit colleges, universities, and other incorporated nonprofit educational institutions which are exempt from federal taxation under 26 U.S.C. 501(c)(3) to make their premises available to groups associated with the school wishing to invite candidates to address students, faculty and the general public. The proposed provisions in § 114.4(c)(7) are intended to ensure that these candidate appearances will not become campaign rallies, fundraising events, or opportunities for the school or group issuing the invitation to expressly advocate, or encourage the audience to expressly advocate, the election or defeat of the candidate who is appearing. The presence of campaign banners, posters, balloons and other

similar items would be viewed as indicative of a campaign rally.

These proposals would not permit candidates to collect contributions during the appearance, although candidates could ask for contributions to be sent to the candidate's campaign committee. Under the draft rules, educational institutions could allow the media to cover these candidate appearances and to broadcast them to the general public, provided the schools follow the guidelines set out at either Alternative C–1 in § 114.3(c)(2)(iii) or Alternative C–2 in § 114.4(b)(2)(viii). Comments are sought on these proposals. The Commission is also considering whether to adopt a similar approach for candidate appearance in churches and synagogues.

2. Candidate Debates

The changes proposed in the candidate debate regulations at 11 CFR 110.13 and 114.4(f) are generally similar to the changes described above regarding candidate appearances under § 114.4(b)(2). First, staging organizations would not be allowed to manipulate the structure and format of debates so as to favor one or more participating candidate, such as by allocating the time unequally or by giving only one candidate advance information as to the nature of the topics to be covered or the specific questions to be asked. Staging organizations would also not be permitted to expressly advocate in support of or opposition to any clearly identified candidate during the debates. However, a news organization that stages a candidate debate would be able to produce an editorial containing express advocacy under the news story exception to the definition of contribution and expenditure in 11 CFR 100.7(b)(2) and 100.8(b)(2). Finally, the proposed revisions would recognize that a limited amount of contact with candidates is necessary to conduct debates.

3. Voting Records

The attached draft of § 114.4(c)(4) would modify the voting records regulation in two respects. First, new language would prohibit voting records, and all accompanying communications to the general public, from expressly advocating the election or defeat of one or more clearly identified candidates. The proposed amendments would also disallow coordination with candidates in distributing voting records. Comments are sought as to whether to permit or prohibit corporations and labor organizations from obtaining directly from the candidates voting information and data on which votes to include.

4. Voter Guides

As discussed above, the First Circuit concluded in *Faucher* that the current provisions of § 114.4(b)(5)(i) exceed the regulatory boundaries imposed by the FECA as interpreted by the Supreme Court. 928 F.2d at 472. Consequently, the Commission is considering several changes to these rules. First, the proposed revisions, which would be located in § 114.4(c)(5), would allow corporations and labor organizations to prepare and distribute to the general public their own voter guides or to obtain voter guides prepared by nonprofit organizations that are tax-exempt under 26 U.S.C. 501 (c)(3) or (c)(4). The factors currently set forth in § 114.4(b)(5)(i) would be replaced with a more limited set of requirements intended to ensure the same amount of space is provided for each candidate's response, that the voter guide does not contain express advocacy, and that contact with candidates is limited to the preparations reasonably necessary to produce the guide, such as written communications regarding the candidate's positions on issues. The proposed revisions would also eliminate the current restrictions on the geographic area in which voter guides may be distributed, but would prohibit coordinating the distribution of voter guides with candidates.

5. Voter Registration and Get-Out-The-Vote Drives

Section 114.3(c)(4) sets forth provisions governing voter registration and get-out-the-vote drives aimed at a corporation's or labor organization's restricted class. Voter drives aimed at other employees or the general public are covered in renumbered § 114.4(d). The Commission is considering revising both of these provisions in several respects. First, the draft language which follows would distinguish between the speech and nonspeech components of voter drives. Thus, the proposals would conform to the *MCFL* decision by applying an express advocacy standard to the speech components of voter drives. New language would be added to § 114.4(d) to indicate that communications containing express advocacy may not be made during voter drives aimed at employees outside the restricted class, or during voter drives aimed more broadly at the general public. In contrast, § 114.3(c)(4) would be revised to state explicitly that express advocacy is permissible in voter drive communications aimed solely at a corporation's or labor organization's restricted class. Thus, the proposed revisions to § 114.3(c)(4) would also retain the current language specifically permitting voter drive communications to urge the restricted class to vote for particular candidates and to register with a particular party.

The draft rules would also include changes regarding the nonspeech components of voter drives. Section 114.4(d) would be changed to permit corporations and labor organizations to conduct voter registration and get-out-the-vote drives without the involvement of a nonprofit organization which is tax exempt under 26 U.S.C. 501(c)(3) or (c)(4). Such drives could not be targeted primarily at those who are or were registered with only one political party, such as only Republicans or only Democrats. In addition, workers could not be paid only to register voters supporting a particular candidate or political party. Finally, the proposed rules in §§ 114.3 and 114.4 would continue the current policy that information and assistance in registering and voting shall not be withheld on the basis of support for or opposition to particular candidates or political parties. The Commission seeks comments on these proposals.

6. Endorsements

The Commission is proposing adding new § 114.4(c)(6) to provide a statement as to its current policy regarding public endorsements of candidates by corporations and labor organizations. This language would continue the approach taken in AO 1984–23, where the Commission permitted a corporation to include an endorsement in a publication directed to its restricted class. In addition, the new rule would allow the endorsement to be made during the candidate's appearance before the restricted class. The Commission is considering two alternative approaches regarding further corporate or labor efforts to publicize the endorsement. Under Alternative D–1, the corporation or labor organization may spend a *de minimis* amount to issue a press release regarding the endorsement to its usual media contacts. This language would also explicitly recognize that the press release may be accompanied by a routine press conference. In contrast, Alternative D–2 would permit the corporation or labor organization to publicize the endorsement only by responding to questions posed during a routine press conference. Finally, the proposed rules would permit corporations and labor organizations to have contact with candidates to the limited extent necessary to make the endorsement, without treating these communications

as impermissible in-kind contributions. The Commission seeks comment, however, on whether this limitation on candidate contact would inhibit the corporation's or labor organization's ability to obtain the information needed to make an endorsement decision. If so, how can the rules be structured to avoid the coordination problems raised by these communications?

7. Facilitating the Making of Contributions

As part of the extensive revisions to 11 CFR 114.3 and 114.4, the Commission is proposing adding new language to these sections to set forth the current policies regarding facilitating the making of contributions. In AOs 1987–29, 1986–4 and 1982–2, and in the 1977 Explanation and Justification of § 114.3, the Commission has stated that corporations and labor organizations may not facilitate the making of contributions to particular candidates or political committees other than their own separate segregated funds. *Explanation and Justification of Regulations*, H. Doc. No. 95–44, 95th Cong., 1st Sess. at 104–105. Draft § 114.3(d) would list examples of activities which constitute facilitation, such as providing envelopes addressed to the committee.

The proposed rules would follow the current policy that facilitation does not include situations where an individual's contribution to the separate segregated fund is earmarked for a specific candidate. In such cases, the contribution will be counted against the individual's limitations on contributions to both the separate segregated fund and to the candidate. If the separate segregated fund exercises direction or control over the contribution, the contribution will also count against the separate segregated fund's contribution limits. See 11 CFR 110.6. Moreover, if the corporation or labor organization uses treasury funds to seek earmarked contributions from its restricted class to specific candidates through its separate segregated fund, such contributions will be attributable to the limits of the separate segregated fund and the individual contributors.

8. Use of Logos, Trademarks and Letterhead

This rulemaking provides an opportunity to address the use of corporate or labor organization logos, trademarks and letterhead. The Commission has encountered situations in which executives of corporations or labor organizations use official corporate or labor organization stationery, whether or not reproduced at the executive's personal expense, to solicit funds or support for a candidate. *E.g.*, MURs 3068, 1690 and 1261. The use of such stationary in these instances is something of value and may assist the candidate in garnering support or soliciting funds, and thus constitutes a prohibited corporate or labor organization contribution. The question presented is whether such a logo, trademark or letterhead may be used if the corporation or labor organization is reimbursed for the intangible value of the item(s), or whether their use (except through ordinary commercial transactions in the usual course of business) should be prohibited.

Comments are sought on two alternative approaches, which are set out in different sections of the regulations. The first option, which is set out as Alternative B–1 in the definitions § 114.1(a)(1), is to treat logos, trademarks and letterhead as something of value and a contribution or expenditure if provided without charge or at less than the fair market value. That approach would allow individuals and candidates to reimburse corporations and labor organizations for the cost of the stationery plus the value of using the corporate or union symbol, name, etc. One difficulty with this approach is ascertaining the fair market value, given subjective considerations such as goodwill. Thus, the second option, which is set forth as Alternative B–2 in § 114.4(b)(1), is to simply prohibit such uses, whether or not the corporation or labor organization is reimbursed for the use, with four exceptions for: Corporations qualifying for the *MCFL* exception; communications to the restricted class, as described under 11 CFR 114.3; communications beyond the restricted class, as permitted under 11 CFR 114.4; and solicitations made in accordance with 11 CFR 114.5 through 114.8.

The proposed language of both alternatives would also apply to situations in which an individual makes a communication either by using personal stationery or by appearing in a campaign ad, where the letter or advertisement indicates that the individual is acting on behalf of the corporation or labor organization, including references to the individual's official title at that organization. However, this proposal would enable an individual to include a general identification such as "auto maker," whereas "Vice President of XYZ Automobile Corporation" would be precluded. These proposals would supersede AOs 1984–43 and 1978–77 in this respect. Please note that these communications would not fall within the narrow scope of permissible corporate and labor organization endorsements discussed above. The Commission welcomes comments on whether there are any conditions under which a corporate or labor official could include references to his or her official title in a communication without creating the appearance that he or she is acting in an official, rather than individual volunteer, capacity.

E. Coordination with Candidates

As noted above, the *MCFL* decision addressed the scope of the FECA's prohibition against corporate expenditures. However, the prohibition against corporate contributions was expressly reaffirmed in *MCFL*. 479 U.S. at 260. Accordingly, the proposed rules which follow would preserve the statutory ban on contributions made by corporations and labor organizations in connection with federal elections. This includes in-kind contributions resulting from the coordination of election-related corporate or union communications with candidates, although the limited types of activities described in 11 CFR 114.3 and 114.4 may involve contact with candidates. Thus, the proposed rules would distinguish between the limited contact with candidates that is necessary to produce voter guides, or to make endorsements or to hold candidate appearances, and the more extensive discussions resulting in arrangement, coordination or direction of these and other activities by the candidate or the campaign staff. In addition, 11 CFR 109.1(b)(4) would be amended to reflect this distinction. Please note that the draft rules generally do not distinguish between verbal and written communications. Nevertheless, comments are requested as to whether the proposed voter guide provision should restrict permissible contact to written communications with candidates which are "limited to the preparations reasonably necessary to produce the voter guide." Please note that draft language in new § 114.2(c) would indicate that the limited types of election-related contact with a candidate, which are described in §§ 114.3 and 114.4, will not cause those activities to be treated as prohibited in-kind contributions or expenditures. In addition, contact beyond these limits, for the purpose of making communications just to the restricted class, will not cause that activity or future communications to the restricted class to be considered in-kind contributions. Nevertheless, any contacts may be used as evidence of

impermissible coordination that would negate the independence of other activities directed to the general public which are conducted by the corporation, labor organization, or separate segregated fund.

F. Exempt Corporations

1. Introduction

In *MCFL*, the Supreme Court recognized an exception to the prohibition on independent expenditures by corporations and labor organizations contained in 2 U.S.C. 441b. Noting that "MCFL was formed to disseminate political ideas, not to amass capital," the Court said that "MCFL is not the type of 'traditional corporatio[n] organized for economic gain' that has been the focus of regulation of corporate political activity." 479 U.S. at 259.

The Court's decision is based on its conclusion that "[v]oluntary political associations do not suddenly present the specter of corruption merely by assuming the corporate form * * *. Some corporations have features more akin to voluntary political associations than business firms, and therefore should not have to bear burdens on independent spending solely because of their incorporated status." *Id.* at 263. The Court went on to list the "three essential features" of these corporations that are "more akin to voluntary political associations," and therefore, like MCFL, are not subject to the prohibitions on independent expenditures contained in 2 U.S.C. 441b.

The Commission proposes to add new section 114.10 to implement the portions of the *MCFL* decision that create an exception from section 441b for these "MCFL-type" organizations. The Commission is seeking comment on two versions of this section that take different approaches to defining the MCFL exception. Generally, version 1 uses the language of the MCFL and *Austin* decisions to describe an MCFL corporation. Version 2 takes a broader tax law approach.

Since the two versions take different approaches, they are set out separately in the proposed rules. However, the two versions would have several paragraphs in common. Specifically, paragraphs (b), (d), (e)(1), (f), (g) and (h) would be the same in both versions. Therefore, rather than reprint the common paragraphs in version 2 of the proposed rules, we have inserted in their place cross references to the corresponding paragraphs in version 1. Commenters should refer to the narrative discussion of version 1 for a more detailed explanation of these common paragraphs.

The two versions use different terms to describe those organizations that qualify for the MCFL exception. Version 1 uses the term "exempt corporation." Version 2 uses the term "qualified corporation." By proposing these two alternatives, the Commission hopes to elicit comments on which term would be preferable. Commenters are encouraged to express their views on these two alternatives, and to submit suggestions of other terms that might be used to describe these corporations. Since version 1 uses the term "exempt corporation" to describe MCFL organizations, the narrative portion of this notice will use that term in most instances. However, commenters should regard the term "exempt corporation" as synonymous with the term "qualified corporation."

In accordance with the *MCFL* decision, an "exempt corporation" would be allowed to use treasury money to make independent expenditures without violating 2 U.S.C. 441b. However, exempt corporations would still be subject to the existing prohibition on contributions, including in-kind contributions, contained in section 441b and the regulations. See proposed 11 CFR 114.2. They would also be subject to certain limitations when they make independent expenditures.

In *MCFL*, the Supreme Court addressed the concern that "persons may desire that an organization use their contributions to further a certain cause, but may not want the organization to use their money to urge support for or opposition to political candidates solely on the basis of that cause." 479 U.S. at 261. The Court suggested that this concern could be met by "requiring that contributors be informed that their money may be used for such a purpose." *Id.* The Commission regards this as important "to ensure[ ] political resources reflect political support." *Id.* at 264. Therefore, paragraph (f) of proposed § 114.10 would require an exempt corporation that solicits donations to inform potential donors of the possibility that their donations might be used for election influencing purposes.

Exempt corporations would also be required to comply with certain reporting requirements. Those making independent expenditures aggregating in excess of $250 in a calendar year would be required to file reports under 11 CFR 109.2. In addition, they would be required to file a qualifying statement showing that they qualify for exempt status. These reporting requirements are discussed further below.

Finally, when an exempt corporation's major purpose is making independent expenditures, that corporation becomes a political committee that is subject to the registration and reporting requirements of 11 CFR parts 102 and 104. The proposed rules define the circumstances under which an exempt corporation's major purpose will be considered to be making independent expenditures.

2. Version 1

a. Exempt Corporation Status

In *MCFL*, the Supreme Court said that "*MCFL* has three features essential to our holding that it may not constitutionally be bound by section 441b's restriction on independent expenditures." 479 U.S. at 263–64. Paragraph (c) of proposed § 114.10 breaks these features down into separate paragraphs. Corporations with all these features will qualify for an exemption from section 441b.

Under the first feature, an exempt corporation is one that was formed for the express purposes of promoting political ideas and cannot engage in business activities. 479 U.S. at 264. The proposed rules break this first feature down into two elements which are addressed in separate paragraphs in the interest of clarity.

The first aspect of this feature is set forth in proposed paragraphs (b)(1), (b)(2) and (c)(1). A corporation must have only one express purpose, the promotion of political ideas, in order to satisfy the first element. A corporation "whose bylaws set forth more varied purposes * * * which are not inherently political *. * *" would not qualify for an exemption. *Austin* v. *Michigan Chamber of Commerce*, 494 U.S. 652, 662 (1990). To clarify the phrase "promotion of political ideas," paragraph (b)(1) indicates that this term includes both issue advocacy and election influencing activity. The term "political purposes," which is used later in the proposed rules, also includes both kinds of activity.

Several comments received by the Commission in response to the Advance Notice of Proposed Rulemaking suggested a flexible approach to this portion of the first feature. They argue that statements in the corporation's organic documents should not be read too literally, nor should they be the exclusive criteria for exempt status. The proposed rule does allow for flexibility in the corporation's organic documents. For example, the corporation could include boilerplate language such as "any lawful purpose" in its articles of

incorporation or bylaws and still qualify as an exempt corporation. In addition, tax-exempt organizations that operate "exclusively for the promotion of social welfare" under 26 U.S.C. 501(c)(4) would satisfy this portion of the first feature. The Commission regards this purpose as consistent with the proposed rule.

The proposed rule also accounts for other matters in determining express purpose. The Commission would regard statements made by the corporation through its agents, and the corporation's actual activities, as evidence of the corporation's purpose. Paragraph (b)(2)(iii) is included to indicate that the Commission may look beyond statements made in a corporation's articles of incorporation to determine its express purpose. If the corporation's actual activities are inconsistent with the exemption, it will lose its exempt status. This approach is consistent with *Austin*, which involved a corporation that complied and disseminated various kinds of information, provided publications and educational services to its members, many of which are nonpolitical, and promoted ethical business practices. The Supreme Court said "[the corporation's] nonpolitical activities suffice to distinguish it from MCFL in the context of this characteristic." 494 U.S. at 663.

Many of the commenters also suggested that a corporation's tax exempt status under 26 U.S.C. 501(c)(4) should support a presumption that it satisfies the first feature. The Commission agrees that section 501(c)(4) status is relevant to the question of whether a corporation qualifies for an exemption. Consequently, it is included in paragraph (c)(5) of the proposed rule, discussed further below. However, the *Austin* decision indicates that, with regard to the first feature, the focus is on the activities conducted and the statements made by the corporation. Therefore, the proposed rule focuses on those matters in relation to the first feature, and considers tax exempt status separately.

The second element of the first feature is set forth in proposed paragraph (c)(2). In *MCFL*, the Supreme Court said that exempt corporations "cannot engage in business activities." 479 U.S. at 264. Thus, under proposed paragraph (c)(2), only those corporations that cannot engage in business activities would be entitled to an exemption. The use of the word "cannot" in the *MCFL* opinion suggests that corporations would not satisfy the business activity prohibition solely by showing that they have not engaged in business activities in the past. Instead, only those that are unable to engage in business activity in the future would fall within the scope of the exemption.

Proposed paragraph (b)(2) contains a non-exhaustive list of activities that would be considered business activities for the purposes of this section. For example, if a corporation receives income as a result of providing goods or services to its members or to the general public, that corporation would be engaging in business activity. Under this rule, a corporation that engages in activity such as selling books or calendars through commercial retail stores would be engaging in business activity. This is to be distinguished from political fundraising activities that are expressly described to potential donors as a request for donations that will be used for political purposes. Fundraising activities so described are not business activities under the proposed rule.

For the limited purposes of 11 CFR 114.10(b)(2), the term "members" would encompass a larger class of persons than it does in 11 CFR 114.1(e), where it defines those persons considered part of a membership organization's solicitable class. In this situation, "members" includes any person who is eligible to participate in activities conducted by the organization. There would be no change in the § 114.1(e) definition of "members" for solicitation purposes. The Commission welcomes comments on this subject, and encourages suggestion of a term that might be substituted for "members" in order to make this distinction clearer.

The second feature that distinguished MCFL from other corporations was that "it ha[d] no shareholders or other persons affiliated so as to have a claim on its assets or earnings." 479 U.S. at 264. Consequently, the proposed rules would exclude corporations that have shareholders or other affiliated persons with a financial interest in the corporation. This "no shareholders" requirement is designed to "ensure[ ] that persons connected with the organization will have no economic disincentive for disassociating with it if they disagree with its political activity." *Id.* Under proposed paragraph (c)(3)(i), no persons associated with an exempt corporation would be allowed to have any ownership or other financial interest in the corporation.

However, in *Austin*, the Supreme Court recognized that persons who are not shareholders may also face disincentives to disassociate with the corporation. "Although the Chamber also lacks shareholders, many of its members may be similarly reluctant to withdraw as members even if they disagree with the Chamber's political expression, because they wish to benefit from the Chamber's nonpolitical programs * * *. The Chamber's political agenda is sufficiently distinct from its educational and outreach programs that members who disagree with the former may continue to pay dues to participate in the latter." 494 U.S. at 663.

Consequently, the proposed rules separate these two concepts by addressing "shareholders and other persons" in paragraph (c)(3)(i) and other "disincentives to disassociate" in paragraph (c)(3)(ii). Corporations would have to satisfy both paragraphs in order to be entitled to an exemption.

Paragraph (c)(3)(ii) contains a non-exhaustive list of the kinds of benefits that would disqualify the corporation if they were offered or conferred by the corporation and conditioned on continued membership. The benefits listed are the kind that led the *Austin* Court to recognize that disincentives to disassociate take various forms, many of which are less onerous than loss of a job or an ownership interest. In *Austin*, access to educational seminars, conventions, and "contacts with other members of the business community" were strong enough disincentives to negate the second feature. 494 U.S. at 662–63. The proposed rule takes the same approach. "Certainly members would be disinclined to terminate their involvement with the organization on the basis of less extreme disincentives than the loss of employment." 494 U.S. at 663.

It is important to note that corporations that do not qualify for exempt status because they condition benefits on continued membership would not be able to remedy this and qualify for an exemption by disclosing the political nature of their membership solicitations. See proposed § 114.10(f). Such a disclosure would make members aware of how the income generated by their membership is used. However, it would not eliminate the "disincentive to disassociate" created by benefits conditioned on maintaining membership.

The third feature that distinguished MCFL from other corporations was "MCFL was not established by a business corporation or labor union, and it is its policy not to accept contributions from such entities." *MCFL*, 479 U.S. at 264. Therefore, under paragraph (c)(4) of the proposed rules, no corporation established by a business corporation or labor organization, and no corporation directly or indirectly accepting donations of anything of value from a business corporation or labor

organization, would be eligible for an exemption.

In order to ensure that corporations have this feature, the proposed rules would require corporations to have a written policy against accepting donations from business corporations and labor organizations. "This prevents such corporations from serving as conduits for the type of direct spending that creates a threat to the political marketplace." *Id.* The proposed rules also seek to deter less apparent conduit activity, by excluding corporations that might be receiving business or labor donations or support indirectly through a third organization.

Many of the comments submitted in response to the previous notices suggested that the Commission adopt a rule that would allow an exempt corporation to accept a *de minimus* amount of corporate contributions without losing its exemption. The commenters suggested that the Commission require exempt corporations to segregate these contributions in a separate account in order to avoid the Court's concerns.

In both *MCFL* and *Austin* the Court placed great importance on the need to prevent the use of exempt corporations as conduits for prohibited contributions. The *MCFL* Court said that one of the reasons MCFL's independent spending could not be restricted was because "it [was MCFL's] policy not to accept contributions from [business corporations or labor unions]." 479 U.S. at 264. The Court viewed MCFL's independence, and its policy against accepting business or labor organization contributions, as significant barriers to the dangers of conduit activity. Since an unqualified policy is the best way of ensuring that exempt corporations are not used as conduits for corporate or labor organization contributions, the proposed rule does not contain a *de minimus* exception or a separate account requirement.

However, the Commission recognizes that some organizations that do not qualify for an exemption may wish to reconstitute themselves so that they qualify for exempt status. The Commission is considering creating a mechanism whereby a previously nonexempt corporation could qualify for an exemption if it adopted all of the essential characteristics of an exempt corporation. In particular, the nonexempt corporation would be required to purge its accounts of corporate and labor organization donations and implement a policy to ensure that it does not accept these donations in the future. Once it adopts the essential characteristics, purges its accounts, and implements such a policy, the corporation would qualify for exempt status after the expiration of a minimum time period. The Commission is interested in comments on such a mechanism, and on the amount of time that should expire before the corporation qualifies for the exemption.

The Commission also recognizes that, in some situations, a corporation that does not qualify for the exemption may wish to set up a separate corporation that does qualify in order to engage in election influencing activity. One example of this would be an organization that is tax-exempt under 26 U.S.C. 501(c)(3) ("(c)(3)") that establishes a related organization that is tax-exempt under section 501(c)(4) ("(c)(4)"). Since the (c)(3) organization can accept donations from business corporations and labor organizations, and may share certain operating expenses with the (c)(4), this arrangement raises an issue as to whether the (c)(4) should be exempt from section 441b.

If the (c)(3) pays more than its share of the total operating expenses, the (c)(3) is, in effect, subsidizing the operation of the (c)(4), and may be doing so with business corporation and labor organization donations. If the (c)(4) were an exempt corporation, these impermissible donations would be facilitating the making of independent expenditures, a result that the *MCFL* Court was clearly trying to avoid.

The Commission has drafted two alternatives to proposed § 114.10(c)(4) in order to elicit commenters' views on this issue. Alternative E–1 would limit section 441b exempt status to corporations that have "no organizational relationship with any organization that accepts" donations from business corporations and labor organizations. This alternative seeks to avoid the question of whether one organization is subsidizing the other by denying both organizations exempt status under § 114.10. Under this rule, there would be no need to determine whether each organization is paying an appropriate share of the expenses.

Alternative E–2 would take a narrower approach. It would allow an exempt corporation to have an organizational relationship with a group that accepts business corporation or labor organization donations, so long as the exempt corporation does not accept donations from such an organization. Under this rule, an exempt corporation could have an organizational relationship with a 501(c)(3) tax-exempt organization.

However, if the (c)(3) organization accepts business corporation or labor organization donations, the exempt corporation could not accept donations from the (c)(3). Consequently, if the two organizations share operating expenses such as rent, office supplies, staff, or utilities, some method of accurately allocating those expenses between the two organizations would be necessary in order to ensure that business corporation and labor organization donations are not facilitating the making of independent expenditures. The Commission seeks comments on how this allocation might be accomplished, and on whether it would be preferable to avoid the need for allocation by choosing the first alternative.

Finally, proposed paragraph (c)(5) would limit the exemption to corporations that are non-profit, tax exempt, social welfare organizations described in 26 U.S.C. 501(c)(4). Corporations must fit this description in order to be exempt from the prohibition on independent expenditures. One commenter noted that application for formal recognition of exempt status under section 501(c)(4) is permissive rather than mandatory. Therefore, under the proposed rules, a 501(c)(4) organization may qualify for the section 441b exemption regardless of whether it applies to the Internal Revenue Service for formal recognition of its tax exempt status.

The Commission is considering an alternative version of paragraph (c)(5) in an effort to limit the scope of the exemption from section 441b to small grass roots organizations that operate primarily on the local level. The alternative version would limit the exemption to section 501(c)(4) organizations that are eligible to file IRS Form 990EZ. Form 990EZ is the short form of IRS Form 990, the return required of organizations that are exempt from income tax under section 501(c) of the Internal Revenue Code. Form 990EZ is available to organizations that have gross receipts during the year of less than $100,000 and total assets at the end of the year of less than $250,000. See Form 990EZ, Short Form Return of Organization Exempt From Income Tax, and accompanying instructions. The IRS created this form to minimize the reporting burdens on smaller tax-exempt organizations. This is consistent with the goal of the *MCFL* Court.

As part of this approach, the Commission would further limit the reporting requirements for exempt corporations, which are discussed in detail below. Specifically, exempt corporations would not be required to report their total disbursements. This information is used to determine

whether the corporation's major purpose is the making of independent expenditures. Instead, the Commission would require the exempt corporation to certify that its independent expenditures did not equal or exceed fifty percent its total disbursements during the time periods contained in paragraph (h). See discussion of paragraph (e)(1) below. Eliminating the need to submit figures for total disbursements would reduce the reporting requirements for exempt corporations.

The Commission is also considering limiting the section 441b exemption to groups that use the less sophisticated fundraising techniques typically employed by grass roots organizations. One criterion under consideration would deny the exemption to organizations that utilize more formalized fundraising methods such as direct mail solicitation. *MCFL* involved an organization whose resources came from garage sales, bake sales, dances, raffles and picnics. In contrast, solicitation by direct mail typically involves a greater level of sophistication and organization. Therefore, the Commission is considering limiting the section 441b exemption to organizations that use the less formalized fundraising techniques.

b. Reporting Independent Expenditures

In *MCFL*, the Supreme Court recognized the need to impose disclosure requirements to prevent "massive undisclosed political spending" by MCFL-type organizations and the use of these organizations as "conduits for undisclosed spending by business corporations and unions." 479 U.S. at 262. The Court suggested that the requirements of 2 U.S.C. 434(c) would protect against these dangers.

Section 434(c) requires persons, other than political committees, that make independent expenditures exceeding $250 in a calendar year to report certain information, such as the identity of any persons whose contributions exceed $200 in a calendar year. Section 109.2 of the regulations explains these reporting requirements in greater detail.

Paragraph (e) of proposed § 114.10 would require exempt corporations to report in accordance with § 109.2. Exempt corporations would be required to file a report when they make independent expenditures exceeding $250 in a calendar year. Additional reports would be required for each subsequent reporting period in which the exempt corporation makes independent expenditures.

Since exempt corporations would be treated as "persons" for reporting purposes, they would be expected to comply with these reporting requirements by filing FEC Form 5. The Commission is proposing to modify this form slightly so that it can be used in this situation. The revised form would require an exempt corporation to indicate its total disbursements during certain time periods. This information could be used to determine whether the exempt corporation has triggered political committee status. See discussion of § 114.10(h). Providing space for this information on Form 5 would obviate the need for an additional form or letter, thereby minimizing the reporting burdens on exempt corporations. Otherwise, FEC Form 5 would remain the same.

As indicated, the additional information requested is necessary to implement proposed paragraph (h), discussed below.

The proposed rules contain two alternative versions of paragraph (h) that use different time periods to determine whether an exempt corporation has triggered political committee status. Consequently, the proposed rules contain corresponding alternative versions of paragraph (e)(1). The first alternative, F–1, would require the corporation to report its total disbursements during the current calendar year from the beginning of the year through the close of the reporting period. The second alternative, F–2, would require the corporation to report its total disbursements during the previous calendar year.

As mentioned in the discussion of proposed paragraph (c)(5), the Commission is considering a third option for paragraph (e)(1) that is not contained in the proposed rules. Under this third alternative, the Commission would not require an exempt corporation to report its total disbursements for the time periods described in paragraph (h). Instead the Commission would require the exempt corporation to certify that the independent expenditures it made did not equal or exceed fifty percent of its total disbursements during those time periods. This would reduce the reporting requirements for exempt corporations by eliminating the need to submit figures for total disbursements. Commenters are encouraged to express their views on this third alternative.

The Commission will also need other information in order to determine whether a corporation qualifies for exempt status.

Consequently, when an exempt corporation makes independent expenditures that it is required to report under 11 CFR 109.2(a), it would also be required to submit a statement containing this information. The information is listed in § 114.10(e)(2)(ii), which closely tracks the requirements for exempt status in proposed section 114.10(c).

The statement containing this information would be referred to as the corporation's qualifying statement. The statement could be submitted either along with, or prior to, the corporation's first independent expenditure report. It is important to note that the corporation would not be required to submit a qualifying statement unless it makes independent expenditures that must be reported under 11 CFR 109.2(a). In other words, no statement would be required unless the corporation makes independent expenditures aggregating in excess of $250 in a calendar year. If the corporation stays below that level, it need not submit a qualifying statement.

The proposed rules would allow the corporation to submit the qualifying statement in letter form. However, corporations would also have the option of reporting this information using a form that the Commission is proposing to create for this purpose. If the information provided in the qualifying statement were to change, the corporation would be required to file an amendment with its next independent expenditure report. Amendments could also be in letter form, and would need to contain only the corporation's name and the corrected information.

c. Exempt Corporation as Political Committees; Major Purpose Test

In *MCFL*, the Supreme Court said that "should MCFL's independent spending become so extensive that the organization's major purpose may be regarded as campaign activity, the corporation would be classified as a political committee." 479 U.S. at 262. Paragraph (h) of the proposed rules sets forth the circumstances under which an exempt corporation will trigger political committee status. The Commission is proposing alternative versions of this provision in order to elicit comments on the complicated issues involved. Commenters are encouraged to submit their views on both versions.

Alternative G–1 lays out a two part test for political committee status. If an exempt corporation falls within the statutory definition of political committee at 2 U.S.C. 431(4), and its major purpose is campaign activity, it will become a political committee. The corporation falls within the statutory definition of political committee if it has made more than $1000 of independent expenditures during the calendar year. The corporation's major purpose will be campaign activity if its independent

expenditures equal or exceed fifty percent of its total disbursements during either one of two time periods. The two parts of this test are described in more detail below.

The sequence of the events involved in this two part test is very important. The corporation will not become a political committee unless it falls within the definition of political committee when its major purpose becomes campaign activity. In other words, the corporation will not become a political committee unless, on the last day of the time period during which its independent expenditures exceed fifty percent of its total disbursements, it has made more than $1000 in independent expenditures since the beginning of that calendar year. These two events must occur simultaneously.

The corporation's major purpose will be campaign activity if its independent expenditures equal or exceed fifty percent of its total disbursements during either one of two time periods. The two time periods are the current calendar year from the first day of the year to the close of the current reporting period, and the sixty days prior to an election in which the corporation made independent expenditures. If the corporation's independent expenditures equal or exceed fifty percent of its total disbursements during either time period, its major purpose would be considered campaign activity.

When using the current calendar year to date time period, the Commission would look backward from the closing date of each reporting period to the beginning of the calendar year in order to determine whether fifty percent or more of the corporation's total disbursements were for independent expenditures. For example, if an exempt corporation filed a report for the third quarter, the Commission would use the time period from January 1 through September 30 in order to determine the corporation's major purpose. If independent expenditures represent fifty percent or more of the corporation's total disbursements during that period, the corporation's major purpose would be campaign activity.

Some corporations may confine their independent expenditure activity to the critical time period before the election. Therefore, the proposed rule would also use the sixty days before an election as an alternative time period for determining major purpose. If an exempt corporation's independent expenditures during the sixty days preceding an election equal fifty percent or more of its total disbursements during the same time period, the corporation's major purpose will be campaign activity. This test would only be used to determine the major purpose of exempt corporations whose independent expenditure activity significantly increase during the preelection period. Therefore, the proposed rules would not require all exempt corporations to report their total disbursements during the sixty day preelection period. If an exempt corporation's disclosure reports reveal a significant increase in campaign activity during the sixty day time period, the proposed rule would allow the Commission to request that the corporation disclose its total disbursements during the period in order to determine if the corporation has triggered political committee status.

As indicated above, an exempt corporation whose major purpose is campaign activity would become a political committee only if it falls within the statutory definition of political committee at 2 U.S.C. 431(4). Section 431(4) defines political committee as an organization that makes expenditures aggregating in excess of $1000 in a calendar year. In the case of an exempt corporation, the corporation would have to exceed the $1000 threshold on or before the close of the reporting period or the date of the election. In other words, the corporation would become a political committee only if, on the closing data of the reporting period or the date of the election, it had made more than $1000 of independent expenditures since the beginning of that calendar year.

Alternative G–2 would tie the fifty percent threshold to the calendar year. Early each year, the corporation would be required to report its total disbursement during the previous calendar year. If fifty percent or more of the corporation's total disbursements were for independent expenditures, the corporation's major purpose would be campaign activity. If it made more than $1000 of independent expenditures by the end of that year, the corporation would become a political committee.

The calendar year approach would require less reporting than alternative G–1, but may not adequately serve the purposes of the FECA. Because it determines political committee status only once a year, it would allow some exempt corporations to operate as political committees for extended periods of time without registering and reporting as such and without eliminating impermissible funds from their accounts. Commenters are encouraged to express their views on this alternative.

The Commission also welcomes comments on several other issues raised by the major purpose concept. First, should the test turn on whether independent expenditures are "a" major purpose or "the" major purpose of the corporation? Should political committee status be triggered at the fifty percent level, or at some lower level if, even at the lower level, the corporation's independent expenditure activity still constitutes the greatest percentage category of corporate activities? If the Commission were to adopt a plurality rather than majority approach, how should the amount spent on independent expenditures be compared to other corporate activities—i.e., would the Commission need to establish categories of activities that it would compare in order to determine a corporation's major purpose?

In *MCFL*, the Supreme Court acknowledged that MCFL-type organizations that become political committees "would automatically be subject to the obligations and restrictions applicable to those groups whose primary objective is to influence political campaigns." 479 U.S. at 262. Consequently, the proposed rules would require an exempt corporation to eliminate all impermissible funds from its cash on hand before it becomes a political committee. Since exempt corporations cannot accept corporate or labor organization contributions, the impermissible funds that would have to be eliminated in this context would be contributions from federal contractors, foreign nationals, and in excess of the contribution limits. This requirement places exempt corporations that trigger political committee status under section 114.10 an equal footing with other political committees, which are required to dispose of impermissible funds before they cross the $1000 threshold.

3. Version 2

As noted earlier, version 2 uses the term "qualified corporation" to describe an MCFL-type organization. Version 2 takes a broader, tax law approach to defining these corporations. This version seeks comments on simply defining an MCFL corporation as one that is organized under 501(c)(4) of the Internal Revenue Code, subject to certain specifically enumerated exceptions.

In order to qualify as a tax exempt organization under section 501(c)(4), a corporation must engage in "social welfare" activity conferring benefits on a charitable class or the community at large. An organization whose activities primarily benefit its own membership is not eligible for (c)(4) status.

Version 2 describes MCFL-type organizations as "qualified corporations," and focuses on two

points. First, a qualified corporation is generally one that is organized under section 501(c)(4). Second, such an organization will not be a qualified corporation if it has any of the features listed in proposed section (c)(2) (i) through (vi). These features track the rationale of the *MCFL* and *Austin* opinions. Two additional disqualifying features would be the existence of a separate segregated fund, and ineligibility to file IRS Form 990EZ.

Version 2 would also require a simpler version of the qualifying statement than would be required under paragraph (e)(2) of version 1. As indicated in the proposed rules, paragraphs (b), (d), (e)(1), (f), (g), and (h) would be the same in version 2 as they are in version 1.

The Commission welcomes comments on the proposed revisions to parts 109, 110 and 114 and the issues raised in this Notice.

List of Subjects

11 CFR Part 109

Campaign funds, Elections, Political candidates, Political committees and parties, Reporting requirements.

11 CFR Part 110

Campaign funds, Elections, Political candidates, Political committees and parties.

11 CFR Part 114

Business and industry, Elections, Labor.

Certification of No Effect Pursuant to 5 U.S.C. 605(b) [Regulatory Flexibility Act]

The attached proposed rules, if promulgated, will not have a significant economic impact on a substantial number of small entities. The basis for this certification is that, as anticipated by the Supreme Court, in *MCFL*, there may not be a substantial number of small entities affected by the proposed rules. In addition, the only new requirement is the completion of the proposed Qualifying Statement, which would not have a significant economic impact on the small entities affected.

For the reasons set out in the preamble, it is proposed to amend subchapter A, chapter I of title 11 of the Code of Federal Regulations as follows:

PART 109—INDEPENDENT EXPENDITURES (2 U.S.C. 431(17), 434(c))

1. The authority citation for part 109 would continue to read as follows:

Authority: 2 U.S.C. 431(17), 434(c), 438(a)(8), 441d.

2. 11 CFR part 109 would be amended by revising paragraphs (b)(1) and (b)(2) and by republishing the introductory text of paragraph (b)(4) adding paragraph (b)(4)(iii) to section 109.1 to read as follows:

§ 109.1 Definitions (2 U.S.C. 431(17)).

* * * * *

(b) For purposes of this definition—

(1) *Person* means an individual, partnership, committee, association, exempt corporation under 11 CFR 114.10(c), or any organization or group of persons, including a separate segregated fund established by a labor organization, corporation, or national bank (see part 114) but does not mean a labor organization, nonexempt corporation under 11 CFR 114.10(c), or national bank.

Alternative A–1

(2) (i) *Expressly advocating* means any communication that, when taken as a whole, includes an expression of support for or opposition to a clearly identified candidate, a clearly identified group of candidates, or to the candidates of a clearly identified political party, with respect to an election.

(ii) *Support for or opposition to* includes, but is not limited to, expressions such as *vote for, elect, support, cast your ballot for,* and *Smith for Congress,* or *vote against, defeat,* or *reject,* and suggestions to take action to affect the result of an election such as to make contributions or to participate in campaign activity.

(iii) *Taken as a whole* means that all statements, expressions and messages contained in the communication, whether in the same or separate documents, are read together in light of the circumstances under which they were made and with limited reference to external events.

Alternative A–2

(2) *Expressly advocating* means any communication, or portion thereof, which constitutes an exhortation to support or oppose a clearly identified candidate with respect to an election.

(i) An *exhortation to support or oppose*—

(A) Includes phrases such as *vote for, elect, support, cast your ballot for, Smith for Congress, vote against, defeat* or *reject.*

(B) Also includes any other message which contains a reference to a clearly identified candidate, if the message taken as a whole with limited reference to external events is susceptible to no other reasonable interpretation than as encouraging the candidate's election or defeat rather than some other course of action on a specific issue. *Taken as a whole* means that all statements, expressions and messages contained in the communication, whether in the same or separate documents, are read together in light of the circumstances under which they were made and with limited reference to external events.

(C) If a communication is made within _____ days preceding an election, and it contains a reference to a clearly identified candidate, and it does not encourage any action on any specific issue, the communication will constitute an exhortation to support or oppose that clearly identified candidate.

(ii) *Clearly identified candidate* means the candidate's name, nickname, photograph, drawing, or other unambiguous reference to his or her identity such as "the President", "your Congressman", or "the incumbent", or to his or her status as a candidate such as "the Democratic presidential nominee" or "the Republican candidate for Senate in the State of George." The phrases "Vote Republican" or "Vote Democratic" refer to clearly identified candidates if made within _____ days preceding a special or general election or an open primary election.

(iii) *With respect to an election* includes any express, implied or understood reference to an upcoming election, such as "SMITH '92" or "JONES IS THE ONE".

[end of Alternatives A–1 and A–2]

* * * * *

(4) *Made with the cooperation or with the prior consent of, or in consultation with, or at the request or suggestion of, a candidate or any agent or authorized committee of the candidate* means—

* * * * *

(iii) But may include limited contacts with candidates, candidates' agents and authorized committees of candidates regarding candidate appearances, candidate debates, voter guides, endorsements and publications, as described in 11 CFR 110.13(b)(4), 114.2(c), 114.3 and 114.4.

* * * * *

PART 110–CONTRIBUTION AND EXPENDITURE LIMITATIONS AND PROHIBITIONS

3. The authority citation for part 110 would be revised to read as follows:

Authority: 2 U.S.C. 431(8), 431(9), 432(c)(2), 437d(a)(8), 438(a)(8), 441a, 441b, 441d, 441e, 441f, 441g and 441h.

4. 11 CFR Part 110 would be amended by revising section 110.13 to read as follows:

§ 110.13 Candidate debates.

(a) *Staging organizations.* (1) A nonprofit organization which is exempt from federal taxation under 26 U.S.C. 501(c)(3) or (c)(4) and which does not endorse, support, or oppose political candidates or political parties may stage candidate debates in accordance with 11 CFR 110.13(b) and 114.4(f).

(2) Broadcasters, *bona fide* newspapers, magazines, and other periodical publications may stage candidate debates in accordance with 11 CFR 110.13(b) and 114.4(f).

b. *Debate structure.*—The structure of debates staged in accordance with 11 CFR 110.13 and 114.4(f) is left to the discretion of the staging organization, provided that:

(1) Such debates include at least two candidates;

(2) No candidate is favored through the structure or format of the candidate debate, such as my designing the debate to provide one or more candidates with more time than other participating candidates, or by providing one candidate with more advance information regarding the topics to be addressed or the specific questions to be asked;

(3) No communication made by the staging organization during the debate expressly advocates the election or defeat of any clearly identified candidate, clearly identified group of candidates, or candidates of any clearly identified political party. Communications made at other times by staging organizations that are broadcasters, *bona fide* newspapers, magazines and periodical publications shall be governed by 11 CFR 100.7(b) (2) and 100.8(b)(2).

(4) Contact with the candidate, the candidate's agents and the candidate's authorized committee(s) shall be limited to communications reasonably necessary to staging the debate, such as discussions of the structure, format and timing of the debate, and discussions of the candidate's positions on issues, but shall not include discussions of campaign strategy or tactics not necessary to staging the debate.

PART 114—CORPORATE AND LABOR ORGANIZATION ACTIVITY

5. The authority citation for part 114 would continue to read as follows:

Authority: 2 U.S.C. 431(8) (B), 431(9)(B), 432, 437d(a)(8), 438(a)(8), and 441b.

6. 11 CFR Part 114 would be amended in § 114.1 by adding new text at the end of paragraph (a)(1), by revising paragraph (a)(2)(ii) and by adding paragraph (j) to section 114.1 as follows:

§ 114.1 Definitions.

Alternative B–1 (See § 114.4 (c)(1) for Alternative B–2)

(a) (1) * * * The term *anything of value* includes:

(i) The use of a corporate or labor organization logo, trademark, or letterhead without charge or at less than the fair market value; or

(ii) The inclusion of information, including but not limited to an official title, in a communication indicating that the individual making the communication is acting in his or her capacity as a representative of a corporation or labor organization.

This shall not prevent an exempt corporation under 11 CFR 114.10(c) from using its logo, registered trademark, or letterhead in communications to the general public, and shall not prevent a corporation, labor organization or separate segregated fund from using the corporation's or labor organization's logo, trademark, or letterhead in communications, including solicitations, made in accordance with 11 CFR 114.3 through 114.8.

[end of Alternative B–1]

(2) * * *

(ii) Registration and get-out-the-vote campaigns by a corporation aimed at its stockholders and executive or administrative personnel and their families or by a labor organization aimed at its members and executive or administrative personnel, and their families, as described in 11 CFR 114.3;

* * * * *

(j) *Restricted class.* A corporation's restricted class is its stockholders and executive or administrative personnel, and their families. A labor organization's restricted class is its members and executive or administrative personnel, and their families. The restricted class of an incorporated membership organization, incorporated trade association, incorporated cooperative or corporation without capital stock is its members and executive or administrative personnel, and their families. [The solicitable class of a corporation, labor organization, membership organization, cooperative, corporation without capital stock or trade association, as described in 11 CFR 114.5(g), 114.7 and 114.8, may include some persons who are not considered part of the organization's restricted class, and may exclude some persons who are in the restricted class.]

7. 11 CFR part 114 would be amended by revising section 114.2 to read as follows:

§ 114.2 Prohibitions on contributions and expenditures.

(a) National banks and corporations organized by authority of any law of Congress are prohibited from making a contribution, as defined in 11 CFR 114.1(a), in connection with any election to any political office, including local, State and Federal offices, or in connection with any primary election or political convention or caucus held to select candidates for any political office, including any local, State or Federal office. National banks and corporations organized by authority of any law of Congress are prohibited from making expenditures for communications to the general public expressly advocating the election or defeat of a clearly identified candidate, a clearly identified group of candidates, or the candidates of a clearly identified political party, with respect to an election to any political office, including any local, State or Federal office.

(1) Such national banks and corporations may engage in the activities permitted by 11 CFR part 114, except to the extent that such activity is foreclosed by provisions of law other than the Act.

(2) The provisions of 11 CFR part 114 apply to the activities of a national bank, or a corporation organized by any law of Congress, in connection with local, State and Federal elections.

(b) Any corporation whatever or any labor organization is prohibited from making a contribution as defined in 11 CFR 114.1(a) in connection with any Federal election. Except as provided at 11 CFR 114.10, corporations and labor organizations are prohibited from making expenditures for communications to the general public expressly advocating the election or defeat of a clearly identified candidate, a clearly identified group of candidates, or the candidates of a clearly identified political party, with respect to a Federal election.

(c) Corporations and labor organizations are prohibited from coordinating the election-related activities described in 11 CFR Part 114 with any candidate, candidate's agent, candidate's authorized committee(s) or any party committee, except to the limited extent specifically permitted under 11 CFR 114.3 and 114.4. The limited contact permitted under 11 CFR 114.3 and 114.4 shall not cause a corporation's or labor organization's disbursements for the activities described in those sections to become contributions or expenditures. Moreover, contacts beyond those permitted under 11 CFR 114.3 shall not

cause future activities conducted under that section to be considered contributions or expenditures. However, any communications may be considered evidence that could negate the independence of other activities conducted by the corporation, labor organization or its separate segregated fund. See 11 CFR 109.1 regarding independent expenditures and coordination with candidates.

(d) A candidate, political committee, or other person is prohibited from knowingly accepting or receiving any contribution prohibited by this section.

(e) No officer or director of any corporation or any national bank, and no officer of any labor organization shall consent to any contribution or expenditure by the corporation, national bank, or labor organization prohibited by this section.

8. 11 CFR part 114 would be amended by revising § 114.3 to read as follows:

§ 114.3 Disbursements for communications to the restricted class in connection with a Federal election.

(a) *General.* (1) Corporations and labor organizations may make communications on any subject, including communications containing express advocacy, to their restricted class or any part of that class. Corporations and labor organizations may also make the communications permitted under 11 CFR 114.4 to their restricted class or any part of that class. The activities permitted under this section may involve election-related contact with candidates and political committees only to the extent permitted by this section. See 11 CFR 109.1 and 114.2(c) regarding independent expenditures and coordination with candidates.

(2) Incorporated membership organizations, incorporated trade associations, incorporated cooperatives and corporations without capital stock may make communications to their restricted class, or any part of that class as permitted in paragraphs (a)(1) and (c) of this section.

(b) *Reporting communications containing express advocacy.* Disbursements for communications expressly advocating the election or defeat of a clearly identified candidate made by a corporation, including a corporation described in paragraph (a)(2) of this section, or labor organization to its restricted class shall be reported in accordance with 11 CFR 100.8(b)(4) and 104.6.

(c) *Means of making communications containing express advocacy.* The means of making communications containing express advocacy for which disbursements must be reported under paragraph (b) of this section include, but are not limited to, the examples set forth in paragraphs (c)(1) through (4) below.

(1) *Publications.* Printed material expressly advocating the election or defeat of a clearly identified candidate, clearly identified group of candidates or candidates of a clearly identified political party may be distributed by a corporation or by a labor organization to its restricted class, provided that:

(i) The material is produced at the expense of the corporation or labor organization;

(ii) The material constitutes a communication of the views of the corporation or the labor organization, and is not the republication or reproduction in whole or in part, of any broadcast, transcript or tape or any written, graphic, or other form of campaign materials prepared by the candidate, his or her campaign committees, or their authorized agents. A corporation or labor organization may, under this section, use brief quotations from speeches or other materials of a candidate that demonstrate the candidate's position as part of the corporation's or labor organization's expression of its own views; and

(iii) Except as provided in 11 CFR 114.2(c), contact with each candidate, candidate's agent, and candidate's authorized committee(s) shall be limited to the communications reasonably necessary to produce the publication, such as discussions of the candidate's speeches and campaign materials and the candidate's positions on issues, but shall not include discussions of campaign strategy or tactics not necessary to produce the publication.

(2) *Candidate and party appearances.*

Alternative C–1 (Continued at § 114.3(c)(2)(iii) and § 114.4(b)(1)(viii))

(i) A corporation may allow a candidate or party representative to address its restricted class at a meeting, convention or other function of the corporation. A labor organization may allow a candidate or party representative to address its restricted class at a meeting, convention, or other function of the labor organization. A corporation or labor organization may allow employees outside the restricted class of the corporation or labor organization who are necessary to administer the meeting, other guests of the corporation who are being honored or speaking or participating in the event, and representatives of the news media to be present during a candidate or party representative appearance under this section.

Alternative C–2 (Continued at § 114.4(b)(1)(viii))

(i) A corporation may allow a candidate or party representative to address its restricted class at a meeting, convention or other function of the corporation. A labor organization may allow a candidate or party representative to address its restricted class at a meeting, convention, or other function of the labor organization. A corporation or labor organization may allow employees outside the restricted class of the corporation or labor organization who are necessary to administer the meeting, and other guests of the corporation who are being honored or speaking or participating in the event to be present during a candidate or party representative appearance under this section. However, the corporation or labor organization may not allow representatives of the news media to be present during a candidate or party representative appearance unless the appearance meets the conditions set forth at 11 CFR 114.4(b)(1).

[end of Alternative language]

(ii) The candidate or party representative may ask for contributions to his or her campaign or party, or ask that contributions to the separate segregated fund of the corporation or labor organization be designated for his or her campaign or party. The incidental solicitation of persons outside the corportion's or labor organization's restricted class who may be present at the meeting as permitted by this section will not be a violation of 11 CFR 114.5(g).

Alternative C–1 (See § 114.4(b)(1)(viii) for continuation of Alternatives C–1 and C–2)

(iii) If the corporation or labor organization permits more than one candidate to address its restricted class, and permits the news media to cover or carry an appearance by one candidate, the corporation or labor organization shall also permit the news media to cover or carry the appearances by the other candidate(s). If the corporation or labor organization permits a representative of the news media to cover or carry a candidate appearance, the corporation or labor organization shall provide all other representatives of the news media with equal access for covering or carrying that candidate appearance. The corporation or labor organization may require the news media to use a pooling arrangement to provide all representatives of the news

media with equal access for covering or carrying candidate appearances.

[end of Alternative language]

(iv) Except as provided in 11 CFR 114.2(c), contact with each candidate, candidate's agent, and candidate's authorized committee(s) shall be limited to the communications reasonably necessary to arrange the candidate appearance, such as discussions of the structure, format and timing of the candidate appearance, and discussions of the candidate's positions on issues, but shall not include discussions of campaign strategy or tactics not necessary to arrange the candidate appearance.

(3) *Phone banks.* A corporation or a labor organization may establish and operate phone banks to communicate with its restricted class, urging them to register and/or vote for a particular candidate or candidates, or to register with a particular political party.

(4) *Registration and get-out-the-vote drives.* A corporation or a labor organization may conduct registration and get-out-the-vote drives aimed at its restricted class. Registration and get-out-the-vote drives include providing transportation to the polls. Such drives may include communications containing express advocacy, such as urging individuals to register with a particular party or to vote for a particular candidate or candidates. Information regarding and assistance in registering or voting, including transportation and other services offered, shall not be withheld or refused on the basis of support for or opposition to particular candidates, or a particular political party.

(d) *Facilitating the making of contributions.* Corporations and labor organizations are prohibited from facilitating the making of contributions to candidates or political committees, other than the separate segregated funds of the corporations and labor organizations. Examples of facilitating the making of contributions include—

(1) Providing materials used to transmit or deliver contributions, such as stamps, envelopes addressed to the candidate or political committee, or other similar items which would assist in transmitting or delivering contributions;

(2) Collecting contributions to a candidate or political party in conjunction with an appearance by the candidate or party representative; and

(3) Enrolling members of a corporation's or labor organization's restricted class in a payroll deduction plan, check-off system, or other plan which deducts contributions from dividend or payroll checks, other than a plan used to make contributions to the corporation's or labor organization's separate segregated fund or an employee participation plan pursuant to 11 CFR 114.11. See 11 CFR 110.6 regarding contributor earmarking of contributions made through a separate segregated fund to a candidate.

9. 11 CFR Part 114 would be amended by revising § 114.4 to read as follows:

§ 114.4 Disbursements for communications beyond the restricted class in connection with a Federal election.

(a) *General.* Any communications which a corporation or labor organization may make to the general public under paragraph (c) of this section may also be made to the corporation's or labor organization's restricted class and to other employees and their families. Communications which a corporation or labor organization may make to its restricted class and to other employees, but not to the general public are found in paragraph (b) of this section. Communications which a corporation or labor organization may make only to its restricted class are found at 11 CFR 114.3. The activities permitted under this section may involve election-related contact with candidates and political committees only to the extent permitted by this section. See 11 CFR 109.1 and 114.2(c) regarding independent expenditures and coordination with candidates. Incorporated membership organizations, incorporated trade associations, incorporated cooperatives and corporations without capital stock will be treated as corporations for the purpose of making communications beyond the restricted class under this section.

(b) *Communications by a corporation or labor organization to its employees and its restricted class*—(1) *Candidate and party appearances on cooperate premises or at a meeting, convention or other function.* Corporations may permit candidates, candidates' representatives or representatives of political parties on corporate premises or at a meeting, convention, or other function of the corporation to address or meet its restricted class and other employees of the corporation and their families, in accordance with the conditions set forth in paragraphs (b)(1) (i) through (viii) of this section.

(i) If a candidate for the House or Senate or a candidate's representative is permitted to address or meet employees, all candidates for that seat who request to appear must be given a similar opportunity to appear;

(ii) If a Presidential or Vice Presidential candidate or candidate's representative is permitted to address or meet employees, all candidates for that office who are seeking the nomination of a major party or who are on the general election ballot in enough States to win a majority of the electoral votes and who request to appear must be given a similar opportunity to appear;

(iii) If representatives of a political party are permitted to address or meet employees, representatives of all political parties who had a candidate or candidates on the ballot in the last general election or which are actively engaged in placing or will have a candidate or candidates on the ballot in the next general election and who request to appear must be given a similar opportunity to appear;

(iv) A corporation, its restricted class, or other employees of the corporation or its separate segregated fund shall not, either orally or in writing, solicit or direct or control contributions by members of the audience to any candidate or party in conjunction with any appearance by any candidate or party representative under this section, and shall not facilitate the making of contributions to any such candidate or party;

(v) A corporation or its separate segregated fund shall not, in conjunction with any candidate or party representative appearance under this section, expressly advocate the election or defeat of any clearly identified candidate, clearly identified group or candidates or candidates of a clearly identified political party and shall not promote or encourage express advocacy by other employees;

(vi) No candidate shall be favored through the structure or format of the candidate appearance, such as by providing one or more candidates with more time or a substantially better location than other candidates who appear, unless the corporation is able to demonstrate that it is clearly impractical to provide all candidates with similar times or locations;

(vii) Contact with each candidate, candidate's agent, and candidate's authorized committee(s) shall be limited to the communications reasonably necessary to arrange the candidate appearance, such as discussions of the structure, format and timing of the candidate appearance, and discussions of the candidate's positions on issues, but shall not include discussions of campaign strategy or tactics not necessary to arrange the candidate appearance; and

Alternative C–1 (Continued from § 114.3(c)(2)(i) and (iii))

(viii) A corporation may allow representatives of the news media to be present during a candidate or party representative appearance under this section, in accordance with the procedures set forth at 11 CFR 114.3(c)(2)(iii).

Alternative C–2 (Continued from § 114.3(c)(2)(i))

(viii) If the corporation or labor organization permits more than one candidate to address its employees, and permits the news media to cover or carry an appearance by one candidate, the corporation or labor organization shall also permit the news media to cover or carry the appearances by the other candidate(s). If the corporation or labor organization permits a representative of the news media to cover or carry a candidate appearance, the corporation or labor organization shall provide all other representatives of the news media with equal access for covering or carrying that candidate appearance. The corporation or labor organization may require the news media to use a pooling arrangement to provide all representatives of the news media with equal access for covering or carrying candidate appearances.

[end of Alternatives C–1 and C–2]

(2) *Candidate and party appearances on labor organization premises or at a meeting, convention or other function.* A labor organization may permit candidates, candidates' representatives or representatives of political parties on the labor organization's premises or at a meeting, convention, or other function of the labor organization to address or meet its restricted class and other employees of the labor organization, and their families, in accordance with the conditions set forth in paragraphs (b)(1)(i) through (iv), (vi) through (viii), and paragraphs (b)(2)(i) and (ii) of this section.

(i) No official, member, or employee of a labor organization or its separate segregated fund shall, either orally or in writing, solicit or direct or control contributions by members of the audience to any candidate or party representative under this section, and shall not facilitate the making of contributions to any such candidate or party.

(ii) No official, member, or employee of a labor organization or its separate segregated fund shall, in conjunction with any candidate or party representative appearance under this section, expressly advocate the election or defeat of any clearly identified candidate, clearly identified group of candidates or candidates of a clearly identified political party.

(c) *Communications by a corporation or labor organization to the general public*—(1) *General.* A corporation or labor organization may make the communications described in paragraphs (c)(2) through (c)(5) of this section to the general public. Notwithstanding the provisions of paragraph (c) of this section, an exempt corporation under 11 CFR 114.10(c) may include express advocacy in any communication made to the general public under paragraphs (c)(2) through (c)(5) of this section. The general public includes anyone who is not in the restricted class. The corporation or labor organization may include its logo or otherwise identify itself as the sponsor of a communication made to the general public under paragraph (c)(2) through (c)(5) of this section.

Alternative B–2 (See § 114.1(a)(1) for Alternative B–1) (c)(1) [The first four sentences would be the same as paragraph (b)(1) above.]

However, no person, including a corporation or labor organization, shall use a corporate or labor organization logo, trademark, or letterhead in any communication to the general public which contains express advocacy or solicits contributions. No individual making a communication expressly advocating the election or defeat of any clearly identified candidate or soliciting funds for any candidate shall include information indicating that he or she is acting in his or her capacity as a representative of a corporation or labor organization, including, but not limited to, reference to the corporation's or labor organization's name or the official's title at the corporation or labor organization. This shall not prevent an exempt corporation under 11 CFR 114.10(c) from using its logo, trademark, or letterhead in communications to the general public, and shall not prevent a corporation, labor organization or separate segregated fund from using the corporation's or labor organization's logo, trademark, or letterhead in communications to the restricted class under 11 CFR 114.3 or in solicitations under 11 CFR 114.5 through 114.8.

[end of Alternative B–2]

(2) *Registration and voting communications.* A corporation or labor organization may make registration and get-out-the-vote communications to the general public, provided that the communications do not expressly advocate the election or defeat of any clearly identified candidate, clearly identified group of candidates or candidates of a clearly identified political party. The preparation and distribution of registration and get-out-the-vote communications shall not be coordinated with any candidate, group of candidates or political party. A corporation or labor organization may make communications permitted under this section through posters, billboards, broadcasting media, newspapers, newsletters, brochures, or similar means of communication with the general public.

(3) *Official registration and voting information.* (i) A corporation or labor organization may distribute to the general public, or reprint in whole and distribute to the general public, any registration or voting information, such as instructional materials, which has been produced by the official election administrators.

(ii) A corporation or labor organization may distribute official registration-by-mail forms to the general public if registration by mail is permitted by the applicable State law. A corporation or labor organization may distribute absentee ballots to the general public if permitted by the applicable State law.

(iii) A corporation or labor organization may donate funds to State or local government agencies responsible for the administration of elections to help defray the costs of printing or distributing registration or voting information and forms.

(iv) The corporation or labor organization shall not, in connection with any such distribution, expressly advocate the election or defeat of any clearly identified candidate, clearly identified group of candidates or candidates of a clearly identified political party and shall not encourage registration with any particular political party.

(v) The reproduction and distribution of registration or voting information and forms shall not be coordinated with any candidate, group of candidates or political party.

(4) *Voting records.* A corporation or labor organization may prepare and distribute to the general public the voting records of Members of Congress, provided that the voting record and all communications distributed with it do not expressly advocate the election or defeat of any clearly identified candidate, clearly identified group of candidates or candidates of a clearly identified political party. The distribution of voting records shall not

be coordinated with any candidate, group of candidates or political party.

(5) *Voter guides.* (i) A corporation or labor organization may prepare and distribute to the general public voter guides consisting of questions posed to candidates concerning their positions on campaign issues and the candidates' responses to those questions, including voter guides obtained from a nonprofit organization which is exempt from Federal taxation under 26 U.S.C. 501(c)(3) or (c)(4) and which does not support, endorse or oppose candidates or political parties, provided that—

(A) The questions are directed in writing to all of the candidates for a particular seat or office, giving the candidates equal time to respond, except that in the case of Presidential and Vice Presidential candidates the corporation or labor organization may choose to direct the questions only to those candidates seeking the nomination of a major party or to those appearing on the general election ballot in enough States to win a majority of the electoral votes;

(B) No candidate is favored through the structure or format of the voter guide, such as by designing the voter guide to provide one or more candidates with greater prominence and other participating candidates, or by devoting unequal space to the responses of each candidate;

(C) The voter guide does not expressly advocate the election or defeat of any clearly identified candidate, clearly identified group of candidates or candidates of any clearly identified political party; and

(D) Contact with each candidate, candidate's agents, and candidate's authorized committee(s) is limited to written communications reasonably necessary to produce the voter guide, such as discussions of the structure, format and timing of the voter guide, and discussions of the candidate's positions on issues, but shall not include discussions of campaign strategy or tactics not necessary to produce the voter guide.

(ii) The sponsoring organization may impose limitations on the number of words per response when the questions are initially sent to the candidates for their comments.

(iii) The sponsor may ask each candidate to provide biographical information such as education, employment positions, offices held, and community involvement and may impose a limitation on the number of words per submission.

(iv) The voter guide may be made available to the general public in any geographic area, but the distribution of the voter guide shall not be coordinated with any candidate, group of candidates or political party.

(6) *Endorsements.* A corporation or labor organization may endorse a candidate and may communicate the endorsement to its restricted class through the publications described in 11 CFR 114.3(c)(1) or during a candidate appearance under 11 CFR 114.3(c)(2). The corporation or labor organization may publicly announce the endorsement and state the reasons therefor, in accordance with the conditions set forth in paragraphs (c)(6)(i) and (ii) of this section.

Alternative D–1

(i) The public announcement of the endorsement shall be made through a press release or press conference. Disbursements for the press release or press conference shall be *de minimis.* The disbursements shall be considered *de minimis* if the press release and notice of the press conference is distributed only to the representatives of the news media that the corporation or labor organization customarily contacts when issuing press releases or holding press conferences.

Alternative D–2

(i) The public announcement of the endorsement shall only be made in response to questions posed at a routine press conference. Disbursements for the press conference shall be *de minimis.* The disbursements shall be considered *de minimis* if notice of the press conference is distributed only to the representatives of the news media that the corporation or labor organization customarily contacts when holding press conferences.

[end of Alternatives D–1 and D–2]

(ii) Contact with the candidate, the candidate's agents and the candidate's authorized committee(s) shall be limited to the communications reasonably necessary to make the endorsement, such as discussions of the candidate's position on issues, but shall not include discussions of campaign strategy or tactics not necessary to make the endorsement.

(7) *Candidate appearances on educational institution premises.* An incorporated nonprofit educational institution which is exempt from federal taxation under 26 U.S.C. 501(c)(3), such as a school, college or university may allow associated organizations, such as student groups, to sponsor appearances by candidates, candidates' representatives or representatives of political parties at which such individuals address or meet the general public on the educational institution's premises in accordance with the conditions set forth in paragraphs (c)(7)(i) through (c)(7)(vii) of this section.

(i) The educational institution must have an established policy allowing associated organizations to sponsor such appearances, and this policy shall not favor any one candidate or political party over any other. The policy will not be considered to favor any candidate or political party if any group associated with the educational institution is allowed to sponsor such an appearance in the educational institution's facilities, and any other groups are permitted a similar or comparable opportunity if they so request;

(ii) No candidate, candidate's representative, or representative of a political party shall collect contributions from members of the audience in conjunction with an appearance under paragraph (c)(7) of this section. The educational institution shall not, either orally or in writing, solicit or direct or control contributions by members of the audience to any candidate or party in conjunction with any appearance by any candidate or party representative under paragraph (c)(7) of this section, and shall not facilitate the making of contributions to any such candidate or party;

(iii) An educational institution shall not, in conjunction with any candidate or party representative appearance under paragraph (c)(7) of this section, expressly advocate the election or defeat of any clearly identified candidate or candidates of a clearly identified political party, and shall not promote or encourage express advocacy by members of the audience;

(iv) Contact with each candidate, candidate's agent, and candidate's authorized committee(s) shall be limited to the communications reasonably necessary to arrange the candidate appearance, such as discussions of the structure, format and timing of the candidate appearance, and discussions of the candidate's positions on issues, but shall not include discussions of campaign strategy or tactics not necessary to arrange the candidate appearance;

(v) An educational institution may allow representatives of the news media to be present during a candidate or party representative appearance under this section, in accordance with the procedures set forth at 11 CFR 114.3(c)(2)(iii);

(vi) Educational institutions allowing candidates, candidates' representatives and representatives of political parties to make political appearances in the

institution's facilities pursuant to paragraph (c)(7) of this section shall ensure that the appearances constitute speeches, question and answer sessions, or similar communications in an academic setting, and are not conducted as campaign rallies or events; and

(vii) In order to qualify under this section, the educational institution or its associated organization must ensure that admission to the event is available to the institution's academic community or the general public (whichever is invited) without regard to party affiliation or support of any particular candidate. The educational institution or its associated organization, and not the candidate's campaign or the political party, must have control over access to the facility by the audience.

(d) *Registration and get-out-the-vote drives.* A corporation or labor organization may support or conduct voter registration and get-out-the-vote drives which are aimed at employees outside its restricted class and the general public in accordance with the conditions set forth in paragraphs (d)(1) through (d)(6) of this section. Registration and get-out-the-vote drives include providing transportation to the polls.

(1) The corporation or labor organization shall not make any communication expressly advocating the election or defeat of any clearly identified candidate, clearly identified group of candidates or candidates of any clearly identified political party as part of the voter registration or get-out-the-vote drive.

(2) The registration or get-out-the-vote drive shall not be coordinated with any candidate, group of candidates or political party.

(3) The registration drive shall not be directed primarily to individuals previously registered with one particular political party, as opposed to another political party, or to individuals intended to be registered with a particular party. The get-out-the-vote drive shall not be directed primarily to individuals currently registered with one particular political party as opposed to another political party.

(4) These services shall be made available without regard to the voter's political preference. Information regarding and assistance in registering or voting, including transportation and other services offered, shall not be withheld or refused on the basis of support for or opposition to particular candidates or a particular political party.

(5) Individuals conducting the registration or get-out-the-vote drive shall not be paid on the basis of the number of individuals registered or transported who support a particular candidate, group of candidates or political party.

(6) The corporation or labor organization shall notify those receiving information or assistance of the requirements of paragraph (d)(4) of this section. The notification shall be made in writing at the time of the registration or get-out-the-vote drive.

(e) *Incorporated membership organizations, incorporated trade associations, incorporated cooperatives and corporations without capital stock.* An incorporated membership organization, incorporated trade association, incorporated cooperative or corporation without capital stock may permit candidates, candidates' representatives or representatives of political parties to address or meet members and employees of the organization, and their families, on the organization's premises or at a meeting, convention or other function of the organization, in accordance with the conditions set forth in paragraph (b)(2)(i) through (viii) of this section.

(f) *Candidate debates.* (1) A nonprofit organization qualified under 11 CFR 110.13(a)(1) may use its own funds and may accept funds donated by corporations or labor organizations under paragraph (f)(3) of this section to defray costs incurred in staging candidate debates held in accordance with 11 CFR 110.13.

(2) A *bona fide* broadcaster, newspaper, magazine or other periodical publication may use its own funds to defray costs incurred in staging public candidate debates held in accordance with 11 CFR 110.13.

(3) A corporation or labor organization may donate funds to nonprofit organizations qualified under 11 CFR 110.13(a)(1) to stage candidate debates held in accordance with 11 CFR 110.13 and § 114.4(f).

10. 11 CFR part 114 would be amended by adding 114.10 as follows:

§ 114.10 Nonprofit corporations exempt from the prohibition on independent expenditures.

Version 1 of § 114.10

(a) *Scope.* This section describes those corporations that are exempt from the prohibition on independent expenditures contained in 11 CFR 114.2. It sets out the requirements for demonstrating exempt status, for reporting independent expenditures, and for disclosing the potential use of solicited funds for political purposes. It also describes the circumstances under which an otherwise exempt corporation will become a political committee.

(b) *Definitions.* For the purposes of this section—

(1) *The promotion of political ideas* and *political purposes* include both issue advocacy and election influencing activity.

(2) A corporation's *express purpose* includes:

(i) The corporation's purpose as stated in its charter, articles of incorporation, or bylaws, except that a statement such as "any lawful purpose," "any lawful activity," or other comparable statement will not preclude a finding under paragraph (c) of this section that the corporation's only express purpose is the promotion of political ideas;

(ii) The corporation's purpose as publicly stated by the corporation or its agents; and

(iii) Any purpose evidenced by activities in which the corporation actually engages.

(3)(i) The term *business activities* includes but is not limited to:

(A) The provision of goods or services to members or to the general public which results in income to the corporation from members, the general public, or the provider of the services; and

(B) Advertising or promotional activity which results in income to the corporation, other than in the form of membership dues or donations.

(ii) The term *business activities* does not include political fundraising activities that are expressly described in writing to potential donors as requests for donations that will be used for political purposes.

(iii) For the purposes of paragraph (b)(3) of this section, the term members includes all persons eligible to receive services provided by the corporation or participate in activities conducted by the corporation.

(4) The term *shareholder* has the same meaning as the term stockholder, as defined in 11 CFR 114.1(h).

(c) *Exempt corporations.* For the purposes of this section, an exempt corporation is a corporation:

(1) Whose only express purpose is the promotion of political ideas;

(2) That cannot engage in business activities;

(3) That has:

(i) No shareholders or other persons affiliated in any way that allows them or could allow them to make a claim on the organization's assets or earnings at any time during or after its existence; and

(ii) No persons affiliated in any way that creates a disincentive for them to disassociate themselves from the

corporation if they disagree with its position on any political issue. This includes but is not limited to:

(A) Persons receiving benefits such as credit cards, insurance policies or savings plans, if, in order to receive such benefits, persons must maintain a membership in the corporation;

(B) Persons receiving training or information, other than newsletters or similar publications devoted to the promotion of political ideas, if access to the training or information is conditioned upon maintaining a membership in the corporation; and

(C) Persons receiving other associational benefits, such as professional prestige or business contacts, if the benefits would be lost by failing to maintain a membership in the corporation;

Alternative E–1

(4) That was not established by a business corporation or labor organization, does not directly or indirectly accept donations of anything of value from business corporations or labor organizations, has a written policy against directly or indirectly accepting donations of anything of value from business corporations or labor organizations, and has no organizational relationship with any organization that accepts donations of anything of value from business corporations or labor organizations; and

Alternative E–2

(4) That was not established by a business corporation or labor organization, does not directly or indirectly accept donations of anything of value from business corporations, labor organizations, or any other organization that accepts donations from business corporations or labor organizations, and has a written policy against directly or indirectly accepting donations of anything of value from business corporations or labor organizations; and

[end of Alternatives E–1 and E–2]

(5) That is described in 26 U.S.C. 501(c)(4).

(d) *Permitted corporate independent expenditures.* (1) An exempt corporation may make independent expenditures, as defined in 11 CFR part 109, without violating the prohibitions against corporate expenditures contained in 11 CFR part 114.

(2) Except as provided in paragraph (d)(1) of this section, exempt corporations remain subject to the requirements and limitations of 11 CFR part 114, including those provisions prohibiting corporate contributions, whether monetary or in-kind.

(e) *Exempt corporations; reporting requirements.*

Alternative F–1

(1) *Reporting independent expenditures.* Exempt corporations that make independent expenditures aggregating in excess of $250 in a calendar year shall file reports as required by 11 CFR 109.2. When filing these reports, the corporation shall also indicate the total amount of disbursements it has made since the beginning of the calendar year.

Alternative F–2

(1) *Reporting independent expenditures.* Exempt corporations that make independent expenditures aggregating in excess of $250 in a calendar year shall file reports as required by 11 CFR 109.2. When filing these reports, the corporation shall indicate the total amount of disbursements it made during the previous calendar year.

[end of Alternatives F–1 and F–2]

(2) *Demonstrating exempt status.* Corporations claiming an exemption from the prohibition on independent expenditures shall file, in accordance with 11 CFR 104.4(c), a qualifying statement showing that they qualify for exempt status.

(i) Qualifying statements filed under this section shall be submitted at any time on or before the due date of the corporation's first independent expenditure report. If there is any change in the information provided in the qualifying statement, an amended statement shall be submitted with the corporation's next report of independent expenditures. Amendments may be in the form of a letter, and need only indicate the name of the corporation and the change or correction.

(ii) This qualifying statement may be made either by filing FEC Form ____ or by submitting a letter containing the following information:

(A) The name and address of the corporation, and the signature and printed name of the individual filing the qualifying statement;

(B) A copy of the relevant portions of the corporation's charter, articles of incorporation, or bylaws that shows the stated purpose of the corporation, or a complete quotation of the corporation's stated purpose taken from those documents;

(C) A statement indicating whether the corporation was established by a business corporation or labor organization;

(D) A description of the method by which the corporation ensures that the donations it receives, or cash or anything else of value, do not come directly or indirectly from business corporation or labor organizations;

(E) A statement indicating whether the corporation has an organizational relationship with any organization that accepts donations from business corporations or labor organizations;

(F) A description of the services and benefits that the corporation provide to its members; and

(G) A statement indicating whether the corporation is an organization described in 26 U.S.C. 501(c)(4).

(f) *Solicitation; disclosure of use of contributions for election influencing purposes.* When an exempt corporation solicits donations of anything of value, it shall inform potential donors in writing that it may use their donations for election influencing purposes.

(g) *Non-authorization notice.* Exempt corporations making independent expenditures under this section shall comply with the requirements of 11 CFR 110.11.

Alternative G–1

(h) *When exempt corporations become political committees; major purpose test.* (1) If at any time making independent expenditures becomes the major purpose of an otherwise exempt corporation, the corporation will become a political committee and shall register and report as required by 11 CFR parts 102 and 104, provided that, on the date described in paragraph (h)(2) (i) or (ii), the corporation would be a political committee under 11 CFR 100.5(a) because it had made more than $1000 in independent expenditures since the beginning of that calendar year.

(2) The major purpose of an exempt corporation is making independent expenditures when:

(i) On the closing date of any reporting period, fifty percent or more of its total disbursements since the beginning of the current calendar year were for independent expenditures as defined in 11 CFR 109.1; or

(ii) On the date of an election, as defined in 11 CFR 100.2, fifty percent or more of the corporation's total disbursements for the 60 days preceding the election were for independent expenditures as defined in 11 CFR 109.1.

(3) Before becoming a political committee, an exempt corporation shall eliminate from its cash on hand any funds that do not comply with the limitations and prohibitions of the Act.

Alternative G–2

(h) *When exempt corporations become political committees; major purpose test.* (1) If at any time making independent expenditures becomes the major purpose of an otherwise exempt corporation, the corporation will become a political committee and shall register and report as required by 11 CFR parts 102 and 104, provided that, on the last day of the calendar year referred to in paragraph (h)(2), the corporation would be a political committee under 11 CFR 100.5(a) because it had made more than $1000 in independent expenditures since the beginning of that calendar year.

(2) The major purpose of an exempt corporation is making independent expenditures when fifty percent or more of its total disbursements during a calendar year were for independent expenditures as defined in 11 CFR 109.1.

(3) Before becoming a political committee, an exempt corporation shall eliminate from its cash on hand any funds that do not comply with the limitations and prohibitions of the Act.

[end of Alternatives G–1 and G–2] [end of Version 1]

Version 2 of § 114.10

(a) *Scope.* This section describes those corporations that are, and are not, qualified to make independent expenditures under 11 CFR part 109.

(b) [same as version 1]

(c) *Qualified Corporations.* (1) A qualified corporation is a nonprofit social welfare corporation organized under section 501(c)(4) of the Internal Revenue Code and any other not-for-profit corporation having features more akin to a voluntary political association than a business firm.

(i) "Features akin to a voluntary political association" include, but are not limited to, being formed for the express purpose of promoting political ideas.

(ii) "Features akin to a business firm" do not include selling or renting a membership list to commercial entities for the organization's own fundraising purposes.

(2) A corporation is not qualified under this section if:

(i) It engages in business activity for profit; or

(ii) Has any shareholders or other persons having a claim on the assets or earnings of the organization; or

(iii) Has exclusive membership services creating a financial disincentive for members to disassociate themselves from the corporation; or

(iv) Was established by, or accepts contributions from, a corporation or labor organization organized under section 501(c)(3) of the Internal Revenue Code; or

(v) Sponsors or is affiliated with any separate segregated fund or political action committee organized under the Federal Election Campaign Act; or

(vi) Is ineligible to file a Tax Form 990EZ.

(d) [same as version 1]

(e) *Exempt corporations; reporting requirements.* (1) [same as version 1]

(2) Corporations claiming qualification to make independent expenditures shall file, simultaneously with any report due under § 109.2, a qualifying statement made either by FEC form _____ or by letter which states the corporation complies with section (c)(1) of this section and does not contain any of the features listed in part (c)(2) (A)–(F) of this section.

(f) [same as version 1]

(g) [same as version 1]

(h) [same as version 1]

11. 11 CFR part 114 would be amended by revising paragraph (b) of § 114.12 to read as follows:

§ 114.12 Miscellaneous provisions.

* * * * *

(b) Notwithstanding any other provision of part 114, a corporation or a labor organization which customarily makes its meeting rooms available to clubs, civic or community organizations, or other groups may make such facilities available to a political committee or candidate if the meeting rooms are made available to any candidate or political committee upon request and on the same terms given to other groups using the meeting rooms.

* * * * *

Dated: July 17, 1992.

Joan D. Aikens,

Chairman, Federal Election Commission.

[FR Doc. 92–17304 Filed 7–28–92; 8:45 am]

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Part III

Office of Personnel Management

5 CFR Parts 831 et al.

Court Orders Affecting Retirement Benefits; Final Rule

OFFICE OF PERSONNEL MANAGEMENT

5 CFR Parts 831, 838, 841, 842, 843, 846, and 890

RIN 3206-AE14

Court Orders Affecting Retirement Benefits

AGENCY: Office Of Personnel Management.

ACTION: Final rule.

SUMMARY: The Office of Personnel Management (OPM) is issuing final regulations to improve processing of court orders affecting retirement benefits under the Civil Service Retirement System (CSRS) and the Federal Employees Retirement System (FERS). The final regulations establish rules of interpretation and procedures for processing court orders that divide retirement benefits or award survivor annuities, provide model paragraphs for use in preparing court orders, and create a single uniform set of procedures for processing court orders under FERS and CSRS. The regulations are needed to streamline OPM's procedures to allow disputes over the interpretation of State court orders to be brought to closure more easily and quickly, minimizing hardship to the former spouse.

EFFECTIVE DATE: August 28, 1992.

ADDRESSES: Send court orders affecting CSRS or FERS benefits to Office of Personnel Management, Retirement and Insurance Group, P.O. Box 17, Washington, DC 20044; or deliver to Court-ordered Benefits Section, Allotments Branch, Retirement and Insurance Group, Office of Personnel Management, 1900 E Street, NW., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Harold L. Siegelman, (202) 606-0299.

SUPPLEMENTARY INFORMATION: On January 2, 1992, we published (at 57 FR 120) proposed regulations concerning court orders affecting retirement benefits to replace the existing separate sets of interim regulations under the Civil Service Retirement System (CSRS) and the Federal Employees Retirement System (FERS). We received six comments on the proposed regulations. The comments are discussed later in this supplementary information.

These regulations apply only to court orders affecting CSRS and FERS basic benefits administered by OPM. These regulations do not apply to court orders affecting the Thrift Savings Plan. The Federal Retirement Thrift Investment Board administers the Thrift Savings Plan. The Board processes court orders relating to the Thrift Savings Plan pursuant to regulations found at subpart I of part 1650 of title 5, Code of Federal Regulations. Court orders relating to the Thrift Savings Plan must be submitted directly to the Board's recordkeeper, the National Finance Center in New Orleans.

1. History of the Current Regulations

On May 13, 1985, we published (at 50 FR 20064) interim regulations which, in part, revised our procedures for processing court orders affecting benefits under CSRS. Those interim rules were necessary to implement the Civil Service Retirement Spouse Equity Act of 1984 (CSRSEA) (Pub. L. 98-615).

On September 8, 1986, we published (at 51 FR 31927) interim regulations amending the interim regulations published May 13, 1985. The September 8th interim regulations implemented several changes to CSRSEA made by the Federal Employees Benefits Improvement Act of 1986 (Pub. L. 99-251). The September 8th interim regulations also included changes based on comments received in response to the interim regulations published May 13, 1985.

On February 3, 1987, we published (at 52 FR 3209) interim regulations amending the interim regulations for processing court orders under CSRS to implement the Federal Employees' Retirement System Technical Corrections Act of 1986 (Pub. L. 99-556).

On March 12, 1990, we published (at 55 FR 9093) amendments to the interim regulations implementing CSRSEA. The amendments included revised guidelines explaining how we interpret certain language used in court orders affecting CSRS benefits.

On December 30, 1986, we published (at 51 FR 47021) proposed regulations for revising our procedures for processing court orders under CSRS to expedite payments to the former spouses. On September 9, 1991, we withdrew (at 56 FR 45883) those proposed regulations.

On December 31, 1986, we published (at 51 FR 47190) interim regulations for processing court orders affecting FERS basic benefits. Those interim regulations implemented for FERS the procedures that we had proposed the day before for CSRS. This final rule replaces the interim regulations published December 31, 1986, for court orders affecting FERS benefits.

This final rule replaces both the CSRS interim regulations published May 13, 1985, as amended, and the FERS interim regulations published December 31, 1986, for court orders affecting retirement benefits.

2. Reasons to Change Processing Procedures

These final regulations will make it easier for the parties in a divorce to ensure that OPM will divide CSRS or FERS benefits, or provide a survivor benefit, in accordance with their wishes. In enacting the provisions allowing OPM to honor the decisions of State courts respecting a former spouse's interest in an employee's retirement benefits, the intent of Congress was that the Federal Government not insert itself into marital property disputes. These final regulations assure that the dispute-resolution role rests in the hands of the State courts as was originally intended by the Congress.

Under the current interim regulations for court orders, a process has evolved that, rather than truly protecting the rights of all parties, often simply resulted in delays in payments to former spouses and hardships to them. Under the existing interim regulations, when we receive a court order that awards a benefit to a former spouse of a CRS or FERS retiree, the retiree can protest OPM's decision through frequently lengthy administrative procedures. This may create financial hardship because, under CSRS procedures, no money is paid while the administrative proceedings are pending. Since the aftermath of many divorces is often an emotionally charged situation, some retirees deliberately use the process to delay payments for as long as possible.

These final regulations synthesize our experience in processing court orders since 1978, and contain two important changes that we believe will improve our service to people affected by these orders. First, the regulations will make it easier for people to submit court orders that will be acceptable to OPM. The regulations are very detailed as to what constitutes a court order that is acceptable for processing, and as to the exact meaning of court order terminology. The definitions in these regulations are designed to give the most commonly-used meaning to words most often encountered in court orders. This will allow OPM to accept as many court orders as possible rather than rejecting orders, which would require the parties to return to State courts. To further facilitate preparation of acceptable orders, appendices to the regulations contain model paragraphs that attorneys can use to ensure that, in drafting orders, the language they select will both produce the intended result and meet OPM's processing requirements.

Second, because the regulations prescribe in detail what is and is not acceptable for processing, OPM can now assume the appropriate role for itself, which is a ministerial role, rather than a mediator in marital property disputes. This role belongs to the State courts. If a court order is so flawed that it is not sufficiently clear to satisfy our requirements, the appropriate action is for the parties to return to the State court to correct the problem. Likewise, if the retiree contends that the court intended its order to have a different meaning than the clear meaning it has under these regulations, the proper forum for the retiree's complaint is the State court. OPM will require the employees and former spouses to settle the disputes in the State courts where they belong, not in Federal proceedings. The courts issuing the orders are in the best position to determine the meaning of their own orders. This will result in faster resolution of disputes and eliminate the delay in payments to former spouses with court orders that comply with the requirements of the regulations.

3. Changes From the Existing Interim Regulations That Have Broad Application

These regulations consolidate the CSRS and FERS regulations concerning court orders affecting retirement benefits into a single set of regulations applicable to both retirement systems. The final regulations include the changes that we proposed to make the regulations easier to use by both the legal community in drafting and submitting court orders and by OPM staff in applying the regulations to court orders. These final regulations distinguish clearly among regulations that affect employee annuities, refunds of employee contributions, and former spouse survivor annuities. Under the existing interim regulations, some sections contain regulations pertaining to more than one of these different benefits. This resulted in a lack of clarity about which regulatory provisions apply to which types of benefit. These final regulations also divide rules into separate subparts covering procedures, requirements, and terminology. These changes make it easier for the legal community to focus on the provisions that effect benefits involved in the case with which they are concerned. A side effect of clearly dividing the regulations by the type of benefits the order seeks to affect is repetition of provisions that apply to more than one type of benefit. The repetition has added greatly to the length of these regulations; however, separate provisions about the effect of court orders on different types of benefits will simplify this very difficult subject and enhance the usability of the regulations.

As we proposed, these final regulations change several terms that have caused confusion or misunderstandings under the current regulations. We hope that the new terms will make the regulations easier to understand.

The term, "employee retirement benefits," that is used in the current regulations has been replaced by its two component parts, "Employee annuities" and "Refunds of employee contributions." The failure to distinguish between these two distinct types of benefits in the current regulations makes the regulations more complex and difficult to understand. Although most of the rules relating to "employee retirement benefits"apply to both annuities and refunds, some of the rules affecting "employee retirement benefits" make sense only for annuities, and others, only for refunds. Treating annuities and refunds separately makes the regulations longer; however, we believe that it also makes them simpler for attorneys and others to use.

The term, "former spouse annuity," which is used in the current regulations, has been replaced by "former spouse survivor annuity." Comments on prior regulations demonstrated that most commenters did not understand that "former spouse annuity" in the current regulations is only used when we are referring to the survivor benefit payable to a former spouse. The term has never included payments to a former spouse during a retiree's lifetime.

The term, "qualifying court order," which is used in the existing interim regulations, has been replaced by "court order acceptable for processing." The principal reason for this change is to eliminate any similarity in terminology between court orders affecting CSRS and FERS benefits and "qualified domestic relations orders," QDRO's, under the Employees Retirement Income Security Act (ERISA), 29 U.S.C. 1001 *et seq.* In addition, the new term is more consistent with our role under the proposed regulations as the ministerial processor of court orders.

4. Preparing a Court Order

A court order may affect any of three types of retirement benefits paid by OPM. The regulations treat each of the three—employee annuities, refunds of employee contributions, and survivor annuities—independently. In preparing a court order, attorneys should keep in mind that we consider each of the three types of awards separate and independent of the other two, and should exercise great care in each type of benefit they intend to affect. Our requirement that the award of each type of benefits be independent does not mean that the court award of one type of benefit cannot affect another. For example, awarding a former spouse survivor annuity requires a reduction in the employee annuity. If the former spouse has been awarded a portion of the gross or net employee annuity, the former spouse's portion of the employee annuity will be affected.

A complete court order requires three separate provisions—one addressing each type of benefit that the court can affect. However, frequently, courts intend to award only a portion of the employee annuity or a survivor annuity, rather than a complete retirement package. The regulatory structure is designed to maintain a clear separation between court orders affecting different types of benefits.[1] This permits a court that intends only to divide an employee annuity to consider only subparts A, B, C, and F of these regulations. Similarly, if the court intends to award only a survivor annuity, only subparts A, G, H, and I of these regulations apply.

5. Changes Required by U.S. Court of Appeals Decision

Section 838.806 and newly redesignated § 838.1004(e) (formerly § 831.1704(e)) have been revised to comply with the decision of the United States Court of Appeals for the Federal Circuit in the case of *Newman* v. *Love*, No. 91–3268 (Fed. Cir. April 15, 1992).

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[1] Subpart A contains definitions and other material of significance to all types of court orders affecting CSRS or FERS. The rest of the part is divided into three major units depending on whether the court order applies to employee annuities, refunds of employee contributions, or former spouse survivor annuities. For each unit, separate subparts cover procedures for processing, requirements that court orders must satisfy, and definitions of terms frequently used in court orders. (The terminology section for employee annuities and refunds of employee contributions are combined to avoid excessive duplication.

The subparts (B, D and G,) regulating procedures contain rules relating to former spouse filing requirements and to our actions upon receipt of court orders. In addition, they contain rules and limitations that the State court cannot change such as such as when benefits are paid. The subparts (C, E, and H) regulating requirements that court orders must satisfy certain rules pertaining to the requirements that a court order must meet to be acceptable for processing. The subparts (F and I) defining terms explains our understanding of the meaning of terms commonly used in court orders. By choosing the correct term, the State court can tell us exactly what to do. We assume that State courts are familiar with our assigned meanings of these terms and have used them in the way that they are defined in these subparts.

The Court found that OPM has authority to honor a court order for survivor annuity, if the order is the first order addressing marital property issues, even if the order is issued after the retirement of the former employeee OPM's existing interim regulations and the proposed rules interpreted the law (sections 8341(h)(4) and 8445(d) of title 5, United States Code) to prevent us from honoring a post-retirement court order that ordered us to allow a survivor annuity if this order was not issued prior to, or as part of, the divorce decree.

6. Comments on the Proposed Regulations

As stated above, we received six comments on the proposed regulations. The comments were generally supportive of the proposed regulations, especially of the provisions providing former spouses with prompt notice whether a court order was acceptable for processing.

We have considered all of the comments. Many of the comments suggested editorial changes. Only substantive comments are discussed below.

The Federal Retirement Thrift Investment Board requested that we clarify that these regulations apply only to CSRS and FERS basic benefits administered by OPM. We agree with this suggestion and have included a detailed clarification in the second paragraph of this supplementary information and have added a new paragraph (d) in § 838.101 to expressly state that these regulations do not apply to the Thrift Saving Plan.

One commenter objected to the provisions in § § 838.302 and 838.803 that provide that any court order labelled a "Qualifying Domestic Relations Order" or "QDRO" is not acceptable for processing. The commenter complains that a former spouse could be deprived of benefits because an attorney or court makes a "trivial" error. (This is particularly true in cases affecting survivor annuity where we are prohibited by statute from accepting a modification after the retirement or death of the employee.)

ERISA created the term QDRO to describe a court order that summarizes the division of retirement benefits under ERISA plans. We decided to prohibit use of this label because we have seen from experience that attorneys prepare these orders on the assumption that they can provide any benefits available under ERISA to CSRS and FERS.[2] Since we are exempt from ERISA, some provisions that ERISA plans must honor do not apply to us. The current practice of honoring as much of a QDRO as we can under our law has been difficult and controversial even when we were attempting to comply with the court's intent as well as its words. For our function to be ministerial, we and the court must be speaking the same language. To assure that the court has used our terminology, rather than ERISA's terminology, we proposed to prohibit QDRO's.

The proposed total ban on QDRO's is more severe than necessary to accomplish its purpose. We have revised sections 838.302 and 838.803 to relax the total ban on QDRO's to accept court orders labelled QDRO's if the court orders expressly state that they are written in conformity with our regulations. We do not want to create an unnecessary trap for the uninformed. Since we can guarantee that the purpose of the ban—that the court understands that we are exempt from ERISA and that the court is using the terminology as provided in the regulations—is satisfied by requiring that any QDRO mention our regulations, we will accept QDRO's that expressly acknowledge that they are written to conform with our regulation. In addition, we have added a model paragraph that could be used for this purpose.

The requirement that a QDRO expressly state that it conforms with the regulations is necessary because even if the QDRO's terminology is acceptable, the court's intent may have been that the terms have different meanings than those assigned under these regulations. Abandoning the ban on QDRO's without requiring that QDRO's mention our regulations undermines the reasonableness of our assumption that the court is using our terminology, rather than ERISA terminology. That assumption is necessary for our actions to be ministerial, rather than having to interpret each court order.

One commenter objected to § 838.302(b), which provides that a court order directed at employee annuity that expressly provides that the former spouse's portion of the employee annuity may continue after the death of the employee or retiree, such as a court order providing that the former spouse's portion of the employee annuity will continue for the lifetime of the former spouse, is not acceptable for processing. The commenter stated that the order should be acceptable with respect to the former spouse's portion of the employee annuity during the lifetime of the employee. Under these regulations the order would not be acceptable for any purpose because, in view of the fact that the court will have demonstrated its lack of awareness that the statutory authority for a State court to award the former spouse a share of employee annuity stops at the employee's death (a survivor annuity award must be specifically included in the court order), we do not know what the court intended to provide. This lack of awareness about the nature of our benefits indicates that the court, having considered the distribution of marital property as a whole, and having approved a distribution that, by law, cannot be honored with respect to a significant part of it (survivor benefits), needs to issue a new order. As the commenter noted, an amended court order can generally substitute acceptable language and be effective retroactively, as described in §§ 838.225 and 838.234.

One commenter objected to our failure to include a provision in the regulations to allow the court to correct errors in survivor annuity awards. Section 8341(h)(4) of title 5, United States Code, provides a strict statutory bar to any modification of survivor annuity provisions in a court order after the retirement or death of the employee. We do not allow corrections because the law simply bars all such modifications. we note that in *Newman* v. *Love, supra,* the court, considering the statutory bar to these modifications, determined that the first order dividing marital property is not a modification for this purpose.

One commenter questioned the lack of a provision in the proposed regulations on administrative or judicial appeal rights. The commenter applauds our desire to follow State court orders rather than to mediate between the court and the parties. However, the commenter suggests that the regulation should clearly provide that appeals from OPM decisions based on interpretation of Federal law are still appropriate. We have added § 838.136 to clarify the situations in which administrative appeal rights are available.

Actions taken by OPM in cases under these regulations are those ordered by the State court and for this reason they are not appealable to MSPB. MSPB does not have authority to review the State court order, and because we are merely following the explicit instructions of the court, appeal to MSPB is inappropriate. This will assure that marital property

[2] The most important difference between ERISA plans and CSRS and FERS is that under ERISA the former spouse's share of the benefit can begin when the employee reaches the minimum retirement age, even if the employee is still working. The availability of this early benefit, or lack of availability, can seriously alter negotiations over the settlement agreement.

distribution disputes will be resolved by the State courts, as Congress originally intended. This approach ensures the quickest final resolution of these disputes by avoiding a Federal administrative appeal level that cannot decide on the merits of the distribution. The parties to the divorce may return to the State court to resolve the dispute, instead of delaying the final resolution by resorting to an inappropriate Federal administrative review.

Issues concerning the validity of regulations themselves are issues of Federal law. Accordingly § 838.136 clarifies that if the issue in dispute is the validity of the regulations, our final decision on that issue is appealable to MSPB.

In cases in which an appeal to MSPB is authorized, we will not delay withholding from the employee annuity or payment to the former spouse during the pendency of the appeal. An allegation that a provision of these regulations is invalid does not suspend operation of that provision.

One commenter objected to the proposed rule that any portion of an employee annuity awarded to the former spouse reverts to the employee upon the death of the former spouse unless a court order provides otherwise. The proposed regulation would change the procedures that we currently follow on the death of the former spouse but this change would rarely alter the ultimate result. When the former spouse dies and an employee annuity continues to be payable, the current interim regulations require us to request further instructions from the court that issued the order. Usually, the court does not respond, which the current regulations provide has the same effect as instructing us to restore the former spouse's share to the employee. The proposed regulations merely would eliminate the step of contacting the court, but would not preclude an amended court order to require the deceased former spouse's share to be sent to another person.

The commenter suggests that the former spouse's heirs, rather than the employee, receive the former spouse's share if the court order provides no instructions concerning payments after the death of the former spouse. Since enactment of the statute authorizing State courts to divide employee annuities, we have consistently maintained that the statute did not authorize State courts to require us to distribute payments to multiple payees. Accordingly, our regulations have always included a provision that we would not pay heirs directly.[3] We will pay heirs indirectly if the court orders us to pay a central account—such as a single bank account, an attorney's trust account, or the registry of the court—for distribution to the heirs. This allows distribution as the court wishes while avoiding problems associated with payment of small shares. Accordingly, we are retaining the provision in the proposed regulations.

One commenter asked about the application of these regulations to voluntary contributions and excess deductions. Voluntary contributions may be made by CSRS-covered employees in addition to normal retirement deductions. They earn interest and may be used to purchase additional annuity. Excess deductions are retirement deductions taken from the salary of CSRS-covered employees who service exceeds the amount necessary (usually 41 years and 11 months) to qualify for the maximum annuity (80 percent of average salary).

These regulations do not apply to voluntary contributions or refunds of excess deductions. Section 8345(j) of title 5, United States Code, provides that State courts in divorce or legal separation proceedings may affect payments under CSRS "which would otherwise be made to an employee or Member based upon his service." OPM's payments based on voluntary contributions (regardless of whether the payment is as an annuity or in a lump sum) is based on the amount of the voluntary contributions plus interest. The payments are not "based on his service." Accordingly, voluntary contributions fall outside the statutory authorization for court orders to affect CSRS benefits.

Section 8342(h) of title 5, United States Code, provides that, at the retirement or death of the employee, the balance of excess deductions not applied toward the service credit deposits is deemed a voluntary contribution. Accordingly, when we pay excess deductions to the employee we are paying "voluntary contributions," and for this reason the payment is not subject to a State court order.

One commenter suggested that a former spouse should be able to begin to receive benefits when the employee reaches the age and service requirements for retirement, even if the employee continues to work or otherwise fails to apply for retirement. The statutes authorizing us to honor State court orders only grant State courts authority to affect payments that would otherwise be made to the employee. Because no payments are made to the employee until the employee separates from Federal service and files and application, we have no statutory authority to pay the former spouse before the separation and application requirements have been met.

[3] The ban on direct payment to heirs has one exception. We accept court orders that direct us, after the death of the former spouse, to pay the children of former spouse and the employee.

7. Other Amendments to the Proposed Regulations

We have made minor changes in several other provisions. The supplementary information for the proposed regulations stated that we were delaying the implementation date for the regulations to give the public, especially the legal community, notice of the new requirements and standards. We intended the delay to provide time for dissemination of information about the new requirements and standards. The proposed regulations would have established July 1, 1992, as the date when the new requirements and procedures would begin to apply. Section 838.101(c) establishes January 1, 1993, as the new date when we will begin processing court orders under the new procedures established by these regulations. Court orders that we receive before that date will be processed under subpart J of part 838. The procedures under subpart J contain the existing interim CSRS regulations. Of course, the model language in appendix A to subparts F and I is available for immediate use. Using the model language produces the same award under subpart J (the regulations covering court orders that we receive before the implementation date) as under the new regulations (subparts A through I).

We have amended § 838.421(b)(3) to eliminate CSRS or FERS claim numbers from the list of examples of identifying information that should be provided for court orders directed at refunds of employee contributions. Separated employees applying for refunds will not have such claim numbers.

We have amended § 838.623(c)(2) concerning how we use the amount of unused sick leave in computations of the former spouse's share of an employee annuity to state that these computations only apply to employee annuities under CSRS or to the CSRS component of a FERS annuity. Unused sick leave is not used in the computation of an annuity under FERS rules. Accordingly, the rules for determining when to include sick leave in computing the former spouse's share have no application to normal FERS benefits.

We have eliminated proposed section 838.725 and redesignated section 838.726 as section 838.725. Proposed section 838.725 stated that we would not accept an amended court order awarding a survivor annuity if issued after the retirement or death of the employee. The proposed section 838.725 has been eliminated because section 838.806 contains specific detailed requirements on amended court orders and covers all the information previously contained in proposed section 838.725.

We have added § 838.923 concerning cost-of-living adjustments (COLA's) on the future survivor annuity rate before the death of a retiree. Section 838.735 provides that we will add COLA's to all former spouse survivor annuities actually being paid. The new § 838.923 provides that we will apply COLA's (occurring after the retirement of the employee) to the future survivor annuity rate unless the court order expressly orders us not to include them. Model paragraph ¶704 has been amended to include sample language for excluding COLA's before the death of a retiree.

The proposed regulations included approximately 45 changes to Title 5 of the Code of Federal Regulations to conform existing regulations with the proposed regulatory structure for court orders affecting retirement benefits. Since that time, we have discovered approximately 15 more provisions requiring conforming amendment. Most of these changes correct cross references to sections or subparts that are being redesignated or removed by these regulations.

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 Government employees, spouses, and former spouses.

List of Subjects

5 CFR Parts 831, 841, 842, 843, and 846

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

5 CFR Part 838

Administrative practice and procedure, Claims, Disability benefits, Government employees, Income taxes, Pensions, Retirement, Courts.

5 CFR Part 890

Administrative practice and procedure, Government employees, Health insurance, Retirement.

U.S. Office of Personnel Management.

Constance Berry Newman,

Director.

Accordingly, OPM is amending title 5, Code of Federal Regulations, as follows:

PART 838—COURT ORDERS AFFECTING RETIREMENT BENEFITS

1. Part 838 is added to read as follows:

Subpart A—Court Orders Generally

Orgsnization and Structure of Regulations on Court Orders

Sec.
838.101 Purpose and scope.
838.102 Regulatory structure.
838.103 Definitions.

Statutory Limit on Court's Authority

838.111 Exemption from legal process except as authorized by Federal law.

Division of Responsibilities

838.121 OPM's responsibilities.
838.122 State courts' responsibilities.
838.123 Claimants' responsibilities.
838.124 Employees' and retirees' responsibilities.

Procedures Applicable to All Court Orders

838.131 Computation of time.
838.132 Payment schedules.
838.133 Minimum awards.
838.134 Receipt of multiple court orders.
838.135 Settlements.
838.136 Administrative Appeal Rights.

Address for Filing Court Orders With OPM

Appendix A to Subpart A of Part 838—Addresses for Serving Court Orders Affecting CSRS or FERS Benefits

Subpart B—Procedures for Processing Court Orders Affecting Employee Annuities

Regulatory Structure

838.201 Purpose and scope.

Availability of Funds

838.211 Amounts subject to court orders.

Application and Processing Procedures

838.221 Application requirements.
838.222 OPM action on receipt of a court order acceptable for processing.
838.223 OPM action on receipt of a court order not acceptable for processing.
838.224 Contesting the validity of court orders.
838.225 Processing amended court orders.

Payment Procedures

838.231 Commencing date of payments.
838.232 Suspension of payments.
838.233 Termination of payments.
838.234 Collection of arrearages.
838.235 Payment of lump-sum awards.
838.236 Court orders barring payment of annuities.
838.237 Death of the former spouse.

Procedures for Computing the Amount Payable

838.241 Cost-of-living adjustments.
838.242 Computing lengths of service.
838.243 Minimum amount of awards.

Subpart C—Requirements for Court Orders Affecting Employee Annuities

838.301 Purpose and scope.
838.302 Language not acceptable for processing.
838.303 Expressly dividing employee annuity.
838.304 Providing for payment to the former spouse.
838.305 OPM computation of formulas.
838.306 Specifying type of annuity for application of formula, percentage or fraction.

Subpart D—Procedures for Processing Court Orders Affecting Refunds of Employee Contributions

Regulatory Structure

838.401 Purpose and scope.

Availability of Funds

838.411 Amounts subject to court orders.

Application and Processing Procedures

838.421 Application requirements.
838.422 Timeliness of application.
838.423 OPM action on receipt of a court order acceptable for processing.
838.424 OPM action on receipt of a court order not acceptable for processing.
838.425 Contesting the validity of court orders.

Payment Procedures

838.431 Correcting failures to provide required spousal notification.
838.432 Court orders barring payment of refunds.

Procedures for Computing the Amount Payable

838.441 Computing lengths of service.

Subpart E—Requirements for Court Orders Affecting Refunds of Employee Contributions

838.501 Purpose and scope.
838.502 Expressly dividing a refund of employee contributions.
838.503 Providing for payment to the former spouse.
838.504 OPM computation of formulas.
838.505 Barring payment of refunds.

Subpart F—Terminology Used in Court Orders Affecting Employee Annuities or Refunds of Employee Contributions

Regulatory Structure

838.601 Purpose and scope.

Identification of Benefits

838.611 Identifying the retirement system.
838.612 Distinguishing between annuities and contributions.

Computation of Benefits

838.621 Prorata share.
838.622 Cost-of-living and salary adjustments.
838.623 Computing lengths of service.
838.624 Distinguishing between formulas and fixed amounts.
838.625 Types of annuity.

Model Paragraphs

Appendix A to Subpart F of Part 838—Recommended Language for Court Orders Dividing Employee Annuities

Subpart G—Procedures for Processing Court Orders Awarding Former Spouse Survivor Annuities

Regulatory Structure

838.701 Purpose and scope.

Limitations on Survivor Annuities

838.711 Maximum former spouse survivor annuity.

Application and Processing Procedures

838.721 Application requirements.
838.722 OPM action on receipt of a court order acceptable for processing.
838.723 OPM action on receipt of a court order not acceptable for processing.
838.724 Contesting the validity of court orders.
838.725 Effect on employee and retiree election rights.

Payment Procedures

838.731 Commencing date of payments.
838.732 Termination of entitlement.
838.733 Rights of current and other former spouses after termination of a former spouse's entitlement.
838.734 Payment of lump-sum awards by survivor annuity.
838.735 Cost-of-living adjustments.

Subpart H—Requirements for Court Orders Awarding Former Spouse Survivor Annuities

838.801 Purpose and scope.
838.802 CSRS limitations.
838.803 Language not acceptable for processing.
838.804 Court orders must expressly award a former spouse survivor annuity or expressly direct an employee or retiree to elect to provide a former spouse survivor annuity.
838.805 OPM computation of formulas in computing the designated base.
838.806 Amended court orders.
838.807 Cost must be paid by annuity reduction.

Subpart I—Terminology Used in Court Orders Awarding Former Spouse Survivor Annuities

Regulatory Structure

838.901 Purpose and scope.

Identification of Benefits

838.911 Identifying the retirement system.
838.912 Specifying an award of a former spouse survivor annuity.

Computation of Benefit

838.921 Determining the amount of a former spouse survivor annuity.
838.922 Prorata share defined.
838.923 Cost-of-living adjustment before the death of a retiree.

Miscellaneous Provisions

838.931 Court orders that provide temporary awards of former spouse survivor annuities.
838.932 Court orders that permit the former spouse to elect to receive a former spouse survivor annuity.
838.933 Payment of the cost of a former spouse survivor annuity.

Model Paragraphs

Appendix A to Subpart I of Part 838—Recommended Language for Court Orders Awarding Former Spouse Survivor Annuities

Authority: 5 U.S.C. 8347(a) and 8461(g). Subparts B, C, D, E, and J also issued under 5 U.S.C. 8345(j)(2) and 8467(b). Sections 838.221, 838.422, and 838.721 also issued under 5 U.S.C. 8347(b).

Subpart A—Court Orders Generally

Organization and Structure of Regulations on Court Orders

§ 838.101 Purpose and scope.

(a)(1) This part regulates the Office of Personnel Management's handling of court orders affecting the Civil Service Retirement System (CSRS) or the Federal Employees Retirement System (FERS), both of which are administered by the Office of Personnel Management (OPM). Generally, OPM must comply with court orders, decrees, or court-approved property settlement agreements in connection with divorces, annulments of marriage, or legal separations of employees, Members, or retirees that award a portion of the former employee's or Member's retirement benefits or a survivor annuity to a former spouse.

(2) In executing court orders under this part, OPM must honor the clear instructions of the court. Instructions must be specific and unambiguous. OPM will not supply missing provisions, interpret ambiguous language, or clarify the court's intent by researching individual State laws. In carrying out the court's instructions, OPM performs purely ministerial actions in accordance with these regulations. Disagreement between the parties concerning the validity or the provisions of any court order must be resolved by the court.

(b) This part prescribes—

(1) The requirements that a court order must meet to be acceptable for processing under this part;

(2) The procedures that a former spouse must follow when applying for benefits based on a court order under sections 8341(h), 8345(j), 8445 or 8467 of title 5, United States Code;

(3) The procedures that OPM will follow in honoring court orders and in making payments to the former spouse; and

(4) The effect of certain words and phrases commonly used in court orders affecting retirement benefits.

(c)(1) Subparts A through I of this part apply only to court orders received by OPM on or after January 1, 1993.

(2) Subpart J of this part applies only to court orders received by OPM before January 1, 1993.

(d) This part has no application to the Thrift Savings Plan described in subchapter III of chapter 84 of title 5, United States Code.

§ 838.102 Regulatory structure.

(a) This part is organized as follows:

(1) Subpart A contains information and rules of general application to all court orders directed at CSRS or FERS retirement benefits.

(2) Subparts B and C of this part contain information about court orders directed at ongoing employee annuity payments.

(3) Subparts D and E of this part contain information about court orders directed at refunds of employee contributions.

(4) Subpart F of this part contains information about the effect of words and phrases commonly used in court orders affecting ongoing employee annuity payments and refunds of employee contributions.

(5) Subparts G, H, and I of this part contain information about court orders awarding former spouse survivor annuities.

(6) Subpart J of this part contains the rules applicable to court orders filed under procedures in effect prior to the implementation of this part. These rules continue to apply to court orders received by OPM before January 1, 1993.

(b) Part 890 of this chapter contains information about coverage under the Federal Employees Health Benefits Program.

(c) Part 581 of this chapter contains information about garnishment of Government payments including salary and CSRS and FERS retirement benefits.

(d) Parts 294 and 297 of this chapter and §§ 831.106 and 841.108 contain information about disclosure of information from OPM records.

(e) Subpart V of part 831 of this chapter and subpart G of part 842 of this chapter contain information about how

court orders affect eligibility to make an alternative form of annuity election.

(f) Part 1600 of this title contains information about court orders affecting the Federal Employees Thrift Savings Plan.

(g) Subpart F of part 831 of this chapter, subpart F of part 841 of this chapter, and part 843 of this chapter contain information about entitlement to survivor annuities.

(h) Subpart T of part 831 of this chapter and subpart B of part 843 of this chapter contain information about refunds of employee contributions and lump-sum death benefits.

(i) Parts 870, 871, 872, and 873 of this chapter contain information about the Federal Employees Group Life Insurance Program.

§ 838.103 Definitions.

In this part (except subpart J)—

Civil Service Retirement System or *CSRS* means the retirement system for Federal employees described in subchapter III of chapter 83 of title 5, United States Code.

Court order means any judgment or property settlement issued by or approved by any court of any State, the District of Columbia, the Commonwealth of Puerto Rico, Guam, The Northern Mariana Islands, or the Virgin Islands, or any Indian court in connection with, or incident to, the divorce, annulment of marriage, or legal separation of a Federal employee or retiree.

Court order acceptable for processing means a court order as defined in this section that meets the requirements of subpart C of this part to affect an employee annuity, subpart E of this part to affect a refund of employee contributions, or subpart H of this part to award a former spouse survivor annuity.

Employee means an employee or Member covered by CSRS or FERS.

Employee annuity means the recurring payments under CSRS or FERS made to a retiree. "Employee annuity" does not include payments of accrued and unpaid annuity after the death of a retiree under section 8342(g) or section 8424(h) of title 5, United States Code.

ERISA means the Employees Retirement Income Security Act, 29 U.S.C. 1001 *et seq.*

Federal Employees Retirement System or *FERS* means the retirement system for Federal employees described in chapter 84 of title 5, United States Code.

Former spouse means (1) in connection with a court order affecting an employee annuity or a refund of employee contributions, a living person whose marriage to an employee has been subject to a divorce, annulment of marriage, or legal separation resulting in a court order, or (2) in connection with a court order awarding a former spouse survivor annuity, a living person who was married for at least 9 months to an employee or retiree who performed at least 18 months of civilian service covered by CSRS or who performed at least 18 months of civilian service creditable under FERS, and whose marriage to the employee of retiree was terminated prior to the death of the employee or retiree.

Former spouse survivor annuity means a recurring benefit under CSRS or FERS, or the basic employee death benefit under FERS as described in part 843 of this chapter, that is payable to a former spouse after the employee's or retiree's death.

Gross annuity means the amount of monthly annuity payable after reducing the self-only annuity to provide survivor annuity benefits, if any, but before any other deduction. Unless the court order expressly provides otherwise, *gross annuity* also includes any lump-sum payments made to the retiree under section 8343a or section 8420a of title 5, United States Code.

Member means a Member of Congress covered by CSRS or FERS.

Net annuity means the amount of monthly annuity payable after deducting from the gross annuity any amounts that are (1) owed by the retiree to the United States, (2) deducted for health benefits premiums under section 8906 of title 5, United States Code, and §§ 891.401 and 891.402 of this chapter, (3) deducted for life insurance premiums under section 8714a(d) of title 5, United States Code, (4) deducted for Medicare premiums, (5) properly withheld for Federal income tax purposes, if the amounts withheld are not greater than they would be if the retiree claimed all dependents to which he or she was entitled, or (6) properly withheld for State income tax purposes, if the amounts withheld are not greater than they would be if the retiree claimed all dependents to which he or she was entitled. Unless the court order expressly provides otherwise, *net annuity* also includes any lump-sum payments made to the retiree under section 8343a or section 8420a of title 5, United States Code.

Reduction to provide survivor benefits means the reduction required by section 8339(j)(4) or section 8419(a) of title 5, United States Code.

Refund of employee contributions means a payment of the lump-sum credit to a separated employee under section 8342(a) or section 8424(a) of title 5, United States Code. *Refund of employee contributions* does not include lump-sum payments made under section 8342(c) through (f) or section 8424(d) through (g) of title 5, United States Code.

Retiree means a former employee or Member who is receiving recurring payments under CSRS or FERS based on his or her service as an employee. *Retiree* does not include a person receiving an annuity only as a current spouse, former spouse, child, or person with an insurable interest. Self-only annuity means the recurring payments to a retiree who has elected not to provide a survivor annuity to anyone. Unless the court order expressly provides otherwise, self-only annuity also includes any lump-sum payments made to the retiree under section 8343a or section 8420a of title 5, United States Code.

Separated employee means a former employee or Member who has separated from a position in the Federal Government covered by CSRS and FERS under subpart B of part 831 of this chapter or subpart A of part 842 of this chapter, respectively, and is not currently employed in such a position, and who is not a retiree.

Statutory Limit on Court's Authority

§ 838.111 Exemption from legal process except as authorized by Federal law.

(a) Employees, retirees, and State courts may not assign CSRS and FERS benefits except as provided in this part.

(b) CSRS and FERS benefits are not subject to execution, levy, attachment, garnishment or other legal process except as expressly provided by Federal law.

Division of Responsibilities

§ 838.121 OPM's responsibilities.

OPM is responsible for authorizing payments in accordance with clear, specific and express provisions of court orders acceptable for processing.

§ 838.122 State courts' responsibilities.

State courts are responsible for—

(a) Providing due process to the employee or retiree;

(b) Issuing clear, specific, and express instructions consistent with the statutory provisions authorizing OPM to provide benefits to former spouses and the requirements of this part for awarding such benefits;

(c) Using the terminology defined in this part only when it intends to use the meaning given to that terminology by this part;

(d) Determining when court orders are invalid; and

(e) Settling all disputes between the employee or retiree and the former spouse.

§ 838.123 Claimants' responsibilities.

Claimants are responsible for—

(a) Filing a certified copy of court orders and all other required supporting information with OPM;

(b) Keeping OPM advised of their current mailing addresses;

(c) Notifying OPM of any changes in circumstances that could affect their entitlement to benefits; and

(d) Submitting all disputes with employees or retirees to the appropriate State court for resolution.

§ 838.124 Employees' and retirees' responsibilities.

Employees and retirees are responsible for—

(a) Raising any objections to the validity of a court order in the appropriate State court; and

(b) Submitting all disputes with former spouses to the appropriate State court for resolution.

Procedures Applicable to all Court Orders

§ 838.131 Computation of time.

(a) The rules applicable for computation of time under §§ 831.107 and 841.109 of this chapter apply to this part.

(b)(1) Appendix A of this subpart lists the proper addresses for submitting court orders affecting CSRS and FERS benefits.

(2) A former spouse should submit the documentation required by this part to the address provided in Appendix A of this subpart. The component of OPM responsible for processing court orders will note the date of receipt on court orders that it receives.

(3) If a court order is delivered to OPM at an address other than the address in Appendix A of this subpart, the recipient will forward the court order to the component of OPM responsible for processing court orders. However, OPM is not considered to have received the court order until the court order is received in the component of OPM responsible for processing orders.

§ 838.132 Payment schedules.

(a) Under CSRS and FERS, employee annuities and survivor annuities are payable on the first business day of the month following the month in which the benefit accrues.

(b) In honoring and complying with a court order, OPM will not disrupt the payment schedule described in paragraph (a) of this section, despite any provision in the court order directing a different schedule of accrual or payment of amounts due the former spouse.

§ 838.133 Minimum awards.

Payments under this part will not be less than one dollar per month. Any court order that awards a former spouse a portion of an employee annuity or a former spouse survivor annuity in an amount of less than one dollar per month will be treated as an award of an annuity equal to one dollar per month.

§ 838.134 Receipt of multiple court orders.

(a) Except as provided in paragraph (c) of this section, for court orders affecting employee annuities or awarding former spouse survivor annuities, in the event that OPM receives two or more court orders acceptable for processing—

(1) When the court orders affect two or more former spouses, the court orders will be honored in the order in which they were issued to the maximum extent possible under § 838.211 or § 838.711.

(2) When two or more court orders relate to the same former spouse or separated spouse, the one issued last will be honored.

(b)(1) Except as provided in paragraph (c) of this section, for court orders affecting refunds of employee contributions, in the event that OPM receives two or more court orders acceptable for processing—

(i) When the court orders affect two or more former spouses—

(A) The refund will not be paid if either court order prohibits payment of the refund of contributions; otherwise,

(B) The court orders will be honored in the order in which they were issued until the contributions have been exhausted.

(ii) When two or more court orders relate to the same former spouse, the one issued last will be honored first.

(2) In no event will the amount paid out exceed the amount of the refund of employee contributions.

(c) With respect to issues relating to the validity of a court order or to the amount of payment—

(1) If the employee, separated employee, retiree, or other person adversely affected by the court order and former spouse submit conflicting court orders from the same jurisdiction, OPM will consider only the latest court order; or

(2) If the employee, separated employee, retiree, or other person adversely affected by the court order and former spouse submit conflicting court orders from different jurisdictions—

(i) If one of the court orders is from the jurisdiction shown as the employee's, separated employee's, or retiree's address in OPM's records, OPM will consider only the court order issued by that jurisdiction; or

(ii) If none of the court orders is from the jurisdiction shown as the employee's, separated employee's, or retiree's address in OPM's records, OPM will consider only the latest court order.

§ 838.135 Settlements.

(a) OPM must comply with the terms of a properly filed court order acceptable for processing even if the retiree and the former spouse agree that they want OPM to pay an amount different from the amount specified in the court order. Information about OPM's processing of amended court orders is contained in §§ 838.225 and 838.725.

(b)(1) OPM will not honor a request from the former spouse that an amount less than the amount provided in the court order be withheld from an employee annuity or a refund of employee contributions.

(2) OPM will not honor a request from the retiree that an amount greater than the amount provided in the court order be withheld from an employee annuity or a refund of employee contributions.

§ 838.136 Administrative appeal rights.

(a) Issues concerning application of these regulations are not appealable to the Merit Systems Protection Board. OPM's actions to apply these regulations are not subject to further administrative review.

(b)(1) Issues concerning the validity of these regulations are appealable to the Merit Systems Protection Board. Such an appeal must be filed in accordance with the procedures established by the Board and may not be filed before OPM has issued its final decision, including a notice of the right to appeal, on the validity of the regulation. Such an appeal is limited to the issue of the validity of the regulation.

(2) Any claim that a provision of these regulations is invalid, must be presented to the Merit Systems Protection Board before the validity of the regulation may be reviewed in the Federal courts.

Address for Filing Court Orders With OPM

Appendix A to Subpart A of Part 838—Addresses for Serving Court Orders Affecting CSRS or FERS Benefits

(a) The mailing address for delivery of court orders affecting CSRS or FERS benefits by the United States Postal Service is—

Office of Personnel Management, Retirement and Insurance Group, P.O. Box 17, Washington, DC 20044

(b) The address for delivery of court orders affecting CSRS or FERS benefits by process servers, express carriers, or other forms of handcarried delivery is—

Court-ordered Benefits Section, Allotments Branch, Retirement and Insurance Group, Office of Personnel Management, 1900 E Street, NW., Washington, DC

Subpart B—Procedures for Processing Court Orders Affecting Employee Annuities

Regulatory Structure

§ 838.201 Purpose and scope.

(a) This subpart regulates the procedures that the Office of Personnel Management will follow upon the receipt of claims arising out of State court orders directed at employee annuities under CSRS or FERS. OPM must comply with qualifying court orders, decrees, or court-approved property settlements in connection with divorces, annulments of marriages, or legal separations of employees or retirees that award a portion of an employee annuity to a former spouse.

(b) This subpart prescribes—

(1) The circumstances that must occur before employee annuities are available to satisfy a court order acceptable for processing; and

(2) The procedures that a former spouse must follow when applying for a portion of an employee annuity based on a court order under section 8345(j) or section 8467 of title 5, United States Code.

(c)(1) Subpart C of this part contains the rules that a court order must satisfy to be a court order acceptable for processing to affect an employee annuity.

(2) Subpart F of this part contains definitions that OPM uses to determine the effect on employee annuity of a court order acceptable for processing.

Availability of Funds

§ 838.211 Amounts subject to court orders.

(a)(1) Employee annuities are subject to court orders acceptable for processing only if all of the conditions necessary for payment of the employee annuity to the former employee have been met, including, but not limited to—

(i) Separation from a position in the Federal service covered by CSRS or FERS under subpart B of part 831 of this chapter or subpart A of part 842 of this chapter, respectively;

(ii) Application for payment of the employee annuity by the former employee; and

(iii) The former employee's immediate entitlement to an employee annuity.

(2) Money held by an employing agency or OPM that may be payable at some future date is not available for payment under court orders directed at employee annuities.

(3) OPM cannot pay a former spouse a portion of an employee annuity before the employee annuity begins to accrue.

(b) Payment to a former spouse under a court order may not exceed the net annuity.

(c) Waivers of employee annuity payments under the terms of section 8345(d) or section 8465(a) of title 5, United States Code, exclude the waived portion of the annuity from availability for payment under a court order if such waivers are postmarked or received before the date that OPM receives a court order acceptable for processing.

Application and Processing Procedures

§ 838.221 Application requirements.

(a) A former spouse (personally or through a representative) must apply in writing to be eligible for a court-awarded portion of an employee annuity. No special form is required.

(b) The application letter must be accompanied by—

(1) A certified copy of the court order acceptable for processing that is directed at employee annuity;

(2) A certification from the former spouse or the former spouse's representative that the court order is currently in force and has not been amended, superseded, or set aside;

(3) Information sufficient for OPM to identify the employee or retiree, such as his or her full name, CSRS or FERS claim number, date of birth, and social security number;

(4) The current mailing address of the former spouse; and

(5) If the employee has not retired under CSRS or FERS or died, the mailing address of the employee.

(c)(1) When court-ordered payments are subject to termination (under the terms of the court order) if the former spouse remarries, no payment will be made until the former spouse submits to OPM a statement in the form prescribed by OPM certifying—

(i) That a remarriage has not occurred;

(ii) That the former spouse will notify OPM within 15 calendar days of the occurrence of any remarriage; and

(iii) That the former spouse will be personally liable for any overpayment to him or her resulting from a remarriage.

(2) OPM may subsequently require periodic recertification of the statements required under paragraph (c)(1) of this section.

§ 838.222 OPM action on receipt of a court order acceptable for processing.

(a) If OPM receives a court order acceptable for processing that is directed at an employee annuity that is in pay status, OPM will inform—

(1) The former spouse—

(i) That the court order is acceptable for processing;

(ii) Of the date on which OPM received the court order, the date on which the former spouse's benefit begins to accrue, and if known, the date on which OPM commences payment under the order;

(iii) Of the amount of the former spouse's monthly benefit and the formula OPM used to compute the monthly benefit; and

(iv) That, if he or she disagrees with the amount of the monthly benefits, he or she must obtain, and submit to OPM, an amended court order clarifying the amount; and

(2) The retiree—

(i) That the former spouse has applied for benefits under this subpart;

(ii) That the court order is acceptable for processing and that OPM must comply with the court order;

(iii) Of the date on which OPM received the court order, the date on which the former spouse's benefit begins or accrue, and if known, the date on which OPM commences payment under the court order;

(iv) Of the amount of the former spouse's monthly benefit and the formula OPM used to compute the monthly benefit;

(v) That, if he or she contests the validity of the court order, he or she must obtain, and submit to OPM, a court order invalidating the court order submitted by the former spouse; and

(vi) That, if he or she disagrees with the amount of the former spouse's monthly benefits, he or she must obtain, and submit to OPM, an amended court order clarifying the amount.

(b) If OPM receives a court order acceptable for processing that is directed at an employee annuity but the employee has died, or if a retiree dies after payments from an employee to a former spouse have begun, OPM will inform the former spouse that the employee or retiree has died and that OPM can only honor court orders dividing employee annuities during the lifetime of the retiree.

(c) If OPM receives a court order acceptable for processing that is directed at an employee annuity that is not in pay status, OPM will inform—

(1) The former spouse—

(i) That the court order is acceptable for processing;

(ii) That benefits cannot begin to accrue until the employee retires;

(iii) To the extent possible, the formula that OPM will use to compute the former spouse's monthly benefit; and

(iv) That, if he or she disagrees with the formula, he or she must obtain, and submit to OPM, an amended court order clarifying the amount; and

(2) The employee, separated employee, or retiree—

(i) That the former spouse has applied for benefits under this subpart;

(ii) That the court order is acceptable for processing and that OPM must comply with the court order;

(iii) To the extent possible, the formula that OPM will use to compute the former spouse's monthly benefit;

(iv) That, if he or she contests the validity of the court order, he or she must obtain, and submit to OPM, a court order invalidating the court order submitted by the former spouse; and

(v) That, if he or she disagrees with the amount of the former spouse's monthly benefits, he or she must obtain, and submit to OPM, an amended court order clarifying the amount.

(d) The failure of OPM to provide, or of the employee, separated employee, or retiree or the former spouse to receive, the information specified in this section prior to the commencing date of a reduction or accrual does not affect—

(1) The validity of payment under the court order; or

(2) The commencing date of the reduction in the employee annuity or the commencing date of the accrual of former spouse benefits as determined under § 838.231.

§ 838.223 OPM action on receipt of a court order not acceptable for processing.

If OPM receives an application from a former spouse not based on a court order acceptable for processing, OPM will inform the former spouse that OPM cannot approve the application and provide the specific reason(s) for disapproving the application. Examples of reasons for disapproving an application include that the court order does not meet the definition of court order in § 838.103 or does not meet one or more of the requirements of subpart C of this part.

§ 838.224 Contesting the validity of court orders.

(a) An employee, separated employee, or retiree who alleges that a court order is invalid must prove the invalidity of the court order by submitting a court order that—

(1) Declares the court order submitted by the former spouse is invalid; or

(2) Sets aside the court order submitted by the former spouse.

(b) OPM must honor a court order acceptable for processing that appears to be valid and that the former spouse has certified is currently in force and has not been amended, superseded, or set aside, until OPM receives a court order described in paragraph (a) of this section or a court order amending or superseding the court order submitted by the former spouse.

§ 838.225 Processing amended court orders.

(a) If the employee, separated employee, retiree, or former spouse submits an amended court order pertaining to payment of a portion of the employee annuity, OPM will process the amended court order prospectively only, effective against employee annuity accruing beginning the first day of the second month after OPM receives the amended court order.

(b) A court order is not effective to adjust payments prior to the first day of the second month after OPM receives the court order unless—

(1) The court order—

(i) Expressly directs OPM to adjust for payment made under the prior court order; and

(ii) Determines the total amount of the adjustment or the length of time over which OPM will make the adjustment; and

(iii) Provides a specific monthly amount of the adjustment or a formula to compute the amount of the monthly adjustment; and

(2) Annuity continues to be available from which to make the adjustment.

Payment Procedures

§ 838.231 Commencing date of payments.

(a) A court order acceptable for processing is effective against employee annuity accruing beginning the first day of the second month after OPM receives the court order.

(b)(1) OPM will not begin payments to the former spouse until OPM receives all the documentation required by § 838.221 (b) and (c).

(2) If payments are delayed under paragraph (b)(1) of this section, after OPM receives all required documentation, it will authorize payment of the annuity that has accrued since the date determined under paragraph (a) of this section but the payment of which was delayed under paragraph (b)(1) of this section.

§ 838.232 Suspension of payments.

(a) Payments from employee annuities under this part will be discontinued whenever the employee annuity payments are suspended or terminated. If employee annuity payments to the retiree are restored, payments to the former spouse will also resume subject to the terms of any court order acceptable for processing in effect at that time.

(b) Paragraph (a) of this section will not be applied to permit a retiree to deprive a former spouse of payment by causing suspension of payment of employee annuity.

§ 838.233 Termination of payments.

A former spouse portion of an employee annuity stops accruing at the earliest of—

(a) The date on which the terms of the court order require termination;

(b)(1) The last day of the first month before OPM receives a court order invalidating, vacating, or setting aside the court order submitted by the former spouse if OPM receives the latest court order no later than 20 days before the end of the month; or

(2) The last day of the month in which OPM receives a court order invalidating, vacating, or setting aside the court order submitted by the former spouse if OPM receives the latest court order than 20 days before the end of the month; or

(c) The last day of the first month after OPM receives an amended court order;

(d) The last day of the first month before the death of the retiree; or

(e) Except as provided in § 838.237, the date on which the former spouse dies.

§ 838.234 Collection of arrearages.

Specific instructions are required before OPM may pay any arrearage. Except as provided in § 838.225(b), OPM will not increase a former spouse's share of employee annuity to satisfy an arrearage due the former spouse. However, under § 838.225, OPM will prospectively honor the terms of an amended court order that either increases or decreases the court order's entitlement.

§ 838.235 Payment of lump-sum awards.

If a court order acceptable for processing awards a former spouse a lump-sum amount from the employee annuity and does not state the monthly rate at which OPM should pay the lump-sum, OPM will pay the former spouse equal monthly installments at 50 percent of the gross annuity (subject to the limitations under § 838.211) at the time

of retirement or the date of the order, whichever comes later, until the lump-sum amount is paid.

§ 838.236 Court orders barring payment of annuities.

(a) State courts lack authority to prevent OPM from paying employee annuities as required by section 8345(a) or section 8463 of title 5, United States Code. OPM will not honor court orders directing that OPM delay or otherwise not pay employee annuities at the time or in the amount required by statute.

(b) Except as otherwise provided in this subpart, OPM will honor court orders acceptable for processing that direct OPM to pay the employee annuity to the court, an officer of the court acting as a fiduciary, or a State or local government agency during the pendency of a divorce or legal separation proceeding.

§ 838.237 Death of the former spouse.

(a) Unless the court order acceptable for processing expressly provides otherwise, the former spouse's share of an employee annuity terminates on the last day of the month before the death of the former spouse, and the former spouse's share of employee annuity reverts to the retiree.

(b) Except as otherwise provided in this subpart, OPM will honor a court order acceptable for processing or an amended court order acceptable for processing that directs OPM to pay, after the death of the former spouse, the former spouse's share of the employee annuity to—

(1) The court;

(2) An officer of the court acting as fiduciary;

(3) The estate of the former spouse; or

(4) One or more of the retiree's children as defined in section 8341(a)(4) or section 8441(4) of title 5, United States Code.

Procedures for Computing the Amount Payable

§ 838.241 Cost-of-living adjustments.

Unless otherwise provided in the court order, when the terms of the court order or § 838.621 provide for cost-of-living adjustments on the former spouse's payment from employee annuity, the cost-of-living adjustment will be effected at the same time and at the same percentage rate as the cost-of-living adjustment in the employee annuity.

§ 838.242 Computing lengths of service.

(a)(1) The smallest unit of time that OPM will calculate in computing a formula in a court order is a month, even where the court order directs OPM to make a more precise calculation.

(2) If the court order states a formula using a specified simple or decimal fraction other than twelfth parts of a year, OPM will use the specified number to perform simple mathematical computations.

(b) Unused sick leave is counted as "creditable service" on the date of separation for an immediate CSRS annuity; it is not apportioned over the time when earned. Unused sick leave is not countable as "creditable service" in a FERS annuity (except in a CSRS component for an employee who transferred to FERS) or in a deferred CSRS annuity.

§ 838.243 Minimum amount of awards.

OPM will treat any court order that awards a former spouse a portion of an employee annuity equal to less than $12 per year as awarding the former spouse $1 per month.

Subpart C—Requirements for Court Orders Affecting Employee Annuities

§ 838.301 Purpose and scope.

This subpart regulates the requirements that a court order directed at employee annuity must meet to be a court order acceptable for processing.

§ 838.302 Language not acceptable for processing.

(a) *Qualifying Domestic Relations Orders.* (1) Any court order labeled as a "qualified domestic relations order" or issued on a form for ERISA qualified domestic relations orders is not a court order acceptable for processing unless the court order expressly states that the provisions of the court order concerning CSRS or FERS benefits are governed by this part.

(2) When a court order is required by paragraph (a)(1) of this section to state that the provisions of a court order concerning CSRS or FERS benefits are governed by this part the court order must expressly—

(i) Refer to part 838 of title 5, Code of Federal Regulations, and

(ii) State that the provisions of the court order concerning CSRS or FERS benefits are drafted in accordance with the terminology used in this part.

(3) Although any language satisfying the requirements of paragraph (a)(2) of this section is sufficient to prevent a court order from being unacceptable under paragraph (a)(1) of this section, OPM recommends the use of the language provided in ¶ 001 in appendix A to subpart F of this part to state that the provisions of the court order concerning CSRS or FERS benefits are governed by this part.

(4) A court order directed at employee annuity that contains the language described in paragraph (a)(2) of this section must also satisfy all other requirements of this subpart to be a court order acceptable for processing.

(b) *Benefits for the lifetime of the former spouse.* Any court order directed at employee annuity that expressly provides that the former spouse's portion of the employee annuity may continue after the death of the employee or retiree, such as a court order providing that the former spouse's portion of the employee annuity will continue for the lifetime of the former spouse, is not a court order acceptable for processing.

§ 838.303 Expressly dividing employee annuity.

(a) A court order directed at employee annuity is not a court order acceptable for processing unless it expressly divides the employee annuity as provided in paragraph (b) of this section.

(b) To expressly divide employee annuity as required by paragraph (a) of this section the court order must—

(1) Identify the retirement system using terms that are sufficient to identify the retirement system as explained in § 838.611; and

(2) Expressly state that the former spouse is entitled to a portion of the employee annuity using terms that are sufficient to identify the employee annuity as explained in § 838.612.

§ 838.304 Providing for payment to the former spouse.

(a) A court order directed at employee annuity is not a court order acceptable for processing unless it provides for OPM to pay the former spouse a portion of an employee annuity as provided in paragraph (b) of this section.

(b) To provide for OPM to pay the former spouse a portion of an employee annuity as required by paragraph (a) of this section the court order must—

(1) Expressly direct OPM to pay the former spouse directly;

(2) Direct the retiree to arrange or to execute forms for OPM to pay the former spouse directly; or

(3) Be silent concerning who is to pay the portion of the employee annuity awarded to the former spouse.

(c) Except when the court order directed at employee annuity contains a provision described in paragraph (b)(2) of this section, a court order directed at employee annuity that instructs the retiree to pay a portion of the employee annuity to the former spouse is not a court order acceptable for processing.

(d) Although paragraphs (b)(2) and (b)(3) of this section provide acceptable methods for satisfying the requirement that a court order directed at employee annuity provide for OPM to pay the former spouse, OPM strongly recommends that any court order directed at employee annuity expressly direct OPM to pay the former spouse directly.

§ 838.305 OPM computation of formulas.

(a) A court order directed at employee annuity is not a court order acceptable for processing unless the court order provides sufficient instructions and information that OPM can compute the amount of the former spouse's monthly benefit using only the express language of the court order, subparts A, B, and F of this part, and information from normal OPM files.

(b)(1) To provide sufficient instructions and information for OPM to compute the amount of the former spouse's share of the employee annuity as required by paragraph (a) of this section the court order must state the former spouse's share as—

(i) A fixed amount;

(ii) A percentage or a fraction of the employee annuity; or

(iii) A formula that does not contain any variables whose values are not readily ascertainable from the face of the court order directed at employee annuity or normal OPM files.

(2) Normal OPM files include information about—

(i) The dates of employment for all periods of creditable civilian and military service;

(ii) The rate of basic pay for all periods of creditable civilian service;

(iii) The annual rates of basic pay for each grade and step under the General Schedule since 1920;

(iv) The amount of premiums for basic and optional life insurance under the Federal Employees Group Life Insurance Program;

(v) The amount of the Government and the employee shares of premiums for any health insurance plan under the Federal Employees Health Benefits Program;

(vi) The standard Federal income tax withholding tables;

(vii) The amount of cost-of-living adjustments under section 8340 or section 8462 of title 5, United States Code, and the amount of the percentage change in the national index on which the adjustment is based;

(viii) The amount of pay adjustments to the General Schedule under section 5303 (or section 5305 prior to November 5, 1990) of title 5, United States Code, and the amount of the percentage change in the national index on which the adjustment is based;

(ix) The provision of law under which a retiree has retired; and

(x) Whether a retiree has elected to provide survivor benefits for a current spouse, former spouse, or a person with an insurable interest.

(c)(1) A court order directed at employee annuity is not a court order acceptable for processing if OPM would have to examine a State statute or court decision (on a different case) to understand, establish, or evaluate the formula for computing the former spouse's share of the employee annuity.

(2) A court order directed at employee annuity is not a court order acceptable for processing if it awards the former spouse a "community property" fraction, share, or percentage of the employee annuity and does not provide a formula by which OPM can compute the amount of the former spouse's share of the employee annuity from the face of the court order or from normal OPM files.

(d) A court order directed at employee annuity is not a court order acceptable for processing if the court order awards a portion of the "present value" of an annuity unless the amount of the "present value" is stated in the court order.

(e) A court order directed at employee annuity is not a court order acceptable for processing if the court order directs OPM to determine a rate of employee annuity that would require OPM to determine a salary or average salary, other than a salary or average salary actually used in computing the employee annuity, as of a date prior to the date of the employee's separation and to adjust that salary for use in computing the former spouse share unless the adjustment is by—

(1) A fixed amount or fixed annual amounts that are stated in the order;

(2) The rate of cost-of-living or salary adjustments as those terms are described in § 838.622;

(3) The percentage change in pay that the employee actually received excluding changes in grade and/or step; or

(4) The percentage change in either of the national indices used to compute cost-of-living or salary adjustments as those terms are described in § 838.622.

§ 838.306 Specifying type of annuity for application of formula, percentage or fraction.

(a) A court order directed at employee annuity that states the former spouse's share of employee annuity as a formula, percentage, or fraction is not a court order acceptable for processing unless OPM can determine the type of annuity on which to apply the formula, percentage, or fraction.

(b) The standard types of annuity to which OPM can apply the formula, percentage, or fraction are net annuity, gross annuity, or self-only annuity, which are defined in § 838.103. Unless the court order otherwise directs, OPM will apply the formula, percentage, or fraction to gross annuity. Section 838.625 contains information on other methods of describing these types of annuity.

Subpart D—Procedures for Processing Court Orders Affecting Refunds of Employee Contributions

Regulatory Structure

§ 838.401 Purpose and scope.

(a) This subpart regulates the procedures that the Office of Personnel Management will follow upon the receipt of claims arising out of State court orders that affect refunds of employee contributions under CSRS or FERS. OPM must comply with court orders, decrees, or court-approved property settlements in connection with divorces, annulments of marriages, or legal separations of employees or retirees that—

(1) Award a portion of a refund of employee contributions to a former spouse; or

(2) If the requirements of §§ 838.431 and 838.505 are met, bar payment of a refund of employee contributions.

(b) This subpart prescribes—

(1) The circumstances that must occur before refunds of employee contributions are available to satisfy a court order acceptable for processing; and

(2) The procedures that a former spouse must follow when applying for a portion of a refund of employee contributions based on a court order under section 8345(j) or section 8467 of title 5, United States Code.

(c)(1) Subpart E of this part contains the rules that a court order directed at a refund of employee contributions must satisfy to be a court order acceptable for processing.

(2) Subpart F of this part contains definitions that OPM uses to determine the effect on a refund of employee contributions of a court order acceptable for processing.

Availability of Funds

§ 838.411 Amounts subject to court orders.

(a)(1) Refunds of employee contributions are subject to court orders acceptable for processing only if all of the conditions necessary for payment of

the refund of employee contributions to the separated employee have been met, including, but not limited to—

(i) Separation from a covered position in the Federal service;

(ii) Application for payment of the refund of employee contributions by the separated employee; and

(iii) Immediate entitlement to a refund of employee contributions.

(2) Money held by an employing agency or OPM that may be payable at some future date is not available for payment under court orders directed at refunds of employee contributions.

(b) Payment under a court order may not exceed the amount of the refund of employee contributions.

Application and Processing Procedures

§ 838.421 Application requirements.

(a) A former spouse (personally or through a representative) must apply in writing to be eligible for a court-awarded portion of a refund of employee contributions. No special form is required.

(b) The application letter must be accompanied by—

(1) A certified copy of the court order acceptable for processing that is directed at a refund of employee contributions.

(2) A certification from the former spouse or the former spouse's representative that the court order is currently in force and has not been amended, superseded, or set aside;

(3) Information sufficient for OPM to identify the employee or separated employee, such as his or her full name, date of birth, and social security number;

(4) The current mailing address of the former spouse; and

(5) If the employee or separated employee has not applied for a refund of employee contributions, the current mailing address of the employee or separated employee.

§ 838.422 Timeliness of application.

(a) Except as provided in § 838.431 and paragraph (b) of this section, a court order acceptable for processing that is directed at a refund of employee contributions is not effective unless OPM receives the documentation required by § 838.421 not later than—

(1) The last day of the second month before payment of the refund; or

(2) Twenty days after OPM receives the Statement required by § 838.2007(c) or § 843.208(b) of this chapter if the former spouse has indicated on that Statement that such a court order exists.

(b) If OPM receives a copy of a court order acceptable for processing that is directed at a refund of employee contributions but not all of the documentation required by § 838.421, OPM will notify the former spouse that OPM must receive the missing items within 15 days after the date of the notice or OPM cannot comply with the court order.

§ 838.423 OPM action on receipt of a court order acceptable for processing.

(a) If OPM receives a court order acceptable for processing that is directed at a refund of employee contributions, OPM will inform—

(1) The former spouse—

(i) That the court order is acceptable for processing;

(ii) Of the date on which OPM received the court order;

(iii) Whether OPM has a record of unrefunded employee contributions on the employee;

(iv) That the former spouse's share of the refund of employee contributions cannot be paid unless the employee separates from the Federal service and applies for a refund of employee contributions;

(v) To the extent possible, the formula that OPM will use to compute the former spouse's share of a refund of employee contributions; and

(vi) That, if the former spouse disagrees with the formula, the former spouse must obtain, and submit to OPM, an amended court order clarifying the amount; and

(2) The employee or separated employee—

(i) That the former spouse has applied for benefits under this subpart;

(ii) That the court order is acceptable for processing and that OPM must comply with the court order;

(iii) Of the date on which OPM received the court order;

(iv) That the former spouse's share of the refund of employee contributions cannot be paid unless the employee separates from the Federal service and applies for a refund of employee contributions;

(v) To the extent possible, the formula that OPM will use to compute the former spouse's share of the refund of employee contributions;

(vi) That, if he or she contests the validity of the court order, he or she must obtain, and submit to OPM, a court order invalidating the court order submitted by the former spouse; and

(vii) That, if he or she disagrees with the formula, he or she must obtain, and submit to OPM, an amended court order clarifying the amount.

(b) The failure of OPM to provide, or of the employee or separated employee or the former spouse to receive, the information specified in this section does not affect the validity of payment under the court order.

§ 838.424 OPM action on receipt of a court order not acceptable for processing.

If OPM receives an application from a former spouse not based on a court order acceptable for processing, OPM will inform the former spouse that OPM cannot approve the application and provide the specific reason(s) for disapproving the application. Examples of reasons for disapproving an application include that the order does not meet the definition of court order in § 838.103 or does not meet one or more of the requirements of subpart E of this part.

§ 838.425 Contesting the validity of court orders.

(a) An employee or separated employee who alleges that a court order is invalid must prove the invalidity of the court order by submitting a court order that—

(1) Declares invalid the court order submitted by the former spouse; or

(2) Sets aside the court order submitted by the former spouse.

(b) OPM must honor a court order acceptable for processing that appears to be valid and that the former spouse has certified is currently in force and has not been amended, superseded, or set aside, until the employee or separated employee submits a court order described in paragraph (a) of this section or a court order amending or superseding the court order submitted by the former spouse.

Payment Procedures

§ 838.431 Correcting failures to provide required spousal notification.

The interests of a former spouse with a court order acceptable for processing that is directed at a refund of employee contributions who does not receive notice of an application for refund of employee contributions because the employee or separated employee submits fraudulent proof of notification or fraudulent proof that the former spouse's whereabouts are unknown are protected if, and only if—

(a) The former spouse files a court order acceptable for processing that affects or bars the refund of employee contributions with OPM no later than the last day of the second month before the payment of the refund; or

(b) The former spouse submits proof that—

(1) The evidence submitted by the employee was fraudulent; and

(2) Absent the fraud, the former spouse would have been able to submit

the necessary documentation required by § 838.421 within the time limit prescribed in § 838.422.

§ 838.432 Court orders barring payment of refunds.

A court order, notice, summons, or other document that attempts to restrain OPM from paying a refund of employee contributions is not effective unless it meets all the requirements of § 838.505 or part 581 of this chapter.

Procedures for Computing the Amount Payable

§ 838.441 Computing lengths of service.

(a) The smallest unit of time that OPM will calculate in computing a formula in a court order is a month, even where the court order directs OPM to make a more precise calculation.

(b) If the court order states a formula using a specified simple or decimal fraction other than twelfth parts of a year, OPM will use the specified number to perform simple mathematical computations.

Subpart E—Requirements for Court Orders Affecting Refunds of Employee Contributions

§ 838.501 Purpose and scope.

This subpart regulates the requirements that a court order directed at or barring a refund of employee contributions must meet to be a court order acceptable for processing.

(a) A court order is directed at a refund of employee contributions if it awards a former spouse a portion of a refund of employee contributions.

(b) A court order bars a refund of employee contributions if it prohibits payment of a refund of employee contributions to preserve a former spouse's court-awarded entitlement to a portion of an employee annuity or to a former spouse survivor annuity.

§ 838.502 Expressly dividing a refund of employee contributions.

(a) A court order directed at a refund of employee contributions is not a court order acceptable for processing unless it expressly awards a former spouse a portion of a refund of employee contributions as provided in paragraph (b) of this section.

(b) To expressly award a former spouse a portion of a refund of employee contributions as required by paragraph (a) of this section, the court order must—

(1) Identify the retirement system using terms that are sufficient to identify the retirement system as explained in § 838.611; and

(2) Expressly state that the former spouse is entitled to a portion of a refund of employee contributions using terms that are sufficient to identify the refund of employee contributions as explained in § 838.612.

§ 838.503 Providing for payment to the former spouse.

(a) A court order directed at a refund of employee contributions is not a court order acceptable for processing unless it provides for OPM to pay a portion of a refund of employee contributions to the former spouse as provided in paragraph (b) of this section.

(b) To provide for OPM to pay a portion of a refund of employee contributions to the former spouse as required by paragraph (a) of this section, the court order must—

(1) Expressly direct OPM to pay the former spouse directly;

(2) Direct the employee or separated employee to arrange or to execute forms for OPM to pay the former spouse directly; or

(3) Be silent concerning who is to pay the portion of the refund of employee contributions awarded to the former spouse.

(c) Although paragraphs (b)(2) and (b)(3) of this section provide acceptable methods for satisfying the requirement that the court order provide for OPM to pay the former spouse, OPM strongly recommends that the court order expressly direct OPM to pay the former spouse directly.

§ 838.504 OPM computation of formulas.

(a) A court order directed at a refund of employee contributions is not a court order acceptable for processing unless the court order provides sufficient instructions and information so that OPM can compute the amount of the former spouse's share of the refund of employee contributions using only the express language of the court order, subparts A, D, and F of this part, and information from normal OPM files.

(b) To provide sufficient instructions and information that OPM can compute the amount of the former spouse's share of the refund of employee contributions as required by paragraph (a) of this section requires that the court order state the former spouse's share as—

(1) A fixed amount;

(2) A percentage or a fraction of the refund of employee contributions; or

(3) A formula that does not contain any variables whose values are not readily ascertainable from the face of the court order or normal OPM files.

(c) A court order directed at a refund of employee contributions is not a court order acceptable for processing if OPM would have to examine a State statute or court decision (on a different case) to understand, establish, or evaluate the formula for computing the former spouse's share of the refund of employee contributions.

§ 838.505 Barring payment of refunds

A court order barring payment of a refund of employee contributions is not a court order acceptable for processing unless—

(a) It expressly directs OPM not to pay a refund of employee contributions;

(b) It awards, or a prior court order acceptable for processing has awarded, the former spouse a former spouse survivor annuity or a portion of the employee annuity; and

(c) Payment of the refund of employee contributions would prevent payment to the former spouse under the court order described in paragraph (b) of this section.

Subpart F—Terminology Used in Court Orders Affecting Employee Annuities or Refunds of Employee Contributions

Regulatory Structure

§ 838.601 Purpose and scope.

(a) This subpart regulates the meaning of terms necessary to award benefits in a court order directed at an employee annuity or a refund of employee contributions. OPM applies the meanings to determine whether a court order directed at an employee annuity or a refund of employee contributions is a court order acceptable for processing and to establish the amount of the former spouse's share of an employee annuity or a refund of employee contributions.

(b)(1) This subpart establishes a uniform meaning to be used for terms and phrases frequently used in awarding a former spouse a portion of an employee annuity or a refund of employee contributions.

(2) This subpart informs the legal community about the definitions to apply terms used in drafting court orders so that the resulting court orders contain the proper language to accomplish the aims of the court.

(c)(1) To assist attorneys and courts in preparing court orders that OPM can honor in the manner that the court intends, appendix A of this subpart contains model language to accomplish many of the more common objectives associated with the award of a former spouse's share of an employee annuity or a refund of employee contributions.

(2) By using the language in appendix A of this subpart, the court, attorneys, and parties will know that the court

order will be acceptable for processing and that OPM will treat the terminology used in the court order in the manner stated in the appendix.

Identification of Benefits

§ 838.611 Identifying the retirement system.

(a) To satisfy the requirements of § 838.303(b)(1) or § 838.502(b)(1), a court order must contain language identifying the retirement system to be affected. For example, "CSRS," "FERS," "OPM," or "Federal Government" benefits, or benefits payable "based on service with the U.S. Department of Agriculture," etc., are sufficient identification of the retirement system.

(b) Except as provided in paragraphs (b)(1) and (b)(2) of this section, language referring to benefits under another retirement system, such as military retired pay, Foreign Service retirement benefits or Central Intelligence Agency retirement benefits, does not satisfy the requirements of § 838.303(b)(1) or § 838.502(b)(1).

(1) A court order that mistakenly labels CSRS benefits as FERS benefits and vice versa satisfies the requirements of §§ 838.303(b)(1) and 838.502(b)(1).

(2) Unless the court order expressly provides otherwise, for employees transferring to FERS, court orders directed at CSRS benefits apply to the entire FERS basic benefit, including the CSRS component, if any. Such a court order satisfies the requirements of §§ 838.303(b)(1) and 838.502(b)(1).

(c) A court order affecting military retired pay, even when military retired pay has been waived for inclusion in CSRS annuities, does not award a former spouse a portion of an employee annuity or a refund of employee contributions under CSRS or FERS. Such a court order does not satisfy the requirements of § 838.303(b)(1) or § 838.502(b)(1).

§ 838.612 Distinguishing between annuities and contributions.

(a) A court order using "annuities," "pensions," "retirement benefits," or similar terms satisfies the requirements of §§ 838.303(b)(2) and 838.502(b)(2) and may be used to divide an employee annuity and a refund of employee contributions.

(b)(1) A court order using "contributions," "deductions," "deposits," "retirement accounts," "retirement fund," or similar terms satisfies the requirements of § 838.502(b)(2) and may be used only to divide the amount of contributions that the employee has paid into the Civil Service Retirement and Disability Fund.

(2) Unless the court order specifically states otherwise, when an employee annuity is payable, a court order using the terms specified in paragraph (b)(1) of this section satisfies the requirements of § 838.303(b)(2) and awards the former spouse a benefit to be paid in equal monthly installments at 50 percent of the gross annuity at the time of retirement or the date of the court order, whichever comes later, until the specific dollar amount is reached.

Computation of Benefits

§ 838.621 Prorata share.

(a) *Prorata share* means one-half of the fraction whose numerator is the number of months of Federal civilian and military service that the employee performed during the marriage and whose denominator is the total number of months of Federal civilian and military service performed by the employee.

(b) A court order that awards a former spouse a prorata share of an employee annuity or a refund of employee contributions by using the term "prorata share" and identifying the date when the marriage began satisfies the requirements of §§ 838.305 and 838.504 and awards the former spouse a prorata share as defined in paragraph (a) of this section.

(c) A court order that awards a portion of an employee annuity as of a specified date before the employee's retirement awards the former spouse a prorata share as defined in paragraph (a) of this section.

(d) A court order that awards a portion of the "value" of an annuity as of a specific date before retirement, without specifying what "value" is, awards the former spouse a prorata share as defined in paragraph (a) of this section.

§ 838.622 Cost-of-living and salary adjustments.

(a)(1) A court order that awards adjustments to a former spouse's portion of an employee annuity stated in terms such as "cost-of-living adjustments" or "COLA's" occurring after the date of the decree but before the date of retirement provides increases equal to the adjustments described in or effected under section 8340 or section 8462 of title 5, United States Code.

(2) A court order that awards adjustments to a former spouse's portion of an employee annuity stated in terms such as "salary adjustments" or "pay adjustments" occurring after the date of the decree provides increases equal to the adjustments described in or effected under section 5303 of title 5, United States Code until the date of retirement.

(b)(1) Unless the court order directly and unequivocally orders otherwise, a court order that awards a former spouse a portion of an employee annuity either on a percentage basis or by use of a fraction or formula provides that the former spouse's share of the employee annuity will be adjusted to maintain the same percentage or fraction whenever the employee annuity changes as a result of—

(i) Salary adjustments occurring after the date of the decree and before the employee retires; and

(ii) Cost-of-living adjustments occurring after the date of the decree and after the date of the employee's retirement.

(2) A court order that awards a former spouse a specific dollar amount from the employee annuity prevents the former spouse from benefiting from salary and cost-of-living adjustments after the date of the decree, unless the court expressly orders their inclusion.

(c)(1)(i) Except as provided in paragraph (b) of this section, a court order that contains a general instruction to calculate the former spouse's share effective at the time of divorce or separation entitles the former spouse to the benefit of salary adjustments occurring after the specified date to the same extent as the employee.

(ii) To prevent the application of salary adjustments after the date of the divorce or separation, the court order must either state the exact dollar amount of the award to the former spouse or specifically instruct OPM not to apply salary adjustments after the specified date in computing the former spouse's share of the employee annuity.

(2)(i) Except as provided in paragraph (b) of this section, a court order that requires OPM to compute a benefit as of a specified date before the employee's retirement, and specifically instructs OPM not to apply salary adjustments after the specified date in computing the former spouse's share of an employee annuity provides that the former spouse is entitled to the application of cost-of-living adjustments after the date of the employee's retirement in the manner described in § 838.241.

(ii) To award cost-of-living adjustments between a specified date and the employee's retirement, the court order must specifically instruct OPM to adjust the former spouse's share of the employee annuity by any cost-of-living adjustments occurring between the specified date and the date of the employee's retirement.

(iii) To prevent the application of cost-of-living adjustments that occur after the employee annuity begins to accrue to

the former spouse's share of the employee annuity, the decree must either state the exact dollar amount of the award to the former spouse or specifically instruct OPM not to apply cost-of-living adjustments occurring after the date of the employee's retirement.

§ 838.623 Computing lengths of service.

(a) Sections 838.242 and 838.441 contain information on how OPM calculates lengths of service.

(b) Unless the court order otherwise expressly directs—

(1) For the purpose of describing a period of time to be excluded from any element of a computation, the term "military service" means military service as defined in section 8331(13) of title 5, United States Code, and does not include civilian service with the Department of Defense or the Coast Guard; and

(2) For the purpose of describing a period of time to be included in any element of a computation, the term "military service" means all periods of military and civilian service performed with the Department of Defense or the Coast Guard.

(c)(1) When a court order contains a formula for dividing employee annuity that requires a computation of service worked as of a date prior to separation and using terms such as "years of service," "total service," "service performed," or similar terms, the time attributable to unused sick leave will not be included.

(2) When a court order contains a formula for dividing employee annuity that requires a computation of "creditable service" (or some other phrase using "credit" or its equivalent) as of a date prior to retirement, unused sick leave will be included in the computation (involving a CSRS employee annuity or the CSRS component of a FERS employee annuity) as follows:

(i) If the amount of unused sick leave is specified, the court order awards a portion of the employee annuity equal to the monthly employee annuity at retirement times a fraction, the numerator of which is the number of months of "creditable service" as of the date specified plus the number of months of unused sick leave specified (which sum is rounded to eliminate partial months) and whose denominator is the months of "creditable service" used in the retirement computation.

(ii) If the amount of unused sick leave is not specified, the court order awards a portion of the employee annuity equal to the monthly rate at the time of retirement times a fraction, the numerator of which is the number of months of "creditable service" as of the date specified (no sick leave included) and whose denominator is the number of months of "creditable service" used in the retirement computation (sick leave included).

(d)(1) General language such as "benefits earned as an employee with the U.S. Postal Service * * *" provides only that CSRS retirement benefits are subject to division and does not limit the period of service included in the computation (i.e., service performed with other Government agencies will be included).

(2) To limit the computation of benefits to a particular period of employment, the court order must—

(i) Use language expressly limiting the period of service to be included in the computation (e.g., "only U.S. Postal Service" or "exclusive of any service other than U.S. Postal Service employment"); or

(ii) Specify the number of months to be included in the computation; or

(iii) Describe specifically the period of service to be included in the computation (e.g., "only service performed during the period Petitioner and Defendant were married" or "benefits based on service performed through the date of divorce").

§ 838.624 Distinguishing between formulas and fixed amounts.

(a) A court order that contains both a formula or percentage instruction and a dollar amount is deemed to include the dollar amount only as the court's estimate of the initial amount of payment. The formula or percentage instruction controls.

(b) A court order that awards a portion of the "present value" of an employee annuity and specifically states the amount of either the "present value" of the employee annuity or of the award is deemed to give the former spouse "a specific dollar amount" that is payable from a monthly employee annuity and will be paid as a lump-sum award in accordance with § 838.235.

§ 838.625 Types of annuity.

(a) Terms that are synonymous with net annuity are—

(1) Disposable annuity; and

(2) Retirement check.

(b) Terms that are synonymous with self-only annuity are—

(1) Life rate annuity;

(2) Unreduced annuity; and

(3) Annuity without survivor benefit.

(c) All court orders that do not specify net annuity or self-only annuity apply to gross annuity.

Model Paragraphs

Appendix A to Subpart F of Part 838—Recommended Language for Court Orders Dividing Employee Annuities

This appendix provides recommended language for use in court orders attempting to divide employee annuity. A court order directed at employee annuity should include five elements:

- Identification of the benefits;
- Instructions that OPM pay the former spouse;
- A method for computing the amount of the former spouse's benefit;
- Identification of the type of annuity to which to apply a fraction, percentage or formula; and
- Instructions on what OPM should do if the employee leaves Federal service before retirement and applies for a refund of employee contributions.

The court order may also include instructions for disposition of the former spouse's share if the former spouse dies before the employee. By using the model language, courts will know that the court order will have the effect described in this appendix.

The model language in this appendix does not award a benefit that is payable after the death of the employee. A separate, distinct award of a former spouse survivor annuity is necessary to award a former spouse a benefit that is payable after the death of the employee. Appendix A to subpart I of this part contains model language for awarding survivor annuities and contains some examples that award both a portion of an employee annuity and a survivor annuity.

The model language uses the terms "[former spouse]" to identify the spouse who is receiving a former spouse's portion of an employee annuity and "[employee]" to identify the Federal employee whose employment was covered by the Civil Service Retirement System or the Federal Employees Retirement System. Obviously, in drafting an actual court order the appropriate terms, such as "Petitioner" and "Respondent," or the names of the parties should replace "[former spouse]" and "[employee]."

Similarly, the models are drafted for employees covered by the Civil Service Retirement System. The name of the retirement system should be changed for employees covered by the Federal Employees Retirement System.

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¶ 001 Language required in Qualified Domestic Relations Orders.

Using the following paragraph will expressly state that the provisions of the court order concerning CSRS or FERS benefits are governed by this part. A court order directed at employee annuity (or awarding a survivor annuity) that is labelled a "Qualified Domestic Relations Order" or is issued on an ERISA form will not be automatically rendered unacceptable under § 838.302(a) or § 838.803(a) if the court order contains the following paragraph.

"The court has considered the requirements and standard terminology provided in part 838 of Title 5, Code of Federal Regulations. The terminology used in the provisions of this order that concern benefits under the Civil Service Retirement System are governed by the standard conventions established in that part."

100 Series—Identification of the benefits and instructions that OPM pay the former spouse.

¶ 101 Identifying retirement benefits and directing OPM to pay the former spouse.

Using the following paragraph will expressly divide employee annuity to satisfy the requirements of § 838.303 and direct OPM to pay the former spouse a share of an employee annuity to satisfy the requirements of § 838.304.

"[Employee] is (or will be) eligible for retirement benefits under the Civil Service Retirement System based on employment with the United States Government. [Insert language for computing the former spouse's share from 200 series of this appendix.] The United States Office of Personnel Management is directed to pay [former spouse]'s share directly to [former spouse]."

¶ 102–110 [Reserved].

¶ 111 Protecting a former spouse entitled to military retired pay.

Using the following paragraph will protect the former spouse interest in military retired pay in the event that the employee waives the military retired pay to allow crediting the military service under CSRS or FERS. The paragraph should be used only if the former spouse is awarded a portion of the military retired pay. "If [Employee] waives military retired pay to credit military service under the Civil Service Retirement System, [insert language for computing the former spouse's share from 200 series of this appendix]. The United States Office of Personnel Management is directed to pay [former spouse]'s share directly to [former spouse]."

200 Series—Computing the amount of the former spouse's benefits.

Paragraphs 201 through 204 contain model language for the most common types of wards that court orders make to former spouses. Subsequent paragraphs in the 200 series contain model language for less common, more complex awards.

Awards other than fixed amounts require that the court order specify the type of annuity ("gross," "net," or self-only) on which the award is computed. The types of annuity are defined in § 838.103. Variations on type of annuity are covered by the 300 series of this appendix.

¶ 201 Award of a fixed monthly amount.

Using the following paragraph will award the former spouse a fixed monthly amount. OPM will not apply COLA's to a fixed monthly amount unless the court order expressly directs that OPM and COLA's using the language in ¶ 231 of this appendix or similar language.

"[Employee] is (or will be) eligible for retirement benefits under the Civil Service Retirement System based on employment with the United States Government. [Former spouse] is entitled to $[insert a number] per month from [employee]'s civil service retirement benefits. The United States Office of Personnel Management is directed to pay [former spouse]'s share directly to [former spouse]."

¶ 202 Award of a percentage.

Using the following paragraph will award the former spouse a stated percentage of the employee annuity. Unless the court order expressly directly that OPM not add COLA's to the former spouse's share of the employee annuity, OPM will add COLA's to keep the former spouse's share at the stated percentage. Paragraph 232 of this appendix provides language for excluding COLA's.

"[Employee] is (or will be) eligible for retirement benefits under the Civil Service Retirement System based on employment with the United States Government. [Former spouse] is entitled to [insert a number] percent of [employee]'s [insert "gross," "net," or "self-only"] monthly annuity under the Civil Service Retirement System. The United States Office of Personnel Management is directed to pay [former spouse]'s share directly to [former spouse]."

¶ 203 Award of a fraction

Using the following paragraph will award the former spouse a stated fraction of the employee annuity. Unless the court order expressly directly that OPM not add COLA's to the former spouse's share of the employee annuity, OPM will add COLA's to keep the former spouse's share at the stated percentage. Paragraph 232 of this appendix provides language for excluding COLA's.

"[Employee] is (or will be) eligible for retirement benefits under the Civil Service Retirement System based on employment with the United States Government. [Former spouse] is entitled to [insert fraction] ths of [employee]'s [insert "gross," "net," or "self-only"] monthly annuity under the Civil Service Retirement System. The United States Office of Personnel Management is directed to pay [former spouse]'s share directly to [former spouse]."

¶ 204 Award of a prorata share.

Using the following paragraph will award the former spouse a prorata share of the employee annuity. Prorata share is defined in § 838.621. To award a prorata share the court order must state the date of the marriage. Unless the court order specifies a different ending date, the marriage ends for computation purposes on the date that the court order is filed with the court clerk. Unless the court order expressly directs that OPM not add COLA's to the former spouse's share of the employee annuity, OPM will add COLA's to keep the former spouse's share at the stated percentage. Paragraph 232 of this appendix provides language for excluding COLA's.

"[Employee] is (or will be) eligible for retirement benefits under the Civil Service Retirement System based on employment with the United States Government. [Former spouse] is entitled to a prorata share of [employee]'s [insert 'gross,' 'net,' or self-only] monthly annuity under the Civil Service Retirement System. The marriage began on [insert date]. The United States Office of Personnel Management is directed to pay [former spouse]'s share directly to [former spouse]."

¶ 205–210 [Reserved].

¶ 211 Award based on a stated formula.

Using the following paragraphs will award the former spouse a share of the employee annuity based on a formula stated in the court order. The formula must be stated in the court order (including a court-approved property settlement agreement). The formula may not be incorporated by reference to a statutory provision or a court decision in another case. If the court order uses a formula, the court order must include any data that is necessary for OPM to apply the formula unless the necessary data is contained in normal OPM files.

"[Employee] is (or will be) eligible for retirement benefits under the Civil Service Retirement System based on employment with the United States Government. [Former spouse] is entitled to a share of [employee]'s [insert 'gross,' 'net,' or self-only] monthly annuity under the Civil Service Retirement System to be computed as follows: [Insert formula for computing the former spouse's share.]"

"The United States Office of Personnel Management is directed to pay [former spouse]'s share directly to [former spouse]."

¶ 212–230 [Reserved].

¶ 231 Awarding COLA's on fixed monthly amounts.

Using the following paragraph will award COLA's in addition to a fixed monthly amount to the former spouse. The model awards COLA's at the same rate applied to the employee annuity.

"[Employee] is (or will be) eligible for retirement benefits under the Civil Service Retirement System based on employment with the United States Government. [Former spouse] is entitled to $[insert a number] per month from [employee]'s civil service retirement benefits. When COLA's are applied to [employee]'s retirement benefits, the same COLA applies to [former spouse]'s share. The United States Office of Personnel Management is directed to pay [former spouse]'s share directly to [former spouse]."

¶ 232 Excluding COLA's on awards other than fixed monthly amounts.

Using the following paragraph will prevent application of COLA's to a former spouse's share of an employee annuity in cases where the former spouse has been awarded a percentage, fraction or prorata share of the employee annuity, rather than a fixed dollar amount.

"[Employee] is (or will be) eligible for retirement benefits under the Civil Service Retirement System based on employment with the United States Government. [Insert language for computing the former spouse's share from ¶ 202, ¶ 203, ¶ 204, or ¶ 211 of this appendix.] The United States Office of Personnel Management is directed to determine the amount of [former spouse]'s share on the date [insert 'when [employee] retires' if the employee has not retired, or 'of this order' if the employee is already retired] and not to apply COLA's to that amount. The United States Office of Personnel Management is directed to pay [former spouse]'s share directly to [former spouse]."

300 Series—Type of annuity.

Awards of employee annuity to a former spouse (other than awards of fixed dollar amounts) must specify whether OPM will use the "gross," "net," or self-only annuity as defined in § 838.103 in determining the amount of the former spouse's entitlement. The court order may contain a formula that has the effect of creating other types of annuity, but the court order may only do this by providing a formula that starts from "gross," "net," or self-only annuity as defined in § 838.103.

¶ 301 Awards based on benefits actually paid.

The court order may include a formula that effectively uses the court's definition of net annuity rather than the one provided by § 838.103. For example, using the following paragraph will award the former spouse a prorata share of the employee annuity reduced only by the amount deducted as premiums for basic life insurance under the Federal Employee Group Life Insurance Program.

"[Employee] is (or will be) eligible for retirement benefits under the Civil Service Retirement System based on employment with the United States Government. [Former spouse] is entitled to a prorata share of [employee]'s monthly annuity under the Civil Service Retirement System, where monthly annuity means the self-only annuity less the amount deducted as premiums for basic life insurance under the Federal Employee Group Life Insurance Program. The marriage began on [insert date]. The United States Office of Personnel Management is directed to pay [former spouse]'s share directly to [former spouse]."

¶ 302–310 [Reserved].

¶ 311 Awards of earned annuity in cases where the actual annuity is based on disability.

Using the following paragraph will award a former spouse a prorata share of what the employee annuity would have been based on only the employee's actual service in cases where the actual employee annuity is based on disability. The paragraph also allows the court order to provide for the former spouse's share to begin when the employee reaches a stated age, using age 62 as an example. As with all other formulas the court order must specify whether the computation applies to "gross," "net," or self-only annuity. OPM will apply COLA's that occurred after the date of the disability retirement to the former spouse's share. The following paragraph should be used only for disability retirees under CSRS. Under FERS, section 8452 of title 5, United States Code, provides a formula for recomputation of disability annuities at age 62 to approximate an earned annuity. Therefore to award a portion of the "earned" benefit under FERS add the introductory phrase, "Starting when [employee] reaches age 62," to the paragraph describing how to compute the amount.

"[Employee] is (or will be) eligible for retirement benefits under the Civil Service Retirement System based on employment with the United State's

Government. Starting when [employee] reaches age 62, [former spouse] is entitled to a prorata share of [employee]'s [insert "gross," "net," or self-only] monthly annuity under the Civil Service Retirement System, where monthly annuity means the amount of [employee]'s monthly annuity computed as though [employee] had retired on an immediate, nondisability annuity on the commencing date of [employee]'s annuity based on disability. In computing the amount of the immediate annuity, the United States Office of Personnel Management will deem [employee] to have been age 62 at the time that [employee] retired on disability. The marriage began on [insert date]. The United States Office of Personnel Management is directed to pay [former spouse]'s share directly to [former spouse]."

400 Series—Refunds of employee contributions.

Court orders that award a former spouse a portion of a future employee annuity of an employee who is not then eligible to retire should include an additional paragraph containing instructions that tell OPM what to do if the employee separates before becoming eligible to retire and requests a refund of employee contributions. The court order may award the former spouse a portion of the refund of employee contributions or bar payment of the refund of employee contributions.

¶ 401 Barring payment of a refund of employee contributions.

Using the following paragraph will bar payment of the refund of employee contributions if payment of the refund of employee contributions would extinguish the former spouse's entitlement to a portion of the employee annuity. "The United States Office of Personnel Management is directed not to pay [employee] a refund of employee contributions."

¶ 402 Dividing a refund of employee contributions.

Using the following paragraph will allow the refund of employee contributions to be paid but will award a prorata share of the refund of employee contributions to the former spouse. The sentence on the beginning date of the marriage is unnecessary if the beginning is stated elsewhere in the order. The award of a prorata share is used only as an example; the court order could provide another fraction, percentage, or formula, or a fixed amount. Note that a refund of employee contributions voids the employee's rights to an employee annuity and the former spouse's right to any portion of that annuity.

"If [employee] becomes eligible and applies for a refund of employee contributions, [former spouse] is entitled to a prorata share of the refund of employee contributions. The marriage began on [insert date]. The United States Office of Personnel Management is directed to pay [former spouse]'s share directly to [former spouse]."

500 Series—Death of the former spouse.

¶ 501 Full annuity restored to the retiree.

No special provision is necessary to restore the entire annuity to the retiree upon the death of the former spouse. Unless the court order expressly provides otherwise, OPM will pay the former spouse's share to the retiree after the death of the former spouse.

¶ 502 Former spouse share paid to children.

Using the following paragraph will award the former spouse's share of an employee annuity to the children, including any adopted children, of the employee and former spouse.

"If [former spouse] dies before [employee], the United States Office of Personnel Management is directed to pay [former spouse]'s share of [employee]'s civil service retirement benefits to surviving children of the marriage including any adopted children, in equal shares. Upon the deaths of any child, that child's share will be distributed among the other surviving children."

The language may be modified to terminate the payments to the children when they reach a stated age. A court order that includes such a provision for termination must include sufficient information (such as the children's dates of birth) to permit OPM to determine when the children's interest terminate. OPM will not consider evidence outside the court order (and normal OPM files) to establish the children's dates of birth.

¶ 503 Former spouse share paid to the court.

Using the following paragraph will provide for payment of the former spouse's share of an employee annuity to the court after the death of the former spouse. This would allow a court officer to administer the funds. "If [former spouse] dies before [employee], the United States Office of Personnel Management is directed to pay [former spouse]'s share of [employee]'s civil service retirement benefits to this court at the following address: "[Insert address where checks should be sent. The address may be up to six lines and should include sufficient information for court officials to credit the correct account.]"

Subpart G—Procedures for Processing Court Orders Awarding Former Spouse Survivor Annuities

Regulatory Structure

§ 838.701 Purpose and scope.

(a) This subpart regulates the procedures that the Office of Personnel Management will follow upon the receipt of claims arising out of State court orders awarding former spouse survivor annuities under CSRS or FERS (including the FERS basic employee death benefit as defined in § 843.602 of this chapter). OPM must comply with qualifying court orders, decrees, or court-approved property settlements in connection with divorces, annulments of marriages, or legal separations of employees or retirees that award former spouse survivor annuities.

(b) This subpart prescribes—

(1) The commencing and terminating dates of former spouse survivor annuities based on court orders acceptable for processing; and

(2) The procedures that a former spouse must follow when applying for a former spouse survivor annuity based on a court order under section 8341(h) or section 8445 of title 5, United States Code.

(c)(1) Subpart H of this part contains the rules that a court order must satisfy to be a court order acceptable for processing to award a former spouse survivor annuity.

(2) Subpart I of this part contains definitions that OPM uses to determine the effect of a court order in connection with a former spouse survivor annuity.

Limitations on Survivor Annuities

§ 838.711 Maximum former spouse survivor annuity.

(a) Under CSRS, payments under a court order may not exceed the amount provided in § 831.614 of this chapter.

(b) Under FERS, payments under a court order may not exceed amount provided in § 842.613 of this chapter plus the basic employee death benefit as defined in § 843.102 of this chapter.

Application and Processing Procedures

§ 838.721 Application requirements.

(a)(1) A former spouse (personally or through a representative) must apply in writing to be eligible for a former spouse survivor annuity based on a court order acceptable for processing. No special form is required to give OPM notice of the court order.

(2) OPM may require an additional application after the death of the employee, separated employee, or retiree. This additional application will be on a form prescribed by OPM.

(b)(1) The application letter under paragraph (a)(1) of this section must be accompanied by—

(i) A certified copy of the court order;

(ii) A certification from the former spouse or the former spouse's representative that the court order is currently in force and has not been amended, superseded, or set aside;

(iii) Information sufficient for OPM to identify the employee or retiree, such as his or her full name, CSRS or FERS claim number, date of birth, and social security number;

(iv) The current mailing address of the former spouse;

(v) If the employee has not retired or died, the mailing address of the employee; and

(vi) A statement in the form prescribed by OPM certifying—

(A) That the former spouse has not remarried before age 55;

(B) That the former spouse will notify OPM within 15 calendar days of the occurrence of any remarriage before age 55; and

(C) That the former spouse will be personally liable for any overpayment to him or her resulting from a remarriage before age 55.

(2) OPM may subsequently require recertification of the statements required by this paragraph.

§ 838.722 OPM action on receipt of a court order acceptable for processing.

(a) If OPM receives a court order acceptable for processing that awards a former spouse survivor annuity based on the service of a living retiree, OPM will inform—

(1) The former spouse—

(i) That the court order is acceptable for processing;

(ii) Of the date on which OPM received the court order; and

(iii) Of the present amount of the monthly former spouse survivor annuity if the retiree were to die immediately and the formula OPM used to compute the monthly benefit; and

(2) The retiree—

(i) That the former spouse has applied for benefits under this subpart;

(ii) That the court order is acceptable for processing and that OPM must comply with the court order;

(iii) Of the date on which OPM received the court order;

(iv) Of the amount and commencing date of the reduction in the retiree's annuity;

(v) Of the present amount of the monthly former spouse survivor annuity if the retiree were to die immediately and the formula OPM used to compute the amount of the former spouse survivor annuity; and

(vi) That, if he or she contests the validity of the court order, he or she must obtain, and submit to OPM, a court order invalidating the court order submitted by the former spouse.

(b) If OPM receives a court order acceptable for processing that awards a former spouse survivor annuity, but the employee, separated employee, or retiree has died, OPM will inform—

(1) The former spouse—

(i) That the court order is acceptable for processing;

(ii) Of the date on which OPM received the court order, the date on which the former spouse's benefit will begin to accrue, and if known the date on which OPM will commence payment under the court order; and

(iii) Of the amount on the monthly former spouse survivor annuity and the formula OPM used to compute the former spouse survivor annuity.

(2) Anyone whom OPM knows will be adversely affected by the court order—

(i) That the former spouse has applied for benefits under this subpart;

(ii) That the court order is acceptable for processing and that OPM must comply with the court order;

(iii) Of the date on which OPM received the court order;

(iv) How the court order may adversely affect him or her; and

(v) That, if he or she contests the validity of the court order, he or she must obtain, and submit to OPM, a court order invalidating the court order submitted by the former spouse.

(c) If OPM receives a court order acceptable for processing that awards a former spouse survivor annuity and the employee or separated employee has not retired or died, OPM will attempt to inform—

(1) The former spouse—

(i) That the court order is acceptable for processing;

(ii) To the extent possible, the formula that OPM will use to compute the former spouse survivor annuity (including the FERS basic employee death benefit as defined in § 843.602 of this chapter, if applicable); and

(iii) That, if he or she disagrees with the formula, he or she must obtain, and submit to OPM, an amended court order clarifying the amount before the employee or separated employee retires or dies; and

(2) The employee or separated employee—

(i) That the former spouse has applied for benefits under this subpart;

(ii) That the court order is acceptable for processing and the OPM must comply with the court order;

(iii) To the extent possible, the formula that OPM will use to compute the former spouse survivor annuity (including the FERS basic employee death benefit as defined in § 843.602 of this chapter, if applicable); and

(iv) That, if he or she—

(A) Contests the validity of the court order, he or she must obtain, and submit to OPM, a court order invalidating the court order submitted by the former spouse; or

(B) Disagrees with the formula, he or she must obtain, and submit to OPM, an amended court order clarifying the amount before he or she retires or dies.

(d) The failure of OPM to provide, or of the employee, separated employee, or retiree, the former spouse, or anyone else to receive, the information specified in this section does not affect—

(1) The validity of payment under the court order; or

(2) The commencing date of the reduction in the employee annuity or the commencing date of the former spouse's entitlement as determined under § 838.731.

§ 838.723 OPM action on receipt of a court order not acceptable for processing.

If OPM receives an application from a former spouse not based on a court order acceptable for processing, OPM will inform the former spouse that OPM cannot approve the application and provide the specific reason(s) for disapproving the application. Examples of reasons for disapproving an application include that the order does not meet the definition of court order in § 838.103 or does not meet one or more of the requirements of subpart H of this part.

§ 838.724 Contesting the validity of court orders.

(a) An employee, retiree or person adversely affected by a court order who alleges that a court order is invalid must prove the invalidity of the court order by submitting to OPM a court order that—

(1) Declares invalid the court order submitted by the former spouse; or

(2) Sets aside the court order submitted by the former spouse.

(b) OPM must honor a court order acceptable for processing that appears to be valid and that the former spouse has certified is currently in force and has not been amended, superseded, or set aside, until the employee, separated employee, retiree, or person adversely

affected by the court order submits to OPM a court order described in paragraph (a) of this section or, if issued before the retirement or death of the employee or separated employee, a court order acceptable for processing amending or superseding the court order submitted by the former spouse.

§ 838.725 Effect on employee and retiree election rights.

(a) A court order acceptable for processing that awards a former spouse survivor annuity does not affect a retiring employee's or retiree's rights and obligations to make survivor elections under subpart F of part 831 of this chapter or subpart F of part 842 of this chapter.

(b) A court order acceptable for processing that awards a former spouse survivor annuity requires OPM to pay a former spouse survivor annuity and prevents OPM from paying an elected survivor benefit to a widow or widower or another former spouse if the election is inconsistent with the court order.

Payment Procedures

§ 838.731 Commencing date of payments.

(a) A former spouse survivor annuity based on a court order acceptable for processing begins to accrue in accordance with the terms of the court order but no earlier than the later of—

(1) The first day after the date of death of the employee, separated employee, or retiree; or

(2) The first day of the second month after OPM receives a copy of the court order acceptable for processing.

(b) OPM will not authorize payment of the former spouse survivor annuity until it receives an application and supporting documentation required under § 838.721.

§ 838.732 Termination of entitlement.

(a) A former spouse survivor annuity (other than the FERS basic employee death benefit as defined in § 843.602 of this chapter) or the right to a future former spouse survivor annuity based on a court order acceptable for processing terminates in accordance with the terms of the court order but no later than the last day of the month before the former spouse remarries before age 55 or dies.

(b) If the employee dies before the former spouse remarries before age 55 or dies, the former spouse's entitlement to the FERS basic employee death benefit as defined in § 843.602 of this chapter based on a court order acceptable for processing terminates in accordance with the terms of the court order.

§ 838.733 Rights of current and other former spouses after termination of a former spouse's entitlement.

(a) If a former spouse of a retiree loses entitlement to a former spouse survivor annuity based on a court order acceptable for processing while the retiree is living and—

(1) If court orders acceptable for processing award former spouse survivor annuities to other former spouses, OPM will continue the reduction to comply with court orders in the order specified in § 838.135;

(2) If paragraph (a)(1) of this section does not obligate the entire entitlement lost by he former spouse, OPM will continue the reduction to provide a current spouse survivor annuity or a former spouse survivor annuity based on a timely-filed election under § 831.604, § 831.605, § 831.612, § 831.613, § 842.603, § 842.604, § 842.611, or § 842.612 of this chapter; or

(3) If paragraphs (a)(1) and (a)(2) of this section do not obligate the entire entitlement lost by the former spouse, the retiree (except a retiree under CSRS who retired before May 7, 1985 and who remarried before February 27, 1986) may elect within 2 years after the former spouse loses entitlement to continue the reduction to provide a survivor annuity for a spouse acquired after retirement.

(b)(1) If a former spouse of an employee or retiree loses entitlement to a former spouse survivor annuity based on a court order acceptable for processing after the death of the employee or retiree and—

(i) If court orders acceptable for processing award former spouse survivor annuities to other former spouses, OPM will pay the next entitled former spouse in the order specified in § 838.135; or

(ii) If paragraph (b)(1) of this section does not obligate the entire entitlement lost by the former spouse, OPM will pay the balance to a current spouse of the deceased—

(A) Retiree who had elected a reduced annuity to provide a current spouse annuity (as defined in § 831.603 or § 842.602); or

(B) Employee.

(2) Except as provided in § 838.734—

(i) The former spouse survivor annuity based on paragraph (b)(1)(i) of this section begins to accrue in accordance with the terms of the court order but no earlier than the later of—

(A) The first day of the month in which the former spouse with the earlier-issued court order loses entitlement; or

(B) The first day of the second month after OPM receives a copy of the court order acceptable for processing; or

(ii) The current spouse annuity under paragraph (b)(1) (ii) of this section begins to accrue on the first day of the month in which the former spouse loses entitlement.

(c) OPM will not authorize payment of the former spouse survivor annuity until it receives an application and supporting documentation required under § 838.721.

§ 838.734 Payment of lump-sum awards by survivor annuity.

OPM will not honor court orders awarding lump-sum payments (other than the FERS basic employee death benefit as defined in § 843.602 of this chapter) to a former spouse upon the death of an employee or retiree.

§ 838.735 Cost-of-living adjustments.

(a) OPM applies cost-of-living adjustments to all former spouse survivor annuities in pay status at the time of the adjustment and in the amount provided by Federal statute.

(b) OPM will not honor provisions of a court order that alters the time or amount of cost-of-living adjustments or that attempts to prevent OPM from applying cost-of-living adjustments to a former spouse survivor annuity in pay status.

Subpart H—Requirements for Court Orders Awarding Former Spouse Survivor Annuities

§ 838.801 Purpose and scope.

This subpart regulates the requirements that a court order awarding a former spouse survivor annuity must meet to be a court order acceptable for processing.

§ 838.802 CSRS limitations.

(a) A court order awarding a former spouse survivor annuity under CSRS is not a court order acceptable for processing unless the marriage terminated on or after May 7, 1985.

(b) In the case of a retiree who retired under CSRS before May 7, 1985, a court order awarding a former spouse survivor annuity under CSRS is not a court order acceptable for processing unless the retiree was receiving a reduced annuity to provide a survivor annuity to benefit that spouse on May 7, 1985.

§ 838.803 Language not acceptable for processing.

(a) *Qualifying Domestic Relations Orders.* (1) Any court order labeled as a "qualified domestic relations order" or issued on a form for ERISA qualified domestic relations orders is not a court order acceptable for processing unless the court order expressly states that the

provisions of the court order concerning CSRS or FERS benefits are governed by this part.

(2) When a court order is required by paragraph (a)(1) of this section to state that the provisions of a court order concerning CSRS or FERS benefits are governed by this part the court order must—

(i) Expressly refer to part 838 of Title 5, Code of Federal Regulations, and

(ii) Expressly state that the provisions of the court order concerning CSRS or FERS benefits are drafted in accordance with the terminology used in this part.

(3) Although any language satisfying the requirement of paragraph (a) (2) of this section is sufficient to prevent a court order from being unacceptable under paragraph (a)(1) of this section, OPM recommends the use of the language provided in ¶001 in appendix A to subpart F of this part to state that the provisions of the court order concerning CSRS or FERS benefits are governed by this part.

(4) A court order directed at employee annuity that contains the language described in paragraph (a)(2) of this section must also satisfy all other requirements of this subpart to be a court order acceptable for processing.

(b) *Employee annuity cannot continue after the death of the retiree.* Any court order that provides that the former spouse's portion of the employee annuity shall continue after the death of the employee or retiree, by using language such as "will continue to receive benefits after the death of" the employee, that the former spouse "will continue to receive benefits for his (or her) lifetime," or "that benefits will continue after the death of" the employee, but does not use terms such as "survivor annuity," "death benefits," "former spouse annuity," or similar terms is not a court order acceptable for processing.

§ 838.804 Court orders must expressly award a former spouse survivor annuity or expressly direct an employee or retiree to elect to provide a former spouse survivor annuity.

(a) A court order awarding a former spouse survivor annuity is not a court order acceptable for processing unless it expressly awards a former spouse survivor annuity or expressly directs an employee or retiree to elect to provide a former spouse survivor annuity as described in paragraph (b) of this section.

(b) To expressly award a former spouse survivor annuity or expressly direct an employee or retiree to elect to provide a former spouse survivor annuity as required by paragraph (a) of this section the court order must—

(1) Identify the retirement system using terms that are sufficient to identify the retirement system as explained in § 838.911; and

(2) (i) Expressly state that the former spouse is entitled to a former spouse survivor annuity using terms that are sufficient to identify the survivor annuity as explained in § 838.912; or

(ii) Expressly direct the retiree to elect to provide a former spouse survivor annuity using terms that are sufficient to identify the survivor annuity as explained in § 838.912.

§ 838.805 OPM computation of formulas in computing the designated base.

(a) A court order awarding a former spouse survivor annuity is not a court order acceptable for processing unless the court order provides sufficient instructions and information so that OPM can determine the amount of the former spouse's monthly benefit using only the express language of the court order, subparts A, G and I of this part, and information from normal OPM files.

(b) To provide sufficient instructions and information for OPM to compute the amount of a former spouse survivor annuity as required by paragraph (a) of this section, if the court order uses a formula to determine the former spouse survivor annuity, it must not use any variables whose values are not readily ascertainable from the face of the court order or normal OPM files.

(c) A court order awarding a former spouse survivor annuity is not a court order acceptable for processing if OPM would have to examine a State statute or court decision (on a different case) to understand, establish, or evaluate the formula for computing the former spouse survivor annuity.

§ 838.806 Amended court orders.

(a) A court order awarding a former spouse survivor annuity is not a court order acceptable for processing if it is issued after the date of retirement or death of the employee and modifies or replaces the first order dividing the marital property of the employee or retiree and the former spouse.

(b) For purposes of awarding, increasing, reducing, or eliminating a former spouse survivor annuity, or explaining, interpreting, or clarifying a court order that awards, increases, reduces or eliminates a former spouse survivor annuity, the court order must be—

(1) Issued on a day prior to the date of retirement or date of death of the employee; or

(2) The first order dividing the marital property of the retiree and the former spouse.

(c) A court order that awards a former spouse survivor annuity and that is issued after the first order dividing the marital property of the retiree and the former spouse has been vacated, set aside, or otherwise declared invalid is not a court order acceptable for processing if—

(1) It is issued after the date of retirement of death of the retiree;

(2) It changes any provision concerning a former spouse survivor annuity in the court order that was vacated, set aside or otherwise declared invalid; and

(3)(i) The court order is effective prior to the date when it is issued; or

(ii) The retiree and former spouse do not compensate the Civil Service Retirement and Disability Fund for any uncollected annuity reduction due as a result of the court order vacating, setting aside, or otherwise invalidating the first order terminating the marital relationship between the retiree and the former spouse.

(d) In this section, "date of retirement" means the later of—

(1) The date that the employee files an application for retirement; or

(2) The effective commencing date for the employee's annuity.

(e) In this section, "issued" means actually filed with the clerk of the court, and does not mean the effective date of a retroactive court order that is effective prior to the date when actually filed with the clerk of the court (e.g., a court order issued nunc pro tunc).

(f)(1) In this section, the "first order dividing the marital property of the retiree and the former spouse" means—

(i) The original written order that first ends (or first documents an oral order ending) the marriage if the court divides any marital property (or approves a property settlement agreement that divides any marital property) in that order, or in any order issued before that order); or

(ii) The original written order issued after the marriage has been terminated in which the court first divides any marital property (or first approves a property settlement agreement that divides any marital property) if no marital property has been divided prior to the issuance of that order.

(2) The first order dividing marital property does not include—

(i) Any court order that amends, explains, clarifies, or interprets the original written order regardless of the effective date of the court order making

the amendment, explanation, clarification, or interpretation; or

(ii) Any court order issued under reserved jurisdiction or any other court order issued subsequent to the original written order that divide any marital property regardless of the effective date of the court order.

§ 838.807 Cost must be paid by annuity reduction.

(a) A court order awarding a former spouse survivor annuity is not a court order acceptable for processing unless it permits OPM to collect the annuity reduction required by section 8339(j)(4) or section 8419 of title 5, United States Code, from annuity paid by OPM. OPM will not honor a court order that provides for the retiree or former spouse to pay OPM the amount of the annuity reduction by any other means.

(b) The amount of the annuity reduction required by section 8339(j)(4) or section 8419 of title 5, United States Code, may be paid—

(1) By reduction of the former spouse's entitlement under a court order acceptable for processing that is directed at employee annuity; or

(2) By reduction of the employee annuity.

(c) Unless the court order otherwise directs, OPM will collect the annuity reduction required by section 8339(j)(4) or section 8419 of title, 5, United States Code, from the employee annuity.

Subpart I—Terminology Used in Court Orders Awarding Former Spouse Survivor Annuities

Regulatory Structure

§ 838.901 Purpose and scope.

(a) This subpart regulates the meaning of terms necessary to award a former spouse survivor annuity in a court order, and for OPM to determine whether a court order awarding a former spouse survivor annuity is a court order acceptable for processing and the amount of the former spouse survivor annuity.

(b)(1) This subpart establishes a uniform meaning to be used for terms and phrases frequently used in awarding a former spouse survivor annuity.

(2) This subpart informs the legal community about the definition to be applied to terms used in court orders, to permit the resulting orders to be more carefully drafted, using the proper language to accomplish the aims of the court.

(c)(1) To assist attorneys and courts in preparing court orders that OPM can honor in the manner that the court intends, appendix A of this subpart contains model language to accomplish many of the more common objectives associated with the award of a former spouse survivor annuity.

(2) By using the language in appendix A of this subpart, the court, attorneys, and parties will know that the court order will be acceptable for processing and that OPM will treat the terminology used in the court order in the manner stated in the appendix.

Identification of Benefits

§ 838.911 Identifying the retirement system.

(a) To satisfy the requirements of § 838.804(b)(1), a court order must contain language identifying the retirement system affected. For example, "CSRS," "FERS," "OPM," or "Federal Government" survivor benefits, or "survivor benefits payable based on service with the U.S. Department of Agriculture," etc., are sufficient identification of the retirement system.

(b) Except as provided in paragraphs (b)(1) and (b)(2) of this section, language referring to benefits under another retirement system, such as military retired pay, Foreign Service retirement benefits and Central Intelligence Agency retirement benefits, does not satisfy the requirements of § 838.804(b)(1).

(1) A court order that mistakenly labels CSRS benefits as FERS benefits and vice versa satisfies the requirements of § 838.804(b)(1).

(2) Unless the court order expressly provides otherwise, for employees transferring to FERS, court orders directed at CSRS benefits apply to this entire FERS basic benefit, including the CSRS component, if any. Such a court order satisfies the requirements of § 838.804(b)(1).

(c) A court order affecting military retired pay, even when military retired pay has been waived for inclusion in CSRS annuities, does not award a former spouse survivor annuity under CSRS or FERS. Such a court order does not satisfy the requirements of § 838.804(b)(1).

(d) A court order that requires an employee or retiree to maintain survivor benefits covering the former spouse satisfies the requirements of § 838.804(b)(1), if the former spouse was covered by a CSRS or FERS survivor annuity or the FERS basic employee death benefit as defined in § 843.602 of this chapter at the time of the divorce.

§ 838.912 Specifying an award of a former spouse survivor annuity.

(a) To satisfy the requirements of § 838.804(b)(2), a court order must specify that it is awarding a former spouse survivor annuity. The court order must contain language such as "survivor annuity," "death benefits," "former spouse survivor annuity under 5 U.S.C. 8341(h)(1)," etc.

(b)(1) A court order that provides that the former spouse is to "continue as" or "be named as" the beneficiary of CSRS survivor benefits or similar language satisfies the requirements of § 838.804(b)(2).

(2) A court order that requires an employee or retiree to maintain survivor benefits covering the former spouse satisfies the requirements of § 838.804(b)(2), if the former spouse was covered by a CSRS or FERS survivor annuity or the FERS basic employee death benefit as defined in § 843.602 of this chapter at the time of the divorce.

(c) Two types of potential survivor annuities may be provided by retiring employees to cover former spouses. Under CSRS, section 8341(h) of title 5, United States Code, provides for "former spouse survivor annuities" and section 8339(k) of title 5, United States Code, provides for "insurable interest annuities." These are distinct benefits, each with its own advantages. The corresponding FERS provisions are sections 8445 and 8444, respectively.

(1) OPM will enforce court orders to provide section 8341(h) or section 8445 annuities. These annuities are less expensive and have fewer restrictions than insurable interest annuities but the former spouse's interest will automatically terminate upon remarriage before age 55. To provide a section 8341(h) or section 8445 annuity, the court order must use terms such as "former spouse survivor annuity," "section 8341(h) annuity," or "survivor annuity."

(2) OPM cannot enforce court orders to provide "insurable interest annuities" under section 8339(k) or section 8444. These annuities may only be elected at the time of retirement by a retiring employee who is not retiring under the disability provision of the law and who is in good health. The retirees may also elect to cancel the insurable interest annuity to provide a survivor annuity for a spouse acquired after retirement. The parties might seek to provide this type of annuity interest if the nonemployee spouse expects to remarry before age 55, if the employee expects to remarry a younger second spouse before retirement or if another former spouse has already been awarded a section 8341(h) annuity. However, the court will have to provide its own remedy if the employee is not eligible for or does not make the election. OPM cannot enforce the court order. Language including the words "insurable interest" or referring to section 8339(k) or section 8444 does

not satisfy the requirements of § 838.804(b)(2).

(3) In court orders which contain internal contradictions about the type of annuity, such as "insurable interest annuity under section 8341(h)," the section reference will control.

Computation of Benefit

§ 838.921 Determining the amount of a former spouse survivor annuity.

(a) A court order that contains no provision stating the amount of the former spouse survivor annuity provides the maximum former spouse survivor annuity permitted under § 831.614 or § 842.613 of this chapter and satisfies the requirements of § 838.805.

(b)(1) A court order that provides that "a former spouse will keep" or "an employee or retiree will maintain" the survivor annuity to which he or she was entitled at the time of the divorce satisfies the requirements of § 838.805 and provides a former spouse survivor annuity in the same proportion to the maximum survivor annuity under § 831.614 or § 842.613 of this chapter as the former spouse had at the time of divorce. For example, a former spouse of an employee would be entitled to a maximum survivor benefit; a former spouse of a retiree (who was married to the retiree at retirement and continuously until the divorce resulting in the court order) would be entitled to the survivor benefit elected at retirement.

(2) If, at the time of divorce, the employee covered by FERS had at least 18 months of civilian service creditable under FERS but less than 10 years of service creditable under FERS, a former spouse with a court order described in paragraph (b)(1) or paragraph (b)(2) of this section may be entitled to the basic employee death benefit as defined in § 843.602 of this chapter, but is not entitled to any other former spouse survivor annuity based on the court order.

(c)(1) A court order that awards a former spouse survivor annuity of less than $12 per year satisfies the requirements of § 838.805 and provides an initial rate of $1 per month plus all cost-of-living increases occurring after the later of—

(i) The date of the court order; or

(ii) The date when the employee retires.

(2) The reduction in the employee annuity will be computed as though the court order provided a former spouse survivor annuity of $1 per month.

(d)(1) A court order that awards a former spouse survivor annuity while authorizing the employee or retiree to elect a lesser former spouse survivor annuity upon the employee's or retiree's remarriage satisfies the requirements of § 838.805, and provides the former spouse survivor annuity at the rate initially provided in the court order but does not allow the employee or retiree to elect a lesser benefit for the former spouse.

(2) To provide full survivor annuity benefits to a former spouse while authorizing the employee or retiree to elect a lesser former spouse survivor annuity benefit in order to provide survivor annuity benefits for a subsequent spouse, the court order must provide for a reduction in the former spouse survivor annuity upon the employee's or retiree's election of survivor annuity benefits for a subsequent spouse.

(3) A reduction in the amount of survivor benefits provided to the former spouse does not satisfy the requirements of § 838.805 if it is contingent upon the employee's or annuitant's remarriage rather than his or her election of survivor annuity benefits for a subsequent spouse.

§ 838.922 Prorata share defined.

(a) *Prorata share* means the fraction of the maximum survivor annuity allowable under § 831.614 or § 842.613 of this chapter whose numerator is the number of months of Federal civilian and military service that the employee performed during the marriage and whose denominator is the total number of months of Federal civilian and military service performed by the employee.

(b) A court order that awards a former spouse a "prorata share" of a survivor annuity by using that term and identifying the date when the marriage began satisfies the requirements of § 838.805 and awards the former spouse a former spouse survivor annuity equal to the prorata share as defined in paragraph (a) of this section.

(c) A court order that awards a portion of a survivor annuity, as of a specified date before the employee's retirement, awards the former spouse a former spouse survivor annuity equal to the prorata share as defined in paragraph (a) of this section.

(d) A court order that awards a portion of the "value" of a survivor annuity as of a specific date before retirement, without specifying what "value" is, awards the former spouse a former spouse survivor annuity equal to a prorata share as defined in paragraph (a) of this section.

§ 838.923 Cost-of-living adjustment before the death of a retiree.

A court order that awards a former spouse survivor annuity is deemed to order OPM to add to the survivor annuity rate cost-of-living adjustments that occur before the death of a retiree (in the same manner as these adjustments are applied to the survivor rate generally) unless the court order contains an instruction expressly directing OPM not to add these adjustments to the survivor annuity rate. (See § 838.735 for information concerning cost-of-living adjustments after the death of an employee or retiree.)

Miscellaneous Provisions

§ 838.931 Court orders that provide temporary awards of former spouse survivor annuities.

A provision in a court order that temporarily awards a former spouse survivor annuity satisfies the requirements of § 581.804(b)(2), but the temporary award becomes permanent on the date on which OPM is barred from honoring a modification of the court order (the date of retirement or death, or, in the case of a post-retirement divorce, the date of the initial court order), as provided in sections 8341(h)(4) and 8445(d) of title 5, United States Code.

§ 838.932 Court orders that permit the former spouse to elect to receive a former spouse survivor annuity.

(a) Except as provided in paragraph (b) of this section, a court order that gives the former spouse the right to elect a former spouse survivor annuity satisfies the requirements of § 838.8804(b)(2) and provides a former spouse survivor annuity in the amount otherwise provided by the court order.

(b) A former spouse who has been awarded a former spouse survivor annuity by a court order that gives the former spouse the right to elect a former spouse survivor annuity may irrevocably elect not to be eligible for a former spouse survivor annuity based on the court order.

(c) The former spouse may make the election under paragraph (b) of this section at any time after the issuance of the court order. An election under paragraph (b) of this section—

(1) Must be in writing and in the form prescribed by OPM;

(2) Is effective on the first day of the month following the month in which OPM received the election; and

(3) Is irrevocable once it has become effective.

(d) The reduction in an employee annuity based on a court order that gives the former spouse the right to elect a former spouse survivor annuity terminates on the last day of the month in which OPM receives the former spouse's election under paragraph (b) of this section.

§ 838.933 Payment of the cost of a former spouse survivor annuity.

(a) A court order that unequivocally awards a former spouse survivor annuity and directs the former spouse to pay for that benefit satisfies the requirements of § 838.805, and—

(1) If the former spouse has also been awarded a portion of the employee annuity then the cost of the survivor benefit will be deducted from the former spouse's share of the employee annuity (if sufficient to cover the total cost—there will be no partial withholding); otherwise,

(2) The reduction will be taken from the employee annuity and collection from the former spouse will be a private matter between the parties.

(b) a court order that conditions the award of a former spouse survivor annuity on the former spouse's payment of the cost of the benefit satisfies the requirements of § 838.805 only if a court order acceptable for processing also awards the former spouse a portion of the employee annuity sufficient to cover the cost.

Model Paragraphs

Appendix A to Subpart I of Part 838—Recommended Language for Court Orders Awarding Former Spouse Survivor Annuities

This appendix provides recommended language for use in court orders awarding former spouse survivor annuities. A former spouse survivor annuity is not a continuation of a former spouse's share of an employee annuity after the death of the employee. A former spouse's entitlement to a portion of an employee annuity cannot continue after the death of the employee. A court order that attempts to extend the former spouse's entitlement to a portion of an employee annuity past the death of the employee is not effective. The model language in this appendix does not award benefits payable to the former spouse during the lifetime of the employee. A separate, distinct award of a portion of the employee annuity is necessary to award a former spouse a benefit during the lifetime of the employee. Appendix A to subpart F of this part contains model language for a portion of an employee annuity.

Attorneys should exercise great care in preparing provisions concerning former spouse survivor annuities because sections 8341(h)(4) and 8445(d) of title 5, United States Code, prohibit OPM from accepting modifications after the retirement or death of the employee. (See § 838.806 concerning unacceptable modifications.) A court order awarding a former spouse survivor annuity should include four elements:

- Identification of the retirement system;
- Explicit award of the former spouse survivor annuity.
- Method for computing the amount of the former spouse's benefit; and
- Instructions on what OPM should do if the employee leaves Federal service before retirement and applies for a refund of employee contributions.

By using the model language, courts will know that the court order will have the effect described in this appendix.

The model language uses the terms "[former spouse]" to identify the spouse who is receiving a former spouse survivor annuity and "[employee]" to identify the Federal employee whose employment was covered by the Civil Service Retirement System or the Federal Employees Retirement System. Obviously, in drafting an actual court order the appropriate terms, such as "Petitioner" and "Respondent," or the names of the parties should replace "[former spouse]" and "[employee]."

Similarly, except when the provision applies only to the basic employee death benefit (defined in § 843.103 of this chapter) that is available only under the Federal Employees Retirement System, the models are drafted for employees covered by the Civil Service Retirement System (5 U.S.C. 8331 *et seq.*). The name of the retirement system should be changed for employees covered by the Federal Employees Retirement System (5 U.S.C. chapter 84.).

Statutory references used in the models are to CSRS provisions (such as section 8341(h) of title 5, United States Code). When appropriate, the corresponding FERS provision (such as section 8445 of title 5, United States Code) should be used.

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700 Series—Computing the amount of the former spouse's benefit.

Paragraphs 701 through 704 contain model language for awards of former spouse survivor annuities in amounts that do not require specification of the base on which the former spouse's share will be computed. Situations in which the computational base need not be specified include amounts defined by law or regulation. For example, the maximum former spouse survivor annuity is fixed by statute generally at 55 percent of the employee annuity under CSRS and 50 percent of the employee annuity under FERS.

Paragraphs 711 and 712 contain model language for awards of former spouse survivor annuities that use the employee annuity as the base on which the portion awarded will be computed (that is, on which percentage, fraction or formula will be applied). Paragraphs 721 and 722 contain model language for awards of former spouse survivor annuities that use the maximum possible survivor annuity as the base on which the portion awarded will be computed (that is, on which percentage, fraction or formula will be applied). Using the maximum possible survivor annuity as the base will generally award 55 percent under CSRS and 50 percent under FERS of the amount that using the employee annuity as the base would produce.

Paragraphs 750 and higher contain model language to implement the most common other types of awards.

Each model paragraph includes a reference to the statutory provision under CSRS that authorizes OPM to honor court orders awarding former spouse survivor annuities. The FERS statutory provision that corresponds to section 8341(h) (mentioned in the first

sentence of each example) is section 8445.

¶ 701 Award of the maximum survivor annuity.

Using the following paragraph will award the maximum possible former spouse survivor annuity. Under CSRS, the maximum possible survivor annuity is 55 percent of the employee annuity unless the surviving spouse or former spouse was married to the retiree at retirement and agreed to a lesser amount at that time. Under FERS, the maximum possible survivor annuity is 50 percent of the employee annuity unless the surviving spouse or former spouse was married to the retiree at retirement and agreed to a lesser amount at that time.

"Under section 8341(h)(1) of title 5, United States Code, [former spouse] is awarded the maximum possible former spouse survivor annuity under the Civil Service Retirement System."

¶ 702 Award that continues the pre-divorce survivor annuity benefits.

Using the following paragraph will award a former spouse survivor annuity equal to the amount that the former spouse would have received if the marriage were never terminated by divorce.

"Under section 8341(h)(1) of title 5, United States Code, [former spouse] is awarded a former spouse survivor annuity under the Civil Service Retirement System in the same amount to which [former spouse] would have been entitled if the divorce had not occurred."

¶ 703 Award of a prorata share.

Using the following paragraph will award the former spouse a prorata share of the maximum possible survivor annuity. Prorata share is defined in § 838.922. To award a prorata share the court order must state the date of the marriage. Unless the court order specifies a different ending date, the marriage ends for computation purposes on the date that the court order is filed with the court clerk.

"Under section 8341(h)(1) of title 5, United States Code, [former spouse] is awarded a former spouse survivor annuity under the Civil Service Retirement System. The amount of the former spouse survivor annuity will be equal to a prorate share. The marriage began on [insert date]."

¶ 704 Award of a fixed monthly amount.

Using the following paragraph will award a former spouse survivor annuity that will start at the amount stated in the order when the employee or retiree dies, unless the stated amount exceeds the maximum possible former spouse survivor annuity. If the amount stated in the order exceeds the maximum possible former spouse survivor annuity, the court order will be treated as awarding the maximum. After payment of the former spouse survivor annuity has began, COLA's will be applied in accordance with § 838.735. If the final sentence of this model paragraph is omitted, OPM will add COLA's occurring after the date of the employee's retirement or the date of issuance of the court order, whichever is later.

"Under section 8341(h)(1) of title 5, United States Code, [former spouse] is awarded a former spouse survivor annuity under the Civil Service Retirement System. The amount of the former spouse survivor annuity will be equal to $[insert a number] per month. The Office of Personnel Management is ordered not to increase this amount by COLA's occurring before death of [employee or retiree]."

¶ 705–710 [Reserved].

¶ 711 Award of a percentage or fraction of the employee annuity.

Using the following paragraph will award a former spouse survivor annuity equal to the stated percentage or fraction of the employee annuity. The stated percentage or fraction may not exceed 55 percent under CSRS or 50 percent under FERS.

"Under section 8341(h)(1) of title 5, United States Code, [former spouse] is awarded a former spouse survivor annuity under the Civil Service Retirement System. The amount of the former spouse survivor annuity will be equal to [insert a percentage or fraction] percent of the [employee]'s employee annuity."

¶ 712 Award based on a stated formula as a share of employee annuity.

Using the following paragraphs will award a former spouse survivor annuity in an amount to be determined by applying a stated formula to employee annuity. The amount of the former spouse survivor annuity may not exceed 55 percent of the employee annuity under CSRS or 50 percent under FERS. The formula must be stated in the court order (including a court-approved property settlement agreement). The formula may not be incorporated by reference to a statutory provision or a court decision in another case. If the court order uses a formula, the court order must include any data that is necessary for OPM to evaluate the formula unless the necessary data is contained in normal OPM files.

"Under section 8341(h)(1) of title 5, United States Code, [former spouse] is awarded a former spouse survivor annuity under the Civil Service Retirement System. The amount of the former spouse survivor annuity will be the portion of the [employee]'s employee annuity computed as follows:

"[Insert formula.]"

¶ 713–720 [Reserved].

¶ 721 Award of a percentage or fraction of the maximum survivor annuity.

Using the following paragraph will award a former spouse survivor annuity equal to the stated percentage or fraction of the maximum possible survivor annuity. The stated percentage or fraction may not exceed 100 percent.

"Under section 8341(h)(1) of title 5, United States Code, [former spouse] is awarded a former spouse survivor annuity under the Civil Service Retirement System. The amount of the former spouse survivor annuity will be equal to [insert a percentage or fraction] of the maximum possible survivor annuity.

¶ 722 Award based on a stated formula as a share of maximum survivor annuity.

Using the following paragraphs will award a former spouse survivor annuity based on a stated formula to be applied to the maximum possible survivor annuity. The formula must be stated in the court order (including a court-approved property settlement agreement). The formula may not be incorporated by reference to a statutory provision or a court decision in another case. If the court order uses a formula, the court order must include any data that is necessary for OPM to evaluate the formula unless the necessary data is contained in normal OPM files.

"Under section 8341(h)(1) of title 5, United States Code, [former spouse] is awarded a former spouse survivor annuity under the Civil Service Retirement System. The amount of the former spouse survivor annuity will be the portion of the maximum possible survivor annuity computed as follows:

"[Insert formula.]"

¶ 723–750 [Reserved].

¶ 751 Changing amount of former spouse survivor annuity based on remarriage before retirement.

Using the following paragraph will award the maximum possible former spouse survivor annuity unless the employee remarries before retirement. Upon the employee's remarriage before retirement the amount of the former spouse survivor annuity changes to a prorata share. The maximum possible

and prorata share are used as examples only; other amounts may be substituted. Similar language is not acceptable for remarriages after retirement.

"Under section 8341(h)(1) of title 5, United States Code, [former spouse] is awarded the maximum possible former spouse survivor annuity under the Civil Service Retirement System unless [employee] remarries before retirement. If [employee] remarries before retirement, under section 8341(h)(1) of title 5, United States Code, [former spouse] is awarded a former spouse survivor annuity under the Civil Service Retirement System. The amount of the former spouse survivor annuity will be equal to a prorata share. The marriage to [former spouse] began on [insert data]."

¶ 752 Changing amount of former spouse survivor annuity based on remarriage after retirement.

Using the following paragraph will award the maximum possible former spouse survivor annuity unless the employee remarries after retirement and elects to provide a survivor annuity for the spouse acquired after retirement. Upon the employee's remarriage after retirement and election to provide a survivor annuity for the spouse acquired after retirement, the amount of the former spouse survivor annuity changes to a prorata share. The maximum possible and prorata share are used as examples only; other amounts maybe substituted. The change in the amount of the former spouse survivor annuity must be triggered by the election, which is a part of normal OPM files, rather than the remarriage, which is not documented in normal OPM files.

"Under section 8341(h)(1) of title 5, United States Code, [former spouse] is awarded the maximum possible former spouse survivor annuity under the Civil Service Retirement System unless [employee] elects to provide a survivor annuity for a new spouse acquired after retirement. If [employee] elects to provide a survivor annuity to a new spouse acquired after retirement, under section 8341(h)(1) of title 5, United States Code, [former spouse] is awarded a former spouse survivor annuity under the Civil Service Retirement System. The amount of the former spouse survivor annuity will be equal to a prorata share. The marriage to [former spouse] began on [insert data]."

¶ 800 Series—Paying the cost of a former spouse survivor annuity.

A court order awarding a former spouse survivor annuity requires that the employee annuity be reduced. The reduction lowers the gross employee annuity. The costs associated with providing the former spouse survivor annuity must be paid by annuity reduction. Under § 838.807, if the former spouse is awarded a portion of the employee annuity sufficient to pay the cost associated with providing the survivor annuity, the former spouse's share maybe reduced to pay the cost.

¶ 801 Costs to be paid from the employee annuity.

No special provision on payment of the costs associated with providing the former spouse survivor annuity is necessary if the court intends the cost to be taken from the employee annuity.

¶ 802 Costs to be paid from former spouse's share of the employee annuity.

Using the following paragraph will award the former spouse a prorata share of the employee annuity and a prorata share of the maximum possible survivor annuity and provide that the cost associated with the survivor annuity be deducted from the former spouse's share of the employee annuity. Prorata share and self-only annuity are used as examples only; another amount or type of annuity may be substituted.

"[Employee] is (or will be) eligible for retirement benefits under the Civil Service Retirement System based on employment with the United States Government. [Former spouse] is entitled to a prorata share of [employee]'s self-only monthly annuity under the Civil Service Retirement System. [Former spouse]'s share of [employee]'s employee annuity will be reduced by the amount of the costs associated with providing the former spouse survivor annuity awarded in the next paragraph. The marriage began on [insert date]. The United States Office of Personnel Management is directed to pay [former spouse]'s share directly to [former spouse]."

"Under section 8341(h)(1) of title 5, United States Code, [former spouse] is awarded a former spouse survivor annuity under the Civil Service Retirement System. The amount of the former spouse survivor annuity will be equal to a prorata share.

¶ 900 Series—Refunds of employee contributions.

Court orders that award a former spouse survivor annuity based on the service of an employee who is not then eligible to retire should include an additional paragraph containing instructions that tell OPM what to do if the employee requests a refund of employee contributions before becoming eligible to retire. The court order may award the former spouse a portion of the refund of employee contributions or bar payment of the refund of employee contributions.

¶ 901 Barring payment of a refund of employee contributions.

Using the following paragraph will bar payment of the refund of employee contributions if payment of the refund of employee contributions would extinguish the former spouse's entitlement to a former spouse survivor annuity. "The United States Office of Personnel Management is directed not to pay [employee] a refund of employee contributions."

¶ 902 Dividing a refund of employee contributions.

Using the following paragraph will allow the refund of employee contributions to be paid but will award a prorata share of the refund of employee contributions to the former spouse. The award of a prorata share is used only an example; the court order could provide another fraction, percentage, or formula, or a fixed amount. A refund of employee contributions voids the employee's rights to an employee annuity unless the employee is reemployed under the retirement system. Payment of the refund of employee contributions will also extinguish the former spouse's right to a court-ordered portion of an employee annuity or a former spouse survivor annuity unless the employee is reemployed and reestablishes title to annuity benefits.

"If [employee] becomes eligible and applies for a refund of employee contributions, [former spouse] is entitled to a prorata share of the refund of employee contributions. The marriage began on [insert date]. The United States Office of Personnel Management is directed to pay [former spouse]'s share directly to [former spouse.]"

2. Subpart Q of part 831 of this chapter consisting of sections 831.1701 through 831.1718 and appendices A and B is redesignated as subpart J of part 838, sections 838.1001 through 838.1018 and appendices A and B of subpart J, respectively. Subpart Q is reserved.

3. Newly redesignated § 838.1001 is removed and reserved; § 838.1010 is removed; and § 831.2009 of this chapter is redesignated as § 838.1010.

4. In newly redesignated § 838.1002, paragraphs (c) and (d) are revised to read as follows:

¶ 838.1002 Relation to other regulations.

* * * * *

(c) Subpart F of part 831 of this chapter, subpart F of part 842 of this chapter, and subpart C of part 843 of this

chapter contain information about entitlement to survivor annuities.

(d) Subpart T of part 831 of this chapter and subpart B of part 843 of this chapter contain information about entitlement to lump-sum death benefits.

* * * * *

5. In newly redesignated § 838.1004, paragraph (e) is revised to read as follows:

¶ 838.1004 Qualifying court orders.

* * * * *

(e)((1) For purposes of awarding, increasing, reducing, or eliminating a former spouse survivor annuity, or explaining, interpreting, or clarifying a court order that awards, increases, reduces or eliminates a former spouse annuity, the court order must be—

(i) Issued on a day prior to the date of retirement or date of death of the employee; or

(ii) The first order dividing the marital property of the retiree and the former spouse.

(2) In paragraph (e)(1) of this section, "date of retirement" means the later of—

(i) The date that the employee files an application for retirement; or

(ii) The effective commencing date for the employee's annuity.

(3) In paragraphs (e)(1) and (e)(4) of this section "issued" means actually filed with the clerk of the court, and does not mean the effective date of a retroactive court order that is effective prior to the date when actually filed with the clerk of the court (e.g., a court order issued nunc pro tunc).

(4)(i) In paragraph (e)(1)(ii) of this section, the "first order dividing the marital property of the retiree and the former spouse" means—

(A) The original written order that first ends (or first documents an oral order ending) the marriage if the court divides any marital property (or approves a property settlement agreement that divides any marital property) in that order, or in any order issued before that order; or

(B) The original written order issued after the marriage has been terminated in which the court first divides any marital property (or first approves a property settlement agreement that divides any marital property) if no marital property has been divided prior to the issuance of that order.

(ii) The first order dividing marital property does not include—

(A) Any court order that amends, explains, clarifies, or interprets the original written order regardless of the effective date of the court order making the amendment, explanation, clarification, or interpretation; or

(B) Any court order issued under reserved jurisdiction or any other court orders issued subsequent to the original written order that divide any marital property regardless of the effective date of the court order.

6. Newly redesignated § 838.1012 is revised to read as follows:

§ 838.1012 Death of the former spouse.

(a) Unless the qualifying court order expressly provides otherwise, the former spouse's share of employee retirement benefits terminates on the last day of the month before the death of the former spouse, and the former spouse's share of employee retirement benefits reverts to the retiree.

(b) Except as otherwise provided in this subpart, OPM will honor a qualifying court order or an amended qualifying court order that directs OPM to pay, after the death of the former spouse, the former spouse's share of the employee annuity to—

(1) The court;

(2) An officer of the court acting as a fiduciary;

(3) The estate of the former spouse; or

(4) One or more of the retiree's children as defined in section 8341(a)(4) or section 8441(4) of title 5, United States Code.

§§ 831.603, 831.620, 831.624, 838.1003, 838.1004, 838.1006, 838.1007, 838.1009, 838.1010, 838.1011, 838.1016, 841.110, 841.804, 842.602, 842.615, 890.808, Appendix A to Subpart J of Part 838, Appendix B to Subpart J of Part 838 [Amended]

7. In the list below, for each section and paragraph indicated in the left two columns, remove the reference indicated in the third column where it appears in the paragraph, and add the reference indicated in the fourth column:

Section	Paragraph	Remove	Add
831.603	"Net annuity"	831.1703	838.103 of this chapter.
831.620	(b)(2)(ii)	831.1705	838.721 or § 838.1005 of this chapter.
831.624	(b)	831.1703	838.103 of this chapter.
831.624	(c)	831.1703	838.103 of this chapter.
838.1003	"Qualifying court order".	831.1704	838.1004.
838.1004	(c)(1)(i)	831.1709	838.1009.
838.1004	(c)(1)(ii)	831.1708	838.1008.
838.1006	(b)	831.1708	838.1008.
838.1006	(d)(2)	831.1705	838.1005.
838.1007	(a)(1)	831.1705	838.1005.
838.1007	(a)(1)	831.1706	838.1006.
838.1007	(a)(2)	831.1705	838.1005.
838.1007	(a)(2)	831.1704	838.1004.
838.1007	(a)(3)	831.1705	838.1005.
838.1007	(a)(3)	831.1706	838.1006.
838.1007	(a)(3)	831.1704	838.1004.
838.1007	(b)	831.1708	838.1008.
838.1009	(a)(1)	831.1708	838.1008.
838.1009	(b)	831.1706	838.1006.
838.1010	(e)	831.1705	838.1005.
838.1010	(f)(2)(ii)	831.1705	838.1005.
838.1011	(a)(3)	831.1705	838.1005.
838.1011	(b)(2)(ii)	831.1705	838.1005.
838.1016	(a)	831.1706	838.1006.
Appendix A to Subpart J	I. A. 2.	5305	5303.
Appendix A to Subpart J	I. C. 1.	831.1704(b)	838.1004(b).
Appendix A to Subpart J	I. F.	Subpart Q of Part 831	subpart J of part 838.
Appendix A to Subpart J	II. C.	831.1703	838.1003.
Appendix A to Subpart J	II. E.	831.1703	838.1003.
Appendix A to Subpart J	V. D.	831.1704(b)	838.1004(b).
Appendix A to Subpart J	VI. B.	831.1704(b)	838.1004(b).
Appendix B to Subpart J	III. G.	831.1704(b)	838.1004(b).

Section	Paragraph	Remove	Add
841.110	(f)	Subpart I of this part	part 838 of this chapter.
841.804		841.905(b)	838.111(c) of this chapter.
842.602	"Net annuity"	841.902	838.103 of this chapter.
842.615	(b)	841.902	838.103 of this chapter.
890.808	(c)	831.1704	part 838 of this chapter.

§§ 838.1002, 838.1003, 838.1006, 838.1007, 838.1009, 838.1010, 838.1016, [Amended]

8. In the list below, for each section and paragraph indicated in the left two columns, add the words "of this chapter" after the section reference indicated in the third column where it appears in the paragraph:

Section	Paragraph	Section reference
838.1002	(b)	831.106.
838.1002	(g)	831.109.
838.1003	"Former spouse annuity".	831.603.
838.1006	(c)(3)	831.614.
838.1006	(d)(3)	831.607.
838.1007	(c)	831.109.
838.1009	(a)(2)	831.109.
838.1010	(e)(2)	831.2007(c).
838.1010	(g)(1)	831.603.
838.1016	(a)	831.614.

PART 831—RETIREMENT

Subpart F—Survivor Benefits

9. The authority citation for 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); § 831.201(b)(6) also issued under 5 U.S.C. 7701(b)(2); § 831.204 also issued under section 7202(m)(2) of the Omnibus Budget Reconciliation Act of 1990, Pub. L. 105–508, 104 Stat. 1388–339; § 831.303 also issued under 5 U.S.C. 8334(d)(2); § 831.502 also issued under 5 U.S.C. 8337; § 831.502 also issued under section 1(3), E.O. 11228, 3 CFR 1964–1965 Comp.; § 831.621 also issued under section 201(d) of the Federal Employees Benefits Improvement Act of 1986, Pub. L. 99–251, 100 Stat. 23; subpart S also issued under 5 U.S.C. 8345(k); subpart V also issued under 5 U.S.C. 8343a and section 6001 of the Omnibus Budget Reconciliation Act of 1987, Pub. L. 100–203, 101 Stat. 1330–275; § 831.2203 also issued under section 7001(a)(4) of the Omnibus Budget Reconciliation Act of 1990, Pub. L. 101–508; 104 Stat. 1388–328.

10. In § 831.603, the definition of "qualifying court order" is revised to read as follows:

§ 831.603 Definitions.

* * * * *

Qualifying court order means a court order that awards a former spouse annuity and that satisfies the requirements of section 8341(h) of title 5, United States Code, for awarding a former spouse annuity.

* * * * *

Subpart V—Alternative Forms of Annuity

11–12. In § 831.2203, paragraph (b) is revised to read as follows:

§ 831.2203 Eligibility.

* * * * *

(b) An employee or Member who, at the time of retirement has a former spouse who is entitled to a portion of the employee's or Member's retirement benefits or a former spouse annuity under a court order acceptable for processing as defined by § 838.103 of this chapter or under a qualifying court order as defined in § 838.1003 of this chapter may not elect an alternative form of annuity.

* * * * *

PART 841—FEDERAL EMPLOYEES RETIREMENT SYSTEM—GENERAL ADMINISTRATION

13. The authority citation for part 841 continues to read as follows:

Authority: 5 U.S.C. 8461; § 841.108 also issued under 5 U.S.C. 552a; subpart D also issued under 5 U.S.C. 8423; § 841.504 also issued under 5 U.S.C. 8422; § 841.506 also issued under 5 U.S.C. 7701(b)(2); § 841.507 also issued under section 505 of Pub. L. 99–335; § 841.508 also issued under section 505 of Pub. L. 99–335; subpart J also issued under 5 U.S.C. 8469.

Subpart H—Waiver of Benefits

14. In § 841.802, the definition of "qualifying court order" is revised to read as follows:

§ 841.802 Definitions

* * * * *

Qualifying court order means a court order acceptable for processing as defined in § 838.103 of this chapter or a qualifying court order as defined in § 838.1003 of this chapter.

* * * * *

Subpart I—Court Orders Affecting Retirement Benefits

15. Subpart I of part 841 is removed and reserved.

PART 842—FEDERAL EMPLOYEES RETIREMENT SYSTEM—BASIC ANNUITY

16. The authority citation for part 842 continues to read as follows:

Authority: 5 U.S.C. 8461(g); §§ 842.104 and 842.106 also issued under 5 U.S.C. 8461(n); § 842.105 also issued under 5 U.S.C. 8402(c)(1) and 7701(b)(2); § 842.106 also issued under section 7202(m)(2) of the Omnibus Budget Reconciliation Act of 1990, Pub. L. 101–508 and 5 U.S.C. 8402(c)(1); §§ 842.604 and 842.611 also issued under 5 U.S.C. 8417; § 842.607 also issued under 5 U.S.C. 8416 and 8417; § 842.614 also issued under 5 U.S.C. 8419; § 842.615 also issued under 5 U.S.C. 8418; § 842.703 also issued under section 7001(a)(4) of the Omnibus Budget Reconciliation Act of 1990, Pub. L. 101–508; § 842.707 also issued under section 6001 of the Omnibus Budget Reconciliation Act of 1987, Pub. L. 100–203; § 842.708 also issued under section 4005 of the Omnibus Budget Reconciliation Act of 1989, Pub. L. 101–239 and section 7001 of the Omnibus Budget Reconciliation Act of 1990, Pub. L. 101–508; subpart H also issued under 5 U.S.C. 1104.

Subpart F—Survivor Elections

17. In § 842.602, the definition of "qualifying court order" is revised to read as follows:

§ 842.602 Definitions

* * * * *

Qualifying court order means a court order that awards a former spouse annuity and that satisfies the requirements of section 8445 of title 5, United States Code, for awarding a former spouse annuity.

* * * * *

Subpart G—Alternative Forms of Annuity

18. In § 842.703, paragraph (b) is revised to read as follows:

§ 842.703 Eligibility.

* * * * *

(b) An employee or Member who, at the time of retirement has a former spouse who is entitled to a portion of the employee's or Member's retirement benefits or a former spouse annuity under a court order acceptable for processing as defined by § 838.103 of this chapter or a qualifying court order as defined in § 838.1003 of this chapter

may not elect an alternative form of annuity.

* * * * *

PART 843—FEDERAL EMPLOYEES RETIREMENT SYSTEM—DEATH BENEFITS AND EMPLOYEE REFUNDS

19. The authority citation for part 843 continues to read as follows:

Authority: 5 U.S.C. 8461; §§ 843.205, 843.208, and 843.209 also issued under 5 U.S.C. 8424; § 843.309 also issued under 5 U.S.C. 8442; § 843.406 also issued under 5 U.S.C. 8441.

20. In § 843.102, the definition of "qualifying court order" is revised to read as follows:

§ 846.102 Definitions.

* * * * *

Qualifying court order means a court order that awards a former spouse annuity and that satisfies the requirements of section 8445 of title 5, United States Code, for awarding a former spouse annuity.

* * * * *

PART 846—FEDERAL EMPLOYEES RETIREMENT SYSTEM—ELECTING COVERAGE

21. The authority citation for part 846 continues to read as follows:

Authority: 5 U.S.C. 8461(g); § 841.201(b) also issued under 5 U.S.C. 7701(b)(2); § 846.202 also issued under section 301(d)(3) of Pub. L. 99–335.

22. In § 846.102, the definitions of "former spouse" and "qualifying court order" are revised to read as follows:

§ 846.102 Definitions.

* * * * *

Former spouse means a former spouse as defined in § 838.103 or § 838.1003 of this chapter.

* * * * *

Qualifying court order means a court order acceptable for processing as defined in § 838.103 of this chapter or a qualifying court order as defined in § 838.1003 of this chapter.

* * * * *

23. In § 846.202, the first two sentences of paragraph (a) are revised to read as follows:

§ 846.202 Condition for making an election.

(a) An election under § 846.102 of this part may not become effective unless the election is made with the written consent of any former spouse(s) entitled to benefits under subpart F of part 831 of this chapter or part 838 of this chapter. As provided in section 301(d)(2)(A) of the FERS Act of 1986, this section applies only if OPM has been duly notified concerning any qualifying court order and has received the documentation required in § 838.211, § 838.721, or § 838.1005 of this chapter. * * *

* * * * *

PART 890—FEDERAL EMPLOYEES HEALTH BENEFITS PROGRAM

24. The authority citation for part 890 continues to read as follows:

Authority: 5 U.S.C. 8913; § 890.803 also issued under 50 U.S.C. 403p., 22 U.S.C. 4069c and 4069c–1; subpart L also issued under sec. 599C of Pub. L. 101–513, 104 Stat. 2064.

25. Section 890.802 is revised to read as follows:

§ 890.802 Definition.

In this subpart, a *Qualifying court order* means a court order acceptable for processing as defined in § 838.103 of this chapter or qualifying court order as defined in § 838.1003 of this chapter.

26. In § 890.808(b)(1), the last sentence is revised to read as follows:

§ 890.808 Employing office responsibilities.

* * * * *

(b) * * *

(1) * * * A request for the retirement system's determination whether a court order is a qualifying court order for health benefits enrollment under this subpart must be accompanied by the documentation specified in § 838.221, § 838.721, or § 838.1005 of this chapter.

* * * * *

[FR Doc. 92–17591 Filed 7–28–92; 8:45 am]

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federal register

Wednesday
July 29, 1992

Part IV

Department of Education

Dwight D. Eisenhower National Program for Mathematics and Science Education; Notice

DEPARTMENT OF EDUCATION

Dwight D. Eisenhower National Program for Mathematics and Science Education—State Curriculum Frameworks for Mathematics and Science

AGENCY: Department of Education.

ACTION: Notice of Final Priority for Fiscal Years 1992 and 1993.

SUMMARY: The Secretary announces a priority for fiscal years 1992 and 1993 for projects that will assist in the development and implementation of State curriculum frameworks, kindergarten through grade 12 (K–12), together with new approaches to teacher education and certification appropriate to the frameworks.

The Secretary takes this action to focus Federal financial assistance on State curriculum frameworks as the starting point for systemic improvement in mathematics and science education.

EFFECTIVE DATE: This priority takes effect either 45 days after publication in the **Federal Register** or later if the Congress takes certain adjournments. If you want to know the effective date of this priority, call or write the Department of Education contact person.

FOR FURTHER INFORMATION CONTACT: Becky Wilt, U.S. Department of Education, 555 New Jersey Avenue, NW., room 522, Washington, DC 20208–5524. Telephone (202) 219–1496. Deaf and hearing impaired individuals may call the Federal Dual Party Relay Service at 1–800–877–8339 (in Washington, DC 202 area code, telephone 708–9300) between 8 a.m. and 7 p.m., eastern time.

SUPPLEMENTARY INFORMATION: The Eisenhower National Program for Mathematics and Science Education supports projects of national significance in mathematics and science instruction at the elementary and secondary levels. One of the six National Education Goals calls for U.S. students to be first in the world in mathematics and science achievement by the year 2000. The President's AMERICA 2000 strategy for helping the Nation achieve the Goals calls for the creation of world-class national standards for student achievement in the five core subjects, including mathematics and science, and for a system of improved assessments tied to the standards.

The National Council on Education Standards and Testing (NCEST), a congressionally created group of 32 individuals charged with investigating the desirability and feasibility of standards and improved assessments, issued its report in January 1992. The report called for the development of national standards and a national system of voluntary assessments as an urgently needed first step in reforming American education.

Standards for mathematics have been developed by the National Council of Teachers of Mathematics. Substantial progress in developing world-class standards in science has also been made under the leadership of such organizations as the National Science Teachers Association and the American Association for the Advancement of Science. The National Academy of Sciences began a project in the fall of 1991 to complete the development of standards for the sciences.

World-class standards that define what students should know and be able to do in the subject areas of math and science provide the foundation for systemic reform. State curriculum frameworks serve as the bridge between these standards and the classroom by providing guidelines for the content of the curriculum and for how that content should be organized and presented. They provide the guidelines for curriculum and course design at the district, school, and classroom levels.

Defining what students in a State should learn is a critical step in the process of ensuring that the State's students are prepared to meet world-class standards. Engaging more and more States in this process will help to achieve national consensus on world-class standards for American students and will prepare the way for all students to reach these standards. States must participate as lead agents in the design of these and related activities because they bear central responsibility in matters of education, and are best placed to coordinate efforts to raise general standards, to disseminate curricular frameworks, to influence new directions in teacher education and professional development, and to establish appropriate criteria for teacher certification.

States, or States working with other entities of their own choice, may apply for funding to support a project in either math or science or both. But in every case, the development of a curricular framework must be accompanied by closely related plans for teacher education and certification as well as for professional development and recertification.

The Secretary notes that this priority is consistent with, and complementary to, the National Science Foundation's (NSF) Statewide Systemic Initiative. Whereas the NSF Initiative embraces a comprehensive array of approaches, this priority for the Eisenhower National Program directly focuses on the development of coherent, integrated K–12 curricula consistent with national standards, and on specified programs for teacher education and certification needed to implement those curricula.

On May 1, 1992, the Secretary published a notice of proposed priority for this program in the **Federal Register** (57 FR 19014).

Note: This notice of final priority does not solicit applications. A notice inviting applications under this competition in FY 1992 was published in the **Federal Register** on June 15, 1992 (57 FR 26756). A notice inviting applications under this priority in FY 1993 will be published in the **Federal Register** at a later date.

Analysis of Comments and Changes

In response to the Secretary's invitation in the notice of proposed priority, eight parties submitted comments. An analysis of the comments and of the changes in the priority since publication of the notice of proposed priority follows. Technical and other minor changes—and suggested changes the Secretary is not legally authorized to make under the applicable statutory authority—are not addressed.

Comments: One commenter expressed concern that the priority did not state the goal of being first in the world in mathematics and science achievement.

Discussion: The supplementary information provided with the priority notice explains that the priority reflects the fourth National Education Goal, which states that by the year 2000 U.S. students should be first in the world in science and mathematics achievement. Further, this goal is discussed thoroughly in a number of publications concerning the AMERICA 2000 Educational Strategy. A reference in the priority itself is not necessary.

Changes: None.

Comments: The Secretary received a number of comments that suggested that the Department guard against what might appear to be an endorsement of any one organization's conception of national standards for mathematics or science education. One commenter expressed the view that the Department should not require funded projects to build mathematics frameworks upon standards developed by the National Council of Teachers of Mathematics (NCTM), but rather should allow grantees the option of basing frameworks on other nationally recognized standards for mathematics education. Another commenter recommended that the priority state that

documents prepared by the major curriculum reform movements in science education are draft documents that should not be used as standards in the development of a State framework. On the other hand, a commenter expressed surprise that the priority did not cite the *California Science Framework* as a model for other State frameworks.

Discussion: The Secretary believes that, as national standards for mathematics and science education reach final form and gain acceptance in that form, States should build their curriculum frameworks upon them. The NCTM standards are widely recognized as the national standards for mathematics and therefore the priority requires that applicants build upon these standards in developing frameworks.

The Secretary agrees that science standards are in the process of emerging and that grantees should not be required to build on each specific curriculum reform project named in the priority. However, the Secretary sees no need to refer to documents produced by those projects as drafts. The Secretary does not consider it appropriate to cite any one State's framework as a model for other States to follow.

Changes: The priority has been revised to allow grantees to build science curriculum frameworks upon science standards emerging from any of the major curriculum reform projects named in the priority, rather than require that the frameworks build upon all of these projects.

Comments: One commenter suggested that the priority acknowledge the importance of computer education in curriculum frameworks for mathematics and science education.

Discussion: The Secretary recognizes that technology is an integral part of instruction in mathematics and science. For example, the NCTM standards address the role of technology in math, and the Secretary expects that emerging science standards will also incorporate uses of technology. The Secretary presumes that each State will incorporate technology into its curriculum framework to the extent appropriate for the framework.

Changes: None.

Comments: One commenter recommended that States be allowed to develop assessment programs under the priority.

Discussion: While the Secretary concurs that there is a need for better assessments and would like to see more work on them, he views the development of curriculum frameworks based on standards as a necessary first step in systemic reform. The Secretary hopes to support assessment activities related to the frameworks in the future.

Changes: None.

Comments: One commenter thought that the priority did not provide opportunities for the business community to participate in the development of curriculum frameworks.

Discussion: The priority provides these opportunities. Section (d) of the priority states that each funded project must include representatives of business, labor, and industry among the members of the advisory committee.

Changes: None.

Comments: A commenter recommended that the priority's requirement that the frameworks serve all children be expanded to cite children with disabilities and gifted children specifically.

The commenter also suggested that the priority require that experienced educators of children with disabilities and gifted children be included among the developers of State frameworks, and that links between curriculum frameworks and teacher education and certification include preparation for teachers to instruct exceptional children.

Discussion: The priority is intentionally broad to be inclusive of all students. However, the Secretary agrees that this priority should ensure the involvement of educators with an expertise in working with students with disabilities.

Changes: The priority has been revised to require each grantee to include educators expert in working with students with disabilities on the advisory committee that guides the activities of the project.

Comments: A commenter expressed the view that efforts to develop new approaches to teacher education and certification should receive emphasis equal to that given the implementation of State curriculum frameworks.

Discussion: The Secretary believes that sections (b) and (c) of the proposed priority give serious and substantive attention to teacher education, certification, recertification, and professional development insofar as these activities relate to the development of curriculum frameworks.

Changes: None.

Comments: A commenter recommended that the Department require grantees to meet with other grantees so that persons developing curriculum frameworks in different States will have an opportunity to share their experience and avoid duplication of effort.

Discussion: All grantees of the Eisenhower National Program for Mathematics and Science Education are routinely required to attend the annual meeting held jointly by the National Program and the Eisenhower Mathematics and Science Education State Grant Program. This meeting will afford grantees working on curriculum frameworks the opportunity to meet with colleagues engaged in the same work in different States.

Changes: None.

Priority

Under 34 CFR 75.105(c)(3) and 34 CFR 755.12(c) the Secretary gives an absolute preference to applications that meet the following priority. The Secretary will fund under this competition only applications that meet this absolute priority:

State Curriculum Frameworks for Mathematics and Science Education

Projects in which States, or States in collaboration with other entities, carry out all the following activities:

(a) Develop a State curriculum framework, kindergarten through grade 12 (K–12), that reflects world-class standards and will be made available for local schools and districts to implement, or to adapt, for themselves. These frameworks must cover mathematics or science or both disciplines. The frameworks must embody coherent, non-repetitive curricula carefully designed to ensure that all children study challenging subject material in every grade, K–12. Frameworks must build upon nationally recognized mathematics standards developed by the National Council of Teachers of Mathematics and science standards emerging from major curriculum reform projects, such as the National Science Teachers Association's *Scope, Sequence, and Coordination* project, the American Association for the Advancement of Science's *Project 2061—Science for All Americans*, and the work of the Mathematical Sciences Education Board and the National Academy of Sciences. The design of these frameworks must involve college and university scholars and specialists as well as teachers and administrators from public or private schools working together as equal collaborators.

(b) Develop model guidelines for effective approaches to teacher education and certification based upon the world-class standards and the State curriculum framework tied to those world-class standards. The model guidelines must be developed in cooperation with one or more institutions of higher education in the State. The collaborative work of

designing these model guidelines must also involve scholars and specialists, school teachers, and school administrators from public or private schools.

(c) Develop criteria for teacher recertification, and design and pilot test a model, cost-effective inservice professional development program for teachers based upon the world-class standards and the State curriculum framework tied to those standards. Again, the work of designing these programs must involve collaboration among scholars and specialists, school teachers, and school administrators from public or private schools. In addition, these programs must be pilot tested in a variety of schools throughout the State.

(d) Provide the Secretary with a copy of the evaluation conducted under 34 CFR 75.590.

To guide the activities of the project, each project must establish an overall advisory committee that includes classroom teachers, educators with expertise in working with students with disabilities, university scholars in mathematics and science, State and local school administrators, representatives of private schools, specialists in teacher education, representatives of the State legislature, the Governor's office, and State and local boards of education, and representatives of business, labor, industry, and the community at large.

Intergovernmental Review

This program is subject to the requirements of Executive Order 12372 and the regulations in 34 CFR part 79. The objective of the Executive Order is to foster an intergovernmental partnership and a strengthened federalism by relying on processes developed by State and local governments for coordination and review of proposed Federal financial assistance.

In accordance with the order, this document is intended to provide early notification of the Department's specific plans and actions for this program.

Applicable Program Regulations: 34 CFR Part 755.

Program Authority: 20 U.S.C. 2992.

(Catalog of Federal Domestic Assistance Number 84.168, Dwight D. Eisenhower National Program for Mathematics and Science Education)

Dated: July 13, 1992.

Lamar Alexander,

Secretary of Education.

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